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**POLICY AND PRACTICE OF SENTENCING MALE  
CHILD SEXUAL OFFENDERS AT WYNBERG SEXUAL  
OFFENCES COURT.**

**BY**

**CARLENE DAVIDS**

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## ABSTRACT

This study explores the attitudes of the magistrates, prosecutors, and the probation officers at the Sexual Offences Court at Wynberg Magistrates Court regarding the sentencing of male child sexual offenders, as well as the types of sentences passed on sex offenders. A combination of documentary evidence, that is, court files, and qualitative and quantitative research methods was used. The quantitative aspect of the research lies in the aggregation of data collected from the court files. The qualitative dimension of the study is reflected in the interview schedules administered to the judicial officials and probation officers. The research findings indicate that magistrates and prosecutors are well informed about significant legislation that influences the sentencing of sex offenders. It emerged from the findings that the value systems and personal biases of magistrates surface when passing sentences on sex offenders. Lack of training opportunities for all judicial officials and probation officers in addition to a poor prison system with inadequate rehabilitation structures, were regarded as key challenges faced during the sentencing process. In the light of the research findings, recommendations were made to address the inconsistent sentencing practices of magistrates in regard to sexual offenders.

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## **CHAPTER ONE**

### **1. SENTENCING OF CHILD SEX OFFENDERS**

#### **1.1. Introduction**

The sanctity of life can be regarded as one of the basic tenets in sentencing. Any person has the right to safety, respect and dignity. The State on behalf of the community has the right to intervene when there are any violations of people's constitutional and human rights (South African Constitution, 1996).

Children have a special legal status. From a young age, children are dependent on adults. Their vulnerability and their actual and presumed inability to perform legal acts are all considerations that need to be taken into account, once children enter the justice system (Law Reform Commission, 1989:3). Many children are victims of sex crimes. At a young age heinous sexual acts are committed against children. Not only is their innocence destroyed, their faith and trust in others are damaged in the process. Unfortunately these sexually abused children experience further disappointment when their experience has to be managed by insensitive justice officials who often became desensitised to their painful reality. The onus is subsequently placed on the court to be the guardian of children, protecting their rights and ensuring that justice has been done.

#### **1.2 Complex Nature in Sentencing**

"The criminal justice response to convicted sex offenders has been marked by uncertainty about how to achieve desired societal goals, whether it involves punishing criminals or preventing re-offences " (Berliner et al, 1995: 487). Regardless of whether sex crimes are committed under different circumstances, courts should aim at fairness and consistency in sentencing sex offenders. The basic dilemma is whether to consider sexual misbehaviour as a psychological disorder that requires treatment or as antisocial behaviour that deserves punishment (Berliner et al, 1995:487). A measure of uncertainty exists among sentencing officials who are inconsistent in sentencing child sex offenders (Berliner et al, 1995:487). Society too, has been uncertain about how to respond to sex offences. Many

communities advocate harsh penalties, while others believe that sex offenders need psychiatric treatment.

Traditionally, with little guidance, each judicial officer had to decide upon an appropriate sanction, giving rise to the inconsistencies in sentences. Nicholas argued that although sentencing is a matter of discretion, the lack of equality could not be in the interest of justice (Midgley, Steyn and Graser, 1975:156). Very little research exists on the effectiveness of sanctions for sex offenders. A judge may impose a sanction outside the 'standard range', but the prosecutor or defence can appeal it.

One would agree that penalties should reflect both the level of the seriousness of the criminal behaviour, and as to how society should be protected (Berliner et al, 1995:487). However, the circumstances of the sex offender need to be taken into consideration when assessing an appropriate sanction. The onus therefore is on the courts to derive a sanction that would fit the crime, criminal and the interests of the community. Judicial officials constantly have to guard against the reality that their choice of sentence might cause the community to lose faith in the criminal justice system.

In the context of child sexual abuse, a harsh sentence should reflect society's judgement on unacceptable violations against children. "If the criminal law does not operate effectively in this area, then not only is its deterrent and educational role diminished, but the genuineness of society's commitment to combat child abuse is thrown into question, affording a source of comfort to those who abuse children and causing a sense of betrayal in victims of abuse" (Law Reform Commission, 1989:4). In view of the aforementioned statement, one can only imagine how disillusioned the child feels when the offender has been acquitted of the offence. For the child and the rest of the public, it creates shock, confusion, and a deep sense of disappointment when sexually offensive behaviour is exonerated in relation to the law's preoccupation with the rule of evidence and the finding of reasonable doubt.

### **1.3 Criminal Justice Response to Child Sexual Abuse**

Considering the national statistics on rape and attempted rape of the children (aged 0-17 years) in South Africa from January – June 1999, one can understand why the public demands punitive, retributive sentences. The Crime Information Analysis Centre, a unit in the South African Police Services provided the following national statistics:

#### **On Investigation Level**

9629 cases of rape and attempted rape have been reported:

of which 4896 ( 50% ) have been referred to court; 2009 (20%) cases were withdrawn; 2631 (27%) cases were untraced; 215 (2%) cases were unfounded

#### **In the Court System**

Of the 50% of the cases that were referred to court:

920 (9%) cases the offender were found guilty; in 926 (9%) cases offenders were found not guilty; during court proceedings a further 2166 (22%) cases were withdrawn; 216 (2%) cases were settled otherwise in court.

The provincial statistics of the Western Cape reflects the following findings:

#### **On Investigation Level:**

1300 cases of rape and attempted rape have been reported:

of which 785 (60%) have been referred to court; 315 (24%) cases were withdrawn; 176 (13%) cases were untraced; 14 (1%) cases were unfounded;

### **In the Court System:**

Of the 60% of the cases that were referred to court for criminal proceedings:

in 166 (12%) cases the offender were found guilty; in 129 (9%) cases offenders were found not guilty; during court proceedings a further 296 (22%) cases were withdrawn; 32 (2%) cases were settled otherwise in court.

**Discussion:** From the above statistics there appears to be a low prosecution and conviction rate of sex offenders. Both national and provincial statistics reflect the harsh reality that these cases are mostly withdrawn, probably due to insufficient or lack of evidence, and fear or reluctance on the part of the victim to continue with the court case. This signals the extreme need for a different approach to court proceedings in cases of sexual crimes.

Sentencing officials have their own approach to sentencing, rendering sentencing a very subjective process. " Judges are human beings: each one is a unique product of a unique combination of social, physical, psychological and economic influences, so each will inevitably go his own way in the absence of articulated guidelines. As a consequence, uniformity in sentencing remains unattainable" (South African Law Commission, 1997:5). This individual approach to sentencing resulted in the reality that many people questioned and lost faith in the criminal justice system.

### **1.4. Civil and Governmental Response to Child Sexual Abuse**

The public has become outraged about the inappropriate sentencing practices of sentencing officials, appealing to the government that the " concern for offenders must give way to concern for the protection of the public" (South African Law Commission, 1997:1). Within the Department of Justice itself there was grave concern about discrepant sentencing practice, to such an extent that a Project Committee was mobilised to investigate and develop a model to enhance sentencing.

The South African government is compelled by law to ensure that its children are living in healthy and safe conditions. Although legislation has been developed to ensure that children are not subjected to harm, many children in fact are exposed to and live in alarming conditions, i.e. overcrowding in the family, poverty and domestic violence. It is the parents' legal responsibility to ensure that the children are living in healthy conditions. South Africa is a third world country, which should be cautious of signing treaties with first world countries whose good infrastructure facilitate the implementation of proposed law. It is a sad reality that policy frequently does not become practice. Thus, laws are being implemented without the community firstly being aware of them, and secondly not reaping the benefits of such implementation. Lack of and poor administration of resources can be regarded as realities that account for why the proposed goals cannot be mobilised and implemented. The lack of enthusiasm and vision of many government officials and other stakeholders in the welfare, health, law and police services often create obstacles in the implementation of policy.

### **1.5 Research Focus**

The aim of this research study is to explore the nature of the sentencing of the adult male child sexual abuse offender sentenced at Wynberg Magisterial Court. The Sex Offences Court at Wynberg Magistrates Court will be the unit of analysis. Magistrates, public prosecutors and probation officers working specifically at the Sex Offences Court will be interviewed regarding their sentencing practice. It will be noted whether the services of an expert witness were requested, and to what extent the sentencing official conceded to the recommendation of the expert witness.

This research study will focus on how existing policies on sentencing are interpreted and applied in practice. The aim of this is to critically discuss the sentencing practice of judicial officials and probation officers at Wynberg Court. It attempts to find an explanation for the variations in sentencing practice.

## CHAPTER TWO

### **2. LITERATURE REVIEW ON SENTENCING OF CHILD SEX OFFENDERS:**

#### **2.1. Introduction:**

There is a scarcity of recent literature on the topic of sentencing, more specifically a scarcity with regards to the sentencing of sex offenders in South African courts. Nevertheless, this section attempts to discuss important literature on the matter of sentencing sex offenders. Close attention will be given to significant factors considered by magistrates when sentencing sex offenders. A comprehensive discussion will follow on the management of sex offenders and the success of existing sanctions within the criminal justice system.

Disparity in sentencing is a reality in the criminal justice system. Generally offenders who commit a similar criminal offence under relatively similar circumstances are expected to get similar sentences. Instead, there was gross inconsistency in the sentencing of sex offenders. Parmanand (1982:136) rightfully remarked that the “rule of law has been replaced by the rule of men simply because too much discretion is afforded to prosecutors, judges, parole boards and prison administration”. Individuals are unique and have different life experiences. However, there is a need for uniformity in sentencing practices among judicial officers regarding the principles on which sentences are based (Graser, 1976:126).

The Honourable Mr Justice Ogilvie Thompson stated that the “administration of justice is the modern and civilised substitute for the primitive practice of private vengeance...The criminal law is designed both for the protection of society and the punishment of those who transgress that body of rules which comprise that law. It is when it comes to assessing the appropriate punishment for any particular transgression that wide differences of opinion manifest themselves” (Ogilvie Thompson, 1973:6).

## **2.2. Problems in Sentencing**

Judge Frankel from the United States District court criticised the sentencing practice of judicial officials, describing sentencing as "... a regime of unreasoned, unconsidered caprice for exercising the most awful power of organised society, the power to take liberty...The sentencing stage has come to strike me as the key focus of disease in our apparatus of punishment" (cited in Graser, 1975:27).

Mr Justice Stephen, quoted by Graser (1975: 28) seems to have a similar perspective about sentencing, stating that "the judge looks at the prisoner for a few moments, makes him a little speech, and pronounces his sentence, often with a good deal of solemnity, but apparently with singularity principle. It may be six, nine or twelve months imprisonment...No one who has not tried knows the sense of helplessness which enters the mind of a man who has such a function to perform even the humblest degree" (Graser, 1975: 28). Graser felt that the same is still true for South Africa. Since judges are human beings, their value systems and prejudices are likely to surface during the sentencing process. Graser reiterated that this subjectivity lead to some 'anomalies' and injustices in sentencing (Proceedings of Conference, 1976: 128). Graser appealed for a complete rethinking of our sentencing approach (1976: 129).

When the crime is grievous, such as the father sexually abusing his daughter, there could be the danger that judgement would be passed in a spirit of anger, and not in equity (Graser, 1975: 28). The risk of recidivism should also be borne in mind when passing a sentence. Ogilvie Thompson stated that the judge or magistrate needs to give equal consideration to the needs of society, offender and the victim (1973:8). An over-emphasis on the needs of any one of the mentioned parties can be viewed as a total disregard of the others (Ogilvie

Thompson,1973:8). In considering crime, it is expected that the courts mirror public opinion. Champion (1988:56) claimed that since children are viewed by society as vulnerable, there is the expectation that judges' sentences ought to reflect society's opinion that crimes by adults against children are unacceptable and intolerable. The reality is that the crimes that normally attract the harshest punishment are those that generally originated from public disgust communicated through the media. "Public revulsion and outrage against incest offenders, paedophiles, and rapists have resulted in a call for severe punishment" (Sue, Sue and Sue, 1994:339).

The burden of proof / rules of evidence and criminal procedures in which evidence is admitted is a problematic aspect. Zieff (1991:43) stated that the "...current evidentiary and procedural rules have frustrated the effective prosecution of sex offenders while submitting the child to a prolonged ordeal in court". According to Levett (1991:15) "...the child is most likely not going to remember the kind of details preferred in the courts of law (times, dates, sequence of evidence and specific incidents) that an adult would remember". It was argued that "there is the widespread belief among lawyers that complaints of sexual assault are often bogus and that children are unreliable, never the less so when they are testifying about sexual assault" (Zieff, 1991:24). Combrinck (1995:327) conducted an interview with a judge who highlighted 6 factors which make the child's evidence unreliable, "namely that 'children's memories are unreliable; children are egocentric; children are highly suggestible; children have difficulty distinguishing fact from fantasy; children make false allegations, particularly of sexual assault; children do not understand the duty to tell the truth" (Combrinck, 1995:327). Levett rightly remarked, "courts are more troubled about an error of conviction than about protecting children from abusers" (Levett, 1991:15).

Legislation sets the outer limits of sentencing discretion. Lund (1979:204) mentioned that legislation provides a "surrounding belt of restriction", providing guidance yet placing limitations on the practices of judicial officers. Nevertheless, courts have wide sentencing

discretion. Graser (1975:28) mentioned that critics of disparity in sentencing argue that the criteria and procedures in sentencing should be uniform. They therefore lobbied not for sentences to be uniform, but that sentencing standards should signal uniformity.

Lack of training of judicial officers in the matter of sentencing is an issue (Graser, 1976:128). The South African judges and magistrates received no formal training in sentencing criminal offenders. There is the notion that experienced sentencing officials develop a 'feel for sentencing'. Due to the lack of training and information on offenders, critics however referred to sentencing in our courts as a 'shot in the dark'; 'haphazard process'; or by the 'rule of thumb' (Graser, 1981:124). Weiner (1976:47) argued that "criminal justice agencies" operate by the 'rule of thumb'... "operating without a scientific base for rational decision making".

According to Graser (1975:30) the training of judges and magistrates is confined to the legal profession. Their training does not include the disciplines of psychology, criminology, social work or sociology. Judge, Farnkfurter of the United States Supreme Court made the following statement: "I myself think the bench are not very competent, are not qualified by experience, to impose sentences where any discretion is to be exercised. I do not think that legal training gives you any special competence. I think that lawyers are people who are competent to ascertain whether or not a crime has been committed... But all the questions that follow upon the ascertainment of guilt, I think require very different and much more diversified talents than the lawyers and judges are normally likely to possess" (Harcourt, 1973:28).

The training and services of probation officers, psychologists and social workers can therefore play a significant role in the sentencing process. The Honourable Mr Justice Ogilvie Thompson had a high regard for investigations and reports by trained professionals who provided background information on the circumstances of the convicted person and subsequently recommended an appropriate sentence (1973:8).

### **2.3. Factors Impacting on Sentencing**

In the researcher's personal social work experience from working with sexually abused children and families at Child Welfare Society, it was found that perpetrators related to the victim were sentenced more severely than unrelated offenders were. In one case for example, the father who was the perpetrator and sole breadwinner of the family, was sentenced to ten years imprisonment, whereas a neighbour who sexually abused a child, received a five-years suspended sentence. In another family, the father who sexually abused his daughter also received a ten-year prison sentence. The Felicia Mabuza – Shuttle talk show (17 March 1999) documented a programme on child sexual abuse. In one case, a four-year old and an eight-year old girl were victims of sexual abuse by her their father. Their father was sentenced to ten years imprisonment whereas a stranger who repeatedly raped a fifteen-year old girl was given a suspended sentence. There is more case examples documented in court files, which reflect inconsistent sentencing practices among magistrates in respect of child sexual offenders.

The courts regard certain types of offences much more seriously than others (Walmsley quoted in West, 1980:62). Some categories of sexual offences are regarded by courts as more serious than others (Walmsley quoted in West, 1980:65). A broad distinction is made between offences involving penetration and other forms of sexual crimes, such as fondling and so forth. "There is certainly a greater degree of indignity and harm inflicted, and outrage felt, where the victim is forced to submit to penetration" (Hogan quoted in West, 1980:46). From the aforementioned it seems that courts view sexual crimes in terms of the different degrees of seriousness.

Mc Cormick et al (1998:423) found in their study that the excessive use of force, and the victim - offender relationship were two significant predictors in sanctioning child sex offenders. Berliner et al (1995:499) found that sex offenders unrelated to the sexually abused child are more likely to be sentenced to imprisonment.

The extent of injury to the victim will have implications for the type of sentence passed on a certain sex offender (Mc Cormick et al, 1998:423). In cases where no additional physical injury is done to the victim, but the victim is threatened, a sentence of between 3 - 5 years imprisonment is likely to be imposed. A harsh sentence is imposed when severe injuries are incurred during the sexual crime (Kapardis quoted in West, 1980:75).

An offender's age can be both a mitigating and aggravating factor in sentencing. Thomas (cited by Kapardis in West, 1980:72) conducted research regarding the role of age factors in sexual abuse cases. He found in his study that a 60-year-old man admitted several charges of indecent assault with his grandnieces over a period of four years. The court ruled that "a substantial custodial sentence" was inevitable, "but that five years did not make sufficient allowance for mitigating circumstances, particularly at his age. The sentence was reduced to three years" (Kapardis quoted in West, 1980:72). Kapardis (quoted in West 1980:73) stated that the age of a victim (in cases of rape) does not appear to have any substantial significance. However, he argued that the rape of a young child or elderly woman could reflect the need for psychiatric investigation into the offender's circumstances. The age factor therefore plays a significant role when sentencing sex offenders.

An offender's previous criminal record in relation to the type of previous convictions plays a fundamental role in sentencing. Sex offenders who were convicted several times of a similar class of offence are likely to receive a harsh sentence (Gibbens, Soothill and Way in West, 1980:94).

The involvement of multiple offenders in sexual crimes is an essential aggravating factor (Kapardis quoted in West, 1980:76). Thomas identified cases in which groups of men received a harsh sentence for the rape and indecent assault of female victims (Kapardis in West, 1980:76).

Breach of trust is considered as an aggravating factor when the offender abuses the trust of a child or the child's parents. "Fathers who commit incest with their daughters...were almost certain to go to prison"(Walmsley in West, 1980:64). However, Judge Foxcroft, a South African judge, caused public outrage when the breach of trust factor played an insignificant role in hearing the case of a 54-year old father who sexually abused his teenage daughter. The father was sentenced to seven years imprisonment since he was found not to pose a threat to the broader society (Cape Argus, 24 May 2000:1).

In South Africa, a victim's previous sexual experience does not play a major role in sentencing (Kapardis in West,1980:77). Regardless of whether a victim of rape had previous sexual experiences or practices prostitution, a sexual crime against any person remains heinous (Kapardis in West,1980:77). However, a sex offender is likely to receive a harsh sentence when the victim lost her virginity during the criminal act (Kapardis in West,1980:78).

According to Hogan consent should not be regarded as a defence in sexual offences (West,1980:47). "Consent by a child under the age of 16 years of age to any sexual act is not a defence to a charge of child molestation". Hence sexual intercourse with, or making sexual advances towards children have legal implications regardless of consent.

