

**THE VALUE OF A PRE-SENTENCE REPORT IN  
DETERMINING THE SUITABILITY OF SENTENCES  
OTHER THAN IMPRISONMENT**

by

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## **SUMMARY**

In this dissertation the problems surrounding the sentencing stage and factors which influence the sentence are briefly considered. The emphasis is on the use and value of a pre-sentence report in determining suitable sentences other than imprisonment. Historical background in the use of pre-sentence reports in South Africa, England and America is briefly referred to. Relevant concepts, such as individualisation of punishment, are considered in relation to possible sentences such as compensation, fines, community service, and correctional supervision. It is concluded that the provisions of sections 274 and 276A of the Criminal Procedure Act 51 of 1977 are not enough to regulate the use of pre-sentence reports in South Africa. It is further concluded that legislation is needed in this area, but in the meantime, our courts should work towards developing guidelines based on the provisions of the Criminal Procedure Act 51 of 1977.

## **KEY TERMS**

Factors influencing sentence: Disparity of sentences; Pre-sentence reports; Sentencing Aids; Contents; Individualisation; Sentencing guidelines; Accuracy problems; Non-custodial sentences; Juveniles; Punishment.

## INTRODUCTION

It has been said that of all functions that a trial judge may perform, no duty weighs more heavily than that of sentencing men and women who have come into conflict with society's laws<sup>1</sup>. Courts have the greatest responsibility to determine suitable sentences for the accused who appear before them<sup>2</sup>. But many factors will contribute towards their decisions. Judges, like any other human beings<sup>3</sup>, have preconceived ideas about class, social status or racial differences<sup>4</sup>. Equally, convictions about the purpose of criminal sentences<sup>5</sup> and information contained in the pre-sentence reports may contribute towards the decision of the court<sup>6</sup>.

All these factors contribute towards a disparity in sentencing. This has been shown by Hogarth<sup>7</sup>, who concludes that, "the judicial process is not as uniform and impartial as many people would hope it to be". This perception has prompted,

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<sup>1</sup> Frosh S. B. "Constructive alternatives to Prison Sentencing" (1982) SACC 18. See also Cloete M.G.T. and Stevens R. (ed) (1990) Criminology 199.

<sup>2</sup> Du Toit E. Straf in Suid Afrika ( 1981) 81-82. See also Fennel S. A. "Due Process at Sentencing" (1980) 93 Harvard law Review 1615-1616.

<sup>3</sup> Jerome F. Law and the Modern Mind (1949) 115.

<sup>4</sup> Randal G.S. Criminal Justice in America: A Sociological Approach (1982) 286.

<sup>5</sup> Senna J. and Siegel L. Introduction to Criminal Justice (1990) 453.

<sup>6</sup> Randal G.S. supra (n 4) 286.

<sup>7</sup> Hogarth J. Sentencing as a human process (1971) 356. See also Pitfield D. J. "Sentencing - where to now? A comparative survey of overseas systems (1994) ACTA CRIMINOLOGICA 52 55.

amongst others, Van Rooyen, to call for guided discretion in sentencing and a better understanding of the sentencing function and its control.<sup>8</sup> The practice of guiding the sentencing discretion through legislation, as is done in other countries, has been found to have flaws<sup>9</sup>. Van der Merwe is of the view that guidelines laid down by the legislature are not the answer to the problem<sup>10</sup>. He holds that view that justice should be left to the judicial arm of government<sup>11</sup>. South African courts have, in fact, laid down guidelines for sentencing officers<sup>12</sup>. The problems already referred to have, nevertheless, remained.

The other concept which I regard as being related to pre-sentence reports is individualisation of punishment. Individualisation of punishment in South Africa has been stressed since the case of Zinn<sup>13</sup>. Guidelines laid down in this case are to the effect that, when the court is considering a suitable sentence, the basic 'triad' must be borne in mind at all times, that is to say the crime, the offender and the

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<sup>8</sup> Van Rooyen J.H. "The decision to imprison - the court's need for guidance" (1980) SACC 228, 229. See also Lund J.R. "Discretion, principles and precedent in sentencing (part one) (1979) SACC 203 and (part two) in (1980) SACC 36.

<sup>9</sup> See Van der Merwe D.P. Sentencing (1992) 3-10 ff. Also Van der Merwe D.P. (1994) 7 SACJ 200, 211-212. For Netherlands see Tak P.J.P. (1994) 7 ACTA CRIMINOLOGICA 7.

<sup>10</sup> Van der Merwe D. P. (1994) 7 SACJ 200, 211, 212.

<sup>11</sup> Van der Merwe D.P. *supra* (n10) 212.

<sup>12</sup> Meaningful guidelines started in the seventies in the cases of Benetti 1975 (3) SA 603 (T) and Scheepers 1977 (2) SA 154 (A), even though the said cases were dealt a blow in Holder 1979 (2) SA 77 (A) 77H.

<sup>13</sup> 1969 (2) SA 537 (A).

interests of the society. Cloete<sup>14</sup> describes individualisation of punishment as follows:

"In die breë gesien, behels die individualisasieproses eerstens daardie stappe wat geneem moet word om vir die hof 'n omvattende beeld van die beskuldigde of veroordeelde te konstrueer met betrekking tot sy maatskaplike en persoonlikheidsagtergrond, kriminele kapasiteit, medies-biologiese anomalieë, verwagte toekomstige gedrag en ander relevante aspekte ten einde 'n geskikte vonnis vir die betrokke individu te bepaal."

Other South African authorities<sup>15</sup> have stated their own understanding of individualisation. Beyers J.A.<sup>16</sup> was of the view that, when passing sentence, the interests and circumstances of the accused must be taken into consideration. Holmes J.A.<sup>17</sup> also said that "punishment should fit the criminal as well as the crime". It may be argued that the 'basic triad' in Zinn<sup>18</sup> also contributes towards the individualisation of punishment. Rabie and Strauss<sup>19</sup> are of the view that, in

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<sup>14</sup> Cloete M.G. Misdaad, Straf en Hervorming (1972) 7.

<sup>15</sup> Du Toit E. Straf in Suid Afrika (1981) 122, describes individualisation as, "Individualisasie... beteken basies dat die verhoorhof in elke geval nie alleen aandag gee aan die algemene aard van die misdryf, die algemene belange van die gemeenskap en die algemene belange van die oortreder nie, maar werklik die betrokke geval en die betrokke oortreder ondersoek". See also Klopper C F "Strafindividualisasie in Suid Afrika" (1990) 2 SACJ 140, 142.

<sup>16</sup> In Berger 1936 AD 334, 341.

<sup>17</sup> In Zonele 1959 (3) SA 319 (A) 330 E.

<sup>18</sup> Zinn supra (n13).

<sup>19</sup> Rabie M.A. and Strauss S.A. Punishment: An Introduction to Principles (1985) 268-9.

order to individualise punishment, the court has have the duty to enquire into subjective elements concerning the crime committed, particularly where the accused is unrepresented. Rumpff, C.J. in Holden<sup>20</sup> said the following:

"Die gemeenskap verwag dat ernstige misdaad gestraf sal word, maar verwag ook tewens dat strafversagende omstandighede in ag geneem moet word en dat die beskuldigde se besondere posisie deeglike oorweging verdien."<sup>21</sup>

As the comments quoted above suggest, some authorities focus on the criminal and others on the crime. It is argued that the most acceptable and reasonable approach, however, is the one found in the Zinn case, where the 'basic triad' is emphasised. To individualise punishment, all the three components of the 'basic triad' must be considered and a weighed against each other. The individualisation of punishment in South Africa is therefore well established and can be regarded as part of our law.

To individualise punishment, one needs reliable information<sup>22</sup>. This information can be found in the pre-sentence report, provided that it has been properly compiled.

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<sup>20</sup> 1979 (2) SA 77 (A).

<sup>21</sup> At 81B.

<sup>22</sup> As also found by the Viljoen Commission in: Report of the Commission of Inquiry into the Penal System of the Republic of South Africa: Report No. RP 78/1976 para 5.1.5.1. as far back as 1976.

This dissertation was chosen after discovering that this valuable aid or tool (pre-sentence report) is not adequately used by our courts at the sentencing stage. The main aim of this dissertation is to show how our courts could utilise the pre-sentence reports in reaching proper and suitable sentences. They are especially valuable in determining sentences other than imprisonment, particularly in instances where the court is considering non-custodial sentences.

## 2. PRE-SENTENCE REPORTS

The first pre-sentence report in South Africa dates back to approximately 1907<sup>23</sup>. Their proper use started in 1910 by a private organisation, the South African Prisoners' Aid Association, known today as 'The National Institute for Crime Prevention and Rehabilitation of Offenders (NICRO)<sup>24</sup>. These reports developed with the probation system. The state probation officers were appointed in 1913, but it was only in 1915 that they provided the court with pre-sentence reports as one of their duties. The probation officers were originally appointed to supervise offenders placed on probation, but the courts started requesting them to obtain information concerning offender's personal background so as to assist in sentencing<sup>25</sup>. This duty subsequently became law in 1986<sup>26</sup>. Section 296(1) of

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<sup>23</sup> Naude B. In her unpublished paper entitled, "The Value of Pre-sentence Reports in Sentencing, delivered at the University of Bophuthatswana on the 20 April 1993; a public lecture entitled "The Victim in the Criminal Justice System" 1.

