South African Law Reform Commission

DISCUSSION PAPER 164

REVIEW OF THE CRIMINAL JUSTICE SYSTEM: ALTERNATIVE DISPUTE RESOLUTION IN CRIMINAL MATTERS

PRE-TRIAL PROCESSES

PART B

Closing date for comments:
31 March 2025

ISBN: 978-177977-374-0

Date of first publication: 20 February 2025

Table of Contents

INTRODUCTION

The South African Law Reform Commission (SALRC) was established by the South African Law Reform Commission Act 19 of 1973.

The Members of the Commission are:

Justice Chris Jafta (Chairperson)
Professor Wesahl Domingo (Deputy Chairperson)
Prof Karthigasen Govender
Adv JB Skosana
Dr Keneilwe Radebe
Dr Nazreen Shaik-Peremanov
Adv Sejako Joseph Senatle SC
Professor Debbie Collier-Reed
Professor Tshepo Mongalo

The Members of the Advisory Committee for this project are:

Judge Francis Legodi (Project leader)
Mr John Baloyi
Professor Nina Mollema
Dr Thomas Mokoena
Professor Lukas Muntingh
Professor Concetta Lorizzo
Ms Colette Ashton
Ms Matshego Ramagaga

Professor Nina Mollema is the lead on the content after the designated researcher, Ms Theresa Häderli resigned in February 2024.

The Secretary of the SALRC is Mr Nelson Matibe. Enquiries about the investigation should be directed to the Secretary.

Telephone: (012) 622 6306
Email: NMatibe@justice.gov.za

Correspondence should be addressed to:

The Secretary
South African Law Reform Commission
Private Bag X668
PRETORIA 0001

The Commission's offices are located in the Spooral Park Building, 2007 Lenchen Avenue South, Centurion, Gauteng.

This document is available on the website of the SALRC at:
https://www.justice.gov.za/salrc/dpapers.htm

When you heal one Offender
You heal a Family
When you heal many Offenders
You heal a Community
When you heal thousands of Offenders
You heal a Nation!

And in All of this
The Victim Heals Too!

Alternative Dispute Resolution

A Context

1 The science that orders the rules of criminal law and its related constructs centre around theories of punishment used to coerce man, on the threat of pain and suffering, to abstain from conduct which is harmful to the competing interests of society.[1] Generally speaking thus, punishment entails harm inflicted by the executive power of the state on a person judged to have violated a rule of law.[2] The extent to which society is aggrieved is determinative of the degree to which underlying theories of punishment will play a role.[3]

2 In other words, how heavily the justification will be towards retribution and deterrence, tending, as these do, towards exacting vengeance and the need to dissuade the further commission of crimes. This *vis a vis* rehabilitation and reformation, whose approaches correspond with an eye on future consequences, entailing the need to improve the character of the offender so he is less likely to re-offend.[4] These latter more humanistic approaches translating to recognizing the right to human dignity of offenders, balanced against the need for them to take responsibility for abhorrent behaviour to the extent of culpability.

3 Thus evolves criminal law, embedded as it is around these weighty concerns. Not excluding influencers such as population growth; the impact of more rapid and innovative technological advances; accelerated global exchanges and the effect this has had on the growth of more sophisticated crime networks; opportunistic increases in the scourge of

---

1 Burchell J and Milton J *Principles of Criminal Law* 2nd Ed Juta & Co Ltd 2000 2.

2 Oraegbunam Ikenga KE *Some Basic Principles of Penal Jurisprudence: An Analytical Approach* JILI 2010 127 referring to A Fagothey *Right and Reason: Ethics in Theory and Practice* CV Mosby Company USA 1959 371.

3 Oraegbunam Ikenga KE *Some Basic Principles of Penal Jurisprudence: An Analytical Approach* JILI 2010 128.

4 Oraegbunam Ikenga KE *Some Basic Principles of Penal Jurisprudence: An Analytical Approach* JILI 2010 136-143.

gender-based violence, femicide, child abuse, substance and alcohol abuse and rising incidences of post-traumatic stress disorder and other mental illnesses caused by the destructive sweep of the COVID-19 pandemic;[5] and the corroding effects of cross-border control fissures brought about by heightened geopolitical merging.

4 In the context of South Africa still, must be added the role played by the former government in its pursuit of policies of racial discrimination that sought to maintain a separatist regime heavily reliant on state sanctioned violence; over-criminalisation and the ready resort to criminal prosecutions and imprisonment[6] of persons of colour as a way of perpetuating injustice and inequality, together with the debilitating impact this has had on what can now be described as a functionally disintegrated society.

5 A brief historical survey will show, in this regard that-[7]

(a) in the early 1900's, the prison system maintained an already inflated inmate population due mainly to pass laws transgressions and the fact that prison labour could be outsourced to mining companies at very low rates;

(b) despite warnings of the Landsdowne Commission on Penal and Prison Reform of 1945 that attempts to organise the prison system along military lines operated out of sync with international practices creating the possibility of working against certain rehabilitative influences, the state went ahead, through legislation, to entrench a military-like character over the prison system;

---

5 Republic of South Africa Department of Social Development *Annual Report for the year ended 31 March 2021* Part A Foreword by Honourable Minister Lindiwe Zulu MP 8.

6 Burchell J and Milton J *Principles of Criminal Law* 2nd Ed Juta & Co Ltd 2000 19-23.

7 Department of Correctional Services *White Paper on Corrections in South Africa* 2005 26-29.

(c) despite the Landsdowne Commission's recommendation that the state put an end to the outsourcing of prison labour to farmers, the practice continued unabated;

(d) as a way of controlling political unrest, changes brought about during the 1960's saw detention of political prisoners become increasingly common;

(e) despite the findings of the 1984 Judicial Inquiry into the Structure and Functioning of the Courts to the effect that using incarceration as an influx control measure was a major contributor to prison overcrowding, prisons remained overcrowded places of security absent of any significant emphasis on rehabilitation; and

(f) whilst the late 1990's saw the introduction of a more cost-effective way of dealing with certain offenders through non-custodial correctional supervision, the prison population remained bloated with awaiting-trial detainees, a remnant of a legacy described as a single custodial mandate.

6 With specific reference to **over-criminalisation**, it has been said that-[8]

(a) the social stigma attached to a criminal conviction and the resultant hardship created by a criminal record gives rise to a number of personal and social consequences, the harm of which is likely to outweigh the effects of the prohibited conduct. Operating like a two-edged sword, over-criminalisation has the tendency to water down the moral authority of the state. In this regard, Packer[9] argues that-

---

8 Burchell J and Milton J *Principles of Criminal Law* 2nd Ed Juta & Co Ltd 2000 31-33.

9 Burchell J and Milton J Principles of Criminal Law 2nd Ed Juta & Co Ltd 2000 32 referring to HL Packer *The Limits of the Criminal Sanction* (1969) at 250.

> The criminal sanction is the law's ultimate threat. …. The sanction is at once uniquely coercive and, in the broadest sense, uniquely expensive. **It should be reserved for what really matters**.;
>
> (Emphasis added)

(b) it has a cost-impact on the criminal justice system. In other words, the more crimes there are, the more criminals are arrested, prosecuted and imprisoned, and if this is the case, the more personnel will be required to maintain the system. If the cost/benefit analysis produces a negative result, surely this undercuts justification?;

(c) the criminalisation of goods and services for which there is a public demand (alcohol, drugs, sex, gambling, *etcetera*) tends to limit availability, thus creating a demand for which some may be willing to pay a premium, in some instances going to the extent of committing other crimes. The black market so created encourages criminals to organise ways of meeting demands, placing untold pressure on law enforcement agency resources; and

(d) over-criminalisation clogs the court machinery, leading to the possibility of selective and arbitrary enforcement and a general decline in the effectiveness of the criminal justice system as a whole.

7 Whilst South Africa's transition into a constitutional democracy saw the introduction of a human rights culture with changes in strategic direction requiring the prison system to ensure that incarceration entailed safe and secure custody under humane conditions, immediate post-1994 transformation saw the system still heavily focussed on safe custody.

8 In response to the aforementioned challenges, the National Crime Prevention Strategy approved by Cabinet in 1996 adopted an Integrated Justice System approach aimed at-[10]

(a) increasing the efficiency and effectiveness of the criminal justice system as a way of deterring crime;

(b) improving access of vulnerable groups, including women and children, to the criminal justice system;

(c) directing resources towards priority crimes; and

(d) creating a more victim-centric society.

9 The national programmes identified under Pillar 1 entailed-[11]

(a) re-engineering criminal justice processes;

(b) making provision for a **diversion programme** for 'minor offenders'.[12] It was noted, in this regard, that the maintenance of an optimally functioning criminal justice system was costly and often proved inappropriate for dealing with 'petty offenders', particularly juveniles, with the potential for stigmatisation, creating an unacceptable burden on the path to responsible

---

[10] Department of Correctional Services *White Paper on Corrections in South Africa* 2005 29.

[11] Department of Correctional Services *White Paper on Corrections in South Africa* 2005 29.

[12] At first glance, the term 'minor offenders' may give the impression that it is intended to apply to minors. However, a focussed reading shows that it applies in relation to 'offenders who commit minor offences'.

adulthood. The idea was to divert petty offenders and juveniles out of the criminal justice system;

(c) making provision for appropriate forms of community sentencing, on the argument that the imposition of custodial sentences for minor offenders reduces the likelihood of their integration back into society, increases the likelihood of re-offending and further burdens the criminal justice system;

(d) providing for a system of secure care for juveniles. It was argued in this regard that youthful offenders suspected of having committed serious offences should not be held in standard prisons or police cells but rather in a secure environment that limited unnecessary trauma and strengthened the likelihood of reintegration into society; and

(e) providing for a victim empowerment programme.

10 Thirty years into what can no longer be described as a fledgling democracy, the criminal justice system continues to be plagued by a number of inefficiencies and challenges, one such being prison overcrowding due, amongst other reasons, to high incarceration rates; the introduction of minimum sentences for particular categories of serious crimes; trends in South Africa towards the commission of serious violent crimes and economic offences and the inappropriate accommodation of awaiting-trial detainees in correctional facilities.

11 So despite efforts at transformation spearheaded by various agencies, the police system remains besieged; the prosecuting system harried, the judicial system overworked and the prison system overextended as the state battles to prosecute and punish criminal behaviour, often yielding to hard-line undertakings to ‘punish at all costs’ on the promise of ‘zero-tolerance.’

12 As a way of facing these challenges head-on in this mostly adversarial system of law, itself polluted with shortcomings pointing to a heavy reliance on technical and complex language; convoluted pleadings; complex processes and protracted

proceedings, the Criminal Procedure Act, 1977[13] (Criminal Procedure Act) was used as a vehicle to put in place of host of amendments in what turned out to be a unsatisfactorily piecemeal effort.

B Basis for reform

13 Based on this, the Minister of Justice and Correctional Services (Minister) called upon the SA Law Reform Commission (Commission) to conduct a wholesale review and overhaul of the South African criminal justice system in a way that holistically, innovatively and in a transformative manner works to promote the values of human dignity, the achievement of equality and the advancement of human rights and freedoms.

14 The deliverable is a new Criminal Procedure Act, together with possible amendments to related legislation, including the Correctional Services Act, 1959[14] (Correctional Services Act) and Probation Services Act, 1991[15] (Probation Services Act).

15 In line with Commission deliberative processes, the question now arising is **why**, if this is the case, **an attempt was never made to incorporate the principles of alternative dispute resolution (ADR) into the criminal justice process** as a way of addressing some of these ongoing challenges.

C Current law

16 In response to the question, a review of the current law pertaining to ADR is required.

---

13 Criminal Procedure Act 51 of 1977.

14 Correctional Services Act 111 of 1998.

15 Probation Services Act 116 of 1991.

17 It must be noted, in this regard, that the South African legal system does not make provision for the coherent and unified regulation of **ADR in criminal matters**, a concept which, in foreign jurisdictions may be referred to in a number of ways, including discretionary prosecution, waiver of prosecution and **out of court settlements**.