The nature of the child's testimony in relation to medical evidence plays a significant role in sentencing. Steve Collings' study of reported cases of child sexual abuse at the Durban Child Welfare Society, showed that approximately 90 % of these cases involved abuse within the home, signalling a picture of "largely unsuccessful prosecutions of such abuse". Physical injuries are also rare. Even where there is medical evidence, it may not be regarded as sufficient evidence of sexual abuse, especially if a child was previously

abused” (Levett, 1991:15). One of the problems is that it is very difficult to find out what actually occurred. Some children can give a factual account but others cannot, and it makes it much worse to question them closely (Gibbens, Soothill and Way in West, 1980:90). Levett cites a social worker’s comment “...and then that child is left with those feelings of ‘am I the one then that was guilty, because nothing happened to that person? Didn’t I ... tell the truth? Doesn’t anybody believe me?’” (Levett, 1991:17). She points out that the lack of evidence can result in the acquittal of criminal charges.

The lack of legal representation of the accused, the poverty of the accused, culture, race, gender, social standing, youth, occupational background of the magistrates, outlook on the life of judicial officers, and their life experiences impact immensely on sentencing practice (South African Law Commission, 2000:37).

## **2.4. The Management of Sex Offenders in the Criminal Justice System**

### **2.4.1. Imprisonment:**

Deterrence theory maintains that the “ increasing probability of arrest, conviction, or incarceration, or increasing sentencing lengths, will decrease the willingness of potential offenders to commit crimes” (Greenwood in Wolfgang and Weiner, 1982:321). Hence imprisonment has been the main forms of treatment of sex offenders. That is, to physically restrain them from committing similar crimes. According to Champion, in the United States child sexual abuse offenders receive a sentence of incarceration more frequently than other felons do (1998:55). “If we can get these fellows locked up, we can give the streets back to the citizens ” (Greenwood quoted in Wolfgang and Weiner, 1982:337). Some authors feel, however, that it remains questionable whether the public would feel safer if prison terms were longer (Greenwood quoted in Wolfgang and Weiner, 1982:320).

Both Vera’s and Cook’s studies also found that crimes between acquaintances were less likely to result in incarceration (Greenwood quoted in Wolfgang and Weiner, 1982:333). In the instance of incest, an effort is usually made to keep the family intact for the benefit of the child (Sue, Sue and Sue, 1994:338). The pre-occupation with the maintenance of the family system can be more harmful than beneficial for the child. Droison and Driver

(1989:150) argued that the aforementioned policy, that accommodates family preservation in the context of child sexual abuse, is not protective but ideological in that there is the underlying expectation that the family unit should be rebuilt in the midst of this turmoil.

Hence, the perpetrator who happens to be the relative can continue to invade the child's space in the family home. In a South African court case on child sexual abuse, the following comment was made: "Nie alleen is die klaagster se vermoedens bevestig nie, maar sy moes verdere venedering, viktimisering en druk om die saak terug te trek, ondergaan...die klaagster is op 'n verskeidenheid van geleenthede, wat tussen 1993 –1999 afgespeel het, deur haar stiefvader, die beskuldigde, onsedelik aangerand. Hy word diengevolglik skuldig bevind soos aangekla" (in *S v A. Barnes* 1 Aug 2000). The victims of child sexual abuse are likely to experience severe pressure from the rest of the family prior the outcome of court proceedings.

These aforementioned arguments are contrary to the statements of previous authors and to the South African experience whereby family members receive custodial sentences to offer temporarily protection to the child and the wider community.

Imprisonment plays an essential role in removing the sex offender temporarily from society. It seeks to highlight society's disapproval of the vile sexual act (Dominelli, 1991:64). As far as child sexual offenders' prison experiences are concerned, reports from prison officials state that child sex offenders are often physically and sexually assaulted by fellow prisoners due to their child molestation convictions (Champion, 1988:56). However, Dominelli (1991:63) argued that the abuser uses his or her jail sentence to "relive his crimes, strengthening himself in continuing his previous lifestyle, and learn how to evade capture more easily next time he offends". Thus, imprisonment in itself does not seem to be an appropriate sanction for sex offenders.

### **2.4.2. Castration**

In certain jurisdictions castration was considered to be an appropriate sanction for the treatment of sex offenders. In a study conducted by Sue, Sue and Sue (1994:339) it was found that sex offenders who were surgically castrated reported a decrease in sexual intercourse, masturbation, and frequency of sexual fantasies. However, they were still able to engage in sexual intercourse several years after being castrated. Marshall (quoted in Sue, Sue and Sue, 1994:339) argued that the introduction of surgical castration affected a low recidivism rate in European countries.

### **2.4.3. Rehabilitation**

Rehabilitation is an objective of punishment generally used in relation to imprisonment by magistrates when sentencing the sex offender. The rehabilitative treatment of sex offenders seeks to reduce the offender's "propensity" to engage in further criminal activities (Greenwood quoted in Wolfgang and Weiner, 1982:321). Habitual sex offenders may be sentenced to treatment programmes (Berliner et al, 1995:499). Regardless of the fact that treatment is becoming more sophisticated, the efficacy of these programmes remains questionable (Sue, Sue and Sue, 1994:339). Broadhurst and Maller (1991:38) argued that the outcome of treatment for sex offenders is generally poor. On the other hand, William Marshall, a clinical psychologist believed that treatment could be effective with sex offenders, "although clearly not all of them respond positively" (URL: <http://www.cidg.com/~belina/k/i/mitls.html>).

The effectiveness of rehabilitative programmes has been subjected to criticisms. One of the arguments is that the high return rate of sex offenders into the criminal justice system could be indicative of the reality that contemporary corrections have failed to accomplish the goal of rehabilitation (Weiner, 1976:43). It was argued by Weiner that "...a man cannot be brutally punished for his wrong deeds and then expected to trust the very system that in some ambiguous and coercive way says it wants to help him change. Perhaps the problem lies in the absurdity of assuming that the offender can make the shift in perspective, even though not even the correctional system makes the shift successfully" (Weiner, 1976:43).

### **2.5. Sexual Recidivism**

Christiansen (cited in Gibbens, Soothill and Way in West, 1980:99) states that there is a high recidivism rate among sex offenders. Maginnis pointed out that a 15-year study concluded in 1988 found that about 20 % of all convicted sex offenders were re-arrested for a similar crime (URL:<http://www.cidg.com/~belina/k/i/mit1s.html>). According to Maginnis sex offenders are less likely to commit sex crimes for which they were caught before. Instead, other types of sex crimes or offences are likely to be committed by convicted sex offenders (Maginnis, URL:<http://www.cidg.com/~belina/k/i/mit1s.html>).

Romero and Williams (cited in Broadhurst and Maller, 1991:36) concluded that individuals who committed a series of sex offences are more likely to recidivate than those who committed a once-off sexual crime. Grunfeld and Noreik (cited in Broadhurst and Maller, 1991:36) followed a similar period (9-14 years) and found that across all classes of sexual offenders about 12.8% had been re-convicted of further sex offence, while those convicted of rape had the highest re-offence rate, namely of 21.7%. In all sex offence categories large numbers of sex offenders were re-incarcerated for any offence, "notably for carnal knowledge and wilful exposure" (Broadhurst and Maller, 1991:49).

## **2.6. Conclusion**

In light of the aforementioned, Graser (1975), Levett (1991) and Zieff (1991) are examples of authors who highlighted significant issues that made sentencing an important yet complex process. Mc Cormick (1998), West (1980) and others made powerful contributions in reflecting the critical factors magistrates considered when sentencing sex offenders. The relationship between the victim and the offender, the age of the victim and the offender, the nature of the sexual crime and the breach of trust are examples of significant factors, which can aggravate or mitigate the sentence of the sex offender. Champion (1998), Dominelli (1991), Berliner and other authors (1995), comprehensively discussed the existing sanctions and their effectiveness when sentencing sex offenders. From this it emerged that, instead of only using imprisonment as an appropriate sentence for sex offenders, a combination of alternative sanctions was deemed to be appropriate and effective when sentencing sex offenders. The conviction of the sex offender plays a central role in the process. Hence, sound evidence is needed to ensure that the sex offender gets convicted and is sentenced appropriately. However, the aforementioned literature highlighted the reality that it is extremely difficult for young children to be competent witnesses in sexual abuse cases. The cross-examination process can be so intense, that it presents further turmoil to the child and defeats the purpose of justice. The courts need to have a rigorous system to ascertain the guilt or innocence of the sex offender. However, then it should not be at the expense of the child's emotional and psychological trauma. An inquisitorial system will enable the courts to inquire into the truth in a less threatening, child-friendly manner. This matter will be considered in more detail further when recommendations are made.

## CHAPTER THREE

### **3. POLICIES AND LEGISLATION IMPACTING ON SENTENCING OF CHILD SEX OFFENDERS**

#### **3.1. Introduction:**

This chapter focuses primarily on the complex nature of sentencing. Inconsistent sentencing practices will be discussed against the framework of sentencing objectives and the principles underlying sentencing. Inconsistent sentencing practices among magistrates gave rise to sentencing reform in overseas countries and in South Africa specifically. Policy documents focussing on sexual offences against children will be discussed.

Sentencing plays a fundamental role in criminal proceedings. A judge cited in Harcourt (1973:21) made the following statement: "we on the bench are obliged by our oath of office: to 'administer justice to all persons alike without fear, favour or prejudice, as the circumstances of any particular case may require, in accordance with the law and customs of the Republic of South Africa'".

Sentencing is one of the most neglected, yet one of the most crucial process in criminal proceedings. After hearing the evidence placed before the court by the prosecutor, defense lawyer and expert witness, the sentencing official has to decide on an appropriate sentence. Too much time is spent on dealing with the crime, and very little time is spent on thinking of appropriate sanctions.

Once the accused has been found guilty, a sentence is usually passed within a few minutes (Hiemstra quoted in Midgley, Steyn and Graser, 1975:202). Fritzgerald (Proceedings of the Conference, 1976:119) concluded that, "if the criminal law as a whole is the Cinderella of jurisprudence, then the law of sentencing is Cinderella's illegitimate baby".

Mr Justice Stephen, an English judge claimed that judges paid little attention to sentencing, although sentencing was the gist of the criminal trial (Nicholas cited in Midgley, Steyn and Graser, 1975:149). An enormous amount of strain is therefore placed on the judge in the sentencing process. An American judge once stated that: " In no other function is the judge more alone: no other act of his carries greater potentialities for good or evil than the determination of how society will treat its transgressors " (Midgley, Steyn, and Graser, 1975:131).

### **3.2. Objectives of Sentencing**

South African sentencing practices primarily operate within the 'just desserts' model whereby there is a strong emphasis on "deliberate infliction of unpleasantness" and penal pain (Parmanand, 1982:140). Punishment serves as the foundation of the criminal law. Punishment underpins "the intentional infliction of suffering upon an offender and the expression of the community's condemnation and disapproval of the offender and his conduct" (South African Law Commission, 1997:7). The severity of the sanction should thus mirror the seriousness of the offence. However, Nicholas (1972:28) stated that the "infliction of more suffering than is necessary is gratuitous cruelty".

The objectives underlying sentencing comprise the elements of retribution, deterrence, incapacitation (protection of society) and rehabilitation. In an attempt to distinguish between these objectives, Thomas maintained that a court imposed a sentence as a deterrent to demonstrate to the offender that the particular type of punishment is what they can expect should a similar offence be committed (International Conference Proceedings, 1976:142). Regarding retribution, however, the court would address a large segment of society, reinforcing its view that the offence was unacceptable, affirming the values of society (International Conference Proceedings, 1976: 142).

Retribution is the law of equal retaliation / legal vengeance (Graser, 1981:123). Suffering is therefore inflicted to symbolize the community's disapproval. There is a great trust in punishment as a deterrent. Many magistrates are convinced that by sending the sex offender to prison, society will be protected. There is therefore the "willful inflicting of harm on an offender in an attempt to right the upset to the balance of the 'jurido – moral order' presuming that the sanction affords a degree of satisfaction to the victim and society (Asquith, 1996:185). Thus, any form of punishment, which results in the attitude change and character development, brings about more lasting protection of society. Rehabilitation depends on various factors: the offender's age, personality, life experience, and attitude (Asquith, 1996:186). One would argue that, in order to enhance the well being of the offender and effect an actual shift of mindset, there is a dire need for adequate resources, programme development, staff and collaboration among professionals.

### **3.3 Principles Underlying Sentencing:**

According to the Law Reform Commission of Canada (1974:3), the following serve as the fundamental principles underlying sentencing:

- It is important to know that when sentencing the accused, the innocent shall not be harmed. Usually one finds that family of the accused suffers from the effects of the sentence. Therefore, it is essential to consider the impact the sentence will have on the offender's immediate family
- Punishment should be similar for similar offences. This is to ensure that there is a level of consistency when meting out sentences.
- Dispositions should not be cruel, degrading or inhumane. Sanctions should have an element of restorativeness in order to enhance the offender's state of being.
- Sentences should be proportional to the offence and offender. Punishment should therefore fit the crime and criminal.

- Punishment should balance the interest of the offender, victim and society. Justice provides an opportunity to individualize the sentence, balancing the wrong done in conjunction with the need to restore the rights of society. Sanctions should therefore embrace the educative aspect, simultaneously focussing on the harm done. "Within the context of a sentence which reflects the gravity of the harm done and is humane, there is room for restitution and rehabilitation".
- There are severe consequences of the lack of systematic defined sentencing principles. One can argue that it can lead to confusion and even contradiction regarding sentencing. Consequently it gives rise to a degree of disparity in sentencing. There should be a high degree of uniformity in sentencing criteria. Strong emphasis on retribution and deterrence already and still will result in large prison population and state expenses.
- When wanting to send the accused to prison, the sentencing official needs to be conscious of its effects on families, and whether it would enhance the lifestyle of the accused. The Law Reform Commission of Canada (1974:5) stated that State intervention could not be justified where there is no net gain to the interest of the community, victim and the offender. Should the sentencing official sentence the accused to prison, expenses to the State are high and the family can become a burden to society regarding community support to the family of the prisoner.

**The following are additional principles underlying sentencing:**

- Judicial officers need to be aware of the theories of sentencing. The intended outcome of the sentence can serve as a benchmark when considering sanctions. Judicial officers must have a sound knowledge of the nature and extent of penal resources. The sentencing officials should have a sound knowledge on the theories of punishment and the availability of sentencing alternatives. It is crucial that the sentencing official knows the nature of the institution and what programmes are being run to enhance the well being of the offender. Thus, if the sentencing official passes a sentence of a given

length, s/ he must know how it would impact on the offender (Thomas cited in the Proceedings of the Conference, 1976:117).

- The sentencing official must know what non-institutional measures are available; i.e. probation services, correctional supervision, and programmes run by State departments and welfare organisations. The judicial officer must keep in touch with the developments in the field of penology. Things change in institutions and organisations. They must have an up to date idea of the institution, or the programme the offender is sentenced to (Graser, class notes :1998).
- The sentencing official needs to understand the culture of the offender, knowing his norms and values. When a particular sentence is passed on an offender, s / he needs to be aware of exactly what s / he is doing to the person, and the offender's family and society (Graser, class notes: 1998).

One would agree with Nicholas (1972:31) when he argued that since “sentencing is a matter of discretion, disparity in sentences would be inevitable even if all sentencers had the same penal philosophy”.

### **3.4. Sentencing Reform :**

Historically, magistrates and judges exercised and often abused their discretionary power in South African courts. Sentencing disparity existed mainly when similar offences were committed by people who are similar in relevant respects, but receive very different sentences (Fitzmaurice and Pease, 1986:10). According to the South African Law Commission's Issue Paper on Sentencing, the judges' or magistrates' ideology played an integral role in their approach to sentencing (1997:26). Racial discrimination and prejudice consequently filtered through when sentences were passed. Legislation was broad, enabling extensive interpretations of the act, which in turn enhanced inconsistency. The existing sentencing principles appeared to be ineffective in limiting sentencing discretion, leaving clear absence of a systematic approach. Consequently, it necessitated an alternative to limit sentencing discretion (South African Law Commission, 1997:26).

In the international context, sentencing officials likewise exercised sentencing discretion when having to impose any sentence. Magistrates and judges were also seen as having been inconsistent in sentencing. The predominant assumption was that imprisonment would control and reduce criminal activities. However, it was discovered that tough laws actually increased the prison population. In Australia, the situation was more controversial in that, although punitive laws increased the prison population, at the same time its politicians lobbied for 'executive release', which impacted on the reality that offenders did not serve the entire prison sentence (South African Law Commission , 1997:30).

### **3.5. Some International Trends In Sentencing Reform:**

#### **3.5.1. Sentencing Reform in United States of America:**

##### **3.5.1.1. Minnesota Sentencing Guidelines**

Prior to 1972, federal judges were responsible for the sentencing of the offender. However, there was a marked shift from the discretionary power of courts to a more structured system. Many states have subsequently replaced "indeterminate" sentencing with a more structured sentencing approach. In the former sentencing approach, the discretionary powers of the sentencing officials gave rise to inconsistent sentencing patterns where as the latter lobbied for an appropriate sentence for a particular offence. There was the underlying belief that a structured sentencing system would deter "potential offenders" and "incapacitate" dangerous offenders (South African Law Commission, 1997:31). In 1978, the Minnesota Sentencing Guidelines were developed to deal with all serious crime. These guidelines were to " specify possible correct prison-commitment; considering previous sentencing practices in relation to existing resources; provide that the entire prison sentence be served" (South African Law Commission, 1997:35).

In view of the Minnesota guidelines, it becomes evident that this sentencing approach has an evaluative component, reflecting on past and impacting on present sentencing conduct. Judges and magistrates therefore have to consider the availability of existing resources in relation to the type of sanction, ensuring the feasibility of passing a particular sentence.

### 3.5.1.2. Mandatory Minimum Sentences

The following reasons have been given for the need to shift to a more structured sentencing law: there was the need for retributive punishment, one whereby punishment would fit the crime; incapacitation would protect society; mandatory minimum sentences would minimize inconsistent sentencing patterns (South African Law Commission, 1997:41).

Research was conducted to investigate the nature of mandatory sentences in practice. It was discovered that convicted offenders were sentenced below the statutory minimum sentence; prosecutors redefining the classifications of the different types of offences, which consequently resulted in certain offenders carrying minimum penalty while others with similar offences were convicted otherwise. Once again this gave rise to inconsistent sentencing patterns. The Sentencing Commission therefore preferred the sentencing guidelines (South African Law Commission, 1997:41).

### 3.5.1.3. Three Strikes Legislation in United States of America

In 1993, citizens in Washington state appealed for the introduction of a '**three strikes you're out**' law, which imposed mandatory life sentences to offenders with two serious convictions, and are subsequently convicted of a third serious offence (South African Law Commission, 1997:43). This clearly signals zero tolerance for violent crimes.

In 1994, the Californian legislature responded to public demand for the implementation of the '**Jones-Costa three strikes Bill**', which operates similar to the '**three strikes you're out**' law in Washington. According to this law, the first offender is dealt with in relation to the sentencing guidelines; the second time the statute doubles the minimum mandatory sentence, and the third time, provision mandates indeterminate life sentence to those who committed violent crimes (South African Law Commission, 1997:43). This approach was criticized, arguing that such a law equates non-violent offences with violent offences. It is believed that such an approach is imprecise in "truly incapacitating potentially dangerous offenders" (South African Law Commission, 1997:44).