<sup>24</sup> Naude B. supra (n23) 1-2.

<sup>25</sup> Naude B. supra (n23) 4.

<sup>26</sup> In terms of Probation Service Act 98 of 1986 and Probation Service Act 116 of 1991.

the Criminal Procedure Act provides for a pre-sentence report where a court could, instead of imprisonment, refer an offender to a rehabilitation centre in accordance with the Drugs and Drug Trafficking Act<sup>27</sup>.

The Children's Act<sup>28</sup> was the first which expressly provided for pre-sentence reports. This Act required a social worker, or probation officer to compile a report after enquiring about any person below the age of twenty one and to submit it to the court. The report had to include information about the character and environment of the child.

The other statute which provides for a report expressly is the Correctional Services and Supervision Matters Amendment Act<sup>29</sup>. The Act makes a report a pre-condition before the accused can be placed on correctional supervision.

Our academic writers have also called for the use of pre-sentence reports in some cases, and our courts have laid down guidelines regarding the use of these reports<sup>30</sup>. In South Africa, the inference that can be drawn from sources is that a

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<sup>27</sup> Act 140 of 1992, which repealed the Abuse of Dependence-producing Substances and Rehabilitation Centres Act 41 of 1971.

<sup>28</sup> Act 33 of 1960 as repealed by section 20 of the Probation Service Act 116 of 1991.

<sup>29</sup> Act 122 of 1991.

<sup>30</sup> Eg Van Rooyen J.H and Joubert J. in Bosman F (ed) Social Welfare Law (1982) 120 para 1.6.2, are of the view that, before sentencing a young offender to imprisonment, a pre-sentence report should be obtained. In Jansen 1975 (1) SA 425 (A) it was said that pre-sentence reports are called for in "all serious cases". In Rabotapi 1959 (3) SA 857 (T); Motsoaledi

pre-sentence report is compiled by a probation officer or correctional officer as will be seen hereunder<sup>31</sup>. Graser<sup>32</sup> summed up the development of pre-sentence report in South Africa as follows:

"The development of the pre-sentence report signalled a major break-through in the fight for individualised justice. The report has come to be the foundation stone on which modern probation practice rests. A key ingredient of the pre-sentence process is the assurance it affords the defendant, the court and the community that this enquiry will be thorough and objective and that the report will accurately mirror the defendant and his life."

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1962 (4) SA 703 (O) and Mkwanazi 1969 (2) SA 246 (N) 247 where the court said: "Whilst it is true that the law does not in terms prescribe that a probation officer's report should be obtained, it is plainly necessary for a judicial officer either to obtain such a report or to call evidence regarding the history and character of a juvenile accused when the possibility of committing him to reform school is contemplated".

<sup>31</sup> Correctional Services and Supervision Matters Amendment Act supra (n 29) Van Zyl F.H. "Die noodsaaklikheid van die voorvonnis-verslag by strafoplegging" (1983) SACC 54, 62, Frosh S. B. "Constructive alternatives to prison sentencing" (1982) SACC 18, Van der Merwe S.E. "The Contents and evidential aspects of Pre-sentence Report" (1980) SACC 126 and Walsh A. "The Role of the Probation Officer in the sentencing process" (1985) Criminal Justice and Behaviour 12. For definition of a probation officer, see section 2 of the Probation Service Act 116 of 1991. For correctional official, see section 35 of the Correctional Services and Supervision Matters Amendment Act 122 of 1991.

<sup>32</sup> Midgley J. et al (ed) Crime and Punishment in South Africa (1975) 203.

The value of the pre-sentence reports has caused some of our academic writers to call for greater use of the reports<sup>33</sup>. Skeen<sup>34</sup> has even suggested the appointment of a court official whom he terms "sentencing assistance officer". This officer, it is suggested, would perform duties similar to those of probation officers in as far as compilation of pre-sentence reports<sup>35</sup> is concerned. He further recommends the use of sentencing assistance officer in cases where the court is contemplating a fairly substantial fine or a short term of imprisonment<sup>36</sup>.

The use of pre-sentence reports in South Africa is based on statutory provisions and the Criminal Procedure Act is the most important statute in this regard. Sections 276(1)(h) and 274 Criminal Procedure Act are the sections that need to be considered<sup>37</sup>. Section 274 of the Criminal Procedure Act provides as follows:

"(1) A court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed;

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<sup>33</sup> Eg Van Zyl F.H. supra (n 31), Klopper C.F. "Straf individualisasie in Suid Afrika" (1990) SACJ 140 and Van der Merwe S.E. supra (n. 31).

<sup>34</sup> Skeen A. "Sentencing: Certain thoughts on pre-sentence reports" (1982) 6 SACC 246, 247.

<sup>35</sup> Skeen A. supra (n 34) 248, where the author deals with, 'method of reporting'.

<sup>36</sup> Ibid.

<sup>37</sup> The provisions of this Act will be discussed in detail when Correctional Supervision is considered as a separate punishment.

- (2) The accused may address the court on any evidence received under subsection (1), as well as on the matter of the sentence, and thereafter the prosecution may likewise address the court".

If one considers the provision of this section, it becomes clear that the court has a discretion in terms of subsection (1), to receive evidence as it thinks fit to inform itself as to the proper sentence to be passed. The main problem has been how this discretion is to be exercised by our courts. It is submitted that pre-sentence investigations can be initiated in three ways under section 274:

- i) the presiding officer, on his own, may request for a pre-sentence investigation to be instituted, and the accused is therefore referred to the probation officer in this connection;
- ii) the public prosecutor may request the presiding officer during the trial to order a pre-sentence investigation or on his own cause the accused to be referred to the probation officer for the purpose of obtaining a report and thereafter submit the same to court;
- iii) the defence may request the presiding officer during the trial to order a pre-sentence investigation, and the accused is for this purpose referred to the probation officer or may on his own obtain one and submit the same to court.

Once the court has given this order or the defence or prosecutor has referred the accused to the probation officer for this purpose, the officer must interview the accused and carry out investigations<sup>38</sup>. The probation officer has to interview auxiliary sources to obtain information about the accused. These sources might include the offender's family, friends, neighbours and employer. The probation officer also has to consider professional reports of medical practitioners and psychologists<sup>39</sup>. After compiling the report, the probation officer will submit it to the court.

The compilation of pre-sentence reports is hampered by two factors: the shortage of probation officers in South Africa<sup>40</sup>, and the time needed to compile the report. Interviewing the accused and all auxiliary sources takes considerable time which might result in cases dragging on for too long in our courts<sup>41</sup>. Solutions have been offered<sup>42</sup>. Van Zyl<sup>43</sup> suggests that, if our courts impose alternative sentences to imprisonment, the money that would have been spent on the incarceration of many prisoners could be used to employ and train more probation officers. On the other

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<sup>38</sup> Jacobs J.J. Enkele aspekte van maatskaplike werk in proefdienste M.A. dissertation Unisa (1976) 176.

<sup>39</sup> Jacobs J.J. supra (n 41) 152.

<sup>40</sup> Van Zyl F.H. "Die noodsaaklikheid van die voorvonnis-verslag by strafoplegging" (1983) SACC 54, 61-62.

<sup>41</sup> Thus infringing on the right to a speedy trial as contained in section 25 (2) (b) of the Constitution of the Republic of South Africa, Act 200 of 1993.

<sup>42</sup> Skeen A. supra (n 37) 247-248, Van Zyl F H supra (n 43) 61, Naude B. supra (n 23) 4 and Naude C.M.B. "Crimsa Unit for Offender - Evaluation - A Specialised Service for Legal Practitioners" (1992) Consultus 131.

<sup>43</sup> Supra (n 40) 62.

hand, Naude<sup>44</sup> suggests that legal practitioners could use reports prepared and compiled by private social scientists such as criminologists. She calls for utilization of institutions such as the Criminological Society of Southern Africa (CRIMSA) to ease the load on state appointed probation officers. If these two suggestions could be implemented, the two main problems referred to above would be minimised.

Another problem in the use of reports involves the accuracy of the information in them. When reports are compiled, there is always a possibility that untrue statements and, in some instances, irrelevant information have been included. Inaccuracies are often the result of too much work by probation officers. Like many other state employees in South Africa, probation officers are overloaded with work, and may not always be able to devote as much time to researching or investigating as expected<sup>45</sup>. Sometimes reports are compiled by inexperienced probation officers. However, the problem of inaccuracies can be overcome by cross-examination of the probation officer.

A further problem associated with pre-sentence reports is the reluctance of legal practitioners to acquire such reports. Legal practitioners tend to see probation officers as state employees, and consequently lacking in objectivity<sup>46</sup>. Privately

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<sup>44</sup> Supra (n 42) 131.

<sup>45</sup> Clear T.R. Offender assessment and evaluation: The pre-sentence investigation reports (1988) 164.

<sup>46</sup> Naude B. supra (n 23) 4.

compiled pre-sentence reports would avoid this bias: however, in South Africa,<sup>47</sup> most accused persons do not have the means to pay for the services of a private practitioner, as in other countries<sup>48</sup>.