18 A number of enactments do regulate various aspects of ADR in criminal law in a topic-specific way, either as sections in a particular enactment or in a piece of legislation but never with reference to co-ordinated regulation in a harmonised way.

19 In effect, what this means is that ADR's importance has been **relegated**, mostly on the notion that it is **inappropriate to the exigencies of criminal law**.

20 Surely this is not the case, since sections 34 and 12(1) of the Constitution of the Republic of South Africa, 1994 (Constitution) provide that-

> Section 34: Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, **another independent and impartial tribunal or forum**; and
>
> (Emphasis added)

> Section 12(1): Everyone has the right to freedom and security of the person, which includes the right—
>
> (a) not to be deprived of freedom arbitrarily or without just cause

21 Surely, further still-

(a) the decision to **withdraw** a prosecution,[16] provided for in section

---

16 Section 6 of the Criminal Procedure Act provides as follows:

Section 6: Power to withdraw charge or stop prosecution

An attorney-general or any person conducting a prosecution at the instance of the State

6(a) of the National Prosecuting Authority Act, 1998[17] (National Prosecuting Authority Act), once accompanied by a set of **conditions**, amounts a redirection of criminal matters away from the courts, thus entailing a specific form of ADR;

(b) international practice, together with its emphasis on changing trends towards punishment, has placed a re-energised focus on the benefits of rehabilitation;

(c) international practise encourages and, in some instances, has even institutionalised the use of ADR, in a movement which began as far back as the 1970's and 1980's in the United States in response to a need to find more efficient and effective alternatives to litigation;[18]

(d) international practice has spearheaded advances into the arena of restorative justice, entailing application of an innovate set of principles working in harmony with ADR to produce the best possible outcome for the resolution of disputes; and

---

or any body or person conducting a prosecution under section 8, may

(a) **before** an accused **pleads** to a charge, **withdraw** that charge, …;

(b) at any time **after** an accused **has pleaded**, but **before conviction**, **stop** the prosecution in respect of that charge, in which event the court trying the accused shall **acquit the accused** in respect of that charge:….

(Emphasis added)

17 National Prosecuting Act 32 of 1998.

18 Imiera PP *Integrating Alternative Dispute Resolution into South African Criminal Jurisprudence: An Urgent Need for Law Reforms* Politeia Vol 38 (2) February 2020 3 referring to Yona Shamir *Alternative Dispute Resolution Approaches and Their Application* 2003 https://unesdoc.unesco.org/ark:/48223/pf0000133287 and Wenona Victor *Alternative Dispute Resolution (ADR) in Aboriginal Contexts: A Critical Review* Ontaria Canadian Human Rights Commission.

(e) implementation plans[19] put in place for the elimination of impediments having a deleterious effect on the optimal functioning of the criminal justice system have recognised the need for the provision of diversion programmes for minor offences in instances where it is considered inappropriate to deal with them through the criminal justice system.

22 The reticence towards placing reliance on ADR makes it easy to understand why, since traditional theories of criminal justice have, to a large extent, viewed criminal offending as a matter of conflict between the offender and the state, requiring settlement through the instrumentality of the more Western-oriented court system.

23 This has had the effect not only of relegating the rights of victims, but also the more intuitive systems of indigenous law and ADR that see crime as a form of social conflict requiring deep engagement with community mores and practices for resolution.[20]

24 Thus a general dissatisfaction with these Western adversarial methods of dispute resolution has been bred, seen, for the most part, as failing to reduce rates of recidivism, in some instances increasing the possibility of re-offending for particular groups, including the youth and indigenous populations.[21]

---

19 National Crime Prevention Strategy, 1996.

20 Imiera PP *Integrating Alternative Dispute Resolution into South African Criminal Jurisprudence: An Urgent Need for Law Reforms* Politeia Vol 38 (2) February 2020 2 also referring to R Sarre and J Tomaini *Key Issues in Criminal Justice* eds 2004 Adelaide Australian Humanities Press 144-145 and M Lewis and L McCrimmon *The Role of ADR processes in the Criminal Justice System: A View from Australia* Paper presented at ALREASA Conference Entebbe Uganda September 2005.

21 Imiera PP *Integrating Alternative Dispute Resolution into South African Criminal Jurisprudence: An Urgent Need for Law Reforms* Politeia Vol 38 (2) February 2020 2 referring to S Kift *Victims and Offenders: Beyond the Mediation Paradigm?* 1996 Australian Dispute Resolution Journal 71 and M Lewis and L McCrimmon *The Role of ADR processes in the Criminal Justice System: A View from Australia* Paper presented at ALREASA Conference Entebbe Uganda September 2005.

25 According to Christie-[22]

> Conflicts become the property of lawyers and formal legal processes rob individuals of the right to full participation in the dispute resolution process.

26 Working hand in hand with the principles of ADR, an idea now gaining ground is that a criminal offence represents more than just a violation of state proscriptions, also entailing a community conflict requiring resolution between both victims of crime and offenders.[23] Reacting to what is considered to be an overly harsh criminal justice system neither able to effectively deter crime nor rehabilitate offenders, the **restorative justice movement** was born in the 1970's, championed by a host of practitioners in the various disciplines.

27 Articulated as a process where offenders can meet face to face with their victims in order to **take responsibility for their wrongs** in a supported and structured environment that includes family and community members, the principle embodies four R's: **reparation** (taking responsibility for and explicating the root cause of the problem); **restoration** (making an apology), **reconciliation** (seeking forgiveness and offering to make restitution for losses suffered) and **reintegration** back into the fold of the community).[24]

---

[22] Imiera PP *Integrating Alternative Dispute Resolution into South African Criminal Jurisprudence: An Urgent Need for Law Reforms* Politeia Vol 38 (2) February 2020 3 referring to N Christie *Conflicts as Property* 1977 British Journal of Criminology 17(1) 4.

[23] Imiera PP *Integrating Alternative Dispute Resolution into South African Criminal Jurisprudence: An Urgent Need for Law Reforms* Politeia Vol 38 (2) February 2020 3 referring to M Lewis and L McCrimmon *The Role of ADR processes in the Criminal Justice System: A View from Australia* Paper presented at ALREASA Conference Entebbe Uganda September 2005.

[24] Menkel-Meadow Carrie *Restorative Justice: What Is It and Does It Work?* Annu Rev Law Soc Sci 2007 3:10.1-10.27 at 10.2-10.3.

28 In its more grounded form, restorative justice was often seen as supplemental and not substitutive of conventional criminal proceedings and used more often than not in what was viewed as limited impact, interpersonal wrongs such as thefts; assaults; drug-and-alcohol related offences and matters involving family discord.

29 It has now been adapted to cases involving murder, rape, genocide and other serious transgressions against large groups in society[25] and whilst initially developed as a tool of social reform on a domestic level (in countries like New Zealand, Australia, Canada and United States of America), has attracted world-wide interest in the 1999's when its principles were used as a mechanism for healing and reconciliation by the South African Truth and Reconciliation Commission led by Archbishop Desmond Tutu as the country transitioned from a politically divided country into a just and democratic society.[26]
As an ideology, it is clear to see how restorative justice is able to engender support across board, aiming as it does to foster reform in the criminal justice arena through personalised treatment, compassion and understanding of the plight of socially disadvantaged offenders on the one hand, yet still seek to ensure offender accountability and the making of restitution for harms suffered.[27]

---

25 Menkel-Meadow Carrie *Restorative Justice: What Is It and Does It Work?* Annu Rev Law Soc Sci 2007 3:10.1-10.27 at 10.3 referring to MS Umbreit RB Coates and B Vos *Victim offender mediation: evidence-based practice over three decades* in The Handbook of Dispute Resolution ed ML Moffitt *et al* 2005 455-470 San Francisco: Jossey-Bass and I Wellikoff *Victim offender mediation and violent crimes: on the way to justice* 2004 Cardozo Online J Confli Resolut 5:2.

26 Menkel-Meadow Carrie *Restorative Justice: What Is It and Does It Work?* Annu Rev Law Soc Sci 2007 3:10.1-10.27 at 10.5 referring to R Barnett *Restitution: a new paradigm of criminal justice?* 1977 Ethics 87: 279-301. According to Menkel-Meadow, on a large scale, a properly working system of restorative justice is able to enhance participatory and deliberative democracy, promoting community building, political legitimacy and the development of new social and legal norms.

27 Menkel-Meadow Carrie *Restorative Justice: What Is It and Does It Work?* Annu Rev Law Soc Sci 2007 3:10 1-10.27 at 10.5. On a large scale, a properly working system of restorative justice is able to enhance participatory and deliberative democracy, promoting community building, political legitimacy and the development of new social and legal norms.

30 For in truth, especially in the context of South Africa-

> … a sober analysis, … drives home the reality that the vast majority of our offenders come from communities and families plagued by poverty, hunger, unemployment, absent figures of authority and care, a distorted value system, and general hardship – some of the very factors directly associated with (dysfunctional) families and communities.[28]

31 In attempting to define ADR thus, the related disciplines of **rehabilitation** and **restorative justice**, whilst imbued with their own identifiable markers, should not be viewed as disparate concepts. Whilst the narrower concept of rehabilitation is meant to achieve certain criminogenic outcomes geared towards social responsibility and social justice through humanist interventions that seek to change behavioural attitudes following the imposition of punishment, of necessity, it requires the employment of ADR mechanisms to put in motion the desired outcomes, enhanced by the more expansive principles of restorative justice.

32 Proceeding on the basis that in the same way that incarceration should not be treated as the only sentencing option,[29] the criminal justice system should not be regarded as the only route for meting out justice separate of the beneficial effects of indigenous and more integrative mechanisms that apply ADR, flavoured in sentiments of *Ubuntu* and restorative justice.

---

[28] Department of Correctional Services *White Paper on Corrections in South Africa* 2005 35.

[29] Department of Correctional Services *White Paper on Corrections in South Africa* 2005 49.

D Addressing problems with the current law

1 Background

33 The question now arising is **under what circumstances** this simple, inclusive, cost-effective and consensus-seeking process can be applied-

(a) in order to reach meaningful, people-centered solutions that enhance access to justice in a timely fashion; and

(b) as a way of re-directing cases away from the criminal justice system.

34 Before considering the question, a general **understanding of ADR** is necessary.

35 In its classical formulation, it takes on various forms, including negotiation,[30] facilitation,[31] conciliation[32] and mediation.[33]

---

[30] A process wherein parties to a dispute discuss possible outcomes directly with each other; making proposals, demands and arguments until either a solution is reached or an impasse declared (Imiera PP *Integrating Alternative Dispute Resolution into South African Criminal Jurisprudence: An Urgent Need for Law Reforms* Politeia Vol 38 (2) February 2020 4 referring to SB Goldberg, FEA Sander and NA Rogers *Dispute Resolution: Negotiation, Mediation and Other Processes* Vol 1 1992 2nd ed Little, Brown & Co Boston)

[31] The process whereby a third party, without getting involved in the issues, brokers peace between parties to a dispute in order to get them to reach consensus (Imiera PP *Integrating Alternative Dispute Resolution into South African Criminal Jurisprudence: An Urgent Need for Law Reforms* Politeia Vol 38 (2) February 2020 5-6).

[32] The process where a third party makes active arrangements to bring parties to a dispute together with the aim of getting them to reach consensus, by, amongst other things, assisting with agenda-setting, record keeping and other administrative matters (Imiera PP *Integrating Alternative Dispute Resolution into South African Criminal Jurisprudence: An Urgent Need for Law Reforms* Politeia Vol 38 (2) February 2020 5).