One agrees with the argument that non-violent offences cannot be equated with violent crimes. However, non-violent crimes like property offences for example, also causes psychological and emotional stress on victims, bearing in mind that the mentioned forms of abuse have more lasting and deep-rooted implications than physical assault which would disappear after a short period of time.

### **3.5.2. Sentencing in Sweden:**

In 1989, there has been a shift in the criminal justice system, moving towards a more predictable and consistent 'penal decision-making' (South African Law Commission, 1997:44). There was the belief that punishment should be located within statutory limits, enhancing uniformity that in turn mirrors consistent sentencing patterns. When deciding on an appropriate sanction, judges and magistrates consider the extent of harm inflicted, the offender's ability to comprehend the implications of h / her actions, and the intended motives of the offender. Aggravating circumstances (attitude towards the offence, extent of injury, etc.), mitigating factors (mental illness, emotional imbalance, etc) and previous criminal records are taken into account when meting out an appropriate sanction (South African Law Commission, 1997:46).

### **3.5.3. Sentencing in England:**

The sentencing law in England is notorious for its inconsistent sentencing practices, which date back to 1861. Maximum penalties for individual offences have often been changed. For example, "a man who fondles a 15 year old with her consent commits indecent assault punishable with 10 years imprisonment. If he goes further and has sexual intercourse with her consent, he is guilty of unlawful sexual intercourse, an offence punishable with a maximum of 2 years imprisonment" (South African Law Commission, 1997:50). This is therefore the height of confusion and inconsistency in the criminal justice system. However, in 1991, the Criminal Justice Act provided England and Wales with a coherent legislative framework. Sentencing principles were rooted in the retributive approach, giving objectives such as deterrence, rehabilitation and incapacitation little prominence (South African Law Commission, 1997:50). The White Paper therefore stipulated that violent and sex offenders convicted the second time would automatically receive a life sentence.

### **3.6. South African Focus:**

"South African courts have been criticized for adopting an intuitive approach to sentencing" (South African Law Commission, 1997:34). Sentencing officials enjoyed wide discretionary powers in deciding on the nature and extent of punishment. Judicial offices often feel that, with experience, and because of the stress on fairness inherent in the criminal procedure, they usually know- by intuition- what sentence to impose" (Graser, 1976: 128). One would agree when Graser argued that the 'feel for sentencing' render the process as an intuitive and subjective rather than a rational and objective approach (1976: 128). Hence mandatory minimum sentences were introduced to limit sentencing discretion.

"...Parliament has directed the courts to punish the perpetrators of gang rape and child rape as heavily and severely as the law will allow in the absence of substantial and compelling circumstances dictating otherwise, and that the courts will not shrink from their duty of carrying out this directive however painful it may be to do so" (Jordaan quoted in South African Criminal Law Reports, 1999:418). The aforementioned highlights the government's zero tolerance for sex crimes. State prosecutors apparently value the introduction of the mandatory minimum sentences. "State prosecutors are under pressure to secure convictions for serious offences and to demonstrate to the public that the criminal justice system is working effectively" (South African Law Commission, 2000:27).

Although there is a clear definition of the concept 'substantial and compelling circumstances', its meaning is open to different interpretations by judicial officials. Substantial and compelling circumstances can be defined as "some circumstances so exceptional in nature, and so obviously exposing injustice of statutorily prescribed sentence, that it compelled in conclusion that a lesser than prescribed sentence is justified" (South African Criminal Law Reports, 1999:116). This clause enables courts to retain their discretionary powers to a certain degree.

Research findings of a study conducted by a sub-project of the South African Law Commission indicated that the absence of clear guidelines regarding the meaning of

substantial and compelling circumstances was regarded as one of the main reasons for discrepancy in sentencing practices (South African Law Commission, 2000:34).

The clause 'substantial and compelling circumstances' makes provision for courts to impose a lesser sentence than the mandatory sentence. However, there is uncertainty about what circumstances could be regarded as substantial and compelling. "Most judicial officers believed that the legislature was not referring to normal mitigating circumstances...such circumstances can be found on rare occasions only" (South African Law Commission, 2000:34).

The Mandatory Minimum Sentencing Law in the Criminal Law Amendment Act 105 / 1997 Part 1 of Schedule 1 offence stipulates that:

an offender be sentenced to life imprisonment in the Supreme Court when a victim was raped more than once; by multiple sex offenders/ gang rape; previous convictions of sex assault; offender knowingly transmitting sexually transmitted or other diseases to victim; girl under the age of 16 years; physically disabled women; mentally ill women; severe physical injuries.

Life imprisonment is therefore the mandatory sentence in the mentioned circumstances. However, one can notably see the discriminatory practices in this schedule 1 offence. Women are exclusively regarded as the victim / vulnerable group in this section. What about the situation where boys in the same age category as their female counterparts are subjected to similar sex offences but their offence have a 'less serious category' i.e. indecent assault instead of rape which can lead to life imprisonment? Likewise, physically and mentally disabled men do not seem to fall into the vulnerable grouping. Such discriminatory practices can have serious implications in the face of justice.

The Supreme Court or Regional Court can impose the following mandatory sentences in part 2 of schedule 3 offences (Government Gazette Criminal Law Amendment Act 105 / 1997):

**Rape offence occurring under different circumstances** as mentioned in the Schedule 1 offence

**Indecent assault on a child under the age of 16 years, including the infliction of physical injury**

First offender be sentenced to 10 years imprisonment

Second offender be sentenced to 15 years imprisonment

Third offender be sentenced to 20 years imprisonment

From the abovementioned, it is evident that legislation made a clear distinction between the rape of a man and a woman. Should a male be raped under similar circumstances stipulated in Schedule 1, the sex offender will receive a mandatory sentence of 10 years instead of life imprisonment than was the case for the women. Legislation needs to guard against gender inequality.

### **3.7. The Focus Of International Instruments and the South African Constitution on Sex Offences against Children:**

The South African Law Commission investigated sexual violence against children. A project committee was established to develop a set of principles based on elements of the United Nations Convention on the Rights of the Child, 1989, the African Charter on the Rights and Welfare of the Child, 1990, and the Constitution of the Republic of South Africa, 1996.

#### **3.7.1. United Nations Convention on the Rights of the Child**

On 16 June 1995 the South African government of National Unity ratified the United Nations Convention on the Rights of the Child. The government is consequently compelled by the conditions stipulated in this document to protect, monitor, and report periodically on the well being of its children.

Article 34 of the Convention reads as follows:

“State Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, State Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

the inducement or coercion of a child to engage in any unlawful sexual activity

- a) the exploitative use of children in prostitution or other unlawful sexual abuse
- b) the exploitive use of children in pornographic performances and materials

(South African Law Commission, 2000:10)

### **3.7.2. The African Charter on the Rights and Welfare of the Child, 1990**

The Organisation of African States developed its first “ regional declaration and treaty on the rights of the child” (South African Law Commission 2000,:11). The children’s rights have been placed in cultural perspective, concentrating on sexual abuse within the cultural realm.

Article 21 of the African Children’s Charter (South African Law Commission, 2000:12) stipulates that:

“State Parties to the present Charter shall take appropriate measures to eliminate harmful social and cultural practice affecting the welfare, dignity, normal growth and development of the child”

The Constitution is the supreme law in the country, whereby all the other laws are subjected to the ruling of the Constitutional court. South African children subsequently have constitutional rights, of which the respect for human dignity and equality before the law are paramount to the constitution.

Section 28 of the Constitution 1996 (South African Law Commission, Issue Paper, Project 108:13) states that:

Every child has the right –  
 to a name and nationality from birth  
 to family care or parental care, or to appropriate alternative care when removed from the family environment  
 to basic nutrition, shelter, basic health care services and social services;  
 to be protected from maltreatment, neglect, abuse or degradation  
 to be protected from exploitive labour practice  
 not to be required or permitted to perform work or provide services that –  
 are inappropriate for a person of that child's age; or  
 place at risk the child's well being, education, physical, mental health or spiritual, moral or social development

### **3.8.Types Of Sentences That Can Be Passed On Sex Offenders:**

Law and order is a major political issue in South Africa. Concern about the escalating crime, with specific reference to child sexual abuse, sparked public demands for tougher punishment.

With the abolition of the death penalty and the ruling of the Constitutional Court which rendered whipping as unconstitutional, courts in South Africa have a range of sanctions available: imprisonment; a fine; correctional supervision; compensation and restitution; caution, discharge, declaration as habitual criminal, committal to treatment center, postponed and suspended sentence (Hutton, 1997:318). Sentences can be suspended under various conditions and can also be postponed conditionally or unconditionally. The Community Services Order does not exist as a sentence in its own right, but can be passed

as a condition of a suspended sentence or as part of sentence of correctional supervision (Hutton, 1997:318).

### **3.8.1. Imprisonment:**

Prison is the most severe penalty available to the court in South Africa. Section 286 of the Criminal Procedure Act 51 / 1977 allows the sentencing official to sanction an offender to imprisonment should the offender be regarded a danger to society. Offenders who are employed or sole breadwinners might be sanctioned to periodic imprisonment depending on the nature of the sex offence. Section 285 of the Criminal Procedure Act 51 / 1977 stipulates that the offender sentenced to periodic imprisonment has to serve a sentence not less than 100 and not more than 2000 hours. According to Geldenhuys and Joubert (cited in Hutton, 1997:320) there is "disappointingly little guidance given to the sentencing court on the decision to impose a custodial sentence". Research indicated that although the use of imprisonment has declined, the length of the sentencing period has increased significantly (Hutton, 1997:321). Imprisonment of the offender temporarily protects society. On the flip side, it deprives the offender of his or her liberty to make decisions. Since many criminals are never deterred and re-offend; imprisonment in itself is not sufficient to ensure the safety of the community (Roux cited in Proceedings of Conference, 1976:146). " For the vast majority of law abiding people, arrest and trial and the shame and stigma of conviction probably are a greater deterrent than imprisonment " (Law Reform Commission of Canada, 1974:5).

Considering the high recidivism rate of convicted offenders, prison does not seem to be the most suitable place for offenders to alter their criminal behaviour. There needs to be the will and motivation to change their lifestyle. In prison, offenders are being provided and cared for. The reintegration of sex offenders into society is complicated since it is expected of them to fend for them. Furthermore, the reality is that the family of the prisoner also serves a prison sentence. Not only do they experience the loss of a parent or relative and financial loss, but they also suffer the stigma of having a relative imprisoned (Hinds, 1982:6).

### **3.8.2.Fine:**

The fine is the most common sentence in South African courts. Should a fine be imposed as an alternative to imprisonment, the amount should not be so high that the offender consequently ends up in prison. However, on the contrary, Hutton (1997:320) argued that the fine should be in proportion to the offence regardless of the financial circumstances of the offender. To a certain extent one would agree with the fact that the offender should get a stern fine, sometimes exceeding the sex offender's financial capacity. However, it can be a form of injustice if the amount far exceeds the offender's ability to pay the amount. On the other hand, it can be dehumanizing to the victim and society to give a sex offender a fine which s/ he is likely to pay.

Sentencing officials should be so careful to impose fines since an 'easy' fine could result in the community losing faith in the justice system. In another case scenario a seventeen-year-old girl was raped and abducted by a stranger. The girl recalled the 12-hour sex ordeal whereby her need for survival exceeded her fear. This girl viewed her rape as an 'out of body experience'. However, the magistrate charged the perpetrator, who was a businessman, a R12 000 fine, for having sex with a minor. This sentence sparked horror and public outrage at the inappropriateness of the sentence( Felicia Mabuza – Shuttle talk show, 17 May 1999).

### **3.8.3.Correctional Supervision:**

This is a community- based sanction comprising of a variety of programmes. Section 276 A of the Criminal Procedure Act 51 / 1977 allows for the conversion of imprisonment, and the imposition of correctional supervision. Section 276 (1) (h) of the mentioned Act places the offender under house arrest up to the period of three years. Section 276 (1) (i) of the mentioned Act allows for imprisonment up to five years, but allows the offender to apply for parole after most of the prison sentence had been served. This can include house arrest, monitoring, community service, supervision under a probation officer, life skills courses, compensation of the victim, and numerous programmes aimed at the education and rehabilitation of the offender (Hutton, 1997:321). Correctional supervision, which can be

regarded as a severe sanction, is usually imposed in cases of sexual assault and rape (Hutton, 1997:322). Many sexual molesters who are employed and sole breadwinner usually get community based sentences. Thus, by sanctioning him to imprisonment would not only cost the State for maintaining him in prison, but it can subject the wider community to injustice as the rest of the community then have to maintain the prisoner's family. Berliner et al (1995:501) maintained that society should not bear the cost of supporting the sex offenders' family while offender is being incarcerated. They argued that community safety and justice could well be served by providing the opportunity for rehabilitation in a supervised community setting for sex offenders (Berliner et al, 1995:501). One would argue that it would be an injustice to sanction sex offenders to community-based sentences without thoroughly assessing their attitude towards the crime and the protection and safety of children. Hence, should a sex offender show no remorse and has no insight into the seriousness of h/ his criminal behaviour, then it is best for such an individual to be institutionalized.

#### **3.8.4. Declaration As Habitual Criminal:**

Section 286 A of the Criminal Procedure Act 51 / 1977 declares the offender a dangerous criminal, and may send the offender to a psychiatric hospital for a 30-day observation. Section 286 B of the mentioned Act imposes an indefinite sentencing period on the habitual criminal.

#### **3.8.5. Committal to Treatment Center:**

Section 296 of the Criminal Procedure Act 51 / 1977 allows an offender to be committed to a rehabilitation center upon the report of a probation officer.

The ultimate goal of sex offender treatment is the prevention of further 'community victimization' (Peaslee,1995:112).Berliner et al (1995:489) argued that sentencing alternatives, which contained a treatment component, is based on the assumption that sexual behaviour disorders can be treated. One would agree with the mentioned argument. Often sex offenders have innate feelings, which are rooted in past experiences. A low recidivism rate cannot be guaranteed should such an offender be sent to prison without

providing him or her with an opportunity to address the offenders' unresolved feelings of insecurity, obsession with power, etc. One should therefore have cognizance of the fact that certain sex offenders are in need of treatment. Despite the importance of having treatment as an alternative sanction, there is little evidence that clinical treatment reduces recidivism (Furby et al, 1989 cited in Berliner et al, 1995: 489).

It is essential to remember that official recidivism data do not necessarily reflect the actual rates of re-offences. Berliner et al (1995: 490) reiterated that rapists re-offend more frequently than child molesters; and extra-familial child molesters re-offend more frequently than intra-familial offenders do. The most important goal of legal and therapeutic intervention with sex offenders is averting recidivism (Berliner et al, 1975:490).

#### **3.8.6. Conditional/ Unconditional Postponement/ Suspension of Sentence:**

Section 297 of the Criminal Procedure Act 51 / 1977 stipulates that the court may postpone passing a sentence for up to five years, on one or more conditions, be it correctional supervision, services to the victim, probation supervision, community service, compulsory attendance at treatment center, or order for the offender to re-appear in court on a given date. An alternative sentence could enable the judge to pass a sentence but order the operation of the whole / part of the sentence be suspended for not longer than five years on any conditions. Another alternative sanction is to discharge the accused with caution or reprimand.

#### **3.9. Conclusion**

In view of the above, it is evident that the justice system needs to develop the art of meeting the needs of the community in relation to that of the offender in its sentencing policies and practices. It requires a belief in the sentencing process, expertise and a sound knowledge base to ensure that justice had been done. Since child abuse is such a sensitive, private and yet serious matter, professionals need to be skilled to ensure that the matter is dealt with sensitively. It is in such moments that the justice system could either restore the faith the community and the victim have in it, or signal to everyone that the technicalities of criminal proceedings provide loopholes for sex offenders to be acquitted

of the charges. Subsequently this can lead to a loss of faith in the system. Sentencing officials therefore have to rely on the expertise of other professionals to guide his / her in passing a rational and effective sentence. That is, a sentence that meets the needs of the victim, the offender and the community.

University of Cape Town

## **CHAPTER FOUR**

### **4. RESEARCH METHODOLOGY**

#### **4.1. Introduction**

This section provides a brief overview of the research design. In doing this the key research sources and methods that were utilised during this study are briefly detailed. This overview also includes a brief description of data analysis and some of the limitations of the research.

#### **4.2. Focus of the Study**

This study explores the judicial officials' (magistrates and prosecutors) and probation officers' attitudes about sentencing male child sexual offenders, as well as the types of sentences handed down to such sex offenders at the Sexual Offences Court based at Wynberg Magistrates Court. To this end, this research focuses on four areas:

- 1) sentencing policies of the Justice Department;
- 2) sentences handed down by magistrates;
- 3) sentencing recommendations of probation officers; and
- 4) sentencing arguments of public prosecutors in the Sexual Offences Court.

In evaluating these issues, the researcher's principal focus is on the Criminal Law Amendment Act 105 / 1977. Specific clauses in the mentioned Act facilitate the prosecution of male sex offenders who commit sex offences against children. In addition, court files that were finalized in 1998 at Wynberg Magistrates Court were examined. This provides insight into the sentencing conduct of the aforementioned judicial officials in the Sexual Offences Court. Thirdly, individual interviews were conducted with five out of a total of eight magistrates, five out of a total of nine probation officers and five out of a total eight public prosecutors working at the Sex Offences Court, in order to gain insight

into their perceptions of issues impacting on sentencing practice. The research participants were selected in terms of their availability and professional involvement in the Sexual Offences Court.

#### **4.3. Research Process:**

A combination of documentary evidence and qualitative and quantitative research methods was used in this study.

The documentary evidence consisted of two sources: court files obtained from the Clerk of the Court and primary and secondary literature on sentencing practices. These latter sources consisted of relevant acts and statutes as well as a broad range of articles, books and magazines that deal with sentencing generally and particularly with the sentencing of child sexual offenders. These sources cover both international and local literature.

The qualitative aspect of the research is reflected in the interview schedules that were administered to the judicial officials and probation officers. Questions were designed to elicit the three central themes that underpinned the study, namely the judicial officials' and probation officers' level of awareness and applications of sentencing policies in respect of sexual abuse, their current sentencing practices and the barriers, which constrain fair sentencing practices.

The quantitative dimension lies in the aggregation of data collected from the court files. Following on the classification of trends in this data, a database was developed on Microsoft Excel where demographic data on victims and offenders was recorded along with past criminal records. Pivot tables containing frequencies and proportions were used for the analysis of quantitative data. These tables highlight information on the relationships between the age of the victim, sex of the victim, age of offender and nature of the offence, relationship between the victim and the offender, previous convictions, extent of injury, and the type of sentence passed by magistrates in Wynberg's Sexual Offences Court.

Subsequently, comparisons were made between the themes of the literature review and trends that arise from the court files and the interviews. In terms of this, issues such as the principles and objectives of sentencing, factors considered when sentencing, problems in sentencing, previous convictions and a discussion on the management of sex offenders are key foci of this study.

