

CHAPTER 9 ALTERNATIVE SENTENCING IN SOUTH AFRICA: AN UPDATE

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With South Africa's ever growing prison population, the hope is often expressed that non-custodial sentencing options or 'alternative sentencing' will relieve the overcrowding and its associated ills. The current situation in our prisons is, however, not the result of a lack of creative alternative sentencing options – indeed, these have been on the statute books for decades. Instead, prison overcrowding is caused by the slow administration of justice, resulting in a large awaiting trial population. Another factor is the propensity of South African courts to hand down long prison and prison-based sentences. The introduction in 1997 of legislation prescribing minimum mandatory sentences has also led to an increase in the sentenced prison population. On average 62% of convicted offenders receive a sentence that is in some way connected to imprisonment or direct imprisonment.

It is important to note at the outset that a discussion of alternative sentencing options in South Africa is not easy for the following reasons:

- There is a dire lack of accurate and up-to-date quantitative information. Reports on prosecutions, convictions and sentencing that were produced by the then Central Statistical Services were terminated in 1995/6 and other sources had to be consulted. While the Department of Correctional Services maintains an accurate database of the prison population, the same cannot be said for the Department of Justice and Constitutional Development as far as sentencing data is concerned.
- There does not appear to be an overall and comprehensive approach to sentencing that is in accordance with national policy or guidelines. It is therefore not possible to place non-custodial sentences – such as correctional supervision – within this framework and evaluate it against its intended outcomes. As far as could be established, the South African Law Reform Commission has not completed its work on a sentencing framework for South Africa.

This chapter provides an overview of 'alternative' or non-custodial sentencing, and in doing so, reviews sentencing trends in South Africa. Alternative sentencing options are assumed to be more restorative in nature, perhaps only because they are less retributive than imprisonment. A strict definition of restorative justice would state that the power of decision making is transferred to the parties involved and that they are fully mandated to resolve the conflict and develop restorative measures to heal the damage caused by the crime. In this sense, sentencing cannot by definition be restorative, as the decision making power does not rest with the victim and the offender, but with the magistrate or judge.

Having said this, restorative justice can take on a variety of forms, and there is no linear continuum from least to most restorative approaches. For restorative justice to have its intended impact, it is not only the outcome that is important but also the process by which that outcome is achieved.

The following section discusses alternative sentencing, paying specific attention to correctional supervision and community service orders. These two options were selected primarily because of the availability of data and information. The analysis suggests that the restorative potential of these sentencing options is limited. As far as the use of these two measures is concerned, the judiciary does not appear to subscribe to a more restorative paradigm. More restorative adjudication of cases, in terms of result and process, are likely in pre-trial diversion of child offenders through victim-offender mediation and family group conferencing.

What is alternative sentencing?

The UN Standard Minimum Rules for Non-custodial Measures lists the following as non-custodial sanctions that could be used to dispose of cases:

- verbal sanctions such as admonition, reprimand and warning;
- conditional discharge;
- status penalties;
- economic sanctions and monetary penalties, such as fines and day-fines;
- confiscation or an expropriation order;
- suspended or deferred sentence;
- probation and judicial supervision;
- community service order;
- referral to an attendance centre;
- house arrest;
- any other mode of non-institutional treatment;
- some combination of the measures listed above.¹¹⁰

In South Africa, the following options are available:

- committal to an institution;
- fines;
- community service orders;
- correctional supervision;
- caution and discharge;
- compensatory orders;
- suspended sentences.¹¹¹

The sentences listed above are conventional options borne out of a punishment paradigm that remains prison centred. New types of crime such as environmental crime, organised crime, corruption, and money laundering, involve different criminal actors and new criminal procedures and sanctions. There is therefore a need to distinguish between the conventional prison inspired non-custodial sanctions and the non-prison inspired non-custodial sanctions such as forfeiture, seizure, confiscation and banishment from certain activities.¹¹²

Reasons for non-custodial sentencing

Alternative or non-custodial sentencing probably has its origin in the realisation that imprisonment is not suitable for all offenders and can have a severely detrimental impact on certain types of offenders. Further reasons include the greater chances of successful reintegration of offenders, a reduction in the prison population, and that the offender's family is not victimised by the imprisonment. The arguments in favour of alternative sentencing are succinctly summarised by Zvekic:

The arguments for non-custodial sanctions are essentially the mirror image of the arguments against imprisonment. First, they are considered more appropriate for certain types of offences and offenders. Second, because they avoid 'prisonisation', they promote integration back into the community as well as rehabilitation, and are therefore more humane. Third, they are generally less costly than sanctions involving imprisonment. Fourth, by decreasing the prison population, they ease prison overcrowding and thus facilitate administration of prisons and the proper correctional treatment of those who remain in prison.¹¹³

Each of these arguments will briefly be dealt with in order to present a realistic picture about what alternative sentencing can achieve; all too often, expectations in this regard are too high.