[33] A process whereby a neutral third party brings parties to a dispute together in an effort

36 Whilst it may take on a slightly different character more suited to the exigencies of criminal law in relation to criminal matters together with accompanying differences in nomenclature, it is evident that the classic formulations still hold sway in the unfolding of these somewhat specialised processes, encompassing resolutions of the following kind:

(a) ADR in police matters;

(b) **pre-trial interventions**, entailing the resolution of disputes outside the criminal justice system, dealt with through the following mediums:

(i) admission of guilt fines regulated in terms of sections 57 and 57(A) of the Criminal Procedure Act;

(ii) the conditional withdrawal of a prosecution, in what, for the purpose of delineating outcomes, may be viewed as an out of court settlement;

(iii) the diversion of matters involving children in conflict with the law, dealt with primarily in terms of the Child Justice Act, 2008[34] (Child Justice Act);

(iv) adult diversions;

---

to reach a mutually acceptable resolution, more appropriately used in disputes between family members, the community and business partners **intended to create the foundation for resumption of fractured relationships** (Imiera PP *Integrating Alternative Dispute Resolution into South African Criminal Jurisprudence: An Urgent Need for Law Reforms* Politeia Vol 38 (2) February 2020 4 referring to Yona Shamir *Alternative Dispute Resolution Approaches and their Application* 2003 https://unesdoc.unesco.org/ark:48223/pf0000133287).

[34] Child Justice Act 75 of 2008.

(v) committals to treatment centres provided for in the Prevention of and Treatment for Substance Abuse Act, 2008[35] (Substance Abuse Act), read together with section 255 of the Criminal Procedure Act; and

(vi) enquiries conducted in relation to mental capacity and the defences of mental illness and automatism, regulated in sections 77 to 79 of the Criminal Procedure Act, read together with the Mental Health Act, 2002;[36]

(c) resolutions dealt with through the trial court:

(i) deferred prosecution agreements; and

(ii) plea and sentence agreements; and

(d) **post-trial** resolutions:

(i) correctional supervision regulated in section 276(h) of the Criminal Procedure Act and conversion of imprisonment into correctional supervision, section 276A of the Criminal Procedure Act read together with the Correctional Services Act; and

(ii) postponement or suspension of sentence provided for in section 297 of the Criminal Procedure Act-

(ii)(a) suspending in whole or in part the operation of a sentence;

---

35 Prevention of and Treatment for Substance Abuse Act 70 of 2008.

36 Mental Health Act 17 of 2002.

(ii)(b) effecting a discharge accompanied by a caution or reprimand, having the effect of an acquittal, except that the conviction will be recorded as a previous conviction;

(ii)(c) unconditionally postponing passing of a sentence; and

(ii)(d) conditionally postponing passing of a sentence, the conditions of which are embedded in principles of restorative justice, including providing for the performance of community service and submission to correctional supervision. Where an accused has complied with the conditions, he/she is discharged without the passing of sentence, such discharge having the effect of an acquittal, except that the conviction will be recorded as a previous conviction, attracting thus, a criminal record.

37 It would be remiss to think that any of the above processes could be applied without resort to the all-encompassing principles of restorative justice.

2 Scope of investigation

38 This investigation is centred on **pre-trial processes**, delving, in the main, into the application of **ADR** in its various forms.

39 Due to time constraints, not all pre-trial ADR processes will be looked into at this stage.

40 To this end, the Commission does not intend dealing with-

(a) ADR in police matters: Briefly, what can be said about police ADR is that not all incidences reported for investigation result in formal criminal

charges and in this regard, the application of ADR in what may commonly be referred to as interparty disputes by police officers is well known. What the current position is regarding its application is an issue that may well require looking into based on rising gender-based violence and femicide statistics. The South African Police Service (SAPS) has, in recent years, been severely criticized for decisions to close dockets following employment of what can best be described 'informal' ADR in domestic violence disputes; and

(b) committals for treatment provided for in the Substance Abuse Act, sections 77 to 79 of the Criminal Procedure Act and the Mental Health Care Act: these issues, sometimes operating hand in hand in what is usually referred to in South Africa as dual diagnosis cases, will, for practical reasons, be dealt with together in a forthcoming investigation.

41 Post –trial resolutions are, by definition, matters not entailing redirection proper, since they result in criminal convictions and corresponding criminal records.[37]

3 Synopsis of different processes

42 As an aside, use is made of certain terminology with caution based on nomenclature and process differences in the different jurisdictions, in turn creating a minefield for misapplication.

43 For this reason, the Commission has steered away from use of the following terms for the purposes of application in South African criminal law:

---

[37] See also Mujuzi Jamil DDamulira *Diversion in the South African criminal justice system: Emerging jurisprudence* SACJ (2015) (1) 53-56.

(a) 'out of court settlements': the term is overly broad and at best should preferably be referred to as a **conditional withdrawal of prosecution**[38] since it can also be applied to refer to policies of diversion;

(b) 'diversion' (used as a noun) of matters away from the criminal justice system: has a technical meaning applicable in respect of a **particular** pre-trial process. The act of channelling a matter away from the criminal courts, referred to in many instances as diversion (used as a verb), whilst not incorrect, is best described as **redirecting** matters away from the criminal justice system. The general tendency in literature to employ the term diversion indiscriminately has the potential to create confusion. For example, the act of entering into a deferred prosecution agreement has often been described as a process of diversion; and

(c) the distinction between the terms '**withdrawal**' and '**stopping**' in relation to criminal prosecutions must be rigorously maintained since they have distinct meanings in South African criminal law.

44 A discussion of the different forms of pre-trial ADR can only be enhanced by way of reference to the policy framework within which the principles are required to operate. To this end, a Committee of Ministers of Member States of the Council of Europe adopted a report[39] recommending introduction of a policy of discretionary prosecution for the regulation of minor and more serious offences.

---

[38] An **unconditional** withdrawal of a prosecution may be treated as a withdrawal simple, accompanied more often than not by a simple warning.

[39] Council of Europe *The simplification of criminal justice* (1988) Recommendation R(87)18 Strasbourg referred to in South African Law Commission Project 73: Sixth Interim Report: *Simplification of Criminal Procedure: Out of Court Settlements* August 2002 6-7 and 18-29.

45 Pertinent for consideration in the context of South Africa are the following recommendations, read together with practices applied in a number of jurisdictions, including Germany, Denmark, France and United States of America:[40]

(a) all pre-trial ADR processes including a **conditional withdrawal of a prosecution** and diversion would do well to have regard to the following factors before considering whether or not to have regard to pre-trial ADR processes, the categories of offences of which will benefit by being determined by the law upfront:

(i) the nature, seriousness, surrounding circumstances and impact of an offence;

(ii) the public interest (impact on public order and morale);

(iii) the impact of the offence (economic impact, the likely cost of the prosecution and the presence of previous convictions);

(iv) the likely sentence a court would impose;

(v) the possible effects of conviction on an offender; and

(vi) the impact of the offence on the victim;

(b) pivotal to considering whether to initiate a conditional withdrawal of prosecution is the **simplification** and **acceleration** of the criminal justice process without undermining the rule of law and the basic standards of fairness and justice and in this regard, the consideration of **summary**

---

[40] The Commission was assisted (through GTZ: German Agency for Technical Co-Operation), by Professor Hans-Jörg Albrecht of the Max Planck Institute of Foreign International Criminal Law in Freiburg, Germany in preparing a report on the out of court practices adopted in Europe.

processes that produce the stated outcomes in appropriate cases are ideal;

(c) conditions forming part of any pre-trial ADR agreement must be commensurate with the gravity of an offence, and may include, but not be limited to-

(i) rules of conduct expected of an offender with reference to future behaviour;

(ii) the restitution of goods obtained *via* the commission of the offence;

(iii) the payment of reparation, to be made into a particular public fund, for example, a Victim's Fund;

(iv) the payment of full or appropriate victim compensation;

(v) the carrying out of voluntary public service programmes, for example, community service; and

(vi) attending a particular rehabilitative programme or therapeutic services (including a drug rehabilitation programme, a programme offering cognitive behavioural therapy, *etcetera*);

(d) no pre-trial ADR agreement is valid without an offenders acceptance of the terms thereof, failing which, prosecution must follow. Such acceptance must be informed and freely given. As a precaution to offenders, a formal admission of guilt requires prosecution and can no longer fall to be dealt with under the auspices of pre-trial ADR. No agreement should infringe on an offender's right to have his matter taken to trial; and

(e) once an offender has complied with all obligations set out in a pre-trial ADR agreement, this precludes prosecution on the same facts. None of the processes thus, attract criminal convictions.

(a) Admission of guilt fines

TABLE 1			
Intervention type		**Circumstances under which applied**	**Effect**
Admission of guilt fines			
1.	Admission of guilt **without appearance in court** SECTION 57 OF CRIMINAL PROCEDURE ACT	**Circumstances under which admission of guilt fines operate** • A written notice to appear in court is issued in terms of section 56 to an accused in relation to an offence, under circumstances where a peace officer, on reasonable grounds believes that a conviction will not result in a fine exceeding a *Gazetted* amount- o such written notice endorsed so as to provide for an admission of guilt; o details of the stipulated fine; o the date before which such fine is payable; o the amount of which can be reduced by a public prosecutor on good cause shown; o without an accused having to appear in court; alternatively • Summons issued in terms of section 54, under circumstances where a public prosecutor/clerk of court, on reasonable grounds believes that a conviction will not result in fine a exceeding a *Gazetted* amount o such summons endorsed so as to provide for an admission of guilt; o details of the stipulated fine;	• An accused is deemed to have been convicted and sentenced by a court • Such accused is therefore saddled with a criminal record

		○ the date before which such fine is to be paid; ○ the amount of which can be reduced by a public prosecutor on good cause shown; ○ without an having to appear in court	
2.	Admission of guilt **after appearing in court** SECTION 57A OF CRIMINAL PROCEDURE ACT	• An accused has already appeared in court and- ○ is either in custody awaiting trial on a particular charge and not another more serious offence; ○ has been released on bail in terms of sections 59 or 60; or ○ has been released on warning under section 72 • A public prosecutor may- ○ before such accused enters a plea; ○ under circumstances where such public prosecutor, on reasonable grounds believes that conviction will not result in a fine exceeding a *Gazetted* amount; ○ hand such accused a written notice/cause such written notice to be delivered by a peace officer; ○ endorsed so as to provide for an admission of guilt; ○ details of the stipulated fine; ○ the date before which such fine must be paid; ○ the amount of which can be reduced by such public prosecutor on good cause	• An accused is deemed to have been convicted and sentenced by a court • Such accused is therefore saddled with a criminal record

		shown; ○ without the accused having to appear in court	

46 Admission of guilt fines and pre-trial ADR are strange bedfellows, the former of which provides for-

(a) an **admission of guilt**;

(b) the payment of a **fine**; and

(c) a deeming provision, to the effect that an offender has been **convicted** and **sentenced**.

47 The question arising is why, if the employment of pre-trial ADR is meant to redirect criminal cases away from the courts by submitting them to processes capable of being finalised expeditiously in support of abbreviated and cost-effective processes shouldn't this regime be considered for the purpose of reform, since this net effect is to saddle an accused person with a criminal record.

(i) Proposals for law reform

48 Having regard to the afore-going discussion, the Commission proposes aligning the admission of guilt fines regime so that it works in synergy with the overarching principles of pre-trial ADR.

49 To this end therefore, a proposal is made for amendment of the regime by removing all penalty provisions.

50 To ensure that related principles of pre-trial ADR (embodying, as it does, those of restorative justice), apply with equanimity, no reason exists not to include additional conditions over and above the payment of **reparation,**[41] for example, by providing for participation of an offender into a community service programme.

---

[41] As opposed to providing for the payment of a fine.

51 Caution would need to be exercised in order to ensure that the regime retains its simple and unabbreviated format so that it is not burdened with complicated conditions and processes.