#### **4.4. Data Collection Tools:**

##### **4.4.1. Court Records:**

The study of court files that were finalized in 1998, specifically relating to the sexual abuse of children, served as a fundamental research method. The information on the court files was obtained from the clerk of Wynberg Court. The main document is the J15. This document contains the police docket and a record of factors the court took into account when passing sentence. The J15 reflects information on the age of the victim, sex of the victim, age of offender, nature of the offence, relationship between the victim and the offender, previous convictions, extent of injury, and the type of sentence passed by the magistrates in Wynberg's Sexual Offences Court.

From a total of 108 court files, 27 cases (25 %) were selected to focus on relevant research issues. These 108 cases do not include cases referred to the High Court for sentencing or where the victim is 16 years and older. The exclusion of victims 16 years and older is consistent with the Child Care Act 74 / 1983 as Amended in 1996 in which a person is considered to be a child until the age of 18 years. However in the Criminal Law Amendment Act 105 of 1977 and in the Labour Relations Act 66 of 1995 a child is considered to be under the age of 16 years. Since this research focus on the legal aspect as opposed to the social welfare aspect of child sexual abuse, a child will be considered to be under the age of 16 years.

#### **4.4.2. Personal Interviews:**

Interviews were conducted with judicial officials, namely magistrates, public prosecutors and probation officers practicing in the Sexual Offences Court at Wynberg Magistrate Court. The interviews with the judicial officials focussed on three significant themes namely, their level of awareness of and applications of sentencing policies, their current sentencing practices, and their perceptions of the barriers impacting on sentencing practices.

#### **4.5. Sampling:**

##### **4.5.1. Court Records**

In selecting the 27 court cases a probability sampling technique was used. This technique involved 2 selection phases.

In the first phase, a list was compiled of the primary sampling unit; namely the sexual abuse cases finalised in 1998. Subsequently the court files that were ineligible for the study were eliminated. These files mainly represented the cases in which the victim of the sexual offence was 16 years and older.

In the second stage, the selected primary sampling units (sexual crimes) were listed, followed by a list of secondary sampling units (victims of sexual abuse under the age of 16 years) that were sampled through random selection. In order to establish the representivity, it was felt that a sample size of 10 % or even 20 % of the cases was too small. Thus, 25 % of the cases were selected to provide a 'snapshot' of the wider context. Hence, 27 from a total of 108 cases (25 %) were randomly selected.

##### **4.5.2. Personal Interviews**

Interviews were conducted with judicial officials, namely magistrates and public prosecutors, as well as with probation officers practicing in the Sexual Offences Court at Wynberg Magistrate Court. The research participants comprise of 5 out of a total of 8 magistrates (60 %), 5 out of a total of 8 public prosecutors in the Sex Offences Court (60 %) and 5 out of a total 9 probation officers from the Department of Social Services,

Athlone and Wynberg offices (55.5%)). The interviews with the probation officers were held at their offices at the Department while the magistrates and the public prosecutors were interviewed in their offices at Wynberg Court.

A non-probability sampling method was used whereby the research participants were selected in terms of their availability and professional involvement in the Sexual Offences Court. Hence, those judicial officials who started recently, were on leave, those who were unavailable due to other work commitments during office hours were excluded from the study.

#### **4.6. Data Analysis:**

With regards to the analysis of court files, a database was developed on Microsoft Excel whereby the relevant data was recorded and coded. This database contains information on the age of the victim, sex of the victim, age of offender, nature of the offence, relationship between the victim and the offender, previous convictions, extent of injury, and the type of sentence passed by the magistrates in Wynberg's Sexual Offences Court. The aforementioned was used to calculate frequencies and proportions, but no statistical techniques were used, as the number of cases was too small.

A multi-stage process was followed when analysing the interviews with the respective judicial officials and probation officers. In the first phase, the responses of each respondent were recorded on individual interview schedules. Thereafter, the responses of each cluster of judicial officials were grouped together on a data sheet. Consequently, the data were analysed under the three themes, looking at the general trends in responses. Subsequently, a cross analysis was done, drawing comparisons between the three groups of judicial officials. The literature review in addition to information on the analysis of court files aided the analysis of the interviews.

#### **4.7. Limitations of Research:**

##### **4.7.1. Literature Review:**

There is a serious shortage of adequate and relevant literature regarding the sentencing of sex offenders especially within the South African context. South Africa's social, political, cultural, legislative and economic conditions are different from other countries. Hence, this study is limited to the extent to which one could draw on recent and relevant literature on the sentencing of sex offenders in the South African context. Considering the escalating sexual crimes committed against the children in South Africa, there is an extreme need for more South African research on this subject matter. The lack of South African literature on review studies complicates the extent to which one can comparatively study the sentencing of child sexual offenders. Information gathered from international literature and the Internet however enabled the researcher to gather useful information on the mentioned issues.

##### **4.7.2. Court Files:**

The primary document of analysis is the J15 charge sheet. However, the inadequate recording and or lack of information in court files hampered the data collection process. Unfortunately some crucial information, such as the age of the victim, relationship between the victim and the offender, previous convictions, medical examination of the victim, and the statements of the complainants was not recorded in some of the cases. Lack of adequate information can have unfair consequences for the victim of sexual abuse mainly because this information is necessary for the judicial officials and probation officers in arriving at a just and effective sentence.

A further limitation concerns the absence of magistrates' comments stating the reasons for passing a particular sentence. A short note of explanation on the reason for passing a specific sentence would provide understanding about the factors that played a functional role during the sentencing process. However, the interviews with the magistrates enabled the researcher to gather significant information on the matter of sentencing of child sexual offenders. The interviews with the magistrates, prosecutors and probation officers allowed the researcher to gain insight into the sentencing practice of sentencing officials based at Wynberg Sex Offences Court.

## CHAPTER FIVE

### **5. FINDINGS AND DISCUSSION**

#### **5.1. The Sentencing Policies and Practices of Magistrates in respect of sexual offences against children:**

##### **5.1.1. Awareness and Application of policies impacting on sentencing of sex offenders**

###### **5.1.1.1. Understanding of existing policies in respect of sentencing sex offenders:**

Magistrates reported that there was no policy with regards to sentencing sex offenders. However, there was great awareness of significant legislation which impacts on the sentencing of sex offenders, namely the Criminal Law Amendment Act 105 /1997, Criminal Procedure Act 51 / 1977, and the Criminal Procedure Second Amendment Act 75 / 1995. Hence Lund's argument that legislation sets the outer limits of sentencing discretion, directing yet preventing unfair practices of judicial officials (1979:204). Among these magistrates, the Criminal Law Amendment Act was the most frequent legislation used as a point of reference when sentencing sex offenders.

Magistrates mentioned that it was policy to refer serious cases that warrant harsh sentencing to the Supreme Court. Magistrate courts have limited jurisdiction in that they can only impose sentences up to 15 years imprisonment. The Supreme Court however has jurisdiction to impose the life sentence on convicted offenders. This policy was mentioned by magistrates to be a key barrier in achieving consistency when sentencing sex offenders. In addition, this policy could be indicative of the tension between the Magistrate Court and the Supreme Court.

One magistrate mentioned, “the sentencing practice varies from region to region”. From the literature review it emanated that national sentencing practices differs from international sentencing conduct in that different sentencing options are available which are streamlined to the needs of the specific country’s constitution. For example, in Washington State, castration is used as a sentencing option for sex offenders, while South African law does not consider castration as an appropriate sanction since it is seen as a violation of offenders’ human rights and dignity (Sluder and Roberts, 1993:184). Hence, policy makers and legislators need to exercise caution when introducing overseas *modi operandi* to deal with the South African situation.

A magistrate reported, “government can’t dictate policy in terms of the Constitution on how magistrates should sentence. They can set guidelines however. But we cannot have policy and ignore factors...”. This particular magistrate argued for flexibility in legislation, emphasizing the need for discretionary powers among magistrates when in fact, discretionary powers in themselves played a contributory role to inconsistent sentencing practices. Graser’s argument highlighted the probation officers’ and prosecutors’ views that the court’s discretionary power was a key barrier in achieving consistency in sentencing practices. Parmanand (1982:136) claimed that the “rule of law has been replaced by the rule of men” since too much discretionary power is afforded to magistrates.

#### 5.1.1.2. Interpretation of sentencing objectives:

Some of the magistrates were very cynical about the sentencing objectives. “I am expected to say that all objectives are taken into consideration when sentencing, but it does not happen in practice. In a rape case, rehabilitation is less important than deterrence and retribution”. From this perspective, retribution and deterrence enable magistrates to visibly mirror society’s disapproval and intolerance for sex crimes against children. Another magistrate was also cynical about this issue, stating: “I can give you a model answer to this question. I can pay lip service to the prescribed norm. However, the extent to which I apply the sentencing objectives depends on one’s moral fiber and norms.” Personal feelings were also reported to determine the outcome of a sentence. There was

the general consensus that “decision-makers cannot hide behind reported objectiveness”. This statement portrays sentencing of sex offenders as an intuitive and subjective process.

Considering that human beings are responsible for sentencing, the human aspect in relation to the element of subjectivity is deemed to embrace a subjective / intuitive approach. Hence the need for mechanisms to be introduced i.e. active involvement of expert witnesses and review committees to ensure that sentences are passed based on rational decision-making.

A very experienced magistrate made an impressive contribution to this question. He stated, “sentencing objectives were crystallized in the law. The current sentencing objectives are regarded as traditional objectives. With the new constitutional dispensation and the introduction of the mandatory minimum sentences, the applicability of existing traditional objectives is questioned. The main purpose nowadays is to do crime control rather than due process”. In light of this argument, one will agree with the magistrate that crime control is vital. However, in the face of justice, crime prevention and due process rights play an equally important role in the management of crime within the criminal justice system.

Another striking comment was made when it was mentioned, “politicians are pressurized by the community. The public is not aware that there is a 70% conviction rate of sex offenders. The media portrays the wrong picture”. Sue, Sue and Sue (1994:339) claimed that public pressure and outrage in the community towards sex offenders have resulted in the imposition of harsh sentences. A magistrate claimed that the prevalence of sex crimes and increased reporting of crime “compel magistrates to decide upon deterrence instead of prevention”. Hence, magistrates in the study are guided by the objectives of deterrence and retribution. It is evident that magistrates did not give true consideration to all the sentencing objectives when sentencing sex offenders. The responses of magistrates indicate that they still operate mainly within the just desserts model, which gives emphasis to the infliction of punishment and penal pain (Parmanand, 1982:40).

Consequently there is great concern about magistrates' ongoing sentencing discretion in their interpretation of sentencing objectives regardless of the mandatory minimum sentencing provision, which was introduced to limit subjectivity and sentencing discretion.

#### 5.1.1.3. Role of the mandatory minimum sentences:

The magistrates were well informed about the content of the mandatory minimum sentencing provisions. Three out of the five magistrates reported that it was "compulsory to follow the mandatory minimum sentences, which makes sentences mandatory". It was mentioned that provision was made for the magistrates to refer serious cases to the High Court for sentencing. One magistrate stated that although the High Court interfered with their sentencing discretion, and coerced magistrates into passing a harsh sentence, it is still helpful because it gives expression to the community's feelings. A respondent who stated that there were two schools of thoughts made an important point. The first one is the positivist approach whereby the mandatory minimum sentences are strictly applied. The second school of thought is the liberals' approach where the chances to deviate from the mandatory sentences are greater. "The discretion of the court is still there, but is limited". The clause 'substantial and compelling circumstances' enables magistrates to discretely decide upon the imposition of a lesser sentence than the mandatory sentence (South African Law Commission, 2000:34).

It was reported that the magistrates "seek their guidance from the High Court about what issues constitute substantial and compelling circumstances". The South African Law Commission found in a research study that the lack of clearly defined guidelines regarding the meaning of 'substantial and compelling circumstances' were deemed to add more confusion and discrepancy in sentencing practices (South African Law Commission, 2000:34). It is clear, therefore, that magistrates are well aware of the significant role the mandatory minimum sentences play in respect of sentencing sex offenders.

Magistrates had varying views regarding the matter of mandatory minimum sentences. One magistrate claimed that he was working within the framework of the mandatory minimum sentences. Another magistrate remarked that the mandatory minimum sentences “should not have influenced my sentencing practice, but it did. The mandatory minimum sentences emphasize the importance and seriousness of the offence. However, less emphasis is placed on the circumstances of the accused. Everybody is supposed to be treated equally, but it can lead to unfair consequences”. The Law Reform Commission of Canada (1974:5) stated that state intervention could not be justified where there is no net gain to the interest of the community, victim and the offender. Thus, when sentencing, these aforementioned issues must be taken into consideration.

Other magistrates stated that the mandatory minimum sentences have not impacted on their sentencing practices. “The mandatory minimum sentences do not influence my sentencing practice. I accept that offenders should be punished more harshly”. One magistrate made the point that “the mandatory minimum sentences make magistrates aware of the sentencing disparity in the past. Also about the divisions in the provinces”. The introduction of the mandatory minimum sentences therefore does not seem to make a very significant impact on the sentencing practice of the magistrates in this study. This either indicates that magistrates perceived themselves to be passing rational sentences, or that they do not need any form of guidance from legislation to assist them with sentencing of sex offenders. If the latter is true, then magistrates’ ignorance about legislative intervention could be considered a crucial barrier in the passing of rational sentences.

#### 5.1.1.4. Knowledge of other new developments in the field of sentencing adult male sex offenders:

Four out of the five magistrates reported that besides the mandatory minimum sentencing provision, they are unaware of new developments in the field of sentencing sex offenders. One magistrate however was well informed about this matter. He made reference to the Law Commission who just completed a White Paper on the sentencing of sex offenders,

and commented that the mandatory minimum sentences have been the forerunner to the White Paper. Another magistrate mentioned that the mandatory minimum sentence is only temporary in nature. He stated that there is great opposition from magistrates and judges to the mandatory minimum sentences, since it is believed to limit the court's discretion. However, he indicated that the White Paper allows deviation from the new Act. Apart from the magistrate who made this comment, it would appear magistrates in this study generally did not know of any new developments in the field of sentencing of sex offenders. For example, they did not mention the SAYSTOP programme (South African Young Sex Offenders Programme), which is a joint venture between NICRO, the Department of Social Services of the Western Cape, The Office of The Attorney General, The Community Law Center at the University of Western Cape, and the Institute of Criminology at the University of Cape Town. This programme focuses on the sentencing of juvenile sex offenders. A reason for this could be that magistrates seldom hear probation officers recommending juvenile sex offenders to the SAYSTOP programme.

Magistrates reported that they have not attended any workshops pertaining to sentencing of sex offenders. One magistrate could remember attending a workshop organized by the Justice College. However, he was unsure whether this workshop focussed primarily on sentencing. Another magistrate reported, "the government have to sanction a unit that focuses primarily on the sentencing aspect of sex offenders. They have to put their money where their mouth is". Three of the five magistrates had not attended any workshops regarding sentencing of sex offences. This reflects the lack of training workshops offered to magistrates to assist them with their sentencing practice (Graser cited in International Conference Proceedings, 1976:128).

The lack of training and learning opportunities offered to judicial staff can play an essential role in the passing of discrepant sentences among magistrates. The Justice Department needs to create extensive learning opportunities on the matter of sentencing for judicial officials to enhance their knowledge base, keeping them abreast with the new developments in the field of sentencing. This would enable magistrates to pass rational and fair sentences and would counter discrepancy in sentencing.

### **5.1.2. Current sentencing practices:**

#### **5.1.2.1. The process of sentencing adult male sex offenders:**

The magistrates reported that experience plays a fundamental role in their sentencing practice. "Things become more obvious when doing something for a long time", one magistrate remarked. Graser (cited in International Conference Proceedings, 1976:128) mentioned that there is the notion that experienced sentencing officials develop a 'feel for sentencing'. Magistrates cannot avoid being subjective, but if their 'feel for sentencing' is the dominant benchmark used to judge, then how can a trial be fair? Surely one needs to take into account that each and every case is unique, warranting an objective and unbiased response. Considering that sentencing is a complex process, it is vital that all the role players involved in sentencing receive specialized training in this regard. This notion of the 'feel for sentencing', the researcher feels, plays an important role in the inconsistent sentencing practices among magistrates, which have negative consequences not only for the criminal offenders and the victims, but also for the community, which loses faith in the criminal justice system.

One magistrate reported that one "gains experience of human nature. One of the most difficult things is to prove conviction which becomes easier with experience". Such responses of magistrates gave rise to critics referring to the sentencing process as a 'haphazard process', 'rule of thumb', and 'shot in the dark' (Graser, 1981:124). Another magistrate stated that "personal life experience" seems to play an equally important role. A striking comment was made when a magistrate stated that "lewenservaring en lewenskennis speel 'n groot rol. Lewensrypheid kom nie van 'n boek nie". These attributes are not enough considering that magistrates' sentencing conduct should mirror rational decision-making (Weiner cited in Crime, Punishment and Correction, 1976:47). The magistrates therefore seem to draw on their life and work experience when sentencing, thinking that it is sufficient to know intuitively what sentence to pass (Graser cited in International Conference Proceedings, 1976:128). This is risky as these subjective factors shape our thought processes that in turn direct our actions.

Magistrates reported that they consult their colleagues whenever there "are gray areas in a case". One very experienced magistrate stated that he "usually has a feel for the case"; therefore it is not difficult for him to decide on the type of sentences for sex offenders. It is unacceptable for magistrates to adopt such an attitude about sentencing of sex offenders. It over simplifies the matter of sentencing. Sentencing in its very nature is a complex human process. Hence the need to make informed and rational decisions on the case, involving qualified expert witnesses, such as probation officers, to assist with the sentencing process. It will also enable magistrates to give adequate consideration to all aspects of the case.

Another magistrate reported that it is "general practice" for him to discuss difficult cases with his colleagues. However, this particular magistrate also consults South African case law and research topics on the Internet to assist him with his sentencing practice. Thus, magistrates seem to recognize that certain cases necessitate consultation with others. Consultation with colleagues can reduce elements of subjectivity. However, it can be meaningless when you only consult with those who share the same sentencing philosophy.

Magistrates need to engage in critical discussions with other professionals who are involved in aspects of sentencing. Multidisciplinary interaction, for example with criminologists and social workers, would also broaden the knowledge base of magistrates in matters related to sentencing. This can serve as a platform for role players to consult with each other and recognize the benefits of working together as a team within the court setting.

Magistrates reported that they consider a wide variety of factors when deciding on an appropriate sentence for sex offenders. One magistrate reported, "after evidence is led and the offender is convicted and found to be a liar, it counts against him. This indicates that he has no sense of remorse, subjecting the victim to further victimization." Other factors, according to the respondents are considered, such as the nature of crime, the

circumstances of the offence, impact on the victim, specific facts relating to the offence, the community's feelings around the matter, whether violence is involved, the existence of other forms of abuse, weapons, age of victim, whether there is a history of abusive relationship. One magistrate said: "I have to start at 10 years up to 15 years. The mentioned factors can play a decisive role in whether I am going to sentence the offender for more than 10 years". This rigid attitude towards sentencing can negatively affect the extent to which magistrates are susceptible to the involvement and recommendations of expert witnesses. Magistrates considered many factors when sentencing sex offenders. However, from the magistrates' point of views, the interests of the community and of the victim seem to completely overshadow the interests and the needs of the offenders. The needs of the offender were rarely taken into account when they sentenced sex offenders.