Most of the pre-sentence reports are submitted in terms of section 274 of the Criminal Procedure Act. The purpose of this section has been explained by Kriegler<sup>49</sup> as follows:

"Die primêre doel - en duidelike strekking - van artikel 274(1) is dan om die hof uitdruklik te bekleed met 'n diskresie wat betref die aanhoor van getuienis by die heel andersoortige fase van die verhoor. Uiteraard word dit regterlik uitgeoefen maar dit is en bly 'n kwessie van die hof se goeddunke".

In considering how the court will exercise its discretion in admitting the report, there are many issues involved. The most important are the manner in which the report is put before the court, and its evidential value. As far as the first is concerned, Skeen correctly points out that a probation officer may present his report by viva voce evidence or by a written report<sup>50</sup>.

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<sup>47</sup> Ibid.

<sup>48</sup> See Kulis C.J. "Profit in the Private Pre-sentence Report" (1983) 47 Federal Probation 11 and Hoelter H.J. "Private Pre-sentence Report: Boon or Boondoggle?" (1984) 48 Federal Probation 66.

<sup>49</sup> Kriegler J. Hiemstra Suid-Afrikaanse Strafproses (1993) 655.

<sup>50</sup> Skeen A. *supra* (n 34) 248.

As far as evidential value is concerned, probation officers are experts in their field and should therefore be regarded as expert witnesses<sup>51</sup>. But Hoffmann and Zeffertt are of the view that a court which relies upon an expert's opinion is, to a greater or lesser extent, taking a step in the dark - something which should be done only with considerable caution<sup>52</sup>. In their discussion of Keeton<sup>53</sup>, they conclude that a good deal will depend upon the general repute of the witness's profession<sup>54</sup>. What comes out clearly is that if an expert's opinion is to carry any weight, it is essential for him to state his reasons for his opinion and recommendations<sup>55</sup>.

Before a pre-sentence report can be received in evidence for the purpose of sentencing, it must either be given under oath or affirmation<sup>56</sup> or must be formally admitted by the court<sup>57</sup>. If there are no disputes with regard to the contents of the report, the court will authorise its admission. The probation officer on handing the

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<sup>51</sup> Van der Merwe S.E. "The contents and evidential aspects of a pre-sentence report" (1980) 4 SACC 126, 128 and 130. See also Harvey 1977 (2) 180 (O) 189 B-C.

<sup>52</sup> Hoffmann L.H. and Zeffertt D.T. The South African Law of Evidence (1989) 103.

<sup>53</sup> 1906 EDC 56.

<sup>54</sup> Ibid.

<sup>55</sup> Hoffmann L.H. and Zeffertt D.T. supra (n 52) 102.

<sup>56</sup> Van der Merwe S.E. supra (n 51) 128.

<sup>57</sup> See section 220 of the Act. See also Maasdorp 1967 (2) SA 93 (G) and Mvulba 1965 (4) SA 113 (O).

report in<sup>58</sup>, will then confirm the contents. If there is a dispute, the accused should be given the opportunity to counter detrimental allegations in the report. This will be done by questioning the probation officer and by leading evidence.

The other problem associated with the reports is the rule against hearsay evidence. In his search for information the probation officer relies upon hearsay statements. Van der Merwe, however, is of the view that, verification can solve the problem<sup>59</sup>. On the other hand, Du Toit<sup>60</sup> is of the view that in cases like these rules of evidence may be applied more liberally, especially where the facts are in favour of the accused, and a technical approach would exclude from consideration facts which are obviously relevant and helpful in coming to a suitable sentence. Some writers also hold that the term 'evidence', as used under section 274(1) of the Criminal Procedure Act, is usually not interpreted in the strict sense of the word, and the law of evidence is not strictly observed<sup>61</sup>. There is also some authority for the rule that hearsay evidence may be admitted for the purpose of determining a suitable sentence<sup>62</sup>. However, the admission of disputed detrimental hearsay

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<sup>58</sup> Van der Merwe S.E. supra (n 51) 128.

<sup>59</sup> Van der Merwe S.E. supra (n 51) 130.

<sup>60</sup> Du Toit E. et al Commentary on the Criminal Procedure Act (1993) 28-4. See also Gqabi 1964 (1) SA 261 (T) 265 D and Zonele 1959 (3) SA 319 (A) 330 F.

<sup>61</sup> Eg. Geldenhuys T. and Joubert J.J. (eds) Criminal Procedure Handbook (1994) 222.

<sup>62</sup> See Gqabi supra (n 60) 265 and Van der Merwe S.E. supra (n 51) 130. See also Section 3 (1) of the Law of Evidence Amendment Act 45 of 1988.

evidence is indeed grossly unfair to the accused and would constitute an irregularity<sup>63</sup>.

The evidential value of the pre-sentence report will therefore depend on the weight given to such a report by the court, bearing in mind the provisions of the Law of Evidence Amendment Act<sup>64</sup>. In considering all relevant factors, the court, in exercising its discretion, must apply its mind judicially. The court is not bound by the recommendations of a probation officer. In terms of the decision in Harvey<sup>65</sup> the court must not slavishly follow the recommendations of the probation officer and merely substitute the latter's view for its own. Van der Merwe<sup>66</sup> is of the view that recommendations by the probation officer, if based upon a weak factual basis, will carry hardly any weight at all. A balanced recommendation which is properly supported by facts, is more likely to persuade the court. This is in accordance with the general principles which relate to the persuasive and probative value of expert evidence<sup>67</sup>.

Sometimes a written report may be submitted and if there are no problems with the contents, it can be admitted without any viva voce evidence being given by the probation officer. This procedure is usually followed where there would be undue

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<sup>63</sup> See Jabavu 1969 (2) SA 466 (A) 472 E.

<sup>64</sup> *Supra* (n 62).

<sup>65</sup> Harvey 1977 (2) SA 185 (E). See also H 1978 (4) SA 385 (E) 386 E.

<sup>66</sup> Van der Merwe S.E. *supra* (n 51) 131.

<sup>67</sup> *Ibid.*

delay or unnecessary expenses if the probation officer is to give viva voce evidence.

### **3. CONTENTS OF PRE-SENTENCE REPORTS**

I propose to consider briefly the contents of a pre-sentence report before dealing with each condition which may be imposed by the court. It is not possible to list all that has to be included in the report, but the following deserve mention:

#### **i) Family history/situation**

The report usually contains information about accused's family. A number of questions are addressed. Are both parents alive? Are there other children in the family? Are the parents divorced; if so, where does the non-custodial parent stay? Are the parents working; if so where, and what type of work? Have the parents had any problem with the accused? Is the family religious or not?<sup>68</sup>. The accused's childhood, his home and neighbourhood environment would also be considered, as would his habits, interests and general life style.

#### **ii) Educational background**

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<sup>68</sup> Newman D.J. and Anderson P.R. Introduction to Criminal Justice (1989) 379-380; Richmond R. "A proposal to ensure accuracy in Presentence investigation reports" (1982) 91 6 Yale Law Journal 1228; Dombek C. and Chitra M.W. "The Pre-sentence Report: An Update" (1981) 23 2 Criminal Law Quarterly 217; Robin G.D. and Anson R.H. Introduction to the Criminal Justice (1990) 349 and Fennel S.A. and Hall M.N. "Due process at sentencing: An empirical and Legal analysis of the disclosure of Pre-sentence Reports in Federal Courts". (1990) 93 Harvard Law Review 1616.

The report includes information about the offender's education. How far did he go with his education? Is he a high school graduate or does he have any tertiary education? What is his IQ? What was his general behaviour at school?. Did he take part in sport, for instance soccer?. What was his relationship with other children and teachers?<sup>69</sup>.

iii) **Employment history**

Did the accused have any summer or winter jobs as a student? What type of a job did he do? The report will compare the accused's relationships with his fellow employees and fellow students. Did the accused serve in the military? The officer will contact his previous and current employers for a character reference, and details of his salary<sup>70</sup>.

iv) **Medical history**

The report should include information about the accused's physical and mental health, including psychiatric diagnoses and psychological history. Emotional health must also be referred to in the report<sup>71</sup>.

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<sup>69</sup> Newman D.J. and Anderson P.R. supra (n 68) 380; Robin G.D. and Anson R.H. supra (n 68) 349; Richmond R. supra (n 68) 1228; Senna J.J. and Siegel L.J. Introduction to Criminal Justice (1990) 453; Sheldon R.G. Criminal Justice in America: A Sociological Approach (1982) 286; Naude B. supra (n 23) 6-7 and Jacobs J.J. Enkele aspekte van maatskaplike werk in proefdienste. M.A. dissertation, Unisa (1976) 194.

<sup>70</sup> Richmond R. supra (n 68) 1228; Robin G.D. and Anson R.H. supra (n 68) 349 and Newman D.J. and Anderson P.R. supra (68) 380.

<sup>71</sup> Sacco T.M. "Humanising the accused: The Social Worker's Contribution in Mitigation of sentence" (1994) 30 (2) Social Work 164-5; Newman D.J. and Anderson P.R. supra (n 68) 377; Richmond R. supra (n 68) 1228.

v) **Personal problems**

The report should consider whether the accused has any personal problems. It should also include his reaction to those problems. Is the accused easily influenced; does he have aggressive tendencies? His potential and his motivation must also be investigated. The report should generally consider the accused's interpersonal relationships<sup>72</sup>.

vi) **Attitudes towards the offence**

The report may include by the probation officer's observations about the attitude of the accused to the offence: whether he is defensive, aggressive, defiant, or shows any remorse. This will guide the probation officer in making recommendations in respect of the sentence<sup>73</sup>.