Questions

a) Should the admission of guilt regime be aligned so that it works in synergy with the overarching principles of ADR to the extent that it does not attract the penalty of conviction and sentence and the attendant criminal record?

b) What offences should such admission of guilt regime cover or not cover?

Respondents are requested to comment on the proposal, giving full reasons for their stance, together with suggestions for alternative options, where applicable.

(b) Diversion effected in terms of Child Justice Act

TABLE 2			
	Intervention type	**Circumstances under which applied**	**Effect**
		Diversion	
1.	Diversion of children[42] **PROJECT 106 REPORT ON JUVENILE JUSTICE JULY 2000** CHILD JUSTICE ACT	**Background** • The Child Justice Act provides for the establishment of a criminal justice system for children in conflict with the law by creating, in line with two central features, the possibility of **diverting** matters involving children who have committed offences away from the criminal justice system heavily centred on principles of **restorative justice** utilising procedures provided for in Chapters 6 to 8, amongst other things, aimed at-	• Failure to comply with a diversion order results in a warrant of arrest being issued for the purposes of establishing reasons for non-compliance and the possibility of the matter being referred to trial.[43]

---

[42] This topic was subject to a previous Commission investigation: South African Law Commission Project 106 *Report on Juvenile Justice* July 2000. Following ratification of the United Nations Convention on the Rights of the Child in 1995, the Commission was requested to undertake an investigation into juvenile justice and to make recommendations for reform of this area of the law. It was proposed that a separate Bill should be drafted to provide for a cohesive set of procedures for the management of cases dealing with children accused of committing crimes. At the conclusion of the Commission's investigation, a draft Bill was developed encapsulating a new system to cover all actions concerning the child from the moment of commission of an offence through to sentencing. The Bill resulted in promulgation of the Child Justice Act which came into effect on 1 April 2010.

[43] In a Children's Court.

		○ dealing with a child outside of the formal criminal justice system in appropriate cases; encouraging the child to be accountable for the harm caused by him or her; ○ promoting the reintegration of the child into his or her family and community; ○ providing the opportunity to those affected by the harm to express their views on its impact; ○ encouraging the rendering to the victim of some symbolic benefit or the delivery of some object as compensation for the harm; ○ promoting reconciliation between the child and the person or community affected by the harm caused by the child; and ○ preventing stigmatising the child and the adverse consequences flowing from being subjected to the criminal justice system. • The Child Justice Act makes provision for two types of diversions: diversions by prosecutors in respect of Schedule 1 offences and diversions in respect of Schedules 2 and 3 offences made after a preliminary inquiries. • Any information pertaining to a child acquired at any stage of the diversion process, obtained, amongst other things, through the conducting an assessment or at preliminary hearing, is confidential and is inadmissible as evidence at any bail application, plea, trial or sentencing proceedings in which a child appears. **Prosecutorial Diversions: Diversions in respect of the commission of Schedule 1 minor offences provided for in Chapter 6** • A prosecutor may divert a matter regarding a child alleged to committed a Schedule 1 minor offence including-	• In terms of section 59(1), if a diversion order has been successfully complied with, a prosecution on the same facts may not be instituted, negating the question of attracting a criminal record and thus a previous conviction. Neither does the question of a private prosecution arise.

		○ theft (where the amount does not exceed R2 500-00); ○ fraud (where the amount does not exceed R2 500-00); ○ malicious injury to property (where the amount involved does not exceed R1 500-00); ○ common assault (excluding grievous bodily harm); ○ perjury; contempt of court; trespass; public indecency; ○ offences under any law relating to the illicit possession of dependence-producing drugs (where the quantity does not exceed R500-00); ○ bestiality, statutory rape and statutory sexual assault; • The prosecutor may only consider diversion if the following factors are present: ○ the child acknowledges responsibility for the offence; ○ the child has not been unduly influenced to acknowledge responsibility; ○ there is a *prima facie* case against the child; and ○ the child (and if available, the parent/adult/guardian) consents to the diversion. • The prosecutor may dispense with an assessment if it is in the best interests of the child (the reasons therefore must be entered on the record of proceedings by the magistrate in chambers before whom the diversion option is being made an order of court) • In taking a decision to divert, the prosecutor must take into account whether the child has a record of previous diversions. This does not preclude a new diversion from taking place, even in instances where a previous conviction is established, if such a child is able to benefit from a proposed programme.	

		• Once a decision is taken by a prosecutor to divert a matter under this Chapter, the diversion option selected must be made an order of court by a magistrate in chambers. • If a prosecutor decides not to divert a matter, arrangements must be made for the child to appear before a preliminary enquiry, the latter of which can only take place after an assessment of a child has been conducted. **Conducting of assessment by probation officer** • The main purposes of the **assessment** (conducted by a probation officer appointed in terms of the Probation Services Act, which assessment must take place within 48 hours of a child being arrested and before appearance before a preliminary enquiry) is to- o gather information relating to previous convictions, previous diversions and pending charges; o formulate recommendations concerning release of the child (if in detention), detention or placement; and o establish prospects for diversion. • Amongst other things, a probation officer must enquire from the child whether he acknowledges responsibility for the offence. • The assessment report completed by the probation officer may make recommendations-	

		○ on the appropriateness of diversion, including information on a service provider and a diversion options(s); ○ an indication whether a further and more detailed assessment of a child is required, this usually made under the following circumstances: ▪ if the child appears to be a danger to self; ▪ has a history of repeat offences or absconding; ▪ the social welfare history of the child warrants further assessment; and ▪ there exists a possibility of admission into sexual offenders' programme, substance abuse programme or other intensive treatment; and ○ if a likelihood exists a child will be detained after the first appearance at the preliminary enquiry or placed in a specified child and youth care centre or prison. **Conducting of preliminary inquiry** • The preliminary inquiry, required to be held within 48 hours of arrest if the child remains in detention) entails an informal pre-trial procedure which is inquisitorial in nature presided over by an enquiry magistrate. • The objectives are to- ○ consider the probation officer's report; ○ ensure that all available information relevant to a child, such child's circumstances and the offence are considered in order to make a decision;	

		○ establish whether the matter can be diverted before plea; ○ identify a suitable diversion option, where applicable; ○ ensure that all the views of all persons present are considered; ○ determine release or placement of a child pending conclusion of the hearing. • In order to consider diversion, an inquiry magistrate must ascertain from the child whether such child acknowledges responsibility for the alleged offence. • A prosecutor may- ○ in respect of minor Schedule 1 offences where a matter was not diverted in line with Chapter 6; or ○ in respect of Schedule 2 offences indicate that a matter may be diverted after considering the views of the victim or any person having a direct interest in the affairs of the victim (unless it is not reasonably possible to do so) and consulting with the investigating officer. • A Director of Public Prosecutions may- ○ in writing; ○ in respect of Schedule 3 offence; ○ in circumstances where exceptional circumstances exist (as determined by Directives issued by the National Director of Public Prosecutions); ○ after considering the views of the victim or any person having a direct interest in the affairs of the victim (unless it is not reasonably possible to do so), including views on the diversion option; compensation or the rendering	

		of a specific benefit or service; and ○ after consulting with the investigating officer indicate that a matter may be diverted. • A prosecutor's objection to having the matter diverted based on availability of evidence pointing to the need for referral to a children's court must be noted as a confirmation that the matter is not amenable to diversion. • The proceedings of a preliminary inquiry may be postponed if a child is required to be submitted for an enquiry into such child's mental capacity provided for in sections 77 or 78 of the Criminal Procedure Act. • Whilst the Child Justice Act does not expressly state at which stage this must take place, sections 61 and 62 of the Child Justice Act provide for the holding either of- ○ a **family group conference**, an informal procedure facilitated by a family group conference facilitator (who may or may not be a probation officer) intended to bring the child and the victim together, by agreement, supported by their families and other appropriate persons for the purpose of developing a plan indicating how the child intends making redress; or ○ a **victim-offender mediation**, an informal procedure mediated by a probation officer or diversion service provider, intended to bring the child and the victim together, by agreement, for the purpose of developing a plan indicating how the child intends making redress	

		• It is submitted that these procedures ideally be held at preliminary inquiry stage since the content of the plan developed entails information relevant to the proceedings. • Whilst the two procedures may appear to be the same, they differ in relation to the parties required to attend and also the role required to be played in relation to the facilitator/mediator distinction. • Once an enquiry magistrate has considered all information, an order may be made for the diversion with or without conditions, the latter of which take the form of a level one (Schedule 1 offence) diversion option and level two (Schedules 2 and 3 offences) diversion options.	
2.	Adult diversions	• Adult diversion is dealt with fully in this investigation, the details of which appear in the body of the Discussion Paper.	

52 The detailed discussion captured above is intended to give solid background into the investigation conducted into the diversion of children in terms of the Child Justice Act. No further need arises to look into this Act except to use it as a basis for the consideration of law reform into the area of **adult diversion**.

(c) Adult Diversion

(i) Background

53 Prior to 2010, no legislative framework existed for the uniform regulation of ADR generally or its sub-component, diversion. Despite this, diversion initiatives have been practised since the early 1990's, with National Institute for Crime Prevention and the Reintegration of Offenders (NICRO)[44] launching its first initiatives in South Africa in the Western Cape and KwaZulu Natal. There has since been an increase in child referrals since 1996.[45]

54 South African criminal law authorises the Director of Public Prosecutions to withdraw charges against an accused conditionally or unconditionally.[46] It is through this process that the practice of diversion has evolved. In the majority of cases where diversion is authorised, charges are withdrawn on condition that a child (or adult) participates in a specific activity, including a diversion programme or community service.[47] Whilst the

---

[44] A non-governmental organisation and programme service provider, working in partnership with the Department of Social Development and National Prosecuting Authority.

[45] Wood C *Diversion in South Africa: A review of policy and practice* 1990-2003 ISS Paper 79 October 2003 1-2.

[46] The power of which is delegated to prosecutors at district court level.

[47] Wood C *Diversion in South Africa: A review of policy and practice* 1990-2003 ISS Paper 79 October 2003 2 referring to LM Muntingh *The effectiveness of diversion programmes – a longitudinal evaluation of cases* Cape Town NICRO 2001.

practise is legitimate, it's been carried out in the absence of a legislative framework in a manner seen as heavily cautious and highly discretionary, resulting in application that's been disjointed and selectively applied.[48]

55 At this point, the practice was applied in conjunction with the Probation Services Act, aimed at providing programmes and services to accused and convicted persons for the-

(a) the prevention and combatting of crime;

(b) the performance of community service;

(c) the provision of treatment and information to offenders and other persons; and

(d) the provision of victim compensation.

56 Noting glaring disparities pertaining to the limited availability of and unequal access to diversion programmes, two parallel processes were initiated, aimed at spearheading reform in the arena of child justice and the provision of expanded diversion services and programmes.

57 The Probation Services Amendment Act, 2002,[49] (Probation Services Amendment Act)[50] sought to extend its reach to victims of crime and expand the operation of the Act by providing for-

---

48 Wood C *Diversion in South Africa: A review of policy and practice* 1990-2003 ISS Paper 79 October 2003 3.

49 Probation Services Amendment Act 35 of 2002.

50 Which came into operation on 7 November 2002.

(a) **assessment**, care, treatment, support and the provision of **mediation services** in respect of **victims of crime**;

(b) **assessment** of an arrested child; and

(c) the provision of early intervention services, including **family group conferencing** and **restorative justice** as part of an appropriate **sentencing** and **diversion option**.

58 In a similar vein, the draft Child Justice Bill set to be presented in Parliament around the same time contained recommendations for the regularizing of ADR, restorative justice and diversion in cases involving children in conflict with the law. The passage of the Bill in question, however, was still a long way off.