#### 5.1.2.2. Perceived seriousness of sex crimes and its application in case scenarios:

Magistrates encountered problems in rating the seriousness of child sexual abuse in relation to other offences. One magistrate said: "Almal is ernstig, is vernietigend!" Another magistrate stated that he "cannot commit himself to this". Magistrates regarded all the sex crimes to be very serious criminal offences. However, courts regard certain types of sex offences much more seriously than others (Walmsley cited in West, 1980:65). Two interesting responses however were given on this matter. The one magistrate gave child abduction the highest rating since he was a father of 3 little boys. Marital rape was seen as the other form of sex crime that is regarded as more serious than the other sex crimes and property offences. The other magistrate gave child sexual abuse the highest rating, followed by bank robbery, then marital rape, house breaking, car theft and then child prostitution. Magistrates responded differently to this question. Therefore, one can determine that magistrates' life experience shaped their perspectives on the seriousness of criminal offences.

The magistrates sentenced both penetrative and non-penetrative sexual offences against children harshly. In the case scenarios, developed to examine the nature of their respective sentencing practices regarding a father, grandfather, neighbour or stranger sexually abusing a child, the majority of the magistrates reported that they would refer

the cases, which involved penetration to the High Court for the imposition of life imprisonment. Another magistrate reported that instead he would give the maximum sentence to those sex offenders. Hogan cited in West (1980:46) argued, "there is certainly a degree of indignity and harm inflicted, and outrage felt, where the victim is forced to submit to penetration". In the interviews, magistrates indicated that they would sentence sex offences against children harshly, striving to pass the maximum sentence on adult sex offenders.

The analysis of the court files at Wynberg Sex Offences Court that was finalised in 1998, reflected another scenario. Firstly, not all the cases that involved penetration went to the High Court for the life imprisonment sentence. Of the 27 court cases being analysed, five male child sexual offenders received a prison sentence, seven sex offenders received a combined imprisonment and suspended sentence, five sex offenders received a full suspended sentence, two sex offenders were fined, and seven sex offenders were acquitted from the charges. Thus, from a total of 27 cases, in 12 (46%) of the cases, male child sexual offenders received a reasonable sentence. However, in the other 14 (54%) of the cases the sex offenders received unreasonable lenient sentences such as a fine and full-suspended sentence.

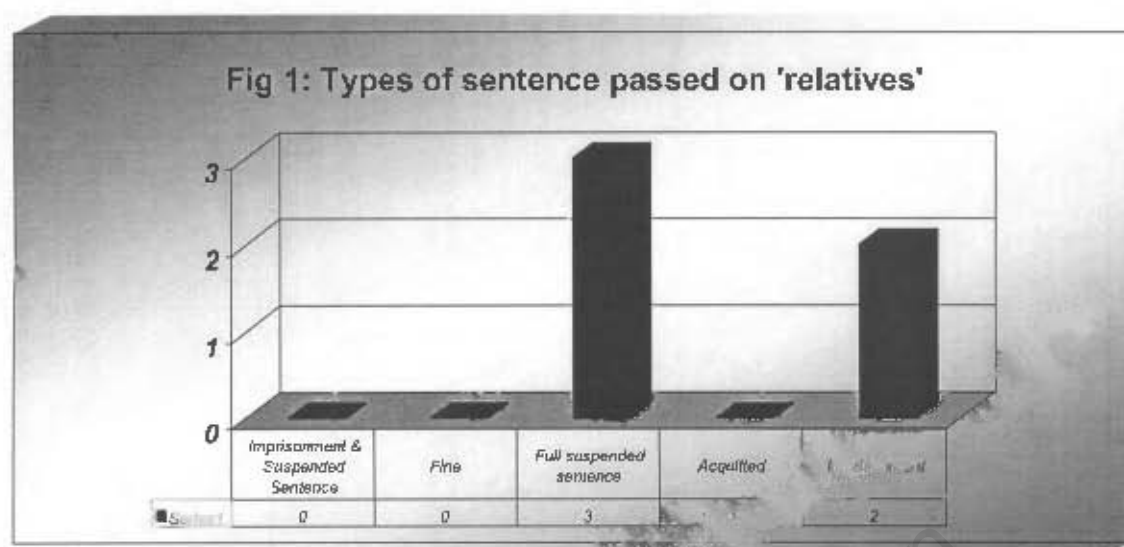
Comparing the magistrates' responses in interviews with the analysis of the court files, it is evident that sex offenders are not necessarily receiving harsh sentences from magistrates in Wynberg Sex Offences Court. Unlike what magistrates have been stating in the interviews, it was found from studying court files that child sexual offenders were given fines, received full suspended sentences, or given a combination of imprisonment and suspended sentence. Therefore, one can argue that what magistrates are saying (attitudes) does not necessarily become practice (what they are doing).

A prison sentence between 5 - 10 years was claimed to be the most appropriate form of punishment for cases that involved fondling. One magistrate deviated from the norm, and reported that he would sentence sex offenders that fondled children to correctional supervision. The court files from Wynberg Sex Offences Court that involved two non-

penetrative sex offences, that is, two attempted rape cases, showed that in 1998 one of the two sex offender received a prison sentence whereas the other one was acquitted. In all 27 cases, suspended sentences and fines were the only alternatives to imprisonment used for male child sexual offenders at Wynberg Sex Offences Court.

Another magistrate reported that he would give the stepfather in the case study correctional supervision instead of imprisonment since it might cause suffering to the family. This magistrate considered the relationship between the victim and offender of the sex offence. This underlined Bradmiller and Walters' (1985) argument that offenders who were related to their victims were charged with less serious offences than those who were unrelated. Nevertheless, unlike the one magistrate who mentioned the issue of the relationship between the victim and the offender, the majority of the magistrates did not voice this issue. This could indicate that they assumed that one knows that they when sentencing would regard this factor.

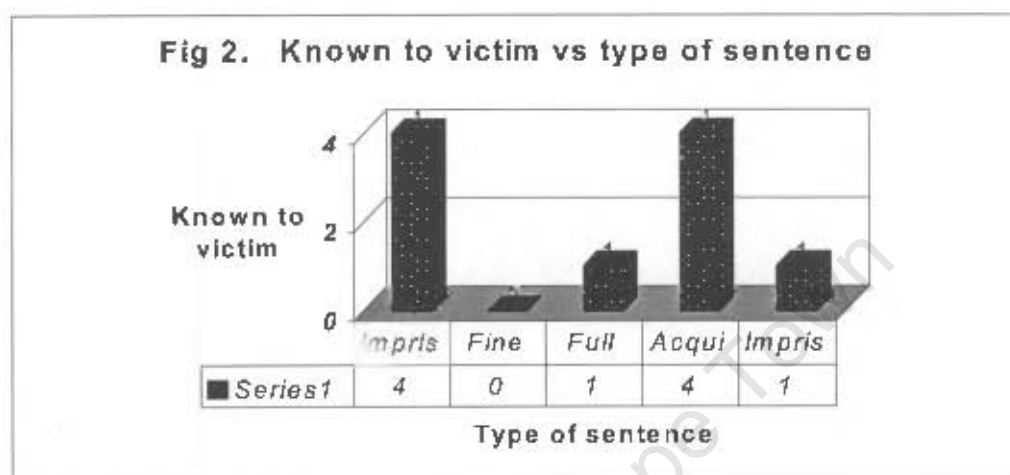
In the analysis of court files finalised in 1998 at Wynberg Sexual Offences Court, it was found that when a step-father, mother's boyfriend or a relative sexually offended against a child, they were sentenced as follows: two child sexual offenders were sentenced to imprisonment whereas the other three child sexual offenders received a full suspended sentence. This phenomenon is outlined in the following graph.



From the above graph, it is clear that some relatives received prison sentences for sex offences committed against children in the family. It also shows, that magistrates passed full suspended sentences on three out of five sex offences committed by relatives. Consequently, these relatives could possibly continue sharing the same family home with the victim. It is conceivable that the sexual abuse could then continue.

In the 1998 court files regarding the **conviction of strangers**, it was found that, out of a total of four child sexual offence cases, one child sexual offender received a combination of imprisonment and a suspended sentence, one sex offender was acquitted and two offenders were fined. Contrary to the research findings in Fig 1, which focussed on the types of sentences passed on relatives who sexually offended against children in the family, strangers who committed similar offences seemed to receive more lenient sentences. Besides the one out of four sex offender who received a combination of imprisonment and suspended sentence, the other three sex offenders were either fined or acquitted. It therefore seems that sex offences against children by their relatives attract harsher sentences in Wynberg Sex Offences Court than those sex offences committed by strangers.

It was found that ten child sexual offenders who were known to the victims received the following sentences respectively; four offenders were acquitted, four received a combination of imprisonment and suspended sentence, one offender was sentenced to imprisonment, and one offender received a full-suspended sentence. The following graph illustrates this phenomenon.



1<sup>st</sup> Coloumn = Combination of imprisonment and suspended sentence; 2<sup>nd</sup> Coloumn=fine;  
3<sup>rd</sup> col =full suspended sentence; 4<sup>th</sup> col=acquittal; 5<sup>th</sup> col=imprisonment

From the 1998 court files, it is evident that people known to them mainly sexually abused the victims in these cases. Secondly, that a total of four out of ten sex offenders were acquitted of the sex crime, most probably due to lack of evidence or inadequate testimonies of witnesses. This high acquittal rate can have serious implications for the conviction of sex offenders within the criminal justice system. Perhaps this should serve as an indicator that the justice system should adopt an inquisitorial approach in eliciting evidence for a case. Zieff stated that the “current evidentiary and procedural rules have frustrated the effective prosecution of sex offenders while submitting the child to a prolonged ordeal in court” (Zieff, 1991:43).

In the light of the above-mentioned, one would agree with Levett that the courts are “more troubled about an error of conviction than about protecting children from abusers” (Levett, 1991:15). It is important that the court should guard against convicting an

innocent person for a crime. However, in view of the fact that the child is most likely not going to remember the kind of details preferred in courts (times, dates, sequence of evidence and specific incidents) which an adult would remember, perhaps courts should adopt an inquisitorial approach which facilitates the gathering of information in a child-friendly manner (Levett, 1991:15).

#### 5.1.2.3. Role of expert witnesses in sentencing of sex offenders:

Magistrates reported that expert witnesses play an essential role in the sentencing of sex offenders. The input of expert witnesses on issues unfamiliar to the magistrate was highly regarded among the magistrates. The sentiments of most of these magistrates were captured in the words of the learned Judge, Mr Justice Frankfurter (Harcourt, 1973:28) who stated: "I do not think that legal training gives you special competence...But all the questions that follow upon the ascertainment of guilt, I think require very different and much more diversified talents than lawyers and judges are normally likely to possess".

However, one magistrate remarked that they "do not need expert witnesses at this stage. After 10 years in the regional court, magistrates can see the seriousness of the case. Expert witnesses tell obvious things, unless issues emerge in a case, for example behavioural problems emerging due to the sexual crime". Such reasoning is flawed in that it reflects the notion that magistrates can deal with sentencing issues on their own. This individualistic and subjective approach to sentencing by magistrates leads to the problem of discrepant sentencing practices. Graser argued that this subjectivity leads to some anomalies and injustices in sentencing (Crime, Punishment and Correction, 1975:128). Regardless of this magistrate's strong argument, the majority of the magistrates advocated for the assistance of expert witnesses in most cases.

Four of the five magistrates reported that there is a need for probation officers in court. However, mixed responses were given regarding the function of probation officers. Probation officers in general seem to play an essential role in terms of supplying relevant pre-sentence information to assist the court. The input of probation officers was valued by one specific magistrate who reported, "probation officers enable magistrates to

exercise discretion with the amount of information they provide to the court". However, one specific magistrate reported that he "does not really need probation officers in sex offence cases since the sentence is clear-cut. Probation officers can play a role in minor offences, but there is no way they are going to influence my sentencing as far as sex offences are concerned". One would argue that this particular magistrate seems to disregard probation officers' professional opinions on the matter of sentencing, especially in the case of sex offenders. This is a source of concern in that although probation officers are trained in the human sciences and, therefore, can contribute important knowledge on the matter of sentencing, they are awarded a minimal or insignificant role in this magistrate's court. That is, if they are used at all.

It is important to recognise that the matter of sentencing breaches the borders of the legal profession and lies, to a large extent, in the field of human sciences. Unlike this particular magistrate under discussion, Judge Frankfurter argued that legal training does not give one special competence to deal with sentencing matters (in Harcourt, 1973:28). It requires additional knowledge and competencies, covered in the broad field of human sciences, especially in disciplines such as social work and criminology. In order to be effective, however, 'expert witnesses' particularly probation officers have to be well trained and competent. One magistrate stated, "there is lots of room for improvement with probation reports. Probation officers lack expertise, commitment and depth. However, their services are important". Nevertheless, most magistrates felt the need for the services of probation officers.

### **5.1.3. Barriers in achieving consistency in sentencing sex offenders:**

#### **5.1.3.1. Key barriers in achieving consistent sentences of sex offenders:**

Magistrates identified numerous barriers that impacted on their sentencing practices. One magistrate remarked, "we are not machines, we are human". This magistrate acknowledged the potential for human flaws and errors in their subjective approach to sentencing. The limited jurisdiction of the magistrates was identified as a key barrier, whereby magistrates "have to motivate why the sex offender was given the maximum sentence". Magistrates seem to have a problem with the limited powers assigned to them

and with accounting to the Supreme Court for the type of sentences they pass on convicted sex offenders. The High Court is seen to be "interfering". It was reported that the "judges have the tendency to look for tangible evidence forgetting that victims often suffer emotional scars which are difficult to observe". A magistrate mentioned that the High Court see sex offence cases once every three months, unlike the magistrates who hear these cases on a daily basis. Magistrates argued that they were in a better position to deal with sex offences since they are working on such matters on a daily basis. These responses could be indicative of the tension between the Supreme Court and the Magistrates Court. Another magistrate stated, "the law has been squarely in the way of passing an appropriate sentence". The mandatory minimum sentencing provision played an instrumental role in this regard.

Magistrates also expressed the view that gender discrimination played a vital role in the sentencing process. ". The lack of understanding among magistrates about women issues has been identified as an obstacle. The general response by magistrates was that "women are seen to be inferior by many men, whether they are magistrates or the ordinary guy out in the street. However, magistrates are nowadays more sensitive to the painful realities women experience". Racial prejudice was reported to play a fundamental role in the sentencing process. It was also reported that magistrates "lack knowledge about social contextual issues". Hereby magistrates communicate that they are uninformed about most realities in communities. Herewith expert witnesses, that are probation officers could play a vital role in disseminating information. Input from social science disciplines such as social work, probation and psychology for example provide insight into different facets of the sexual offence. The various responses to this question indicate that the aforementioned factors are examples of how structural and informal barriers could complicate the sentencing practice of magistrates.

In the light of the aforementioned, it appears that magistrate' prejudices and value systems are likely to surface while sentencing sex offenders, which Graser argued would lead to some anomalies and injustices in sentencing (International Conference Proceedings, 1976:128). Magistrates reported that personal feelings play a role in the

sentencing process. One magistrate reported, “magistrates are only human, carrying their personal baggage to work”. However, another magistrate stated that “more information on the case challenges the magistrates’ own biases”. Another magistrate reported, “magistrates should be aware of the fact that their personal feelings play a role. We can never be separate from our value system. But we have to balance the objective standard with our own subjective standards”. Thus, personal feelings reportedly play a functional role in magistrates’ sentencing practices.

The humane aspect of the process of sentencing is of crucial importance. In order to render sentencing as an objective and effective process, one has to guard against personal ideologies and value systems. Hence the great need for the involvement of other professionals to assist magistrates in this matter.

The introduction of the mandatory minimum sentencing provision could be regarded as a mechanism to reduce and even to cancel the role of personal feelings and other subjective responses, which often play active roles in the sentencing process.

#### 5.1.3.2. Challenges in deciding on sentences for sex offenders, and recommendations for improvement:

Magistrates reported that they do not have major problems in sentencing a sex offender. However, the inadequate prison system makes it difficult for a magistrate to sentence an offender to prison knowing that prison life would further damage the offender. One magistrate remarked that although this study is not focussing on juvenile sex offenders, he reported that it is difficult for him to sentence a juvenile sex offender to imprisonment because the offender would in turn be a rape victim in prison. Champion (1988:56) stated that child sexual offenders often experience severe physical and sexual assaults by fellow prisoners. The physical and sexual assault among prisoners are also real in South African prisons. Hence the need for a good reliable rehabilitation system, even within the prison setting to restore the human dignity and well being of incarcerated offenders. A magistrate reported that it is extremely difficult for him to sentence a relative of the victim especially if it is the father of the child, whom the child still loves dearly. The

relationship between a sex offender and victim therefore plays an essential role in sentencing of sex offenders.

The introduction of the mandatory minimum sentences seems to advocate for the imprisonment of sex offenders, ignoring the lack of proper rehabilitative structures within the prison setting. The aforementioned could perpetuate the problem of prisons producing hardened criminals who would in due time be released into the community. One magistrate remarked, "the system should be ashamed of its lack of rehabilitative structure. There is very little point in sentencing a sex offender to imprisonment". Despite this, many sex offenders are imprisoned.

According to the respondent, the lack of DNA testing in many rape cases often makes it difficult to convict a sex offender. The magistrate stated that it is difficult to prove a conviction when it is the word of the victim against that of the offender. Forensic evidence would have made things easier. Magistrates strongly emphasised the important role played by rules of evidence / burden of proof. The complexity of this issue is highlighted when judicial officials regard children to be unreliable witnesses. The fact that some children for example struggle to remember the factual information about the case complicates court proceedings (Combrinck, 1995:327).

Magistrates made several suggestions with regards to ways in which these challenges could be addressed. One magistrate stated that legislation needs to change to make provision for indecent assault of the boy / male victim. Presently the rape of a male victim is regarded by legislation as indecent assault whereas the rape of the female victim is regarded as rape, which viewed more serious. The building of more prisons was not regarded as a solution. Instead, one magistrate stated that "die sosiale struktuur van die gemeenskap moet aangespreek word". This magistrate therefore claimed that society re-thinks their way of doing things while interacting with the world. Educational programmes in the community were regarded as a viable means to educate toddlers and other school children about sexual offences. It was also mentioned that there should be constant training for judicial officials regarding women issues. "The constitution speaks

of the equality principle, arguing that every person should be treated equally. However, if you have equality before the law you cannot treat the victim and the offender the same. The offender has overpowered the victim. Thus, the magistrate should therefore act accordingly”.