#### **4. PRE-SENTENCE REPORT FOR VARIOUS SENTENCES**

##### **4.1 Community Service**

Community service as a condition to postpone or suspend the passing of sentence requires the offender to perform unpaid work in the community. Community service is governed by section 297(1)(a)(cc) of the Criminal Procedure Act. This

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<sup>72</sup> Naude B. *supra* (n 23) 7.

<sup>73</sup> Newman D.J. and Anderson P.R. *supra* (n 68) 381; Senna J.J. and Siegel L.J. *supra* (n 68) 455; Dombek C.F. and Chitra M.W. *supra* (n 68) 232; Richmond R. *supra* (n 68) 1242; Sacco T.M. *supra* (n 71) 164; Celnick A. "Negotiating Alternatives to Custody: A Quantitative Study of an Experiment in Social Enquiry Practice" (1986) 16 (3) British Journal of Social Work 364; Robin G.D. and Anson R.H. *supra* (n 68) 349 and Naude B. *supra* (n 23) 8.

section empowers the court to postpone the passing of sentence or suspend the working of the sentence for a given period not exceeding five years and to release the offender on condition that he renders some service for the benefit of the community. The practice of community service in South Africa started in the sixties<sup>74</sup>.

Our courts have laid down guidelines for the application of this punishment<sup>75</sup>. In the case of Abrahams<sup>76</sup>, Conradie J. was of the view that community service is not only applicable in cases which are less serious<sup>77</sup>. He went on to say that sometimes there are offenders who commit serious offenses but who nevertheless will be suitable for community service<sup>78</sup>. In his opinion courts should utilise imprisonment only if the offence is so serious that non-custodial punishment would discredit the system of criminal justice in the eyes of the community<sup>79</sup>. On the other hand, Gordon A.J. in Guntenhöner<sup>80</sup> was of the view that community service, coupled with a short period of imprisonment, was inappropriate in a case which he

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<sup>74</sup> See Esterhuizen 1963 (3) S A 165 (GW); Bock 1963 (3) S A 163 (G W); Jones 1976 (1) SA 239 (T); Ferreira 1975 (1) SA 44 (O); Khumalo 1984 (4) SA 642 (WLD) and C 1973 (1) SA 739 (C).

<sup>75</sup> The latest being in Lister 1993 (2) SACR 228 (A).

<sup>76</sup> 1990 (1) SACR 172 (C).

<sup>77</sup> At 177 D-E.

<sup>78</sup> Ibid.

<sup>79</sup> At 177 F-G.

<sup>80</sup> 1990 (1) SACR 642 (W).

regarded as extremely serious. The case involved a bank losing R33 million through fraud<sup>81</sup>.

The South African position was fortified by the Criminal Procedure Amendment Act 33 of 1986. Before the amendment there were areas of uncertainty, such as the question of who was liable for delicts committed by a person on community service. This and other problems have been resolved by the 1986 Act.

If we consider the English position, we find that community service orders were introduced into English law in 1972<sup>82</sup>. They are now governed by the Criminal Justice Act of 1991<sup>83</sup>. According to this Act, for community service to be ordered the offender must be over seventeen years. The offender has to give consent to the order. The service must not be less than 40 hours and not more than 240 hours<sup>84</sup>. The work is arranged by the community service organiser or a voluntary organisation, but the responsibility lies with the probation service<sup>85</sup>. The important factor is that a report of a probation officer is a pre-requisite. The court cannot impose a community service order without first obtaining a pre-sentence report<sup>86</sup>.

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<sup>81</sup> See Lister supra (n 75) where community service was also regarded as being inappropriate for fraud.

<sup>82</sup> See Wasik M. Emmins on Sentencing (1993) 181.

<sup>83</sup> See section 10 of the Criminal Justice Act of 1991.

<sup>84</sup> Wasik M. supra (n 82) 181. See also Skeen A. "Community Service Orders" (1988) 2 SACJ 206.

<sup>85</sup> Ibid.

<sup>86</sup> See section 7 (3) of the Criminal Justice Act of 1991; Wasik M. supra (n 82) 182; Reid J.D. (1984) SACC 126, 128; Frances H. (1984) SACC 131;

The South African position differs in some respects. In South Africa the bottom age limit is 15, and the offender has to serve a minimum of 50 hours. The consent of the offender is not required, and the order can be granted for any offence, whereas in England it is only when the offence is punishable by imprisonment<sup>87</sup>.

The report can be very important with respect to community service orders because it contains information on the social background of the offender. This enables the court to decide if the offender can be sent back to the community. The court is also able to select a social institution in which to place the offender on the basis of details of his education and work experience. It is important that the offender be seen as reliable. The court can obtain information with regard to this question in the report. The probation officer will have included his evaluation of the offender, which usually includes recommendations of whether he can be sent back to the community. Such evaluation will be based on the information obtained from the offender's employer, relatives and whoever might have had relations with the offender. Even though it is impossible to be sure that the offender will behave in a particular manner, it is submitted that the information in the pre-sentence report will at least assist the court in determining whether the offender is suitable for community service.

## **4.2 CORRECTIONAL SUPERVISION**

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Henderson J.H. (1983) SACC 44 and Skeen A. *supra* (n 84) 206.

<sup>87</sup> See section 297 (1) (a) (1) (cc) of the Act; Skeen A. *supra* (n 84) 207-208 and Wasik M. *supra* (n 82) 182-183.

Correctional supervision in South Africa is governed by the Criminal Procedure Act as amended by the Correctional Services and Supervision Matters Amendment Act<sup>88</sup>. For the purpose of this dissertation, section 276A(1)(a) is of importance. Correctional supervision is a "community-based punishment" which is executed within the community<sup>89</sup>. According to Kriegler, A.J.A. correctional supervision has ushered in a new phase in the South African criminal justice system<sup>90</sup>. He draws attention to the fact that there is a wide variety of measures which make up correctional supervision outside the prison<sup>91</sup>. These measures are: monitoring, community service, house arrest, placement in employment, etc<sup>92</sup>. Correctional supervision may be imposed by the court as an alternative to imprisonment or as a condition with regard to a postponed or suspended sentence<sup>93</sup>. The court may also impose a sentence of imprisonment which can be converted into correctional supervision by the Department of Correctional Services<sup>94</sup>.

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<sup>88</sup> Act 122 of 1991.

<sup>89</sup> Terblanche S. "The unfit probationer" (1993) April Consultus 53.

<sup>90</sup> In R 1993 (1) SA 476 (A) and 1993 (1) SACR 209.

<sup>91</sup> R 1993 (1) SA 476 (A) 487 D-F.

<sup>92</sup> Du Toit E. et al Commentary on the Criminal Procedure Act (1993) 28-10B.

<sup>93</sup> Jones E. "Correctional Supervision in South Africa: The Practical Application" (1993) De Rebus 982.

<sup>94</sup> *Ibid.*

Correctional supervision is now one of the most important forms of punishment in South Africa. This fact has been acknowledged by academic writers<sup>95</sup>. A large number of cases have been decided on this form of punishment<sup>96</sup>. In contrast to imprisonment, correctional supervision is said to have a number of advantages<sup>97</sup>. The probationer can benefit to a greater extent from the normalizing influences of the community, and is not exposed to the negative influences of hardened criminals and prison sub-culture. The rehabilitation process takes place within the community, where the best results can be obtained. It is a more cost-effective sentence option, and there is less pressure on available prison space. The isolating effect and stigma attached to imprisonment are avoided, and to a large extent, some negative results of imprisonment are eliminated, e.g. loss of self-respect, loss of income resulting in the inability to provide for the family, breaking up of family life.

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<sup>95</sup> Terblanche S.S. "'n Nuwe fase in straftoemeting" (1993) 28 The Magistrate 52; Naser et al "Korrektiewe toesig: 'n straftoemestings oefening" (1993) 28 The Magistrate 47; Naser et al "Die lewensvatbaarheid van korrektiewe toesig" (1993) 28 The Magistrate 35; Jones E. supra (n 93); Terblanche S. supra (n 89) and Engelbrecht J. " 'N Alternatiewe Vonnisopsie: Die wysigingswet op aangeleenthede rakende korrektiewe dienste en toesig" (1991) De Rebus 867.

<sup>96</sup> Eg R 1993 (1) SACR 209 (A); Leeb 1993 (1) SACR 315 (T); Omar 1993 (2) SACR 5 (C); Croukamp 1993 (1) SACR 439 (T); Dercksen 1993 (2) SACR 575 (O); Somers 1994 (2) SACR 401 (T); Kruger 1995 (1) SACR 27 (A); Ingram 1995 (1) SACR 1 (A); Flanagan 1995 (1) SACR 13 (A) and James 1993 (1) SACR 461 (C).

<sup>97</sup> Jones E. supra (n 93) 982 - 983. See also Naudé C.M.B. "Correctional supervision: alternative community-based sentencing options for South Africa" (1991) 4 ACTA CRIMINOLOGICA 14 15.