59 At this point, two challenges remained in the application of ADR and diversion.

60 First, the practice of resorting to unregulated ADR and diversion in respect of the conditional withdrawal of criminal cases, aggravated by the fact that the power to divert vests in a closed subset of professionals accorded wide discretionary authority became problematic. Not excluding the possibility of increasing the potential for race, class and gender bias in relation to the kinds of children afforded access to diversion services.[51]

61 The following judgments provide a synopsis of the challenges experienced:

(a) In *S v Shilubane*,[52] the accused was charged with theft to the value of R226-00. A sentence of nine months imprisonment was handed down. In

---

[51] Wood C *Diversion in South Africa: A review of policy and practice* 1990-2003 ISS Paper 79 October 2003 2 referring to LM Muntingh *A critical review of diversion* in LM Muntingh (ed) *Perspectives on diversion* NICRO Research Series No. 2 Cape Town 1995.

[52] *S v Shilubane* 2008 1 SACR 295 T in Himongo C, Taylor M and Pope A *Reflections on Judicial Views on Ubuntu* [2013] PER 67 at 17-18.

weighing the facts of the case, including the fact that the accused had no previous convictions and had expressed genuine remorse, the court found the sentence to be 'disturbingly inappropriate'. Comparing the values of restorative justice to that of retributive justice, the court found that the latter failed to curb rising crime levels, viewing it not only as counter-productive but self-defeating to expose an accused to so harsh a sentence for an offence of such a trifling nature. The court was of the view that serious consideration should be given to the application of alternative sentences such as community service, especially in instances where an accused posed no threat to the interests of society.

(b) In *S v Maluleke*,[53] an accused convicted of murder was sentenced to imprisonment. The court found several mitigating factors pointing to the possibility of considering community service an alternative sentencing option, combined with suitable conditions, including the fact that the accused demonstrated remorse and did not present a danger to society. Considering the motivation for introducing restorative justice into South Africa's legal system, the court pointed to the location of its principles within the following traditional African practices:

- the emphasis on reintegrating offenders back into the community after their shaming;
- the show of repugnance expressed by the offender when viewing the offence through new lenses;
- the avoidance of prolonged segregation or marginalization of offenders; and
- the community-based focus on reconciliation and the restoration of harmonious relations after the conflict.

---

53 *S v Maluleke* 2008 1 SACR 49 T in Himongo C, Taylor M and Pope A *Reflections on Judicial Views on Ubuntu* [2013] PER 67 at 18.

In closure, the court remarked how this was capable of easing the burden on our overcrowded correctional institutions.

(c) On a charge of breaching a protection order whilst serving a suspended sentence on a conviction of domestic violence, the court in *Sibiya*[54] rejected the view that direct imprisonment was the only option, on the notion that this would lead to loss of employment and expose the accused to hardened criminals in a way likely to cause more harm than good. The court was of the view that a suspended sentence would have been more appropriate, coupled with an attempt to effect reconciliation between the parties in line with *Ubuntu*.

(d) In *M v The Senior Public Prosecutor, Randburg Magistrates Court and Another*[55] and on a plea of guilty, a 16-year old was convicted of theft. An application was made for review of the decision to prosecute, or put differently, a decision made not to divert a matter. In argument, the applicant placed before the court the fact that in exercising its discretion, a [different] prosecutor decided not to proceed against a co-culprit notwithstanding that the case was based on same-facts evidence. The court noted how for acts more suitable to discipline, prosecutors tended to show a reticence for proceeding with prosecutions. This, the court remarked, was not untoward, and wholly in keeping with prosecutorial discretion, the latter of which involved considering the impact of a previous conviction on the life of an accused *vis a vis* the specific crime and consequences. Whilst the court was willing to consider the impact of shoplifting, it was quick to underline that the matter involved a child. No

---

54 *S v Sibiya* 2010 1 SACR 284 (GNP) in Himongo C, Taylor M and Pope A *Reflections on Judicial Views on Ubuntu* [2013] PER 67 at 18.

55 *AEM v The Senior Public Prosecutor Randburg Magistrates Court and Another* Case No. 3284/00 WLD (unreported) (delivered on 27 September 2000). See also J Sloth-Nielsen *Challenging the Decision not to Divert* Article 40 Volume 2 No. 4 December 2000.

attempt was made by the prosecutor to explain the reason for his decision to prosecute. Under the circumstances, the court was hard-pressed to find that the prosecutor failed to properly exercise his discretion, the upshot of which caused the subsequent proceedings to be tainted.

62 Second, whilst amendments to the Probation Services Act in 2002 extended the reach of probation programmes and services to both adults and children, this does not detract from the fact that the power to divert vests in the prosecuting authority alone. In other words, the Probation Services Act cannot be said to provide legislative authority to divert.[56]

63 1 April 2010 rung in changes to the regulatory landscape with the Child Justice Act closing gaps in the way in which ADR and diversion were applied to matters involving **children** in trouble with the law.

64 The absence of a legislated regulatory framework for adults remained, resulting in the developing and issuing by the National Prosecuting Authority of Directives[57] in an attempt to formalise the application of ADR and diversion in suitable cases, with part 7 outlining procedures and selection criteria that prosecutors are required to follow.

65 It has been argued however that the National Prosecuting Authority Directives-[58]

---

[56] At this point the National Prosecuting Authority realised that the establishment of a comprehensive legislative framework would go a long way in ensuring uniformity in the application of ADR in line with the policy 'equal justice for All' (National Prosecuting Authority *Diagnostic Study of Alternative Dispute Resolution Mechanisms* 2019) 12.

[57] National Director of Public Prosecutions *Prosecution Policy Directives* Part 7 Diversion and Informal Mediations (2015) (unpublished).

[58] National Prosecuting Authority *Diagnostic Study of Alternative Dispute Resolution Mechanisms* 2019) 4-5, 11-12.

(a) are both inadequate and inconsistently applied, thus creating resistance by some courts in having regard to them; and

(b) are applied in an environment where there is insufficient control and oversight.

66 It is in this respect that the Commission approaches the question of adult diversion, submitting, to this end that a need indeed exists for-

(a) recognition of the right to diversion in respect of adults in conflict with the law, in keeping with the section 9 constitutional right to equality provided for as follows:

> Section 9(1): Everyone is equal before the law and has the right to equal protection and benefit of the law; and

(b) statutory regulation of the right in a manner that is uniformly applied together with an explication of the content of the right.

67 An exploratory analysis of the question of ADR and adult diversion will undoubtedly be enhanced by having regard to the principles encapsulated in Child Justice Act, together with a consideration of challenges in implementation being experienced on the ground by the National Prosecuting Authority, probation officers, NICRO and other programme service providers.

(ii) Proposals for law reform

68 Overall, the idea that the Commission consider formalising the use of ADR and diversion in criminal matters involving adults by way of legislation intended to apply uniformly similarly to the way this has been done in the Child Justice Act has been workshopped with stakeholders.

69 The proposal was well-received.

70 A workshop in this respect was held with the following stakeholders on 23 June 2023:

(a) National Prosecuting Authority;

(b) Department of Justice and Constitutional Development;

(c) Department of Correctional Services;

(d) SAPS; and

(e) Legal Aid South Africa.

71 During the workshop, stakeholders, in the main, qualified their approval with requests that proposals for new legislation ensure that consideration be given to excluding from the purview of ADR and diversion, the more serious offences such as rape.

72 Following the workshop, further written submissions received from the stakeholders and an evaluation of research material in this area of the law, the Commission identified the undermentioned key challenges required to be addressed for the purposes of law reform:

(a) unchanging attitudes towards punishment and sentencing that still view the criminal justice system as the only medium through which social reform can be effected, thereby relegating ADR as an untenably 'soft' option. The following statement by the Department of Correctional Services is telling with regard to the impact of hard-line attitudes:[59]

> When poverty and lack of social support to the disadvantaged are combined with a "tough on crime" rhetoric and policies which call for stricter law enforcement and

---

59 Department of Correctional Services *Annual Report* 2021/2022 29.

sentencing, the result is invariably a significant increase in the inmate population. The increased population typically comprises an overrepresentation of the poor and marginalised, charged with petty and non-violent offences…. Community-based non-custodial alternatives are often overlooked in favour of the deprivation of liberty.;

(b) leaving the decision whether or not to **apply** ADR and diversion entirely up to prosecutorial discretion, thus encouraging inconsistency in application and a lack of uniformity. Statistical information contained in the Annual Report of the Department of Justice and Constitutional Development in relation to Child Justice Act referrals show a reduction in preliminary inquiries held at both District Court and Regional Court levels (and by implication, ADR and diversion referrals) by almost 50% between the financial years 2018 to 2022 (10 067 (DC): 17 (RC) in 2018, steadily decreasing to 5 408 (DC): 8 (RC) in 2022);[60]

(c) leaving the **definitional criteria** and **offences** for which ADR and diversion can be applied up to prosecutorial discretion, once again encouraging inconsistency in application and lack of uniformity. Some commentators have remarked in this respect that the National Prosecuting Authority Directives are vague; that the definitional criteria of cases that can be referred are wide and subjective and that the failure to provide a list of offences was problematic;

(d) the need to avoid over-regulation, perceived to be the case in the Child Justice Act;

(e) no ready access to, alternatively, incomplete statistical data available in order to effectively assist mandated organs of state to evaluate the extent to which referrals to ADR and diversion address victim's rights; the scourge

---

60 Department of Justice and Constitutional Development *Annual Report* 2021/2022 102.

of gender-based violence and femicide and the rights of vulnerable groups including women, children, the aged, the poor and the unemployed;

(f) lack of centralised databases reflecting statistics of ADR and diversion cases that have been referred and finalised;

(g) lack of availability to diversion programmes that are personalised and geared towards addressing more crime-specific behaviours like anger management and programmes that deal with gender-based violence);

(h) unequal distribution of ADR and diversion service providers, with rural areas and small towns bearing the brunt;

(i) poorly funded and resourced ADR and diversion programmes;

(j) no ready indication of the extent to which a decision to refer to ADR and diversion takes into account whether an offender abuses substances;

(k) no ready indication of the extent to which a decision to refer to ADR and diversion takes into account whether an offender has been diagnosed with a mental illness; alternatively, whether such offender is considered by any person, including the offender's family members, to be a person suffering from mental illness or a mental disorder; and

(l) the need to ensure that service providers don't under-report, that is, the need to obtain more detailed information pertaining to the programme that was utilised, the impact on the user and the outcome of the engagement.

73 Using the Child **Justice Act and the challenges identified above, any proposals for law reform, will of necessity, have to be guided by the following principles:**

(a) provision of a list of the offences amenable to ADR and diversion in the form of Schedules, much like the Child Justice Act does. In the 2017-2018 financial year, employment of ADR and diversions in respect of the following

offences[61] were listed in an analysis conducted by the National Prosecuting Authority, using as a test sample, statistics for 515 courts of which 56 were selected to participate in the study:[62]

(i) assault with intent to do grievous bodily harm (the highest number, computed at 30,7% of submissions to ADR); common assault (the second highest number, computed at 25,2% of submissions to ADR);

(ii) domestic violence (computed at 1,3% of submissions to ADR); contravention of a protection order (computed at 1,2% of submissions to ADR): failure to pay maintenance (computed at 0,6% of submissions to ADR);

(iii) theft (the third highest, computed at 14,3% of submissions to ADR); malicious damage to property (the fourth highest, computed at 9% of submissions to ADR); housebreaking; fraud (computed at 0,5% of submissions to ADR); shoplifting; theft out of a motor vehicle;

(iv) robbery; robbery (aggravated);

---

61 The offences are not listed in order, and are packaged together because of their relational similarities, merely for the purpose of saving line-spaces.