#### 5.1.3.3 Proposed solutions for the criminal justice system to assist judicial officials in sentencing of sex offenders:

Various responses were given by the magistrates when it was asked what the criminal justice system could do to enhance their sentencing practice. It was reported that minimum sentences unfortunately bind them by law to act according to legal prescriptions. Prosecutors are expected by magistrates to play a more active role, giving more information on the case, and thus enabling magistrates to pass a more rational sentence. The right infrastructure such as having adequate resources, well-trained personnel, regular training workshops and a bigger staff complement were examples of resources needed to facilitate good service delivery within the court setting. There is consequently a need for more probation officers and social workers. However, they should improve their academic qualifications in the field of probation and criminology. One magistrate was wondering whether it would be good to have the victim testify before a sentence was passed on the offender. However, he then felt that it would not be fair in the face of justice since the victim at that stage might change her mind about the outcome of the case. Another magistrate questioned whether the justice system could do anything about the situation.

## **5.2. Attitudes of public prosecutors on the matter of sentencing in respect of sexual offences against children:**

### **5.2.1. Awareness and applications of policies impacting on sentencing of sex offenders**

#### **5.2.1.1. Understanding of existing policies in respect of sentencing of adult male sex offenders:**

Public prosecutors reported that there were no policies on the sentencing of sex offenders. It was reported that legislation served as the framework for their sentencing conduct. From the responses of the prosecutors in the study, they do not seem to be aware of any policy framework, and are without clear sentencing guidelines.

#### **5.2.1.2. Interpretation of sentencing objectives:**

Prosecutors provided similar responses to this question. There was the expectation among prosecutors that courts should take all objectives, namely retribution, deterrence, incapacitation, and rehabilitation into consideration. There was overall support amongst prosecutors for removing the sex offender from society. Like the magistrates, prosecutors are strongly in favour of the just desserts model, which rather yields to retribution, deterrence and incapacitation than being concerned about rehabilitation of an offender. Hence, the need for expert witnesses to provide concise information on the circumstances underpinning the criminal offence. One prosecutor mentioned that "prosecutors are the mouthpiece for the community", highlighting the seriousness of the offence in their minds. In this study, deterrence in relation to the interest of the community took precedence over the aforementioned sentencing objectives.

### 5.2.1.3. Role of the mandatory minimum sentences:

The prosecutors were familiar with the content of the mandatory minimum sentencing provision in the Criminal Law Amendment Act 105 / 1997. They reported that the mandatory minimum sentences provided “strong guidelines”, making sentences mandatory. One prosecutor mentioned that “courts have no other option than to adhere to the mandatory minimum sentences, unless if there are exceptional circumstances”. Another prosecutor remarked that, with the introduction of the mandatory minimum sentences, harsh sentences are now imposed and many cases are referred to the High Court for sentencing. A critical comment was made by one of the prosecutors, stating, “legislation interferes, which could be regarded as a good and bad thing. The good thing is that sentences are now prescribed, so serious offences receive harsh sentences. The bad thing, however, is that magistrates are now bound by legislation, having little movement for deviations”. It is clear from the aforementioned that prosecutors are aware of the content of mandatory minimum sentence provision in the law.

The majority of the prosecutors reported that the mandatory minimum sentences influenced in their current sentencing practice. There was the general report that they “are bound by law to adhere to the mandatory minimum sentences”. One prosecutor differed from the aforementioned perspective, stating, “each case should be dealt with differently”. This is one of the principles stipulated by the Law Reform Commission of Canada, which stated that ‘justice provides the opportunity to individualize the sentence...’ (Law Reform Commission of Canada, 1974:3). Nevertheless he stated “I will try to get the maximum sentence for a sex offender”. Regardless of the aforementioned perspective, the prosecutors in the study seem to operate within the boundaries of the mandatory minimum sentences. Therefore, it appears from this study that the mandatory minimum sentencing provision seems to play an influential role among prosecutors. In the study conducted by the South African Law Commission, it was found that state prosecutors felt positive about the mandatory minimum sentences provision (South African Law Commission, 2000:27).

#### 5.2.1.4. Knowledge on other new developments in the field of sentencing adult male sex offenders:

The prosecutors reported that they are aware of new developments in the fields of sentencing of sex offenders. One prosecutor reported, "legislation is in the pipeline to make it mandatory for courts to give similar sentences for similar offences, not only for sex offences, but for the broader scope". Another prosecutor reported, "next year the mandatory minimum sentences will remain intact. Offenders will have to go to the Appeal Court in Bloemfontein for appeal hearings". Prosecutors in the study therefore seem to be aware of new developments in the field of sentencing sex offenders. The prosecutors reported that they had not attended workshops and did not know of any workshops arranged on the matter of sentencing sex offenders. Workshops for prosecutors on this matter seem to be non-existent, indicating that Graser's argument about the lack of adequate training for judicial officials is still valid today (International Conference Proceedings, 1976:128).

#### 5.2.2. Current sentencing practices:

##### 5.2.2.1. The process of sentencing adult male sex offenders:

In this study, prosecutors did not have a long employment period. Their level of work experience ranged from one month to three years. Regardless, the three prosecutors who had more than one year experience emphasized the importance of experience in the process of sentencing. All the prosecutors reported that experience plays a crucial role in the process of sentencing. However, all of them reported that experience per se was not sufficient to ensure effective sentencing. "Experience plays a significant role, but one can never pre-empt sentencing". The involvement of expert witnesses was identified as another tool in deciding on appropriate sentencing recommendations. "Yes, experience helps, but prosecutors get direction from probation officers and psychologists". A prosecutor stated that "experience helps, but it is more about personality. At times prosecutors have to be sensitive and counsel their clients. The longer you are doing this kind of work (experience), the danger exists that you become unsympathetic and desensitized". Hence, experience in relation to the mentioned factors play an immense

role in the sentencing process, but on its own it is not sufficient to ensure appropriateness for sentencing sexual offenders.

The prosecutors reported that they consult with colleagues to discuss difficult cases. However, there seems to be the preference among them to work individually. One prosecutor stated that they “have been authorized to make their own recommendations”. This strong statement communicates this specific prosecutor's unwillingness to consult when working on a case. In the past, magistrates had a similar attitude, arriving at sentences on their own. Many of the prosecutors consult legislation and case precedents to decide on sentencing recommendations. Another prosecutor reported that “when leading the complainant, I ask the victim about the impact of the offence on her life, getting in the school teachers, the mother and probation officers to testify”. Thus, prosecutors in this study felt comfortable to consult other sources of information in formulating their arguments, but preferred to work alone.

Numerous factors were mentioned which prosecutors tend to consider when making sentencing recommendations. The prosecutors mentioned that they would usually take into account the seriousness of the offence, extent of physical and psychological injuries, sexual history of the victim only as aggravating circumstances, previous convictions, position of the complainant, community's feelings, multiple offenders, whether victim is a child or an adult.

#### 5.2.2.2. Perceived seriousness of sex crimes and its application in case scenarios:

Prosecutors found it extremely difficult, if not impossible, to rate the seriousness of child sexual abuse in relation to the other criminal offences. This could be due to the fact that they are trained to look at the criminal offence without really considering the social context in which crimes are committed. The prosecutors assigned a high rating to all the sex crimes as opposed to property offences. However, they regarded all the mentioned sex crimes as equally serious. One prosecutor stated “it was difficult to rate the sex crimes since it is all so serious...”. Another prosecutor claimed that all the sex offences “were harming the moral integrity of the victim”. One prosecutor managed to complete a

rating, giving sexual abuse a high rating in relation to the other sex crimes. The property offences were rated less serious. The general feeling of the prosecutors were encapsulated in a prosecutor's conclusive comment on this matter, namely that he "would not like to distinguish between the sex crimes since all of it are traumatic on the victim". Although two magistrates reacted in a similar manner with regards to this issue, they were able to categorise the types of sex offences in terms of its level of seriousness. The fact that these mentioned prosecutors were unable to categorise types of sex offences in terms of its level of seriousness, were quite contrary to the argument that courts regard certain types of sex offences more serious than others (Walmsley quoted in West, 1980:62).

Prosecutors gave various responses to the case scenarios developed to examine the nature of their respective sentencing recommendations made about a father, grandfather, neighbour or stranger sexually abusing a child. Life imprisonment and direct imprisonment for a maximum of 15 years were the predominant form of sentence for sex offences that involved penetration. This indicates the prosecutors' strong compliance with the Criminal Law Amendment Act. Correctional supervision was considered for non-penetrative sex offences. Prosecutors regarded sodomy and rape as equally serious. From the prosecutors' responses to the case scenarios, they clearly evaluated sex offences in terms of whether there was any form of penetration or not. Hence it appears that prosecutors were able to rate the seriousness of sex offences even though they initially mentioned that they could not do so.

#### 5.2.2.3. The role of expert witnesses in the sentencing of adult male sex offenders:

Prosecutors reported that expert witnesses could play a vital role in assisting the court with sentencing options. It was mentioned that expert witnesses can "play a mitigating and aggravating role in court proceedings". A prosecutor reported "expert witnesses can tip the scale on both sides". Thus, prosecutors in this study seem to believe that expert witnesses have a vital role to play in the criminal justice system.

The prosecutors had mixed feelings about the need to have probation officers in court. One prosecutor claimed that probation officers “play an important role, giving direction to the court”. Three out of five prosecutors reported, “probation officers undermine the impact of an offence on a victim”. It was claimed that probation officers “do not consider the seriousness of the offence and the community’s feelings”. Another prosecutor stated that “probation officers can play a major role, but I don’t think that in Cape Town the court has the right assistance. In Gauteng we had someone who compiled a report which focussed on both the victim and the accuser’s circumstances”. In addition, it was mentioned that a probation officer “compiled a pre-sentence report after briefly interviewing a sex offender. Then the probation officer still takes the accuser’s word”. These are examples of real concerns and frustrations prosecutors have with probation officers. Therefore, while prosecutors acknowledged the need for probation officers, the quality of probation work in the Wynberg Sex Offenders’ Court seems to present problems to them.

### **5.2.3. Barriers in achieving consistency in sentencing sex offenders:**

#### **5.2.3.1. Key Barriers in achieving consistency in sentences of sex offenders:**

Numerous reasons were given by prosecutors in the study suggesting why there could be disparity in sentences among magistrates. It was reported that the “court’s discretionary powers” hampered the extent to which fair sentences were passed. Lack of legislation and policy was considered as a reason for the disparity in sentences. One would have to disagree with this argument as significant legislation and policies do exist to facilitate the conviction of offenders. However, the lack of systematic and clearly defined sentencing principles can result in various interpretations of legislation and policies. For example, the introduction of the mandatory minimum sentencing provision guides courts in terms of sentencing sex offenders. However, there is little guidance regarding the interpretation of the clause ‘substantial and compelling circumstances’. This lack of clear definition of the concept ‘substantial and compelling circumstances’ creates confusion among judicial officials since it is stated in the Criminal Law Amendment Act 105/ 1997 that the usual mitigating factors do not qualify as ‘substantial and compelling circumstances’. Only when factors are ‘rare’ it could be considered to be ‘compelling and substantial

circumstances' (South African Law Commission, 2000:34). Like the concept 'compelling and substantial circumstances', the concept 'rare' is vague and open to different interpretations, possibly leading to inconsistent sentencing practice. The South African Law Commission's research findings indicate that the absence of clear guidelines regarding the meaning of 'substantial and compelling circumstances' was one of the main reasons for discrepant sentences passed on sex offenders (South African Law Commission, 2000:34).

The uniqueness of each case was identified as another barrier. A prosecutor made a significant remark, stating, "all magistrates are white and the majority of the offenders are coloured and black. White magistrates naturally have sympathy towards white offenders". As a result of our country's historical past, the majority of the magistrates are white and the criminal offenders are predominantly black. Considering that since 1994 we moved into a new democratic dispensation, it is possible that magistrates' racial prejudices could surface during their sentencing practice. This issue of racial prejudice re-emerged in the interviews with probation officers. They recalled case examples whereby racial prejudice against sex offenders of colour influenced a particular magistrate in Wynberg Sex Offences Court.

The "social standing and financial circumstances of the accused" was highlighted as another significant barrier. Mkaya Ntini the South African cricket player, who allegedly raped a lady, was used as an example, whereby the courts were more sympathetic towards him as he had adequate legal representation and the support of the United Cricket Board. The reverse can also be true, where people of high social standing receive harsh sentences with the aim to 'teach the wider society a lesson'. It appears, therefore, that the social status of sex offenders could play an influential role in the sentencing practice of magistrates.

One prosecutor mentioned that personal factors played an immense role. "Married magistrates who have children are more sympathetic than those who have neither". Prosecutors also reported that personal feelings play a significant role in their own sentencing practice. "Personal feelings should not play a role, but we are human. We are, however, trained to apply the law and not our personal feelings". Another prosecutor reported that her personal feelings do play a role on occasions. "Sometimes in a situation, you have a special bond with a complainant. It definitely affects the way you argue for your case". It appears, therefore, that personal feelings do play a role in the sentencing process. Responses by prosecutors indicate that they are aware that sentencing is a subjective process.

#### 5.2.3.2. Challenges in making sentencing recommendations for sex offenders and recommendations for improvement:

Prosecutors reported that they do not experience any problem in deciding on an appropriate sentence to recommend to the court. It was mentioned that one only "need to focus on all the facts available, balancing the sentencing objectives". A prosecutor added, that it "is really a matter of studying and knowing the facts". Another prosecutor who claimed that he has no problem in deciding on a sentence nevertheless made the significant remark that: "I question if I have the right authority to recommend a sentence on someone else's life". This prosecutor made reference to his religious beliefs while speaking on this matter. A further respondent reported "there are no appropriate sentencing options available for sex offenders". A probation officer, arguing that this mentioned factor could be a reason for the strong preference for imprisonment, shared this opinion. These issues seem to complicate the extent to which prosecutors can arrive at appropriate sentencing recommendations that do not differ significantly in similar cases.

The prosecutors made several suggestions of how these challenges could be addressed. One prosecutor mentioned that the effectiveness of the different sentencing options needs to be researched in order to determine which sentences are most effective. Another prosecutor stated "the appeal procedures should be simplified in order to provide access to the ordinary man out there who does not have a lot of money. No ordinary man can afford that kind of money to pay for appeal ". He felt that one should be mindful of the economic and social circumstances of all criminal offenders, making appeal procedures more accessible to materially disadvantaged groups. One respondent felt that the "sentences should be made mandatory (standard), giving the courts a two year discretionary period". Two prosecutors were unsure about the type of recommendations that need to be made in this regard.

#### 5.2.3.3 Proposed solutions in assisting judicial officials in sentencing sex offenders:

On this issue the prosecutors gave varying responses. One prosecutor claimed "the community needs to be educated around the nature of all sentencing options so that they can know what kind of sentence to expect". Presently the wider society is more familiar with imprisonment as a sanction for sex offenders than other forms of sanctions. The public therefore needs to be educated about the strengths or benefits of other sanctions. This process of education should be a product of research on the efficacy of all sanctions.

It was also mentioned that more probation officers were needed. However, respondents felt that the current way in which probation officers are working should change. It was for instance; felt that probation reports should include information on both the victim and the accused. An interesting point was made by a prosecutor who mentioned, "there is still a place for probation reports regardless of the introduction of the mandatory minimum sentences. Otherwise the High Court would only have the court records to rely on". The researcher sees it as a positive sign that prosecutors feel that probation officers have a role to play in criminal proceedings. As Graser pointed out, in order to pass a rational and effective sentence, judicial officials require guidance from behavioural scientists- such as probation officers (Graser in Crime, Punishment and Correction,

1975:33). From the responses by some prosecutors it would appear, however, that there is room for improvement of probation services in the courts, in order to render the sentencing process more effective.

Another point made by a prosecutor related to plea-bargaining. He claimed, "we must attend to the plea bargaining processes especially in rape cases. If an accused is caught in the act, he should not have the right to plead as he is wasting the court's time just to spend time trying to convict the offender". It is difficult not to agree with this argument as it will save the courts a great deal of time and money, by being able to proceed to the sentencing phase rather than spend time trying to establish whether such a person was indeed responsible for the criminal offence. This would free the magistrates to process cases more expeditiously.

### **5.3. Attitudes of probation officers on the matter of sentencing in respect of sexual offences against children:**

#### **5.3.1. Awareness and applications of policies impacting on sentencing of sex offenders**

##### **5.3.1.1. Understanding of existing policies in respect of sentencing adult male sex offenders:**

In the interviews with probation officers, there seems to be the following trend. Three of the five probation officers interviewed mentioned that they were unsure of any sentencing policies specifically related to sex offenders. They could not identify any policy relating to the subject matter. In their understanding, the serious nature of the offence seems to predict the type of sentence passed to a sex offender. This gives an indication of probation officers' lack of knowledge and understanding of significant legislation and policies impacting on sentencing of sex offenders.

A probation officer mentioned that his long years of experience of doing probation work enabled him to know that it was policy to refer serious cases to the Supreme Court for the imposition of harsh sentences. A senior probation officer reported that there was no policy with regards to sentencing the sex offender. However, according to him there was the "unspoken rule that the seriousness of the case determines the type of sentence. There are no guidelines, you just know what happens". This response reflects the probation officer's lack of awareness about sentencing guidelines to assist magistrates with the sentencing of sex offenders.

Based on these responses, it is evident that probation officers generally operate without a sentencing policy framework in respect of the matter of sentencing. Hence, pre-sentence investigations and reports are completed in an ad hoc manner. This supports the argument that the lack of clearly defined sentencing principles creates confusion and disparity among judicial officials (Law Reform Commission of Canada, 1974:3). Lack of awareness of policy gives rise to different practices within the workplace. It is essential

that probation officers are knowledgeable about the sentencing policy regarding sex offenders. The policy framework would enhance uniform and consistent sentencing practices. However, consideration should be given in each situation to the merits of the case.

#### 5.3.1.2. Interpretation of sentencing objectives:

The various probation officers responded differently to this question. One probation officer mentioned that it was a “tricky question”. Retribution and deterrence seem to be the most appropriate objectives used when making sentencing recommendations. Adherence to these objectives offers the community protection from further sexual crimes. Literature supports the research findings that South African sentencing practices mainly operate within the just dessert framework whereby there is a strong emphasis on the infliction of penal pain (Parmanand, 1982:140). Like the magistrates and public prosecutors, the probation officers favoured retribution, incapacitation and deterrence of sex offenders. In so doing, they feel that the interests of the community, victim and wider society are taken into account. The general reasoning behind this is the notion that, if criminal offenders were imprisoned, the community would be safe ( Greenwood quoted in Wolfgang and Weiner, 1982:320). However, considering that these probation officers are knowledgeable about the strengths and weaknesses of the retribution model one would expect that they be more cautious of operating within a purely punitive model. It is expensive for the State to maintain prisoners within the prison setting. In addition, sometimes in the situation where the relative has sexually offended, the victim might not necessarily want the offender to be imprisoned but to serve an alternative sentence instead.

One probation officer mentioned that she does not believe that sex offenders can be cured. This is the dilemma that magistrates and prosecutors are facing, namely that there is great uncertainty about whether a sexual offence should be dealt with as a criminal or psychological phenomenon. Berliner et al (1995:489) argued that sentencing alternatives, which contained a treatment component, underpinned the assumption that sexual behavioural disorders can be treated. Once there is clarity about the criminal versus the

psychological aspect of sex offences, one could argue that judicial officials would be in a better position deal with the sentencing issue more effectively. According to the mentioned probation officer, sex offenders should be imprisoned. Yet, there is the general agreement among criminologists that imprisonment offers only temporary protection to society. A probation officer mentioned that retribution should be linked to education but in the case of sexual offenders, within the confinement of prison.