Appropriateness

There are a range of petty offences for which a prison sentence would not be appropriate, especially when the age and personal circumstances of the offender are taken into account. A ten year review of community service orders in Cape Town revealed that, of those who received this sentence, almost equal proportions had committed crimes against property (44%) as those who had committed victimless crimes (42%).¹¹⁴ Only 15% were convicted for crimes against the person, which include violent crimes (Table 1).

Offence category	Number	Percentage
Crimes against property	628	43.6
Victimless crimes	597	41.5
Crimes against the person	215	14.9

Source: L Muntingh, 1997

The most common offences were driving under the influence (31%), theft (20%) and shoplifting (4%). The remaining types of offences varied widely, ranging from environmental crime and bigamy to possession of counterfeit money. Of the total, 49% were first offenders and a further 30% had one prior conviction. Under half (46%) the offenders were younger than 25 years, and most (85%) were males.

Non-custodial sentences like community service orders were found to be not only appropriate for certain offences, but also for certain types of individual offenders. The same study found that offenders with the highest compliance rate were: non-drug users, those convicted of victimless crimes, first offenders, those who were married, older than 22 years, employed, and more highly educated.¹¹⁵

Despite the appropriateness of alternative sentences for certain crimes and individuals, all the indications are that only a small percentage of offenders are actually considered for non-custodial sentences.

Reintegration

Although non-custodial measures avoid imprisonment and its negative impacts on the individual, there is unfortunately no clear evidence on

whether these options are more successful at curbing recidivism than prison sentences. Recidivism studies are fraught with methodological problems and while the re-offending rate of select groups can be traced (such as the community servers in Cape Town referred to above) there are no baseline data with which their recidivism rate can be compared. The inherent differences in the offence and individual profiles of prisoners and ‘community servers’ present major obstacles to the comparison.

The success of non-custodial measures is usually measured according to the ‘compliance rate’ – whether or not the offender complied with the conditions of the sentence. This can, however, create a false impression as the offender can be placed under a severe regime with very strict monitoring conditions such as correctional supervision, which assists the offender to comply with the conditions but does not reduce the risk factors he or she faces on completion of the sentence. The Cape Town study of community service orders found that despite complying with the order, those who re-offended did so after an average time lapse of 30 months.¹¹⁶

Less costly

The strongest argument for the increased use of non-custodial measures is around the issue of cost reduction – an argument that is particularly favoured by the Department of Correctional Services (DCS). According to the DCS annual report the daily cost of managing a probationer/parolee was R9.54 in 1999/00 compared to R80.82 per day for prisoners.¹¹⁷ The added benefit is that the ideal staff to probationer/parolee ratio is 1:33 compared to the 1:5 for prisoners.

Although the figures look promising, reductions in the prison population as a result of non-custodial sanctions would have virtually no impact on the maintenance costs of prisons. For example, if each prison had 10% fewer prisoners, this would have very little if any effect on the amount of personnel needed, the programme costs or the daily management of the prison.¹¹⁸