62 National Prosecuting Authority *Diagnostic Study of Alternative Dispute Resolution Mechanisms* 2019) 12-34. According to the National Prosecuting Authority, diversion is generally suitable for less serious offences such as those qualifying for the fixing of an admission of guilt fine. The list of offences does, however, contain crimes which at face value do not warrant being treated as less serious (rape, aggravated robbery and fraud). The same applies for what they describe as referrals to 'informal' mediation (murder, rape, robbery with aggravating circumstances, domestic violence (involving assault or threat thereof), serious offences involving children and racially motivated crimes). This does not preclude obtaining authorisation from the Director of Public Prosecutions to refer to mediate or divert, indicated as probably the reason why certain offences such as rape and robbery with aggravated circumstances show up in the statistics. It is maintained that referrals to ADR in rape cases is not widespread. It is indicated, further still, that in some cases, they are hamstrung since complainants refused to proceed with cases, the upturn of which created a conundrum of its own (complainants failing to turn up on scheduled court days, complainants becoming hostile witnesses or insisting that charges should be withdrawn and referred to mediation or diversion because of their relational association with the accused).

(v) possession of drugs (computed at 3,9% of submissions to ADR); drugs (computed at 2,6% of submissions to ADR); possession of dagga (computed at 0,7% of submissions to ADR); driving under the influence of alcohol (computed at 0,3% of submissions to ADR);

(vi) *crimen injuria*; trespassing; defeating ends of justice;

(vii) reckless and negligent driving; exceeding speed limit; driving/using a motor vehicle without consent; theft of motor vehicle;

(viii) pointing of firearm; intimidation;

(ix) rape (computed at 0,3% of submissions to ADR – 43 in all of the 56 courts sampled representing an average of 1,3% of cases per court); sexual assault (computed at 0,2% of submissions to ADR); kidnapping and

(x) attempted murder;

(b) ensuring that the list was not exhaustive. The purpose is two-fold-

(i) it promotes dynamism in application, ensuring first, that uniformity across board is achieved in line with the right to equality for service users; and

(ii) it leaves open room for the exercise of prosecutorial discretion in deserving cases;

(c) providing for the regulation the following mandatory processes:

(i) the conducting of assessments unless, in the case of minor offences intended to be diverted summarily, it is not in the interests of an accused to be so subjected;

(ii) the making of an annotation on the docket providing reasons for the decision to divert or not to divert, together with the criteria that must be applied in coming to a decision; and

(iii) the conducting of a preliminary enquiry; and

(iv) the maintenance, on an annual basis, of electronic and manual records/registers contained on a form prescribed by means of Regulations, providing data pertaining to the names and last-known address of an offender; details of the offence; details of previous diversions; details of the diversion plan opted for; details on the outcome of the diversion; follow-up details (to be provided annually for three consecutive financial years) reporting on the question of recidivism, copies of such records to be furnished on a quarterly basis to stakeholders including SAPS, Department of Social Development, Department of Justice and Constitutional Development, Department of Correctional Services and NICRO together with provisions providing for the preservation and destruction of records.

Questions

a) Under which conditions should a decision be taken whether or not to divert a matter?

b) Which regulatory framework must be applied in diversion situations?

c) What type of offences should be covered or excluded in diversion cases?

d) Should a (non-exhaustive) list of the offences amenable to ADR and diversion be created in the form of Schedules, much like the Child Justice Act?

e) How and by whom should statistics on diversion cases be kept?

f) Who should have access to these statistics?

g) How should recidivism be handled in diversion cases?

h) How many opportunities should an offender be given before a decision to decline a diversion is taken?

i) What kind of victim interests should be taken into account in diversion cases?

j)	What is the role that prosecutors are required to play in the protection of victims' rights in diversion cases?
k)	To what extent should a decision to refer to diversion take into account whether an offender abuses substances or is mentally ill?
l)	In which way can the equal distribution of ADR and diversion service providers be ensured throughout the Republic?
m)	In which way can the provision of information by service providers pertaining to the programme that was utilised, the impact on the user and the outcome of the engagement be ensured?

74 **Respondents are requested to give inputs into any of the issues discussed above, including the discussion contained in paragraphs 4.4.4.39 and 4.4.4.40 above, together with any other comments that can assist in formulating proposals for law reform. Alternative motivated proposals are welcome.**

TABLE 3			
Intervention type		**Circumstances under which applied**	**Effect**
Committals for purposes of treatment			
1.	Committals for treatment in terms of Treatment for Drug Dependency Act PREVENTION OF AND TREATMENT FOR DRUG DEPENDENCY ACT SECTION 255 OF CRIMINAL PROCEDURE ACT	• Section 255 of the Criminal Procedure Act pertaining to the ordering of an enquiry under the Treatment of Dependency Act takes place under two circumstances- • before conviction – in this case, the referral by the trial court to the court of enquiry must be regarded as a **pre-trial referral** – under these circumstances it is the court of enquiry which orders committal of an accused to a treatment centre; and • after conviction – in this case, the trial court convicts and sentences an accused, part of the court order of which may entail committal to a treatment centre in relation to a **post-trial referral**.	• the referral will have the same effect as diversion. In other words, if the referral was successfully complied with, a prosecution on the same facts may not be instituted, negating the question of attracting a criminal record and thus a previous conviction. Neither does the question of a private prosecution arise. • Once an accused has been convicted, the question of diversion can never arise since a successful diversion prevents prosecution on the same facts.
2.	Enquiries conducted in relation to defences of mental illness and automatism SECTIONS 77 TO 79 OF CRIMINAL PROCEDURE ACT MENTAL HEALTH ACT	In the case where an inquiry is initiated into- • the capacity of an accused to stand trial; and • his state of mind at the time of commission of an offence; and a finding is made that such accused either- • has the capacity to stand trial; or • was mentally fit at the time of commission of an offence, the matter will proceed to trial.	

(d) Committals for purposes of treatment

74 As already indicated, this topic is not being dealt with currently due to time constraints. Detail contained on the table relates to a cursory examination of these initiatives, to be followed up more fully once the investigation into these matters ensue.

75 It may be worthy to note that the Department of Correctional Services and Office of the Judicial Inspectorate provided detailed inputs into challenges posed with enquiries conducted in relation to defences of mental illness, which will go a long way into assisting the Commission to formulate proposals for law reform when the time comes.

76 Respondents are more than welcome to provide the Commission with comments regarding challenges experienced in the respective regimes for consideration once these investigations commence.

TABLE 4			
Intervention type		**Circumstances under which applied**	**Effect**
Settlement agreements			
1.	Conditional withdrawal of prosecution PROJECT 73: SIXTH INTERIM REPORT: SIMPLIFICATION OF CRIMINAL PROCEDURE: **OUT OF COURT SETTLEMENTS** AUGUST 2002 NATIONAL PUBLIC PROSECUTION: PROSECUTORIAL DIRECTIVES	• This topic is subject to a previous Commission investigation in respect of Project 73: Sixth Interim Report: Simplification of Criminal Procedure: Out of Court Settlements[63] published in August 2002. • In the Report, consideration was given to the question whether a need existed in South Africa to develop procedures that provide for the settling of criminal cases without having to go to court, and if so, the best way in which this can be achieved. • During the investigation, attention was given to the international trend towards dealing with criminal cases out of court, based mainly on the following considerations: o the need to increase the cost-efficiency of the criminal justice system through simplified and streamlined processes; and o the need to deal with proliferate crime outside the traditional criminal court system so that they have more time to adequately deal with increasingly complex cases. • The Commission concluded that a definite need existed for legislation formalising out of court settlements in criminal matters, and in this regard, recommended a list of criteria to be adopted in regulating such a regime.	• The Report was finalised and submitted to the Justice Ministry in line with section 7(1) of the South African Law Reform Commission Act in August 2002. • No further action was taken in respect of this investigation – in other words, there is no indication that legislation was promoted following the Commission's recommendations as contained in the draft Bill that was developed. • Because the Commission's recommendations Commission were never pursued, the topic is being reconsidered because of its potential for diverting matters away from the courts and the overall impact this will have on reducing backlogs.
2.	Deferred prosecution agreements	• This topic is not subject to investigation under this Chapter. A loose definition, pointing to what it entails, is however,	

63 South African Law Commission Project 73: Sixth Interim Report: **Simplification of Criminal Procedure: Out of Court Settlements** August 2002.

	SECTION 204 OF THE CRIMINAL PROCEDURE ACT	provided in the body of the Discussion Paper for the purpose of providing definitional context into the other two agreements.	
3.	Plea and sentence agreements[64] FOURTH INTERIM REPORT: SIMPLIFICATION OF CRIMINAL PROCEDURE: **SENTENCE AGREEMENTS**: MAY 2001 SECTION 105A OF CRIMINAL PROCEDURE ACT	• This topic is subject to a previous Commission investigation. • During 1989, in this regard, the then Minister of Justice requested the Commission to investigate the possibility of simplifying the criminal procedure, with particular reference to a number of questions, two of which were- o whether the existing provisions relating to the procedure for pleadings was unnecessarily cumbersome or gave rise to abuse; and o whether any provision relating to the criminal procedure and the law of evidence should be amended in order to obviate unnecessary delays and abuses. • An Interim Report developed by the Commission recommended the introduction of legislation for the formal recognition of a process of plea negotiations. • The report was finalised and submitted to the Minister in January 1996. • The Select Committee on Justice (Senate) considered the Bill based on the recommendations contained in the Report and requested that the matter be referred back to the Department of Justice for reconsideration based on a concern regarding the **practicality of the provisions recommended.** • Having reconsidered the matter, the Commission proposed a simpler procedure recommending the formal recognition of a process of plea negotiations (referred to as sentence	• Sentence agreements (now referred to as **Plea and Sentence Agreements**) have become part of South African law (**section 105A of the Criminal Procedure Act**) by virtue of the Criminal Procedure Second Amendment Act 62 of 2001. • The Commission wishes to look into the utilisation of plea and sentence agreements in order to determine to what extent, if any, it is being under-utilised.

---

64 South African Law Commission Project 73: Fourth Interim Report: **Simplification of Criminal Procedure: Sentence Agreements:** May 2001.

		agreements), in the Criminal Procedure Act. • The Report was subsequently submitted to the Justice Ministry.	

(e) Conditional withdrawal of prosecutions

77 As indicated in paragraph 44, the term out of court settlements is best described as a conditional withdrawal of prosecution.

78 In attempting to extrapolate principles applicable to conditional withdrawal of prosecutions, regard must be had to all the principles discussed in paragraph 45.

79 The following further details are isolated in further explication, in relation to-

(a) proposed offences: inclusion of the Schedule 1 offences listed in the Child Justice Act and exclusion of certain offences appearing in Schedule 2 of the same Act, the gravity of which a sentencing court will unlikely impose a penalty of direct imprisonment without the option of a fine for two years or more;

(b) impact of offence on the offender: whether the offender has dependants; whether he/she is gainfully employed or engaged in studies; whether he/she abusers substances; whether he/she has been diagnosed with or is suspected of suffering from a mental illness; *etcetera*; and

(c) impact of the offence on the victim: whether the offence involves rape or other forms of sexual misconduct; whether the offence involves domestic violence or non-compliance with a protection order; whether the offence involves maintenance; whether the victim has been diagnosed with or is suspected of suffering from a mental illness; *etcetera*;

(d) application of a summary process: whether the matter is amenable to application of a summary process that is able to forego a preliminary enquiry;

(e) length of programme: it is envisaged that because conditional withdrawals of prosecution are meant to entail simpler, less complex processes , the length of the programme should range between three months and a year;

(f) need to attend a particular rehabilitative programme or therapeutic services: whether it would benefit an offender to attend to a drug rehabilitation programme or other therapeutic services; and

(g) the need to attend victim offender mediation or a family group conference.

80 The question arising is now to what end, if any, would regard still need to be had to maintaining the practice of providing for conditional withdrawals of prosecution (with the *caveat* that this be formally regulated by way of legislation) if law reform proposals are already being made for the formal regulation of adult diversion.