#### 5.3.1.3. Role of mandatory minimum sentences:

Only two of the five probation officers were knowledgeable about the mandatory minimum sentencing provision. One stated, " the mandatory minimum sentence is an innovative way of addressing disparity in sentences". The mandatory minimum sentence is regarded as an attempt to arrive at uniformity among judicial officials in regard to imposing harsh sentences. This argument was echoed by 70 % of the research participants in the study conducted by the South African Law Commission who reported that the prescribed minimum sentences would enhance consistency in sentencing practices (South African Law Commission, 2000:6). However, the other three probation officers in the study were unfamiliar with the content of the mandatory minimum sentence provision. These probation officers reportedly only heard the court making reference to mandatory minimum sentences. This re-affirmed that probation officers lack adequate knowledge about relevant legislation underpinning sentencing of sex offenders.

The two probation officers, who were informed about mandatory minimum sentences, reported that the mandatory minimum sentencing provision influenced their sentencing recommendations. A probation officer claimed that her knowledge on mandatory minimum sentences makes her cautious of the type of sentence recommendation to make. " It gives you more credibility indicating to the court that you are informed about mandatory minimum sentences". The other probation officers who did not know about mandatory minimum sentences subsequently reported that the mandatory minimum sentences did not influence their sentencing practice.

Therefore, in this study the mandatory minimum sentences seem to play a minimal role in probation practice. It can be argued that probation officers have a limited role in terms of suggesting the prescribed sentences for schedule 1 offences-including rape- in the Criminal Law Amendment Act 105 / 1997. The mandatory minimum sentences for sex offenders can limit the extent to which magistrates accept the sentencing recommendations of probation officers. However, the magistrate might find substantial and compelling circumstances transpiring from the pre-sentence information given by the probation officer's pre-sentence report.

#### 5.3.1.4. Knowledge of other new developments in the field of sentencing adult male sex offenders:

All the probation officers reported that they are aware of additional new developments in the fields of sentencing of sex offenders. The arrangement that serious cases are referred to the High Court for harsh sentences was one example given on the matter. The introduction of the SAYSTOP programme (South African Young Offenders Programme) for juvenile sex offenders was the other example of new developments in the field of sentencing sex offenders, involving the Department of Social Services, NICRO, The Attorney General's Office, UWC Community Law Center and UCT Criminology Institute. The SAYSTOP programme, however, was relevant for juvenile sex offenders instead of adult sex offenders. Hence, probation officers seem to be informed about new developments on sentencing of sex offenders in the probation / social work field.

Probation officers predominantly agreed that they have not attended workshops or know of any workshops arranged on the matter of sentencing of sex offenders. One senior probation officer mentioned, "occasional interdepartmental workshops were planned". However, he mentioned that "one can have beautiful ideas, yet the wide sentencing discretion and individual sentencing is a big problem". In view of the above, it seems that workshops on this issue seem to be infrequent for some and non-existent for other probation officers.

### **5.3.2. Current Sentencing Practices:**

#### **5.3.2.1. The process of sentencing adult male sex offenders:**

Four out of five probation officers interviewed were very experienced in the field of probation in that their levels of work experience ranged from eighteen months to ten years. They reported that one's level of experience plays a significant role in deciding on sentencing recommendations for sex offenders. The probation officer that had worked in the field for a short period believed that a higher level of experience would make him a "more credible witnesses". It was mentioned by a probation officer that experience increases one's knowledge base on the subject matter. The responses of the probation officers resembled those of the research participants in the study of the South African Law Commission in which 80 % of the respondents claimed that a judicial officer's life experiences played a role in determining the sentence (South African Law Commission, 2000:6). Thus, experience seems to play a significant role in deciding upon appropriate sentencing recommendations.

Probation officers just like magistrates highly valued the years of work experience in their professions. However, one cannot use the years of experience as a yardstick to measure best sentencing practice. The researcher feels that the over-emphasis of magistrates on experience played a contributory role to inconsistent sentencing practice. Hence, as the prosecutors argued, experience per se is not sufficient. One would argue that life and work experience coupled with a sound knowledge base on the matter of sentencing of sex offenders would facilitate rational and effective sentencing.

Regardless of their level of work experience, when drawing up a pre-sentence report, probation officers consulted with their colleagues and supervisors. This situation is prevalent in cases whereby probation officers are uncertain about appropriate sentencing recommendations. Case discussions in regular staff meetings among probation officers are used as the forum to decide upon case management issues regarding 'difficult cases'. This aforementioned system is reportedly beneficial for 'less experienced' probation officers that encountered difficulty in arriving at appropriate sentencing recommendations.

The probation officers knew what factors to consider when making sentencing recommendations to the court. The type of offence, its serious nature, previous convictions, the severity of injury to victim, its impact on victim, remorse of offender, mental state of the offender, and the interest of the community are the key factors considered by probation officers. Probation officers clearly gather useful information pertaining the sex offence that was committed.

The sentencing recommendations of probation officers seem to be of a consultative nature in that consultation is achieved through regular meetings. However, consultation among colleagues also occurred on an informal level during lunchtimes and after office hours. Hence, probation officers very rarely decide on appropriate sentencing recommendations on their own where difficult cases are concerned.

#### 5.3.2.2. Perceived seriousness of sex crimes and its application in case scenarios:

Probation officers responded very differently when it was asked to rate the seriousness of child sexual abuse in relation with other sex and property offences. As mentioned by Walmsley (quoted in West, 1980:65) probation officers regard certain sexual offences more serious than others. Four out of the five probation officers rated sexual crimes more serious than the rest of the crimes. However, there were different responses to the type of sex crime that would be rated more serious. Two probation officers gave child sexual abuse the highest rating.

Another probation officer rated child prostitution highly whereas another thought marital rape should be regarded the most serious offence. In addition to the differences within the ratings of the sex crimes, one probation officer markedly deviated from the other probation officers. She gave child abduction the highest rating, arguing, "in the case of child abduction, I might never see my child again. At least with child sexual abuse and the others, I can still have my child although the child might be traumatised...Abduction might be forever...". Personal life experiences clearly influence this probation officer's way in perceiving crime. Generally, probation officers perceived child sexual abuse to be

the most serious offence in relation to other sex crimes and property offences. From the responses of the probation officers, it is evident that their sentencing recommendations are strongly influenced by their life experiences, once again rendering sentencing a subjective process. Hence the need for a sentencing framework and legislative guidelines to limit subjectivity.

The probation officers responded as follows with reference to the case scenarios developed to examine the nature of their respective sentencing recommendations made about a father, grandfather, neighbour or stranger who was sexually abusing a child. Probation officers predominantly decided on direct imprisonment in the cases that involved penetration by the perpetrator. In this instance, penetration was regarded to be of a more serious nature than non-penetration. However their responses varied when there was no penetration, specifically concerning matters of indecent assault. Correctional supervision and rehabilitation were the sanctions mainly used in indecent assault matters. However, other probation officers reported that they would recommend direct imprisonment. Thus, there was no general consensus among probation officers regarding sentencing recommendations on the indecent assault matter, which excludes the sodomy of boy victims.

#### 5.3.2.3. Role of expert witnesses in the sentencing of adult male sex offenders:

Probation officers generally felt that expert witnesses play an essential role in assisting the court with sentencing options. There was the general agreement that expert witnesses provide courts with a picture of the offender's "background and psychological make-up". Probation officers reported that magistrates focus on crime and punishment whereas probation officers consider the social context when assisting the magistrates in passing appropriate sentences. They felt that expert witnesses have a definite role to play in sentencing sex offenders.

The majority of the probation officers argued that there was a need for probation officers in assisting courts with sentencing recommendations. One probation officer mentioned that magistrates and prosecutors could be "vindictive, seeing crime as a big sin". "Retribution and pay back will be their (magistrates and prosecutors) strong emphasis". Probation officers therefore argued that they have the capacity to balance the interest of the community and the seriousness of the crime. One experienced probation officer however did not share this perspective that probation officers are needed in courts. She stated that she "don't think that probation officers have that important role to play. The probation officer's role stops after s / he gave courts insight into the functioning of the offender. The magistrates do not care about the probation officer's recommendation. The final decision is with the court". Nevertheless, probation officers generally believed that they have a crucial role to play in the court proceedings of sex offenders. However, it is essential that probation officers be versed in the law in order to understand the framework in which judicial officials operate. In so doing, they can render a more effective service to the court by combining the social science and legal professions. It can be detrimental to the legal system to include professionals in the sentencing aspect of court proceedings if they do not have a sound knowledge base regarding the psychology of the criminal court and of the matter of sentencing.

### **5.3.3. Barriers in achieving consistency in sentencing sex offenders:**

#### **5.3.3.1. Key barriers in achieving consistency in sentencing of sex offenders:**

Probation officers provided various reasons why there could be disparity among magistrates in sentences. It was reported that magistrates' wide sentencing discretion could be considered to be a barrier in this regard. Insufficient information on the facts of the case was identified as an additional obstacle. While doing an analysis of court documents for this study, insufficient and lack of proper information on court dockets often resulted in prosecutors withdrawing the case. Magistrates' value system seems to play a prominent role when sentencing sex offenders. In addition, magistrates' personal feelings reportedly played an influential role. Here probation officers do not take into consideration their own biases and subjectivity. Racial prejudice is claimed to be prevalent in the justice system. "There is still the racial bias we can't seem to get rid of",

one probation officer remarked. She gave an example of two cases where she was involved in writing two pre-sentence reports on a white and coloured sex offender. The coloured sex offender was a **first offender** while the white sex offender was a **third offender**, having previously raped his own stepchild. The probation officer mentioned her shock and disillusionment with the type of sentences passed. The one magistrate sentenced the coloured sex offender to 10 years imprisonment while the white sex offender was given correctional supervision! The issue of racial prejudice once again emerged when the probation officer was shocked to witness the unfair sentencing practice of white magistrates. Racial prejudice seems to be a real phenomenon during the sentencing practice.

There was the general perception that “magistrates arrive at work in a foul mood”. One probation officer did not think that the magistrates’ personal feelings played a great role. However, she claimed that it was “the magistrates’ ‘Mr Tough Guy’ – attitude” which played a deciding role. Gender discrimination was identified as another barrier to fair sentencing by probation officers. Probation officers mentioned, “this gender bias you pick up when listening to magistrates’ summations. An example of gender discrimination was given by a probation officer who heard one magistrate stating, “...it seemed the women’s behaviour could have led to this...” (rape case!). Another probation officer reported that magistrates have class and language preferences. “If an offender is perceived to be middle class and speak English, s /he tends to be treated ‘softly’, and a ‘soft’ sentence will be imposed”.

Probation officers identified other interesting barriers. One probation officer reported that the “difference in atmosphere of the city as opposed to that of a rural dorpie in which a particular sex offence was committed” might be regarded as a reason why sentences varied quite extensively. It is believed by this particular probation officer that magistrates in rural areas will adopt a more conservative and harsh approach when sentencing sex offenders than their counterparts in the urban areas. A very experienced probation officer reported that the rotation of magistrates to other courts hampers specialisation and efficiency. It was argued that magistrates should be stationed at one court, instead of

rotating every six months to another court. Thus, probation officers seemed to have given this issue much thought and therefore could provide comprehensive information on this matter.

#### 5.3.3.2. Challenges in making sentencing recommendations for sex offenders and recommendations for improvement:

Probation officers responded differently to this question. Two experienced probation officers mentioned that they do not experience difficulty in making sentencing recommendations. However, they seem to experience difficulty when sex offenders are first offenders and no penetration was involved. The art to successfully balance the needs of the community, the seriousness of the offence in relation to the needs of the offender presented a problem. An experienced female probation officer stated that she still feels compassion for sex offenders, which in return "clouds her judgement". Another probation officer made a striking remark, stating that the alternative sanctions to imprisonment is a main problem. He therefore feels that the alternatives to imprisonment should be improved or other sanctions need to be introduced.

The probation officers in the study made numerous suggestions of how these challenges could be addressed. It was reported that the community needs to be educated regarding the alternative sanctions. The community seems to be aware only of imprisonment and are ignorant of the other sentencing options. Probation officers reported that greater awareness and increasing knowledge on legislation could assist them in their sentencing practice. One probation officer mentioned that mock trials involving probation officers, prosecutors and magistrates would not only educate the key role players about each other's roles, but it would facilitate communication amongst each other.

Regular interdepartmental forums and workshops were seen as a means for knowledge and information to be shared. One probation officer was cynical about whether these challenges could be addressed. She remarked: "Can it? The magistrates need to change their attitude, everybody should change their attitude about work, but will they?" Overall, probation officers seemed positive that the mentioned challenges could be addressed.

#### 5.3.3.3 Proposed solutions for the criminal justice system to assist judicial officials in sentencing of sex offenders:

There was overwhelming support for magistrates to be stationed at the Sex Offences Court on a more long- term basis. The probation officers claimed that experience and exposure in this specific court play a vital role in dealing with the sentencing aspect of child sexual abuse. The need for well-trained judicial officials is another proposal. The need for combined workshops for the different departments, that is justice, welfare, police services and correctional services was seen as means to enhance the service delivery among professionals whilst working at court. One probation officer reported that the criminal justice system should liaise with the media to ensure transparency. In this way the community could be informed regarding the situation in the justice system. Magistrates are expected by probation officers to change their arrogant attitude since this is regarded as one of the reasons why inconsistent sentencing practices exist.

One probation officer reported that the “defence lawyers, especially from legal aid, do not know what is going on”. It was felt that skilled defence lawyers could improve the situation. Probation officers argued that the courts should “sort themselves out”. An important argument was made when a probation officer claimed, “ there is a dichotomy between what the court expects from a probation officer and what magistrates do. The mandatory minimum sentence is still imposed regardless of the probation report”. Another probation officer voiced her frustration, reporting that courts already have a predetermined sentence in mind. In view of one’s magistrate’s argument when he stated in an interview that he does not need the input of probation officers to inform him about the seriousness of sexual offences, one can understand the latter’s frustration and disillusionment about magistrates’ attitudes about sentencing. From the probation officers’ responses, it seems that magistrates are reluctant to yield to the input and recommendations of expert witnesses, especially those of probation officers.

## CHAPTER SIX

### **6. CONCLUSIONS AND RECOMMENDATIONS**

#### **6.1. Conclusions:**

The inconsistent sentencing practices of magistrates have caused major concerns in both the government and the public domain. The public especially has become outraged at what is seen as inappropriately lenient sentences passed on sex offenders. From the findings it would appear that sentencing officials are uncertain about how to deal with sex crimes, whether it involves punishing or treating the convicted offenders. Based on the research findings, the researcher was able to draw the following conclusions.

##### **6.1.1. Attitudes and practices of magistrates regarding the matter of sentencing of child sex offenders:**

Magistrates have a great awareness and understanding of significant legislation regarding the sentencing of sex offenders. They were especially well informed about the content of the mandatory minimum sentencing provision stipulated in the Criminal Law Amendment Act 105 of 1997. However, although magistrates were knowledgeable about the relevant legislation, these magistrates indicated that they do not need any form of guidance from legislation to assist with their sentencing practice, perceiving they to be passing rational sentences irrespective of the awareness about inconsistent sentencing practice among magistrates.

Magistrates were very cynical about the sentencing objectives. The respondents strongly favoured the objectives of deterrence and retribution, operating mainly within the just desserts model which has a strong emphasis on deliberate infliction of penal pain. The interests of the community and of the victim seem to completely overshadow the interests and needs of the offenders. These clearly rigid and punitive attitudes of magistrates to

sentencing can have negative consequences, in that they do not really serve the interest of society in the long term if the attitudes and behavioural patterns of sex offenders are not changed positively. That is, if as a result of the type of sentence they receive, offenders are not less inclined to re-offending. Retribution on its own is unlikely to bring about such positive changes. It is felt that a more balanced and rational approach is needed when sentencing sex offenders. Here one thinks of an approach that balances the objective of punishment, especially retribution and rehabilitation. While society's revulsion of sexual offending against children should find expression in a degree of retribution, its long-term interests-that is, lack of re-offending- would be met more effectively by passing a sentence which also aims at changing the attitudes and behaviour patterns of the offender that pose a threat to society.

Sex offences against children particularly are serious violations, which require an expression of disapproval. But the disapproval should be of the act, not the person who offended. However, in a sense one gets the idea that the magistrates are unable to separate the person from the offence. Hence the possibility of having magistrates' value systems impacting on their sentencing practice. From the interviews with the magistrates and from studying court files, gender discrimination and racial prejudice were deemed to be key barriers in achieving consistency in the sentencing of sex offenders. Magistrates' personal feelings, arising from their prejudices and value systems, are likely to surface while sentencing sex offenders. It appears that subjective feelings and perceptions about people can cloud their judgment when having to pass sentences on sex offenders.

Apart from their knowledge of recent legal prescriptions, magistrates seem to be unaware of new developments in the field of sentencing of sex offenders. The majority of the magistrates have not attended any workshops pertaining to the sentencing of sex offenders. There clearly is a lack of training and learning opportunities offered to magistrates to enhance their sentencing practice. It is essential that judicial officials, especially magistrates, keep abreast of new developments in the field. They hold a powerful position in courts and what they decide greatly affects the offender, the victim as well as the community, therefore they should be kept informed about new

developments in the field of sentencing, especially that of sex offences. Considering that sentencing is an important and complex human process, magistrates need to be trained in the field of sentencing generally including the human dynamics that are involved in order to ensure that appropriate sentences are passed.

Magistrates reported that experience plays an important role in sentencing as they develop a 'feel for sentencing'. The researcher feels that this position towards sentencing over-simplifies the matter, making it a subjective rather than an objective process. It is felt that this subjective approach plays an important role in the inconsistent sentencing practices of magistrates. Daily practice enables one to gain knowledge about the management and sentencing of cases, but it should not become a yardstick to deal with all sex offences, especially in view of the uniqueness of each case. Therefore, multidisciplinary interaction, especially with probation officers and criminologists can make positive contributions to the matter of rational and objective sentencing.

From a study of court files it appears that, contrary to their emphasis on retribution and deterrence, sex offences against children are not necessarily attracting harsh sentences from these magistrates. The files showed that sex offenders were often given fines, received full-suspended sentences, or were given a combination of imprisonment and suspended sentences. It also appeared, that sex offences against children by their relatives attract harsher sentences in Wynberg Sex Offences Court than those committed by strangers. From this discrepancy between sentencing attitudes and sentencing practices, magistrates in this study seem to be unaware of their general sentencing practice in the Sex Offences Court. This reflects the need for magistrates, apart from specialized and ongoing training, to communicate with each other regularly and formally on the matter of sentencing generally, and sentencing of sex offenders particularly. Such interaction, in the form of sentencing seminars or workshops would provide magistrates with greater efficacy in the art of sentencing. Also, while not being dictated to by public pressure, magistrates should, nevertheless, be aware of and take cognizance of the views of victims and of the community generally.