Section 276A(1) provides as follows:

"Punishment shall only be imposed under section 276(1)(h) -

- (a) after a report of a probation officer or a correctional official has been placed before the court; and
- (b) for a fixed period not exceeding three years".

In terms of this section correctional supervision can only be imposed after a report from a probation or a correctional officer has been placed before the court<sup>98</sup>. The report is a pre-requisite to the consideration of correctional supervision as a form of punishment.

If we consider cases dealing with this punishment, we find that in R the appellate division considered this form of punishment and found that even though it was still new, it had a great potential<sup>99</sup>. In this case a report was compiled by a probation officer in the court a quo, in which she made her observations and recommendations. It is important to note that the court remitted the matter to the trial court for the imposition of a sentence of correctional supervision in terms of section 276(1)(h) of the Criminal Procedure Act after it was found that the accused was relatively young, with strong family ties and a stable work pattern. It was also

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<sup>98</sup> Du Toit E. et al supra (n 92) 28-10 C.

<sup>99</sup> R 1993 (1) SA 476 (A) 487 D-F.

found that the accused's criminality had its origin in his personality defects which responded favourably to therapy<sup>100</sup>. All this information was contained in the pre-sentence report.

In Croukamp<sup>101</sup> the court considered a report compiled on a form (G345), designed by the Department of Correctional Services, and found that it was not in line with what had been envisaged in the legislation<sup>102</sup>. What the court required was one that evaluated the accused<sup>103</sup>, such as would be found in a report compiled by a qualified probation officer or correctional officer. The form was also criticised by the court as it containing many irrelevant facts<sup>104</sup>.

In Ingram<sup>105</sup> the court referred to the case of R<sup>106</sup> that the legislature, by the introduction of correctional supervision, has sought to distinguish between two types of offenders: those who ought to be removed from society and imprisoned and those who, although deserving of punishment, should not be so removed. In Ingram's case two reports were compiled by two professionals. Even though there were disagreements between the compilers, the information contained in the

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<sup>100</sup> R supra (n 99) 484-485.

<sup>101</sup> 1993 (1) SACR 439 (T).

<sup>102</sup> At 442.

<sup>103</sup> At 443 A-C.

<sup>104</sup> At 442 D-G.

<sup>105</sup> 1995 (1) SACR 1 (A) 9.

<sup>106</sup> Supra (n 99) 492.

reports was of assistance to the court. The professionals did not agree in their evaluations but the court reached a conclusion because the duty rested with it, as far as the sentence was concerned.

The court is required to exercise its discretion properly. The information and recommendations by the probation officer are only there to assist the court to reach an informed decision. This factor was highlighted in the case of R<sup>107</sup> where it was stated that the responsibility of imposing a suitable sentence always rests with the judicial officer. The point was made again in the case of Kruger<sup>108</sup>, where the regional magistrate referred the accused to a correctional officer. This officer concluded that the accused was not a suitable candidate for correctional supervision because he lived in a dangerous area which made visitation difficult. The Appeal Court found that the magistrate did not investigate the issue of monitoring sufficiently because other means, such as visits at the accused's place of work and the use of the neighbour's telephone could be employed to monitor the accused. This case shows that the court should still exercise its discretion properly and should not be a rubber-stamp for recommendations by the probation officer or correctional official.

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<sup>107</sup> Ibid.

<sup>108</sup> 1995 (1) SACR 27 (A).

Correctional supervision can be a severe sentence<sup>109</sup>. In Flanagan<sup>110</sup>, the Appellate Division found that the trial court had considered correctional supervision to be less of a deterrent than imprisonment. The court corrected this view by stating that it is not correct to regard correctional supervision as a light sentence and a lesser deterrent. The Appellate Division then used the information contained in the report to individualise the accused. This resulted in the sentence being reduced from seven to four year's imprisonment.

It is important to note what is generally and normally addressed by correctional officials in a report to court. According to Jones<sup>111</sup>, the following areas are normally addressed in such reports: the risk posed to the community by the offender, the possibility of effective offender - control in the community, whether the offender can earn a living or can be supported and the willingness of the offender to participate in appropriate treatment programmes. This information can then further assist the court to determine whether the accused is a suitable candidate for correctional supervision.

#### **4.3 COMPENSATION**

Compensation in our law is governed by section 297 and 300 of the Criminal Procedure Act. Section 300 provides for compensation where the offence has

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<sup>109</sup> Ndaba 1993 (1) SACR 637 (A) 641 G-W; W 1995 (1) SACR 610 (A) 614 C-E and Flanagan 1995 (1) SACR 13 (A) 16 B-D. See also Kriegler J. Hiemstra Suid Afrikaanse Strafproses (1993).

<sup>110</sup> *Supra*. See also Terblanche S. *supra* (n 89) 55.

<sup>111</sup> Jones E. *supra* (n 93) 983.

caused damage to or loss of property belonging to some other person, and such person or the prosecutor acting on the instructions of the injured person, applies for compensation for such damage or loss. Section 297 provides that, where a court convicts a person of any offence, other than in respect of which any law prescribes a minimum punishment, it may in its discretion postpone for a period not exceeding five years the passing of sentence and release the offender concerned on condition that he pays compensation to the victim of the crime.

According to Majola, "in the Southern African criminal context, compensation is payment in money in terms of the order of a criminal court by the convicted person to the victim of the crime for the damage, loss or injury which the latter has suffered as a result of the commission of the crime".<sup>112</sup>

In the former Bophuthatswana there used to be confusion whether compensation could be regarded as punishment<sup>113</sup>. With the re-incorporation of Bophuthatswana into South Africa, it is hoped that this will now be settled. The Supreme Court of the former Bophuthatswana will now have to follow precedents of South African courts which regard compensation as punishment, in terms of section 297<sup>114</sup>.

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<sup>112</sup> Majola B.C. "A Review of Compensation in Criminal cases in Bophuthatswana" (1986) SACC 245.

<sup>113</sup> See the views of Hiemstra C.J. in John Mojahi unreported 22/9/83) CA and R182/1982 P 3. See also Moseme (C A 190/85 (B) (unreported) per Steward C.J.

<sup>114</sup> See Charlie 1976 (2) SA 596 (A); Miyathi 1973 (1) SA 553 (R); Swane 1973 (3) SA 601 (O); Mila 1973 (3) SA 942 (O); Baloyi 1981 (2) SA 227 (T). See also Mihalik J. "Compensation as punishment: The Parliament of the High Court" (1989) 106 SALJ 370; (1988) 105 Mahomed Khan (1988) 105

Before the court can make a compensatory order, it is required to hold a separate inquiry in order to determine whether the offender will be able to pay<sup>115</sup>. This factor will be considered below.

Compensation in terms of section 297 is discretionary. In other words the court is entitled to exercise its discretion to postpone the passing of the sentence on condition that compensation is paid to the victim. Usually the court suspends or postpones the sentence on condition that the accused compensates the victim<sup>116</sup>.

Information in the pre-sentence report could assist the court in deciding whether to order compensation or not. The court will have information as to how much the accused is earning and what assets he has. This information could also assist in the holding of the inquiry mentioned above.

If we consider compensation under English law, we find that it is governed by the provisions of Criminal Courts Act of 1973. Scarman, L.J. in Inwood<sup>117</sup> explained the central aim of making a compensation order as follows:

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SALJ 417, and Tshondeni 1971 (4) SA 79 (T).

<sup>115</sup> See Tshondeni 1971 (4) SA 79 (T); Mila supra (n 166); Magakise 1973 (3) SA 493 (O) and Lam 1969 (3) SA 149 (RA).

<sup>116</sup> Bosman F. (ed) Social Welfare Law (1982) 10.

<sup>117</sup> (1975) 60 Cr App R70. Generally see Wasik M. Emmins on Sentencing 1993.

"... a convenient and rapid means of avoiding the expense of resorting to civil litigation, when the criminal clearly has means which would enable the compensation to be paid".

Compensation may be ordered for any personal injury, loss or damage resulting from the offence. The order may be made whenever it can be fairly said that a particular loss resulted from the offence<sup>118</sup>. A commonsense test should be applied in deciding such cases without having regard to technical issues of causation<sup>119</sup>. The victim does not have to apply to the court before a compensation order can be made<sup>120</sup>. The making of a compensation order should not, in principle, affect the punishment imposed for the offence<sup>121</sup>. Section 35(4) of the Powers of Criminal Courts Act of 1973 lays down the important principle that compensation orders should be made only where the sentencer is satisfied that the offender has the means to pay. Wasik<sup>122</sup> highlights a problem which usually arises at the sentencing stage. The defence, in mitigation, stresses the offender's willingness to pay compensation in the hope that this will persuade the court to

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<sup>118</sup> Kenny (1982) 4 Cr App (S) 85.

<sup>119</sup> Thomson Holidays (1974) QB 592 and Taylor (1993) 14 Cr App R (S) 276.

<sup>120</sup> Wasik M. Emmins on Sentencing 1993 242.

<sup>121</sup> Wasik M. *supra* (n 120) 244. See also Barney (1991) 11 Cr App R (S). 448.

<sup>122</sup> *Supra* 244-245.

pass a community sentence rather than a custodial one. Later, it transpires that the offer to pay was unrealistic<sup>123</sup>.

Situations such as these can be avoided through the use of a pre-sentence report. The court will not have to rely only on the evidence led by the defence in mitigation. The information contained in the report will assist the court in deciding whether to order compensation or not. Pre-sentence reports are essential tools at the sentencing stage where the court is considering compensation as a way of keeping the offender out of prison.

#### 4. FINE

A fine involves in ordering the offender to pay an amount of money to the state as punishment for his crime<sup>124</sup>, as provided for in section 276(1)(f) of the Criminal Procedure Act. A fine is usually imposed by our courts as an alternative to imprisonment when it is trying to keep the accused out of prison<sup>125</sup>.

In deciding whether to impose a fine or not, the court generally takes three factors into account<sup>126</sup>. Firstly, the crime should not be so serious that imprisonment is

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<sup>123</sup> See Roberts (1987) 9 Cr App R (S) 275 and Hayes (1992) 13 Cr App R (S) 454.

<sup>124</sup> Geldenhuys T. and Joubert J.J. (eds) Criminal Procedure Handbook (1994) 124.

<sup>125</sup> See Bhembe 1993 (1) SACR 164 (T); Lekgoale 1983 (2) SA 175 (B); Ntlele 1993 (2) SACR 610 (W); Moyi 1994 (2) SACR 408 (T); Motlounj 1993 (2) SACR 214 (NC) and Mlalazi 1992 (2) SACR 673 (W).

<sup>126</sup> See Geldenhuys T. and Joubert J.J. supra (n 124) 234.

called for and, secondly, the offender must have some financial means (or have access to them) with which to pay the fine. The third factor comes into play when crimes are committed for financial gain and the offender is given a fine which will indicate to him that crime does not pay<sup>127</sup>.

An important factor to be considered is the case when an accused person is unable to pay the fine. The court is required to hold a purposeful inquiry to determine the means of the offender<sup>128</sup>. Some guidelines have been laid down by our courts. In Ncobo<sup>129</sup> Howard A.J.P. reasoned that:

"... it cannot serve the ends of justice to give the accused the option of a fine, even a 'scaled down' fine, which he is unable to pay. To do so would be tantamount to sentencing him to imprisonment without the option of a fine which, ex hypothesi, is unmerited and inappropriate ..." <sup>130</sup>.

Hiemstra C.J. (as he then was) on the other hand said:

"If, however, the ability to pay should be strictly taken into account, there will be unacceptable anomalies. A court might wish to keep the offender out of prison by giving him the option of a fine, but if he has to take the

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<sup>127</sup> Ibid.

<sup>128</sup> Ibid.

<sup>129</sup> 1988 (3) SA 954 (N).

<sup>130</sup> At 956 B-C.

accused's means into account, the fine will sometimes have to be so small that it has no deterrent value to others and it might seem as if the court regarded the offence as a trivial one"<sup>131</sup>.

In Mbele<sup>132</sup> it was held that, in respect of a relatively serious offence where a large fine is prescribed by the legislature, the court should not be deterred from imposing a fine beyond the ability of the accused to pay<sup>133</sup>. In Wana<sup>134</sup> the court was of the view that when deciding on a fine, the court should not calculate the fine by comparing the maximum fine with the maximum imprisonment that the statute might allow.

As is the case with imprisonment, our courts generally enjoy a wide discretion to impose fines<sup>135</sup>. Ordinary jurisdiction of our courts must also be borne in mind. Correctional Supervision as an alternative punishment to imprisonment could partly alleviate this problem<sup>136</sup>.

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<sup>131</sup> In Lekgoale and Another 1983 (2) SA 175 (B) 176 F. See also Molefe 1989 (2) SA 881 (B).

<sup>132</sup> 1955 (4) SA 203 (N).

<sup>133</sup> At 206H-207C.

<sup>134</sup> 1990 (2) SA 877 (Tk).

<sup>135</sup> See Geldenhuys T. and Joubert J.J. *supra* (n 124) 235.

<sup>136</sup> *Ibid.*

In cases where the accused is unrepresented, the court, if it intends to impose a fine, should bring it to the accused's attention that such a fine might be paid in instalments, in terms of section 297(5) of the Act<sup>137</sup>. Our courts have always been urged to accommodate people without the funds to pay the fine immediately<sup>138</sup>.

As far as both compensation and fines are concerned, it is vital that the offender's means are determined<sup>139</sup>. The court has to make purposeful inquiries to establish this information. Van Schalkwyk J. in Ntlele<sup>140</sup> when referring to an unreported judgement of Flemming, D.J.P. in the case of David Lawrence George<sup>141</sup>, stated: "The principle underlying this view is that the accused might be able to supplement his own resources by, for instance, selling his assets or acquiring a loan from the family or friends ..."

The information in the report can assist the court in deciding whether or not to impose a fine or order compensation. It will greatly facilitate the inquiry which the court is required to hold in determining the means of the accused. The report will contain information relating to, amongst others, whether the accused is employed, how much he earns, whether the employer is still willing to retain him, the accused's assets, financial abilities and whether any of his family or friends is

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<sup>137</sup> See Motloug supra (n 125); and Ntlele supra (n 125).

<sup>138</sup> Ibid.

<sup>139</sup> Sithole 1979 (2) SA 67 (A).

<sup>140</sup> Supra (n 125).

<sup>141</sup> A 1167/92 (WLD) (unreported).

prepared to assist with the payment. The court will then impose a fine or order compensation in the full knowledge of the accused's financial situation.

In comparing the South African and English positions we find both similarities and differences. The English courts, like their South African counterparts, have the discretion to impose a fine<sup>142</sup>. The court will also determine the appropriate level of a fine according to the seriousness of the offence and the means of the person<sup>143</sup>. There are similarities between South Africa's Adjustment of Fines Act<sup>144</sup> and the English Criminal Justice Act of 1991<sup>145</sup>, but the latter sets out how the amount of the fine is to be calculated. There are different maximum fines which can be imposed by the Youth Court for offenders under the age of 14 and those of 14 to 17 years<sup>146</sup>. There is upper limit in the Crown Court, as is the case in our Supreme Court. If the offender is under 16, the Children and Young Persons Act of 1933<sup>147</sup> regulates who pays the fine. As in South Africa, the court can order the fine to be paid in instalments. Another similarity between the English and South African positions is that the court must hold an inquiry to determine the means of the offender. English law further requires the court to determine the means of

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<sup>142</sup> See Brayne H. and Martin G. Law for Social Workers (1993) 234.

<sup>143</sup> Ibid.

<sup>144</sup> Act 101 of 1991.

<sup>145</sup> Sections 18-24 and section 57.

<sup>146</sup> Brayne H. and Martin G. supra (n 142) 234. The Youth Court has a limit of £250 for an offender under 14, and £1 000 for one of 14 to 17.

<sup>147</sup> See section 55.

parents or guardian<sup>148</sup>. It also provides that, if the money is not paid, the court can make a money supervision order by appointing a suitable person to oversee the payments<sup>149</sup>. Fines may also be deducted from the income support received by the young offender or by the parent or guardian ordered to pay the fine.

## 5. INTERNATIONAL OVERVIEW

### 5.1 UNITED KINGDOM

Pre-sentence reports, or social inquiry reports, as they are sometimes referred to in England, emerged as an aid to sentencing in the nineteenth century as a result of three related penological developments<sup>150</sup>. The first of these was an increase in the variety of punishments and in the discretion of courts to impose them. The second was a shift in emphasis from retribution and deterrence to rehabilitation<sup>151</sup>. The third was the development of probation as a system of dealing with offenders<sup>152</sup>.

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<sup>148</sup> Brayne H. and Martin G. *supra* (n 146) 235.

<sup>149</sup> *Ibid.*

<sup>150</sup> White S. "The nineteenth Century Origins of pre-sentence Reports" (1978) 11 Australian and New Zealand Journal of Criminology 157.

<sup>151</sup> Recently there has been a shift from rehabilitation, back to retribution. See Duff A. (ed.) Punishment (1993) xi.

<sup>152</sup> White S. *supra* (n 150) 157.

The use of pre-sentence reports grew from 1846 when the judge's discretion was increased considerably<sup>153</sup>. This resulted in more information being brought before the court at the sentencing stage. One has to bear in mind that, until 1872, prisoners were prevented from giving sworn evidence themselves<sup>154</sup>. According to White<sup>155</sup>, the fullest account of pre-sentence inquiries in the 19th century was given by Edward Cox in a book published in 1877<sup>156</sup>. Throughout his book Cox stressed the importance of inquiry into the suitability of an offender for particular types of punishment. An inquiry into the background of the offender was made, by the police officer in charge of the case, who later gave evidence in court. White<sup>157</sup> further reports that the judge himself could also conduct an inquiry in court. If the information provided by the police and the inquiry by the court was inadequate, the judges could defer the sentence and refer the matter to an "Inquiry Officer". The officer would then go back to his sources, which included those persons named by the offender on the invitation of the court as persons to whom he would like reference made<sup>158</sup>. The only problem with these 'reports' were that the information contained in them was not recorded<sup>159</sup>.

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<sup>153</sup> See White S. supra (n 150) 160 and the Administration of Criminal Justice Act of 1846.

<sup>154</sup> White S. supra (n 150) 160.

<sup>155</sup> Supra (n 70) 164.

<sup>156</sup> Cox was a recorder of Helston and Falmouth, from 1857 to 1868. In 1868 he became recorder of Portsmouth, and in 1870 was appointed Chairman of the second court of the Middlesex sessions.

<sup>157</sup> Supra (n 150) 160.

<sup>158</sup> Supra (n 150) 164.

<sup>159</sup> Ibid.

Pre-sentence reports in England have since been governed by statutes and Home Office circulars<sup>160</sup>. Schedule 3 paragraph 8(1) of the Criminal Courts Act of 1973 makes it clear that in accordance with any direction of the court it is the duty of probation officers to inquire into the circumstances or home surroundings of any person with the view to assisting the court in determining the most suitable method of dealing with his case. Section 45 of the said Act provides that the Home Secretary may require that, in certain cases, courts must consider a social inquiry report<sup>161</sup>. For instance, section 2(2) of the Criminal Justice Act of 1982 provides that, in cases where the court considers placing the offender in detention centre or youth custody, a social inquiry report must be considered. The Home Office issues circulars from time to time to guide the courts in the use of pre-sentence reports. By 1988, the probation service in England and Wales was preparing some 250 000 reports per year for courts at all levels<sup>162</sup>.

The old provisions<sup>163</sup> dealing with guidelines at the sentencing stage and presentence reports were changed by the Criminal Justice Act of 1991<sup>164</sup>. All the

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<sup>160</sup> Bottoms A. and Stelman A. Social Inquiry Reports (1988) 2-3.

<sup>161</sup> See Wesson A.M. "Recommendations for sentence in Probation Reports - An argument against" (1986) 150 Justice of the Peace 406.

<sup>162</sup> Waters R. "Race and Criminal Justice Process" (1988) 28 British Journal of Criminology 82, 86.

<sup>163</sup> Criminal Courts Act of 1973, Criminal Justice Act of 1982 and Criminal Justice Act of 1988.

<sup>164</sup> See also Wasik M. and Turner A. "Sentencing Guidelines for the Magistrate Courts" (1993) The Criminal Law Review 345; Stone N. "Pre-sentence Reports, culpability and the 1991 Act: (1992) The Criminal Law Review 558; The Magistrate's Association, Association of Chief Officers of

requirements relating to pre-sentence reports were given a substantial overhaul by the Criminal Justice Act of 1991<sup>165</sup>.

Section 3(5) of the said Act provides that a pre-sentence report is a report in writing which:

- (a) "with a view to assisting the court in determining the most suitable method of dealing with an offender, is made or submitted by a probation officer or by a social worker of a local authority social services department; and
- (b) contains information as to such matters, presented in such manner, as may be prescribed by the Secretary of State."

According to Wasik<sup>166</sup>, reports on those who are over 21 are compiled by probation officers, while reports on children aged under 13 are compiled by local authority social workers. For intermediate ages, responsibility is shared between probation officers and social workers, which vary from area to area<sup>167</sup>. Wassik<sup>168</sup> reports that

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Probation and the Justices' Clerks Society "Community Sentences and Restrictions of Liberty" (1993) 49 The Magistrate 89 and Stone N. "Losing 'Help and Balance': Dispensing with Pre-sentence Reports" The Magistrate 75.

<sup>165</sup> Wasik M. Emmins on Sentencing (1993) 104.

<sup>166</sup> Ibid.

<sup>167</sup> Ibid.

<sup>168</sup> Ibid.

whenever a court requests a report, a copy must be given to the accused or his lawyer. This is done to enable the accused to challenge any controversial matters that might be in the report. In the case of a disputed report, the writer of the report must be called. The Home Office National Standard provides most of the details because the Criminal Justice Act of 1991 gives little information about the form and content of the pre-sentence reports. Because of the requirement that a pre-sentence report must be in writing<sup>169</sup>, it is doubtful whether 'stand-down'<sup>170</sup> inquiries will be allowed. These reports were allowed before the passing of the Criminal Justice Act of 1991.

The Criminal Justice Act of 1991 requires a sentencing court to obtain and consider a pre-sentence report when making a decision whether a custodial sentence is justified. The report should state whether the offence was 'so serious' that only a custodial sentence can be justified<sup>171</sup>. The report is also required where the offence was a violent or sexual one and only a custodial sentence would be adequate to protect the public from serious harm from the offender<sup>172</sup>. The court is also required to take into account 'all such information about the circumstances of the offence, including any aggravating or mitigating factors as is available'<sup>173</sup>.

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<sup>169</sup> Section 3 (5).

<sup>170</sup> 'Stand-down' inquiries are "brief verbal reports" following an interview at court during an adjournment. See Wasik M. *supra* (n 120) 104-105.

<sup>171</sup> Section 1 (2) (a).

<sup>172</sup> Section 1 (2) (b).

<sup>173</sup> Section 3 (3) (a).

Wasik is of the opinion that, 'subject to two qualifications, the obtaining of a pre-sentence report in custody cases and in respect of the more onerous community sentences may be referred to as a mandatory requirement. The first qualification is that section 3(2) of the Criminal Justice Act of 1991 provides that no pre-sentence report needs to be obtained where the offence is triable only on indictment and the Crown court judge takes the view that obtaining one is 'unnecessary'. The second qualification is that, even in those cases where obtaining a report is mandatory, the sentence is not invalidated by the court's failure to obtain one. If the case is taken on appeal, sections 3(4) and 7(4) make provision that the appeal court must obtain and consider the pre-sentence report'<sup>174</sup>.

It is also important to note that the Home Office National Standard requires that reports should be prepared as quickly as possible, should take no more than seven days where the accused has been remanded in custody and should, in any event, normally be completed within four weeks<sup>175</sup>.

Lastly, the Criminal Justice Act of 1991 removes the power of probation officers and social workers to make a recommendation with regard to sentence.

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<sup>174</sup> Wasik M. *supra* (n 120) 106.

<sup>175</sup> Wasik M. *supra* (n 120) 107.

It is clear that, in England and Wales, a pre-sentence report is an essential aid at the sentencing stage<sup>176</sup>. Though, in some instances, the courts are allowed by the Criminal Justice Act of 1991 to dispense with the said report, when an appeal is made, the Act requires that a report be made available<sup>177</sup>. The information contained in the report then assists the court in determining a suitable sentence for the accused.

## 5.2 UNITED STATES OF AMERICA

The development of pre-sentence reports in the United States of America is said to be intimately connected with the rehabilitative model of sentencing<sup>178</sup>. It was premised on the assumption that a sentencing judge, armed with an intimate knowledge of the offender's character and background and aided by scientific and clinical evaluations, can determine an appropriate sentence and treatment program that will rehabilitate the offender<sup>179</sup>.

Pre-sentence reports in America date back to 1841 in Boston, Massachusetts<sup>180</sup>. These reports are associated with John Augustus, who is regarded as the first

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<sup>176</sup> Brayne H. and Martin G. Law for Social Workers (1993) 143.

<sup>177</sup> Wasik M. *supra* (n 120) 49. See also Stone N. "Losing 'Help and Balance': Dispensing with Pre-sentence Reports" (1994) The Magistrate 75.

<sup>178</sup> Fennel S. and Hall W.N. "Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Pre-sentence Reports in Federal Courts" (1980) 93 Harvard Law Review 1621.

<sup>179</sup> Frankel M. Criminal Sentences (1972) 88.

<sup>180</sup> White S. *supra* (n 150) 168.

probation officer<sup>181</sup>. Augustus used to offer security for the release on bail, for a short period, for persons just convicted on their own pleas of guilty. At the end of the period of bail, he would furnish a report about them. If it was favourable, the court, instead of sentencing those persons to imprisonment, would release them on payment of a nominal fine<sup>182</sup>. Augustus used to present at least two reports to the court, the preliminary report in which he indicated to the court his willingness to stand surety for the prisoner and requested the court to release him on bail, and the report provided at the end of the period of bail.

The first federal statute which dealt with pre-sentence reports was passed in 1925<sup>183</sup>. This Act created probation as an alternative to other dispositions and authorised the establishment of probation officers to supervise offenders placed on probation. Judges started using probation officers informally to gather information about the offender's background<sup>184</sup>. The haphazard approach to pre-sentence investigation was standardized in 1946 by the enactment of Federal Rule of Criminal Procedure<sup>185</sup>. The rule required probation officers to prepare reports on every defendant unless the court directed otherwise. Fennell and Hall report that

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<sup>181</sup> Ibid.

<sup>182</sup> White S. *supra* (n 150) 169.

<sup>183</sup> Federal Probation Act of 1925.

<sup>184</sup> Fennell S.A. and Hall W.N. *supra* (n 178) 1963.

<sup>185</sup> Federal Rule of Criminal Procedure 32 (c) (1).

subsequently the pre-sentence report developed into the single most important document at both the sentencing and correctional levels of the criminal process<sup>186</sup>.

A pre-sentence report is regarded as an essential aid at the sentencing stage<sup>187</sup>. According to Fennell and Hall<sup>188</sup>, the pre-sentence report serves two vital functions in the sentencing process. First, because an overwhelming majority of defendants plead guilty and therefore forego trial, the report often substitutes for the trial itself as a mechanism through which facts are found in a criminal case. In such cases, the report is said to provide the sentencing judge with his only knowledge of the offence and the defendant, other than the minimal facts necessary to support the acceptance of a guilty plea. Secondly, the report presents the defendant as a living human being. The report assists the court to know the accused's background, the circumstances surrounding the offence, and many other factors which are relevant in determining a suitable and proper sentence for the accused. In this way, punishment is individualised.

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<sup>186</sup> Ibid.

<sup>187</sup> Kittrie N.N. and Zenoff E.H. Sanctions, Sentencing and Corrections (1981) 66; Merrit F.S. "Defamation - Reference to Third Persons in Pre-sentence Reports" (1983) 19 Criminal Law Bulletin 364; Spica A.R. "Pre-sentence Reports: The Key to Probation Strategy" (1987) 49 Corrections Today 192; Newman D.J. and Anderson P.R. Introduction to Criminal Justice (1989) 375; Senna J.J. and Siegel L.J. Introduction to Criminal Justice (1990) and Robin G.D. and Anson R.H. Introduction to the Criminal Justice System (1990) 349.

<sup>188</sup> Supra (n 178) 1627.

According to Clear<sup>189</sup>, variation exists in whether the report is mandatory or optional. As a general rule, a pre-sentence report is not an automatic part of the sentencing process. Ordinarily, the court must order that a pre-sentence report be prepared. There are three basic legal approaches as to whether a pre-sentence report should be ordered.

- (a) Twenty-three states and the Federal government are reported to have laws stating that a pre-sentence report is mandatory for all or almost all felony offenses. In these jurisdictions, other factors can also require that a report be prepared. Clear states the following as examples of these factors:<sup>190</sup>
  - "i) when incarceration of a year or more is a possible disposition, or
  - ii) when the defendant is under 21, or under 18 years of age, or
  - iii) the defendant is a first offender.
  
- (b) Nine states' statutes make the report mandatory in felony cases when probation is being considered as a disposition. Where it is not being considered, the report is left to the discretion of the court.
  
- (c) In seventeen jurisdictions, ordering a report is entirely up to the discretion of the sentencing court."

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<sup>189</sup> Clear R.T. Offender assessment and evaluation: The Pre-Sentence Investigation report (1988) 173-4.

<sup>190</sup> Ibid.

The remaining jurisdictions (i.e. New Jersey, Connecticut, Pennsylvania, California, Arizona, Texas and the district of Columbia) do not have any specified approach except those provided by the provisions of the Federal Rule 32<sup>191</sup>. Rule 32(c)(3) requires disclosure to the defendant or his counsel, upon request, of the factual sections of the report, subject to certain exceptions<sup>192</sup>. The exceptions to disclosure permit the judge to withhold diagnostic information, information obtained under a promise of confidentiality, and information that could result in harm to the defendant or others<sup>193</sup>. Rule 32(c)(3) also protects administrative interests by not requiring the disclosure of the probation officer's recommendations and by permitting the court to decide whether the parties may obtain or retain copies of the report<sup>194</sup>.

Private reports are allowed in court<sup>195</sup>. These reports can be requested by defence attorneys and completed by a private corporation. After completion, they are given to Federal probation officers as a supplement to their own background

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<sup>191</sup> Ibid.

<sup>192</sup> Fennel S.A. and Hall W.N. supra (n 178) 1634.

<sup>193</sup> Ibid.

<sup>194</sup> Ibid.

<sup>195</sup> Robin G.D. and Anson R.H. supra (n 187) 353; Hoelter H. "The private Presentence Report: Issues for Consideration" (1985) 65 The Prison Journal 53; Dickey W. "The Lawyer and the Accuracy of the Presentence Report" (1979) 43, 2 Federal Probation 28; Kulis C.J. "Profit in the Private Presentence Report" (1983) 47 4 Federal Probation 11.

investigations<sup>196</sup>. Judges are free to consider both reports before passing sentence<sup>197</sup>.

The position in the United States of America depends on which state one finds oneself in. The position is clear in the Federal government and those states which have statutes dealing with pre-sentence reports. Even those states which do not have statutes dealing expressly with pre-sentence reports, do have court rules or administrative policies which help to determine the circumstances under which a report is required<sup>198</sup>. Pre-sentence reports are therefore essential at the sentencing stage in assisting the court in determining a suitable sentence for the accused.

## 6. CONCLUSION

Individualisation of punishment is a well established principle in South Africa. It is submitted that we can only speak of individualised punishment when we have enough information about the accused at the sentencing stage. Pre-sentence reports in our law are not compulsory. Our courts have the discretion to call for a report mero motu or after a request for one has been made by the defence or the prosecution. The defence or prosecution may also submit one to court. Section 274 of the Act is important and our courts should utilise it to call for more reports at the sentencing stage. The manner in which a pre-sentence investigation is

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<sup>196</sup> Robin G.D. and Anson R.H. *supra* (n 187) 353.

<sup>197</sup> Clear R.T. *supra* (n 189) 174.

<sup>198</sup> *Ibid.*

conducted and a report is compiled<sup>199</sup>, makes it possible to cover all the circumstances surrounding the case and the accused as an individual.

When my recommendations are considered below, it should be borne in mind that they are offered without any claim that they are perfect. The use of pre-sentence reports in South Africa still faces many practical obstacles, as has already been shown<sup>200</sup>.

The following are my recommendations:

Even though there are some statutes which expressly require a pre-sentence report, they are not enough. However, the legislature has taken steps in the right direction through the introduction of correctional supervision as a form of punishment. Correctional supervision requires a report before an accused can be sentenced to undergo such punishment. Section 296(1) also provides for a report by a probation officer. It is suggested that legislation be passed which will allow for greater use of reports at the sentencing stage. Of course a report cannot be called for in every case before our courts. Legislation will therefore have to require reports under the following circumstances:

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<sup>199</sup> Jacobs J.J. supra (n 69) and Bennie S.G. "Bevoeghede en Pligte van Proefbeamptes" (1991) Welfare Focus 4.

<sup>200</sup> See text to footnotes 40-48 above.

Where juveniles are involved, a report should be a pre-requisite. No juvenile should appear before our courts without the advantage and assistance of a pre-sentence report. By juvenile I refer to any person of or below the age of 18. People below the age of 18 are usually immature and sometimes appear before our courts without the assistance of a legal representative. The report would serve to inform the court.

Where the court is considering any non-custodial sentence, a pre-sentence report should be a pre-requisite. Courts are there to ensure that justice is done and that society is protected from any harm by criminals. If the court wants to keep the offender within the community, it must try to ensure that the community will be protected. It can ensure this by collecting all the information about the accused and, through this information and the evaluation by the probation officer, determine whether the accused is a suitable candidate for a non-custodial sentence. The report should be a pre-requisite because all the required information will be contained in such a report.

Where the court is considering a long-term imprisonment, a report should be a pre-requisite and discretionary if considering short-term imprisonment. In removing the offender for a long time from the community, the court must have enough information at its disposal to be able to decide suitable sentence under the circumstances. This can be done by the use of the report.

From the above, it should be clear that I recommend a pre-sentence report for almost all offences. Only trivial offences such as parking and related offences are excluded. The passing of such legislation will mean that more probation officers need to be employed by the state. This will also mean a greater burden on the taxpayer, but we should strive for justice, and not convenience. The above suggestions can be implemented only if the practical problems referred to above are solved to some extent. The position in the United Kingdom and the United States of America as outlined above<sup>201</sup> can be of some guidance to the formulation of our legislation.

It is also submitted that, without enough information at the sentencing stage, we cannot speak of proper individualised punishment. We can therefore individualise punishment through the use of pre-sentence reports and let the information contained in them assist our courts to determine different sentences. Our courts cannot individualise punishment by only looking at previous convictions and at what the accused will say in mitigation. The value of information at the sentencing stage has long been acknowledged<sup>202</sup>. It is hoped that the legislature will work towards an improvement of the present situation.

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<sup>201</sup> See text to footnotes 166-175 and 189-197 respectively.

<sup>202</sup> See Viljoen Commission Report No RP 78/1976 paragraph 5.1.5.1.

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## R.

R	1993(1)	SA	476(A)
R	182/1982 (unreported (Bop))		
Rabotapi	1959(3)	SACR	209(A)
Roberts	(1987) 9	Cr App	R(s) 275

## S.

Scheepers	1977(2)	SA	154(A)
Sithole	1979(2)	SA	67(A)
Somers	1994(2)	SACR	401(T)
Swane	1973(3)	SA	601(O)

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**W.**

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W	1995(1)	SACR	610(A)
Wana	1990(2)	SA	877(TK)

**Z.**

Zinn	1969(2)	SA	537(A)
Zonele	1959(3)	SA	319(A)

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TITLE	ACT NO.	YEAR
1. Abuse of Dependence-Producing Substances and Rehabilitation Centres Act.	41	1971
2. Criminal Procedure Act.	51	1977
3. Criminal Procedure Amendment Act.	33	1986
4. Children's Act.	33	1960
5. Drugs and Drug Trafficking.	140	1992
6. Probation Service Act.	116	1991
7. Probation Service Act.	98	1986
8. Constitution of the Republic of South Africa.	200	1993
9. Correctional Services and Supervision Matter Amendment Act.	122	1991
<p><b>COMMISSION OF INQUIRY</b>            Report of the Commission of Inquiry into the penal system of the Republic of South Africa, RP 78 of 1976.</p>		

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