81 Perhaps the more direct question is this: '**what distinguishes the practice of a conditional withdrawal of prosecution from that of diversion**?"

82 The answer, it is believed, does not lie in the types of offences that will be proposed to be dealt with, since the idea is for them to cover a similar, if not the same ground.

83 It is submitted that the answer lies in the fact that-

(a) diversion entails processes that are more involved, having the tendency to require deeper levels of engagement, evident from the number of processes necessary before conclusion thereof, including the assessment; the possibility of requiring an additional assessment; the possible need to refer the parties to victim offender mediation or the family group conference; the need to conduct a preliminary enquiry; *etcetera*;

(b) diversion may be suited to more complex cases requiring the use of long-term programmes of perhaps up to two years;

(c) diversion may be better suited to cases involving vulnerable victims; and

(d) a conditional withdrawal of prosecution provides an opportunity to maximise possible benefits provided by this regime to serve as a counterweight to challenges diversion is struggling to address like-

(i) limited access to diversion programmes due to funding challenges. Under these circumstances, certain offenders may be gainfully employed in high salary brackets and may be in a position to comply with some or all of the conditions without the need for state subsidy; and

(ii) the desire by victims wishing to maintain confidentiality to forego the preliminary enquiry and some of the more interactive mediation processes because of their public or professional image; the extent of the harm caused by the offence, for example, in cases involving sexual violations; etcetera.

84 It may be helpful too, at this point, to deal with the distinction between conditional withdrawal of prosecutions and deferred prosecution agreements.

85 A deferred prosecution agreement entails an **admission of liability** in relation to a particular subset of offences (for example, conspiracy, fraud, bribery, money laundering, tax evasion and corruption) entered into between a prosecuting authority and a **corporate entity** in return for **immunity from prosecution**. What this amounts to is an entity avoiding conviction and thus a criminal record, similarly to conditional withdrawal of prosecutions and diversion. Whilst South African law makes no provision for the formal regulation of deferred prosecution agreements, section 204 of the Criminal Procedure Act does provide a mechanism that can be used to achieve the goal deferred prosecution agreements was intended to achieve.

(i) Proposals for law reform

86 The Commission proposes providing for the legislative regulation of both conditional withdrawals of prosecution and adult diversion.

87 Users of this Report are reminded that both practices are already being applied by the National Prosecution Authority, but by way of (unlegislated) directives, some of the problems in this arena having been highlighted in the discussions above.

Questions

a) If the practice of conditional withdrawals of prosecution is formally regulated, under which conditions should a decision be taken whether or not to initiate the practice?

b) What other factors should be considered before the pre-trial process of conditional withdrawals of prosecution is initiated?

c) What kind of victim interests should be taken into account in such cases?

d) What is the role that prosecutors are required to play in the protection of victims' rights in conditional withdrawals of prosecution cases?

Respondents are requested to give inputs into any of the issues discussed above, together with any other comments that can assist in formulating proposals for law reform. Alternative motivated proposals are welcome.

(f) Plea and sentence agreements

88 Defined as the exchange of official concessions for a offender's **act of self-conviction**, the concessions of which could relate either to the sentence imposed by the court or recommended by the prosecutor; the offence charged or a variety of other circumstances,[65] plea bargaining is said to be a controversial topic often subjected to sharp criticism. Despite this, the procedure is considered to play an important part in reducing the number of cases going to trial and acting as a counter-measure against congested court rolls.

89 The use of plea agreements is regulated in section 105(A) of the Criminal Procedure Act.

90 In terms of section 105A(1), a prosecutor (authorised thereto in writing by the National Director of Public Prosecutions) and a legally represented accused, may before the accused pleads to the charge, negotiate and enter into an agreement in respect of-

(a) a plea of guilty to the offence charged or to an offence for which he may be convicted; or

---

[65] South African Law Commission Project 73 Fourth Interim Report: Simplification of Criminal Procedure: **Sentence Agreements** May 2001 20 referring to AW Alschuler "**Plea Bargaining and its History**" Columbia Law Review (1979) 1.

(b) one or other listed just sentence.

91 Consultation must take place with the investigating officer assigned to the case (which requirement may be dispensed with if the case is likely to be delayed) and the complainant or his representative (where it is reasonable to do so, taking into account the nature and circumstances of the offence).

92 If a court is of the opinion that a sentence agreement is unjust, the court shall inform the prosecutor and the accused of that which it considers just.

93 If the prosecutor and the accused abide by the agreement, the court may proceed with the imposition of sentence and if the parties withdraw from the agreement, a trial must start *de novo* before another presiding officer.

94 A conditional withdrawal of charges is distinguishable from a plea and sentence agreement in that the former constitutes an agreement between the prosecution and defence in terms of which an accused undertakes to comply with conditions as agreed upon between the parties in exchange for the prosecutor **discontinuing a particular prosecution**. Such conditional discontinuation results in the **redirection** of the matter away from the trial process.

95 A plea and sentence agreement follows on a decision by a prosecutor to institute a prosecution. The latter agreement may affect the offences for which the accused is finally charged, but invariably results in the **conviction and sentence** of the offender. The offender will have been put through the criminal justice process and will end up with a **criminal record**.

96 A conditional withdrawal of charges does not involve the entire criminal process, does not lead to a conviction and does not result in a criminal record.

(i) Proposal for law reform

97 As already indicated, the Commission has already dealt with an investigation into the matter, the outcome of which lead to promulgation of legislation.

98 The Commission proposes that the question of plea and sentence agreements be re-looked into, but only for the purposes of determining whether-

(a) there exists implementation challenges regarding application of the procedure outlined in the section in question;

(b) if so, what are the challenges being experienced; and

(c) whether the prosecution is utilising the provision as a way of expediting the finalisation of cases in a way that supports both the public interest and the effective administration of justice;

Questions

a) Are there any implementation challenges regarding application of plea and sentence agreements?

b) If so, what are the challenges being experienced?

c) Is the prosecution utilising section 105(A) of the Criminal Procedure Act as a way of expediting the finalisation of cases in a way that supports both the public interest and the effective administration of justice?

99 Respondents are requested to give inputs into any of the issues discussed above, together with any other comments that can assist in formulating proposals for law reform. Alternative motivated proposals are welcome.

LIST OF SOURCES

Alschuler AW "*Plea Bargaining and its History*" Columbia Law Review (1979)

Barnett R *Restitution: a new paradigm of criminal justice?* 1977 Ethics 87: 279-301

Burchell J and Milton J *Principles of Criminal Law* 2nd Ed Juta & Co Ltd 2000

Christie N *Conflicts as Property* 1977 British Journal of Criminology 17 (1)

Council of Europe *The simplification of criminal justice* (1988) Stasbourg

Department of Correctional Services *White Paper on Corrections in South Africa* 2005

Fagothey A *Right and Reason: Ethics in Theory and Practice* CV Mosby Company USA 1959 371

Goldberg SB, Sander FEA and Rogers NA *Dispute Resolution: Negotiation, Mediation and Other Processes Vol 1 1992 2nd ed Little, Brown & Co Boston*

Himongo C, Taylor M and Pope A *Reflections on Judicial Views on Ubuntu* [2013] PER 67

Imiera PP *Integrating Alternative Dispute Resolution into South African Criminal Jurisprudence: An Urgent Need for Law Reforms* Politeia Vol 38 (2) February 2020

Kift S *Victims and Offenders: Beyond the Mediation Paradigm?* 1996 Australian Dispute Resolution Journal 71

Lewis M and McCrimmon L *The Role of ADR processes in the Criminal Justice System: A View from Australia* Paper presented at ALREASA Conference Entebbe Uganda September 2005

Menkel-Meadow Carrie *Restorative Justice: What Is It and Does It Work?* Annu Rev Law Soc Sci 2007 3:10.1-10.27

Muntingh LM *A critical review of diversion* in LM Muntingh (ed) *Perspectives on*

Muntingh LM *The effectiveness of diversion programmes – a longitudinal evaluation of cases* Cape Town NICRO 2001

National Prosecuting Authority *Diagnostic Study of Alternative Dispute Resolution Mechanisms* 2019

Oraegbunam Ikenga KE *Some Basic Principles of Penal Jurisprudence: An Analytical Approach* JILI 2010

Republic of South Africa Department of Correctional Services *Annual Report* 2021/2022

Republic of South Africa Department of Justice and Constitutional Development *Annual Report* 2021/2022

Republic of South Africa Department of Social Development *Annual Report for the year ended* 31 March 2021

Sarre R and Tomaini J *Key Issues in Criminal Justice* eds 2004 Adelaide Australian Humanities Press

Shamir Yona *Alternative Dispute Resolution Approaches and their Application* 2003 https://unesdoc.unesco.org/ark:48223/pf0000133287

Sloth-Nielsen J *Challenging the Decision not to Divert* Article 40 Volume 2 No. 4 December 2000

South African Law Commission Project 73 Fourth Interim Report: *Simplification of Criminal Procedure Sentence Agreements* May 2001

South African Law Commission Project 73 Sixth Interim Report: *Simplification of Criminal Procedure Out of Court Settlements* August 2002

South African Law Commission Project 106 Report on Juvenile Justice July 2000

Umbreit MS Coates RB and Vos B *Victim offender mediation: evidence-based practice over three decades* in The Handbook of Dispute Resolution ed ML Moffitt *et al* 2005 455-470 San Francisco

Victor Wenona *Alternative Dispute Resolution (ADR) in Aboriginal Contexts: A Critical Review* Ontaria Canadian Human Rights Commission

Wellikoff I *Victim offender mediation and violent crimes: on the way to justice* 2004 Cardozo Online J Confli Resolut

Wood C *Diversion in South Africa: A review of policy and practice* 1990-2003 ISS Paper 79 October 2003

LEGISLATION/REGULATIONS/BILLS

Child Justice Act 75 of 2008

Children's Act 38 of 2005

Correctional Services Act 111 of 1998

Criminal Procedure Act 51 of 1977

Mental Health Act 17 of 2002

National Prosecuting Act 32 of 1998

Prevention of and Treatment for Substance Abuse Act 70 of 2008

Probation Services Act 116 of 1991

Probation Services Amendment Act 35 of 2002

TABLE OF CASES

AEM v The Senior Public Prosecutor Randburg Magistrates Court and Another Case No. 3284/00 WLD (unreported) (delivered on 27 September 2000)

S v Maluleke 2008 1 SACR 49 T

S v Shilubane 2008 1 SACR 295 T

S v Sibiya 2010 1 SACR 284 (GNP)

ADULT DIVERSION IN CRIMINAL MATTERS BILL

CHAPTER 10
ALTERNATIVE MEASURES – PRE-TRIAL DIVERSION OF CERTAIN MATTERS

Interpretation of Chapter 10

65. In this Chapter, unless the context indicates otherwise—

"alternative resolution" means the diversion of certain matters from the formal court processes for purposes of applying alternative measures for their resolution;

"assessment" means assessment of a divertee conducted in terms of section 8 of this Act by a probation officer appointed in terms of the Probation Services Act;

"community service" means the community service as defined in section 1 of the Correctional Services Act;

"diversion" means the application of alternative measures outside court process to address and resolve the conduct of a divertee by means of procedures set out in this Chapter;

"divertee" means a person accused of an offence and who is diverted from the formal criminal justice system processes in terms of this Chapter;

"family group conference" means a conference referred to in section 9(1);

"probation officer" means a probation officer appointed under section 2 of the Probation Services Act, 1991 (Act No. 11 of 1991);

"restorative justice" means an approach to justice that aims to involve a divertee, the victim, the families concerned and members of the community to collectively identify and address harms, needs and obligations through accepting responsibility, making restitution, taking measures to prevent a recurrence of the incident and promoting reconciliation;

"**symbolic restitution"** means—

(a) the giving of an object owned, made or bought by the divertee; or

(b) the provision of any service,

to a victim, any other specified person, community, charity or welfare organisation or institution as symbolic compensation for the harm caused by that divertee; and

"victim-divertee mediation" means a procedure referred to in section 9(2).