Magistrates reported in the interviews that they consider a wide variety of factors when sentencing sex offenders, such as the nature of the crime, the circumstances of the offence, the impact on the victim, specific facts relating to the offence, the community's feelings around the matter, whether violence was used, other forms of abuse, use of weapons, and the attitude of offender. From the above it is evident that the magistrates focussed mainly on the aggravating circumstances underpinning the case. Little emphasis is placed on the offender as a person. Thus the need for guidance from the probation officers and other expert witnesses in providing the courts with useful information on the offender. This would facilitate a more rational and effective sentence. However, from studying the court files, the opposite happened in that relatively lenient sentences were passed on the sex offenders.

The majority of the magistrates maintained that there is a need for probation officers in court since probation officers generally provide useful pre-sentence information to assist the court. However, some magistrates seem to disregard probation officers' professional opinions, giving them an insignificant role to play in the sentencing process. This attitude is unacceptable considering that probation officers can make a positive contribution to the matter of sentencing.

Coupled with the lack of training opportunities available to magistrates, the lack of a proper rehabilitation system in prison complicates the extent to which magistrates could decide on a sentence for sex offenders which also focuses on rehabilitation. The mandatory minimum sentencing provisions were seen to be an instrument that advocates for the imprisonment of sex offenders. This further reinforces the emphasis on retribution and prevents magistrates from individualizing punishment and using a variety of sentencing options.

### **6.1.2. Attitudes of public prosecutors on the matter of sentencing of sex offenders:**

Prosecutors in the study did not seem to be aware of a policy framework, and in their sentencing recommendations, were without clear guidelines. This is troublesome in that clear legislative sentencing guidelines can enhance the practice of prosecutors in terms of using uniform sentencing principles and guidelines. Nevertheless, the prosecutors were familiar with the content of the mandatory minimum sentencing provision in the Criminal Law Amendment Act 105/ 1 997.

The prosecutors maintained that the courts should consider all the sentencing objectives, namely retribution, deterrence, incapacitation, and rehabilitation. However, from their responses, deterrence and retribution overshadowed the other sentencing objectives. The punitive approach of prosecutors to sentencing was mirrored by the fact that they considered the following factors when making sentencing recommendations: namely the seriousness of the offence, the extent of the physical and psychological injuries on the victim, sexual history of the victim in aggravating circumstances, previous convictions of the offender, position of the complainant, community's feelings, multiple offenders, and whether the victim is an adult or a child. The circumstances of the offender clearly played an insignificant role in requesting a particular sentence.

Although prosecutors seem to be aware of new developments in the field of sentencing of sex offenders, there appear to be no workshops for them on the matter. It is clearly essential that it be made possible for prosecutors to attend training workshops on the matter of sexual offenders, particularly on punishing such person. Since sex offences are clearly not merely a legal problem, but present an intricate social challenge, training workshops would provide the platform for critical thinking and arguments about the management of sex offences. It would prevent prosecutors from adopting a one-sided punitive attitude when making sentencing recommendations.

The prosecutors also stated that experience plays a crucial role in the process of sentencing. However, they maintained that experience on its own was not sufficient to ensure appropriateness in the sentencing of sex offenders. Although prosecutors consulted with their colleagues to discuss difficult cases, there was the strong preference amongst them to work individually. This individualistic stance is dangerous in that it loses the value of teamwork and different opinions. Sex offending in itself is a complex phenomenon, which requires a broad range of knowledge, which transcends the borders of the legal profession.

In the interviews with the prosecutors, they found to extremely difficult, if not impossible to rate the seriousness of child sexual abuse in relation to other criminal offences. This could be due to them being trained to look at the criminal offence without really considering the social context –particularly the offender as a person- in which the crime was committed. Therefore, in arriving at sentencing recommendations, other significant role players should be involved, particularly social workers and criminologists. From this study, prosecutors seem to believe that expert witnesses have a vital role to play in the criminal justice system. They had mixed feelings about the need to have probation officers in court and they mentioned their real concerns and frustrations with inadequate trained and inexperienced probation officers. Yet, generally, prosecutors do not seem to have a problem in working with expert witnesses.

#### **6.1.3. Attitudes of probation officers regarding the matter of sentencing of child sex offenders:**

In interviews with the probation officers, it emerged that they lack adequate knowledge and understanding of significant legislation and policies impacting on sentencing of sex offenders. It therefore seems that probation officers operate without a sentencing policy framework, completing pre-sentence investigations and reports in an ad hoc manner. This is a real concern in that all aspects of sentencing should be approached in a rational and scientific manner. Absence of a clear sentencing framework impacts on the extent to which probation services render adequate professional services to the court. No wonder

that prosecutors and magistrates experience some frustrations in working with probation officers.

The probation officers seem to be informed about the new developments on the sentencing of sex offenders in the probation/ social work field. However, irrespective of their exposure to new developments in the field, they favoured the retribution, deterrence and incapacitation approach to sex offenders. This could indicate that, as was mentioned in the interviews by probation officers, workshops on the matter of sentencing of sex offenders are infrequent for some and non-existent for other probation officers. Consequently they receive little, if any, training in the matter of sentencing

From the responses of the probation officers in the interviews, it appears that their sentencing recommendations are also strongly influenced by their life experience. This, as is the case with judicial officials, renders sentencing a subjective process. Sentencing plays a vital role in criminal proceedings and to approach it from a subjective position is unacceptable. Although life and work experience are important, a sound knowledge base on the matter of sentencing of sex offenders is crucial in practicing rational sentencing.

Because of their training in social sciences, probation officers gather useful information during the pre-sentencing investigations. However, they do require additional training relative to court procedure and sentencing in order to function effectively in the court setting. Probation officers generally felt that expert witnesses have a definite role to play in the sentencing of sex offenders. The type of offence, the seriousness of the case, previous convictions of the offender, the severity of injury to the victim, its impact on the victim, remorse of the offender, mental state of the offender, and the interests of the community are key factors considered by probation officers when making sentencing recommendations. In providing courts with this information, probation officers can make a powerful contribution in the court. However, it is vital that probation officers are well informed about the law and criminal procedures in order to render a more effective service to the courts.

### **6.2. Recommendations:**

In the light of the interviews conducted with the magistrates, prosecutors and probation officers from the Wynberg Sex Offences Court, and having studied a number of court files, the following recommendations are made:

- Magistrates should be stationed at the Sex Offences Court on a more long-term basis. This is to ensure consistency and specialization.
- The rehabilitation system in prison should be scrutinized with the view of rendering it more effective in order to restore the human dignity and well being of sex offenders with the aim to positively change their attitude towards crime. Educational programmes organized by correctional service staff, especially social workers should emphasis these aspects.
- To provide sentencing officials with clear sentencing guidelines and principles, to assist them with sentencing. This will avoid confusion and misinterpretation of the aim and purpose of sentencing.
- To research the effectiveness of the different sentencing options. This will provide judicial officials with a clearer understanding of which sanctions are appropriate and effective.
- Magistrates should approach sentencing in a more objective manner, involving probation officers and other expert witnesses to actively assist the court in passing rational and effective sentences. A review committee consisting of these expert witnesses and judicial officials will enhance multidisciplinary action and the monitoring of sentences.

- Regular sentencing seminars, mock trials and regular interdepartmental workshops - between the Departments of Social Services, Justice, Police, Corrections and Education - would facilitate communication among the key role players involved in criminal proceedings.
- Educational programmes should be arranged by relative state departments and NGO's, such as NICRO, to educate the community about the strengths and benefits of the alternative sanctions to imprisonment. Such community workers need to be trained in order to educate the residents at schools, clinics, and other public places about the benefits of objective and rational sentencing of sex offenders.
- Multi-disciplinary pre-sentence assessment/ evaluation committees should be established at all the major magistrates courts. These committees, on which experts from inter alia the fields of criminology, social work law and psychiatry should serve, could advise judicial officials and probation officers on complex cases of child sexual abuse-particularly in regard to appropriate sentencing. Such committees have functioned with great success in cities such as Durban, and should be established at all magistrates' courts.

## APPENDIX A:

### INTERVIEW SCHEDULE FOR MAGISTRATES

#### Awareness and Applications of Policies impacting on Sentencing of Adult Male Sex Offenders:

*Objectives:* 1) Need to establish level of knowledge re existing policies

2) **How policies are translated into sentencing practice**

3) **What the magistrate's own objectives are in sentencing**

1. Are there any policies in respect of sentencing sex offenders?

Yes

No

Unsure

2. If so, what are they?

.....

.....

3. Are Mandatory Minimum Sentences applied and what do they involve?

.....  
 .....  
 .....  
 .....

4. Do you think the introduction of the Mandatory Minimum Sentence has influenced your sentencing practice? If so, in which way?

.....  
 .....  
 .....  
 .....

5. Are there any other new developments in the field of sentencing policy in respect of sex offenders?

a) Yes

No

Unsure

6. If yes, can you please tell me about it?

.....  
 .....  
 .....  
 .....

7. What do you think are the objectives of sentencing generally?

.....  
 .....  
 .....  
 .....

8. Of those, what are the most appropriate objectives used when sentencing a male child sex offender?

.....  
 .....  
 .....  
 .....

**Current Sentencing Practice:**

**Objectives:** Profile of magistrate's current sentencing practice

Focus on the process followed during sentencing of sex offender

Investigate the level of support in general in respect of sentencing sex offenders

Whether magistrates employ the services of other professionals

1. Frequently sentencing decisions are reached with the aid of experience. How long have you been a magistrate in the sex offence court?

.....  
 .....  
 .....

2. What procedures in terms of consultation are followed when sentencing the child sex offender?

.....  
 .....  
 .....  
 .....

3. Please rate the following crimes in terms of seriousness :

Child Prostitution    Child Abduction    Marital rape    Child Sexual Abuse

Car theft

Housebreaking

Bank robbery

.....

.....

.....

.....

.....

.....

.....

4. In the following scenario, what would the most likely sentence be?

***5 yr old girl indecently assaulted ('fingered') by 52 yr old grandfather. First offender***

.....  
 .....

***6 yr old girl raped and indecently assaulted by 19 yr old neighbour. Multiple offender***

.....  
 .....

***8 yr old girl raped by 27 yr old mother's boyfriend. Second offender***

.....  
 .....

*11 yr old boy indecently assaulted (sodomised) by 52 yr old stranger. Third offender.*

.....  
 .....

*14 yr old girl indecently assaulted (touched breast and vagina) by stepfather. First offender*

.....  
 .....

5. What role can expert witnesses generally play in sentencing a sex offender?

.....  
 .....  
 .....  
 .....

6. Do you think there is a need for probation officers in assisting with a profile of the offender and assisting with sentencing recommendations?

.....  
 .....  
 .....  
 .....

7. What factors are considered when passing a sentence on a male child sex offender?

.....  
 .....  
 .....  
 .....

### **3.Barriers in achieving consistency in sentencing of adult male sex offenders**

**Objectives:** To identify structural barriers in terms of the criminal justice system's hierarchical structural in the processing of information. Identifying formal barriers, i.e. lack of training, and informal barriers, i.e. involvement of personal feelings, and so forth. What magistrates regard as solutions to achieve consistency in sentencing of male sex offenders.

1. There is the general belief that there is disparity between the sentencing patterns of magistrates. What in your opinion are the key barriers in achieving greater consistency in sentencing of male child sex offenders?

.....  
 .....  
 .....  
 .....

2. What do you consider are the main problems in sentencing an adult male sex offender?

.....  
 .....  
 .....  
 .....

3. How do you think can these challenges be addressed?

.....  
 .....  
 .....

4. Do you believe that the personal feelings of judicial officials play a role in sentencing?

.....  
 .....  
 .....

5. Are there workshops on the matter of sentencing adult sex offenders?

b)Yes                      No                      Unsure

6. How frequent are these workshops?

.....  
.....

7. What mechanisms can the criminal justice system set in place to assist judicial officials with the sentencing of adult male sex offenders?

.....  
.....  
.....

a)Other Views

.....  
.....  
.....  
.....  
.....  
.....

**APPENDIX B:  
INTERVIEW SCHEDULE FOR PUBLIC PROSECUTORS**

**Awareness and Applications of Policies impacting on Sentencing of Adult Male Sex Offenders:**

*Objectives:* 1) Need to establish level of knowledge re existing policies  
 2) **How policies are translated into sentencing practice**  
 3) **What the magistrate's own objectives are in sentencing**

1. Are there any policies in respect of sentencing sex offenders?

Yes

No

Unsure

2. If so, what are they?

.....  
 .....

3. Are Mandatory Minimum Sentences applied and what do they involve?

.....  
 .....  
 .....  
 .....

4. Do you think the introduction of the Mandatory Minimum Sentence has influenced your sentencing practice? If so, in which way?

.....  
 .....  
 .....  
 .....

5. Are there any other new developments in the field of sentencing policy in respect of sex offenders?

c) Yes

No

Unsure

6. If yes, can you please tell me about it?

.....  
 .....  
 .....  
 .....

7. What do you think are the objectives of sentencing generally?

.....  
 .....  
 .....  
 .....

7. Of those, what are the most appropriate objectives used when sentencing a male child sex offender?

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**Current Sentencing Practice:**

**Objectives:** Profile of prosecutor's current sentencing practice

Focus on the process followed during sentencing of sex offender

Investigate the level of support in general in respect of sentencing sex offenders

Whether prosecutors employ the services of other professionals

1. Frequently sentencing decisions are reached with the aid of experience. How long have you been a magistrate in the sex offence court?

.....  
 .....  
 .....

2. What procedures in terms of consultation are followed when sentencing the child sex offender?

.....  
 .....  
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 .....

3. Please rate the following crimes in terms of seriousness :

Child Prostitution    Child Abduction    Marital rape    Child Sexual Abuse

Car theft

Housebreaking

Bank robbery

.....

.....

.....

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.....

.....

.....

4. In the following scenario, what would the most likely sentence be?

***5 yr old girl indecently assaulted ('fingered') by 52 yr old grandfather. First offender***

.....  
 .....

***6 yr old girl raped and indecently assaulted by 19 yr old neighbour. Multiple offenders***

.....  
 .....

***8 yr old girl raped by 27 yr old mother's boyfriend. Second offender***

.....  
 .....

*11 yr old boy indecently assaulted (sodomised) by 52 yr old stranger. Third offender.*

.....  
 .....

*14 yr old girl indecently assaulted (touched breast and vagina) by stepfather. First offender*

.....  
 .....

5. What role can expert witnesses generally play in sentencing a sex offender?

.....  
 .....  
 .....  
 .....

6. Do you think there is a need for probation officers in assisting with a profile of the offender and assisting with sentencing recommendations?

.....  
 .....  
 .....  
 .....

7. What factors are considered when passing a sentence on a male child sex offender?

.....  
 .....  
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### **Barriers in achieving consistency in sentencing of adult male sex offenders**

**Objectives:** To identify structural barriers in terms of the criminal justice system's hierarchical structural in the processing of information. Identifying formal barriers, i.e. lack of training, and informal barriers, i.e. involvement of personal feelings, and so forth. What magistrates regard as solutions to achieve consistency in sentencing of male sex offenders.

1. There is the general belief that there is disparity between the sentencing patterns of magistrates. What in your opinion are the key barriers in achieving greater consistency in sentencing of male child sex offenders?

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 .....

2. What do you consider are the main problems in sentencing an adult male sex offender?

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3. How do you think can these challenges be addressed?

.....  
 .....  
 .....

4. Do you believe that the personal feelings of judicial officials play a role in sentencing?

.....  
 .....  
 .....

5. Are there workshops on the matter of sentencing adult sex offenders?

d)Yes

No

Unsure

6. How frequent are these workshops?

.....  
.....

7. What mechanisms can the criminal justice system set in place to assist judicial officials with the sentencing of adult male sex offenders?

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b)Other Views

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University of Cape Town

**APPENDIX C:  
INTERVIEW SCHEDULE FOR PROBATION OFFICERS**

**Awareness and Applications of Policies impacting on Sentencing of Adult Male Sex Offenders:**

*Objectives:* 1) Need to establish level of knowledge re existing policies  
 2) How policies are translated into sentencing practice  
 3) What the magistrate's own objectives are in sentencing

1. Are there any policies in respect of sentencing sex offenders?

Yes

No

Unsure

2. If so, what are they?

.....  
 .....

8. Are Mandatory Minimum Sentences applied and what do they involve?

.....  
 .....  
 .....  
 .....

9. Do you think the introduction of the Mandatory Minimum Sentence has influenced your sentencing recommendations? If so, in which way?

.....  
 .....  
 .....  
 .....

10. Are there any other new developments in the field of sentencing policy in respect of sex offenders?

e)Yes

No

Unsure

11. If yes, can you please tell me about it?

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 .....  
 .....  
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7. What do you think are the objectives of sentencing generally?

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 .....  
 .....  
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12. Of those, what are the most appropriate objectives used when sentencing a male child sex offender?

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**Current Sentencing Practice:**

**Objectives:** Profile of probation officers' probation practice

Focus on the process followed during probation tasks

Investigate the level of support in general in respect of deciding on appropriate sentencing recommendations for sex offenders

8. Frequently sentencing decisions are reached with the aid of experience. How long have you been a probation officer in the sex offence court?

.....  
 .....  
 .....

9. What procedures in terms of consultation are followed when sentencing the child sex offender?

.....  
 .....  
 .....  
 .....

10. Please rate the following crimes in terms of seriousness:

Child Prostitution    Child Abduction    Marital rape    Child Sexual Abuse

Car theft

Housebreaking

Bank robbery

.....  
 .....  
 .....

11. In the following scenario, what would the most likely sentence be?

*5 yr old girl indecently assaulted ('fingering') by 52 yr old grandfather. First offender*

.....  
 .....

*6 yr old girl raped and indecently assaulted by 19 yr old neighbour. Multiple offenders*

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*8 yr old girl raped by 27 yr old mother's boyfriend. Second offender*

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*11 yr old boy indecently assaulted (sodomised) by 52 yr old stranger. Third offender.*

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*14 yr old girl indecently assaulted (touched breast and vagina) by stepfather. First offender*

.....  
 .....

12. What role can expert witnesses generally play in sentencing a sex offender?

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13. Do you think there is a need for probation officers in assisting with a profile of the offender and assisting with sentencing recommendations?

.....  
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14. What factors are considered when passing a sentence on a male child sex offender?

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### **Barriers in achieving consistency in sentencing of adult male sex offenders**

**Objectives:** To identify structural barriers in terms of the criminal justice system's hierarchical structural in the processing of information. Identifying formal barriers, i.e. lack of training, and informal barriers, i.e. involvement of personal feelings, and so forth. What magistrates regard as solutions to achieve consistency in sentencing of male sex offenders.

8. There is the general belief that there is disparity between the sentencing patterns of magistrates. What in your opinion are the key barriers in achieving greater consistency in sentencing of male child sex offenders?

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9. What do you consider are the main problems in sentencing an adult male sex offender?

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10. How do you think can these challenges be addressed?

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11. Do you believe that the personal feelings of judicial officials play a role in sentencing?

.....  
 .....  
 .....

12. Are there workshops on the matter of sentencing adult sex offenders?

f) Yes                      No                      Unsure

13. How frequent are these workshops?

.....  
.....

14. What mechanisms can the criminal justice system set in place to assist judicial officials with the sentencing of adult male sex offenders?

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c)Other Views

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