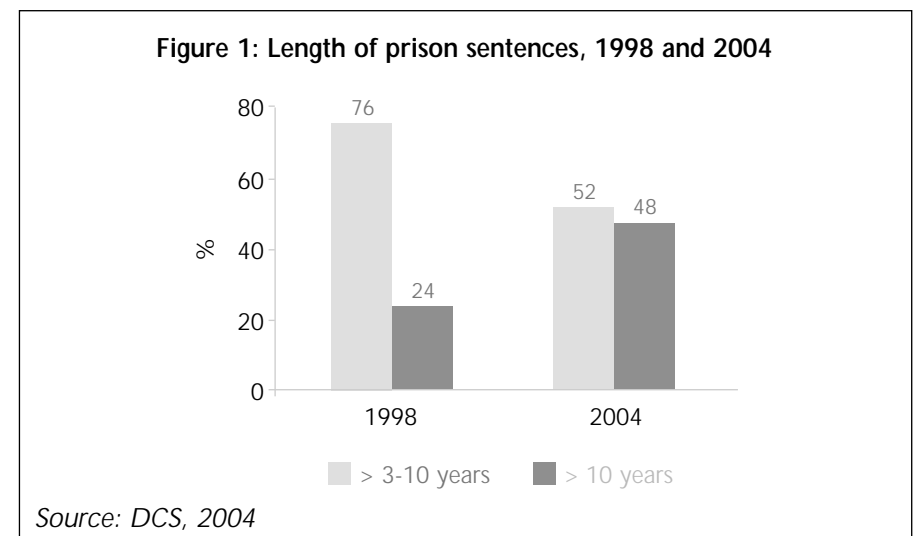
Non-custodial sentences also have other costs that are not always accounted for in these calculations, such as the supervision provided by non-profit organisations either as part of an agreement with the relevant government department or when such organisations are used for community service placements. Supervising offenders in these settings can be time consuming and if not placed and matched properly to the placement, they can become a burden instead of a help.

Prison population reduction

Correctional supervision and parole are currently used extensively to decrease the number of prisoners. On average, for the period 1 April 2003 to 31 March 2004 there were 75,061 persons under supervision. Despite these substantial numbers, the prison population has been steadily increasing, primarily as a result of the awaiting trial population but also, more recently, because of increases in the sentenced population. The sentenced population has increased from 110,074 in January 2001 to 136,941 by August 2004.¹¹⁹

The expectation that non-custodial sentencing will decrease prison numbers is perhaps unrealistic in the light of overall sentencing trends. There is a definite shift towards longer prison terms and fewer prisoners are being admitted for terms of less than six months. Of most concern is the significant increase in the number of prisoners serving long and life sentences. This trend has been linked to the minimum sentencing legislation.¹²⁰ In January 1998 (prior to the implementation of minimum sentencing) only 24% of the sentenced prison population was serving a prison term of longer than 10 years. This has since increased to 48% (Figure 1).

In view of this trend, it is somewhat unrealistic to expect non-custodial sentences to have any significant impact on prison numbers in the foreseeable future. While short term prisoners (six months or less) make up nearly half of



annual admissions, they comprise only about 5% of the daily prison population. Even if DCS were to convert all of these sentences into correctional supervision, it would amount to a reduction of only 5% in the daily prison population.

While this would alleviate the workload of officials responsible for prison admissions, it would not make much difference to those responsible for the day-to-day services and management of prisons. Table 2 illustrates the difference in numbers between admissions and day counts.

Sentence	Profile of admissions, 1999 ¹²¹	Profile of day count, 31/8/2004 ¹²²
0-6 Months	49.3	3.2
>6-12 Months	-	3.5
>12-<24 Months	19.3	3.3
2-3 Years	11.7	9.9
>3-5 Years	6.9	9.1
>5-7 Years	3.4	6.6
>7-10 Years	3.9	11.5
>10-15 Years	2.8	12.0
>15-20 Years	1.0	5.5
>20 Years to Life	1.1	7.8
Other Sentenced	0.6	0.9

To summarise, while the arguments in favour of non-custodial sentencing have their merits, expectations about what these sentences can achieve should be tempered. Many variables impact on the use of non-custodial sentencing and its intended outcomes. The fairly stringent selection procedures for these sentencing options immediately exclude a large number of offenders, leaving imprisonment as the only option. Furthermore, there is little in the form of guidelines or incentives for the judiciary on the use of non-custodial sentences, which reduces the chances that they will hand these sentences down.

Sentencing trends in South Africa

Since 1977/78 when the first data became available, sentencing trends in South Africa have shown a strong propensity for prison based options.¹²³

Between 1977/8 and 1995, on average, nearly 62% of all offenders received a sentence that is in some way connected to a term of imprisonment – either direct imprisonment, or fully or partly suspended on certain conditions, for example payment of a fine. Given this, it is not surprising that non-custodial sentencing has not made any significant impact on prisoner numbers.

Table 3 presents the sentence profile for 1995/6 indicating the strong reliance of the courts on prison based sentencing options. The table shows that 56% of sentences were connected to a prison term.

Sentence option		Number	Percent
Cautioned		4,958	2.2
Fully suspended		55,721	24.9
Fine only		22,221	9.9
Imprisonment or fine	Not suspended	56,671	25.3
	Partly suspended	17,209	7.7
Without a fine	Not suspended	40,933	18.3
	Partly suspended	9,059	4.0
Plus a fine	Not suspended	77	0.0
	Partly suspended	41	0.0
Plus corporal punishment	Not suspended	31	0.0
	Partly suspended	12	0.0
Corporal punishment only		577	0.3
Other imprisonment	Periodic	414	0.2
	Corrective	55	0.0
	For life	122	0.1
	Habitual	130	0.1
	Dangerous criminal	600	0.3
	Reformatory/industry school	850	0.4
Correctional supervision		5,500	2.5
Sentence deferred		8,311	3.7
Treatment centre		167	0.1
Detention until court adjourns		38	0.0
Total		223,697	100.0

Correctional supervision and community service orders

The following section assesses two sentencing options that could theoretically have substantial restorative impact. These particular options were selected because of the availability of information. Other measures, such as compensation orders, could also have restorative outcomes, but these are applied in so few cases that meaningful analysis is not possible.

*Correctional supervision*¹²⁵

In terms of the Criminal Procedure Act (51 of 1977) a person may be sentenced to correctional supervision as an alternative to imprisonment. In addition, DCS may – under certain conditions – convert a prison sentence to correctional supervision. The commissioner of correctional services may apply to the court for such a conversion if the offender's prison term is less than five years or if there is less than five years remaining of a longer prison term. The commissioner may, without applying to a court, convert a prison term to correctional supervision when an offender has been sentenced to a fine but the offender is unable to pay the fine.

The commissioner of correctional services, who is responsible for placing most offenders on correctional supervision, is empowered to impose the following conditions with regard to correctional supervision:

- (a) is placed under house detention;
- (b) does community service;
- (c) seeks employment;
- (d) takes up and remains in employment;
- (e) pays compensation or damages to victims;
- (f) takes part in treatment, development and support programmes;
- (g) participates in mediation between victim and offender or in family group conferencing;
- (h) contributes financially towards the cost of the community corrections to which he or she has been subjected;
- (i) is restricted to one or more magisterial district;
- (j) lives at a fixed address;
- (k) refrains from using or abusing alcohol or drugs;
- (l) refrains from committing a criminal offence;
- (m) refrains from visiting a particular place;
- (n) refrains from making contact with a particular person or persons;
- (o) refrains from threatening a particular person or persons by word or action;
- (p) is subject to monitoring;
- (q) in the case of a child, is subject to the additional conditions as contained in section 69.¹²⁶

From the list it is evident that with some creativity these can be applied in a restorative manner. There is, however, no data available on the utilisation of these options and how they are being used in combination. While the Correctional Services Act provides for victim compensation as part of correctional supervision, there does not appear to be any information available on how extensively this condition is applied by magistrates and judges.

Within these parameters, the lifestyle of a probationer (as they are referred to) can be severely curtailed through strict monitoring, drug and alcohol testing, and unannounced visits by a correctional officer.

The decision about whether or not an offender is a suitable candidate for correctional supervision is influenced by a range of variables that are assessed and presented in a report by the probation officer or correctional officer:

- whether the offender can be monitored and controlled in the community;
- the willingness of the offender to participate in the treatment programme;
- the risk posed to the community by the offender;
- whether the offender can earn a living or can be supported;
- the offender's previous convictions and types of crimes committed.

All probationers are monitored by correctional officials or contracted voluntary workers by means of:

- personal visits to their work places and homes;
- telephone calls to their work places and homes;
- visits by the probationer to the community corrections office.

Table 4 shows the number of people placed under correctional supervision and parole by the DCS. Over the period 2001/02–2003/04, the total number of persons under supervision grew by 7.5% while the total sentenced prison population increased by 17%.¹²⁷ This means that as a measure to reduce the prison population, correctional supervision alone will not be successful.

Year	Under supervision	Absconders
2001/02	68,395	13,094
2002/03	71,560	6,747
2003/04	73,554	1,525

Correctional supervision is also used for children, as shown in Table 5. In 2001, a total of 1,481 children were placed under correctional supervision, mostly in KwaZulu-Natal and the Eastern Cape.

Province	<14 years	14–16 years	16–18 years	Total
KZN	5	42	287	334
E Cape	4	31	204	239
Free State	1	30	166	197
Limpopo	4	31	118	153
N West	2	27	117	146
W Cape	2	11	124	137
Mpumalanga	0	18	92	110
N Cape	2	6	59	67
Gauteng	4	17	77	98
Total	24	213	1,244	1,481

Correctional supervision appears to be used mostly for property offenders who, in July 2000, made up nearly 60% of the total, while those convicted of violent offences constituted just less than a quarter (Table 6).

Offence category	Male	Female	Total	%
Economic (including property crimes)	9,783	6,351	16,134	59.2
Aggressive	5,876	844	6,720	24.6
Other	2,703	201	2,904	10.6
Narcotics	1,208	254	1,462	5.4
Sexual	52	0	52	0.2
Total	19,622	7,650	27,272	100.0

An analysis of the 35,131 offenders sentenced to correctional supervision in 2001 shows that 63% were originally sentenced to a prison term in lieu of payment of a fine, after which the sentence was converted to correctional supervision by the commissioner of correctional services.¹³⁰ The data further suggests that magistrates and judges were responsible for only 21.5% of

correctional supervision sentences while the commissioner of correctional services was responsible for 73% of these sentences (Table 7). This sentencing option is thus favoured not by the judiciary, but by the commissioner of correctional services, who appears to be the driving force behind the use of correctional supervision.

An analysis by DCS of the use of community corrections also suggests that the judiciary's role in using this sentencing option has changed over the years: the

Province	S 276(1)(h) admitted	S 276(1)(i) converted	S 276A(3) converted	S 286B(4)	S 287(4)(a) converted to 276 (1)	S 287(4)(b) converted to 276 A (3)	Other
Free State	758	365	4	0	1,804	5	991
Western Cape	1,504	1,293	13	0	4,186	8	239
Mpumalanga	558	123	7	0	1,994	8	207
Gauteng	829	551	39	0	782	10	60
KwaZulu Natal	1,078	479	45	2	2,570	8	73
North West	864	187	15	0	1,479	5	182
Northern Cape	313	195	4	0	1,481	7	2
Limpopo	448	116	2	1	2,867	9	7
Eastern Cape	1,025	272	2	0	5,006	1	48
Total	7,377	3,581	131	3	22,169	61	1,809
Percentage	20.9	10.2	0.4	0.0	63.1	0.2	5.1

- S 276 (1)(h) Describes and establishes correctional supervision as a sentence to be handed down by a court.
- S 276(1)(i) Makes provision for the possibility that the commissioner of correctional services can convert a prison sentence to sentence of correctional supervision.
- S 276(A)(3) Enables the commissioner to apply to the court for a conversion of a prison sentence to correctional supervision if the sentence is less than five years or there is less than five years remaining of a longer sentence.
- S 286(B)(4) Provides for the conversion of a sentence of an indefinite period of imprisonment to correctional supervision.
- S 287(4)(a) to 276(1) A prison sentence being served as an alternative to a fine can be converted by the commissioner to a sentence in terms of S 276(1).
- S 287(4)(b) to 276(A)(3) If the offender is serving a sentence as an alternative to a fine, the commissioner must apply to the court to have the sentence converted to correctional supervision.

number of sentences passed by judges and magistrates declined from 4,352 between January and June 1995 to 3,370 in 2000 – a decrease of 29%. By comparison, the conversion of prison sentences with the option of a fine to community corrections increased by 60% from 4,362 during January – June 1995 to 10,976 during January – June 2000.¹³¹

Apart from the impact of how the sentencing option is used, measuring the success of community corrections is difficult. According to the DCS annual reports,¹³² the success rate of correctional supervision ranges from 80% to 92%. The 'success rate' is, however, measured in terms of actual sentences served and includes fines that were paid, warrants of liberation that were issued and even deaths of offenders. The success rate is therefore more of a 'compliance rate' and as such does not measure the impact of this sentencing option but rather the ability of the department to manage offenders outside the prison environment. There does not appear to be any reliable data available on the recidivism rates of offenders placed under correctional supervision.

As a sentencing option, correctional supervision has been criticised for raising unrealistic expectations about treatment, and the lack of a unified approach towards the aims of rehabilitation.¹³³ Treatment in the correctional supervision model has been described as forced; probationers are not very desirous of the services offered, and are not willing to partake in anything that goes beyond what the law requires of them. Furthermore, a unified approach to rehabilitation has been found to be undermined by the following characteristics of the correctional supervision model:

- the bureaucratic system of prison management was transferred to correctional supervision – an option that requires a more integrated approach;
- while this bureaucratic system works well in terms of administration, it is not conducive to treating offenders as individuals;
- the officials who have the most contact with offenders are generally those of the lowest rank with the result that those who are aware of offenders' needs do not have the authority to implement the necessary changes;
- in the prison environment a pacifying approach to treating prisoners is generally applied, whereas in the correctional supervision context, the application of discipline and the threat of imprisonment lies at the heart of ensuring compliance;
- offenders under correctional supervision are monitored by supervision officials, whereas social workers and psychologists handle treatment even though the supervision officials have more contact with offenders and

know more about their personal circumstances – there is no official linkage where information can be shared.¹³⁴

Community service orders¹³⁵

Sections 297(1)(a) and (b)(i)(cc) of the Criminal Procedure Act (No 51 of 1977) make provision for the rendering of community service as a condition of a postponed or suspended sentence. Although the Act made provision for this sentencing option, the procedure itself was not clearly described and consequently not used as a sentencing option. It was only in 1980 when pilot projects were run by NICRO in Cape Town and Durban that these procedures were developed. Section 297(1)(a)(cc) of the Criminal Procedure Amendment Act (No 33 of 1986) clarified the statutory confusion and gave clear guidelines regarding community service. The most important guidelines are:

- the server must be older than 15 years;
- a minimum of 50 hours of service should be performed;
- the server and the placement should be informed in writing about their respective duties and responsibilities;
- it is a criminal offence for the server to report for service while under the influence of drugs or alcohol;
- it is a criminal offence for somebody else to pretend to be a person who has been sentenced to perform community service;
- damages resulting from the performance of community service can be claimed from the state.

The procedure for this sentencing option can be summarised as follows:

- after conviction, the court may request that the offender be assessed for community service and the case is postponed to a later date;
- an assessment interview is then conducted with the offender by a probation officer, NICRO social worker, or parents of the offender (in the case of a child);
- the assessment interview will focus on the offender's lifestyle stability, willingness to do community service, personal circumstances, etc;
- the probation officer will, based on the interview and any other relevant information, make a recommendation to the court regarding the offender's suitability for community service, and if suitable, the number of hours to be served, the period in which it needs to be performed, and possible placement;
- if the court agrees with the recommendation for community service it will specify the total number of hours, the placement time in which it needs to

be completed, minimum number of hours per month to be performed, usually all as conditions to a suspended prison term;

- the community server's performance will then be monitored by the probation officer or NICRO, as was the arrangement in the past;
- should the server fail to comply with the conditions of the sentence, he or she is entitled to one written warning after which the court is informed of the situation and the alternate conditions of the sentence come into operation.

Up to the mid-1990s NICRO was primarily responsible for the administration and supervision of community service in South Africa. Thereafter it was handed over to the Department of Social Development and although not supported with accurate statistical information, all indications are that the popularity of this sentencing option has dwindled to insignificant numbers.

The restorative content of community service orders and community service when applied as part of correctional supervision is questionable. The 'payment' to society through providing free labour for public benefit non-profit activities is largely symbolic and hidden from society's view. The symbolic impact is felt primarily by the judicial officer who passes the sentence, and hopefully, also by the offender. Community service very rarely benefits the victim directly, and considering that around 40% of offenders sentenced to community service have committed a victimless crime,¹³⁶ the potential for restorative justice further diminishes. Despite these concerns, community service remains an under-utilised sentencing option that presents the bench with an alternative to imprisonment for those offenders who meet the criteria.

Conclusion

Alternative sentencing options, such as correctional supervision and community service orders, are not widely used by magistrates and judges. Correctional supervision is largely driven by the commissioner of correctional services who is responsible for nearly three quarters of these cases.

The large scale use of alternative sentencing will only be achieved if stricter guidelines are given to those handing down sentence. Moreover, if non-custodial sentences are to contribute towards restorative justice, the conditions of such sentences must reflect at least some restorative principles. When assessed against a stringent definition of restorative justice, no current sentencing options can be classified as restorative. At this stage, the restorative adjudication of cases appears to be limited to the domain of diversion

programmes primarily used for children who have been charged with criminal offences.

Non-custodial sentencing options should not simply be equated with restorative justice. The process of administering justice is important and should be based on an empowerment approach. As long as the parties concerned are excluded from the decision making process, the potential for restorative justice will be limited. Having said this, the approach need not be a matter of 'all or nothing'. There are different ways in which the interests of the victim, society, the offender and the state can be served through the use of creative sentencing options that may have a greater or lesser restorative content.