Objectives of diversion

66. The objectives of diversion are to—

(a) deal with a divertee outside of the formal criminal justice system in appropriate cases;

(b) embed within its policies, principles of restorative justice aimed at encouraging a divertee to take responsibility for the harm caused;

(c) prevent stigmatization of a divertee, including the adverse consequences flowing from being subjected to the criminal justice system;

(d) provide those affected by the harm, including victims, with an opportunity to express their views on its impact;

(e) reduce the potential for re-offending; and

(f) prevent a divertee from having a criminal record.

Eligibility criteria

Authority and considerations to apply diversion

67. (1) The authority to divert a matter from the court for purposes of alternative resolution lies with the Director of Public Prosecutions, which authority may be delegated to a prosecutor.

(2) Consideration to apply diversion may not be taken in the absence of sufficient admissible evidence to provide a reasonable prospect of a conviction of a divertee.

(3) A decision to apply diversion may not be taken without having regard to the principles of restorative justice and in accordance with the objectives of this Chapter.

(4) A written consent of a divertee must be obtained before such divertee may participate in a programme of diversion.

Guiding principles underlying policies of diversion

68. (1) A decision to divert a matter for alternative resolution must encourage simplification and the acceleration of the criminal justice process without undermining the rule of law and the basic standards of fairness and justice.

(2) A decision to divert a matter must take into account the impact of the offence in relation to—

(a) the nature, seriousness and surrounding circumstances;

(b) the public interest;

(c) the impact of the offence on the victim

(d) a sentence that a court may impose;

(e) the possible effects of conviction on the divertee; and

(f) the likely cost of the prosecution and the presence of previous convictions.

(3) The incorporation of conditions for diversion into the rehabilitation plan must be commensurate with the gravity of an offence, and may include—

(a) rules of conduct expected of a divertee with reference to future behaviour;

(b) the restitution of goods obtained through the commission of the offence;

(c) the payment of reparation, to be made into a particular fund including, but not limited to, a Victims Fund;

(d) the payment of full or appropriate compensation to the victim;

(e) participation in voluntary public service programmes, including community service; and

(f) participation in identified rehabilitative programmes, including therapeutic services.

(4) Programmes for the successful reintegration of a divertee back into the community must encompass—

(a) a structured plan aimed at striking a balance between the circumstances of divertee, the harm caused to the victim and the interests of society;

(b) provisions that are not exploitive or harmful to physical, psychological or mental health and well-being of the divertee;

(c) innovative ways to optimise accessibility, including the utilisation of resources other than state subsidies to fund programmes such as private medical aid to cater for therapeutic needs of the divertee;

(d) a focussed evaluation to determine whether a divertee abuses substances, and if so, the extent to which this impacted on the commission of the offence;

(e) an evaluation to determine whether a divertee has been diagnosed with or is known to be suffering from a mental illness, disease or disorder or chronic illness having a debilitating effect, and if so, the extent to which this impacted on the commission of the offence;

(f) a design which is sensitive to the individual needs of certain divertees, including the—

(i) need for certain female divertees to obtain trauma counselling or other therapeutic services in cases involving allegations of chronic abuse; and

(ii) needs of single-parent divertees running women-headed households.

Diversion regimes

69. In deciding whether to divert a matter or not, a Director of Public Prosecutions must subject the matter to a—

(a) Schedule 1 minor offence regime; or

(b) Schedule 2 medium impact offence regime.

Criteria for application of Schedule 8 minor offences

70. Diversion of matters in relation to Schedule 8 minor offences must comply with the principles relating to the—

(a) application of restorative justice;

(b) peremptory holding of a preliminary inquiry;

(c) requirement for the development of a plan and programme requiring engagement and the need to solicit the views of the divertee, victim and members of their respective family representatives, where necessary;

(d) conditions considered necessary for the fulfilment of the obligations forming part of the rehabilitation plan and the programme identified as essential for the reintegration of the divertee must endure for a period of not less than six months and not more than 12 months; and

(e) rehabilitation plan referred to in section 68(3).

Criteria for application of Schedule 9 medium impact offences

71. Diversion of matters in relation to Schedule 2 medium impact offences must comply with the principles relating to the—

(a) application of restorative justice;

(b) holding of a preliminary inquiry as a peremptory process;

(c) requirement for the development of a comprehensive plan and programme requiring deep engagement and the need to solicit the views of key stakeholders including the divertee, victim and members of their respective family representatives together with identified members of the community;

(d) the conditions considered necessary for the fulfilment of the obligations forming part of the rehabilitation plan and the programme identified as essential for the reintegration of the divertee must endure for a period of not less than one year and not more than two years; and

(e) rehabilitation plan referred to in section 68(3).

Assessment

72. (1) A divertee alleged to have committed an offence must be assessed by a probation officer.

(2) The purpose of the assessment is to—

(a) gather information pertaining to the circumstances of a divertee leading to the commission of the offence;

(b) gather information pertaining to the personal circumstances of a divertee, including—

(i) whether the divertee has dependents;

(ii) the dependency status of the divertee;

(iii) whether the commission of the offence involved substance abuse;

(iv) whether the divertee has been diagnosed with a mental condition or other debilitating chronic disorder that might have contributed to the commission of the offence;

(c) gather information pertaining to the relationship between the divertee and victim;

(d) gather information pertaining to any previous convictions, previous diversions or other pending charges not related to the enquiry under consideration;

(e) formulate recommendations pertaining to the release of the divertee, if such a divertee is awaiting trial; and

(f) establish the prospects of diversion.

(3) Any information obtained at an assessment is confidential and—

(a) may only be used for purposes authorised by this Chapter, including the holding of a preliminary inquiry; and

(b) is inadmissible as evidence at any bail application, plea, trial or sentencing proceedings.

(4) Any person who contravenes subsection (3)*(a)* is guilty of an offence and is liable, on conviction, to the payment of a fine or imprisonment for a period not exceeding three months or both such fine and imprisonment.

(5) The assessment must comprise of—

(a) the divertee; and

(b) a police official, if a probation officer establishes that there may be risk of the divertee endangering the safety of such probation officer; or

(c) at the discretion of the probation officer—

(i) a diversion service provider;

(ii) a family member who the divertee desires to be present, as long as such attendance will not be disruptive to the assessment; and

(iii) any other persons whose presence will enhance the assessment process.

(6) The report of the probation officer must provide recommendations—

(a) indicating whether the divertee acknowledges responsibility for the offence;

(b) pertaining to the appropriateness of the alternative resolution dispensation recommended;

(c) providing details of the diversion programme, service provider and available options;

(d) providing an indication whether a victim-divertee mediation or a family group conference will enhance the developmental needs of the divertee;

(e) indicating whether a further and more detailed assessment of the divertee is required, informed by whether the—

(i) divertee is a danger to oneself;

(ii) divertee has a history of repeatedly committing offences; or

(iii) social welfare history of the divertee warrants further assessment; and

(f) as to the possibility of the divertee being admitted to a substance abuse programme or other intensive treatment programme.

(7) The report of the probation officer report must be submitted to the prosecutor assigned to the matter before the commencement of the preliminary inquiry.

Interventions

73. (1)*(a)* A family group conference entails an informal procedure aimed at bringing the divertee and the victim together, supported by their families and other appropriate persons at which a plan is developed on how the divertee must address the harms committed.

(b) A divertee and the victim must consent to the holding of such conference.

(c) The probation officer responsible for the investigation into the circumstances of the offender must convene such a conference within 21 days of being ordered to do so by a court or a divertee and victim agreeing to participate in such a conference.

(d) The family group conference may be facilitated by a family group conference facilitator who may be the probation officer or a diversion service provider.

(e) The family group conference may additionally be attended by—

(i) any person requested by a divertee;

(ii) the prosecutor;

(iii) a police official;

(iv) a member of the community in which the divertee normally resides; and

(v) any other person authorized to attend by the family group conference facilitator.

(f) If a family group conference fails to take place as scheduled, the probation officer must convene another conference within a further 21 days.

(g) A plan developed at the family group conference must—

(i) set out the objectives intended to be achieved in relation to the selected option for rehabilitation of the divertee;
(ii) contain details of the programme, service provider and services to be provided in response to the developmental needs of a divertee;
(iii) outline the responsibilities of the divertee;
(iv) include any other matter pertaining to the education, training, employment and treatment of a divertee;
(v) include a mechanism to monitor the plan; and
(vi) record the details of the reasons for the programme option adopted in the plan.

(h) If the participants of the conference cannot agree on a plan, the conference must be closed and the matter must be referred back to the prosecutor or inquiry magistrate for consideration of an alternative programme option.

(i) No information furnished by an offender at a family group conference may be used in any subsequent criminal proceedings arising from the same facts.

(2) *(a)* A victim-offender mediation entails an informal procedure intended to bring an offender and a victim together for the purpose of developing a plan on how the offender must redress the effects of the harm caused.

(b) The provisions relating to the family group conference apply with the necessary changes required by the context to the victim-offender mediation.

Preliminary inquiry

74. (1) A preliminary inquiry entails an informal pre-trial procedure which is inquisitorial in nature;

(2) The objectives of the preliminary inquiry are to—

(a) consider the assessment report of the probation officer, including information pertaining to whether a further and more detailed assessment is required;
(b) establish whether a matter can be diverted before the divertee enters a plea;
(c) identify a suitable diversion option;
(d) ascertain all relevant information pertaining to the offender, including the offender's circumstances and the offence committed; and
(e) ensure that the views of all persons present at the preliminary inquiry are

considered before a decision is taken to redirect a matter for the purposes of alternative resolution.

(3) A preliminary inquiry must be held within 48 hours of arrest if a divertee has been arrested and remains in detention, alternatively, within the time periods specified in a written notice or summons.

(4) An appearance before a preliminary inquiry by a divertee is regarded as a first appearance before a lower court.

(5) No information furnished by any person at a preliminary inquiry in relation to a divertee may be used against such divertee in any bail application, plea, trial or sentencing proceedings.

Legal consequences of alternative resolution

75. (1) If adivertee has successfully complied with the terms of a diversion order, a prosecution on the same facts may not be instituted.

(2) A diversion order made in terms of this Chapter does not constitute a previous conviction.

(3) A private prosecution may not be instituted against a divertee in respect of whom a diversion order has been made.

SCHEDULE 8

MINOR OFFENCES

(SECTION 70)

1. Theft, whether under common law or a statutory provision, receiving stolen property knowing it to be stolen or theft by false pretences, where, in all cases, the amount involved does not exceed R1 500.00.
2. Malicious injury to property, where the amount involved does not exceed R1 500.00.
3. Perjury.
4. Contempt of court.
5. Blasphemy.
6. Compounding.
7. *Crimen iniuria*.
8. Trespass.
9. Public indecency.
10. Any offence under any law relating to the illicit possession of dependence

producing drugs, other than any offence referred to in item 17 of this Schedule, where the quantity involved does not exceed R500.00 in value.

11. Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule.

SCHEDULE 9

MEDIUM IMPACT OFFENCES

(SECTION 71)

1. Theft, whether under the common law or a statutory provision, receiving stolen property knowing it to have been stolen, or theft by false pretences, where the amount involved exceeds R2 500 but is less than R20 000.
2. Malicious injury to property, where the amount involved exceeds R1 500 but does not exceed R20 000.
3. Public violence.
4. Culpable homicide.
5. Arson.
6. Housebreaking, whether under the common law or a statutory provision, with the intent to commit an offence.
7. Defeating or obstructing the course of justice.
8. Any offence under any law relating to the illicit possession of dependence producing drugs, other than any offence referred to in item 24 of this Schedule, where the quantity involved exceeds R500 but does not exceed R2 000 in value.
9. Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule.