

SOUTH AFRICAN LAW COMMISSION

PROJECT 107

SEXUAL OFFENCES

REPORT

December 2002

ISBN:

To Dr PM Maduna, Minister for Justice and Constitutional Development

I have the honour to submit to you in terms of section 7(1) of the South African Law Commission Act, 1973 (Act 19 of 1973), for your consideration the Commission's report on **Sexual Offences**.

pp Madam Justice Y Mokgoro
Chairperson: South African Law Commission
December 2002

INTRODUCTION

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

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SELECTED LEGISLATION

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Constitution of the Republic of South Africa Act 108 of 1996
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Criminal Procedure Act 51 of 1977
Danish Administration of Procedure Act 1980
Divorce Act 70 of 1979
Domestic Violence Act 116 of 1998
Extradition Act 67 of 1962
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Namibian Combating of Rape Act 8 of 2000
Prescription Act 68 of 1969
Public Finance Management Act 1 of 1999
Riotous Assemblies Act 17 of 1957
Sexual Offences Act 23 of 1957
The New Zealand Evidence Act 1908
The Western Australia Consolidated Act Evidence Act 1906

CHAPTER 1

INTRODUCTION

1.1 Background

The South African Law Commission was requested to investigate sexual offences by and against children and to make recommendations to the Minister for Justice and Constitutional Development for the reform of this particular branch of the law in 1996. A project committee was appointed and an issue paper on sexual offences against children was published for general information and comment in May 1997.

It became clear during the course of the investigation and pertinently at workshops held on the Issue Paper that any proposed changes to the law relating to sexual offences would have a far-reaching effect on the position not only of children but of adults as well. A lively debate ensued as to whether all sexual crimes, including those against adults, should be covered by this investigation. Submissions on the Issue Paper and participants at workshops were divided on this issue. However, this debate largely became irrelevant after the Commission received a request from the Justice Parliamentary Portfolio Committee and the then Deputy Minister of Justice¹ to consider the position of adults affected by sexual violence. Together with this request, the Commission received an expanded mandate which encompassed an overhaul of the criminal justice system in relation to sexual offences. The Commission were given the unique mandate of not only effecting necessary law reform but of ensuring that the legislative changes made would be effected by the making of recommendations for the reform of the processes employed by the criminal justice system in its response to sexual violence. The scope of the investigation was subsequently expanded to include sexual offences against adults and renamed sexual offences.

A considerable amount of time and energy was spent on the planning of the investigation. Questions on whether one or more discussion papers were needed and what the scope or focus of such discussion papers should be were debated. The

¹ Dr Manto Tshabalala-Msimang, now Minister of Health.

Committee grappled with issues such as how to address the possibility that the particular focus on children might be lost. The option of developing separate discussion papers on children and adults was explored. However practical considerations and political and other pressures made it imperative to deliver as speedily as possible. In the end the Commission decided to publish three separate discussion papers with draft legislation where necessary. The Commission decided that the first discussion paper would address the substantive law relating to sexual offences and would contain draft legislation. It was to have both a child and adult focus. The second discussion paper would deal with matters concerning process and procedure and would again have a combined child and adult focus. The third discussion paper would have a particular adult focus and would concentrate on adult prostitution. Thereafter a fourth topic, namely child pornography, was identified and it was decided that it too deserved to form the substance of a discussion paper.

The existing Project Committee voiced its concern to the Commission that their expertise lay in the field of child sexual abuse and that expertise relating to sexual abuse of adults would be necessary to guide the investigation further. Pursuant to the request of the Commission the Minister of Justice and Constitutional Development expanded the Project Committee by appointing additional members found to have expertise in the field of sexual abuse of adults.

As part of an incremental approach, the South African Law Commission has to date released two discussion papers, the first dealing with the substantive law relating to sexual offences² and the second dealing with the process and procedural law relating to sexual offences.³ Both discussion papers were accompanied by draft legislation. The Bill accompanying the latter discussion paper included substantive law provisions, all of which had been revised following the integration of submissions received on the discussion paper on the substantive law.

Both discussion papers were extensively workshopped both rurally and in urban centres in all of the nine provinces. In this regard, the Commission would like to acknowledge the financial support of Save the Children (Sweden) and the assistance of the Gender

2 Discussion Paper 85: Sexual Offences: The Substantive Law.

3 Discussion Paper 102: Sexual Offences: Process and Procedure.

Commission and the National Network on Violence against Women. These organisations ensured the success of many of the workshops. Numerous telephonic, newspaper, radio and television interviews were conducted. Substantial submissions were elicited both locally and internationally.

Due to the fact that the discussion paper on process and procedure and the accompanying Bill contained progressive recommendations regarding the entire criminal justice process, the Commission hosted an expert consultative meeting in Gordon's Bay. The meeting was attended by a group of selected legal experts and expert role-players in the field of sexual offences from across the country. The purpose of this meeting was to test the legal viability of the proposals contained in the Bill which accompanied the above discussion paper. The proceedings of this meeting were incorporated as group or individual submissions to this report depending on whether consensus was reached.

This report is a joint report on both the substantive and procedural law relating to sexual offences and follows on the above processes. The report contains the final recommendations of the Commission and is accompanied by a draft Bill on Sexual Offences. The report and the Bill, once approved by the Commission, will be handed to the Minister for Justice and Constitutional Development for his consideration.

1.2 Problem statement

This investigation by the South African Law Commission into sexual offences addresses the growing and complex problems relating to rape and sexual abuse of particularly women and children, and the processes and procedures underpinning our criminal justice system in this regard. It has a particular focus on violence against women, both young and old, but is not limited thereto.

It is with this primary focus that the Commission proposes changes to the criminal justice system and to the substantive and procedural laws that underpin it.

The report purposely contains innovative and progressive recommendations regarding changes to the criminal justice system. The intention is to encourage victims of sexual violence to approach the system for assistance and to improve the experiences of those

victims who choose to enter the criminal justice system, whilst at the same time giving due regard to the rights accorded to alleged perpetrators of sexual offences. Also included in the report are recommendations which are non-legislative in nature. These recommendations deal with some of the difficulties encountered by victims of sexual violence and some of the social factors contributing to the high incidence of sexual offences. Although this falls outside the narrow scope of law reform, this investigation's extended terms of reference are explicit in this regard. It is hoped that in so doing, action by the appropriate government structures will be encouraged and that communities will be galvanised to participate in the fight against this form of violence.

A comprehensive exposition of the origin of and background to this investigation can be found in the issue paper on sexual offences against children⁴ and the discussion paper on the substantive law relating to sexual offences.⁵

1.3 General comment

A plethora of workshops, conferences, brainstorming sessions and the like have intensely debated issues relating to the review of the existing legal framework on sexual offences and how co-operation among all role-players can be maximised. The lobby for more effective management of sexual offence cases resulted in the establishment of a specialised sexual offence court in Wynberg, Western Cape in 1993. A National Task Team has since been established by the Department of Justice and Constitutional Development with the aim of extending these specialised courts to every other regional court, nationally. This includes training justice personnel and other stakeholders to handle sexual offence matters more effectively. Other government departments have embarked on related initiatives of their own. However these initiatives have remained largely independent and uncoordinated.

The Commission has attempted to synthesise the theory and practical reality facing victims of sexual offences into workable and enforceable legislative and non-legislative reforms that will protect victims of sexual violence, protect the rights of the offender,

⁴ South African Law Commission (Project 107) **Issue Paper 10: Sexual Offences Against Children** (hereafter Issue Paper 10).

⁵ Discussion Paper 85, Chapter 1.

minimise trauma as well as facilitate, where possible, processes of healing of the victim and rehabilitation of the offender.

The Commission and members of the Project Committee on Sexual Offences would once again like to thank all participants and all those who made submissions in response to the Issue Paper, the discussion paper on the substantive law relating to sexual offences and the discussion paper on the procedure relating to sexual offences for their invaluable contribution to this process. The Commission also specifically acknowledges the contribution made by children⁶ and Rape Crisis (Cape Town), Women and Human Rights Project, Community Law Centre, UWC, Institute of Criminology (UCT) by way of the discussion document commissioned by the Deputy Minister of Justice: Legal Aspects of Rape in South Africa.

In developing its recommendations to improve the process for victims of sexual offences, the Commission has been mindful of the following considerations:

- * Proposals that require substantial additional resources are unlikely to be viable in the current economic climate. Therefore the main focus should be on identifying ways in which existing agencies and processes can be made to work more effectively.

- * Measures requiring legislation should be kept to a minimum.

1.4 General approach taken in drafting the Sexual Offences Bill

In drafting the Sexual Offences Bill, the Commission had to find a balance between a short and succinct Bill (a lean and mean Bill) and a more comprehensive document (a training manual). Those in favour of the lean approach⁷ acknowledge the concerns of those respondents and practitioners who point out that some of the existing legal provisions are not adequately implemented, despite being on the statute book in some cases for a long time. They point out, however, that it would serve little purpose to re-enact, in far greater detail, existing legal provisions inadequately or wrongly applied. By

⁶ See especially Community Law Centre, UWC **Report on Children's Rights**, p 15 -16.

⁷ Such as Judge Bertelsmann and Professor Schwikkard.

the same token it is argued that it would be self-defeating to re-enact provisions of the common law or to duplicate provisions in the Criminal Procedure Act, 1977 or other laws.

Other respondents, including some members of the Project Committee, favoured a more comprehensive approach. This tied in with the vision to present a single, user-friendly, victim-orientated, comprehensive Sexual Offences Act, the argument being that such an Act would assist both court officials and witnesses involved in sexual offence cases: All involved in the criminal process would know what to expect and what is expected of them.

In the discussion paper stage, the Commission adopted the more comprehensive approach. In that stage, provisions were included in the Bill some of which are no longer contained in the draft final Bill. While recognising the urgent need for training and the development of protocols and practice guidelines, the Commission moved towards a leaner Bill in this report. This move was brought about by a careful assessment of the merits of each individual clause in the light of the problem it sought to address.

Where possible, procedural issues were addressed by means of amendments to the Criminal Procedure Act, 1977. Some procedural issues, such as those relating to vulnerable witnesses, ideally belong in the Criminal Procedure Act. However, given the limitation of the Commission's mandate to sexual offences, these provisions are found in the Sexual Offences Act. Should the decision be taken to extend the concept of vulnerable witnesses to all witnesses in all criminal proceedings, serious consideration should be given to place those provisions in the Criminal Procedure Act.

1.5 Financing and costing

The Commission recognises the serious systemic challenges facing the current criminal justice system: the backlogs, the lack of resources, training, experience and inter-sectoral co-operation, etc. To address these challenges and to maintain the existing system, continued and increased fiscal support would be required. However, should the Commission's proposals in this report be accepted, additional state funding would be required *inter alia* to give effect to the victim approach propagated.

Should the Minister decide to proceed and introduce the legislation, a critical step would be to cost the draft legislation.⁸ As stated above, the Commission did adopt a pragmatic approach where it attempted to strike a balance between the available current resources, their optimal use and application, and the realisation that the criminal justice system will continue to need more resources to effectively fight crime for the foreseeable future.⁹ There is thus an urgent need to determine what it would cost to implement the new legislation.

Determining the financial implications (to the State) of the proposed legislation is a precondition for obtaining Cabinet approval to introduce the draft legislation in Parliament. Such Cabinet approval is sought on the basis of a memorandum setting out the purpose and object of the intended legislation, and importantly, whether the legislation envisaged would have a cost implication and if so, what that would be. It is the responsibility of the Department of Justice and Constitutional Development to prepare such a Cabinet memorandum.

1.6 Conclusion

The primary objective of reform should be to ensure that it is implemented at grassroots level and that organisational practices are modified accordingly. The Commission is convinced that the legislative proposals contained in the proposed Bill on Sexual Offences will go a long way to improving the present system as it applies to sexual offence matters. However it is mindful that without the concomitant commitment of the relevant ministries to enact and comply with the national policy framework and to act upon the non-legislative recommendations included in this report the proposed legislation will remain a blunt instrument.¹⁰ The Commission therefore enjoins all the relevant agencies involved to concentrate on the developing of the national policy framework and detailed policies and protocols for modifying existing practices and to come to an agreement to institute these changes as a matter of the utmost priority.

8 As is prescribed by section 35 of the Public Finance Management Act, 1999 (Act No.1 of 1999).

9 The SA Human Rights Commission's **Report on the Enquiry into Sexual Violence against Children**, April 2002, recommendation 47, concludes that as funds and resources are limited, efficiency is essential.

10 The SA Human Rights Commission's **Report on the Enquiry into Sexual Violence against Children**, recommendation 8, endorses a collaborative effort among all role players involved in the management of sexual offences at all levels of government.

For ease of reference each section in the report follows the following format: current law, overview of the proposals contained in Discussion Papers 85 and 102 (containing the relevant clause as published in the proposed Bill attached to the Discussion Paper on Sexual Offences: Process and Procedure), evaluation of comment and recommendation.

CHAPTER 2

GUIDING PRINCIPLES

2.1 Proposals in Discussion Paper 102

In Discussion Paper 102 a set of guiding principles had been considered imperative for the formulation of both the substantive and procedural law with regard to sexual offences. In keeping with the modern trend towards including principles in a number of recent statutes, it was recommended that a set of guiding principles for the management of sexual offences be included in the proposed Bill as a substantive clause. The following clause was proposed:

Guiding principles

2. In the adjudication of any proceedings which are instituted in terms of or under this Act, the following principles shall apply:

- (a) Victims may not be discriminated against, either directly or indirectly, on the grounds of race, colour, ethnic or social origin, gender, sexual orientation, age and developmental level, physical or mental disability, religion, conscience, belief, culture or language.
- (b) Victims must be treated with compassion and respect for their dignity.
- (c) Victims must be ensured access to the mechanisms of justice.
- (d) Victims must be informed of their rights and the procedures within the criminal justice system which affect them.
- (e) Victims have the right to express an opinion, to be involved in all decisions, and to have their opinion taken seriously in any matter affecting them.
- (f) In addition to all due process and constitutional rights, victims have the following rights-
 - (i) to have present at all decisions affecting them a person or persons important to their lives;
 - (ii) to have matters explained to them in a clear, understandable manner appropriate to their age and in a language which they understand;
 - (iii) to remain in the family during the investigation and whilst awaiting a final resolution of the matter and, if a child is removed from the family, to have the placement periodically removed;
 - (iv) to have procedures dealt with expeditiously in time frames appropriate to the victim and the offence.
- (g) Victims have the right to confidentiality and privacy and to protection from publicity about the offence.
- (h) Victims and their families are entitled to receive such therapeutic assistance as is necessary to promote healthy functioning. Where possible the offender should make a financial or material contribution to such assistance.
- (i) Where a child is involved, the best interests of the child shall be paramount in all matters concerning that child.
- (j) The vulnerability of children entitles them to speedy and special protection and provision of services by all disciplines and involved parties during all phases of the investigation, the court process, and thereafter, including the implementation and implications of sentencing of the sexual offender.
- (k) Since the family and the community are central to the well-being of a child,

- consideration should be given, in any decisions affecting a child, to -
- (i) ensuring that the child's family, community and other significant role-players are consulted;
 - (ii) the extent to which decisions affecting the offender will affect a child, his or her family and community;
 - (iii) the particular relationship between the offender and the child;
 - (iv) keeping disruptive intervention into child, family and community life to a minimum in order to avoid secondary victimisation of the child.
- (l) Restorative and rehabilitative alternatives must be prioritized and applied unless the safety of the victim and community requires otherwise.
- (m) A person who commits a sexual offence must be held accountable for his or her actions and should be encouraged to accept full responsibility for his or her behaviour.
- (n) In determining appropriate sanctions for a person who has been found guilty of committing a sexual offence -
- (i) the sanctions applied must ensure the safety and security of the victim, the family of the victim and the community;
 - (ii) the sanctions must promote the restoration of the victim, the family of the victim and the community;
 - (iii) where appropriate, offenders must make restitution which may include material, medical or therapeutic assistance, to victims and their families or dependents;
 - (iv) the child sexual offender should bear special consideration in respect of sanctions and rehabilitation;
 - (v) the possibility of rehabilitating the sexual offender must be taken into account in considering the long-term goal of safety and security of victims, their families and communities,
 - (vi) the interests of the victim must be considered in any decision regarding sanctions.
- (o) In order to avoid systemic secondary victimisation of victims of sexual offences, binding inter-sectoral protocols following an inter-disciplinary approach must be followed.
- (p) All professionals and role-players involved in the management of sexual offences must be properly and continuously trained after going through a proper selection and screening process.
- (q) Cultural diversity must be taken into account in all matters pertaining to the victim, the offender and to their communities. The existence of cultural differences is no justification for or licence to commit a sexual offence or to exclude a criminal justice process.

2.2 Evaluation of comment

A number of participants at the Gordon's Bay Expert Conference expressed the view that the principles have been expressed in language that is too peremptory, and suggested, in order to prevent arguments that there is no sanction for disobedience of the guidelines, that the clause should be couched more in terms of exhortation (ie *should* as opposed to *must*). The Commission agrees with this proposal and has adapted the clause accordingly.

In addition, some participants suggested that the clause should be reformulated to establish *objectives* as opposed to *principles*, as it can then assist with the interpretation of the proposed legislation. Again the Commission found this to be a valuable observation as such an adaptation will eliminate concerns about the enforceability of the clause if it is to be retained as a body of principles. The suggestion also harmonises with the first proposal, namely that the wording should be adjusted to be less peremptory. In the Commission's view the objectives, in conjunction with the preamble, contain the normative values that underpin the draft Bill and serve as indicators as to how, and in which context, the Bill should be interpreted and applied. If it is found that the Bill has been applied without due regard to these values, it should be possible to have such misapplication judicially reviewed.

A number of respondents suggested alternative wording and reformulation of certain provisions contained in the original clause. The extent to which the Commission has heeded these proposals is evident from the reformulated clause reflected under the heading "Recommendation" below. Words and phrases in square brackets and in bold indicate omissions from the original clause, and underlined words and phrases indicate insertions.

In a joint submission by the Children's Rights Project (Community Law Centre, University of the Western Cape); the Department of Forensics and Toxicology (University of Cape Town); Gender, Law and Development Project (Institute of Criminology, University of Cape Town); Gender Project (Community Law Centre, University of the Western Cape) and the Women's Legal Centre,¹ it was proposed that a distinction should be drawn between those provisions contained in the original clause that imposes a positive duty on the State and those merely intended to serve as guidelines. It is argued that the former should be elevated to substantive clauses in the Bill while the latter could be contained in the preamble or in *National Instructions for Sexual Offenders* which are to be issued as part of a proposed multi-disciplinary approach. The respondents also called for the rights to privacy and dignity to be included in the preamble.

It must be noted that the Western Cape joint respondents submitted their comment on the basis that the Commission would retain a clause on *guiding principles* in its

¹ Hereinafter the Western Cape joint submission.

proposed legislation. As pointed out above, the Commission concurs with views expressed that the guiding principles should be transformed into objectives. This (new) approach obviates the need to distinguish between the restatement of constitutional imperatives, an expansion of already entrenched constitutional rights or the establishment of positive duties to be placed on the state.² In the Commission's view the inclusion of a clause on objectives can be seen as supplementing that which is stated in the preamble, with the former emphasising the aims to be achieved by the legislation and the latter stating the purpose of the legislation in general terms.

Respondents³ were generally in favour of the Commission's recommendation that a national strategy for multi-disciplinary intervention relating to sexual offences should be agreed upon by incumbent government departments and non-governmental organisations working in the field of sexual offences, in partnership with civil society. This endorsement was strengthened by a call that positive duties should be placed on government officials dealing with sexual offences to act in a prescribed way.

The Western Cape joint submission calls upon the Commission to encapsulate these positive duties in a code of good practice or regulations so as to allow for flexibility in the management process and regular review and amendment where necessary. They opine that this would form part of the national strategy for multi-disciplinary intervention relating to sexual offences to be agreed upon by government departments and NGO's. On the other hand the same submission also argues that the positive duties resting on state officials should be clearly set out in national legislation (as opposed to regulations or 'internal' or departmental directives or guidelines).

The Commission has taken cognizance of the above recommendations and recent judgements such as the matter between the **Minister of Safety & Security and Dirk van Duivenboden**, delivered on 22 August 2002. In this matter Judge Nugent is

² The respondents recommended, for instance, the inclusion of the following positive duty in the proposed legislation: "In order to give effect to this Act the National Director of Public Prosecutions shall be obliged to determine prosecution policy and issue policy directives for the conduct of sexual offence trials."

³ Lulama Nongogo and Teboho Maitse; Commission on Gender Equality; the Western Cape joint submission; Mollie Kemp, School Social Worker, Department of Education and Culture, KwaZulu Natal.

quoted in an article⁴ in *Business Day* by Michael Hart, chairman of Deneys Reitz, as stating that “while private citizens might be entitled to remain passive when the constitutional rights of other citizens are under threat in this country the state has a positive constitutional duty to act in the protection of the rights in the Bill of Rights”.

The Commission endorses the above viewpoint and recommends that positive duties be visibly imposed on public office bearers responsible for the investigation of sexual offence matters by way of the multi-disciplinary protocols. It thereby also endorses the reason given above that by including positive duties in the protocols the duties will remain flexible and open to amendment as the need arises. The Commission further recommends that any duties imposed should be reinforced by the allocation of sufficient resources and support to enable officials to comply with their duties. The Commission consequently recommends that an empowering provision be included in the Bill that places a statutory obligation on government departments and relevant NGO’s to compile an inter-sectoral, national policy framework to guide the implementation, enforcement and administration of the Sexual Offences Act. This framework must provide for the compilation of internal accountability mechanisms within each of these structures.

While adopting a victim centred approach, the Commission recognises that the term “victim” embodies a value judgement in instances where the alleged offender has not been found guilty in a court of law of the alleged (sexual) offence. To balance the scale and to give effect to the presumption of innocence, the Commission has decided to avoid using the term “victim” where the alleged offender is yet to be found guilty beyond a reasonable doubt. In such instance the term “complainant” is rather used.

2.3 Recommendation

It is recommended that the previously proposed guiding principles be included in the proposed Bill as objectives and that this clause be inserted after the preamble to the Bill as the first substantive clause, preceding the definitions clause. The Commission recommends that the clause be worded as follows:

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[Http://www.bday.co.za/bday/content/direct/1,3523,1178778-6096-0,00.html](http://www.bday.co.za/bday/content/direct/1,3523,1178778-6096-0,00.html).

[Guiding principles] Objectives

1. In the [adjudication of any proceedings which are instituted in terms of or under] application of the provisions of this Act, the following [principles shall apply] objectives must be considered:

- (a) Complainants [Victims may] should not be discriminated against, either directly or indirectly, on the grounds of race, colour, ethnic or social origin, birth status, sex, gender, sexual orientation, age and developmental level, [physical or mental] disability, religion, conscience, belief, culture or language.
- (b) Complainants [Victims may] should be treated with [compassion and respect for their] dignity and respect.
- (c) Complainants [Victims may] should be ensured access to the mechanisms of justice.
- (d) Complainants [Victims may] should be informed of their rights and the procedures within the criminal justice system which affect them.
- (e) Complainants [Victims may] have the right to express an opinion, to be [involved in] informed of all decisions, and to have their opinion taken seriously in any matter affecting them.
- (f) In addition to all due process and constitutional rights, complainants [victims] should have the following rights-
 - (i) to have present at all decisions affecting them a person or persons important to their lives;
 - (ii) to have matters explained to them in a clear, understandable manner appropriate to their age and in a language and manner which they understand;
 - (iii) to remain in the family, where appropriate, during the investigation and whilst awaiting a final resolution of the matter and, if a child is removed from the family, to have the placement periodically [removed] reviewed;
 - (iv) to have procedures dealt with expeditiously in time frames appropriate to the complainant [victim] and the offence.
- (g) Complainants [Victims] should have the right to confidentiality and privacy and to protection from publicity about the offence.
- (h) Complainants [Victims] and their families [are] should be entitled to receive such therapeutic assistance as is necessary to promote healthy functioning.

Where possible the offender should make a financial or material contribution to such assistance.

[(i) Where a child is involved, the best interests of the child shall be paramount in all matters concerning that child.]

(i) The vulnerability of children **[entitles]** should entitle them to speedy and special protection and provision of services by all **[disciplines and involved parties]** role-players during all phases of the investigation, the court process and thereafter **[including the implementation and implications of sentencing of the sexual offender]**.

(j) Since the family and the community are central to the well-being of a child, consideration should be given, in any decisions affecting a child, to -

- (i) ensuring that, in addition to the child, his or her **[the child's]** family, community and other significant role-players are consulted;
- (ii) the extent to which decisions affecting the offender will affect a child, his or her family and community;
- (iii) the particular relationship between the offender and a child;
- (iv) keeping disruptive intervention into child, family and community life to a minimum in order to avoid secondary victimisation of the child.

(k) Restorative and rehabilitative alternatives **[must]** should be **[prioritised]** considered and applied unless the safety of the complainant **[victim]** and the interests of the community requires otherwise.

(l) A person who commits a sexual offence **[must]** should be held accountable for his or her actions and should be encouraged to accept full responsibility for his or her behaviour.

(m) In determining appropriate sanctions for a person who has been found guilty of committing a sexual offence -

- (i) the sanctions applied **[must]** should ensure the safety and security of the victim, the family of the victim and the community;
- (ii) the sanctions **[must]** should promote the **[restoration]** recovery of the victim and the restoration of the family of the victim and the community;
- (iii) where appropriate, offenders **[must]** should make restitution which may include material, medical or therapeutic assistance, to victims and their families or dependents;
- (iv) the child sexual offender should **[bear]** receive special consideration in respect of sanctions and rehabilitation;

- (v) the possibility of rehabilitating the sexual offender [**must**] should be taken into account in considering the long-term goal of safety and security of victims, their families and communities;
 - (vi) the interests of the victim [**must**] should be considered in any decision regarding sanctions.
- (n) In order to avoid systemic secondary victimisation of victims of sexual offences, binding inter-sectoral protocols following an inter-disciplinary approach [**must**] should be followed.
- (o) All professionals and role-players involved in the management of sexual offences [**must**] should be properly and continuously trained after going through a proper selection and screening process.
- (p) Cultural diversity [**must**] should be taken into account in all matters pertaining to the victim, the offender and to their communities. The existence of cultural differences [**is**] should be no justification for or licence to commit a sexual offence or to exclude a criminal justice process.

The empowering provision to create a national policy framework reads as follows:

Implementation of this Act

27. This Act must be implemented by organs of state in the national, provincial and local spheres of government subject to –

- (a) any specific section of this Act and regulations allocating roles and responsibilities; and
- (b) the national policy framework published in terms of section 28.

National policy framework

28. (1) The Minister for Justice and Constitutional Development must

- (a) prepare a national policy framework to guide the implementation, enforcement and administration of this Act in order to secure acceptable and uniform treatment of all sexual offence matters;
- (b) review the policy framework at least once every five years; and
- (c) when required, amend the policy framework.

(2) The Minister must publish the national policy framework and each amendment of the framework by notice in the Government Gazette.

(3) The national policy framework binds –

- (a) all organs of state in the national, provincial and local spheres of government; and
- (b) any other organisations involved in programmes or projects concerning sexual offence matters.

Contents

29. (1) The national policy framework must –

- (a) be a coherent policy directive appropriate for the Republic as a whole to guide the apprehension and prosecution of offenders, and the protection of complainants and victims of sexual offences;
- (b) provide for an integrated, co-ordinated and uniform approach by organs of state in all spheres of government and other organisations on which it is binding; and
- (c) be consistent with the provisions of this Act.

(2) The national policy framework must reflect the following core components:

- (a) national objectives to ensure a uniform approach on how sexual offence matters should be dealt with;
- (b) priorities and strategies to achieve those objectives;
- (c) performance indicators to measure progress with the achievement of those objectives;
- (d) provide for uniform accountability and disciplinary mechanisms for all functionaries involved;
- (e) a framework for co-operative governance on a cross-functional and multi-disciplinary basis in the implementation of this Act;
- (f) the allocation to the different spheres of government and to different organs of state of primary and supporting roles and responsibilities in this regard;
- (g) the engagement of non-governmental organisations in the implementation, enforcement and administration of this Act and in the development and implementation of programmes and projects giving effect to this Act; and

(h) measures to ensure adequate funds.

Consultative process

30. (1) In developing and publishing the national policy framework or any amendment to the framework, the Minister must —

(a) generally follow a consultative process as may be appropriate in the circumstances;

(b) consult with —

(i) Cabinet members whose departments are affected by the framework or amendment; and

(ii) organs of state in other spheres of government in accordance with the principles of co-operative government as set out in Chapter 3 of the Constitution; and

(c) engage the participation of the public and non-governmental organisations in the process.

(2) The Minister may not publish the national framework, or any amendment to the framework, except with the concurrence of the Cabinet members whose departments are directly affected by the framework or amendment.

Regulations

31. The Minister for Justice and Constitutional Development, in consultation with the Ministers of Safety and Security, Correctional Services, Social Development and Health, may make regulations regarding —

(a) any matter which is required or permitted by this Act to be prescribed by regulation;

(b) the inter-sectoral implementation of this Act; and

(c) any other matter which is necessary or expedient to prescribe in order to achieve or promote the objects of this Act.

CHAPTER 3

STATUTORY SEXUAL OFFENCES

3.1 Introduction

This Chapter sets out the Commission's final recommendations relating to the codification of the common law offence of rape, the extension of the common law offence of incest, acts of sexual penetration or indecent acts with mentally impaired persons, or committed in the presence of or with certain consenting children or mentally impaired persons, child prostitution, and compelled or induced sexual acts.¹ In addition, the Commission considers the need for an offence aimed specifically at harmful HIV-related behaviour in cases of non-consensual intercourse. The discussion is started by an overview of the relevant definitions.

For the record it is worth stating that the Commission is not recommending the codification of the omnibus common law offence of indecent assault, for the reasons stated in Discussion Paper 85.²

3.2 Definitions

3.2.1 Proposals in Discussion Paper 102

The following definitions clause was proposed in the Discussion Paper:

Definitions and interpretation of Act

- 1.** In this Act, unless the context indicates otherwise-
- (i) "genital organs" include the whole or part of male and female genital organs and further include surgically constructed genital organs;
 - (ii) "indecent act" includes an act which causes-
 - (a) direct or indirect contact between the anus, breasts or genital organs of one person and any part of the body of another person,
 - (b) unjustified exposure or display of the genital organs of one person to another person, or
 - (c) exposure or display of any pornographic material to a person below the age of 18 years or to any person against his or her willbut does not include an act of sexual penetration or an act which is consistent with sound medical practices which is carried out for proper medical purposes;
 - (iii) "mentally impaired person" means a person affected by any mental impairment irrespective of its cause, whether temporary or permanent, to the

¹ For a valuable systemic analysis of non-consensual sexual crimes, see JMT Labuschagne 'Nie-konsensuele geslagsmisdade: 'n misdaadsistematiese herwaardering' (1981) 44 **THRHR** 18. See also 'Onsedelike aanranding, geweldadige geslagsomgang en misdaadsistematiek' (1988) **Obiter** 83 by the same author.

² Par. 3.10.5.1.

- extent that he or she is or was unable to appreciate the nature and consequences of an indecent act or an act of sexual penetration, or is or was unable to resist the commission of any such act, or is or was unable to communicate his or her unwillingness to participate in any such act;
- (iv) "sexual offence" means any offence in terms of this Act, excluding the Schedule, and includes any common law sexual offence;
- (v) "sexual penetration" means any act which causes penetration to any extent whatsoever by-
- (a) the genital organs of one person into the anus, mouth or genital organs of another person; or
- (b) any object, including any part of the body of an animal, or part of the body of one person into the anus or genital organs of another person in a manner which simulates sexual intercourse
- but does not include an act which is consistent with sound medical practices which is carried out for proper medical purposes.

3.2.2 Evaluation of comment

New definition of child

In order to conform with our Constitution and other international instruments, a definition of "child" has been inserted to make it clear that children are considered to be persons below the age of 18 years. Where the proposed draft Bill contemplates specific ages, such ages have been reflected in the body of the legislation.

New definition of complainant

Advocates Meintjes and Henning SC refer to the word "complainant" which is found in several clauses of the proposed Bill. In their view reference should rather be made to "the person against whom a sexual offence has been committed", as some victims - such as children - may not necessarily be the complainants in proceedings and might not be testifying at all. The Commission is satisfied that the meaning of the word "complainant" has and will by way of common parlance and assimilation into the Criminal Procedure Act (as is demonstrated by section 154(2)(a)) be interpreted to mean the victim of the offence, whether or not the victim physically filed the complaint or testifies. However, in order to avoid any measure of confusion and so as not to create a forum for wordplay by the defence, the Commission recommends that a new definition of complainant be inserted in clause 1 to make it clear that the complainant refers to the victim of an alleged sexual offence.³

Genital organs

³ See also the discussion in par. 2.2 above regarding the Commission's use of the terms 'complainant' and 'victim'.

The majority of respondents concurred with the proposed definition of the term “genital organs” which had been an attempt to avoid anatomical descriptions of the differences between male and female sexual organs. Dr K Muller from the Department of Procedural Law, Vista University, for instance commented that the proposed definition will be especially helpful with children who are unable to identify parts of sexual organs, such as the difference between labia and vagina. Prof PWW Coetzer from the Department of Community Health, Medunsa, and Dr K Muller from the Department of Health, Gauteng Province, however, consider genital organs to be too widely defined. It is submitted that the ovaries, prostate and seminal vesicles, for example, cannot possibly feature in an indecent act or rape. The respondents submit that genital organs, in the case of a male, should be defined as the penis and scrotum with its contents which includes surgical constructions or reconstructions of such organs, and in the case of a female, as the clitoris, labia majora, labia minora, hymen and vagina which includes surgical constructions or reconstructions of such organs. The respondents also propose that labia minora should be further defined to include “the forward extension of the labia minora forming the prepuce of the clitoris and the frenulum of the clitoris and the backward extension of the labia minora forming the posterior fourchette”.

In the Commission’s view its original proposal namely that genital organs include the whole or part of male and female genital organs and constructions and reconstructions⁴ of such organs is adequate. The definition proposed by the respondents in the preceding paragraph merely lists the individual parts that could be involved in the commission of an indecent act or act of sexual penetration. Although it is conceded that internal reproductive organs may arguably be incorporated in a broad definition of genital organs, such incorporation has the benefit of leaving no room for an argument that any particular external sexual organ has been excluded. However, the Commission considers the addition of surgical *reconstructions* as opposed to surgical *constructions* of genital organs to be worthy, in that the respondents have rightly pointed out that when organs are congenitally absent, they are constructed, but when they are injured, they are reconstructed. The definition has been adapted accordingly.

Indecent act

A number of respondents argued that the specific exclusion of sound medical practices from the ambit of the definition is unnecessary as the general defences excluding unlawfulness of conduct would cover the situation. It is granted that any specific formulation which merely entrenches an

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For an analysis of the German and South African law on public indecency where an artificial sexual organ was used, see JMT Labuschagne ‘Openbare onsedelikheid en ekshibionisme met ‘n kunspenis’ (1998) 11 **SACJ** 84.

existing common law defence based on justification poses the danger of being misinterpreted. The argument is conceded and the exclusion has been omitted.

Some respondents also expressed disagreement with the inclusion of the term “unjustified” in the provision “unjustified exposure or display of the genital organs of one person to another person”. The word “unjustified” has originally been inserted to make it clear that consensual or accidental exposure of genital organs is not included within the definition. The problem actually appears to lie with the use of the term “indecent act”. An act of a sexual nature would only be indecent if committed outside the scope of informed consensual sexual activity. As pointed out by one respondent, an indecent act is by definition always unlawful. In this context, it can be argued that the word “unjustified” can be omitted, as the conduct of exposing genital organs in the realm of an indecent act presupposes that it took place unlawfully. However, it does not appear to be possible to circumscribe the variety of acts that may be brought within the ambit of the phrase “act of a sexual nature”. For this reason, the Commission limits the species of indecent acts to the three instances given.

The phrase “or any object, including any part of the body of an animal” has been inserted for purposes of consistency with clause 4, and a differentiation has been made between male and female breasts in that only female breasts are now included.

Mentally impaired person

Some respondents submitted that the word “is” wherever it appears in the definition of mentally impaired person, indicating the present tense, should be omitted as the relevancy of a person being mentally impaired lies in such person’s state of mind at the time of being the victim of a sexual offence. This is conceded and the definition has been adopted accordingly.

Adv R Meintjes and Adv J Henning SC from the Office of the Director of Public Prosecutions, Transvaal, submitted comment to the effect that a differentiation should be made between the definition of a mentally impaired person (which may include a mentally impaired witness) and the definition of a mentally impaired person who is subjected to an indecent act or an act of sexual penetration. The Commission considers this comment to be valuable and has amended the originally proposed provision according to the formulation suggested by the respondents.

Sexual penetration

The definition of sexual penetration has been removed from the definitions clause. This is as a result of the Commission's rethinking of the grading of the offence of rape. Some respondents expressed concern that the definition of sexual penetration, as formulated, is too wide. A scenario would hence be possible in terms of which a perpetrator who performed slight digital penetration of a victim's genital organs would be labelled a rapist on par with a perpetrator who, for instance, hammered a bottle with a wooden mallet into the genital organs of another victim.

Although the view was held, at the time of compilation of Discussion Paper 102, that the Sentencing Framework Bill – which incidentally repeals the minimum sentencing provisions found in the Criminal Law Amendment Act 105 of 1997 – would be passed by the time that the Sexual Offences draft Bill is considered by Parliament, the Commission makes recommendations based on the law as it currently stands. The minimum sentencing provisions are still in force. In relation to sexual offences, the Act referred to contains the following grading system for purposes of sentencing (found in Schedule 2 to the Act):

Indecent assault when use of firearm involved

- * First offender: 5 years imprisonment
- * Second offender: 7 years imprisonment
- * Third or subs. offender: 10 years imprisonment

Indecent assault on child below 16 with infliction of bodily harm

- * First offender: 10 years imprisonment
- * Second offender: 15 years imprisonment
- * Third or subs. offender: 20 years imprisonment

Sodomy when use of firearm involved

- * First offender: 5 years imprisonment
- * Second offender: 7 years imprisonment
- * Third or subs. offender: 10 years imprisonment

Bestiality when use of firearm involved

- * First offender: 5 years imprisonment

- * Second offender: 7 years imprisonment
- * Third or subs. offender: 10 years imprisonment

Rape

- resulting in death of victim
- by more than one person or more than once
- by person with 2 or more convictions of rape
- by person who knowingly has AIDS
- if victim is a girl below 16 years
- if victim is a physically disabled woman
- if victim is a mentally ill woman
- involving infliction of grievous bodily harm

Life imprisonment

Rape (other)

- * First offender: 10 years imprisonment
- * Second offender: 15 years imprisonment
- * Third or subs. offender: 20 years imprisonment

The Commission has consequently decided that it should differentiate between certain degrees of sexual penetration for purposes of sentencing in terms of the currently applicable provisions on minimum sentences. The Commission recommends that unlawful and intentional penetration, to any extent whatsoever, by –

- the genital organs of one person into or beyond the anus or genital organs of another person should amount to *rape*;
- an object, including any part of the body of an animal or any part of the body of a person, into or beyond the anus or genital organs of another person, should amount to an offence named *sexual violation*; and
- the genital organs of one person or of an animal⁵ into or beyond the mouth of another person should amount to an offence named *oral genital sexual violation*.

With regard to the minimum sentences grading scheme reflected above, the Commission concurs with the sentence of life imprisonment for the varying circumstances under which rape took place,

⁵ See the discussion below.

but proposes that oral genital sexual violation of a person below the age of 16 years and sexual violation involving the infliction of grievous harm should be added as offences qualifying for a sentence of life imprisonment. It is also recommended that (ordinary) sexual violation and oral genital sexual violation where the victim was 16 years of age or older should qualify for the terms of imprisonment currently imposed for offences referred to in Part III of Schedule 2 to the Criminal Law Amendment Act, 1997. This implies that a first offender of these offences would be liable to a minimum sentence of 10 years imprisonment, a second offender to 15 years imprisonment, and a third or subsequent offender to 20 years imprisonment. In addition, since the said Schedule 2 in some instances makes a differentiation based on gender, the Commission proposes that the Schedule, as far as sexual offences are concerned, be amended to make the offences gender neutral. Moreover, the Commission holds the view that the reference to “grievous bodily harm” in relation to some of the sexual offences reflected in Schedule 2 should be amended to read “grievous harm”. This amendment would cover instances where the infliction of bodily harm may be absent, or may be present but co-existing with psychological trauma suffered by the victim. The proposed amendment of Schedule 2 of the Criminal Law Amendment Act is reflected in the section dealing with rape.

In view of the considerations set out above, the definition of “sexual penetration” that originally appeared in the definitions clause has been removed and the varying degrees of penetration have been amplified in the proposed new provisions creating substantive offences where penetration is an element.⁶ (see the Commission’s recommendation in the chapter dealing with rape).

The comments received on the original definition of sexual penetration nevertheless require consideration. The Commission concurs with comment that the phrase “in a manner which simulates sexual intercourse” included in the definition is a remnant from a previous draft and that it should be omitted. It also agrees that the justification based on sound medical practices can be excluded as it is adequately covered by the common law.

Professor Coetzer and Dr Muller argue that the penis, even when fully erect, is too blunt and soft to penetrate intact skin. In their view it is not possible to penetrate any genital ‘part’, however, it is possible to penetrate spaces (formed by and between various genital parts). They recommend that the original definition should have been formulated as follows:

An act of sexual penetration means any act which causes penetration to any extent whatsoever by

- (a) the penis or surgically constructed or reconstructed penis into or beyond the
 - (i) space or potential space formed between the outside vermilion borders of the lips of the mouth

⁶ See par 3.3.4 below.

- (ii) external anal orifice
- (iii) space or potential space formed between the labia majora or labia minora, hymenal orifice or vaginal orifice, including a surgically constructed or reconstructed vagina, whichever is applicable
- (b) any object, including any part of the body of an animal or part of the body of one person into or beyond the
 - (i) external anal orifice
 - (ii) space or potential space formed between the labia majora or labia minora, hymenal orifice or vaginal orifice, including a surgically constructed or reconstructed vagina, whichever is applicable.

The Commission has already made a decision on the definition of genital organs (discussed above) and therefore does not agree with listing individual anatomical parts as proposed. The respondents' concern about the inclusion of spaces or potential spaces appears to be based on scientific evidence that in many brutal sexual assaults on virgins, the hymen is not breached but the fourchette is lacerated and the hymen merely bruised. This may lead to a clinical forensic examiner, when being cross-examined in court, to respond in the negative when asked whether penetration took place. The respondents aver that "presiding officers and clinical forensic examiners can be taught that any injuries to the posterior fourchette, fossa navicularis or hymen constitute *prima facie* proof of an act of sexual penetration as defined". The Commission considers the concern expressed to be valid, but holds the view that the phraseology suggested by the respondents does not contribute materially to the definition originally proposed. That definition (now retained in the various substantive penetration offences) made it clear that it extends to penetration *to any extent whatsoever*. This would imply that a breach of the hymen, as opposed to mere bruising or no bruising at all, is not required to prove that penetration took place. In addition, the definition was silent on the question whether injury to the genital organs should be the result of an act of penetration, which means that injury is immaterial for purposes of the definition. The presence of injury would naturally assist with proof that penetration took place. The Commission has, however, inserted the phrase "or beyond" after the word "into" as suggested by the respondents.

Some respondents contended that the reference to any part of the body of an animal in the context of insertion into a person's genital organs or anus, should be limited to the genital organs of an animal. However, these respondents have not argued for the omission of the term "object" from the original definition. In the Commission's view the insertion of an animal's paw, for instance, is no less serious than the insertion of any other objects and it has thus not altered the definition (as carried over to the proposed new substantive offences dealing with penetration) in this respect. However, the original definition did not cover the insertion of the genital organs of an animal into a person's *mouth*. The proposed new substantive offence of oral genital penetration now includes penetration by the genital organs of an animal.

In view of the omission of the definition of sexual penetration in the definitions and interpretation clause, the Commission proposes that the clause should contain an amplification of the phrase “an act which causes penetration” to give guidance with the interpretation of the proposed Bill.

3.2.3 Recommendation

The Commission recommends the inclusion of the following definitions and interpretative provisions in the proposed Bill:

Definitions and interpretation of Act

2. In this Act, unless the context indicates otherwise-

- (i) “an act which causes penetration” refers to an act contemplated in sections 3, 4 and 5;
- (ii) “child” means a person below the age of 18 years;
- (iii) “complainant” refers to the victim of an alleged sexual offence;
- (iv) “genital organs” include the whole or part of male and female genital organs and further include surgically constructed or reconstructed genital organs;
- (v) "indecent act" means any [includes an] act which causes -
 - (a) direct or indirect contact between the anus [**breasts**] or genital organs of one person or, in the case of a female, her breasts and any part of the body of another person or any object, including any part of the body of an animal;
 - (b) [**unjustified**] exposure or display of the genital organs of one person to another person; or
 - (c) exposure or display of any pornographic material to [**a person below the age of 18 years or to**] any person against his or her will or to a child,

but does not include an act [**of sexual**] which causes penetration [**or an act which is consistent with sound medical practices which is carried out for proper medical purposes**];
- (vi) "mentally impaired person" means a person affected by any mental impairment irrespective of its cause, whether temporary or permanent, and for purposes of sections 3, 4, 5, 7, 8 and 9, means a person affected by such mental impairment to the extent that he or she, at the time of the alleged commission of the offence in question, [is or] was -
 - (a) unable to appreciate the nature and reasonably foreseeable consequences of an indecent act or an act [**of sexual**] which causes

penetration; [or]

(b) able to appreciate the nature and reasonably foreseeable consequences of such an act but unable to act in accordance with that appreciation;

(c) [is or was] unable to resist the commission of any such act; or

(d) [is or was] unable to communicate his or her unwillingness to participate in any such act;

(vii) “sexual offence” means any offence in terms of this Act, excluding the Schedule, and includes any common law sexual offence;

(viii) “this Act” includes the regulations made under section 31.

[(v) “sexual penetration” means any act which causes penetration to any extent whatsoever by-

(a) the genital organs of one person into the anus, mouth or genital organs of another person; or

(b) any object, including any part of the body of an animal, or part of the body of one person into the anus or genital organs of another person in a manner which simulates sexual intercourse

but does not include an act which is consistent with sound medical practices which is carried out for proper medical purposes].

3.3 Rape

3.3.1 Current law

According to the current common law definition of the crime of rape, rape consists in a man having unlawful intentional sexual intercourse with a woman without her consent.⁷ ‘Sexual intercourse’ presupposes penetration⁸ of the female sexual organ by the male sexual organ. This precludes intercourse *per anum*, oral penetration and the insertion of foreign objects into the orifices of the body.⁹ The offence is gender specific, in that it can only be committed by a male and the victim can only be a female. There is also an irrebuttable presumption that a girl under the age of 12 years is incapable of consenting to sexual intercourse, but no similar presumption in

⁷ Milton **South African Criminal Law and Procedure** (Volume II) 435.

⁸ See also JMT Labuschagne ‘Die penetrasievereiste by verkragting heroorweeg’ (1991) 108 **SALJ** 148; ‘Heromskrywing van die handeling by geslagsmisdade in Nederland: Beklee die vrou steeds ‘n minderwaardige posisie?’ (1994) 111 **SALJ** 614, ‘Verkragting in die inheemse reg: opmerkings oor die oorsprong van vroulike ondergeskiktheid in misdaadomskrywing’ (1994) **Obiter** 85, ‘Die opkoms van ‘n abstrakte penetrasiebegrip by geslagsmisdade’ (1997) 114 **SALJ** 461.

⁹ This would constitute indecent assault.

respect of boys under the same age exists. Emphasis is placed on the absence of valid consent to intercourse by the female.

3.3.2 Proposals in Discussion Paper 102

In an attempt to move away from the emphasis referred to above, the proposed provision on rape in Discussion Paper 102, besides being framed in gender neutral terms, was based on three categories of circumstances in which an act of sexual penetration would be considered to be *prima facie* unlawful, viz coercive circumstances;¹⁰ circumstances in which an act of sexual penetration is committed under false pretences or by fraudulent means;¹¹ and circumstances in which a person is incapable in law to appreciate the nature of an act of sexual penetration. The provision, set out below, also repealed the common law pertaining to the offence of rape but did not repeal any common law defences to the offence.

Rape

3. (1) Any person who intentionally and unlawfully commits an act of sexual penetration as defined in section 1 with another person, or who intentionally and unlawfully compels, induces or causes another person to commit such an act, is guilty of the offence of rape.

(2) For the purposes of this Act, an act of sexual penetration is *prima facie* unlawful if it is committed -

- (a) in any coercive circumstance;
- (b) under false pretences or by fraudulent means; or
- (c) in respect of a person who is incapable in law to appreciate the nature of an act of sexual penetration.

(3) Coercive circumstances, as referred to in subsection (2)(a), include any circumstances where -

- (a) there is any use of force, whether explicit or implicit, direct or indirect, physical or psychological against any person or any use of force which damages or destroys such person's movable or immovable property;
- (b) there is any threat, whether verbal or through conduct, direct or indirect, to cause any form of harm to any person or to damage or destroy such person's movable or immovable property;
- (c) there is an abuse of power or authority, whether explicit or implicit, direct or indirect, to the extent that the person in respect of whom an act of sexual penetration is committed is inhibited from indicating his or her resistance to such an act, or his or her unwillingness to participate in such an act; or

¹⁰ See also JMT Labuschagne 'Strafbaarheid van die seksuele uitbuiting van 'n gesagsverhouding' (1993) 26 **De Jure** 443, 'Die geweldsbegrip en psigoseksuele outonomie by omskrywing van geslagsmisdade' (2000) **TSAR** 360 and his case discussion '**R v Hann** 1992 75 CCC (3d) 355 (Newfoundland CA)' in (1993) 26 **De Jure** 443 on the sexual abuse of power by a teacher. On the abuse of the doctor-patient relationship, see JMT Labuschagne '**R v Saint-Laurent** 1994 90 CCC (3d) 291 (Quebec Court of Appeal) (1995) 28 **De Jure** 450, 'Strafregtelike aanspreeklikheid weens seksuele misbruik van 'n dokter-pasient-verhouding' (1998) 115 **SALJ** 281.

¹¹ See in this regard, JMT Labuschagne 'Deliktuele aanspreeklikheid vir seksuele bedrog en seksuele uitbuiting van 'n afhanklikheidsverhouding' (1995) 20 **TRW** 32.

(d) a person is lawfully or unlawfully detained.

(4) False pretences or fraudulent means, as referred to in subsection (2)(b), include circumstances where a person in respect of whom an act of sexual penetration is being committed is led to believe that -

- (a) he or she is committing an act of sexual penetration with a particular person who is in fact a different person;
- (b) an act of sexual penetration is something other than such act; or
- (c) an act of sexual penetration will be beneficial to his or her physical, psychological or spiritual health.

(5) The circumstances in which a person is incapable in law to appreciate the nature of an act of sexual penetration as referred to in subsection (2)(c) include circumstances where such person is -

- (a) asleep;
- (b) unconscious;
- (c) under the influence of any medicine, drug, alcohol or other substance to the extent that the person's consciousness or judgement is adversely affected; or
- (d) a mentally impaired person as defined in section 1.

(6) For purposes of this Act a person is incapable in law to appreciate the nature of an act of sexual penetration if that person is below the age of 12 years.

(7) A marital or other relationship, previous or existing, shall not be a defence to a charge of rape.

(8) The common law relating to -

- (a) the irrebuttable presumption that a female person under the age of 12 years is incapable of consenting to sexual intercourse; and
- (b) the offence of rape, except where a person has been charged with, but not convicted of such offence prior to the commencement of this Act, is repealed.

(9) Subject to the provisions of this Act, any reference to "rape" in any law shall be construed as a reference to the offence of rape under this section, unless it is a reference to rape committed before the commencement of this Act which shall be construed to be a reference to the common law offence of rape.

(10) Nothing in this section may be construed as precluding any person charged with the offence of rape from raising any defence at common law to such charge.

3.3.3 Evaluation of comment

Professor P A Carstens, Department of Public Law, University of Pretoria, submits that the phrase "or who intentionally and unlawfully compels, induces or causes another person to commit such an act" in subclause (1) of the proposed provision will lead to an erosion of established principles in our criminal law as well as the importation of common purpose to crimes of rape. The principles are that if a perpetrator does not physically commit the crime of rape or penetration

himself or herself, he or she cannot be a perpetrator to the crime of rape. If a person assists or induces the rape or penetration, the assisting person is a participant and would be guilty as an accomplice to rape – and liable to the same sentence as the main perpetrator. Alternatively the assisting person can be convicted of incitement or conspiracy to rape and the same sentence as for the main perpetrator may be imposed. The respondent also refers to Professor Snyman's text book on **Criminal Law** which states that the imputation (of common purpose) does not operate in respect of charges of having committed an offence which can be committed only through the instrumentality of a person's own body or part thereof (such as rape), or which is generally of such a nature that it cannot be committed through the instrumentality of another. The Commission considers Professor Carstens' comment to be accurate and has amended the definition of rape accordingly. It also revised the provision in order to make it clear that both genders¹² can be convicted of rape.

Concern was expressed by a number of respondents that subclause (2) of the proposed provision on rape creates a reverse onus on the accused which may not survive constitutional scrutiny. Professor S E van der Merwe, Department of Public Law, University of Stellenbosch, however holds the view that subclause (2) amounts to no more than an *evidential burden* on the accused and that an accused who raises a defence (such as the defence of consent) is in terms of general principles not saddled with the onus of proving such a defence. Once a defence is raised, the prosecution is put to the disproof thereof – which means that the absence of consent (if consent is raised by the accused) must be proved by the prosecution beyond a reasonable doubt. In the case of an evidentiary onus on an accused, his or her evidence needs only be reasonably possibly true as opposed to proving something on a balance of probabilities in the case of a reverse onus.

Professor P J Schwikkard, in her publication entitled **Presumption of Innocence**, also states that once a *prima facie* case is established, the evidential burden will shift to the accused to adduce evidence or run the risk of conviction. She adds that it is possible that even if the accused does not adduce evidence, he or she will not be convicted if the court is satisfied that the prosecution has not proved guilt beyond a reasonable doubt. The Commission is satisfied that its proposal does not place a reverse onus on the accused, but merely an evidential onus. A phrase such as "unless there is proof to the contrary" which is normally indicative of the establishment of an onus of proof, has not been used in subclause (2). However, in order to make it clear that its proposals do not alter the standard of proof required when an accused adduces evidence in rebuttal, it is deemed appropriate to add words to this effect in subclause (10) – where the accused's entitlement to raise defences at common law is retained.

¹² See also JMT Labuschagne's case discussion '**LG Mannheim Urt v 16/11/1995 NstZ 1997 85**' (1998) 31 **De Jure** 166 on the transsexual as rape victim.

Most respondents expressed agreement with the inclusion of subclauses (3)(a) and (b) with reference to coercive circumstances, but some suggested that the proposed wording is too detailed and that it should be simplified. The Commission has adjusted the wording accordingly. Regarding subclause (3)(c) Dr K Muller, Department of Procedural Law, Vista University, does not believe that abuse of power of authority should fall within the ambit of the crime of rape. In her view the provision amounts to sexual harassment and as such trivialises the more serious and violent cases of rape. The Commission, however, considers abuse of power or authority as a circumstance vitiating true consent, and if such abuse took place in order to commit an act of penetration, it is, in the Commission's view, something much more serious than mere sexual harassment. In addition, provision has now been made for the grading of the offence of rape for purposes of sentencing (see the discussion under the definition of 'sexual penetration' in the previous chapter). The wording of subclause (3)(c) has been adapted to simplify the provision originally proposed.

Most respondents argued that subclause (3)(d) which refers to detention should be omitted as it can be accommodated within the ambit of subclauses (3)(a) to (c). The Commission, upon reconsideration, agrees with the argument and has deleted subclause (3)(d).

Some respondents argued that the whole of subclause (4) should be deleted as the instances listed are adequately covered under common law, or, with regard to subclause (4)(c), by abuse of power or authority as listed under subclause (3)(c). It was also pointed out that the subclause as drafted casts the net too wide in that it does not establish a closed list of instances of penetration under false pretences or by fraudulent means. This could open the door for the criminalisation of acts of penetration which in ordinary circumstances would not be considered criminal. Professors J Burchell and P J Schwikkard, supported by Judges B van Heerden and E Bertelsmann, called for the substitution of subclause (3)(c) with a clause elevating the intentional non-disclosure by a person that he or she is infected with a life-threatening sexually transmissible disease (such as AIDS) prior to or during sexual penetration of another to the offence of rape. This suggestion stands in contrast to the views held by Judge E Cameron who draws attention to the demographics of HIV testing in South Africa. He states that most South Africans whose HIV status is ascertained are women. Many women are infected by husbands or partners who themselves have acquired the infection outside the relationship but who remains heedless of the risk of infection until the woman's HIV status is known. According to Judge Cameron these women are known to suffer abandonment, rejection and violence on disclosing their HIV status to the very male partners who transmitted the infection to them. He concludes that the result of special enactments aimed at obligatory disclosure of HIV status will in all likelihood further victimise these women who are themselves already suffering disproportionately from the burden

of the epidemic, and that a criminal provision exacerbating this state of affairs can hardly be desirable.

However, Judge Cameron, referring to the authoritative Canadian case of **R v Cuerrier**¹³ in which it was decided that a person infected with HIV who engages in unprotected sex is guilty of rape, states that it is generally expected that this case will be followed in South Africa. What is important is that this case draws a distinction between protected and unprotected sex. In **Cuerrier** it was held that in order to vitiate consent to sex, the fraud must carry with it *a significant risk of serious harm*. It was held, according to Judge Cameron, rightly, that the risk of contracting HIV as a result of engaging in unprotected intercourse meets that test. The court also specifically held that the careful use of condoms might be found to so reduce the risk of harm that it could no longer be considered significant.

Dr J le Roux, Department of Criminal Law, University of Pretoria, points to a number of problems in using the common law elements of crime to prosecute a person who knowingly has AIDS but fails to disclose it.¹⁴ In particular, the elements of causality and guilt pose difficulties. She calls for statutory measures to address these problems, but also points out that HIV transmission may in certain instances result in charges of murder, culpable homicide, *crimen iniuria*, assault or attempted murder.

The Commission has taken all the views set out above into consideration, including the fact that it has recommended, in its Fifth Interim Report on Aspects of the Law relating to AIDS (Project 85), that no statutory measures be adopted to criminalise the acts of persons who fail to disclose that they have a sexually transferable disease. The following problem presents itself: some respondents argue that penetration under fraudulent circumstances are adequately covered by the common law, and that merely listing a few instances (such as those contained in the original legislative proposal) goes unacceptably beyond the common law jurisprudence on the effect of fraud in rape cases. These and other respondents, however, also argue for the specific inclusion of intentional non-disclosure of HIV infection as an offence amounting to rape.

It should be noted that it would appear to be possible, under common law, to prosecute an infected perpetrator for rape – in addition to other crimes such as murder or attempted murder. Including only one instance of fraud could lead to confusion in the sense that it may give rise to a misconception that other instances of fraud are now excluded. The Commission has therefore

¹³ [1998] 127 CCC (3d) 1 (SCC). See also Richard Elliot **After *Cuerrier*: Canadian Criminal Law and the Non-disclosure of HIV-positive Status** Canadian HIV/AIDS Legal Network, 1999; JMT Labuschagne 'VIGS, gevolgsaanspreeklikheid, bedrieglike weerhouding van inligting en die vraagstuk van toestemming by gewelds- en geslagsmisdade'.

¹⁴ 'Die toepassing van strafregbeginsels op HIV-oordrag: 'n Diagnose' (2000) **De Jure** 293 – 318.

decided to abandon its original proposal of including an open-ended list of fraudulent circumstances in the proposed draft Bill, and recommends that there should be only three, namely, fraud regarding the person committing the act of penetration, fraud regarding the act itself, and finally, fraud in the sense of non-disclosing infection with a life-threatening sexually transmissible disease. As far as the last-mentioned instance is concerned, the Commission holds the view that the *significant risk* principle as enunciated in the **Cuerrier** decision should be made applicable, and therefore recommends that there should be “a significant risk of transmission” of the disease to the other party involved. This would imply that protected sex will be taken into consideration, and that the question whether a significant risk existed will have to be assessed by the court in each individual case.

Most respondents agreed with the formulation of subclause (5) regarding the circumstances in which a person is incapable in law of appreciating the nature of an act which causes penetration. Judge Bertelsmann suggested the inclusion of the phrase “at the time of penetration”, which suggestion was followed. Ms N Mazwai, Rape Crisis, Cape Town, proposed that provision should be made for people in a state of hypnosis. Hence circumstances in which a person finds himself or herself in an altered state of consciousness were added. Adv R Meintjes and Adv J Henning SC argued that since subclause (6) also deals with incapability to appreciate the nature of an act of penetration (in relation to children below the age of 12 years), it should be deleted and incorporated in subclause (5). Although the Commission initially held the view that there should be no defence that a child below the age of 12 consented to an act of penetration, and therefore drafted the provision as a substantive subclause, it is, upon reconsideration, possible that a perpetrator (falling in the exempted category provided for in clause 6) may have been led to believe that the other party was over the age of 12 and could rely on such error as a defence. Subclause (6) has therefore been deleted and incorporated in subclause (5).

Subclause (8) of the original draft Bill (now subclause (7)) repealed the common law relating to the offence of rape. Some respondents held the view that it should not be repealed and that the new statutory offence or rape should exist alongside the common law offence. As pointed out by other respondents, this could, *inter alia*, imply that there will be two types of rape; that the statutory definition will be seen as something other than rape and conceivably be used in the alternative in a charge sheet; and that the statutory definition will be perceived as less serious than the common law offence. Even a statutory extension of the common law definition to incorporate the notion of gender neutrality will result in the repeal of the existing definition. The Commission is mindful of these concerns and therefore reiterates its original proposal that the common law offence of rape should be repealed.

3.3.4 Recommendation

The Commission recommends the inclusion of the following adapted provision on rape in the proposed Bill:

Rape

3. (1) Any person who **[intentionally and]** unlawfully and intentionally commits **[an] any act [of sexual penetration as defined in section 1 with another person, or who intentionally and unlawfully compels, induces or causes another person to commit such an act,]** which causes penetration to any extent whatsoever by the genital organs of that person into or beyond the anus or genital organs of another person, or any act which causes penetration to any extent whatsoever by the genital organs of another person into or beyond the anus or genital organs of the person committing the act, is guilty of the offence of rape.

(2) **[For the purposes of this Act, an] An act [of sexual] which causes** penetration is *prima facie* unlawful if it is committed -

- (a) in any coercive circumstance;
- (b) under false pretences or by fraudulent means; or
- (c) in respect of a person who is incapable in law **[to appreciate] of appreciating** the nature of an act **[of sexual] which causes** penetration.

(3) Coercive circumstances, as referred to in subsection (2)(a), include any circumstances where -

- (a) there is any use of force **[whether explicit or implicit, direct or indirect, physical or psychological against any person or any use of force which damages or destroys such person's movable or immovable property]** against the complainant or another person or against the property of the complainant or that of any other person;
- (b) there is any threat **[whether verbal or through conduct, direct or indirect, to cause any form of harm to any person or to damage or destroy such person's movable or immovable property]** of harm against the complainant or another person or against the property of the complainant or that of any other person; or
- (c) there is an abuse of power or authority **[whether explicit or implicit, direct or indirect,]** to the extent that the person in respect of whom an act **[of sexual] which causes** penetration is committed is inhibited from indicating his or her resistance to such an act, or his or her unwillingness to participate in

such an act [; or

(d) a person is lawfully or unlawfully detained].

(4) False pretences or fraudulent means, as referred to in subsection (2)(b), **[include]** are circumstances where a person -

- (a) in respect of whom an act **[of sexual]** which causes penetration is being committed, is led to believe that [- (a)] he or she is committing such an act **[of sexual penetration]** with a particular person who is in fact a different person;
- (b) in respect of whom an act which causes penetration is being committed, is led to believe that such an act **[of sexual penetration]** is something other than **[such]** that act; or
- (c) **[an act of sexual penetration will be beneficial to his or her physical, psychological or spiritual health]** intentionally fails to disclose to the person in respect of whom an act which causes penetration is being committed, that he or she is infected by a life-threatening sexually transmissible infection in circumstances in which there is a significant risk of transmission of such infection to that person.

(5) The circumstances in which a person is incapable in law **[to appreciate]** of appreciating the nature of an act **[of sexual]** which causes penetration as referred to in subsection (2)(c) include circumstances where such person is, at the time of the commission of such act -

- (a) asleep;
- (b) unconscious;
- (c) in an altered state of consciousness;
- [c](d)** under the influence of any medicine, drug, alcohol or other substance to the extent that the person's consciousness or judgement is adversely affected;
- [or]**
- [d](e)** a mentally impaired person **[as defined in section 1];** or
- (f)** below the age of 12 years.

[(6) For purposes of this Act a person is incapable in law to appreciate the nature of an act of sexual penetration if that person is below the age of 12 years.]

[7] (6) A marital or other relationship, previous or existing, shall not be a defence to a charge of rape.

[8] (7) The common law relating to -

- (a) the irrebuttable presumption that a female person under the age of 12 years is incapable of consenting to sexual intercourse; and
- (b) the offence of rape, except where a person has been charged with, but not convicted of such offence prior to the commencement of this Act,
- is repealed.

[9] (8) Subject to the provisions of this Act, any reference to "rape" in any law shall be construed as a reference to the offence of rape under this section, unless it is a reference to rape committed before the commencement of this Act which shall be construed to be a reference to the common law offence of rape.

(9) Nothing in this section may be construed as precluding any person charged with the offence of rape from raising any defence at common law to such charge, nor does adjust the standard of proof required for adducing evidence in rebuttal.

The Commission further recommends the inclusion of the following new statutory offences:

Sexual violation

4. Any person who unlawfully and intentionally commits any act which causes penetration to any extent whatsoever by any object, including any part of the body of an animal, or part of the body of that person, other than the genital organs, into or beyond the anus or genital organs of another person, is guilty of the offence of sexual violation.

Oral genital sexual violation

5. Any person who unlawfully and intentionally commits any act which causes penetration to any extent whatsoever by the genital organs of that person, or the genital organs of an animal, into or beyond the mouth of another person, is guilty of the offence of oral genital sexual violation.

Applicability of provisions on rape to sexual violation and oral genital sexual violation

6. The provisions of section 3(2), (3), (4) and (5) relating to the circumstances in which an act which causes penetration is *prima facie* unlawful, the provisions of section 3(6) relating to marital or other relationships, and the provisions

of section 3(9) relating to defences at common law apply, with such changes as may be required by the context, to the provisions of sections 4 and 5.

The Commission also proposes the following amendments to Schedule 2 of the Criminal Law Amendment Act, 105 of 1997 (amendments reflected by bold or underlined parts):

SCHEDULE 2 (Section 51) PART 1	
Murder, ...	
Rape –	
(a) when committed -	
(i) ...	
(ii) ...	
(iii) ...	
(iv) ...	
(b) where the victim -	
(i) is a [girl] <u>person</u> under the age of 16 years;	
(ii) is a physically disabled [woman] <u>person</u> who, due to her <u>or his</u> physical disability, is rendered particularly vulnerable; or	
(iii) is a mentally ill [woman] <u>person</u> as contemplated in section 1 of the Mental Health Act, 1973 (Act 18 of 1973); or	
(c) involving the infliction of grievous [bodily] harm.	
	<u>Sexual violation of a person involving the infliction of grievous harm.</u>
	<u>Oral genital sexual violation of a person under the age of 16 years.</u>
(b) by the substitution for Part III of the following Part:	
	PART III
	Rape in circumstances other than those referred to in Part I.
	Indecent assault on a child under the age of 16 years, involving the infliction of bodily harm.

Sexual violation.Oral genital sexual violation of a person 16 years of age or older.

Assault with intent to do grievous bodily harm on a child under the age of 16 years.

Any offence in contravention of section 36 of the Arms and Ammunitions Act, 1969 (Act 75 of 1969), on account of being in possession of more than 1000 rounds of ammunition intended for firing in an arm contemplated in section 39(2)(a)(i) of that Act.

3.4 Extension of common law incest

3.4.1 Current law

In terms of our common law incest is defined as the unlawful and intentional sexual intercourse between two persons who on account of consanguinity, affinity or adoptive relationship may not marry one another.¹⁵ What is required is conventional vaginal intercourse; intercourse in some other way is not incest.¹⁶

3.4.2 Proposals in Discussion Papers 85 and 102

As stated in Discussion Paper 85,¹⁷ the common law offence of incest consists in unlawful and intentional sexual intercourse between two persons who on account of consanguinity (blood relationship), affinity (relationship by marriage) or an adoptive relationship may not marry one another. The crime of incest is committed where persons who fall into the prohibited categories perform conventional vaginal intercourse. Absence or lack of consent is not an element of the crime. Where non-consensual sexual intercourse takes place between family members within the prohibited degrees this constitutes rape or indecent assault.

Discussion Paper 85 proposed no substantive amendment to the common law offence of incest, save to incorporate the newly proposed definition of sexual penetration in the common law offence in order to make it gender neutral. The proposal elicited no comment to the effect that the clause

¹⁵ Milton **South African Criminal Law and Procedure** (Volume II) 257. For a customary law perspective, see JMT Labuschagne 'Die bloedskandeverbod in die inheemse reg' (1990) 15 **TRW** 35, 'Die inestaboe in 'n regstaat: regsantropologiese kantaantekeninge' (1999) 22 **South African Journal of Ethnology** 59.

¹⁶ Milton **South African Criminal Law and Procedure** (Volume II) 259.

¹⁷ See par 3.6.1.1. on page 135.

should be revisited, although suggestions were received that the common law offence should be reviewed *in toto*.¹⁸ In view of the inclusion of new provisions in the draft Bill that complement the common law offence of incest, such as the fact that abuse of authority in the provision on rape will constitute coercive circumstances, as well as the provisions on child prostitution, the Commission stated in Discussion Paper 102 that it is satisfied that the *lacunae* foreseen by some respondents would be addressed adequately. In order to preserve the common law offence of incest it was deemed desirable to make it clear that the provisions of the clause regulating acts of sexual penetration or indecent acts with consenting minors do not apply in cases where the perpetrator was a family member of the child (even though the child may have consented to an act of sexual penetration). The provision on incest was therefore adapted only in respect of the heading, which reflected the true purpose of the provision, and in respect of language, by eliminating the Latin expression originally used. The clause in the draft Bill read as follows:

Extension of common law incest

From the date of promulgation of this Act the definition of sexual penetration contained in section 1 of this Act applies to the common law offence of incest.

3.4.3 Evaluation of comment

The clause extending the common law offence of incest received unconditional support from the majority of the respondents.¹⁹ The Commission on Gender Equality²⁰ agrees with the proposal, but recommends that the application of this offence be extended to foster parents on the grounds that the foster care system in South Africa is such that children spend a number of years with their foster parents. It is contended that these children require the same protection afforded to adopted children and other similarly placed children.

One respondent²¹ notes that the inclusion of the common law crime of incest in the new Bill is problematic as the only motivation for the inclusion appears to be based on a particular sexual morality. Firstly, the respondent argues that sexual relationships between children and parents would be covered by laws against child abuse, including the new rape definition that specifically

¹⁸ VCR Msolomba; L Cawood (Childline, Gauteng).

¹⁹ Proffs J Burchell & P J Schwikkard, Department of Criminal Justice, University of Cape Town; Suchilla Leslie, National Programme Manager Child Protection, SA National Council for Child Welfare; Irene Filander, Social Worker, Child Welfare, Vereeniging; Professor P.W.W. Coetzer, Chief Specialist Medunsa; Ntomboxolo Dyantjie, Provincial coordinator, Eastern Cape Network on Violence Against Women; Dr Susan Gräbe, RP Clinic, Medical Doctor; Celestia Beswick, volunteer community worker; E.M. Setai, para-legal, Thusanang Advice Centre; Martha Humn, Tshwaraganang Women Organisation; Mokgabi Mmola, General Secretary, Maboloka HIV/AIDS Awareness Organisation (MAHAAO); Carol Bower, Executive Director, Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN); Judge Belinda Van Heerden, Cape High Court; Dr Katrin Müller, Gauteng Health Department, Chief Medical Officer & Medical Advisor and Dr Karen Müller, Vista University, Department of Procedural Law.

²⁰ Lulama Nongogo & Teboho Maitse, Commission on Gender Equality.

²¹ Helen Alexander, Legal Advocacy Co-ordinator, SWEAT.

includes the abuse of power or authority as a form of coercion; secondly, that incest between children should not be dealt with by the criminal law, but by the Department of Social Development and, thirdly, that there is no medical or other evidence which provides reasons for criminalising consensual sexual activity between related adults. A call²² is also made for a more restrictive interpretation of the common law offence of incest, in that it is felt that the criminal offence relating to incest should only be limited to persons who are in relation to each other in the first degree of consanguinity, and that a balance should be established in relation to cultural values and norms.²³

The relationships of consanguinity, affinity and adoption which determine whether incest is committed are co-extensive with those accepted by the private law as determining legal capacity to intermarry. Should the legislature enlarge or decrease the category of affinity or consanguinity of persons related by adoption who may not intermarry, the category of persons between whom incest is possible is accordingly enlarged or decreased.

The most commonly used reason for the prohibition of intermarriage is that it prevents persons who share the same genetic make-up from procreating and thereby avoiding possible genetic, mental or physical defects. This argument does not apply to persons related by affinity or adoption and no similar provision exists which seeks to prevent procreation between unrelated partners with inherent genetic deficiencies. Today it is broadly recognised that the historical basis for making incest a crime is flimsy.

The criminalising of incest is more readily justified on the ground that it prevents a particular and abhorrent form of sexual abuse of children. The rationale is that it is vital to the actual security and the sense of security of all members of the family unit that certain boundaries are set and preserved within such family. Of these boundaries the sexual one is the most fundamental. It follows that if the criminal law has a role to play in regulating incestuous behaviour, it must seek to protect both the family and the individual within the family from the family. In a changing society with confused and often exploitative attitudes towards sexuality and sexual relationships, it could be argued that the prohibition of the practice of sexual relations within the family unit more than ever needs the force of law behind it.

The most important question which arises from this discussion is whether incest should be used to prosecute people who sexually abuse children in their families. As consent is not an element of the common law offence of incest it is technically possible to prosecute a child for incest. Even where both parties have consented, both are guilty of committing the offence. However the discretion to prosecute and whom to prosecute still rests with the prosecuting authorities.

²² Nolitha Mazwai, Rape Crisis, Cape Town.

²³ Ms B.J. Matshego, probation officer, Department of Safety Services and Correctional Supervision.

A strong argument against using the offence of incest is that the offence stigmatises the victim of the offence. In an attempt to protect children it may be preferable when relatives sexually abuse children to prosecute them for rape, indecent assault or one of the new offences related to child prostitution.²⁴ The fact that the accused is in a position of authority over the child and especially where the accused is related to or has a responsibility to care for the child will naturally serve as an aggravating circumstance at sentencing.

The question of whether the relationships which currently determine legal capacity to intermarry are appropriate does not fall within the parameters of this investigation. In the view of the Commission the only motivation to amend or tamper with these boundaries would be in order to protect children from sexual abuse within the family. The Commission is of the opinion that as a prohibition against intermarriage is and has thus far not been a deterrent to aberrant behaviour within or outside of the family unit, there is no justification for amending the said boundaries. However, as has been stated above, the present law and those appropriate additional crimes proposed in the Bill will give adequate recourse to children who are abused by family members. Consequently the Commission does not recommend the extension of the application of this offence to foster parents or persons *in loco parentis*.

3.4.4 Recommendation

The Commission endorses its recommendation that no substantive amendment be made to the common law offence of incest, save to incorporate the newly proposed definition of sexual penetration in order to make the crime gender neutral and expanding the ambit of sexual intercourse.

In addition the Commission recommends that section 238 of the Criminal Procedure Act be amended to bring it in line with the above recommendation. Briefly, section 238 creates a statutory presumption in incest cases. It provides that it will be sufficient at criminal proceedings at which the accused is charged with incest to prove that the woman or girl on whom and by whom the offence is alleged to have been committed is reputed to be the linear ascendant or descendant or the sister, stepmother or stepdaughter of the other party to the incest.

The Commission recommends that the clause below be included in the proposed Bill:

Extension of common law incest

14. From the date of promulgation of this Act [the definition of sexual

²⁴

Depending on the complexities of the individual case prosecutorial discretion will continue to play a critical role.

penetration contained] an act which causes penetration as contemplated in sections [1] 3, 4, and 5 of this Act applies to the common law offence of incest.

The Commission also recommends the following amendment to section 238 of the Criminal Procedure Act, 51 of 1977:

The amendment of section 238 of the Criminal Procedure Act by the substitution for subsection (1) of the following subsection:

- (1) At criminal proceedings at which an accused is charged with incest –
- (a) it shall be sufficient to prove that the [**woman or girl**] person on whom or by whom the offence is alleged to have been committed, is reputed to be the lineal ascendant or descendant or the sister, brother, stepmother, stepfather, [**or**] stepdaughter or stepson of the other party to the incest;
- (b) the accused shall be presumed, unless the contrary is proved, to have had knowledge, at the time of the alleged offence, of the relationship existing between him or her and the other party to the incest.

3.5 Acts of sexual penetration or indecent acts committed with certain mentally impaired persons

3.5.1 Current law

Section 15 of the Sexual Offences Act makes it an offence for any person to commit or attempt to commit, to entice or solicit any sexual act with an idiot or imbecile provided that that person knew that such other person was an idiot or imbecile.²⁵ Both male and female persons who fall into the category of an idiot or imbecile have equal protection.

3.5.2 Proposals in Discussion Papers 85 and 102

Discussion Paper 85 proposed the enactment of a separate statutory offence covering exploitative relationships with mentally impaired persons and situations where the mental impairment of the complainant excludes free and informed consent to acts of sexual penetration. The aim was to

²⁵

See also JMT Labuschagne 'Die geesteskranke as misdadaadslagoffer' (1980) 4 **SACC** 132.

eliminate the derogatory technical terms “imbecile” and “idiot” used in the Sexual Offences Act and to increase the protection of persons who are particularly vulnerable because of mental impairment. At the same time the Commission sought to recognise that mentally impaired persons do have sexual rights.

There are many categories of persons who can be classified as mentally impaired, without falling into the categories “imbecile” or “idiot”, the latter constituting the lower part of the intellectual spectrum. The idea with the definition proposed in Discussion Papers 85 and 102 of “mentally impaired person” was to create a category of persons who are unable to appreciate the nature of an indecent act or an act of sexual penetration, as a substitute for terms such as imbecile and idiot. It follows that if one is unable to appreciate the nature or consequences of such an act, or is unable to resist the commission of such an act, or is unable to communicate one’s unwillingness to participate in such an act, consent would be absent. The definition therefore does not refer to all forms of mental impairment, but only to those that are considered to be severe enough to exclude consent as indicated by the identified guidelines.

It is, however, possible that mentally impaired persons may still experience the need for some form of sexual expression. To exclude this right completely in the case of persons falling in the lower part of the intellectual spectrum, may amount to discrimination even though such persons may be in need of increased protection. In the Commission’s view the test would be whether an indecent act or an act of sexual penetration with a mentally impaired person (in terms of the proposed definition) took place in coercive circumstances.²⁶ Should that be the case, the person committing the indecent act or act of sexual penetration with such a mentally impaired person would be guilty of “rape”.²⁷

Certain respondents to Discussion Paper 85 were concerned that the formulation proposed would unduly interfere with mentally impaired persons’ rights of sexual expression. It was contended that indecent acts or acts of sexual penetration should not be punishable if no element of coercion was involved.²⁸

The Commission accordingly recommended in Discussion Paper 102 a re-definition of this provision to allow for a defence in circumstances where the mentally impaired person, as defined, induced an indecent act or an act of sexual penetration. Additionally, the defence would only be valid if the perpetrator was unaware of the fact that the mentally impaired person was so impaired.

²⁶ In line with the view held by Dr R Jewkes (Medical Research Council).

²⁷ See paragraph 3.3.4 above.

²⁸ Dr R Jewkes (Medical Research Council); joint submission by the Institute for Security Studies; Nisaa Institute for Women’s Development; the Pretoria Maintenance Forum and Portia Mnisi; joint submission by SK Rajoo (independent); J Hicks (Provincial Parliamentary Programme, M Seedat (Institute for Multi-Party Democracy); C Edwards (KZN Network on Violence Against Women), N Ramsden (Children’s Rights); F Zikalala (Commission on Gender Equality); K Stone (SA Human Rights Commission); N Thejane (SA Human Rights Commission); B Ngwenya (Campus Law Clinic, University of Natal) and W Clark (Verulam Magistrate’s Court).

It was submitted, however, that if the inducement was effected by a mentally impaired person below the age of 16 years there should be no defence, unless the perpetrator was unaware of the mentally impaired person's true age.

The following clause was proposed in Discussion Paper 102:

Indecent acts or acts of sexual penetration with mentally impaired persons

7. (1) Any person who intentionally commits an indecent act as defined in section 1 with a mentally impaired person, also defined in section 1, is guilty of the offence of having committed an indecent act with a mentally impaired person.

(2) It is a defence to a charge under subsection (1) or to a charge of rape under section 3 if-

- (a) the mentally impaired person was over the age of 16 years at the time of the alleged commission of the offence and it is proved, on a balance of probabilities, that such mentally impaired person induced the commission of an indecent act or an act of sexual penetration; and
- (b) it is proved, on a balance of probabilities, that the accused was unaware that the mentally impaired person who induced the commission of an indecent act or act of sexual penetration was so impaired or was below the age of 16 years at the time of the alleged commission of the offence in question.

3.5.3 Evaluation of comment

The commentary received indicates divergent views on the topic. One respondent points out a possible contradiction between the heading of the clause that refers to "acts of sexual penetration" and the contents of the clause.²⁹

Certain respondents are in favour of the clause as it is currently drafted.³⁰ Professor JMT Labuschagne³¹ expresses the opinion that the law should be re-systematized and that the continental approach be adopted where sexual intercourse with a mentally ill person is punished as a crime separate from rape. Further, concepts such as "mentally ill" should be more clearly defined. The difficulty with this approach is when the complainant is mentally impaired to the extent that he or she is not able to appreciate the nature of the act, the mental impairment vitiates the consent and falls clearly within both the common law definition of rape and that proposed by the Commission. In addition, if the phrases "mentally ill" or "mental impairment" are strictly defined, such definition will of necessity draw an arbitrary line and may result in prohibiting certain mentally

²⁹ SOCA Unit (National Director of Public Prosecutions).

³⁰ Dr R Jewkes (Medical Research Council); Dr K Muller (Vista University); Nolitha Mazwai (Rape Crisis Cape Town); Mokgabi Mmola (General Secretary Maboloka HIV/AIDS Awareness Organisation); Ms Suchilla Leslie, (National Programme Manager Child Protection SA National Council for Child Welfare); Mr Prometheus Mabuza (Save the Children, Sweden) who points out that the age limit should not apply.

³¹ Department of Private Law, University of Pretoria.

impaired persons from expressing their sexual rights. In the Commission's view, mental impairment is a matter of degree and is best left in the discretion of the court to determine the degree of impairment depending on the facts of each case.

The SOCA Unit argues that the reference to the biological age of the mentally impaired person should be qualified as there is no reference to a person's mental or psychological age. Further, that "mentally impaired", as defined in clause 1 of the Bill, refers to persons who have a severe form of mental impairment. The question is asked whether biological age should be the determining factor in this regard. The respondent gives the example of a situation where a 19 or 20 year old mentally impaired person induces the commission of an indecent act or act of intercourse with the accused, but due to his/her impairment, is at the mental age of an eight year old. In the respondent's view the law should not provide an accused who takes advantage of such advances by the impaired person with a defense. The respondent goes on to say that if the purpose of this defense is to protect the sexual rights of mentally impaired persons, then the section should distinguish between various degrees of impairment. The degree of impairment referred to by the present section is a very severe form of impairment. The law should provide extensive protection to these persons. The SOCA Unit suggests that the section should make it compulsory for the presiding officer to make use of an expert witness in such circumstances. They say that the expert will be in the best position to evaluate the victims mental/psychological age.³²

Other respondents disagree with any change in the legally accepted definition of "age" on the basis that it is a legally accepted certainty that "age" refers to biological age. The difficulty with this position is that it does not address the problem of vulnerability that a person who is mentally impaired may experience. It is argued that the category of mentally impaired persons who are over 21 years of age, but have the mental age of a person between 12 to 16 years are vulnerable, and deserving of legal protection.

The Commission takes the view that the debate in respect of mental or biological age is best solved by not amending the definition of "age", but providing the court with discretion to consider not only whether the complainant was able to appreciate the nature of the act and the consequences thereof, but also whether he or she has the maturity and judgment to act on that understanding notwithstanding his or her biological age.

The SOCA Unit³³ raises a concern that the clause does not refer to the element of unlawfulness. They go on to argue that unlawfulness is an element of every crime, and should expressly be included in the definition.

³² SOCA Unit, National Prosecuting Authority.

³³ National Director of Public Prosecutions.

The Commission is of the view that it is not necessary to enter this debate as it has concluded that the offence referred to in sub-clause (1) is tautologous in view of the fact that acts of penetration are dealt with in clauses 3, 4, 5 and 6 of the final Bill, while indecent acts are covered by the provisions of the clause dealing with compelled and induced indecent acts.

The majority of the respondents raise the problem of a possible reverse onus in clause 7(2)(a) and (b).³⁴ The Commission agrees that any possible confusion over the question of a possible reverse onus in clause 7(2)(a) and (b) must be clarified. This proposal is implemented by making it clear that it is merely an evidentiary burden on the accused.

Advocates Meintjes and Henning SC³⁵ suggest that clause 7(2)(a) be amended as follows.³⁶

Clause 7(2) "It is a defence to a charge under subsection (1) or to a charge of rape under section 2 if -

(a) the mentally impaired person was over the age of 16 years at the time of the alleged commission of the offence and **[it is proved, on a balance of probabilities, that]** such mentally impaired person induced the commission of an indecent act or an act of sexual penetration; and

(b) **[it is proved, on a balance of probabilities, that]** the accused reasonably believed that the person [was unaware that the mentally impaired person] who induced the commission of an indecent act or sexual penetration was **[so]** not mentally impaired or was **[below]** above/over the age of 16 years at the time of the alleged commission of the offence in question.

The Commission adopts the formulation of these clauses as proposed above with the exception that in line 3 in the proposed sub-clause (b) the word "or" should be deleted and replaced with the word "and".

Advocates Meintjes and Henning, SC, go on to argue that clauses 7(2)(a) and (b) are important as they allow courts some leeway where necessary. However, they hold the view that the age limit of 16 years should be raised to 18. Furthermore, they are of the opinion that some provision should be included prohibiting the prostitution of mentally impaired persons. They suggest that this could be achieved by the inclusion of a provision such as the following: "The provisions of section 9 are *mutatis mutandis* applicable to mentally impaired persons".

³⁴ Advocate A Du Plessis (SOCA Unit National Prosecuting Authority); Proffs J Burchell & P J Schwikkard, Department of Criminology, University of Cape Town; Professor P.W.W. Coetzer, Chief Specialist Medunsa; Irene Filander, Social Worker, Child Welfare, Vereeniging; Barbara Anne Frost, UNITRA; Ntomboxolo Dyantjie, Provincial coordinator, Eastern Cape Network on Violence Against Women; Dr Susan Gräbe, RP Clinic, Medical Doctor; Celestia Beswick, volunteer community worker; E.M. Setai, para-legal, Thusanang Advice Centre; Martha Humn, Tshwaraganang Women Organisation; Ms B.J. Matshego, probation officer, Department of Safety Services and Correctional Supervision; Ms Carol Bower, Executive Director, Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN); Judge Bertelsmann; Judge van Heerden; Dr K Muller (Gauteng Dept of Health); Advocates Meintjes and Henning SC.

³⁵ Office of the Director of Public Prosecutions: Transvaal.

³⁶ Insertions to existing clause are underlined and excisions from the existing clause are in brackets.

The Commission is of the view that mentally impaired persons do require additional protection and that the additional two years suggested would go far to achieving that aim. Further, all possible steps should be taken in the legislation to prevent the exploitation of mentally impaired persons and consequently the provision which extends the prohibition of prostitution of children should be extended to mentally impaired persons.

There was general support from the respondents for the proposed defences that were created in clauses 7(2)(a) and (b).³⁷ One respondent felt that the sub-clause was confusing as it appeared to be one defence with two elements.³⁸ The Commission has clarified the question of whether there are one or two defences available in these clauses, by making it clear that it is one defence with two elements by inserting the conjunction "and" between the two elements of the defence.

3.5.4 Recommendation³⁹

The Commission recommends the incorporation of the following clauses in the proposed Bill:

Defences to indecent acts or acts [of sexual] which cause penetration with certain mentally impaired persons

8. [(1) Any person who intentionally commits an indecent act as defined in section 1 with a mentally impaired person, also defined in section 1, is guilty of the offence of having committed an indecent act with a mentally impaired person.]

[(2)] It is a defence to a charge [under subsection (1) or to a charge of rape under section 3] of an indecent act or an act which causes penetration with a person who is mentally impaired to the extent contemplated in paragraphs (a) to (d) of section 2(v) if -

(a) the mentally impaired person was over the age of [16] 18 years at the time of the alleged commission of the offence and [it is proved, on a balance of probabilities, that] such mentally impaired person induced the commission

³⁷ Professor P.W.W. Coetzer, Chief Specialist Medunsa; Ms Suchilla Leslie, National Programme Manager Child Protection, SA National Council for Child Welfare; Ms Irene Filander, Social Worker, Child Welfare, Vereeniging; Nolitha Mazwai, Rape Crisis, Cape Town; Barbara Anne Frost, UNITRA; Ntomboxolo Dyantjie, Provincial coordinator, Eastern Cape Network on Violence Against Women; Dr Susan Gräbe, RP Clinic, Medical Doctor; Celestia Beswick, volunteer community worker; E.M. Setai, para-legal, Thusanang Advice Centre; Martha Humn, Tshwaraganang Women Organisation; Mokgabi Mmola, General Secretary, Maboloka HIV/AIDS Awareness Organisation (MAHAAO); Carol Bower, Executive Director, Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN); Advocate A Du Plessis (SOCA Unit National Prosecuting Authority).

³⁸ Ms Helen Alexander, Legal Advocacy Co-ordinator, SWEAT.

³⁹ The Commission has made consequential amendments to the proposed clauses which are necessitated by the amendments in regard to the definition of rape.

of [an indecent act or an act of sexual penetration] the act to which the charge relates; and

(b) [it is proved, on a balance of probabilities, that] the accused [was unaware that the mentally impaired] reasonably believed that the person who induced the commission of [an indecent act or act of sexual penetration] the act to which the charge relates was not so impaired [or] and was [below] above the age of [16] 18 years at the time of the alleged commission of the offence in question.

3.6 Acts of sexual penetration or indecent acts committed in presence of certain children or mentally impaired persons

3.6.1 Current law

There is no provision in the Sexual Offences Act dealing with the commission of acts of sexual penetration or indecent acts in the presence of a child or a mentally impaired person. Such acts would be dealt with in terms of the common law as constituting an indecent assault, *crimen inuiriæ* or public indecency.⁴⁰

3.6.2 Proposals in Discussion Paper 102

The wording of clause 9 of the Bill proposed in Discussion Paper 85 made it an offence to commit an indecent act (this definition included an act of sexual penetration) in the presence of a mentally impaired person. One respondent argued that it should also be an offence when committed in the presence of children.⁴¹ As a result the Commission proposed in Discussion Paper 102 that a separate offence be established when an indecent act or act of sexual penetration is intentionally committed in the presence of a child below the age of 16 years or a mentally impaired person.

The following clause was proposed in Discussion Paper 102:

Acts of sexual penetration or indecent acts committed in the presence of minors or mentally impaired persons

8. Any person who intentionally commits an act of sexual penetration or an indecent act as defined in section 1 with another in the presence of a person below the age of 16 years or a mentally impaired person as defined in section 1, is guilty of the offence of having committed such an act in the presence of a minor or a

⁴⁰ See also JMT Labuschagne 'Openbare onsedelikheid, nudisme en ekshibisionisme' (1988) 11 **SACJ** 187, 'Openbare onsedelikheid en ekshibisionisme met 'n kunspenis' (1988) 11 **SACJ** 84.

⁴¹ Dr JM Loffell (Johannesburg Child Welfare Society).

mentally impaired person, as the case may be.

3.6.3 Evaluation of comment

Most respondents express agreement with the creation of such an offence.⁴² Professors Burchell and Schwikkard raise a problem with the use of the word 'intentionally' as it is broad enough to include not merely situations where a person deliberately (i.e. with *dolus directus*) has sexual penetration or commits an indecent act in the presence of children or mentally impaired persons, but also instances of foresight of the possibility that such circumstances could result (i.e. with *dolus eventualis*). In the light of serious overcrowding and sub-economic housing Professors Burchell and Schwikkard suggest that only those who deliberately perform such acts in the presence of children and mentally impaired persons should be punished. They therefore suggest that the word 'intentionally' should be replaced with the word 'deliberately'.⁴³

A number of other respondents⁴⁴ also made reference to the situation of extended families living in one-room shacks, where privacy is not available and the children are believed to be asleep while the parents engage in sexual activity. Dr Katrin Müller also submits that there must be intention and purpose to expose a child to such acts and not be the inevitable result of social circumstances.⁴⁵

The Commission shares the concern respondents express in relation to persons living in poor socio-economic circumstances, but is also acutely aware of the possible early sexualisation of children by exposure to sexual acts. The serious mischief aimed at by such an offence is the deliberate exposure of children or mentally impaired persons to sexual acts to sexualise them as a precursor to involving the child or mentally impaired person in sexual acts.

⁴² Professor P.W.W. Coetzer, Chief Specialist Medunsa; Judge Eberhard Bertelsmann, High Court Pretoria; Judge Belinda van Heerden, Cape High Court; Nolitha Mazwai, Rape Crisis, Cape Town; Ntomboxolo Dyantjie, Provincial coordinator, Eastern Cape Network on Violence Against Women; Dr Susan Gräbe, RP Clinic, Medical Doctor; Celestia Beswick, volunteer community worker; E.M. Setai, para-legal, Thusanang Advice Centre; Martha Humn, Tshwaranang Women Organisation; Mokgabi Mmola, General Secretary, Maboloka HIV/AIDS Awareness Organisation (MAHAAO); Ms B.J. Matshego, probation officer, Department of Safety Services and Correctional Supervision (children learn by imitating others, adults must know / be aware of what they do in front of their children.); Moipone Hakala, Chief Social Worker, Dept of Social Services; Carol Bower, Executive Director, Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN); Helen Alexander, Legal Advocacy Co-ordinator, SWEAT; Irene Filander, Social Worker, Child Welfare, Vereeniging; Prometheus Mabuza, Save the Children, Sweden; Ms Suchilla Leslie, National Programme Manager Child Protection, SA National Council for Child Welfare.

⁴³ Department of Criminal Justice, University of Cape Town.

⁴⁴ Barbara Anne Frost, UNITRA; Dr Rachel Jewkes.

⁴⁵ Gauteng Health Department, Chief Medical Officer & Medical Advisor.

It is not the Commission's intention to criminalise all instances where acts of sexual penetration or indecent acts are committed in the presence of children or mentally impaired persons. It must be done intentionally. What therefore are intended to be addressed are those instances where sexual acts are committed in the presence of children and mentally impaired persons with the purpose of grooming that child or mentally impaired person for possible abuse later. The Commission accordingly does not propose to replace the word "intention" with "deliberate". It further must be remembered that prosecutorial discretion should exclude those cases which should not come before court where the exposure of a child or mentally impaired person has arisen due to cramped living conditions.

Advocates Meintjes and Henning SC⁴⁶ point out that although the words "in the presence" might be too widely framed, it is an important clause to include in the Bill. However, they regard the words "as defined in section 1" as unnecessary. They suggest the following formulation:

Any person who intentionally commits an act of sexual penetration or an indecent act [**as defined in section 1**] with another [**in the presence**] within the view of a person below the age of 16 years or a mentally impaired person as defined in section 1, is guilty of the offence of having committed such an act in the presence of a minor or a mentally impaired person, as the case may be.

There is considerable merit in these suggestions and the Commission accordingly adopts it.

Advocates Meintjes and Henning SC make a further unrelated suggestion that is appropriately dealt with at this point. They suggest that the provisions of clause 9 (which extend the protection of children by broadening the category of persons and activities which are criminalised in regard to prostitution and related activities) should apply, with the changes required by the context, to mentally impaired persons. The Commission concurs with this view as mentally impaired persons are particularly vulnerable, and while mentally impaired children will be protected by the provisions of clause 9, adult mentally impaired persons also need the added protection. The Commission adapts the draft Bill accordingly by inserting a new clause to this effect.

3.6.4 Recommendation

The Commission proposes the incorporation of the following clauses in the draft Bill:

Acts [of sexual] which cause penetration or indecent acts committed [in the presence] within the view of [minors] certain children or certain mentally impaired persons

⁴⁶ Office of the Director of Public Prosecutions Transvaal.

9. Any person who intentionally commits an act [**of sexual**] which causes penetration or an indecent act [**as defined in section 1**] with another [**in the presence**] within the view of a [**person**] child below the age of 16 years or a [**mentally impaired**] person who is mentally impaired to the extent contemplated in paragraphs (a) to (d) of [**as defined in**] section [**1**] 2(v), is guilty of the offence of having committed such an act [**in the presence of a minor**] within the view of a child or a mentally impaired person, as the case may be, and is liable, upon conviction, to a fine or to imprisonment for a period not exceeding two years.

Prostitution of mentally impaired persons

13. The provisions of section 12 relating to child prostitution apply, with such changes as may be required by the context, to the prostitution of any mentally impaired person.

3.7 Acts of sexual penetration or indecent acts with certain consenting children

3.7.1 Current law

Section 14 of the Sexual Offences Act prescribes that:

- (i) 16 years is the minimum age below which the law does not recognise the consent of either a boy or girl to (heterosexual) intercourse;
- (ii) 19 years is the minimum age for both male and female persons to be able to consent to immoral or indecent acts;
- (iii) it is an offence to solicit or entice the commission of any of the above acts;
- (iv) it is a defence to the above offences if, at the time of the commission, of the offence in question, the boy or girl respectively, was a prostitute and the person charged with the offence was under the age of 21 years at the time and it is the first time on which he or she is so charged; or the girl or boy in question, or the person in whose charge she or he was deceived the person so charged into believing that he or she was over the age of 16 years at the time.⁴⁷

The Sexual Offences Act does not define the concepts “immoral or indecent acts”.

3.7.2 Proposals in Discussion Papers 85 and 102

⁴⁷ See, in general, JMT Labuschagne ‘Bestraffing van geslagsomgang tussen kinders’ (1992) 109 **SALJ** 584, ‘Enkele strafregtelike aspekte van ontug met jeugdige meisies’ (1974) 9 **Speculum Juris** 40.

The majority of respondents agreed with the rationale underlying the provision, namely to prosecute persons who sexually exploit children without criminalising teenage sexual experimentation.⁴⁸ Of those who responded on this aspect, some were of the view that the proposed maximum two year age difference between “victim” and “perpetrator” (allowed as leeway for teenage sexual experimentation) should be extended to at least three years.⁴⁹

The formulation of clause 6 in Discussion Paper 102 was based on the following points of departure:

Firstly, section 14 of the Sexual Offences Act has established 16 years as the minimum age of consent for sexual intercourse. Although there were calls for lifting this age to 18 years, the age of 16 was retained for purposes of legal certainty.⁵⁰

Secondly, consensual sexual intercourse with someone below the age of 12 years would amount to rape. As provision is made for this in clause 3 (the rape clause), only the category of children between 12 and 16 years was dealt with in this provision. The Sexual Offences Act does not draw this distinction, and speaks only of children below the age of 16. That provision of course had to be considered in conjunction with the common law principle that consent to sexual intercourse by girls below the age of 12 years does not amount to consent. It was therefore proposed in Discussion Paper 102 that the common law principle be repealed (as it only provided for *girls* under the age of 12).

Third, the defences available to someone accused of consensual sexual penetration of a child (in the 12 to 16 years age category) has been extended in view of calls for broadening the leeway originally allowed.⁵¹ If the perpetrator himself or herself was under 16 at the time of the commission of the “offence” and sexual penetration was consensual, it would be a defence. This

⁴⁸ See also JMT Labuschagne ‘Bestrafing van geslagsomgang tussen kinders’ (1992) 109 **SALJ** 584, ‘Die rol van die strafreg in versekering van die vrye psigoseksuele ontplooiing van kinders’ (1996) 113 **SALJ** 585, ‘Ouderdomsgrense en strafregtelike aanspreeklikheid weens seksuele misbruik van kinders’ (1998) 19 **Obiter** 340, ‘Strafregtelike respektering van jeugdiges se reg op psigoseksuele selfbestemming’ (1999) 62 **THRHR** 161, ‘Die strafregtelike spanningsveld tussen die kind se reg op vrye psigoseksuele ontplooiing en behoefte- en magsmisbruik: Is die Duitse reg navolgenswaardig?’ (2000) **Stell LR** 284.

⁴⁹ Dr R Jewkes (Medical Research Council); joint submission by the Institute for Security Studies, Nisaa Institute for Women’s Development, the Pretoria Maintenance Forum and Portia Mnisi.

⁵⁰ Cf. JMT Labuschagne ‘Ouderdomsgrense en die bestrafing van pedofilie’ (1990) **SACJ** 10, ‘Die strafregtelike spanningsveld tussen die kind se reg op vrye psigoseksuele ontplooiing en behoefte- en magsmisbruik: Is die Duitse reg navolgenswaardig?’ (2000) **Stell LR** 284 who argues that sexual acts committed with sexually immature children should be punished irrespective of the age of the child. Prof Labuschagne states that sexual acts with sexually mature children should only be punished if it is potentially harmful to the child and the perpetrator has previously been warned by the police at the request of the child’s parent or guardian not to sexually molest the child. The question whether the sexual acts are potentially harmful to the child is to be decided by the parent or guardian of the child.

⁵¹ SL Kloppers (Public Prosecutor, Richmond); Dr JM Loffell (Johannesburg Child Welfare Society); Prof DAP Louw (University of Free State); joint submission by Parow Clinic (Western Cape Education Department), Streets, The Homestead (UWC), Ilitha Labantu, Grassroots Education Trust, Safeline, SWEAT, Community Law Centre (University of the Western Cape), NADEL, Saystop, Rural Development Initiative, It’s Your Move, the Parent Centre and Molo Songololo.

would increase the original two year age differential to a maximum of almost four years (in scenario where for instance one party was 12 years and one day and the other 15 years and 364 days old). In addition, the general two year age differential has been increased to three years to constitute a defence in instances where the perpetrator was over the age of 16 years. It would therefore be a defence in a scenario where the perpetrator was 18 years old and the “victim” 15 years. Finally, the defence in the Sexual Offences Act regarding deception of age has been reintroduced, as called for by some respondents.⁵²

Fourth, it was deemed desirable to make it clear that the provisions of the clause do not apply in cases where the perpetrator was a family member of the child (even though the child may have consented to an act of sexual penetration), thereby preserving the common law offence of incest.

Fifth, the Commission maintained that the laying down of strict age limits for consent to sexual intercourse is artificial and does not take account of the individual development and maturity of children to make informed decisions. It is now proposed that the provisions of the clause should not apply if it is found that the victim lacked the intellectual development to appreciate the nature of an act of sexual penetration. It follows that if a child is incapable of appreciating the nature of such an act, there can be no consent and if penetration takes place the offence committed would be rape.

In addition to the inconsistency in the Sexual Offences Act, regarding the age of consent to homosexual as opposed to heterosexual acts (19 years versus 16 years),⁵³ a further anomaly is to be found in that Act in that it lays down the age of consent to heterosexual “intercourse” as 16 years, but the age of consent to an “immoral or indecent act” – whether homosexual or heterosexual – as 19 years. The Act does not define an immoral or indecent act. It therefore requires a higher age of consent to an act that may arguably not be as intimate or disturbing as sexual intercourse. The provision affords the same defences to a perpetrator who has committed an indecent act with a child and one who has committed an act of sexual penetration. Since the common law principle regarding consent by girls under the age of 12 only applies (before its proposed repeal) to sexual intercourse, provision is explicitly made that the commission of an indecent act with a child under 12 years, even with that child’s consent, constitutes an offence.

⁵² Prof J Sloth-Nielsen (Community Law Centre, University of the Western Cape).

⁵³ For a comparative perspective on the constitutionality of setting different age limits for anal intercourse and other forms of sexual intercourse, see **Halem v Minister of Employment and Immigration** (1995) 27 CRR (2d) 23 (Federal Court, Trial Division). See also Ronald Louw ‘Sexual orientation and the age of consent’ (1994) 7 **SACJ** 132.

Finally, a provision has been built in to exempt persons who are legally married to persons above the age of 12 years from liability in terms of this clause.⁵⁴

The following clause was proposed in Discussion Paper 102:

Acts of sexual penetration or indecent acts with consenting minors

6. (1) Any person who commits an act of sexual penetration as defined in section 1 with a child who is at least 12 years of age, but not yet 16 years is, notwithstanding the consent of that child to the commission of such an act, guilty of the offence of having committed an act of sexual penetration with a minor.

(2) It is a defence to a charge under subsection (1) if -

- (a) the accused was a person below the age of 16 years at the time of the alleged commission of the offence;
- (b) the age of the accused did not exceed the age of such child by more than three years at the time of the alleged commission of the offence; or
- (c) it is proved on a balance of probabilities that such child or the person in charge of such child deceived the accused into believing that such child was over the age of 16 years at the time of the alleged commission of the offence.

(3) The provisions of this section do not apply if –

- (a) the accused is related to such child by blood or affinity; or
- (b) such child lacked the intellectual development to appreciate the nature of an act of sexual penetration.

(4) Any person who commits an indecent act as defined in section 1 with a child below the age of 16 years is, notwithstanding the consent of that child to the commission of such an act, guilty of the offence of having committed an indecent act with a minor.

(5) The provisions of subsections (2) and (3) apply, with the changes required by the context, to a person charged under subsection (4), unless the child concerned was below the age of 12 years at the time of the alleged commission of the offence.

(6) A person may not be charged under this section if a valid or legally recognised marriage existed between that person and a child as referred to in this section, unless the child concerned was below the age of 12 years at the time when any offence in terms of this section was allegedly committed.

3.7.3 Evaluation of comment

The reformulated clause elicited divergent responses. Many of the respondents to Discussion Paper 102 are in favour of the creation of a provision that recognises and decriminalises experimental non-coercive sexual behaviour between children.⁵⁵ A concern in this regard is that

⁵⁴ To address a concern expressed by Prof J Sloth-Nielsen (Community Law Centre, University of the Western Cape).

⁵⁵ Professor P.W.W. Coetzer, Chief Specialist Medunsa; Suchilla Leslie, National Programme Manager Child Protection, SA National Council for Child Welfare; Irene Filander, Social Worker, Child Welfare, Vereeniging; Judge Eberhard Bertelsmann, High Court Pretoria; Nolitha Mazwai, Rape Crisis, Cape Town; Barbara Anne

no distinction was made between acts of sexual penetration and other sexual acts in Discussion Paper 102. Neither did respondents to Discussion Paper 102 make that distinction.

The SOCA Unit⁵⁶ recommends that the use of the word 'minor' in clause 6(1) in the description of the 'crime of sexual acts committed with consenting minors,' be reconsidered. The crime specifically refers to acts of sexual penetration or indecent acts committed with children between the age of 12 and 16. Minors are persons under the age of 21, and the general use of the word minor may be confusing in this context. The SOCA Unit argues that it might be clearer if the section was called 'Acts of sexual penetration or indecent acts with children under 16 with their consent' or 'consenting children between 12 and 16'. This would in their opinion provide a clearer description of the group sought to be protected.⁵⁷ The Commission concurs with this view and proposes to amend the clause accordingly.

In this regard advocates Meintjes and Henning SC express concern that the words "at least" in clause 6(1) will, in effect, do away with the current distinction between the ages of 12 -16 years. They point out that should it not be possible to prove the exact age of the complainant, the accused might be acquitted both of rape and of the offence in clause 6. They therefore recommend that clause 6(1) be deleted *in toto*. The Commission does not agree with this proposal. Advocates Meintjes and Henning, SC, also suggest that if clause 6 is retained, the words "who is at least 12 years of age, but not yet" be deleted and be substituted by "below the age of".

The SOCA Unit recommends that clause 6(4) should follow directly after clause 6(1). This will in their opinion make the clause more user-friendly, as clause 6(2) is also applicable to clause 6(4). In view of the change to the definition of rape that is proposed in this Report, the Commission has elected to retain clause 6(4) in its current position.

Clause 6(2)(c) refers to the defence available to the accused who can prove on a balance of probabilities that he/she was deceived into believing that the child was over the age of 16. The SOCA Unit⁵⁸ recommends that some clarification be provided as to whether or not the deception had to be reasonable. The Unit points out that the issue is whether it should be a requirement that a reasonable man in the position of the accused would also have been deceived into believing that

Frost, UNITRA; Ntomboxolo Dyantjie, Provincial coordinator, Eastern Cape Network on Violence Against Women; Dr Susan Gräbe, RP Clinic, Medical Doctor; Celestia Beswick, volunteer community worker; E.M. Setai, para-legal, Thusanang Advice Centre; Martha Humn, Tshwaranang Women Organisation; Ms B.J. Matshego, probation officer, Department of Safety Services and Correctional Supervision; Helen Alexander, Legal Advocacy Co-ordinator, SWEAT.

⁵⁶ National Prosecuting Authority.

⁵⁷ This was the general view expressed at the Gordon's Bay Expert conference.

⁵⁸ National Prosecuting Authority.

the child was over 16, or is it sufficient merely for the accused to prove that he was deceived (regardless of whether such deception was reasonable or not).

Judge Belinda van Heerden⁵⁹ and Professors Burchell and Schwikkard⁶⁰ make the point that it would be best to omit the reverse onus in clause 6(2)(c) in the light of the Constitutional Court's apparent disapproval of such onuses. They go on to say that a similar purpose to reversing the onus onto the accused could be achieved by preventing the accused from escaping liability for sexual penetration with a child simply because he genuinely believed the child was over 16. This could be done by requiring that the accused adduce evidence of the reasonableness of his belief, which amounts to an evidentiary burden only. The Commission agrees with this view and proposes to recommend the sub-clause accordingly.

In relation to clause 6(3), Drs Coetzer and Müller are of the view that it is vague in that it simply refers to "this section" and should be amended to read "the provisions of section 6(2) do not apply if -...". The Commission concurs with this view.

Judge van Heerden indicates that, in addition in clause 6(3)(a), it must be made clear that relationship by blood or affinity here only refers to those categories that constitute incest categories. To avoid uncertainty the Commission intends amending this subclause by specifying that the defences in subclause (2) are not available to an accused that is related to the complainant within the prohibited degrees of blood or affinity.

In relation to clause 6(6) Judge van Heerden requests that the words "valid or legally recognised" and "marriage" be deleted as it would exclude Islamic marriages. She suggests that it be defined in the definitions section of the Bill as in the proposed new children's code. As the reference to "marriage" in the draft Bill is not extensive and in light of the fact that there are various law reform investigations considering the definition of marriage and what should be included therein, the Commission agrees to simply delete the words "valid or legally recognised". This will then give the court the discretion to enquire into the nature of the marriage in accordance with the Constitution and changing morals in our society.

Many respondents are in agreement with the 16 year-old cut-off and 3 year age differential recommended in the defence in non-coercive sexual activities amongst peers.⁶¹ On the other

⁵⁹ Cape High Court.

⁶⁰ Department of Criminal Justice, University of Cape Town.

⁶¹ Mr P Mabuza; Mr Motshego; Professor P.W.W. Coetzer, Chief Specialist Medunsa; Dr Karen Müller, Vista University, Department of Procedural Law; Nolitha Mazwai, Rape Crisis, Cape Town; Barbara Anne Frost, UNITRA; Ntomboxolo Dyantjie, Provincial coordinator, Eastern Cape Network on Violence Against Women; Dr Susan Gräbe, RP Clinic, Medical Doctor; Celestia Beswick, volunteer community worker; E.M. Setai, para-legal, Thusanang Advice Centre; Martha Humn, Tshwaranang Women Organisation; Mokgabi Mmola, General Secretary, Maboloka HIV/AIDS Awareness Organisation (MAHAAO); RAPCAN.

hand, many of those who participated in the rural workshops were of the opinion that the age of consent should be raised to 18 years.

The Equality Project believes that the period of 3 years is too wide. Effectively, the period may be as much as 3 years and 364 days, meaning that, a person aged about 17 could have intercourse with a person aged about 13. In this respect, the Equality Project believes that when looking at the physical and emotional development gaps which could exist between such persons, this gap is set too wide. It supports the original suggestion of the Commission to set the gap at 2 years (effectively then 2 years and as much as 364 days), but recognize that these age limits are still arbitrary. Nevertheless, they believe that it would be more just and equitable to go for the narrower lee-way than the wider.

Judge Eberhard Bertelsmann⁶² is also not in favour of the three year gap and proposes that it be removed. Dr Katrin Müller⁶³ expresses agreement with this clause, but points out that in many such cases there will be no perpetrator or victim. There will be two consensual partners either of the same age or one (male or female) older than the other. She goes on to express concern where one partner is three years and one month older. She notes that in many schools there are learners who are in the same class/grade with more than a three years age difference.

Similarly, Helen Alexander of SWEAT⁶⁴ indicates that the organisation agrees with the 16 year cut-off point and the three year age differential. She points out however, that this will not assist in the foreseeable situation where a child in grade 8 has consensual sex with a child in grade 12. Children could be attending school together and quite conceivably have a relationship. A number of workshop participants express the view that sexual experimentation is not what it used to be and goes much further than in the past and that it is highly likely that in view of sexually transmitted infections penetrative sex will be a death sentence. These participants propose that the age of consent be raised to 18 years old.

The Commission's response to this issue is that it did not intend in Discussion Paper 102 to cater for all school goers' relationships with their peers and that the age differential was introduced to provide protection to younger children who, due to the difference in age, are unable to resist or express their unwillingness to the sexual act in question. Furthermore, there is strong public support for the argument that it is wrong for children below a certain age to engage in sexual relations, even if it is consensual.⁶⁵ Further, the Commission does not intend raising the age of

⁶² High Court, Pretoria.

⁶³ Gauteng Health Department, Chief Medical Officer & Medical Advisor.

⁶⁴ Legal Advocacy Co-ordinator.

⁶⁵ A view expressed at numerous workshops held by the Commission.

consent as it is firmly established in our law and any change thereto will affect a number of related laws dealing with marriage and consequences flowing there from.

In the child participation process, the majority of children participating stated that the age of consent to sexual intercourse should be 18 years. This was followed by suggestions, amongst others, of increasing the age to 21 years and maintaining it at 16 years of age. "It is interesting to note that of all the responses received, none of the children felt that sexual intercourse should be allowed below 16 years of age".⁶⁶

Ms Carol Bower of RAPCAN supports the creation of such criminal offence, but would expect that the new child justice system will ensure that such young people are diverted away from the criminal justice system where appropriate. As will be seen below the Commission supports the view that children found guilty of committing the offence in question should be diverted away from the criminal justice process.

RAPCAN, however, expresses concern that, especially in the case of older offenders (i.e. close to the cut-off age), the perpetrator will argue non-coercive intentions, and the victim may be subject to the same burden of having to prove her veracity as is currently the case. The Commission is of the view that this concern will fall away in view of the proposed amendments below.

According to the United Christian Action Group the seriousness of statutory rape must not be diminished as these provisions are essential to protect children who are vulnerable and easily manipulated for sexual abuse. They fear that a progressive lowering of the age of consent sends a strong message that children are available for acts of penetrative sex. They submit that any changes to the law on sexual offences must thus not be in the direction of easing the statutory rape provisions. Furthermore, the United Christian Action group is of the view that the age of consent for sodomy (anal intercourse) must not be lowered. They argue that teenage years are fraught with emotional conflict as the transition from child to adult is made. They believe that boys need to be protected from exploitation and abuse during their formative years. They believe that anal and vaginal sex is not morally equivalent; that sodomy can have serious health consequences such as:

- HIV is more likely to be transmitted during anal than during vaginal sex
- The anus and rectum can tear during the sexual act
- The presence of sperm in the rectum can cause a variety of auto-immune responses in addition to the slough of diseases known as "gay bowel syndrome".

The Commission does not agree with asserting a moral value to different forms of penetration and

⁶⁶ Report on Children's Rights at p 16.

making a distinction in law between vaginal and anal penetration. Accordingly this suggestion is not followed.

Professor Milton⁶⁷ comments that technically section 14 of the Sexual Offences Act (which the proposed clause 6 amends) can be characterised as a species of age of consent legislation. In other words, the consent of a person to participate in a sexual act deprives that act of any taint of unlawfulness. This means that at common law the consent of a girl or boy to sexual intercourse or to engage in an 'immoral or indecent act' renders that sexual intercourse or act lawful. Societal concern at the capacity of children to be able to give an informed consent has led to the notion that society should regulate the age at which the consent of a child should render sexual activity lawful. The establishment of a so-called age of consent – a chronological age which is a line separating valid and invalid consent – has been the result. Various rationales have been put forward for the prohibition.⁶⁸

3.7.4 Recommendation

The Commission recommends that section 14 of the Sexual Offences Act be repealed and replaced by a new section. However, the essence of section 14 is retained and it is recommended that it remain a criminal offence for a person to have sexual intercourse (in the wider sense) with consenting children below the age of 16 years. While on the one hand trying to protect children below the statutory age from sexual exploitation, the Commission on the other hand also recognises the reality of teenage sexual experimentation. This is allowed for by the three year age differential provided for. However, it should also be clear that sexual interaction with a child under the age of 12 years, even by another child below 12 years of age, would constitute rape in terms of our proposals. We concede that the age limits are set arbitrarily.

Where two children under 16 years of age but above 12 years of age engage in consensual sexual activity, both are potentially liable for prosecution in terms of the existing section 14 of the Sexual Offences Act. While children in this age category certainly engage in sexual activity with one another, not all such activity attracts criminal prosecution. Indeed, much of it goes unreported and rightfully so. However, the Commission wishes to make it very clear that it does not want to encourage children to become sexually active at a younger age – and therefore contribute to the moral disintegration of society, as has been suggested. It is just a reality that children in this age category engage in consensual sexual activity with peers (to the horror of their parents). The Commission has no desire to have these consensual acts between peers criminalised and

⁶⁷ School of Law, University of Natal, Pietermaritzburg.

⁶⁸ Such as the 'surrogate' rape model; protection of children from sexual exploitation; enforcement of morality and chastity; and the empowerment of women.

therefore allows for a wide prosecutorial discretion and provides for defences relating to deception as to age.

The Commission considers it appropriate to differentiate between penetrative and non-penetrative sexual offences in this regard. In order to give effect to the Commission's stated aim not to criminalise consensual sexual experimentation amongst peers, it is recommended that the scope of the provision be defined more narrowly to apply to acts of sexual penetration only.

The Commission accordingly recommends that clause 6(1) be retained. However, to distinguish between penetrative and non-penetrative sexual acts it is necessary to delete the defences relating to youthfulness in clauses (2)(a) and (b).

Clause 6(4) deals with indecent acts. The Commission received very little comment on this clause and proposes to amend the sub-clause as it is now necessary to raise the defences of youth and proximity of age between the parties to the act (which are to be deleted in clauses 6(2)(a) and (b) as that relates to defences to penetrative sexual acts). In this regard the Commission proposes to introduce a new sub-clause detailing the defences available and has elected to adopt the 3 year age gap between the parties due to the fact that in cases involving the more serious indecent acts, the defence of youthfulness (below 16 years of age) and proximity of age will no longer be available. Consequential changes are therefore also necessary to the current clause 6(5).

The Commission therefore recommends that in cases of penetrative sexual acts with consenting children, where the acts causes penetration either of the vagina or anus by a penis; or oral genital penetration; or sexual violation; or sexual violation with intent to inflict grievous harm, there should only be one defence available - namely that the accused was deceived into believing that the child (between the ages of 12 and 16 years) was over the age of 16 and that belief was reasonable. When other acts are committed with a consenting child (between the ages of 12 and 16 years) additional defences are available. These defences are that both parties are younger than 16 years of age, and the age difference between them is not more than three years.

To give effect to these recommendations the Commission proposes the incorporation of the following clause in the draft Sexual Offences Bill:

Acts [of sexual] which cause penetration or indecent acts with [consenting minors] certain children with their consent

10. (1) Any person who commits an act [of sexual] which causes penetration [as defined in section 1] with a child who is [at least] older than 12 years of age, but [not yet] below

the age of 16 years is, notwithstanding the consent of that child to the commission of such an act, guilty of the offence of having committed [an act of sexual penetration] such an act with a [minor] child and is liable, upon conviction, to a fine or to imprisonment for a period not exceeding six years or to both such fine and such imprisonment.

(2) It is a defence to a charge under subsection (1) if -

- (a) **[the accused was a person below the age of 16 years at the time of the alleged commission of the offence;**
- (b) **the age of the accused did not exceed the age of such child by more than three years at the time of the alleged commission of the offence; or**
- (c) it is proved on a balance of probabilities that such child or the person in [charge of such] whose care such child had been, deceived the accused into believing that such child was over the age of 16 years at the time of the alleged commission of the offence; and
- (b) the accused reasonably believed that the child was over the age of 16 years.

(3) The provisions of [this section] subsection (2) do not apply if -

- (a) the accused is related to such child [by] within the prohibited incest degrees of blood or affinity; or
- (b) such child lacked the intellectual development to appreciate the nature of an act of sexual penetration.

(4) Any person who commits an indecent act [as defined in section 1] with a child below the age of 16 years is, notwithstanding the consent of that child to the commission of such an act, guilty of the offence of having committed an indecent act with a [minor] child and is liable, upon conviction, to a fine or to imprisonment for a period not exceeding four years or to both such fine and such imprisonment.

(5) It is a defence to a charge under subsection (4) if -

- (a) the accused was a person below the age of 16 years at the time of the alleged commission of the offence, and
- (b) the age of the accused did not exceed the age of such child by more than three years at the time of the alleged commission of the offence; or
- (c) it is proved on a balance of probabilities that such child or the person in whose care such child had been, deceived the accused into believing that such child was over the age of 16 years at the time of the alleged commission of the offence; and the accused reasonably believed that the child was over the age of 16 years.

[5](6) The provisions of [subsections (2) and (3)] **apply, with the changes**

required by the context, to a person charged under subsection (4), unless the child concerned was below the age of 12 years at the time of the alleged commission of the offence.] subsection (5) do not apply if –

- (a) the accused is related to such child within the prohibited incest degrees of blood or affinity;
- (b) such child lacked the intellectual development to appreciate the nature of an indecent act;
or
- (c) such child was below the age of 12 years at the time of the alleged commission of the offence.

[6](7) A person may not be charged under this section if a **[valid or legally recognised]** marriage existed between that person and a child as referred to in this section, unless the child concerned was below the age of 12 years at the time when any offence in terms of this section was allegedly committed.

3.8 Child prostitution

3.8.1 Current law

Any parent or guardian of a child who “permits, procures or attempts to procure such child to have unlawful sexual intercourse, or to commit any immoral or indecent act, with any person other than the procurer”, allows his or her child to reside in or frequent a brothel, or orders, permits, “or in any way assists in bringing about, or receives any consideration for the defilement, seduction or prostitution of such child” is guilty of an offence.⁶⁹ Section 13 of the Sexual Offences Act further makes it a criminal offence for any person to take or detain any unmarried person under the age of 21 years out of the custody and against the will of such person’s parent or guardian⁷⁰ with the intent that such person or any other person may have unlawful carnal intercourse with such unmarried person. In terms of section 20(1) of the Sexual Offences Act it is *inter alia* an offence for any person to knowingly live wholly or in part on the earnings of prostitution or to have unlawful sexual intercourse, or to commit an act of indecency, with any other person for reward. These provisions apply to children and adults alike.

Section 50A of the Child Care Act, 1983 presently provides for the prohibition of commercial sexual exploitation of children in a similar but much more comprehensive fashion to sections 9 and 20 of the Sexual Offences Act. Section 50A of the Child Care Act is made up of two components. The first component creates an offence to criminalise participation in the commercial sexual exploitation of a child, thus making the client’s actions subject to criminal sanctions, in sharp contrast with the

⁶⁹ Section 9 of the Sexual Offences Act, 1957.

⁷⁰ “Guardian” in this context is defined as any person who has in law or in fact the custody or control of the unmarried person: section 13(2) of the Sexual Offences Act, 1957.

present situation. The second component targets the ‘owner, lessor, manager or occupier of property’ on which child prostitution is taking place who, whilst being aware of such occurrences, fail to report this to the police.

3.8.2 Proposals in Discussion Papers 85 and 102

In Discussion Paper 85, the Commission recommended that a complete ban should be placed on child prostitution and that anyone involved in the sexual exploitation of a child, whether as a pimp or customer, should face severe criminal sanction.⁷¹ The Commission stated that the child prostitute should be regarded as a victim in need of care and protection and should not be prosecuted. The Commission further stated that the force of the criminal law should be harnessed to prosecute the customer, pimp, procurer and parents or guardians who wilfully cause children to participate in child prostitution. A clear distinction was drawn between adult and child prostitution, with a child being defined in accordance with international precedence as a person younger than 18 years.

Discussion Paper 85 dealt with the topic of child prostitution under the chapter heading of “Commercial sexual exploitation of children”, and a definition of this term was given in clause 1 of the draft Bill which accompanied that discussion paper. The definition read as follows:

“commercial sexual exploitation” in respect of a child means engaging the services of a child, or offering such services, to any person, to perform a sexual act for financial or other reward, favour or compensation to the child or to any person.

The gist of the definition was however retained in a number of clauses in that Bill, making the wording tautologous or repetitive.⁷² In view of this and also the fact that definitions contribute towards the complexity of legislation, it was decided in Discussion Paper 102 to remove the definition from clause 1 and to clarify the proposed scope of prohibited activities in the appropriate clause itself.

The various clauses proscribing child prostitution contained in the Bill accompanying Discussion Paper 85, all dealt with divergent role-players who were in some way involved in child prostitution, where the focus was on “financial or other reward, favour or compensation to the child or to any person”. It was therefore decided, in the interests of clarity and simplicity, to converge the various offences that targeted different role-players, yet all involved in child prostitution, including pimps, clients, brothel-keepers etc, into one universal offence, namely “involvement in child prostitution”.

⁷¹ Par 3.7.10.2. This included recommendations for the removal of trade licences, confiscation of property, fines, etc. where children are being accommodated on premises for the purpose of prostitution.

⁷² As pointed out by R Blumrick (DPP’s Office, Pietermaritzburg); D Bosch; Prof Coetzer and Dr Muller.

The potential role-players in this offence were extended to those who could be considered to be *trafficking* in children. Although some respondents called upon the Commission to elevate trafficking to a separate and substantive offence,⁷³ the Commission found that as a trafficker is merely one of several potential participants in child prostitution it is arguable whether the role played by one participant should be singled out, which would indicate that such role is considered to be more blameworthy than that of another.

Likewise, the previous draft definition of “brothel”, viz “any movable or immovable property where the commercial sexual exploitation of a child occurs”, was omitted from the revised Bill⁷⁴ and a more general provision was drafted to incorporate the thrust of that definition as well as the potential range of persons who may be involved in the *keeping* of property for purposes of child prostitution.

The Commission also held that it is possible that someone charged with an offence relating to child prostitution may at the same time be committing a separate offence. If the child concerned was below the age of 12 years and an act of sexual penetration was involved, the perpetrator could in addition be found guilty of rape. A person who recruits a child or harbours a child for purposes of prostitution may also use force in limiting a child’s freedom of movement which may amount to assault, kidnapping or another offence. The revised provision made it clear that involvement in child prostitution is separate from any other act that would constitute a distinct offence.

In Discussion Paper 85 the Commission stated that it was of the opinion that commercial sexual exploitation implies sexual abuse of children based upon remuneration in cash (financially) or in kind. It stated that ‘in kind’ remuneration should be interpreted broadly to cover a variety of situations where there is some value, profit, benefit or consideration interlinking or exchanging between the child and the adult and another adult in regard to the child. The Commission recommended that the phenomenon of commercial sexual exploitation should be regulated in terms of the new Sexual Offences Act and not the Child Care Act as it was of the opinion that commercial sexual exploitation has sexual conduct with a child at its core and that a provision criminalising such actions should be included in like-minded legislation regulating sexual offences. More importantly though, it also recommended that section 50A of the Child Care Act and the definition of commercial sexual exploitation contained in that Act should not merely be transposed into the new Sexual Offences Act. In the Commission’s view this offence should be extended to include failure to report any knowledge of any activities relating to child prostitution. The revised Bill in Discussion Paper 102 contained such an extension.

Provisions relating to receiving consideration from commercial sexual exploitation were incorporated as separate subclauses of clause 9 in the revised Bill. The wording was amended to

⁷³ Molo Songololo.

⁷⁴ As called for by J Sloan (SWEAT).

correlate with the revised structure of all provisions that formerly dealt with child prostitution. In addition, an exemption from liability of receiving consideration from child prostitution has been included to provide for the protection of children below the age of 15 years who are not involved in child prostitution in any way. The rationale behind the inclusion of this provision was to provide for the scenario where, *inter alia*, there is a household of children with no parents and one of the children engages in commercial sexual work in order to support the other children.⁷⁵

In response to calls by some respondents⁷⁶ for the inclusion of provisions prohibiting the organising or promoting of child sex tours, a provision was included to criminalise the actions of both natural and juristic persons who facilitate such tours within or to South Africa in any way, whether by making or organising travel arrangements for potential perpetrators or advertising such tours. The provisions were based on similar provisions in the **New Zealand Crimes Act** of 1961, as amended.

The relevant clause in Discussion Paper 102 read as follows:

Child prostitution

9. (1) Any person who, in relation to a child below the age of 18 years, for financial or other reward, favour or compensation to such child or to any other person, intentionally-
- (a) commits an indecent act or an act of sexual penetration as defined in section 1 with such child;
 - (b) invites, persuades or induces such child to allow him or her or any other person to commit an indecent act or an act of sexual penetration with that child;
 - (c) makes available, offers or engages such child for purposes of the commission of indecent acts or acts of sexual penetration with that child by any person;
 - (d) supplies, recruits, transports, transfers, harbours or receives such child, within or across the borders of the Republic of South Africa, for purposes of the commission of indecent acts or acts of sexual penetration with that child by any person;
 - (e) allows or knowingly permits the commission of indecent acts or acts of sexual penetration by any person with such child while being a primary care-giver as defined in section 1 of the Social Assistance Act, 1992 (Act No. 59 of 1992), parent or guardian of that child;
 - (f) owns, leases, rents, manages, occupies or has control of any movable or immovable property used for purposes of the commission of indecent acts or acts of sexual penetration with such child by any person;
 - (g) detains such child, whether under threat, coercion, deception, abuse of power or force for purposes of the commission of indecent acts or acts of sexual penetration with such child by any person; or
 - (h) participates in, is involved in, promotes, encourages or facilitates the commission of indecent acts or acts of sexual penetration with such child by any person is, in addition to any other offence of which he or she may be convicted, guilty of the offence of being involved in child prostitution.

⁷⁵ Joint submission by S K Rajoo (independent), J Hicks (Provincial Parliamentary Programme), M Seedat (Institute for Multi-Party Democracy), C Edwards (KZN Network on Violence Against Women), N Ramsden (Children's Rights), F Zikalala (Commission on Gender Equality), K Stone (SA Human Rights Commission), N Thejane (SA Human Rights Commission), B Ngwenya (Campus Law Clinic, University of Natal) and W Clark (Verulam Magistrate's Court).

⁷⁶ Dr J M Loffell (Johannesburg Child Welfare Society); H M Meintjies (DPP's Office, Transvaal).

- (2) Any person who has knowledge of the commission of indecent acts or acts of sexual penetration with a child by any person and in any circumstances as contemplated in subsection (1) and who fails to report such knowledge within a reasonable time to the South African Police Services, is guilty of the offence of failure to report knowledge of child prostitution.
- (3) Any person who intentionally receives any financial or other reward, favour or compensation from the commission of indecent acts or acts of sexual penetration with a child below the age of 18 years by any person is guilty of the offence of benefiting from child prostitution.
- (4) Any person who intentionally lives wholly or in part on rewards, favours or compensation for the commission of indecent acts or acts of sexual penetration with a child below the age of 18 years by any person is guilty of the offence of living from the earnings of child prostitution.
- (5) Any person, including a juristic person, who-
 - (a) makes or organises any travel arrangements for or on behalf of any other person, whether that other person is resident within or outside the borders of the Republic of South Africa, with the intention of facilitating the commission of any sexual offence against a child below the age of 18 years, irrespective of whether that offence is committed; or
 - (b) prints or publishes, in any manner, any information that is intended to promote or facilitate conduct that would constitute a sexual offence against a child below the age of 18 years,
 is guilty of the offence of promoting child sex tours.
- (6) A person may not be convicted of an offence in terms of subsections (2), (3) or (4) if that person is -
 - (a) below the age of 15 years; and
 - (b) not a person contemplated in paragraphs (a) to (h) of subsection (1).

3.8.3 Evaluation of comment

In the workshops held on Discussion Paper 102, a number of questions relating to child prostitution were posed to the workshop participants. For ease of reference the questions posed and the comment elicited will be dealt with seriatim.

- **The need for an offence which *inter alia* criminalises child prostitution without criminalising the actions of the child prostitute**

The question was posed as to whether the creation of a criminal offence for child prostitution was supported in view of the fact that the actions of various role-players involved in child prostitution would be criminalised while the child prostitute would be considered to be a child in need of care.

All of the respondents answered affirmatively.⁷⁷ Some, however, voiced concerns regarding the need to address the phenomenon of survival child prostitution by expanding social security benefits;⁷⁸ the need to revisit the mandatory reporting provision⁷⁹ and more specifically the possibility that certain provisions may adversely affect organisations working with sex workers.⁸⁰ Especially in relation to the last mentioned point, SWEAT elaborated its concern by explaining that its employees provide all prostitutes whom they encounter with condoms, including underage prostitutes and that clause 9(1)(h) of the Bill could potentially be used to charge SWEAT with facilitating child prostitution.

From the outset the Commission wishes to reiterate its finding that a child prostitute is a child in need of care and should not be treated as a criminal.⁸¹ In Discussion Paper 103: Review of the Child Care Act, the Commission stresses the need to address the socio-economic circumstances of child prostitutes in a holistic, integrative fashion.⁸² This would entail a child prostitute being brought before the children's court and being dealt with as a child in need of care. The Commission states that an order made by the children's court may include the allocation of some form of grant, the placement of the child in alternative care, the removal of the perpetrator from the family or rehabilitation services. In line with the Government's commitment to eradicate child prostitution the Commission affirms its stance that a child prostitute is a child in need of care and protection. The Commission is of the opinion that the most effective way in which the scourge⁸³ of child prostitution can be eradicated is by mustering public intervention. This would include NGOs who work closely with prostitutes.

In terms of the Commission's proposed offence of facilitation or participation in child prostitution, any person who, in relation to a child below the age of 18 years, for financial or other reward, favour or compensation to such child or to any other person, intentionally participates in, is involved in, promotes, encourages or facilitates the commission of indecent acts of sexual

⁷⁷ Proffs J Burchell & P J Schwikkard, Department of Criminal Justice, University of Cape Town; Professor P.W.W. Coetzer, Chief Specialist Medunsa; Irene Filander, Social Worker, Child Welfare, Vereeniging; Nolitha Mazwai, Rape Crisis, Cape Town; Ntomboxolo Dyantjie, Provincial coordinator, Eastern Cape Network on Violence Against Women; Dr Susan Gräbe, RP Clinic, Medical Doctor; Celestia Beswick, volunteer community worker; E.M. Setai, para-legal, Thusanang Advice Centre; Martha Humn, Tshwaraganang Women Organisation; Mokgabi Mmola, General Secretary, Maboloka HIV/AIDS Awareness Organisation (MAHAAO); Ms B.J. Matshego, probation officer, Department of Safety Services and Correctional Supervision; Moipone Hakala, Chief Social Worker, Dept of Social Services; Carol Bower, Executive Director, Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN); Dr Karen Müller, Vista University, Department of Procedural Law; Judge Belinda van Heerden, Cape High Court; Dr Katrin Müller, Gauteng Health Department, Chief Medical Officer & Medical Advisor.

⁷⁸ Ms Suchila Leslie, SA National Council for Child Welfare.

⁷⁹ Judge Eberhard Bertelsmann, High Court Pretoria.

⁸⁰ Helen Alexander, Legal Advocacy Co-ordinator, SWEAT.

⁸¹ The Parliamentary Task Group on the Sexual Abuse of Children specifically endorses this approach.

⁸² See paragraph 13.8.5.5 on page 638.

⁸³ Suchila Leslie, National Programme Manager Child Protection, SA National Council for Child Welfare alerts the Commission to the fact that pimps not only receive monetary compensation but that allegations abound as to the fact that they also seriously abuse, maim and even cause the death of children.

penetration with such child by any person, may be found guilty of the offence of being involved in child prostitution.

The distribution of condoms to children with the knowledge that they are involved in prostituting themselves could arguably categorise NGOs in the genus of persons who can be found guilty of this offence. However, this provision should not be read in isolation. In Discussion Paper 103 the Commission also makes recommendations in relation to access to contraceptives by children. There the Commission recommended that all sexually active persons, regardless of age, should where necessary have access to and advice about contraceptives at state expense. The enactment of this recommendation would alleviate the 'need' for NGO's to provide child prostitutes with condoms and would hopefully draw such children into the loop of child protection services.

- **Legal obligation on persons with knowledge of the commission of indecent acts or acts of sexual penetration with a child to report such knowledge to the police**

The Commission notes that the submissions⁸⁴ received indicate overwhelming support for the subclause which provides that persons with knowledge of the commission of indecent acts or acts of sexual penetration with a child should be under a legal obligation to report such knowledge to the police.

Judge Eberhard Bertelsmann⁸⁵ suggests that the failure to report should be redefined. Dr Karen Müller⁸⁶ states that the term "within reasonable time" is vague and cautions that it could give rise to practical problems. She recommends substituting these words with the following phrase "within a reasonable time of it coming to their knowledge". Another respondent⁸⁷ commented that it is unclear whether one is required to report seeing a child prostitute or whether you need to have knowledge of persons involved in child prostitution.

⁸⁴ Proffs J Burchell & P J Schwikkard, Department of Criminal Justice, University of Cape Town; Irene Filander, Social Worker, Child Welfare, Vereeniging; Professor P.W.W. Coetzer, Chief Specialist Medunsa; Ntomboxolo Dyantjie, Provincial coordinator, Eastern Cape Network on Violence Against Women; Dr Susan Gräbe, RP Clinic, Medical Doctor; Celestia Beswick, volunteer community worker; Martha Humn, Tshwaraganang Women Organisation; Mokgabi Mmola, General Secretary, Maboloka HIV/AIDS Awareness Organisation (MAHAAO); Moipone Hakala, Chief Social Worker, Dept of Social Services; Carol Bower, Executive Director, Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN); Judge Eberhard Bertelsmann, High Court Pretoria; Dr Karen Müller, Vista University, Department of Procedural Law; Judge Belinda van Heerden, Cape High Court; Dr Katrin Müller, Gauteng Health Department, Chief Medical Officer & Medical Advisor; Suchilla Leslie, National Programme Manager Child Protection, SA National Council for Child Welfare; Barbara Anne Frost, UNITRA; E.M. Setai, para-legal, Thusanang Advice Centre; Ms B.J. Matshego, probation officer, Department of Safety Services and Correctional Supervision; Dr Rachel Jewkes; Adv R Meintjes, Adv Henning SC, Office of the Director of Public Prosecutions, Transvaal; Prometheus Mabuza, Save the Children, Sweden; Gordon's Bay Expert Consultation.

⁸⁵ High Court Pretoria.

⁸⁶ Vista University, Department of Procedural Law.

⁸⁷ Helen Alexander, Legal Advocacy Co-ordinator, SWEAT.

On the same point, the Nadel Human Rights Research & Advocacy Project⁸⁸ notes that the term “knowledge”, as well as “within a reasonable time” has to be clearly defined to avoid subjective interpretations that could potentially perpetuate the occurrence of child prostitution. More directly it states that the term “knowledge” allows for a wide interpretation of what constitutes “knowledge”, compared to “reason to suspect” for instance. It further notes that the increasing levels of child prostitution create a reality in which everyone “knows” it is happening. It could be argued, for example, that a person driving along the streets at night and seeing under-aged sex workers standing on the side of the road approaching cars as they drive by has “knowledge”, or at least reason to suspect that child prostitution is taking place. It can be concluded therefore that this person’s failure to report this knowledge “within a reasonable time” would make them guilty of the offence of failure to report knowledge of child prostitution.

This respondent further recommends the inclusion of a clear definition of “knowledge”, explicitly identifying the various levels “knowledge” can assume and acknowledging the broad societal “knowledge” of the occurrence of child prostitution. It also recommends that the term “knowledge” be inclusive of circumstances within which there is “reason to suspect” child prostitution is taking place without direct knowledge of its occurrence, such as the repeated treatment of young girls for sexually transmissible diseases. It states that the phrase “within a reasonable time” and the failure to clearly define the meaning of “reasonable” minimizes the legal obligation since it is left to a person’s subjective interpretation of what a “reasonable time” is. What seems “reasonable” to a person who has “knowledge” of any activities relating to child prostitution might not be “reasonable” to the child who is prostituted. It therefore also recommends a clear definition of what would constitute “within a reasonable time” to ensure, to some degree, the enforceability of the obligation to report the offence of child abuse. The participants at the Gordon’s Bay Expert Conference suggested that the word ‘reasonable’ be replaced with the words ‘at first reasonable opportunity’.

The Commission takes cognisance of the above comment and comment received from Judge Belinda van Heerden⁸⁹ which urges the Commission to ensure that this clause ties up with the reporting obligations in terms of the Child Care Act and Domestic Violence Act.

Discussion Paper 103 states that according to the Department of Social Development’s legal division, no proceedings can be brought against someone who truthfully and in good faith reports a concern regarding possible abuse in terms of the reporting obligations contained in the Child Care Act 74 of 1983. However, the Commission notes that the lack of specific protection could be considered to be a gap in the law. Further that given the climate of intimidation and reprisals which not infrequently surround such matters, the question arises as to whether some form of legal

⁸⁸ Dr Johanna Kehler, Project Director (Acting), Nadel Human rights Research & Advocacy Project.

⁸⁹ Cape High Court.

protection should be attached to reporting provisions. An example for immunity from legal proceedings for mandated reporters acting in good faith is found in section 42(6) of the Child Care Act 74 of 1983.

Some respondents⁹⁰ opined that the clause would be destructive to organisations dealing with issues relating to prostitution due to the nature of the work they do and that the question of whether the offence should be reported to SAPS or the Department of Social Services should be left in the hands of the project committee investigating the Child Care Act.

Due to the fact that the Commission views child prostitutes as children in need of care, this category of children have received the attention of both the investigation into the Review of the Child Care Act as well as the investigation under discussion. The recommendations contained in Discussion Papers 102 and 103 both confirm that the child prostitute is not a criminal. These recommendations also endorse the fact that prostitution is damaging to the child and that the child should be removed from circumstances which cause a child to be prostituted. To ensure that a child prostitute's needs are speedily met, the need to have an extended list of persons to whom child prostitution is reported and who can consequently act thereon as suggested above is confirmed. Practically this would mean that whether a matter of child prostitution is reported to a police officer or social worker would be irrelevant to the outcome of the matter as the allegations of child prostitution would be followed up by the police and the well-being of the child would be left in the hands of the social worker.

Other respondents disagreed with this clause on the basis that the reality of victimisation of persons who report should be borne in mind⁹¹ and to that end that a person who reports to the relevant authorities should not be forced to give evidence.⁹² The Commission acknowledges the fact that reporters of child prostitution may find themselves in a very vulnerable situation indeed, especially if they too are dependent on the same source of income. Presently reports of abuse in terms of the Child Care Act to social workers by informants are confidential. However, as Discussion Paper 103 points out, this could be overridden by a court, as communications with a social worker are not regarded as privileged in South African law. The Promotion of Access to Information Act 3 of 2000 creates mechanisms whereby a person who is named in a notification of a case of alleged or confirmed abuse of a child might demand to know the identity of the informant.

Given the fact that the Child Care Act already provides for reporting of child abuse in the generic sense and the fact that the implied knowledge of a person of child prostitution is criminalised in

⁹⁰ Nolitha Mazwai, Rape Crisis, Cape Town; Helen Alexander, Legal Advocacy Co-ordinator, SWEAT.

⁹¹ E.M. Setai, para-legal, Thusanang Advice Centre.

⁹² Ms B.J. Matshego, probation officer, Department of Safety Services and Correctional Supervision.

terms of clause 9(1)(f) the Commission now deems this clause as superfluous, thereby too negating the necessity to redefine the offence in terms of the Bill.

- **Penalising living off or benefiting from the earnings of child prostitution**

The question was posed as to whether the fact that pimps and other specified persons benefited or lived off the earnings of child prostitution should be criminalised.

All of the respondents⁹³ noted their support for the inclusion of such provisions under the umbrella offence of child prostitution.

Whilst endorsing the provisions around benefiting from and living off the earnings of child prostitution and acknowledging that the Commission has made provision to exempt children from being penalised by these provisions, SWEAT⁹⁴ opine that there will also be situations in which adults should be exempt, for example where a parent is terminally ill and the child is selling sex in order to support the family (including the ill parent). The Commission concedes that terminal illness and concomitant lack of resources is a sad reality that an impoverished family may have to face. However, the Commission believes that social intervention is more easily accessible and within the reach of an adult parent than a vulnerable child. By extending the exemption to adults the Commission fears that the exemption may signal an increase in child prostitution by impoverished adults. The Commission therefore recommends that the exemption remain for children only.

- **The necessity of criminalising sex tourism**

The inclusion of a provision which criminalises sex tourism in relation to children under the age of 18 was uniformly⁹⁵ accepted and the Commission was lauded for its progressive approach in this regard.

⁹³ Proffs J Burchell & P J Schwikkard, Department of Criminal Justice, University of Cape Town; Dr Katrin Müller, Gauteng Health Department, Chief Medical Officer & Medical Advisor; Irene Filander, Social Worker, Child Welfare, Vereeniging; Professor P.W.W. Coetzer, Chief Specialist Medunsa; Judge Eberhard Bertelsmann, High Court Pretoria; Dr Karen Müller, Vista University, Department of Procedural Law; Judge Belinda van Heerden, Cape High Court; Nolitha Mazwai, Rape Crisis, Cape Town; Barbara Anne Frost, UNITRA; Ntomboxolo Dyantjie, Provincial coordinator, Eastern Cape Network on Violence Against Women; Dr Susan Gräbe, RP Clinic, Medical Doctor; Celestia Beswick, volunteer community worker; E.M. Setai, para-legal, Thusanang Advice Centre; Martha Humn, Tshwaraganang Women Organisation; Mokgabi Mmola, General Secretary, Maboloka HIV/AIDS Awareness Organisation (MAHAAO); Ms B.J. Matshego, probation officer, Department of Safety Services and Correctional Supervision; Moipone Hakala, Chief Social Worker, Dept of Social Services; Carol Bower, Executive Director, Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN); Prometheus Mabuza, Save the Children, Sweden; Gordon's Bay Expert Consultation.

⁹⁴ Helen Alexander, Legal Advocacy Co-ordinator.

⁹⁵ Proffs J Burchell & P J Schwikkard, Department of Criminal Justice, University of Cape Town; Dr Katrin Müller, Gauteng Health Department, Chief Medical Officer & Medical Advisor; Irene Filander, Social Worker, Child Welfare, Vereeniging; Judge Eberhard Bertelsmann, High Court Pretoria; Dr Karen Müller, Vista University, Department of Procedural Law; Judge Belinda van Heerden, Cape High Court; Nolitha Mazwai, Rape Crisis, Cape Town; Ntomboxolo Dyantjie, Provincial coordinator, Eastern Cape Network on Violence Against Women; Dr Susan Gräbe, RP Clinic, Medical Doctor; Celestia Beswick, volunteer community worker; E.M. Setai, para-

- **The exclusion of children under the age of 15 years who are benefiting from or living off the earnings of child prostitution but are not involved in child prostitution from criminal sanction**

The concept of excluding certain children from prosecution despite the fact that they are living off or benefiting from the earnings obtained from child prostitution was uniformly supported.⁹⁶

A number of respondents⁹⁷ voiced reservations regarding the maximum age of 15 years. More specifically participants at the Gordon's Bay Expert Consultation opined that the age should be raised to 16. SWEAT⁹⁸ and Nadel Human Rights Research & Advocacy Project⁹⁹ however argued for the age to be raised to 18. SWEAT opined that as this provision was clearly aimed at dealing with situations in which siblings and other children are being supported through child prostitution, there does not seem to be any reason to exempt children between the ages of 15 and 18 for this purpose. SWEAT further contends that children in this age group who are otherwise involved in child prostitution, for example as pimps, will still be criminalised in terms of clause 9(1) and will also be precluded from using the defence because of the second requirement that the child is not a person contemplated in clause (9)(a-h). NADEL opined that the exemption from prosecution should also extend to exemption from the obligation to report child prostitution.

The rationale behind the Commission's proposal that 15 should be the maximum age for exemption from prosecution was that the Basic Conditions of Employment Act, 1997, prohibits children younger than 15 from being employed. The Commission is however aware of the harsh reality, especially in view of the current economic position we find ourselves in, that 'child

legal, Thusanang Advice Centre; Martha Humn, Tshwaraganang Women Organisation; Mokgabi Mmola, General Secretary, Maboloka HIV/AIDS Awareness Organisation (MAHAAO); Ms B.J. Matshego, probation officer, Department of Safety Services and Correctional Supervision; Moipone Hakala, Chief Social Worker, Dept of Social Services; Carol Bower, Executive Director, Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN); Helen Alexander, Legal Advocacy Co-ordinator, SWEAT; Barbara Anne Frost, UNITRA; Professor P.W.W. Coetzer, Chief Specialist Medunsa; Suchilla Leslie, National Programme Manager Child Protection, SA National Council for Child Welfare. See also JMT Labuschagne 'Sekstoerisme, die kind se reg op waardigheid en vrye psigoseksuele ontplooiing en kulturele en ekonomiese magsmisbruik' (2000) 63 *THRHR* 264.

⁹⁶ Proffs J Burchell & P J Schwikkard, Department of Criminal Justice, University of Cape Town; Suchilla Leslie, National Programme Manager Child Protection, SA National Council for Child Welfare; Professor P.W.W. Coetzer, Chief Specialist Medunsa; Irene Filander, Social Worker, Child Welfare, Vereeniging; Nolitha Mazwai, Rape Crisis, Cape Town; Dr Karen Müller, Vista University, Department of Procedural Law; Ntomboxolo Dyantjie, Provincial coordinator, Eastern Cape Network on Violence Against Women; Dr Susan Gräbe, RP Clinic, Medical Doctor; Celestia Beswick, volunteer community worker; E.M. Setai, para-legal, Thusanang Advice Centre; Martha Humn, Tshwaraganang Women Organisation; Mokgabi Mmola, General Secretary, Maboloka HIV/AIDS Awareness Organisation (MAHAAO); Carol Bower, Executive Director, Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN); Ntomboxolo Dyantjie, Provincial coordinator, Eastern Cape Network on Violence Against Women; Commission for Gender Equality Workshop, Umtata.

⁹⁷ Judge Eberhard Bertelsmann, High Court Pretoria; Judge Belinda van Heerden, Cape High Court; Dr Katrin Müller, Gauteng Health Department, Chief Medical Officer & Medical Advisor.

⁹⁸ Helen Alexander, Legal Advocacy Co-ordinator.

⁹⁹ Dr Johanna Kehler, Project Director.

appropriate' gainful employment is hard to come by. The Commission agrees with the submission made above by SWEAT and supports its recommendation that the age of exemption for children be lifted to 18 years. On the point that the exemption from prosecution should extend to the obligation not to report child prostitution, the Commission draws attention to the fact that this is already reflected in clause 9(6) where it is stated that a person who is younger than 15 years of age who is not a role-player in relation to prostitution may not be convicted of an offence in terms of subclauses (2), (3) or (4). Subclause (2) being the clause regulating mandatory reporting.

The Commission takes cognisance of the comment received from the SOCA Unit of the National Prosecuting Authority in which it notes that the word 'not' used in subclause 9(6)(b) should be deleted as the use of the word creates uncertainty as to whether it is only possible for a person listed in clause 1(a) – (h) to be convicted of the offences listed in subsections 2, 3 or 4, or if only persons listed in (a) – (h) can be convicted. However the Commission opines that this provision is quite clear in its intention, i.e. that any child younger than 15 who is not a role-player in relation to child prostitution as listed under subclause (1) (a)-(h) may not be convicted and thereby charged with an offence in terms of subclauses (2), (3) or (4).

- **Trafficking**

The Commission endorses the finding of the joint submission by Molo Songololo, Nadel Human Rights Research & Advocacy Project, the Children's Rights Project at the Community Law Centre, University of the Western Cape and from the People's Family Law Centre that trafficking of people warrants specific 'trafficking legislation' in order to deal with all aspects and forms of trafficking.¹⁰⁰ In order to ameliorate the already piecemeal legislative approach to trafficking it is recommended that a separate investigation aimed at human trafficking in all its forms be included on the program of the Commission. The joint submission further recommends that until such time as separate legislation is instituted that deals with trafficking specifically, trafficking in adults for sexual purposes be included in sexual offence legislation.

- **Recreational sex venues**

Mr Evert Knoesen of the Lesbian and Gay Equality Project submits that, despite the proposed amendments in relation to child prostitution, a lacuna still exists in terms of regulating so-called recreational sex venues or sex-on-site venues. These are venues that provide the facilities for people to have sexual intercourse, but fall outside the traditional definition of brothel as patrons do not have sex with each other in return for money. Examples of such venues include so-called darkrooms and cruise bars found at some places of entertainment. As most of these venues do

¹⁰⁰ See also the Report of the Parliamentary Task Group on the Sexual Abuse of Children where a host of international instruments are identified which South Africa could accede to in order to address the trafficking in persons.

not have Turkish baths or offer massage or escort services, these venues need not register under Item 2 of Schedule 1 of the Businesses Act, 71 of 1991.

In other countries, such as the Netherlands and the United States, where many sex-on-site venues exist, this industry is heavily regulated. These venues are required to adhere to strict health regulations, children are not allowed entrance, and the sale of alcohol is often prohibited. In these jurisdictions, such venues are required to adhere to some of the following provisions:

1. Not to admit persons under the age of 18, or in some jurisdictions, under the age of 21.
2. To provide, in a widely accessible manner, condoms and personal lubricants.
3. To ensure that a minimum degree of lighting is available.
4. To categorise certain areas within the broader premises as areas where certain forms of sexual conduct may occur.
5. To provide access to safe sex information.

Mr Knoesen points out that while some of these venues sell alcohol and access to these venues would therefore be governed by laws pertaining to the sale of alcohol, not all of these venues sell alcohol. Some venues also sell adult material, such as magazines, videos, sex toys etcetera, and for such venues access would be governed by the Film and Publications Act, 1996 as adult premises. However, some venues do not sell these adult products either.

One is thus left with a category of sex-on-site venues that are not governed by any laws or regulations, which would be able to admit a person of any age to such a venue. The Lesbian and Gay Equality Project believe that this is not an acceptable situation. They submit that children under the age of 18 are not in a position to adequately make responsible decisions or even in a position to necessarily execute such decisions in a public sex-on-site venue. They believe that access to sex-on-site venues should be restricted to adults, i.e. persons over the age of 18, in and of itself. Further, they submit that owners of such venues should be guilty of an accessory type of crime should they admit children who are then involved in illegal sexual conduct within such premises. They further recommend that sex-on-site venues should ideally be explicitly governed by law and local and provincial health regulations.

Though the health regulations may be better addressed within the context of Provincial Health regulations, it is the Lesbian and Gay Equality Project's firm view that access to sex-on-site venues should be governed by the Sexual Offences Act. Further, they believe that national legislation should provide at least guidelines for provincial legislatures as to what they should legislate on in terms of regulating such venues. The Project cites in support of their view a recent poll among

adult gay men and lesbian women that reflected that 84% of the sample was in support of regulating sex-on-site venues.

3.8.4 Recommendation

The Commission confirms its recommendation that:

- a complete ban be placed on child prostitution and that anyone involved in the sexual exploitation of a child, whether as a pimp or customer, should face severe criminal sanction;
- the child prostitute should be regarded as a victim in need of care and protection and should not be prosecuted;
- living off or benefiting from the earnings of child prostitution should be penalised; and
- sex tourism should be criminalised.

Pursuant to the above discussion the Commission also recommends that the exemption from liability of receiving consideration from child prostitution should be extended to 18 years of age. As the provision that a person may be found guilty of another sexual offence in addition to being found guilty of being involved in child prostitution states the obvious, it is recommended that it be removed from clause 9.

It is true that trafficking in persons are now being addressed from various perspectives by the Commission. The issue of trafficking in children for sexual purposes is addressed under the umbrella offence of prostitution of children in the proposed Sexual Offences Bill. The position of child prostitutes as children in need of care and protection received attention in the investigation into the Review of the Child Care Act. The trafficking of adult persons for purposes of prostitution was addressed in the Issue Paper on Adult Prostitution. To give the problem of trafficking of persons the attention it deserves, the Commission will consider the inclusion of such an investigation on its programme. However, given the various initiatives already on their way, the Commission does not recommend that trafficking in adults for purposes of commercial sexual exploitation be singled out for inclusion in the draft Sexual Offences Bill as an interim measure.

Our proposal on child prostitution reads as follows:

Child prostitution

12. (1) Any person who, in relation to a child, [below the age of 18 years,] for

financial or other reward, favour or compensation to such child or to any other person, intentionally -

- (a) commits an indecent act or an act **[of sexual]** which causes penetration **[as defined in section 1]** with such child;
 - (b) invites, persuades or induces such child to allow him or her or any other person to commit an indecent act or an act **[of sexual]** which causes penetration with that child;
 - (c) makes available, offers or engages such child for purposes of the commission of indecent acts or acts **[of sexual]** which cause penetration with that child by any person;
 - (d) supplies, recruits, transports, transfers, harbours or receives such child, within or across the borders of the Republic of South Africa, for purposes of the commission of indecent acts or acts **[of sexual]** which cause penetration with that child by any person;
 - (e) allows or knowingly permits the commission of indecent acts or acts **[of sexual]** which cause penetration by any person with such child while being a primary care-giver as defined in section 1 of the Social Assistance Act, 1992 (Act No. 59 of 1992), parent or guardian of that child;
 - (f) owns, leases, rents, manages, occupies or has control of any movable or immovable property used for purposes of the commission of indecent acts or acts **[of sexual]** which cause penetration with such child by any person;
 - (g) detains such child, whether under threat, coercion, deception, abuse of power or force for purposes of the commission of indecent acts or acts **[of sexual]** which cause penetration with such child by any person; or
 - (h) participates in, is involved in, promotes, encourages or facilitates the commission of indecent acts or acts **[of sexual]** which cause penetration with such child by any person,
- is, in addition to any other offence of which he or she may be convicted, guilty of the offence of being involved in child prostitution and is liable, upon conviction, to imprisonment for a period not exceeding 20 years with or without a fine.

[(2) Any person who has knowledge of the commission of indecent acts or acts of sexual penetration with a child by any person and in any circumstances as contemplated in subsection (1) and who fails to report such knowledge within a reasonable time to the South African Police Service, is guilty of the offence of failure to report knowledge of child prostitution.]

[3](2) Any person who intentionally receives any financial or other reward, favour or compensation from the commission of indecent acts or acts of sexual penetration with a child **[below the age of 18 years] by **[any]** another person is guilty of the offence of benefiting from child prostitution and is liable, upon conviction, to imprisonment for a period not exceeding 20 years with or without a fine.**

[4](3) Any person who intentionally lives wholly or in part on rewards, favours or compensation for the commission of indecent acts or acts of sexual penetration with a child **[below the age of 18 years]** by **[any]** another person is guilty of the offence of living from the earnings of child prostitution and is liable, upon conviction, to imprisonment for a period not exceeding 20 years with or without a fine.

[5](4) Any person, including a juristic person, who-

- (a) makes or organises any travel arrangements for or on behalf of any other person, whether that other person is resident within or outside the borders of the Republic of South Africa, with the intention of facilitating the commission of any sexual offence against a child **[below the age of 18 years]**, irrespective of whether that offence is committed; or
- (b) prints or publishes, in any manner, any information that is intended to promote or facilitate conduct that would constitute a sexual offence against a child **[below the age of 18 years]**,

is guilty of the offence of promoting child sex tours and is liable, upon conviction, to a fine or to imprisonment for a period not exceeding 20 years.

[6](5) A person may not be convicted of an offence in terms of subsections (2) and (3) **[or (4)]** if that person is -

- (a) **[below the age of 15 years]** a child; and
- (b) not a person contemplated in paragraphs (a) to (h) of subsection (1).

As for the regulation of sex-on-site venues in the new sexual offences legislation, the Commission is of the view that this is best done at provincial and local government level, and not national level. Ideally, this regulation should be done through a system of licensing and inspection and the mechanism for that is the Businesses Act 71 of 1991. The Commission accordingly recommends that Item 2 of Schedule 1 of this Act be amended to include sex-on-site venues.

Our proposal in this regard reads as follows:

The amendment of Item 2 of Schedule 1 of the Businesses Act, 71 of 1991 by the insertion after subsection (h) of the following subsection :

- (i) providing facilities for persons to have sexual intercourse.

3.9 Compelled or induced indecent acts

3.9.1 Current law

It is an offence to aid, abet or further the commission of any offence.¹⁰¹ Apart from two provisions in the present Sexual Offences Act,¹⁰² no specific provisions exist to cover the situation where a person forces another to engage in indecent acts with that person, a third person, or to commit indecent acts upon his or her own person. There are also no specific provisions to cover compelled indecent acts with an animal.

3.9.2 Proposals in Discussion Paper 102

The following provision was proposed in Discussion Paper 102:

Compelled or induced indecent acts

4. Any person who intentionally and unlawfully compels, induces or causes another person to engage in an indecent act as defined in section 1 with -

- (a) the person compelling, inducing or causing the act;
- (b) a third person;
- (c) that other person himself or herself; or
- (d) an object, including any part of the body of an animal,

in circumstances where that other person-

- (i) would otherwise not have consented to the commission of the indecent act; or
- (ii) is incapable in law of appreciating the nature of an indecent act, including the circumstances set out in paragraphs (a) to (d) of section 3(5)

is guilty of the offence of having compelled, induced or caused a person to engage in an indecent act.

3.9.3 Evaluation of comment

The vast majority of respondents concurred with the formulation of the provision. The Commission has followed a few suggestions relating to wording, as is evident from the adapted provision recommended below.

Professor P A Carstens, Department of Public Law, University of Pretoria, made certain recommendations regarding the danger of importing the common purpose doctrine in relation to rape. He is specifically concerned about the use of the phrase “causes another person to commit rape” and the evidentiary implications thereof, and argued that his concerns are also valid in

¹⁰¹ Section 18(2)(a) of the Riotous Assemblies Act, 17 of 1957.

¹⁰² Sections 9 and 20(1)(c).

respect of the provision on compelled and induced indecent acts. The Commission takes heed of Professor Carstens' concerns and will amend the provision on *rape*. It is now confronted with the question whether the phrase "compels, induces or causes another person to engage in an indecent act" as it appears in clause 4 poses the same danger.

In assessing whether there is a need to enact a statutory offence aimed at curbing indecent acts committed under compulsion, it is necessary to consider the criminal sanctions that already exist. When X compels Y to commit an indecent act with a third person, Z, X could be charged as an accomplice. However, the role of an accomplice appears to be of a secondary nature and does not take account of the reality that a person may compel another to commit an indecent act. The person who does the deed is then a mere instrument and lacks the required *mens rea* (intention) to commit a crime. Similarly, a person who compels another to self-masturbate or to commit indecent assault cannot be convicted of indecent assault on the basis of common purpose, as the compelled person lacks the intention to commit the offence. There is therefore no common purpose. The essence of common purpose liability is based on association with the commission of the crime by the other participants. Further, there could not be a charge of conspiracy as the agreement between the parties constitutes the unlawful element of conspiracy and there is no agreement as one of the parties is being compelled.

The Commission is satisfied that the provision as proposed, which elicited wide-spread support, will address a specific problem area in the law. The accomplice alluded to in the example of X, Y and Z above merely becomes the perpetrator.

Prof P Coetzer, Department of Community Health, Medunsa, and Dr K Muller, Department of Health, Gauteng Province, submitted that the proposed draft Bill does not make provision for indecent acts committed without compulsion or inducement and suggested that the following provision be included: "Any person who commits an indecent act as defined in section 1 with another person is guilty of an offence".

It should be noted that the Commission has opted for the retention of the common law offence of indecent assault. In Discussion Paper 85 (Sexual Offences: The Substantive Law) the Commission pointed to the fact that the common law offence of indecent assault is both flexible and dynamic. It covers a wide variety of acts, is a competent verdict on a number of offences and is gender neutral – implying that the offence may be committed by persons of the same or different sex. Depending on the circumstances, perpetrators may be prosecuted for rape (or, in terms of the Commission's latest proposals, for sexual violation, sexual violation with intent to cause grievous harm or oral genital penetration), incest, indecent exposure or indecent assault.

This overlap results in the crime of indecent assault being used as a catch-net where it is not possible to conduct a prosecution under one of the other offences. In contrast to the other common law crimes, this crime may take the form of the inspiring, by threats or conduct, of apprehension that force is immediately to be applied. Force does not presume the infliction of actual violence – a mere touching suffices. The Commission abides by its recommendation that the common law offence of indecent assault not be codified, notwithstanding the fact that some acts which could previously only be prosecuted as indecent assault will, after implementation of its recommendations, be prosecuted as substantive offences.

3.9.4 Recommendation

The Commission recommends the inclusion of the following adapted provision on compelled or induced indecent acts in the proposed draft Bill:

Compelled or induced indecent acts

7. Any person who [**intentionally and**] unlawfully and intentionally compels, induces or causes another person to engage in an indecent act [**as defined in section 1**] with -

- (a) the person compelling, inducing or causing the act;
- (b) a third person;
- (c) that other person himself or herself; or
- (d) an object, including any part of the body of an animal,

in circumstances where that other person -

- (i) would otherwise not have [**consented to the commission of**] committed or allowed the indecent act; or
- (ii) is incapable in law of appreciating the nature of an indecent act, including the circumstances set out in paragraphs (a) to ~~[(d)]~~ (f) of section 3(5),

is guilty of the offence of having compelled, induced or caused a person to engage in indecent act and is liable, upon conviction, to a fine and to imprisonment for a period not exceeding five years.

3.10 The need for an offence aimed specifically at harmful HIV-related behaviour in cases of non-consensual sexual intercourse

3.10.1 Proposals in Discussion Paper 102

In the Fifth Interim Report on aspects of the law relating to AIDS the Commission concluded that public health measures, such as public awareness campaigns, in themselves are insufficient to deal with the situation where persons deliberately put others at risk of HIV-infection. The Commission opined that the criminal law undoubtedly has a role to play in protecting the community and punishing those who transgress.

The Commission noted in the discussion paper that although non-consensual intentional or negligent exposure or transmission of HIV/AIDS could be prosecuted under one of the common law crimes of murder, culpable homicide, rape, assault and attempts to commit these crimes, the common law crimes did not seem to provide effective redress in the case of harmful HIV/AIDS-related behaviour. The Commission accordingly provisionally recommended in the discussion paper that criminal sexual activity compounded by deliberate or reckless exposure to HIV/AIDS should be subject to criminal sanction. Two options were proposed by the Commission in this context. Firstly, to introduce practical measures to ensure successful prosecution of harmful HIV-related behaviour in terms of existing common law crimes,¹⁰³ or, secondly, to create a separate offence specifically criminalising harmful HIV-related behaviour in the context of the commission of a sexual offence.

The Commission provisionally endorsed the second option coupled to the proviso that HIV should not be singled out to the exclusion of any other life-threatening sexually transmissible disease or condition. A clause reflecting this recommendation was not included in the draft Bill.

3.10.2 Evaluation of comment

A number of respondents¹⁰⁴ endorsed the recommendation made by the Commission that a separate offence specifically criminalising the intentional exposure of a person to a life-threatening sexually transmissible disease or condition in the context of the commission of a sexual offence should be created. The SOCA Unit of the National Prosecuting Authority specifically notes its support for the creation of the above crime by statute in that it is of the opinion that the common law is not wide enough to cover this type of situation. It is also of the opinion that the section should not be limited to HIV, but should include all potentially lethal STD's.

¹⁰³ As suggested in the Commission's Fifth Interim Report on Aspects of the Law Relating to AIDS.

¹⁰⁴ Professor P.W.W. Coetzer, Chief Specialist Medunsa; Suchilla Leslie, National Programme Manager Child Protection, SA National Council for Child Welfare; Irene Filander, Social Worker, Child Welfare, Vereeniging; Dr Karen Müller, Vista University, Department of Procedural Law; Dr Susan Gräbe, RP Clinic, Medical Doctor; E.M. Setai, para-legal, Thusanang Advice Centre; Martha Humn, Tshwaraganang Women Organisation; Carol Bower, Executive Director, Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN); Nolitha Mazwai, Rape Crisis, Cape Town; Mokgabi Mmola, General Secretary, Maboloka HIV/AIDS Awareness Organisation (MAHAAO).

Judges Belinda Van Heerden and Eberhard Bertelsmann both responded with a qualified endorsement of the proposal, expressing a preference for charging a person, who has deliberately exposed another to a serious illness during a sexual offence, with the commission of a common law offence such as attempted murder. Professors J Burchell and PJ Schwikkard of the Department of Criminal Justice, University of Cape Town both disapprove of the creation of an offence of this nature.

Some respondents raise concerns regarding proof of the offence. Dr Katrin Müller, a Chief Medical Officer & Medical Advisor in the Gauteng Health Department, enquires how it would be possible to prove that the accused was actually aware of his or her HIV status and that his or her deliberate behaviour was a result of his or her HIV status if a person's HIV status is totally confidential. So too, Helen Alexander, the Legal Advocacy Co-ordinator of SWEAT, opines that whilst believing that to intentionally infect another person with a life threatening sexually transmitted disease is wrong and should be punished, she is not convinced that the creation of a new offence is necessary. She argues that the creation of a new offence would imply that to intentionally infect someone with a life threatening sexually transmitted disease is worse or at least different to intentionally infecting someone with something life threatening (such as anthrax). She states that such a distinction would increase the stigma associated with STI's, a stigma which not only impacts on the person's quality of life, but also impacts on health seeking behaviour. She explains that further problems with the creation of a new offence relate to the difficulties in proving the offence. Ms Alexander submits that if it should be decided to create a new offence, this offence should be limited to direct intent. Negligence and *dolus eventualis* should not be included.

However, according to Ms Alexander, taking this question into account in determining an appropriate sentence is sufficient, whether in a rape case or in the event of the matter being tried under one of the common law offences such as attempted murder. In conclusion she voices her concern that the creation of a new offence would be a particularly reactionary approach and is in her opinion not a well-thought out response to the problems we are facing.

3.10.3 Recommendation

After extensive deliberations during workshops held on the Discussion Paper and careful evaluation of the submissions received in this regard, the Commission has reached the conclusion that exposure of a victim of sexual violence to a life-threatening disease during the commission of the sexual offence could successfully be prosecuted under the common law.¹⁰⁵ In so doing the Commission would like to confirm the finding made in the Fifth Interim Report on Aspects of the Law Relating to AIDS¹⁰⁶ that a need exists for the development of practical mechanisms by relevant government departments to effectively utilise the existing common law crimes in cases of

¹⁰⁵ See also the discussion on possible prosecution for rape in these circumstances in par 3.3.3 above.

¹⁰⁶ April 2001 at page 281.

harmful HIV-related behaviour. The Commission therefore encourages the prosecuting authority to prosecute sex offenders in terms of the common law, in addition to the sexual offence committed, specifically for exposing their victims to any harmful or life threatening disease.

CHAPTER 4

PROCEDURAL ISSUES RELATING TO SEXUAL OFFENCES

4.1 Introduction

In this Chapter the Commission presents its final recommendations regarding some of the procedural issues relating to sexual offences. Issues covered are police discretion in deciding cases are unfounded, the competency of children to testify in criminal proceedings, vulnerable witnesses, the protection measures afforded to such witnesses, and placing limits on questioning of witnesses. Evidentiary issues will be covered in Chapter 5 below.

4.2 Decision to proceed with a police investigation

4.2.1 Current law

The existing position is that the initial decision whether to proceed with the investigation of a sexual offence is made by the police. In most cases the police exercise substantial discretion, and unlike judicial officers, do this almost invisibly. Police decide whether a case is founded or unfounded and whether and how to investigate - decisions which affect the quality of evidence available for trial.

The SAPS **National Instruction 22 / 1998 on Sexual Offences: Support to Victims and Crucial Aspects of the Investigation** gives no guidance to members of the police as to when a case is to be regarded as 'unfounded' or what to do when a victim wishes to withdraw the charge. The SAPS **National Instruction 7 / 1999 on Domestic Violence**, on the other hand, does provide that police members are obliged to open a docket and to have it registered for investigation. In cases of domestic violence the SAPS member 'may not avoid doing so by directing the complainant to counselling or conciliation services'.¹ The police must also fully document their responses to every incident of domestic violence on a specific form regardless of whether or not a criminal

¹ Paragraph 7(1) of the National Instruction 7 / 1999: Domestic Violence.

offence has been committed.² Failure to comply with an obligation imposed in terms of the Act or the National Instruction constitutes misconduct.

However, some victims also approach the police after the initial reporting stage to withdraw charges. While the prosecutor (on behalf of the State) would consider such a statement by the complainant to withdraw the charges, the State is not obliged to do so as the State has a very legitimate interest in upholding law and order. The State also has the right to subpoena a victim in such a case to give evidence at any resultant proceedings. In practice, this power is exercised reluctantly, because an unwilling complainant is unlikely to assist in achieving a successful prosecution.

4.2.2 Proposals in Discussion Paper 102

Over recent years there has been a focus on improving police practices and procedures in relation to sexual offence victims due to dissatisfaction with, among other things, the manner in which decisions relating to investigations are made. For example, in 1993, 562 rape cases reported to Khayelitsha, Gugulethu and Nyanga police stations in Cape Town, 47% (261) were classified as unfounded / withdrawn / no arrest made. The decision to 'unfound' is wide and may vary from reasons such as that the incident took place outside of that jurisdiction,³ to the police not believing the victim, to reluctance to pass on what are perceived to be 'real' cases that will not stand up at subsequent stages (such as cases involving no physical injury, a delay in reporting or inability to clearly identify suspects), to victims themselves not wanting to pursue the case. No South African study has, however, examined the factors which may influence the unfounding of cases.⁴

In order to deal with the problems created by police officers making decisions on whether to proceed with an investigation into a complaint that a sexual offence has been committed, the Commission recommended that provision be made in the draft Bill that such a decision be made by the Director of Public Prosecutions.

² Paragraph 12(2) of the National Instruction 7 / 1999: Domestic Violence.

³ Despite the clear provisions of the **SAPS National Instruction 22 / 1998 on Sexual Offences**, par 3.(2)(a) in this regard.

⁴ Stanton, Lochrenberg & Mukasa **Improved Justice for Survivors of Sexual Violence?** p. 17.

The following clause was proposed in the discussion paper for inclusion in the draft Sexual Offence Bill:

Director of Public Prosecutions to decide whether police investigation should proceed

26. The decision as to whether the investigation by a police official of a complaint that a sexual offence has been committed should proceed shall rest with the Director of Public Prosecutions.

4.2.3 Evaluation of comment

There is overwhelming support for the inclusion of this clause in the final Bill.⁵ Both the South African Human Rights Commission⁶ and the Parliamentary Task Group on the Sexual Abuse of Children⁷ support the underlying premise of the clause.

A number of respondents make the point that the reference to the DPP (Director of Public Prosecutions) should in fact be a reference to the NDPP (National Director of Public Prosecutions). The Commission agrees with this view and has adapted the clause accordingly. Furthermore, respondents suggest that the word “proceed” in the above last line should be deleted and inserted in place thereof the words “be discontinued”. Once again the Commission concurs with this proposal.

Some respondents felt that it was not correct to use the words “investigation” and “prosecute” as it is confusing in the proposed clause. They point out that the police

⁵ RAPCAN; Mr P Mabuza; Ms M J Mmola (Maboloka HIV/AIDS Awareness Organisation); Ms M Humn - Tshwaraganang Women Organisation; Ms B J Matshego (probation officer, Dept. of Correctional Services); Thusanang Advice Centre (also they should be no delay as this makes it more traumatic); M Hakala (Dept. Of Social Services, chief social worker); Prof. Coetzer; Dr K Müller; Judge Bertelsmann; CGE Umtata Workshop; Koos Strauss (Rape Intervention Project GRIP); F C Shaw (Welfare Forum Durban and South Region), Eastern Cape Network on Violence Against Women; Age-in-Action; S.T.O.P (Standing Together to Oppose Pornography); Silas I M Nawa (National Department of Education); Mmabatho Lesho; Michael Mokwena (SAPS: Commander CSC); Nolitha Mazwai (Rape Crisis Cape Town); N Mbophane (Masonwabaisane Women Support Centre); Judge Erasmus; Advocate Majokweni; Judge van Heerden.

⁶ **Report on the Enquiry into Sexual Violence against Children** (hereinafter SAHRC **Sexual Violence Report**). Recommendation 6 emphasize that all reported sexual abuse cases should be treated seriously and without prejudice.

⁷ **Report of the Parliamentary Task Group on the Sexual Abuse of Children**, 2002 (hereinafter Report of the Parliamentary Task Group).

investigate complaints and the prosecution service makes the decision whether or not to prosecute. The Commission's response to this submission is that the purpose of this clause is to ensure a higher quality of police investigation by requiring the prosecutor to direct the investigating officer as to how the investigation should be conducted, what evidence to collect and so forth.

4.2.4 Recommendation

The Commission recommends the incorporation of the following clause in the proposed draft Bill:

National Director of Public Prosecutions to decide whether police investigation should [proceed] be discontinued

24. The decision as to whether the investigation by a police official of a complaint that a sexual offence has been committed should [**proceed**] be discontinued, shall rest with the National Director of Public Prosecutions.

4.3 Competency of children to testify in criminal proceedings involving sexual offences

4.3.1 Current law

In terms of section 192 of the Criminal Procedure Act every witness is competent and compellable to testify unless expressly excluded. This section of the Criminal Procedure Act is complemented by section 193 which states that the court will decide upon the competency of a witness.

The common law requirement that all witnesses must testify upon oath restated in section 162 of the Criminal Procedure Act is made subject to two exceptions contained in sections 163 and 164 of the Act respectively. The two exceptions to the general rule are firstly that witnesses who for any reason object to taking an oath are permitted instead to make an affirmation in terms of section 163, and secondly that a witness who

does not understand the nature of an oath may be admonished to speak the truth and then give unsworn evidence in terms of section 164. In practice, section 164 is principally used for receiving the unsworn evidence of children but is also intended to be used by persons without the intellectual capacity to understand the nature of the oath.⁸

4.3.2 Proposals in Discussion Paper 102

Much sexual abuse of children and adults living with various disabilities (physical and mental) goes unpunished in South Africa as a result of a person, usually the complainant, being found to be an incompetent witness. Frequently a decision is reached in this regard on the basis that the person does not understand the oath or, when questioned, is not able to explain the difference between telling the truth and a lie. This decision is made despite the fact that the person may be able to tell the court quite accurately what happened to him or her, understand questions put to him or her and answer these questions intelligibly and honestly. In effect the threshold which a potential witness has to meet in order to be found competent to testify often acts as an exclusionary measure.

In Discussion Paper 102 the Commission stated that it is unclear why the courts need to test whether a potential witness can understand the duty to tell the truth. Further that it is trite that not everyone who takes the oath or affirmation tells the truth, and conversely, that it does not follow that failure to take the oath, or failure to articulate the nature of an oath adequately, will result in a person lying. The Commission opined that the exclusion of the evidence of a witness as a result of not meeting the requirements contained in sections 162, 163 or 164 of the Criminal Procedure Act, seems to run counter to the goal of bringing all relevant evidence before the court and ignores the ability of the presiding officer to make a decision about the weight and credibility to be accorded to such evidence.

The Commission stated that the emphasis which is placed on making the witness aware of the importance of telling the truth and the gravity attached to him or her lying seems to stem from an inherent fear that the witness may fabricate events or evidence presented

⁸ Hoffman and Zeffertt **The South African Law of Evidence** Fourth Edition Butterworths 1989 at p 441.

to court. If, for example, a child cannot display to the court that he or she can explain what it is to tell the truth and is admonished appropriately, his or her evidence is excluded. This is done without assessing whether the child can understandably relay the events which are in issue to the proceedings. Based on recent research the Commission concluded that the memory of children is as accurate as that of adults, that children do not lie more than adults, and that children can discern fact from fantasy particularly in the context of acts of abuse.

The Commission opined that sensitising or training magistrates⁹ to aid them in determining whether a witness is competent to testify or not would be beneficial and would enhance the quality of the decisions made by presiding officers, but would not answer the problem presented. Firstly, one has to recognize that the presiding officer cannot be expected to be or be trained to be a psychologist or behavioral specialist. The role of experts in the field of child psychology, counseling of sexual offence victims and such like is crucial in many sexual offence matters and it is important to recognize the role they have to play. The Commission found that even with training the presiding officer would still be forced to find a witness incompetent to testify if such witness did not measure up to the requirements of sections 162, 163 or 164 of the Criminal Procedure Act.

Consequently the Commission recommended that a witness should not be disqualified from testifying due to the fact that he or she is unable to define the difference between telling the truth and a lie. The Commission submitted that all witnesses should be regarded as competent to testify if they can understand the questions put to them and can in return give answers that the court can understand. If any doubt exists as to whether the witness is capable of communicating with the court, an expert assessment should be called for.¹⁰ Such a witness will then give unsworn evidence. If the evidence as it unfolds appears to be unsatisfactory, the presiding officer, depending on the other evidence presented at trial, can exercise his or her statutory powers to exclude such evidence on the grounds that it is not relevant. It will be for the presiding officer to

⁹ SAHRC **Sexual Violence Report**, recommendation 31: Justice College should extend its training on child sexual abuse to all magistrates.

¹⁰ A witness referring to winter as the time when the leaves are brown or using his or her own terms to describe events is still capable of communicating with the court. The use of special measures will make the testimony of the witnesses accessible to the court.

decide what weight should be placed on such a witness's evidence. Despite the above recommendations and in recognition of the solemnity and seriousness of the proceedings, the Commission retained the requirement that a witness be enjoined to tell the truth.

The Commission therefore recommended that section 164(1) of the Criminal Procedure Act be amended to reflect that all witnesses should be regarded as competent to testify if they can understand the questions put to them and can in return give answers that the court can understand. Further, that a new section be inserted in the Sexual Offences Act clearly establishing that any child in a sexual offence trial is competent to testify.

The relevant clause in the draft Bill read as follows:

Children competent to testify in criminal proceedings involving sexual offences

10. (1) No child below the age of 18 years, other than a child who for any reason does not have the capacity, verbal or otherwise, to respond to simple questions, shall be precluded from giving evidence in court in criminal proceedings involving the alleged commission of a sexual offence.

(2) The evidence given by a child referred to in subsection (1) shall be admissible in criminal proceedings contemplated in that subsection, and the court shall attach such weight to such evidence as it deems fit.

The following amendment to section 164 of the Criminal Procedure Act was also suggested in the discussion paper:

The amendment of section 164 of the Criminal Procedure Act by the substitution for subsection (1) of the following subsection:

(1) Any person who, from ignorance arising from youth, defective education or other cause, [**is found not to understand the nature and import of the oath or the affirmation,**] may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person is able to understand questions put to him or her and to respond to such questions in a manner which is intelligible; and provided further that such person shall, in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth [, **the whole truth and nothing but the truth**]

4.3.3 Evaluation of comment

The questionnaire on the Discussion Paper on Sexual Offences: Process and Procedure posed the question as to whether children and certain adults should be allowed to give unsworn evidence provided that the witness can understand the questions asked and can answer intelligibly. The majority of the respondents answered affirmatively.¹¹ A number of respondents felt, however, that mentally impaired and certain physically disabled¹² persons should receive the benefit of the same provision.¹³

Advocates Meintjes and Henning SC of the Office of the Director of Public Prosecutions: Transvaal opine that this is an extremely important clause. However, they are also of the opinion that if it is stated in the affirmative with a presumption included, this should clearly obviate any need to first apply some (non-sensical and superficial) test to establish competence prior to the child starting to testify - it should become apparent for good reasons during the child's (or impaired person's) testimony that the required capacity to testify is lacking. They suggest that an overriding provision, such as that the provisions of this Act shall override / be given precedence if in conflict with any other more restrictive legal provision or if the common law position is more restrictive will be called for, given the provisions in the Criminal Procedure Act dealing with competence – vide sections 192, 194 and 206. Furthermore they opine that section 195(1) of the

¹¹ SOCA Unit, National Prosecuting Authority; Proffs J Burchell & PJ Schwikkard, Department of Criminal Justice, University of Cape Town; Judge Eberhard Bertelsman, High Court Pretoria; Prof P.W.W. Coetzer, Chief Specialist Medunsa; Dr Karen Müller, Vista University, Department of Procedural Law; Mr Prometheus Mabuza, Save the Children, Sweden; Judge Belinda Van Heerden, Cape High Court; Ms Irene Filander, Social Worker, Child Welfare, Vereeniging; Ms Suchilla Leslie, National Programme Manager Child Protection, SA National Council for Child Welfare; Adv R Meintjes, Office of the Director of Public Prosecutions, Transvaal; Carol Bower, Executive Director, Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN); Age-in-Action; S.T.O.P (Standing Together to Oppose Pornography); F C Shaw, Welfare Forum Durban and South Region; Ntomoboxolo Dyantjie, Provincial coordinator, Eastern Cape Network on Violence Against Women; Michael Mokwena, SAPS: Commander CSC; Koos Strauss (Rape Intervention Project GRIP); Representations from Mabopane; E.M. Setai, para-legal, Thusanang Advice Centre; Moipone Hakala, Chief Social Worker, Department of Social Services; Ms Mkgabi Mmola, Maboloka HIV/AIDS Awareness Organisation (MAHAAO); Ms Martha Humn, Tshwaraganang Women Organisation; Ms B J Matshego, probation officer, Department of Safety Services and Correctional Supervision; Mollie Kemp, School Social Worker, Department of Education and Culture, Kwazulu-Natal.

¹² For example persons suffering from cerebral palsy or who are deaf. In other words a physical disability which affects one's ability to speak.

¹³ Advocates Meintjes and Henning SC, Office of the Director of Public Prosecutions: Transvaal; Gordon's Bay Expert Consultation; Francois Luyt, Attorney; SOCA Unit, National Prosecuting Authority.

Criminal Procedure Act also needs revision – 195(1)(a) should be amended to include also a child that is in the care of either of them. They also suggest that “child” should be defined in clause 1 as persons below 18 years of age. Advocates Meintjes and Henning SC propose the following amendments to clause 10:

Children and impaired persons competent to testify in criminal proceedings involving sexual offences

10(1) All children, physically and mentally impaired persons shall be presumed to be competent to testify in criminal proceedings involving the alleged commission of a sexual offence and no child, physically or mentally impaired person [below the age of 18 years, other than a child who for any reason does not have the capacity, verbal or otherwise, to respond to simple questions,] shall be precluded from giving such evidence [in court in criminal proceedings involving the alleged commission of a sexual offence,] unless such child or person is found, at any stage of the proceedings, not to have the ability or the mental capacity, verbal or otherwise, to respond to simple questions in a way that is understandable to the court or to the person assisting the child or person in testifying.

(2) The court shall note the reasons for finding a child, physically or mentally impaired person not to have the ability or the mental capacity, verbal or otherwise, to respond to simple questions in a way that is understandable to the court or to the person assisting the child or person in testifying, on the record of the proceedings.

[(2)] (3)by a child or person:

Although in support of such a provision, Linda Dobbs QC of London cautions however that the witness must be aware of the importance and seriousness of the proceedings – not to the extent that they are overwhelmed, but more for the appearance of justice and acknowledgement that the matter at hand is a very serious one – i.e. that a convicted offender faces the potential loss of liberty for a very long time.

A small number of respondents did not approve of moving away from the current law and argued that the recommended provision would result in the court proceedings not being taken seriously,¹⁴ that the evidence would have no evidential value,¹⁵ the effect of giving evidence under oath may be undermined leading a witness to lying,¹⁶ and that less weight will be attached to such evidence and that it may also be contrary to the

¹⁴ N Mbophane, Masonwabisane Women Support Centre.

¹⁵ Edmund Szndrauhi, Director Public Prosecutions, KZN; Mmabatho Lesho.

¹⁶ Nolitha Mazwai, Rape Crisis, Cape Town.

equality clause.¹⁷

The Commission takes note of the above comment but endorses its preliminary finding that reform of the application of this area of the law is needed. No similar presumption of incompetency applies to convicted perjurers or to other persons convicted of crimes involving an element of dishonesty.¹⁸ The fact that children are required to pass a test before their evidence will be admitted and the fact that this test may operate to exclude reliable testimony and thus inhibit effective prosecutions, must be questioned. Truth and the duty to tell the truth are abstract notions, which a young child might not be able to understand or explain, but this does not mean that a child cannot give a reliable account of relevant events. The requirement that a judge be satisfied that a child understands the duty to speak the truth before that child is considered a competent witness 'singles out some of society's most vulnerable members for treatment that effectively deprives them of the protection and vindication of the criminal justice system'.¹⁹ Schwikkard²⁰ also concludes her exposition of the current law relating to children and the competency test applied to them by stating that there are strong grounds for arguing that the abandonment of the 'competency test' is necessary for effective equality. In her opinion this would increase the potential for successful prosecutions and will act as a buttress for a child's constitutional right to security and freedom from abuse. Furthermore that reform in this area, based on current research by social scientists, will not detract from the rights of the accused but will merely assist the court in obtaining and assessing relevant evidence.

The Commission agrees that reformulating the provision in the affirmative with a presumption included would, as suggested above, obviate the need to first apply a test to establish competence prior to the child starting to testify. However, it is not thought necessary to include an overriding provision to counter provisions contained in the Criminal Procedure Act or the common law as expounded by section 206 of the Criminal

¹⁷ Silas I M Nawa of the National Department of Education.

¹⁸ PJ Schwikkard 'The abused child: a few rules of evidence considered' (1996) **Acta Juridica** 148 at 149.

¹⁹ A Harvison Young 'Child sexual abuse and the law of evidence: Some current Canadian issues' (1992) 11 **Canadian Journal of Family Law** 11 at 19 as quoted by P J Schwikkard 'The abused child: A few rules of evidence considered' (1996) **Acta Juridica** 148 at 151.

²⁰ Ibid at 151.

Procedure Act as was suggested.

In conjunction with the recommendation contained in the proposed clause regarding a child's competence, the Commission also proposed the requisite amendments to section 164 of the Criminal Procedure Act, thereby providing that all witnesses are competent to testify if they can understand the questions put to them and can in return give answers the court can understand. The Commission still believes that the importance of the proceedings needs to be emphasised by admonishing such witnesses to tell the truth and that consequences exist for not telling the truth.

Section 194 of the Criminal Procedure Act contains an exclusion referred to in section 192, viz that a person may be found incompetent due to his or her state of mind. The emphasis seems to be on the fact that a person who is mentally ill is deprived of the proper use of his or her reason as a result of the mental affliction or disability. According to Hoffmann and Zeffertt,²¹ in modern English law a witness suffering from mental illness is nevertheless a competent witness if he or she has sufficient mental capacity to know what it means to tell the truth and can testify in a rational and intelligible manner. Hoffmann and Zeffertt interpret section 194 of the Criminal Procedure Act in accordance with modern English law and support the approach followed in **R v K**²² where the court accepted medical evidence, saying that the complainant was an imbecile and yet received her evidence, noting that her answers showed surprising intelligence.

The Commission is of the opinion that a mentally impaired person may be admitted to giving evidence in criminal proceedings without taking the oath or making an affirmation if, as is provided for in the amended section 164 of the Criminal Procedure Act, such person is able to understand questions put to him or her and to respond to such questions in a manner which is intelligible, and provided further that such person is admonished to speak the truth. Conversely, if the mentally impaired person is unable to testify in a rational and intelligible manner the person will be found incompetent to testify in terms of section 194 of the Criminal Procedure Act. It is therefore not deemed necessary to include mentally impaired persons under clause 10.

²¹ At 374.

²² 1951 (4) SA 49 (O).

It has also been submitted that clause 10 should be extended to include physically impaired persons. As this suggestion was made without accompanying argument it is unclear what the reason for making this suggestion was. The Commission concurs with Hoffmann and Zeffertt²³ that the fact that a witness is deaf and dumb does not render him or her incompetent as a witness if that witness can communicate by using signs in an intelligible manner. In addition, the rationale behind categorizing physically disabled persons together with children and mentally impaired persons, as suggested above, is unclear. A person's physical disability will not necessarily preclude him or her from giving sworn testimony and will also not necessarily preclude him or her from giving verbal testimony which is rational and intelligible. If a person is unable to give verbal testimony, another witness may have to be sworn in to interpret that person's signs to the court.

However, in considering the extension of the application of this clause the Commission is of the opinion that it would be artificial to draw a distinction between children in general and children who have fallen victim to a sexual offence. The Commission therefore recommends that this clause be extended to apply to all children and consequently that this clause be inserted in the Criminal Procedure Act.

Advocates Meintjes and Henning SC also point out that section 195(1) of the Criminal Procedure Act needs revision in that section 195(1)(a) should be amended to include the words 'a child that is in the care of either of them'. The Commission agrees that this amendment should be effected in order to reflect the reality that a non-biological child may be in a spouse's care.

In the Western Cape joint submission it is submitted that the words "according to the child's age and maturity" be inserted at the end of clause 10(2) of the Bill. The Commission does not agree with this proposal. The aim of this provision is to make a clean break from the current 'competence test' applied to children and together with the amended section 164 of the Criminal Procedure Act ensure that a child who is able to, is allowed to give a reliable account of relevant events without having to explain an abstract concept such as the difference between a truth and a lie.

²³ At 375.

4.3.4 Recommendation

The Commission recommends the deletion of clause 10 of the Bill contained in Discussion Paper 102 and the inclusion of the following adapted provision on competency of children to testify as section 192A in the Criminal Procedure Act:

Children competent to testify in criminal proceedings

192A. (1) All persons below the age of 18 years shall be presumed to be competent to testify in criminal proceedings and no such person shall be precluded from giving evidence unless he or she is found, at any stage of the proceedings, not to have the ability or the mental capacity, verbal or otherwise, to respond to questions in a way that is understandable to the court.

(2) The evidence given by a person referred to in subsection (1) shall be admissible in criminal proceedings contemplated in that subsection, and the court shall attach such weight to such evidence as it deems fit.

(3) The court shall note the reasons for a finding in terms of subsection (1) on the record of the proceedings.

The Commission also recommends that section 164(1) of the Criminal Procedure Act be amended as follows:

(1) Any person [who, from ignorance arising from youth, defective education or other cause, is found not to understand the nature and import of the oath or the affirmation,] may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person is able to understand questions put to him or her and to respond to such questions in a manner which is intelligible; and provided further that such person shall, in lieu of the oath or affirmation, be admonished by the

presiding judge or judicial officer to speak the truth [, **the whole truth and nothing but the truth**].

The Commission further recommends that section 195(1)(a) of the Criminal Procedure Act be amended as follows:

(a) any offence committed against the person of either of them or of a child of either of them or of a child who is in the care of either of them;

4.4 Vulnerable witnesses

4.4.1 Current law

There is no provision for a category of vulnerable witnesses in the Criminal Procedure Act. The vulnerability of witnesses and especially the vulnerability of children have led to a variety of changes in court practices and procedures that have been aimed at making it easier for them to give evidence. However, as South African law does not identify any witness or category of witness as belonging to a special category which deserves automatic protection or protective measures to be employed, it is dealt with on a case by case basis.

4.4.2 Proposal in Discussion Paper 102

In Discussion Paper 102, the Commission proposed that it would be in the interests of justice to create a category of vulnerable witness and to build onto the existing protective measures in the Criminal Procedure Act. While it is conceded that not every child or adult victim of or witness to a criminal offence will necessarily be vulnerable if required to give evidence by conventional means, it cannot be denied that children and victims of a sexual offence are potentially more vulnerable as witnesses than other witnesses due to the very nature of the offence. The Commission therefore recommended that in the event that a victim of a sexual offence desires no protective measures relating to the

manner in which he or she will give evidence, any person older than ten years of age should have the choice to waive the automatic provision of protective measures.

In the Discussion Paper the Commission carefully considered whether the accused should be included in the category of vulnerable witnesses - thereby making him or her eligible for protective measures. However, in this regard the Commission concluded that accused persons are afforded considerable safeguards in criminal proceedings²⁴ to ensure a fair trial and should not be considered a vulnerable witness.

To give effect to these recommendations, the following clause was proposed in Discussion Paper 102:

Vulnerable witnesses

13. (1) A court, in criminal proceedings involving the alleged commission of a sexual offence, must declare a witness, other than the accused, who is to give evidence in that proceedings a vulnerable witness if such witness is -

- (a) the complainant in the proceedings pending before the court; or
- (b) below the age of 18 years and has witnessed the offence being tried.

(2) The court may, on its own initiative or on application by the prosecution or any witness who is to give evidence in proceedings referred to in subsection (1), and if that witness is below the age of 18 years, on application by that witness, if at least ten years of age, or his or her parent, guardian or a person *in loco parentis*, declare any such witness, other than the accused, a vulnerable witness if in the court's opinion he or she is likely to be vulnerable on account of -

- (a) age;
- (b) intellectual impairment;
- (c) trauma;
- (d) cultural differences; or
- (e) the possibility of intimidation.

(3) The court may, if in doubt as to whether a witness should be declared a vulnerable witness in terms of subsection (2), summon any knowledgeable person to appear before and advise the court on the vulnerability of such witness.

(4) Upon declaration of a witness as a vulnerable witness in terms of this section, the court must, subject to the provisions of subsection (5), direct that such witness be protected by one or more of the following measures -

- (a) allowing that witness to be accompanied by a support person as provided for in section 14;
- (b) allowing that witness to give evidence by means of closed-circuit television as

²⁴ See *inter alia* sections 74 and 153(4) of the Criminal Procedure Act and the South African Law Commission Report on Juvenile Justice in respect of accused persons under the age of 18 years.

- provided for in section 158 of the Criminal Procedure Act, 1977;
- (c) directing that the witness must give evidence through an intermediary as provided for in section 170A of the Criminal Procedure Act, 1977;
- (d) directing that the proceedings may not take place in open court as provided for in section 153 of the Criminal Procedure Act, 1977;
- (e) prohibiting the publication of the identity of the complainant as provided for in section 154 of the Criminal Procedure Act, 1977, or of the complainant's family;
- (f) allowing electronically pre-recorded evidence given by that witness; or
- (g) any other measure which the court deems just and appropriate.

(5) If the court has declared a person below the age of 18 years a vulnerable witness, the court must, subject to the provisions of subsection (8), direct that an intermediary as referred to in subsection (4)(c) be appointed in respect of such witness unless there are exceptional circumstances justifying the non-appointment of an intermediary, in which case the court must record the reasons for not appointing an intermediary.

(6) The court may direct that the protective measures referred to in paragraphs (b) to (e) of subsection (4) must be applied in respect of a vulnerable witness, irrespective of any other qualifying criteria that may be prescribed by the provisions of the Criminal Procedure Act, 1977, referred to in those paragraphs.

(7) In determining which of the protective measure or protective measures as referred to in subsection (4) should be applied to a witness, the court must be satisfied that such measure or measures is or are likely to improve the quality of evidence to be given by that witness, and must have regard to all the circumstances of the case, including -

- (a) any views expressed by the witness, if ten years of age or older;
- (b) views expressed by a knowledgeable person who is acquainted with or has dealt with the witness;
- (c) the need to protect the witness's dignity and sense of safety and to protect the witness from further traumatisation; and
- (d) the question whether the protective measure or protective measures is or are likely to prevent the evidence given by the witness from being effectively tested by a party to the proceedings.

(8) The court may at any time revoke or vary a direction given in terms of subsection (4) upon the request of the prosecution or the witness concerned: Provided that where a witness is below the age of 18 years, such revocation or variation may only be effected upon the request of that witness or his or her parent, guardian or a person *in loco parentis* and if that witness is at least ten years of age.

4.4.3 Evaluation of comment

Two categories of vulnerable witnesses have been created in the clause reflected above. The first group is automatically declared vulnerable and includes the complainant in a sexual offence case or a child who has witnessed the sexual offence

being tried. In relation to the second group of witnesses, the court may declare them vulnerable on account of age; intellectual impairment; trauma; cultural differences; or the possibility of intimidation. The latter would also be witnesses involved in sexual offence cases.

A number of respondents, including the Parliamentary Task Group on the Sexual Abuse of Children, commend the Commission for the inclusion of the clause relating to the vulnerable witness in the draft Bill. The participants of a workshop with the Commission for Gender Equality (CGE) believe that this clause will go a long way towards insuring that more and more victims of sexual offences report these crimes with the knowledge that the necessary protection will be afforded to them.²⁵ Participants at the Commission for Gender Equality workshop in Umtata stress the importance of providing special protection for child witnesses.²⁶

In general the majority of respondents are in favour of the introduction of a system whereby a witness in a sexual offence trial may be declared vulnerable.²⁷ One respondent thought the provision should be confined to child witnesses only.²⁸

Another respondent acknowledges the implicit difficulty that this provision creates between witnesses in criminal proceedings involving sexual offences as opposed to other offences, but nevertheless endorses the provision by reason of the nature of the offence.²⁹

The commentary received indicated a number of different schools of thought on the proposed categories of vulnerability. The first school of thought takes the position that

²⁵ Lulama Nongogo and Teboho Maitse.

²⁶ Group 3.

²⁷ Eastern Cape Network on Violence Against Women; Michael Mokwena (SAPS: Commander CSC); F C Shaw (Welfare Forum Durban and South Region); S.T.O.P (Standing Together to Oppose Pornography) N Mbophane (Masonwabisane Women Support Centre); Age-in-Action; Koos Strauss (Rape Intervention Project GRIP); Nolitha Mazwai of Rape Crisis (Cape Town); Representations from Mabopane (no names given); M Hakala (Department of Social Services, chief social worker); Ms B J Matshego (probation officer, Dept. of Correctional Services); Ms M J Mmola (Maboloka HIV/AIDS Awareness Organisation); Ms M Humn - Tshwaraganang Women Organisation; Thusanang Advice Centre; Mr Mabuza (Save the Children Sweden); Dr Coetzer, Judge Bertelsmann ; Gordon's Bay Expert Conference; Dr Johanna Kehler (NADEL).

²⁸ Mmabatho Lesho.

²⁹ Judge Belinda van Heerden; Mr Prometheus Mabuza, Save the Children, Sweden.

the provision of vulnerable status should be automatic, with no discretion, for all child witnesses in criminal proceedings involving a sexual offence (whether or not they witnessed the offence).³⁰ The Gordon's Bay Expert Conference and the South Africa Human Rights Commission³¹ also proposed such a provision.

The second school of thought promotes the view that the court should always retain the discretion to determine whether a witness is vulnerable and that the categories do not *per se* lead to vulnerability.³²

A third school of thought argues that one particular group has fallen through the cracks, namely children (persons under the age of 18 years) who are witnesses in cases other than sexual offences.³³ One respondent says it is vital that all children be offered the same protection and also be entitled to vulnerable witness status. While recognising that the Commission's mandate is limited to sexual offences, Dr Muller is of the view that the Commission must take this opportunity to extend the protection to *all* child witnesses. The SOCA Unit³⁴ is also of the opinion that the mandatory protection afforded to child witnesses in sexual offence cases should be extended to all children. The Unit says it would be as important to provide this protection to a child who has witnessed his mother's murder, as it would be to provide it to a child who has witnessed the rape of his mother.

The Gordon's Bay Expert Conference also proposed that this provision be extended to all child witnesses (not only those in sexual offence criminal proceedings).

³⁰ Commission for Gender Equality; Dr Johanna Kehler (NADEL); Eastern Cape Network on Violence Against Women; Michael Mokwena (SAPS: Commander CSC); F C Shaw (Welfare Forum Durban and South Region); S.T.O.P (Standing Together to Oppose Pornography) N Mbophane (Masonwabisane Women Support Centre); Age-in-Action; Koos Strauss (Rape Intervention Project GRIP); Nolitha Mazwai of Rape Crisis (Cape Town); Representations from Mabopane (no names given); M Hakala (Dept. Of Social Services, chief social worker); Ms B J Matshego (probation officer, Dept. of Correctional Services); Ms M J Mmola (Maboloka HIV/AIDS Awareness Organisation); Ms M Humn - Tshwaragang Women Organisation, Thusanang Advice Centre; Mr Mabuza (Save the Children Sweden); Dr Coetzer, Judge Bertelsmann; Gordon's Bay Expert Conference.

³¹ **Sexual Violence Report**, recommendation 30.

³² Prometheus Mabuza, Save the Children, Sweden; SOCA Unit, National Prosecuting Authority (the latter concur with this view insofar as adult witnesses are concerned).

³³ Dr Karen Muller, Director: Unit for Child Witness Research and Training.

³⁴ Office of the National Director of Public Prosecution.

Mr Enver Daniels and the Western Cape joint submission³⁵ propose extending automatic blanket vulnerable status to every witness (not just child witnesses). Mr Daniels says that it is important to endorse vulnerability from the outset failing which it would marginalise the poorest and benefit the middle class.³⁶

The Commission takes note of these issues and concurs with the views that:

- It is in the interests of justice and will increase accessibility to the courts and the criminal justice process to extend the provision to automatically declare **all child witnesses**, in criminal proceedings involving **sexual offences**, (whether they witnessed the offence or not) vulnerable and accordingly recommends so. This will in effect extend the available protective measures that the court may order to assist them in giving evidence.³⁷ In this regard, it is necessary to give effect to the constitutional imperative to develop the law in accordance with the spirit of the Constitution³⁸ bearing in mind that in all matters affecting the child, the child's best interests are paramount.³⁹ Further, the fundamental requirement that an accused person's right to a fair trial⁴⁰ is met by clause 13(7)(d) which provides that a court, in determining which protective measure/s to apply, must consider whether the particular measure "is or are likely to prevent the evidence being given by the witness from being effectively tested by a party to the proceedings".
- There is merit in investigating extending the automatic declaration of vulnerable status to all children giving evidence in criminal proceedings and not only confining to child witnesses in sexual offence proceedings. The Commission recommends accordingly.

³⁵ Children's Rights Project, Community Law Centre, University of the Western Cape; the Department of Forensics and Toxicology, University of Cape Town; Gender, Law & Development Project, Institute of Criminology, University of Cape Town; Gender Project, Community Law Centre, University of the Western Cape Women's Legal Centre, University of the Western Cape.

³⁶ Mr E Daniels, Chief State Law Adviser (Department of Justice and Constitutional Development).

³⁷ A consequential amendment in this regard is the insertion after the word "must" in sub-clause 13(1) of the words "*mero motu*" and the deletion of the words "and has witnessed the offence being tried" in sub-clause 13(1)(b).

³⁸ Section 39(2) of the Constitution of the Republic of South Africa, Act 108 of 1996.

³⁹ Section 28(2) of the Constitution of the Republic of South Africa, Act 108 of 1996.

⁴⁰ Section 35(3) of the Constitution of the Republic of South Africa, Act 108 of 1996.

Clause 13(2) allows for the protection of witnesses in sexual offence cases other than the 'victim' and children who witnessed the offence. This clause is applicable if the court is of the opinion that the witness is likely to be vulnerable on account of age, intellectual impairment, trauma, cultural differences, or the possibility of intimidation. Many of the respondents endorse clause 13(2).⁴¹ However, one respondent expresses the view that it is unnecessary as protective measures are already in place in the Criminal Procedure Act, 51 of 1977.⁴²

Dr Johanna Kehler⁴³ of NADEL points out that clause 13(2) will facilitate access to special protective measures to, for instance, the parents of child victims of sexual offences, as well as defence witnesses who are vulnerable. She says, however, that the age category needs to be better defined, stating clearly the circumstance under which age becomes a criterion for vulnerability. If, however, this category is meant to provide protection for child witnesses other than the ones who witnessed the offence and are protected in clause 13(1), then it should be stated as such. Further, she is of the view that the trauma category needs to be specific indicating clearly whether the trauma that was caused is a direct result of the offence, or whether it refers to the trauma that is likely to be caused during the trial that would enable a witness to be declared vulnerable.

NADEL recommends clear definitions of the categories defining the eligibility criteria to be declared a vulnerable witness in order to avoid possible abuse regarding the access to the protective measures available for vulnerable witnesses. Similarly, in the Western Cape joint submission,⁴⁴ it is pointed out that clause (2)(c) lists "trauma" as a factor that

⁴¹ Koos Strauss (Rape Intervention Project GRIP); Age-in-Action; S.T.O.P (Standing Together to Oppose Pornography); F C Shaw (Welfare Forum Durban and South Region); Michael Mokwena (SAPS: Commander CSC); Eastern Cape Network on Violence Against Women; Mmabatho Lesho; RAPCAN; Professors Burchill and Schwikkard (University of Cape Town); Judge Bertelsmann; Dr K Müller (Vista University); Dr Coetzer; Thusanang Advice Centre; Ms M Humn - Tshwaraganang Women Organisation; Ms B J Matshego (probation officer, Dept. of Correctional Services); M Hakala (Dept. Of Social Services, chief social worker); Representations from Mabopane (no names given); Ms M J Mmola (Maboloka HIV/AIDS Awareness Organisation) - yes a traumatised witness might miss important points. Possibility of intimidation can happen only if the supporters of the perpetrator are allowed in the same room with victim/witness.

⁴² Edmund Szndrauhi, Director Public Prosecutions Kwazulu-Natal.

⁴³ Acting Project Director, Nadel Human Rights Research & Advocacy Project.

⁴⁴ Children's Rights Project, Community Law Centre, University of the Western Cape; the Department of Forensics and Toxicology, University of Cape Town; Gender, Law & Development Project, Institute of Criminology, University of Cape Town; Gender Project, Community Law Centre, University of the Western Cape Women's Legal Centre, University of the Western Cape

may result in a witness being vulnerable. In this regard, it is recommended that the sub-clause be rephrased to reflect that this trauma may result from recounting the evidence and / or testifying in front of the accused or others. Ms Nolitha Mazwai of Rape Crisis⁴⁵ is also of the view that the circumstances under which a witness will be declared vulnerable should be clearly spelt out to avoid confusion.

The Commission is of the view that neither the 'age' nor the 'trauma' category requires further definition. As it is currently framed it is wide enough to include any trauma or aspect of a witness's age that will impact on the witness giving evidence. This is important as it will enable a court to take into account the needs of elderly witnesses as well as these witnesses who have a pre-existing condition that makes them particularly vulnerable. Further, the recommendation will ensure that all child witnesses to a sexual offence will automatically be declared vulnerable which will avoid the uncertainty raised by some respondents.⁴⁶

The Commission on Gender Equality recommends that the list under clause 13(2) should include race and religion. The Commission agrees with this view, and with specifically stating it as a factor to be considered as these are not necessarily factors which may strike a court as impacting on the vulnerability of a witness. In addition, the Commission proposes adding language as a potential cause for vulnerability of a witness.

The Western Cape joint respondents⁴⁷ are of the view that a witness may be reluctant to testify in front of others to whom they are connected by virtue of a specific relationship. For example, witnesses in sexual offence proceedings have expressed their reluctance to testify in front of community elders and/ or family members whom they fear or respect, be they the accused or simply someone present at the trial. The graphic or incriminating nature of the evidence may also render a witness vulnerable, particularly in the context of sexual offence proceedings where evidence of a particularly private or intimate nature

⁴⁵ Cape Town.

⁴⁶ Dr Johanna Kehler, NADEL.

⁴⁷ Children's Rights Project, Community Law Centre, University of the Western Cape; the Department of Forensics and Toxicology, University of Cape Town; Gender, Law & Development Project, Institute of Criminology, University of Cape Town; Gender Project, Community Law Centre, University of the Western Cape Women's Legal Centre, University of the Western Cape.

may be led. The witness may also have kept the information secret for an extended period of time or may consider it shameful, and may accordingly be reluctant to testify in detail. They suggest the addition of the following two subsections: the relationship of the witness to any party to the proceedings, and / or the nature of the subject matter of the evidence. The Commission concurs with this view and recommends accordingly.

Advocates R Meintjes and Henning SC⁴⁸ redrafted clause 13(2). Much of that draft is, however, superseded by the amendment recommended above in relation to the automatic declaration of vulnerability of all child witnesses in criminal proceedings involving a sexual offence. However, they request an important addition to clause 13(2)(b), namely 'physical impairment', with which the Commission concurs.

The Commission is concerned that subclause (2) constitutes a closed list with the result that the court will not be able to consider other factors that may establish the vulnerability of a witness. As this clause is intended, *inter alia*, to assist persons who may not necessarily have been entitled to protective measures before to once again limit these categories of persons to a defined list will defeat the object of the provision. Accordingly, the Commission proposes that a paragraph be added to provide that the court will have the discretion to take into account any other factor that it deems relevant to rendering a witness vulnerable.

The Commission recommends in clause 13(3) that experts may be called to establish the vulnerability of those witnesses not automatically entitled to vulnerable status and the need for specific protective measures for both categories where necessary. Once again this recommendation had majority support from respondents.⁴⁹

Clause 13(4) received general support from the respondents.⁵⁰ The Gordon's Bay

⁴⁸ Office of the Director of Public Prosecutions: Transvaal.

⁴⁹ F C Shaw (Welfare Forum Durban and South Region); Michael Mokwena (SAPS: Commander CSC); S.T.O.P (Standing Together to Oppose Pornography); Age-in-Action Koos Strauss (Rape Intervention Project GRIP); Eastern Cape Network on Violence Against Women; Mmabatho Lesho, N Mbophane (Masonwabisane Women Support Centre); Silas I M Nawa (National Department of Education); Nolitha Mazwai (Rape Crisis Cape Town); Representations from Mabopane (no names given); Ms M J Mmola (Maboloka HIV/AIDS Awareness Organisation); Ms M Humn - Tshwaraganang Women Organisation; Thusanang Advice Centre; Dr Coetzer; Dr K Müller (Vista University); Ms B J Matshego (probation officer, Dept. of Correctional Services); M Hakala (Dept. of Social Services, chief social worker); Mr Mabuza (Save the Children Sweden).

⁵⁰ Eastern Cape Network on Violence Against Women; Michael Mokwena (SAPS: Commander CSC); F C Shaw (Welfare Forum Durban and South Region); S.T.O.P (Standing Together to Oppose

Expert Conference warns against the use of negatives incorporated by the cross reference to sections 170A and 154 of the Criminal Procedure Act. Professors Burchell and Schwikkard⁵¹ also raise a potential restriction in respect of the references in clause 13(4)(b)-(e) to various other provisions in the Criminal Procedure Act and point out that the same results can be achieved without cross-reference. This is echoed by Dr K Müller⁵² who refers to the overlap with section 170A of the Criminal Procedure Act. She suggests that section 170A be re-phrased for purposes of synergy; otherwise there are two possible choices: proceed via clause 13(4) or to use section 170A. Judge Van Heerden raises the possibility of deleting the references in clause 13(4) to specific sections of the Criminal Procedure Act where appropriate.

The SOCA Unit⁵³ does not agree with the provisions of clause 13(6), which provides that the references in clause 13(4) to protective measures in sections in the Criminal Procedure Act, may be applied by the court irrespective of the qualifying criteria set out in those sections in the Criminal Procedure Act. They say that it seems irregular to allow a court that has declared a person a vulnerable witness to simply direct that such witness be protected by the measures referred to in clauses 13(4) (a) – (g) without regard to the inherent requirements of those sections. They argue that the court should not be able to circumvent the requirements of the various sections in order to protect the vulnerable witness. They point to section 158 of the Criminal Procedure Act as a good example. This section contains strict requirements that all need to be met before it can be used. They argue that the very purpose of this section would be ignored if the court can simply apply it under the auspices of clause 13 of the draft Bill.

The Commission does not favour the option put forward by the SOCA Unit as it will increase the complexity of the draft Bill if entire structural clauses are required to be set up repeating what is essentially already catered for in the Criminal Procedure Act.

Pornography); Age-in-Action; Koos Strauss (Rape Intervention Project GRIP); Silas I M Nawa (National Department of Education); Mmabatho Lesho; N Mbophane (Masonwabisane Women Support Centre); Judge Van Heerden; Representations from Mabopane (no names given); Ms M J Mmola (Maboloka HIV/AIDS Awareness Organisation); M Hakala (Department of Social Services, chief social worker); Ms M Humn - Tshwaraganang Women Organisation; Thusanang Advice Centre; Dr Coetzer; Judge Bertelsmann; RAPCAN.

⁵¹ University of Cape Town.

⁵² Vista University.

⁵³ National Office of the Director of Public Prosecutions.

Advocates Meintjes and Henning SC propose that this problem be dealt with in clause 13(4) itself by the addition of the words “irrespective of any more restrictive legally qualifying criteria as might be provided for in the relevant sections referred to”. For purposes of clarity, the Commission concurs with this suggestion and adapts the subclause accordingly and deletes subclause (7).

In general, the protective measures put forward in clause 13(4) are accepted by respondents⁵⁴ with the following additional measures suggested: a witness friend;⁵⁵ if evidence is not given by way of closed-circuit television the victim should be accompanied by a support person to the stand; prohibition of the publication of the proceedings;⁵⁶ provision must be made for disabled persons, the aged, mentally retarded and children;⁵⁷ limits should be placed on questioning of defence attorneys by disallowing embarrassing questions⁵⁸ and witnesses adequately prepared prior to going to court.⁵⁹ The Commission is of the view that all these suggestions are fully dealt with in the draft Bill and the non-legislative recommendations contained in this Report.

Advocates Meintjes and Henning SC propose the retention of subclause 13(4)(f) so that provision is made in this clause to allow for statements to be taken, by way of video, from a person against whom it is alleged a sexual offence has been committed. They suggest the following draft: “allowing an electronically pre-recorded statement [evidence given] made by that witness as evidence; or”. They are of the view that it will be beneficial to allow a video-taped statement to be admitted as evidence, even if it is only to be used in certain limited instances, especially since it is not a compulsory measure. They argue that if it is not provided for now, it might become very difficult to provide for such a possibility at a later stage. The Commission debated this point at length and came to the conclusion that video-taped evidence is an extremely complex issue and deserving of more detailed research. It is therefore recommended that sub-clause (4)(f)

⁵⁴ Age-in-Action, S.T.O.P (Standing Together to Oppose Pornography); F C Shaw (Welfare Forum Durban and South Region); Eastern Cape Network on Violence Against Women; Nolitha Mazwai (Rape Crisis Cape Town); Ms B J Matshego (probation officer, Department of Correctional Services); RAPCAN.

⁵⁵ Age-in-Action; Representations from Mabopane (no names given).

⁵⁶ Ms M J Mmola (Maboloka HIV/AIDS Awareness Organisation).

⁵⁷ Ms M Humn - Tshwaraganang Women Organisation.

⁵⁸ Thusanang Advice Centre.

⁵⁹ RAPCAN.

be omitted from the draft Bill.

Mr Edmund Szndrauhi⁶⁰ takes a different view to the majority of respondents and is of the opinion that no further measures other than those provided for in the Criminal Procedure Act are necessary. This view is not shared.

Clause 13(5) provides that once a child witness is declared vulnerable, it is mandatory for the court to appoint an intermediary to assist the child in giving evidence, unless there are exceptional circumstances which justify the non-appointment of an intermediary. Further, should such circumstances arise, the court must set out the reasons for not appointing an intermediary. This proposal received majority support from the respondents.⁶¹ One respondent is of the opinion that it is important to clarify what is meant by “exceptional circumstances”.⁶²

In this regard, the Commission has reconsidered the use of the phrase “exceptional circumstances” and elected to delete it due to the uncertainty created by the varied interpretations applied by the courts to this phrase.⁶³ The Commission has elected to insert in place of “exceptional circumstances” the phrase “in the interests of justice”. The meaning of the phrase “in the interests of justice” involves an assessment and balancing of competing rights and interests in each case and recent case law indicates a liberal and purposive interpretation has been applied by the courts. For example, in the case of **Fraser v Naude and others**⁶⁴ the court held that the interests of justice, *in casu*, meant that the prospects of success on appeal was overridden by the child’s best interests which required that the uncertainty in regard to the young child’s placement had to be

⁶⁰ Director Public Prosecutions Kwazulu-Natal.

⁶¹ N Mbophane (Masonwabisane Women Support Centre); Mmabatho Lesho, Eastern Cape Network on Violence Against Women; Koos Strauss (Rape Intervention Project GRIP); Age-in-Action; Michael Mokwena (SAPS: Commander CSC); F C Shaw (Welfare Forum Durban and South Region); Ms B J Matshego (probation officer, Dept. of Correctional Services); Dr K Müller (Vista University); Professors Burchill and Schwikkard (University of Cape Town); RAPCAN; Dr Coetzer; Thusanang Advice Centre; Ms M Humn - Tshwaraganang Women Organisation; Ms M J Mmola (Maboloka HIV/AIDS Awareness Organisation); Representations from Mabopane (no names given); Nolitha Mazwai (Rape Crisis Cape Town); S.T.O.P (Standing Together to Oppose Pornography).

⁶² Mr A Theron (Chief Director, Department of Social Development).

⁶³ Cf case law in respect of the Criminal Law Amendment Act, 105 of 1997 (the Minimum Sentencing Act).

⁶⁴ 1998 (11) BCLR 1357 (CC) at 1358.

brought to finality. Accordingly, the Court disallowed the appeal.

Further, in the case of **Attorney General, Free State v Ramokhosi**⁶⁵ which involved an opposed bail application, the court held that the duty on the court to assess whether the granting of bail was in the “interests of justice” placed the court in a fundamentally different role from a court hearing an ordinary case. If the court was unable to make a finding, it required the court to conduct enquiries to gather information required to determine the best interests of justice.

Judge Bertelsmann supports the provisions of clause 13(5), but raises concerns regarding affordability and the structure necessary to support this recommendation. The Commission shares this concern, but nevertheless includes this provision to ensure proper protection of child witnesses giving evidence in court.

Mr Edmund Szndrahi⁶⁶ and Mr Silas I M Nawa⁶⁷ express the opinion that an intermediary can confuse issues at times and recommend a formal application by the State motivating the appointment of an intermediary. M Hakala⁶⁸ is of the view that each child must be assessed and this should be a specialised service. Alternatively, if each child has to testify through an intermediary service there should be officials specialising in that intermediary services on the permanent staff of the public service. The Commission does not concur with the view that the State must in each instance formally apply and motivate to have an intermediary used.⁶⁹

Judge Van Heerden supports clause 13(5) provided that if a child witness makes an informed decision not to use an intermediary such decision must be respected.⁷⁰ Mr Mabuza⁷¹ is also of the opinion that the decision to waive the appointment of an intermediary must be left to the child. The Commission supports the principle that the

⁶⁵ 1996 (11) BCLR 1514 at 1515.

⁶⁶ Director of Public Prosecutions KZN.

⁶⁷ National Department of Education.

⁶⁸ Department of Social Services, chief social worker.

⁶⁹ See further **Discussion Paper 102** p 419 – 420.

⁷⁰ This view is shared by advocates Meintjes and Henning, SC, Office of the Director of Public Prosecutions: Transvaal.

⁷¹ Save the Children Sweden.

views of children should in all instances be elicited and accorded due weight. Where appropriate, provision is therefore made in the draft Bill that the court must accord the views of children such weight it considers appropriate in view of the child's age and maturity.

Advocates R Meintjes and Henning SC⁷² make the point that in clause 13(5) consideration should be given not only to defining "child", but to also add some general provision that would obviate the need for reiterating that if the child is below ten years, some additional information should be obtained or some other person *in loco parentis* be consulted. This issue has now been addressed by the inclusion of a definition of "child" in the draft Bill.

In the Western Cape joint submission⁷³ support is expressed for the recommendation that an intermediary be appointed in respect of a child who has been afforded "vulnerable witness" status. The respondents are concerned, however, that this protection is made subject to "exceptional circumstances justifying the non-appointment of an intermediary". The respondents point out that the phrase "exceptional circumstances" as employed in section 60(11)(a) of the Criminal Procedure Act in the context of bail proceedings has been subjected to varied and inconsistent interpretation by the courts.⁷⁴ Accordingly, their concern is that such a broad discretion will result in the denial of protection in circumstances where the granting thereof would be appropriate. Furthermore, although the court is directed to record its reasons for the non-appointment of an intermediary, in practice presiding officers often fail to provide reasons and even where reasons are provided, witnesses are forced to testify without being afforded an opportunity to contest the non-appointment of an intermediary prior thereto. Therefore they recommend that a provision be inserted in the draft Bill that provides witnesses in sexual offence proceedings with the right to challenge the non-appointment of an intermediary prior to testifying. The Western Cape joint respondents

⁷² Office of the Director of Public Prosecutions: Transvaal.

⁷³ Children's Rights Project, Community Law Centre, University of the Western Cape; the Department of Forensics and Toxicology, University of Cape Town; Gender, Law & Development Project, Institute of Criminology, University of Cape Town; Gender Project, Community Law Centre, University of the Western Cape Women's Legal Centre, University of the Western Cape.

⁷⁴ See in this regard e.g. **S v Jonas** 1998 (2) SACR 677 (SE); **S v C** 1998 (2) SACR 721 (C); **S v H** 1999 (1) SACR 72 (W); **S v Mokgoje** 1999 (1) SACR 233 (NC); **S v Mauk** 1999 (2) SACR 479 (W); **S v Mohammed** 1999 (2) SACR 507 (C); **S v Siwela** 1999 (2) SACR 685 (W); **S v Yanta** 2000 (1) SACR 237 (Tk); **S v Vanqua** 2000 (2) SACR 371 (Tk).

link such a right to an earlier suggestion made to allow for limited legal representation for witnesses (the ancillary prosecutor).

The Commission is aware of the profound affect that a decision not to grant an intermediary may have on a child witness. However, the granting of legal standing to witnesses, whether children or adults, to challenge orders of the court, will require fundamental changes to our current legal framework. The Commission does not regard such a change as feasible at this point in time and has not recommended limited legal representation for witnesses.

Judge Bertelsmann agrees in part with clause 13(7), but makes the point that the primary concern should be the protection of the witness, and not the quality of the evidence. Judge Van Heerden points out that the word “protective measure or protective measures” in clause 13(7) be deleted and the words “one or more” be inserted in place thereof. The Commission agrees with this submission.

Mr Silas Nawa⁷⁵ indicates that he prefers the use of the words “may have regard to” in place of “must have regard to” in subclause (7). The Commission is of the view that it is necessary to direct the court’s attention to the listed considerations as this clause introduces an entirely different focus and the object of the clause may be defeated by a court not considering the factors set out in paragraphs (a) – (d) of subclause (7).

Judge Van Heerden expresses uncertainty as to whether the reference in subclause 13(7)(b) to “knowledgeable person” includes a lay person. The intention is that it may include a lay person and the Commission is satisfied that the current formulation is sufficiently wide for the court to interpret as such. The Western Cape joint submission⁷⁶ suggest that the summoning of a “knowledgeable person” should be mandatory and not a matter for judicial discretion. Furthermore, guidelines as to who would qualify as a “knowledgeable person” should be included in subclause (3). The Commission does not agree with this suggestion as it will unnecessarily limit the court’s discretion and so

⁷⁵ National Department of Education.

⁷⁶ Children's Rights Project, Community Law Centre, University of the Western Cape; the Department of Forensics and Toxicology, University of Cape Town; Gender, Law & Development Project, Institute of Criminology, University of Cape Town; Gender Project, Community Law Centre, University of the Western Cape Women's Legal Centre, University of the Western Cape

potentially prevent the application of this sub-clause to a particular case.

Advocates Meintjes and Henning SC suggest that in clause 13(7)(c) the word “further” should be deleted as it presupposes existing trauma, which, they argue, should not be given in legislative prescripts, conveying, as it does, some biased view. The Commission agrees with this view and proposes to amend the sub-clause accordingly.

In determining which of the protective measures to apply, the court must in terms of clause (7) be satisfied that such measure is likely to improve the quality of evidence to be given by that witness, bearing in mind the circumstances of the case and a list of issues to give the court direction. This subclause is supported by the majority of respondents⁷⁷ with only a few issues requiring special mention.

The Western Cape joint submission⁷⁸ expresses concern that in terms of subclause (7), when determining which of the protective measures in subclause (4) should apply, the court *must* first be satisfied, presumably on a balance of probability, that such measure(s) “*is likely to improve the quality of evidence to be given by that witness*”. The application of protective measures is thus made subject to the satisfaction of this initial requirement, failing which protective measures cannot be granted. The concern is that presiding officers will disregard the intention of the Act and, claiming that they have not been satisfied as required by the express wording of subclause (7), continue to deny protection to vulnerable witnesses. Accordingly, they submit that it should be accepted that any or all of the protective measures afforded to a vulnerable witness are likely to improve the quality of their evidence and that such acceptance is in line with the intention of the Act. Therefore they recommend that the introductory paragraph to

⁷⁷ Nolitha Mazwai (Rape Crisis Cape Town); N Mbophane (Masonwabisane Women Support Centre); Mmabatho Lesho; Eastern Cape Network on Violence Against Women; Koos Strauss (Rape Intervention Project GRIP); Age-in-Action; S.T.O.P (Standing Together to Oppose Pornography); F C Shaw (Welfare Forum Durban and South Region); Michael Mokwena (SAPS: Commander CSC); Ms B J Matshego (probation officer, Department of Correctional Services); RAPCAN; Dr Coetzer; Thusanang Advice Centre; Ms M Humn - Tshwaraganang Women Organisation; Ms M J Mmola (Maboloka HIV/AIDS Awareness Organisation); Representations from Mabopane (no names given); Judge Van Heerden. Mr Edmund Szndrauhi (Director Public Prosecutions KwaZulu Natal) holds the contrary view that the current, tried and tested measures in the Criminal Procedure Act are adequate.

⁷⁸ Children's Rights Project, Community Law Centre, University of the Western Cape; the Department of Forensics and Toxicology, University of Cape Town; Gender, Law & Development Project, Institute of Criminology, University of Cape Town; Gender Project, Community Law Centre, University of the Western Cape Women's Legal Centre, University of the Western Cape.

subclause (7) be amended to read as follows:

“In determining which protective measure or protective measures as referred to in subsection (4) should be applied to a witness the court must have regard to all the circumstances of the case, including-“

The Commission takes note of this concern and is of the view that the current formulation does create the potential for the purpose of the clause to be defeated if the court is not satisfied that the protective measure or measures will improve the quality of the witness's evidence. One of the purposes of the clause is to improve the quality of the evidence. In addition, another purpose of the clause is to improve witnesses' experience in court and to encourage witnesses to come forward. The Commission accordingly recommends the deletion of the words (the court must) “be satisfied that such measure or measures is or are likely to improve the quality of evidence to be given by the witness”.

In regard to the age at which a child may waive protective measures, Ms Linda Dobbs, QC, expresses the view that the age of ten in clause 13(7)(a) is too low for a child to be able to really make an informed decision about waiving the automatic provision of protective measures. She is of the view that the age of 14 years would be more prudent. This concern was also raised by Judge Belinda van Heerden.

A contrary view is put forward by advocates Meintjes and Henning, SC,⁷⁹ who argue that they have a problem with restricting views to age. As the Commission is proposing that all children, irrespective of age, are to be competent witnesses, should there be an age restriction on them being heard? In the end it should, again, simply be a question of the weight to be attached to the child's opinion. They argue further that provision should be made for the child to be assisted by a parent/person *in loco parentis* or a care taker.

A decision in this regard must take into account the fact that in 1995 South Africa ratified the United Nations Convention on the Rights of the Child.⁸⁰ Article 12 places a duty on State Parties to ensure that a child who is capable of forming his or her own views has the right to express those views freely in all matters affecting the child and that due weight be given to those views in accordance with the age and maturity of the child.

⁷⁹ Office of the Director of Public Prosecutions: Transvaal.

⁸⁰ (1989) General Assembly Document A/RES/44/55.

Further, provision must be made for the child to be heard in any judicial and administrative proceedings affecting the child either directly, through a representative or through an approved body.⁸¹

The Commission takes note of the contrary views put forward by respondents and has elected to delete the reference to 14 years of age and only retain that portion of the proviso that directs the court to accord the views of any witness the weight the court considers appropriate in view of the witness's age and maturity.

4.4.4 Recommendation

The Commission recommends the incorporation of the following clause in the draft Bill:

Vulnerable witnesses

16. (1) A court, in criminal proceedings involving the alleged commission of a sexual offence, must declare a witness other than the accused, who is to give evidence in that proceedings a vulnerable witness if such witness is -

- (a) the complainant in the proceedings pending before the court; or
- (b) **[below the age of 18 years] a child [and has witnessed the offence being tried].**

(2) The court may, on its own initiative or on application by the prosecution or any witness other than a witness referred to in subsection (1) who is to give evidence in proceedings referred to in subsection (1), **[and if that witness is below the age of 18 years, on application by that witness, if at least ten years of age, or his or her parent, guardian or a person *in loco parentis*,]** declare any such witness, other than the accused a vulnerable witness if in the court's opinion he or she is likely to be vulnerable on account of -

- (a) age;
- (b) intellectual, psychological or physical impairment;
- (c) trauma;

⁸¹ Article 12(2).

- (d) cultural differences; **[or]**
- (e) the possibility of intimidation;
- (f) race;
- (g) religion;
- (h) language;
- (i) the relationship of the witness to any party to the proceedings;
- (j) the nature of the subject matter of the evidence; or
- (k) any other factor that the court considers relevant.

(3) The court may, if in doubt as to whether a witness should be declared a vulnerable witness in terms of subsection (2), summon any knowledgeable person to appear before and advise the court on the vulnerability of such witness.

(4) Upon declaration of a witness as a vulnerable witness in terms of this section the court must, subject to the provisions of subsection (5), direct that such witness be protected by one or more of the following measures -

- (a) allowing that witness to be accompanied by a support person as provided for in section **[14] 17**;
- (b) allowing that witness to give evidence by means of closed-circuit television as provided for in section 158 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), irrespective of any additional qualifying criteria prescribed by that section;
- (c) directing that the witness must give evidence through an intermediary as provided for in section 170A of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), irrespective of any additional qualifying criteria prescribed by that section;
- (d) directing that the proceedings may not take place in open court as provided for in section 153 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), irrespective of any additional qualifying criteria prescribed by that section;
- (e) prohibiting the publication of the identity of the complainant as provided for in section 154 of the Criminal Procedure Act, 1977, (Act No. 51 of 1977) or of the complainant's family, including the publication of information that may lead to the identification of the complainant or the complainant's family; or
- (f) **[allowing electronically pre-recorded evidence given by that witness; or]** any other measure which the court deems just and appropriate.

(5) [If Once the court has declared a **[person below the age of 18 years] child** a vulnerable witness the court must **[subject to the provisions of subsection (8),]** direct that an intermediary as referred to in subsection (4)(c) be appointed in respect of such witness unless **[there are exceptional circumstances justifying]** the interests of justice justify the non-appointment of an intermediary, in which case the court must record the reasons for not appointing an intermediary.

[(6) The court may direct that the protective measures referred to in paragraphs (b) to (e) of subsection (4) must be applied in respect of a vulnerable witness, irrespective of any other qualifying criteria that may be prescribed by the provisions of the Criminal Procedure Act, 1977, referred to in those paragraphs.]

(6) In determining which one or more of the protective measure or protective measures as referred to in subsection (4) should be applied to a witness, the court must **[be satisfied that such measure or measures is or are likely to improve the quality of evidence to be given by that witness, and must]** have regard to all the circumstances of the case, including –

- (a) any views expressed by the witness, **[if ten years of age or older]:** Provided that the court shall accord such views the weight it considers appropriate in view of the witness's age and maturity;
- (b) views expressed by a knowledgeable person who is acquainted with or has dealt with the witness;
- (c) the need to protect the witness's dignity and sense of safety and to protect the witness from **[further]** traumatisation; and
- (d) the question whether the protective measure or protective measures is or are likely to prevent the evidence given by the witness from being effectively tested by a party to the proceedings.

(7) The court may, on its own initiative or upon the request of the prosecution at any time revoke or vary a direction given in terms of subsection (4), **[upon the request of the prosecution or the witness concerned: Provided that where a witness is below the age of 18 years, such revocation or variation may only be effected upon the request of that witness or his or her parent, guardian or a person *in loco parentis* and if that witness is at least ten years of age]** and the

court shall, if such revocation or variation has been made on its own initiative, furnish reasons therefor at the time of the revocation or variation.

4.5 Protective measures available to vulnerable witnesses

4.5.1 Introduction

In terms of the Commission's framework, a vulnerable witness would be entitled to any or all of the following protective measures: the presence of a support person, giving evidence by way of closed-circuit television, to testify through an intermediary, to have hearings held *in camera*, and to be protected from having his or her identity being published. These protective measures are discussed more fully in this section.

4.5.2 Support persons

4.5.2.1 Current law

It is widely recognised that testifying in court is a traumatic event, particularly when giving evidence in criminal proceedings involving a sexual offence. It is notable that legislative provisions are already in existence that provides support for an accused person such as section 73(3) of the Criminal Procedure Act. However, no specific provision is made for the presence of a support person for other witnesses. Section 153(3A) of the Criminal Procedure Act allows for certain persons to remain in court during an *in camera* hearing, but it does not indicate who qualifies as a person entitled to remain in court and what support the person(s) who remain in court may give to the complainant.

4.5.2.2 Proposals in Discussion Paper 102

In Discussion Paper 102 the Commission considered a support person to be someone who accompanies either a witness or the accused through the criminal justice process. The purpose of a support person is to strengthen and encourage the witness emotionally by his or her physical presence. The discussion paper stated that any witness in

criminal proceedings involving an alleged sexual offence should be entitled to the presence of a support person of their choice while giving evidence. In addition, the Commission recommended that provision be made for a witness, including a child witness, to be heard on the issue of the presence and choice of a support person.

In Discussion Paper 102 the Commission proposed the following specific primary legislative provision that establishes a support person's role and a court's power to authorise the presence of a support person:

Appointment of support persons

14. (1) Whenever criminal proceedings involving the commission of any sexual offence are pending before any court and a witness, including the complainant, is to give evidence in such court, the court may at any time on its own initiative or upon request by -

- (a) the prosecutor;
- (b) such witness;
- (c) the parent, guardian or person *in loco parentis* of such witness if that witness is below the age of 18 years;
- (d) a social worker;
- (e) a lay counsellor; or
- (f) a medical officer

direct that such witness be accompanied by a support person of the witness's choice when making statements to any person, being interviewed or giving evidence in court.

(2) The court may, notwithstanding a request in terms of this section, refuse the appointment of a support person of the witness's choice if the court is of opinion that the appointment of such person as support person will not be in the interests of justice.

(3) A support person appointed in terms of this section may accompany and be seated next to the relevant witness while such witness is making statements to any person, being interviewed or giving evidence in court.

(4) The court may, if it deems it to be in the interests of justice and in the best interests of the witness, at any time revoke the appointment of a support person and may appoint another person in his or her place.

(5) Whenever a witness in respect of whom a support person has been appointed is to give evidence in court, such person shall affirm to the court prior to giving support that he or she will –

- (a) assist the court to the best of his or her ability; and
- (b) not in any manner interfere with the witness or the evidence being given.

(6) The State shall pay to a support person appointed in terms of this section a prescribed transport allowance for the duration of the period that such person

is required to assist a witness giving evidence in court.

In Discussion Paper 102 the Commission also recommended that section 153(3A) of the Criminal Procedure Act be amended to make it clear that when an *in camera* hearing is ordered, a support person may remain in court to assist the witness who is giving evidence *in camera*.

The following amendment to section 153 of the Criminal Procedure Act was proposed:

The amendment of section 153 of the **Criminal Procedure Act** by the substitution for subsection (3A) of the following subsection:

“(3A) Any person whose presence is not necessary at criminal proceedings referred to in paragraphs (a) and (b) of subsection (3), shall not be admitted at such proceedings while the other person referred to in those paragraphs is giving evidence, unless such other person or, if he is a minor, his parent or guardian or a person *in loco parentis*, requests otherwise or unless the court has directed, in terms of section 14 of the Sexual Offences Act, 20.. (Act No. xx of 20..), that such other person shall be accompanied by a support person in which case the support person shall not be deemed to be a person whose presence is not necessary at such criminal proceedings.”

4.5.2.3 Evaluation of comment

Respondents expressed general support for the clause.⁸² Mr Francois Luyt,⁸³ however, is of the view that the provision of support persons should be left to the discretion of the judicial officer, who, he says, already has that discretion in the case of vulnerable witnesses (children etc.) and expresses concern that the activity of pressure groups tend towards interference in the judicial process. Further, that the proposed change would potentially lead to adverse inferences being made against the witness’s credibility.

⁸² Professor Coetzer; Dr Katrin Müller; Ms I Filander; Dr Karen Müller; Ms Leslie; RAPCAN; Mr P Mabuza; Nolitha Mazwai (Rape Crisis, Cape Town); Mollie Kemp (School Social Worker; Department of Education and Culture, KwaZulu Natal); S.T.O.P (Standing Together to Oppose Pornography); Michael Mokwena (SAPS: Commander CSC); F C Shaw (Welfare Forum Durban and South Region); Eastern Cape Network on Violence Against Women; Koos Strauss (Rape Intervention Project GRIP); Mmabatho Lesho; Silas I M Nawa (National Department of Education); N Mbophane (Masonwabisane Women Support Centre); Age-in-Action; Ms B J Matshego (probation officer, Dept. of Correctional Services); Ms M J Mmola (Maboloka HIV/AIDS Awareness Organisation); representations from Mabopane (no names given); M Hakala (Dept. Of Social Services, chief social worker); Ms M Humn - Tshwaraganang Women Organisation; Thusanang Advice Centre.

⁸³ Attorney.

Advocates R Meintjes and Henning, SC, Mr E Szndrauhi and Judge Bertelsmann hold the opinion that presently a support person can assist a witness and in practice it is being done. They argue that the present system would be impeded by further legislative intervention. In practice, however, support persons are not uniformly allowed in courts across the country, and when they are, there is uncertainty as to their precise role.

A number of person or officials are authorised, in terms of the proposed clause, to apply to court for a witness to have the assistance of a support person. Some concern was expressed that a limited number of persons currently have *locus standi* to appear before the court and this may create practical problems in how the persons listed in clause 14(1)(a) – (f) will bring an application.⁸⁴

Some respondents feel that the following should be added to the list of possible applicants in this subclause: police officials,⁸⁵ forensic nurses,⁸⁶ intermediaries, probation officers, family advocates⁸⁷ and psychologists.⁸⁸ Professor Coetzer⁸⁹ and Dr K Müller also propose that psychologists should be added to the list. In addition, they suggest that the word “officer” should be deleted and the word “practitioner” inserted in place thereof due to the fact that in the usual terminology a medical officer is a subset of a medical practitioner which is employed by a corporate body (including the state). The Commission does not concur with these proposals as there is a danger that a *numerus clauses* may be created and recommends that this subclause should rather contain a general provision to the effect that “any person acting in the interests of such witness” may bring such application. To unnecessarily limit the categories of persons who can bring such an application would defeat the object of the clause and discourage access to the criminal justice process.

Advocates Meintjes and Henning SC are of the opinion that this clause is too broad, that clause 13 is sufficiently wide enough to allow for the appointment of a support person,

⁸⁴ Gordon’s Bay Expert Conference.

⁸⁵ Dr Geldenhuys.

⁸⁶ Ms H Combrinck.

⁸⁷ Gordon’s Bay Expert Conference.

⁸⁸ Professor Coetzer and Dr K Müller.

⁸⁹ Medunsa (Community Medicine).

and that the process should rather be kept informal. Further, that the clause should be amended to restrict the appointment of a support person for a complainant and should rarely be used for other witnesses. The view that this clause is too wide is shared by Nolitha Mazwai.⁹⁰ She suggests that the words in subclause (1) “a witness, including the complainant” be replaced with “A complainant in any sexual offence case or any witness in a sexual offence case who is under the age of 18”. The Commission shares this concern, but is also aware that there may be a number of other vulnerable witnesses who would greatly benefit from being accompanied by a support person such as a mentally impaired or a frail or elderly witness. Consequently, the Commission has not elected to limit this clause outright, but to rather create the possibility of such person having a support person by specific reference to a vulnerable witnesses.

In the Western Cape joint submission⁹¹ the point was made that the current formulation of subclause (1) clearly limits a witness’s entitlement to a support person of their choice. The respondents argue that the provision makes such entitlement a matter to be determined by judicial discretion and that it fails to place a positive duty on the prosecution and the court to inform a witness of his or her right to have a support person present at all times. In regard to the first point, the Commission is satisfied that the proposal contained in this report which requires a court to give reasons for the failure to appoint a support person of the witness’s choice, will require the court to give detailed consideration whether to appoint or who to appoint as a support person. Furthermore, the Commission is of the view that the court should have a discretion in this regard to ensure that individual circumstances are catered for.

In relation to child witnesses, Dr K Müller submits that clause 14(1) can do much to assist children who are stressed and afraid. However, she is of the opinion that it is very important that the child’s wishes are catered for,⁹² because research has shown that many children find the presence of support persons embarrassing, especially when they have to divulge intimate details.

⁹⁰ Rape Crisis Cape Town.

⁹¹ By the Children's Rights Project, Community Law Centre, University of the Western Cape; the Department of Forensics and Toxicology, University of Cape Town; Gender, Law & Development Project, Institute of Criminology, University of Cape Town; Gender Project, Community Law Centre, University of the Western Cape Women's Legal Centre.

⁹² This view is shared by the Western Cape joint respondents.

In recognising the importance of involving child witnesses in decisions affecting them and the need to hear them in this regard, the Commission is of the view that any child witness in criminal proceedings involving an alleged sexual offence should be consulted on both the appointment and the choice of the support person. In this regard the Commission has elected not to impose any age limitations on child witnesses, but to accord all child witnesses a say appropriate to their age and level of maturity.

In regard to clause 14(1)(c) advocates Meintjes and Henning SC express concern that the provision is taken too far. Their view is that the complainant and a child witness should at all stages, including the investigation and consultation stage, be allowed some support person (in the latter instance and depending on the circumstances usually a parent) to sit with and give support. They also submit that the provision of support persons cannot be regulated as proposed by requiring a “court order” even during the investigation stage. Further, they say the reference to “pending proceedings” presupposes that the victim has already made a statement of sorts. In any event, they maintain that it might be very difficult to predict, during the investigation stage, whether a person will eventually be a witness in court proceedings. Having to deal with an unknown number of court applications even prior to any criminal proceedings might simply clog the already full court rolls.

This concern is shared by Judge van Heerden who raises the possibility of problems with the appointment by the court of support persons in relation to pre-trial proceedings (for purposes of assisting with statement-taking, conducting interviews, etcetera). The Commission agrees with the view that the appointment of support persons during pre-trial procedures should not require a formal application to court.

The Commission aims to resolve the difficulties raised by advocates Meintjes and Henning SC and Judge Van Heerden by inserting a new subclause that will establish the right of the complainant and child witnesses to be accompanied by a support person during the investigation phase without the necessity of applying to court. Furthermore, the Commission proposes to ensure that the complainant or child witness (and the latter’s parent, guardian or person *in loco parentis*) is advised, by the investigating officer at the commencement of the investigation or the witness’s first contact with the said police official, of their right to be accompanied by a support person while making any

statement or undergoing any examination, interview or questioning.

Clause 14(2) provides the court with the authority to refuse the appointment of a support person of a witness's choice if the court deems it not to be in the interests of justice. If this subclause is read with subclause (1) it becomes clear that the court has a limited discretion once an application has been made for the appointment of a support person. More specifically, the court may appoint a support person, but may only refuse to appoint a support person **of the witness's choice**. This is to prevent the possibility of alleged offenders abusing their position in relation to a child victim to exert pressure on the child and be appointed as the support person of the child they allegedly have abused. It must be conceded, however, that there is potential ambiguity in clause 14(2) as to whether the court will have the power to refuse to appoint a support person at all. The Commission intends that the court will have the discretion to refuse to appoint any support person if it is not in the interests of justice to do so.

Advocates Meintjes and Henning SC⁹³ propose a new formulation of subclause (2) to provide the court with further discretion to appoint any other person as a support person. The Commission is of the view that this is a necessary amendment and endorses it.

Dr Geldenhuys⁹⁴ raises the issue of a witness refusing or objecting to the particular person appointed. The Commission is of the view that any witness of a sufficient age and maturity should be able to waive the appointment of a support person. In relation to an objection by the witness concerned of the appointment of a particular support person, the Commission considers it proper that the court should have a general discretion to ensure that the interests of justice are served to resolve any such dispute and should give reasons for the appointment of a support person to which the witness objects or for the refusal to appoint a support person of the witness's choice.⁹⁵

Subclause (3) received general support. However, advocates Meintjes and Henning, SC, point out that as it is currently formulated it is too restrictive by the detailed provisions and they suggest that it should be left sufficiently wide to cater for individual

⁹³ Office of the Director of Public Prosecutions: Transvaal.

⁹⁴ SAPS.

⁹⁵ This proposal is also put forward in the Western Cape joint submission.

circumstances. They give an example of a case where a child witness sat on her mother's lap while giving evidence. The Commission agrees with this principle and recommends accordingly.

Subclause (4) raised no substantial problems from respondents. The Western Cape joint respondents submit that the court should first consult in private with the witness concerned before there is any revocation of the appointment of a support person by the court. Unfortunately, no reason is given for the proposal.

Subclause (5), which sets out the role of the support person, elicited comment from advocates Meintjes and Henning, SC, who query in what manner and how will a support person assist the court. Ms Combrinck⁹⁶ raises a similar concern.⁹⁷ The intention behind the inclusion of a provision that a support person will assist the court was to give expression to the positive role that such a person will render by making it easier for the witness they are supporting to give evidence. However, as this is not a direct obligation, the Commission agrees that this provision should be amended to indicate that the support person will assist the witness (and not the court).

As the primary function of the support person is to assist the witness and not the court, the court should explain to the support person that they may not speak to the relevant witness while that witness is still under oath or giving evidence and that the support person should not interfere with the witness while they are giving evidence. This is provided for in subclause (5).

A very real problem for persons supporting witnesses in court is the lack of funds to pay for transport expenses. For this reason it was recommended in subclause (6) that the State should bear transport costs, in the form of a transport allowance, for one support person per witness who is giving evidence in court in sexual offence cases. The Gordon's Bay Expert Conference expresses the general opinion that the payment provision should be removed. Mr Theron⁹⁸ also cautions against the payment provision and highlights the necessity of looking at the cost implications.

⁹⁶ Women's Legal Centre, University of the Western Cape.

⁹⁷ As do the Western Cape joint respondents who propose that sub-clause (5) be deleted *in toto*.

⁹⁸ Chief Director, Department of Social Development.

Ms Combrinck⁹⁹ urges the Commission to retain the payment provision. Advocates Meintjes and Henning, SC, argue that a support person, if subpoenaed or ordered to attend, should receive the ordinary witness fees payable. There is considerable merit in this proposal and the Commission accordingly recommends that support persons be paid the prescribed witness fees. An added advantage is that witness fees potentially cover more than transport costs.

The Western Cape joint respondents agree in principle with clause 14, but recommend some changes to both the draft and the implementation of the principle contained in this clause. They recommend that the following clauses be added:

All health care practitioners must:

- (a) Assess the complainant as soon as possible upon arrival at the designated health care facility, but no longer than two (2) hours;
- (b) Advise the complainant that a support person may be present throughout the examination, which may include family members, friends or other support persons prescribed in this Act, but may not include the investigating officer;

SAPS must inform the complainant of his or her right to:

- a) Make a supplementary statement at a later stage;
- b) To make a full statement after his/her medical examination;
- c) Have his or her statement taken in private;
- d) Have a female member of the SAPS take the statement, where reasonably possible to do so;
- e) Have his or her statement taken in the company of a support person.

In the Western Cape joint submission concern is raised that adequate provision has not been made for a support person when a witness testifies outside the presence of the accused. Accordingly they propose that changes be effected in section 158(3) and 170A of the Criminal Procedure Act. The Commission is of the view that the provisions of clause 16(4) (as proposed in this Report) make it adequately clear that more than one protective measure may be ordered together and no further legislative intervention is necessary.

⁹⁹ Women's Legal Centre, University of the Western Cape. She is supported by the Western Cape joint respondents.

The Western Cape joint submission¹⁰⁰ support the proposed amendment of section 153(3A) of the Criminal Procedure Act to specifically provide for the presence of a support person appointed as such by the court during *in camera* proceedings. On the other hand, advocates R Meintjes and Henning, SC, doubt whether it is necessary to amend section 153(A) as proposed due to the fact that a support person clearly cannot be regarded as unnecessary and consequently there is no need for the exception as proposed. Further, they argue should section 153(3A) of the Criminal Procedure Act be amended as is suggested then any need for a provision in clause 14 explicitly allowing the support person to be present should fall away.

There is considerable merit in the submission by advocates Meintjes and Henning SC – a support person’s presence during the period in which the vulnerable witness to whom support is provided gives evidence by definition cannot be unnecessary. The Commission therefore retracts its preliminary recommendation in Discussion Paper 102 in relation to amending section 153(3A) of the Criminal Procedure Act. It must be realised, however, that not all witnesses, even vulnerable witnesses, may remain in court for the full duration of the criminal case: more than one *in camera* hearing per trial is certainly a possibility.

4.5.2.4 Recommendation

The Commission recommends the incorporation of the following clause in the proposed Bill:

Appointment of support persons

17. (1) The police official responsible for the investigation of a charge relating to the alleged commission of a sexual offence shall, at the commencement of such investigation, inform the complainant in such charge and any child witness or his or her parent, guardian or a person *in loco parentis*, of their right to be accompanied by a support person of the complainant’s or witness’s choice while making any statement;

¹⁰⁰ By the Children's Rights Project, Community Law Centre, University of the Western Cape; the Department of Forensics and Toxicology, University of Cape Town; Gender, Law & Development Project, Institute of Criminology, University of Cape Town; Gender Project, Community Law Centre, University of the Western Cape Women's Legal Centre.

undergoing any examination, medical or otherwise; being interviewed or questioned.

(2) A support person referred to in subsection (1) is not appointed by the court and may accompany the complainant or witness during any of the investigative steps contemplated in that subsection.

[1](3) Whenever criminal proceedings involving the alleged commission of **[any] a** sexual offence are pending before any court and a child witness, including **[the] any** complainant, is to give evidence in such court, the court may at any time on its own initiative or upon request by [-

- (a) the prosecutor [;
- (b) **such witness, if at least ten years of age;**
- (c) **the parent, guardian or person *in loco parentis* of such witness [if that witness is below the age of 18 years]; or**
- (d) **any other person acting in the interests of such witness [a social worker;**
- (e) **a lay counsellor; or**
- (f) **a medical officer]]**

direct that such witness be accompanied by a support person of the witness's choice when **[making statements to any person, being interviewed or]** giving evidence in court.

(4) If the court has appointed a support person in respect of a witness in terms of subsection (3) on its own initiative, such witness may waive the appointment of such support person: Provided that the court shall accord such waiver the weight it considers appropriate in view of the witness's age and maturity.

[2](5) The court may, notwithstanding a request in terms of this section, refuse the appointment of a support person of the witness's choice if the court is of opinion that the appointment of such person **[as support person]** will not be in the interests of justice, and may, after consultation with such witness and upon furnishing reasons for its refusal, appoint another person as support person.

[3](6) A support person appointed in terms of this section may accompany and be seated **[next to] with** the relevant witness while such witness is

making statements to any person, being interviewed or giving evidence in court.

[4](7) The court may, if it deems it to be in the interests of justice and in the best interests of the witness, at any time revoke the appointment of a support person and may appoint another person in his or her place.

[5](8) Whenever a witness in respect of whom a support person has been appointed is to give evidence in court, such person shall affirm to the court prior to giving support that he or she will -

- (a) assist the **[court]** witness to the best of his or her ability; and
- (b) not in any manner interfere with the witness or the evidence being given.

[6](9) The State shall pay to a support person appointed in terms of this section **[a prescribed transport allowance]** the prescribed witness fees for the duration of the period that such person is required to assist a witness giving evidence in court.

4.5.3 The use of closed-circuit television or other forms of electronic media

4.5.3.1 Current law

In 1996, sections 158(2) and (3) of the Criminal Procedure Act was enacted as a result of recommendations made by the South African Law Commission.¹⁰¹ In terms of sections 158(2) and (3), a court may order that a witness (if he or she consents thereto) give evidence outside of the presence of the accused by means of closed-circuit television or similar electronic media. However, the court may order that a witness gives evidence by way of closed-circuit television only if facilities therefore are readily available or obtainable and if it appears to the court that to do so would –

- (a) prevent unreasonable delay;
- (b) save costs;
- (c) be convenient;
- (d) be in the interests of the security of the State or of public safety or in the interests of justice or the public; or
- (e) prevent the likelihood that prejudice or harm might result to any person if he or she testifies or is present at such proceedings.

In addition, the court may, in order to ensure a fair and just trial, make the giving of evidence in terms of section 158(2) subject to such conditions as it may deem necessary: Provided that the prosecutor and the accused have the right, by means of that procedure, to question a witness and to observe the reaction of that witness.

4.5.3.2 Proposals in Discussion Paper 102

The requirement in section 158(2) of the Criminal Procedure Act that closed-circuit television or similar electronic media facilities must be readily available or obtainable obviously limits the use of this protective measure to those centres where such facilities are available. In Discussion Paper 102 the Commission accepted this limitation but recommended that if the court of first instance is of the opinion that a witness should give evidence by way of closed-circuit television and no such facilities are available or

¹⁰¹ See the **Interim Report on the Simplification of Criminal Procedure** (Project 73), August 1995.

obtainable, then that court should be able to transfer the criminal proceedings to another court with the required facilities. The Commission held that such a transfer should be done in consultation with the court to which the case is to be transferred. In making an order for a transfer to a court with closed-circuit television facilities, the Commission recommended that the court of first instance should take into account various factors, which need not co-exist with each other, together with any of the requirements set out in section 158(3)(d) and (e). The factors proposed by the Commission were the need to protect the person who is to give evidence by means of closed-circuit television or similar electronic media from traumatising; the wishes of the person who is to give evidence by means of closed-circuit television or similar electronic media; the wishes of other persons who are to give evidence in the proceedings; the costs of having the proceedings transferred; inconvenience to the complainant in the proceedings; and unreasonable delay that would be brought about by such transfer. The Commission gave effect to these recommendations by suggesting the following amendments to section 158(3) of the Criminal Procedure Act:

The amendment of section 158 of the Criminal Procedure Act (Act 51 of 1977) by the insertion after subsection (3) of the following subsections:

(3A) If in criminal proceedings involving the alleged commission of a sexual offence the court is of opinion that it is imperative that a witness or an accused should give evidence by means of closed-circuit television or similar electronic media and such facilities are not readily available or obtainable, the court may order that the criminal proceedings should be transferred to another court which has such facilities after the approval of such other court has been obtained.

(3B) When considering whether a transfer as referred to in subsection (3A) should be effected, the court shall take into account -

- (a) the need to protect the person who is to give evidence by means of closed-circuit television or similar electronic media from traumatising.
- (b) the wishes of the person referred to in paragraph (a);
- (c) the wishes of other persons who are to give evidence in the proceedings;
- (d) the costs of having the proceedings transferred;
- (e) inconvenience to the complainant in the proceedings; and
- (f) unreasonable delay that would be brought about by such transfer.

In relation to the jurisdictional problems that may arise as a result of a transfer, the Commission was satisfied that the court has a sufficiently wide discretion in terms of the

existing legislation to find jurisdiction and accordingly made no legislative recommendations in this regard.

4.5.3.3 Evaluation of comment

Many respondents support the proposed amendment to section 158(3) of the Criminal Procedure Act:¹⁰² it is seen as assisting complainants in rural areas,¹⁰³ provided that it does not result in long delays and children themselves should be consulted with the options being carefully explained to them.¹⁰⁴

The Western Cape joint respondents submit that section 158 has been subject to narrow interpretation by the courts and its intention repeatedly frustrated as a result.¹⁰⁵ In relation to the proposed amendment to section 158(3) of the Criminal Procedure Act they recommend that the words “it is imperative that” be deleted from line 2 as they have a concern that while it may not be “imperative” that a witness give evidence by means of closed-circuit television, it may nevertheless be the case that such protection should be afforded the witness concerned upon consideration of all the relevant provisions in the Bill.

Furthermore, they are concerned about the appropriateness of certain factors which a court is required by draft section 158(3B) to take into account when considering whether to transfer criminal proceedings in terms of subsection (3A), and particularly the weight which may be attributed to such factors, whether individually or cumulatively. In this regard, they submit that subparagraphs (d) and (f) of subsection (3B) be deleted as it is always likely to be costly to have the proceedings transferred and that such transfer will bring about an “unreasonable delay” given the current backlog experienced by the South

¹⁰² S.T.O.P (Standing Together to Oppose Pornography); Michael Mokwena (SAPS: Commander CSC); F C Shaw (Welfare Forum Durban and South Region); Eastern Cape Network on Violence Against Women; Silas I M Nawa (National Department of Education); N Mbophane (Masonwabisane Women Support Centre); Age-in-Action; Mr Koos Strauss (Rape Intervention Project GRIP); Nolitha Mazwai (Rape Crisis Cape Town); Ms M J Mmola (Maboloka HIV/AIDS Awareness Organisation); Ms M Humn - Tshwaraganang Women Organisation; Ms B J Matshego (probation officer, Dept. of Correctional Services); M Hakala (Department of Social Services, chief social worker); Thusanang Advice Centre.

¹⁰³ Mmabatho Lesho.

¹⁰⁴ RAPCAN; Nolitha Mazwai (Rape Crisis Cape Town).

¹⁰⁵ See in this regard **S v F** 1999 (1) SACR 571 (C).

African courts. Alternatively, presiding officers should be given specific direction as to what constitutes an “unreasonable delay”.

The Commission does not concur with this view as the additional cost and delay caused by the transfer are relevant factors to both the State and other witnesses. The Commission takes note of the potential problem that may be occasioned by the court being unsure how to weight the various criteria. However, that is a matter best solved by training of magistrates. The equipment of more courts over time with closed-circuit television will also address the concerns raised.

Magistrate R Henney¹⁰⁶ points out that the Commission’s interpretation of section 158(3) of the Criminal Procedure Act that the factors listed need not co-exist with each other is not universally shared. He cites **S v F**¹⁰⁷ in which acting Judge Albertus says the following in relation to section 158(3):

“There is also, in my view, merit in the submission of Mr Fourie that the insertion of the conjunction “or” between paragraphs (d) and (e) of (3) and not between paragraphs (a), (b), and (c) of the said subsection, makes it clear that the Legislature intended that the requirements set forth must co-exist with each other together with any of the requirements set forth in (d) and (e) of the said subsection”.

The court says further that:

“There can be little doubt that in enacting section 158, the Legislature intended to facilitate the adducing of evidence of a witness who is either not available or present in the vicinity of the court and whose availability and presence in court would otherwise (a) cause unreasonable delay; (b) lead to incurring of additional costs, and (c) occasion inconvenience to the court and/or any parties involved in proceedings”.

Magistrate Henney submits that in the light of the above judgment this subsection would not assist a victim of a sexual offence if he or she is available or present in the vicinity of the court. This would mean that even if it would be in the interest of justice or where it would prevent the likelihood that prejudice or harm might result to the complainant if he or she testifies in open court, the witness cannot be afforded the protection offered by

¹⁰⁶ Wynberg Regional Court

¹⁰⁷ 1999 (1) SACR 571 at 578j.

section 158(3). Mr Henney therefore urges that this subsection be amended, as a matter of urgency, to include a witness who is available to or in the vicinity of the court to give evidence by means of closed-circuit television or similar electronic media.

Professor Schwikkard echoes the view of Mr Henney that section 158(3) is very limited and goes on to say that too much faith is placed in it. Her view is that the Commission should rather amend section 158 to make it subject to clause 13(6) of the draft legislation.

In legal drafting the word “and” is usually used when the paragraphs are cumulative and “or” is used when it is disjunctive.¹⁰⁸ According to Thornton¹⁰⁹ the placing of “and” and “or” is a matter of custom, but can lead to uncertainty. The Commission has elected to resolve the uncertainty pertaining to section 158(3) by making it clear that the existence of anyone of the criteria is sufficient to justify the making of an order for closed-circuit television to be used. To avoid uncertainty the Commission proposes that section 158(3) of the Criminal Procedure Act be amended to the effect that a court may order the use of closed-circuit television when one or more of the criteria set out exist. This will in effect empower the court and extend the application of the section to witnesses who can attend at court, but where there is a likelihood that prejudice or harm might result if he or she testifies in open court. This amendment will deal adequately with Professor Schwikkard’s concern and her proposed solution.

Advocates Meintjes and Henning, SC, point out that in their experience, the court will solve the problem of a lack of closed-circuit television facilities by either the court itself sitting at another centre which also has jurisdiction, or the prosecutors arrange for the matter to be tried in another court that has jurisdiction where there are the necessary facilities. They understand the Commission’s reasoning in wanting to introduce the amendments, but submit that this provision does not deal with the many other aspects involved in such a provision. They have the following concerns: if the transfer of proceedings is to be legally prescribed, provision will have to be made for an official at the court to approve; the transfer will have to be limited to another court with jurisdiction

¹⁰⁸ G C Thornton **Legislative Drafting** (fourth edition) London: Butterworths, 1996 at p 64.

¹⁰⁹ Ibid, at p 65.

to try the matter;¹¹⁰ it will be necessary to indicate at what stage of the proceedings the transfer can occur and who will preside over the transfer. Further, it will be necessary to provide what consequences will arise if approval for the transfer is not obtained or the transfer is not affected. Advocates Meintjes and Henning, SC, are of the final view that this provision should rather be deleted and it must simply be accepted that all sexual offences will be tried in a court with the required equipment, thus placing an obligation on those responsible to install this. The Commission concurs with this view.

4.5.3.4 Recommendation

The Commission recommends the amendment of section 158(3) of the Criminal Procedure Act, 51 of 1977 as follows:

The amendment of section 158 of the Criminal Procedure Act by

(a) the substitution for the introductory part of subsection (3) of the following introductory part:

“(3) A court may make an order contemplated in subsection (2) only if facilities therefore are readily available or obtainable and if it appears to the court that to do so would either -

[(b) **by the insertion after subsection (3) of the following subsections:**

(3A) If in criminal proceedings involving the alleged commission of a sexual offence the court is of opinion that it is imperative that a witness or an accused should give evidence by means of closed-circuit television or similar electronic media and such facilities are not readily available or obtainable, the court may order that the criminal proceedings should be transferred to another court which has such facilities after the approval of such other court has been obtained.

(3B) When considering whether a transfer as referred to in subsection (3A)

¹¹⁰ Mr E Szndrauhi shares the concern that jurisdictional issues will create logistical problems.

should be effected, the court shall take into account -

- (a) the need to protect the person who is to give evidence by means of closed-circuit television or similar electronic media from traumatisation.**
- (b) the wishes of the person referred to in paragraph (a);**
- (c) the wishes of other persons who are to give evidence in the proceedings;**
- (d) the costs of having the proceedings transferred;**
- (e) inconvenience to the complainant in the proceedings; and**
- (f) unreasonable delay that would be brought about by such transfer.]”**

4.5.4 Use of intermediaries

4.5.4.1 Current law

Section 170A of the Criminal Procedure Act gives the court a discretion to order the use of an intermediary when the witness is a child and if such a witness would be exposed to “undue mental stress or suffering” when giving testimony. No questioning of a person in respect of whom an intermediary has been appointed may take place in any manner other than through the intermediary.¹¹¹ The Minister of Justice and Constitutional Development may determine the persons or class of persons who are competent to be appointed as intermediaries.¹¹²

An intermediary is basically a facilitator through which a child witness can give evidence in criminal proceedings. The intermediary’s role is to put the questions from the court, prosecutor, and defence to the child in language that the child will understand. The child’s answers are then interpreted from a child’s developmental level to the language employed in courts. This means that the child does not give direct evidence and is not

¹¹¹ In **Klink v Regional Court Magistrate NO and others** 1996 (3) BCLR 402 (E) a constitutional challenge to section 170A was dismissed on the basis that the section does not preclude an accused person from representing himself or from having the right to legal representation. The court held (per Melunsky J) that the appointment of an intermediary does not deny an accused the right to a fair trial or limits his right to cross-examine a witness.

¹¹² The following categories of persons have been designated: medical practitioners, family counselors, child care workers, social workers, educators, and psychologists. See GN R1374 in *Government Gazette* 15024 of 30 July 1993, as amended by R360 in *Government Gazette* 17882 of 28 February 1997.

directly cross-examined. This system was introduced following the recognition that the ordinary adversarial trial procedure is at times insensitive to the needs of the child victim, especially in cases involving child abuse.

However, the Criminal Procedure Act does not set out any other role for the intermediary in court. The only indication of what is expected of an intermediary is set out in subsection 170A(2)(b) of the Criminal Procedure Act that provides that an intermediary must convey the general purport of questions to the relevant witness. This lack of detail is problematic.

Furthermore, the intermediary system experiences a number of practical difficulties: the inconsistency with which the court's discretion to appoint an intermediary is exercised; the failure to have intermediaries at court when required and the fact that there is no system of accreditation of intermediaries.

4.5.4.2 Proposals in Discussion Paper 102

As a result of submissions to the Commission it became clear that there exists confusion as to the precise role in court of intermediaries. Some see the intermediary as a mere conduit who relates questions to child witnesses in a child-friendly manner while others would like to see intermediaries playing a far more active role in assisting the court. Suggestions were also made to limit the discretion of the court not to appoint intermediaries.¹¹³

In Discussion Paper 102 the Commission recommended that an intermediary should automatically be appointed for a child witness in criminal proceedings involving sexual offences unless exceptional circumstances exist that justify non-appointment. The Commission also concluded that it is important that the court be empowered to call for expert input in this regard and recommended that the court may of its own accord, or on the request of the prosecutor or the witness concerned, call for expert evidence on the question of whether it is necessary or appropriate to appoint an intermediary in a particular case.¹¹⁴ As to the apparent role confusion, the Commission recommended

¹¹³ See also **S v Stefaans** 1999 (1) SACR 182 (C) on the element "undue mental stress".

¹¹⁴ See also Lirieka Meintjes-Van der Walt 'Pre-trial disclosure of expert evidence: Lessons from

that the intermediary, as a facilitator, should be in a position to convey to the court that the witness is tired, fatigued or stressed and request a recess, i.e. assist the court.

The Commission further recommended that the protection afforded by intermediaries be extended to vulnerable adult witnesses in appropriate cases.

In order to address the administrative difficulties, the Commission recommended that if an intermediary is not available, the prosecutor and the intermediary (if the latter has been appointed) should explain to the court the reasons for the failure to appear. Where the intermediary had been subpoenaed, as should be the case, failure to appear in court would entitle the presiding officer to issue a warrant of arrest for that intermediary.

The Commission's preliminary legislative recommendations were embodied in the following amendments to section 170A of the Criminal Procedure Act:

The amendment of section 170A of the Criminal Procedure Act by the insertion after subsection (4) of the following subsections:

(5) If a court has directed that a vulnerable witness as referred to in section 13 of the Sexual Offences Act, 20.. (Act No. xx of 20..), should be allowed to give evidence through an intermediary, such intermediary may -

- (a) convey the general purport of any question to the relevant witness;
- (b) inform the court at any time that the witness is fatigued or stressed; and
- (c) request the court for a recess.

(6) An intermediary referred to in subsection (5) shall be summoned to appear in court on a specified date and at a specified place and time to act as an intermediary and shall, upon failure to appear as directed, appear before the court to advance reasons for such failure, upon which the court may act as it deems fit.

4.5.4.3 Evaluation of comment

Judge Bertelsmann and a number of respondents¹¹⁵ support the introduction of a

abroad' (2000) 13 **SACJ** 145; J Spencer 'Court experts and expert witnesses: Have we a lesson to learn from the French?' [1992] **Current Legal Problems** 213 at 232 – 233.

¹¹⁵ Professor Coetzer; Dr K Muller; Judge van Heerden; Mr P Mabuza; Ms I Filander; Dr K Muller; Ms Leslie; Ms M Kemp; RAPCAN; Mmabatho Lesho; S.T.O.P (Standing Together to Oppose Pornography); Michael Mokwena (SAPS: Commander CSC); F C Shaw (Welfare Forum Durban and South Region); Eastern Cape Network on Violence Against Women; Koos Strauss (Rape Intervention Project GRIP); Silas I M Nawa (National Department of Education); N Mbophane

provision that an intermediary may be appointed to assist a vulnerable adult witness and enabling the intermediary to advise the court that a witness is fatigued, stressed etcetera.

Age-in-Action strongly supports the proposed amendment as they point out that aged persons may have to attend court for the first time in their lives and that they may find it equally intimidating. In the respondent's view the appointment of an intermediary will greatly assist them. However, as aged persons can be declared vulnerable in terms of clause 13, it is not necessary to provide explicitly for them.

Ms M Kemp strongly supports the extended use of intermediaries and argues that finances should be made available for payment of trained intermediaries by the Department of Justice as this is a specialised service and should be treated as such. Advocates Meintjes and Henning, SC,¹¹⁶ hold a contrary view. They argue that section 170A(5) should be deleted as prosecutors are dependent on the goodwill of intermediaries; they assist the court and should rather be in fixed employment of the State for purposes of sanctioning unacceptable behaviour. They say that nothing prevents intermediaries from being subpoenaed, and the issue of non-appearance can be dealt with in terms of the present provisions of the Criminal Procedure Act.

4.5.4.4 Recommendation

The Commission is of the opinion that intermediaries are playing a significant role in reducing the potential secondary trauma child witnesses face when testifying in court. Indeed, the Commission is so encouraged by this system that it has recommended that the role of intermediaries be expanded to relay not only questions and answers, but also to convey to the court that the witness is tired, fatigued or stressed and to request a recess. In addition, the Commission recommends that the services of intermediaries be extended to other vulnerable witnesses. This is provided for in the following proposed amendment to section 170A of the Criminal Procedure Act:

(Masonwabisane Women Support Centre); Nolitha Mazwai (Rape Crisis Cape Town); Ms B J Matshego (probation officer, Dept. of Correctional Services); Ms M J Mmola (Maboloka HIV/AIDS Awareness Organisation); Ms M Humn - Tshwaranang Women Organisation; M Hakala (Department of Social Services, chief social worker); Thusanang Advice Centre.

¹¹⁶ Office of the Director of Public Prosecutions: Transvaal.

The amendment of section 170A by the addition of the following subsections:

(5) If a court has directed that a vulnerable witness as referred to in section 16 of the Sexual Offences Act, 20.. (Act No. xx of 20..) should be allowed to give evidence through an intermediary, such intermediary may -

- (a) convey the general purport of any question to the relevant witness;
- (b) inform the court at any time that the witness is fatigued or stressed; and
- (c) request the court for a recess.

(6) An intermediary referred to in subsection (5) shall be summoned to appear in court on a specified date and at a specified place and time to act as an intermediary and shall, upon failure to appear as directed, appear before the court to advance reasons for such failure, upon which the court may act as it deems fit.

The Commission notes the concerns regarding training and accreditation of intermediaries. In this regard it is suggested, as was done in the discussion paper, that the office of intermediary be professionalised through a system of accreditation and appropriate training.

4.5.5 *In camera* hearings

4.5.5.1 Current law

Section 153 of the Criminal Procedure Act provides for circumstances in which criminal proceedings may not take place in open court. It states that in a case involving a charge of a sexual offence the court may, at the request of the victim, or, if the victim is a minor at the request of his or her parent or guardian, order an *in camera* hearing.

4.5.5.2 Proposals in Discussion Paper 102

In Discussion Paper 102 the Commission found that although this provision of the Criminal Procedure Act was adequate, the enforcement thereof was problematic. It stated that the lack of control over movement of persons in and out of court during *in*

camera hearings caused distress to the victim and consequently affected the testimony given.

However, the Commission recommended that the movement of both court officials and private persons in and out of court whilst a vulnerable witness is testifying should be strictly monitored. It was further recommended that all courts hearing sexual offence cases must, when the matter is being held *in camera*, have a notice to that effect on the public doors to the court.

4.5.5.3 Evaluation of comment

Advocates Meintjes and Henning, SC¹¹⁷ submit that the evidence of medical practitioners should be regarded as highly confidential and should be included as evidence that should be led *in camera*. This view is shared by Advocate Blumrick¹¹⁸ who argues for the extension of section 153 to include other experts who deal with intimate details. Ms Vetton¹¹⁹ requests the Commission to extend section 153 to include *bona fide* researchers.

4.5.5.4 Recommendation

The Commission confirms its position that a vulnerable witness is entitled to have his or her testimony heard *in camera*. This is particularly so in the case of victims of sexual offences and children, two of the categories singled out by the Commission for automatic vulnerable witness status. However, the general rule remains that all court proceedings should be in open court. Should there be justification to depart from this fundamental rule, then the court already has a discretion in terms of section 153 of the Criminal Procedure Act to do so. No legislative intervention in this regard is therefore necessary.

¹¹⁷ Office of the Director of Public Prosecutions, Gauteng.

¹¹⁸ Office of the Director of Public Prosecutions, Kwazulu-Natal.

¹¹⁹ CSV.R.

4.5.6 Prohibition on publication of certain particulars of victims in criminal trials

4.5.6.1 Current law

Section 154 of the Criminal Procedure Act prohibits the publication of certain particulars in a number of circumstances. The listed circumstances are as follows:

- When a court has ordered an *in camera* hearing, no information relating to the proceedings may be published.
- In criminal proceedings which involve charges of an indecent act, no information may be published that might reveal the identity of the complainant.
- In criminal proceedings which involve charges of indecency, no details may be published about the charge before the accused has both appeared and pleaded.
- In criminal proceedings no information may be published which may reveal the identity of accused persons and witnesses under 18 years of age.

Section 154(2)(b) of the Criminal Procedure Act provides that no person may at any stage before the appearance of an accused in a court on a charge referred to in section 153(3) or at any stage after such appearance but before the accused has pleaded to the charge, publish any information relating to the charge in question.

Further, section 335A of the Criminal Procedure Act prohibits publication of the identity of persons towards or in connection with whom it is alleged that an indecent act or any act for the purpose of procuring or furthering such an act was committed. This section applies prior to the identity of an accused being established.

The court has discretion to allow publication in all of the above circumstances, except in cases of indecency in regard to which no details may be published about the charge in question before the accused has appeared and pleaded.

Other legislation also restricts the publication of personal details of the parties involved in litigation.¹²⁰

¹²⁰ See, e.g. section 12 of the Divorce Act 70 of 1979 and the Commission's **Report on Publication of Divorce Proceedings: Section 12 of the Divorce Act (Act 70 of 1979)**, 2002.

Notwithstanding the various provisions of the Criminal Procedure Act it has become common place for the media to report on sexual offences or alleged sexual offences, sometimes by including names or identifying details of the victim, the alleged offender or giving graphic details of the assault.

4.5.6.2 Proposals in Discussion Paper 102

In Discussion Paper 102 the Commission found adequate, as it currently stands, the law relating to the prohibition on publication of certain particulars in criminal matters. However, the Commission found that a problem clearly exists in practice. Details of victims of sexual offences, and in particular children, and of persons alleged to be the accused, but not yet formally identified as such or charged, are regularly published contrary to the above legal provisions.¹²¹

In order to ensure compliance with the existing provisions of the Criminal Procedure Act, the Commission recommended that the prosecuting authorities focus their attention on prosecuting recalcitrant publishers and media houses. In addition, the Commission recommended that the penalty provisions provided for in sections 154 and 335A of the Criminal Procedure Act be revised upwardly. Lastly, the Commission recommended that a court which finds any person guilty of publishing information in contravention of the provisions of sections 154 or 335A of the Criminal Procedure Act may make a compensatory financial order (in terms of section 300 of the Criminal Procedure Act) after making a finding of guilt in terms of section 154(5) of the Criminal Procedure Act.

To give effect to this last recommendation, the Commission proposed the following amendments to the Criminal Procedure Act:

The amendment of section 154 of the Criminal Procedure Act-

(a) by the substitution for subsection (5) of the following subsection:

“(5) Any person who publishes any information in contravention of this section or contrary to any direction or authority under this section or who in any manner whatever reveals the identity of a witness in contravention of a direction under section 153(2),

¹²¹ Par. 23.5.5 of Discussion Paper 102.

shall be guilty of an offence and liable on conviction to a fine [**not exceeding R1 500**] or to imprisonment for a period not exceeding [**one**] two years or to both such fine and such imprisonment] if the person in respect of whom the publication or revelation of identity was done, is an adult, and if such person is under the age of eighteen years, to a fine or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment."; and

(b) by the addition of the following subsection:

"(6) The provisions of section 300 are applicable, with the changes required by the context, upon the conviction of a person in terms of subsection (5) and if-

(a) the criminal proceedings that gave rise to the publication of information or the revelation of identity as contemplated in that subsection related to a charge that an accused person committed or attempted to commit any indecent act towards or in connection with any other person or any act for the purpose of procuring or furthering the commission of an indecent act towards or in connection with any other person; and

(b) the other person referred to in paragraph (a) suffered any physical, psychological harm or other injury or loss of income or support."

The amendment of section 335A of the Criminal Procedure Act -

(a) by the substitution for subsection (2) of the following subsection:

"(2) Any person who contravenes the provisions of subsection (1) shall be guilty of an offence and liable on conviction to a fine [**not exceeding R1 500**] or to imprisonment for a period not exceeding [**one**] two years or to both such fine and such imprisonment if the person whose identity has been revealed is an adult, and if such person is under the age of eighteen years, to a fine or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment."; and

(b) by the addition of the following subsection:

"(3) The provisions of section 300 are applicable, with the changes required by the context, upon the conviction of a person in terms of subsection (2) and if the person whose identity has been revealed suffered any physical, psychological or other injury or loss of income or support."

4.5.6.3 Evaluation of comment

The Western Cape joint submission¹²² makes the point that the identification of child victims, who may or may not testify, is very serious and has enormous consequences on

¹²² By the Children's Rights Project, Community Law Centre, University of the Western Cape; the Department of Forensics and Toxicology, University of Cape Town; Gender, Law & Development Project, Institute of Criminology, University of Cape Town; Gender Project, Community Law Centre, University of the Western Cape Women's Legal Centre.

the healing of a victim. They argue that even the identification of young victims will probably hold serious consequences for the victim in years to come and say that revealing information that can lead to the identification of the child is secondary victimisation.

However, the Western Cape joint respondents do not agree with the Commission's assessment that the current law is adequate and that the problems lie with implementation. They submit that greater certainty could be achieved if the provision stated clearly that no parent, guardian or care-giver may consent to the identity of a witness or accused below the age of 18 years being revealed. They say that while section 154 of the Criminal Procedure Act is fairly clear that only the court may authorise an otherwise prohibited publication, it should be specifically stated that parents may not authorise such a publication as this will serve to inform members of the media, as well as parents or guardians who may be intimidated by media attention.

The Western Cape joint respondents are in agreement with the Commission's recommendation that the National Director of Public Prosecutions should prosecute violators of these provisions. They propose, however, that the legislative provision should go further by placing a positive statutory duty on the National Director of Public Prosecutions to ensure that the violators are prosecuted for a contravention of the current provisions.

The proposed amendment by which section 300 of the Criminal Procedure Act is made applicable to those guilty of violating the prohibited publications provisions in the Act elicited limited comment. The comments were to the same effect, namely that section 300 of the Criminal Procedure Act is not a useful vehicle to use to discourage prohibited publications as it is already severely under-used. Further, section 300 raises more problems than it solves by creating uncertainty as to whether the "offender" i.e. the publisher, would have a right of appeal and what will be the nature of the role of the State when it acts on behalf of the victim of the publication.

4.5.6.4 Recommendation

In order to protect vulnerable witnesses, the Commission recommends that courts vigorously protect the identity of victims in sexual offence cases. Where transgressions of the existing provisions protecting victim identity do come to the notice of the court, such information should be brought to the attention of the National Director of Public Prosecutions to possibly institute criminal proceedings.

However, the Commission does not concur with the view that the provisions of section 154 of the Criminal Procedure Act require further elucidation, and nor will it solve the problem. If a law is not being applied, there is very little possibility that another law saying the same thing (albeit in a different manner), will be applied. The Commission takes the view that this issue is adequately dealt with by the non-legislative recommendation that the National Director of Public Prosecutions prioritise prosecuting persons or corporate bodies that publish prohibited personal particulars in violation of the provisions of the Criminal Procedure Act. This view is endorsed in the Report of the Parliamentary Task Group on the Sexual Abuse of Children.

The Commission does not agree with the suggestion that a statutory duty be placed on the National Director for Public Prosecutions to prioritise the prosecution of alleged offenders for contravening the provisions of sections 154 and 335A of the Criminal Procedure Act. Clearly the imposition of such a duty would usurp the discretion of the prosecution service.

As far as compensatory awards in terms of section 300 of the Criminal Procedure Act is concerned, the Commission is of the view that this section could be usefully employed to assist those victims who suffered damages as a result of their personal details being published in contravention of the said provisions of the Criminal Procedure Act. In regard to the question whether the offending publisher would have a right of appeal, the Commission deems it unnecessary to clarify this issue as it is clear that the provisions of section 309 of the Criminal Procedure Act apply to all offences.¹²³

¹²³ Section 309 Appeal from lower court by person convicted.

(1) (a) Any person convicted of any offence by any lower court (including a person discharged after conviction) may, subject to section 309B*, appeal against such conviction and against any resultant sentence or order to the provincial or local division having jurisdiction.

The Commission proposes to amend section 335A in precisely the same manner as section 154 by increasing penalties. In addition the Commission proposes to make section 300 applicable.

The Commission therefore recommends the following amendments to sections 154 and 335A of the Criminal Procedure Act:

The amendment of section 154 of the Criminal Procedure Act –

(a) by the substitution for subsection (5) of the following subsection:

“(5) Any person who publishes any information in contravention of this section or contrary to any direction or authority under this section or who in any manner whatever reveals the identity of a witness in contravention of a direction under section 153(2), shall be guilty of an offence and liable on conviction to a fine [**not exceeding R1 500**] or to imprisonment for a period not exceeding [**one**] two years or to both such fine and such imprisonment if the person in respect of whom the publication or revelation of identity was done, is over the age of 18 years, and if such person is under the age of 18 years, to a fine or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment.”; and

(b) by the addition of the following subsection:

“(6) The provisions of section 300 are applicable, with the changes required by the context, upon the conviction of a person in terms of subsection (5) and if

=

(a) the criminal proceedings that gave rise to the publication of information or the revelation of identity as contemplated in that subsection related to a charge that an accused person committed or attempted to commit any indecent act towards or in connection with any other person or any act for the purpose of procuring or furthering the commission of an indecent act towards or in connection with any other person; and

(b) the other person referred to in paragraph (a) suffered any physical, psychological or other injury or loss of income or support.”

The amendment of section 335A of the Criminal Procedure Act –

(a) by the substitution for subsection (2) of the following subsection:

“(2) Any person who contravenes the provisions of subsection (1) shall be guilty of an offence and liable on conviction to a fine [**not exceeding R1 500**] or to imprisonment for a period not exceeding [**one**] two years or to both such fine and such imprisonment if the person whose identity has been revealed is over the age of 18 years, and if such person is under the age of 18 years, to a fine or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment.”; and

(b) by the addition of the following subsection:

“(3) The provisions of section 300 are applicable, with the changes required by the context, upon the conviction of a person in terms of subsection (2) and if the person whose identity has been revealed suffered any physical, psychological or other injury or loss of income or support.”

4.5.7 Placing limits on questioning of witnesses

4.5.7.1 Current law

In South African law, the questioning of witnesses (cross-examination) is governed by the common law and ethical rules of professional conduct.¹²⁴ As far as the common law is concerned, it is important to note that the right to question a witness is not an absolute one as the right may be limited by the court where it appears to be unreasonable and a deliberate attempt to exhaust and humiliate a witness.¹²⁵ Questioning of a witness by a presiding officer is also limited.¹²⁶

4.5.7.2 Proposals in Discussion Paper 102

Several respondents to Issue Paper 10 and Discussion Paper 85 requested the Commission to consider whether it was possible to introduce limits on questioning of witnesses it perceived as being too harsh and often taking too long, particularly for young witnesses. This was seen as causing further trauma for the child without necessarily serving the ends of justice.

The respondents were of the opinion that despite the existence of ethical rules and extensive case authority on the limits of questioning and emphasis on the imperative of curial courtesy, the humiliation and intimidation of witnesses is a fairly common occurrence in South African courts. Respondents said that questioning often takes the form of attacking, either directly or indirectly, the character and credibility of the witness. The respondents concluded by saying that the very nature of questioning is to discredit a witness and although it needs not always be aggressive to be effective it frequently is.

Many victims in sexual assault cases said they find it harrowing to give evidence

¹²⁴ Rule 3.3 of the Uniform Rules of Ethics, for instance, sets out the duties of advocates regarding the cross-examination of witnesses. The rule states that questions that affect the credibility of a witness by attacking the character of that witness, but not otherwise relevant to the actual enquiry, ought not to be asked unless the cross-examiner has reasonable grounds for thinking that the imputation conveyed by the question is well-founded or true.

¹²⁵ See, e.g. **S v Rall** 1982 (1) SA 828 (A); **S v Gidi and another** 1984 (4) SA 537 (C); **K v Regional Court Magistrate NO and others** 1996 (1) SACR 434 (E); **S v Hendricks** 1997 (1) SACR 174 (C).

¹²⁶ **S v Rall** 1982 (1) SA 828 (A).

regarding the events. The negative experience is exacerbated by excessive questioning following the giving of evidence. This dramatically affects a witness's willingness to come forward and testify in court. South African law has responded by introducing a variety of measures to assist witnesses, and in particular children, in giving evidence.¹²⁷ While these measures are welcomed and should be developed further, they do not fully address the problems that excessive questioning pose for witnesses in the criminal justice system, particularly in relation to victims of sexual offences.

In Discussion Paper 102 the Commission entertained the following options in response to the problem of excessive questioning:

- Firstly, to introduce, in primary legislation, a prohibition on questions in cross-examination that are scandalous, insulting or vilifying.
- Secondly, to afford a witness, the accused or the State the right to object to questions which are scandalous, insulting or intended to annoy, or to the manner in which the cross-examination is being conducted.
- Thirdly, to prohibit accused persons without legal representation to directly question the complainant.
- Fourthly, to require co-accused persons only one opportunity to together as a collective pose questions to the victim, rather than each of them putting questions on the same point to the victim. However, the Commission concluded that each accused is entitled to put the same question to the witnesses. As such the Commission made no legislative recommendation in this regard in the discussion paper.
- Fifthly, to prohibit the unduly repetitive, intimidating or offensive questioning of witnesses. Further, that the witness, or the State, may object to such questions.

To give effect to these proposals, the Commission proposed the following amendment to section 166 of the Criminal Procedure Act, 51 of 1977:

¹²⁷ Such as the use of close-circuit television and the intermediary.

The amendment of section 166 of the **Criminal Procedure Act** by the addition of the following subsection:

“(4) If it appears to a court that any cross-examination contemplated in this section is scandalous, vilifying, insulting, unduly repetitive, needlessly annoying, intimidating or offensive, the court may, on its own initiative or upon objection from any witness, the prosecution or the defence, forbid the cross-examiner from pursuing such line of examination unless the examination, in that form, relates to a fact or facts in issue or to matters that require revelation in order to determine the existence or absence of a fact or facts in issue.”

4.5.7.3 Evaluation of comment

For ease of reference, comments received are evaluated under the following three headings:

- *Placing a prohibition on excessive and unduly repetitive questioning, and the right to object to such questions*

There was a clear division in the response to the suggestions¹²⁸ presented in discussion paper 102 where it was suggested that a prohibition be placed on excessive and unduly repetitive questioning of witnesses in the new Sexual Offences legislation. The division was most notably between those in the legal field and those providing direct services to victims.

Many of the legal academics and judges who responded to the proposed amendment to section 166 of the Criminal Procedure Act are not in favour of introducing a prohibition on the questioning of witnesses in primary legislation. On the other hand an entirely different view is expressed by the majority of respondents who work with victims of sexual offences at grass roots level who strongly support the proposed amendment to section 166 of the Criminal Procedure Act.¹²⁹

¹²⁸ This effectively covers discussion paper options 1, 2 and 5.

¹²⁹ Mr Koos Strauss (Rape Intervention Project GRIP); Silas I M Nawa (National Department of Education); Eastern Cape Network on Violence Against Women; F C Shaw (Welfare Forum Durban and South Region); Michael Mokwena (SAPS: Commander CSC); N Mbophane (Masonwabisa Women Support Centre; Nolitha Mazwai (Rape Crisis Cape Town); S.T.O.P (Standing Together to Oppose Pornography); Mmabatho Lesho; Thusanang Advice Centre; M Hakala (Dept. Of Social Services, chief social worker); Ms M Humn - Tshwaraganang Women Organisation; Ms M J Mmola (Maboloka HIV/AIDS Awareness Organisation); Prof. Coetzer; Mr P Mabuza; Ms I Filander; Dr K

Ms Leslie¹³⁰ is of the view that limits must be placed on the questioning of witnesses and child victims of sexual offences in particular. She says that it is important that the worth and dignity of a person, both victim and perpetrator, be respected. This will assist an accused person who has been framed and is found not guilty. Ms M Kemp¹³¹ is of the view that children are often exposed to secondary abuse by the justice system and that if we are serious in protecting our children and take their best interests at heart, the proposed changes need to happen with cross-examination. She therefore strongly supports the comments and recommendations made in Discussion Paper 102 to limit questioning of witnesses. In addition she makes the point that magistrates need to be trained in the emotional, psychological and social development of children in order to better understand the trauma experienced by the child in our present judicial system.

RAPCAN support the proposed amendment of section 166 as their experience has shown that defence lawyers will stop at nothing to assassinate the character of witnesses/victims in sexual assault cases. In addition, they feel that specific guidelines and training should be developed around the issue of appropriate cross-examination of children of different ages.¹³² Age-in-Action also supports the proposed amendment as in their opinion it will, to an extent, introduce more user friendly courts where people might feel free to testify. Ms C McClain¹³³ submits that the Law Society in a submission to the Human Rights Commission identified vigorous cross-examination to be most problematic. She recommends that the proposed amendment to section 166 of the Criminal Procedure Act be effected.

Advocates Meintjes and Henning, SC,¹³⁴ say that in the case of children and mentally impaired persons, it is imperative that the court should be alert to inappropriate questioning and that some action can and should be taken. Advocates Meintjes and Henning, SC, suggest that provision should also be made in the proposed amendment to prohibit questioning which is inappropriate given the level of development of the

Müller.

¹³⁰ SA National Council for Child and Family Welfare.

¹³¹ School Social Worker, Department of Education and Culture, KwaZulu Natal.

¹³² This is dealt with in Chapter 9 of the Report which deals with non-legislative recommendations.

¹³³ Commissioner: Human Rights Commission and member of the Project Committee on Sexual Offences.

¹³⁴ Office of the Director of Public Prosecutions: Transvaal.

witness being cross-examined.

The Western Cape joint submission¹³⁵ commend the Commission for recognising the need to limit cross-examination, but express concern that protection afforded by the proposed new section 166(4) of the Criminal Procedure Act, 51 of 1977 is insufficient as it is still left in the discretion of the court. They go on to say that the case law suggests that very often the presiding officer's themselves are equally if not more guilty of contributing to the traumatising of the complainant or other witnesses in sexual offence proceedings by virtue of the aggressive and insulting manner in which they as presiding officers relate to the witnesses. To remedy this alleged defect in the proposed amendment they suggest that the right a witness has to object to questions which are scandalous, insulting or intended to annoy, or to the manner in which the cross-examination is being conducted, will best be exercised if legislation will allow limited legal representation for *complainants* in sexual offence proceedings. Alternatively, witnesses need to be informed of their rights to object to excessive questioning and a positive duty be placed both on the prosecution and on presiding officers to ensure that witnesses are so informed.

Judges Bertelsmann, Van Heerden and Erasmus are of the view that cross-examination and questioning of witnesses cannot be addressed adequately by legislation. They say it is not necessary to empower the court to forbid certain forms of cross-examination as the common law is adequate. What is required, in their opinion, is the proper training of prosecutors, defence counsel and judicial officers.¹³⁶ The training of all legal practitioners, including presiding officers, is certainly required, and the Commission recommends that the organised legal profession, the Magistrates' Commission and the Chief Justice implement such training programmes as a matter of urgency.

Linda Dobbs QC questions whether it is necessary to legislate on cross-examination as the tribunal should have enough powers under trial management to deal with abuse of cross-examination and in appropriate cases to complain to the relevant professional

¹³⁵ By the Children's Rights Project, Community Law Centre, University of the Western Cape; the Department of Forensics and Toxicology, University of Cape Town; Gender, Law & Development Project, Institute of Criminology, University of Cape Town; Gender Project, Community Law Centre, University of the Western Cape Women's Legal Centre.

¹³⁶ This view was shared by many participants at the Gordon's Bay Expert Consultation.

body if such abuse amounts to misconduct. She goes on to raise the problem of having the prohibition on certain forms of cross-examination in law, but without a sanction.

The difficulty is that despite the existence of ethical rules and extensive case authority on the limits of cross-examination, the boundaries are often breached. Professor Schwikkard then suggests that the powers of the presiding officer should rather be bolstered to enable him or her to better exercise existing powers. The question is how this should be done. Dr K Muller, on the other hand, does not think that the proposed amendment will achieve much as often the problem with questioning is the language used. The defence can pose a question in a friendly manner, but can include language (double negative / peripheral detail etc.) that a (child) witness does not understand.

The proposed amendment to section 166 of the Criminal Procedure Act was based on a combination of existing prohibitions on cross-examination from other jurisdictions. To justify the incorporation of the clause prohibiting certain forms of questioning it is necessary to revisit the comparative research in Discussion Paper 102.

In the United Kingdom counsel's conduct is regulated by the Law Society's Code of Advocacy¹³⁷ in terms of which advocates conducting proceedings at court "must not make statements or ask questions which are **merely** scandalous or intended or calculated only to vilify, insult or annoy either a witness or some other person."¹³⁸ Further, advocates must not "suggest that a witness or other person is guilty of ... misconduct unless such allegations go to a matter in issue (including the credibility of the witness) which is material to their client's case and which appear to them to be supported by reasonable grounds."¹³⁹

In New Zealand the conduct of counsel during cross-examination is governed by the New Zealand Law Society Rules of Professional Conduct for Barristers and Solicitors.¹⁴⁰ Rule 10.02 provides that "counsel must not in the course of making submissions or

¹³⁷ Law Society of England and Wales <http://www.guide-on-line.lawsociety.org.za>

¹³⁸ Law Society's Code of Advocacy Annex 21A Part VII 7.1(e).

¹³⁹ Law Society's Code of Advocacy Annex 21A Part VII 7.1(h).

¹⁴⁰ New Zealand Law Society <http://www.nz-lawsoc.org.za> "About the NZLS" Rule 10.02 commentary 1.

cross-examining a witness say or lead a witness to say anything that might mislead the court. In particular counsel must not make any statement to the court or put any proposition to a witness that is not supported by reasonable instruction or that lacks factual foundation by reference to the information available to the court.”

The commentary to this rule explains that counsel has a particular duty when cross-examining not to put to the witness allegations in the form of questions which counsel knows that the witness does not have the necessary information or knowledge to answer, or where there is no justifiable foundation for the question.

In Victoria, Australia, section 39 of the Victorian **Evidence Act** 1958 empowers the court to forbid any questions or inquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the court, unless they relate to facts in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed.

In Queensland, section 21(1) and (2) of the **Evidence Act** 1997 deals specifically with cross-examination. It provides that:

“(1) A court may disallow a question which, in the opinion of the court, is indecent or scandalous unless the question relates to a fact in issue in the proceedings or to matters necessary to be known in order to determine whether or not the facts in issues existed.

(2) A court may disallow a question which, in the opinion of the court, is intended only to insult or annoy or is needlessly offensive in form.”

The **Evidence Act** 1906 of Western Australia (WA) goes further than the ethical rules in the United Kingdom in terms of which questions are permissible provided that the question is not **only** intended to vilify, insult or annoy. Section 26 of the **Evidence Act** 1906 (WA) empowers a court to forbid any question it regards as indecent or scandalous, although such question may have some bearing on the case before the court, unless the question relates to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issues existed or not. The court may also forbid questions which it regards as intended to insult or annoy, or are needlessly

offensive in form, notwithstanding that such question may be proper in itself.

In Germany¹⁴¹ the position is regulated by the **German Code of Criminal Procedure** (StPO). Paragraph §241a of the StPO stipulates that witnesses under the age of 16 years may be examined only by the presiding judicial officer alone (and not by the whole court). The aim of this section is not only to protect the child from psychological pressure as far as possible, but also to establish the truth more reliably. Other parties wanting to examine the child have to direct questions to the presiding judicial officer first, who in turn has to direct them to the child. The presiding officer may refuse to do so if the questions undermine the rationale of this section which is the protection of the child/juvenile witness. For example, the pressure would be too strong, the question does not contribute to finding the truth (irrelevance) or is not permitted for other reasons (inadmissibility).

In Germany, the court may assess the credibility of the child witness on its own without consulting an expert witness (psychologist).¹⁴² This happens especially if the testimony is clearly supported or dismissed by other testimonies, proofs or circumstances.¹⁴³ However, the specific circumstances of the case can require consultation. This is particularly the case if the child is younger than four and half years¹⁴⁴ or if the child behaves in an abnormal way.¹⁴⁵ According to §247 of the StPO, the court can order the accused to leave the court room during the examination to protect child and juvenile witnesses under the age of 16 years.

As in most other jurisdictions, it is a fundamental principle of the South African legal system that a criminal trial must be fair. In this regard, the Scottish Law Reform Commission found that since it is the accused who is on trial, this has led to an approach which has:

¹⁴¹ The entire section on Germany was translated and written by Mr R Pfaff (Magistrate) and Mr S Moser of the German Technical Cooperation (GTZ).

¹⁴² See BGHst (Bundesgerichtshof, Supreme Court of Appeal) 3, 52; *Neue Zeitschrift für Strafrecht* 198 at p 400; 1985 at p 420; 1997 at p 355.

¹⁴³ BGHSt 7 p 82 and p 85; BGH *Strafverteidiger* 1995 at p 115; Oberlandesgericht Köln, *Neue Juristische Wochenzeitung* 1966 at p 1183.

¹⁴⁴ Oberlandesgericht Zweibrücken *Strafverteidiger* 1995 at p 293.

¹⁴⁵ BGH *Strafverteidiger* 1991 at p 547.

“traditionally been answered only in relation to whether it is fair to the accused. Since the whole trial process is directed towards answering the question of whether or not the accused is guilty of the crime alleged, this is hardly surprising. There have, however, in recent times been increasing calls for attention to be paid to whether the court process is also fair to those other than the accused who are required to take part in it, namely those called witnesses, and in particular those who are the victims of the crime alleged”.¹⁴⁶

From the above comparative analysis it is clear that most common law jurisdictions following an adversarial court process struggle to find the right balance between allowing accused persons’ the opportunity to confront witnesses testifying against them and protecting the integrity and dignity of those witnesses. Questioning of witnesses is not always limited by means of legislation, but often through rules of practice. As for the Australian examples, it is clear that those provisions effectively restate our broad common law rule that questions put to witnesses must be relevant.

- *Questioning of the witness by the unrepresented accused*

The respondents in the Western Cape joint submission submit that it is wholly inappropriate for an unrepresented accused to cross-examine the complainant or any other vulnerable witness in sexual offence proceedings. Furthermore, they submit that the various protective measures either already in existence or proposed elsewhere in Discussion Paper 102 are not necessarily adequate to protect the complainant or other vulnerable witnesses in their current formulation. They give the example that even where a witness may be allowed to testify in camera, or in a separate room, unless the services of an intermediary are provided, the witness will still be required to hear and answer the unrepresented accused's voice, which in itself may be traumatising and negatively affect the witness's ability to testify. They question whether this can be in the interest of justice or the pursuit of the truth.

In regard to the questioning by an unrepresented accused, the respondents in the Western Cape joint submission are not in favour of the Commission's *alternative* proposal¹⁴⁷ that the court appoint a legal representative to conduct the cross-

¹⁴⁶ Scottish Executive Consultations **Redressing The Balance Cross-examination in Rape and Sexual Offence Trials A Pre-Legislative Consultation Document** at p 1. <http://www.scotland.gov.uk/consultations/justice/rtb-04.asp>

¹⁴⁷ See paragraph 38.6.5.5 of Discussion Paper 102.

examination in question on behalf of the unrepresented accused, as the court is only empowered to make such an appointment once it has been established that the State legal aid is available to pay for such representative. This enquiry, they say, may cause an unreasonable delay in the proceedings and the State legal aid may not be available to pay for the representative concerned. The essence of the argument is therefore that it is unlikely that legal representation at State expense will be available to or used by an accused for purposes of cross-examination only if the accused could not obtain such services to defend himself or herself in the first place.

In order to address their serious concerns regarding the questioning of a vulnerable witness by an unrepresented accused, the Western Cape joint respondents recommend that a provision echoing section 6(3) of the Domestic Violence Act¹⁴⁸ be inserted. Their proposal reads as follows:

“If in criminal proceedings involving the alleged commission of a sexual offence an accused is unrepresented, such accused shall not be entitled to cross-examine a vulnerable witness and shall put any question to such witness by stating the question to the court, or a court appointed intermediary, who shall repeat the question accurately to the witness, provided that the person through whom cross-examination takes place may refuse to relay questions that violates the dignity and privacy of the witness.”

From a comparative perspective, provisions prohibiting the cross-examination in person of complainants by persons accused of sexual offences is not uncommon.¹⁴⁹ Section 34 of the English Youth Justice and Criminal Evidence Act, 1999, for instance, reads as follows:

No person charged with a sexual offence may in any criminal proceedings cross-examine in person a witness who is the complainant, either

- (a) in connection with that offence, or
- (b) in connection with any other offence (of whatever nature) with which that person is charged in the proceedings.

¹⁴⁸ Act 166 of 1998.

¹⁴⁹ See also Law Commission of New Zealand **The Evidence of Children and Other Vulnerable Witnesses** (Preliminary Paper 26), par 144; Ainsley Thomson “Accused’s right to question examined” **The New Zealand Herald**, 7 November 2002.

- *Questioning on the same point by several co-accused*

Lastly, the Western Cape joint respondents state that while they accept that in multi-defendant cases each accused is entitled to his or her own defence, they submit that co-accused should not be entitled to pose the same questions to vulnerable witnesses merely as a tactic employed to confuse such witness. The reason for this is that such conduct is deliberately intended to further traumatise an already vulnerable witness thereby rendering him or her unable to give coherent testimony in circumstances where they would otherwise be able to do so. They are of the view that allowing the same questions by different co-accused persons to the same witness may lead to confusion or trauma of the witness, and that this scenario supports their argument for limited legal representation for the complainant as such representatives would be empowered to intervene and object to inappropriate cross-examination in circumstances where the courts and prosecution have been notoriously reluctant to do so. In their view legal representation for the complainant would ensure that the protective measures provided for in the proposed legislation are not merely applied but applied correctly.

4.5.7.4 Recommendation

Upon reflection, the Commission has decided not to limit the right of a party to question witnesses in sexual offences cases by an amendment to section 166 of the Criminal Procedure Act as was suggested in discussion paper 102. In our opinion, the common law, read with the professional rules of conduct, already adequately regulates questioning that is scandalous, insulting, unduly repetitive, intimidating or offensive. The defence, State and the court are obliged to protect their witnesses by objecting to such questioning by the opposing party. However, it is true that witnesses (and complainants in sexual offence cases in particular) are often inadequately protected; this highlights the need for ongoing training for prosecutors, defence attorneys and presiding officers.

It is conceded that witnesses do find it traumatising to be confronted directly by the unrepresented accused in cross-examination, but it in no way makes the experience any better in the hands of a skilful, experienced legal representative. Add to this the fact that the use of legal representation by an accused does not mean that the accused will not be in court – the mere presence of the accused in court inhibits some witnesses.

However, while the Commission is of the view that the protective measures provided for in the draft Bill will greatly improve the experience of witnesses testifying in criminal proceedings involving sexual offences, the Commission sees no harm in specifically providing that all questions must be put to the court and not the witness directly. This is provided for as an amendment to section 166 of the Criminal Procedure Act, 1977.

The Commission proposes the following amendment of section 166 of the Criminal Procedure Act, 51 of 1977:

The amendment of section 166 of the Criminal Procedure Act by the addition of the following subsection:

[(4) If it appears to a court that any cross-examination contemplated in this section or the manner in which it is conducted is scandalous or unduly repetitive, or is intended to vilify, insult, annoy, intimidate or offend, or is inappropriate given the level of development of the witness being cross-examined, the court may, on its own initiative or upon objection from any witness, the prosecution or the defence, forbid the cross-examiner from pursuing such line of examination unless the examination, in that form, relates to a fact or facts in issue or to matters that require revelation in order to determine the existence or absence of a fact or facts in issue.]

(4) An accused in criminal proceedings involving the alleged commission of a sexual offence who has no legal representation shall put any questions to a vulnerable witness as contemplated by section 16 of the Sexual Offences Act, 20.. (Act No. xx of 20..) by stating the question to the court, which shall repeat the question accurately to the witness.

The Commission is not persuaded by the arguments put forward by the Western Cape joint respondents to allow for limited legal representation for the complainant. The suggestion suffers from the same problems relating to the provision of State legal aid (lack of resources) and confuses the roles of witnesses and parties in court proceedings

in an adversarial court system. One must also be consistent: witnesses for the accused, which may include a co-accused, should then also be entitled to limited legal representation to protect them from vigorous cross-examination by the prosecutor.

Lastly, the Commission affirms its preliminary recommendation in Discussion Paper 102¹⁵⁰ not to limit the right of multiple co-accused to pose the same question to the same witness.

4.5.8 Witnesses to be notified of protective measures

4.5.8.1 Current law

Currently there is no provision in either the Sexual Offences Act or the Criminal Procedure Act providing that witnesses must be notified of what possible protective measures they may use while giving evidence in a criminal trial. The Commission took cognisance of the fact that the existing protective measures available to witnesses in the Criminal Procedure Act are not always effectively utilised, partly because witnesses are unaware of the existence of such measures.

4.5.8.2 Proposals in Discussion Paper 102

Discussion Paper 102 considered why the various protective measures (in the Criminal Procedure Act) are not as effective as they could be. The Commission found that it is a multi-faceted problem,¹⁵¹ but that in some respects the lack of effectiveness relates to a lack of knowledge by potential witnesses and a failure on the part of certain public prosecutors to inform witnesses of the availability of measures provided for under these sections. The lack of knowledge on the part of witnesses as to what protective measures they can access is a serious impediment and the Commission proposed the following three inter-related ways to solve this:

¹⁵⁰ Par 38.6.5.7.

¹⁵¹ See also Karen Hollely and Karin Müller 'The child witness: A need for court preparation' 1999 *Obiter* 368.

- * Introducing a witness notification system;
- * Training of court officials; and
- * Communicating information to prospective witnesses.

To ensure effective implementation, the Commission recommended in the discussion paper that the National Director of Public Prosecutions include in guidelines a positive duty on prosecutors to notify witnesses of the protective measures available. A failure in the duty would then give rise to disciplinary proceedings against the particular prosecutor.

The following clause was proposed in Discussion Paper 102:

Witness to be notified of protective measures

12. (1) The prosecution shall, prior to the commencement of criminal proceedings in which a person is charged with the alleged commission of a sexual offence, and where practicable, prior to bail proceedings, inform a witness who is to give evidence in that proceedings, or if such witness is below the age of eighteen years, such witness, his or her parent, guardian or a person *in loco parentis*, of the possibility that he or she may be declared a vulnerable witness in terms of section 13 and of the protective measures listed in paragraphs (a) to (g) of section 13(4).

(2) The court shall, prior to hearing evidence given by a witness referred to in subsection (1), enquire from the prosecutor whether the witness has been informed as contemplated in that subsection and shall note the witness's response in the court file, and if the witness indicates that he or she has not been so informed, the court shall ensure that the witness is so informed.

4.5.8.3 Evaluation of comment

Many respondents support the introduction of a witness notification programme.¹⁵² It was felt that such a programme would encourage witnesses to come forward and give

¹⁵² Silas I M Nawa (National Department of Education); Michael Mokwena (SAPS: Commander CSC); F C Shaw (Welfare Forum Durban and South Region); Eastern Cape Network on Violence Against Women; Koos Strauss (Rape Intervention Project GRIP); Judge van Heerden; RAPCAN; Mr Mabuza (Save the Children Sweden); Judge Bertelsmann; M Hakala (Dept. Of Social Services, chief social worker); Ms B J Matshego (probation officer, Dept. of Correctional Services); Dr K Müller (Vista University); Dr Coetzer; Thusanang Advice Centre; Ms M Humn - Tshwaranang Women Organisation; Ms M J Mmola (Maboloka HIV/AIDS Awareness Organisation); Mollie Kemp, School Social Worker, Department of Education and Culture, KwaZulu Natal; N Mbophane (Masonwabisane Women Support Centre).

evidence, and serve as an important communication tool between the court and the complainant as the latter will be aware of what is happening and what is expected of him or her and ensure the sharing of information.¹⁵³

One respondent feels that the provision was not necessary as the protective measures are already available to witnesses.¹⁵⁴

The Western Cape joint submission¹⁵⁵ commend the Commission for recognising the need to enact legislation requiring that witnesses in sexual offence proceedings be notified with regard to the availability of protective measures and the importance of placing a positive duty on both the prosecution and the presiding officer in this regard. They recommend that witness notification be linked to the time when such witness is to testify rather than the commencement of the criminal proceedings. Accordingly they recommend that subclause (1) be amended as follows:

“The prosecution shall inform a witness who is to give evidence in criminal proceedings in which a person is charged with the alleged commission of a sexual offence, or if such witness is below the age of eighteen years, such witness, his or her parent, guardian or a person *in loco parentis*, of the possibility that he or she may be declared a vulnerable witness in terms of section 13 and of the protective measures listed in paragraphs (a) to (g) of section 13(4) prior to such witness commencing with his or her testimony at any stage of the proceedings.”

They propose further that subclause (2) must make it clear that the court has a duty to enquire whether a witness has been informed of the possibility of being declared a vulnerable witness and of the protective measures associated therewith. The respondents state that the court must ensure that the witness is so informed, but must also apply its mind, prior to the commencement of the witness’s testimony, to whether or not such witness should be declared a vulnerable witness in terms of the provisions of

¹⁵³ Age-in-Action; Mmabatho Lesho; Nolitha Mazwai (Rape Crisis Cape Town); S.T.O.P (Standing Together to Oppose Pornography).

¹⁵⁴ Edmund Szndrauhi (Director Public Prosecutions KZN)

¹⁵⁵ The Children's Rights Project, Community Law Centre, University of the Western Cape; the Department of Forensics and Toxicology, University of Cape Town; the Gender, Law & Development Project, Institute of Criminology, University of Cape Town; the Gender Project, Community Law Centre, University of the Western Cape and the Women's Legal Centre.

clause 13, and, if so, what protective measures should be applied.

4.5.8.4 Recommendation

The Commission is satisfied that clause 15 read with clause 16 gives effect to the proposal made by the Western Cape joint submission. While the primary duty to inform witnesses and to keep them informed would rest upon the prosecutor, the Commission thinks it prudent to build in a safety-net in subclause (2). In terms of this subclause the court must, before it hears the evidence of a witness, enquire from the prosecutor whether the witness was informed of the right to be declared vulnerable and of the protective measures available.

The Commission accordingly recommends that the following clause be incorporated in the proposed Sexual Offences Bill:

Witness to be notified of protective measures

15. (1) The prosecution shall **[prior to the commencement of criminal proceedings in which a person is charged with the alleged commission of a sexual offence, and where practicable, prior to bail proceedings,]** inform a witness who is to give evidence in **[those] criminal proceedings in which a person is charged with the alleged commission of a sexual offence,** or if such witness is **[below the age of eighteen years,] a child,** such **[witness] child,** his or her parent, guardian or a person *in loco parentis*, of the possibility that he or she may be declared a vulnerable witness in terms of section **[13] 16** and of the protective measures listed in paragraphs (a) to (g) of section **[13] 16(4) prior to such witness commencing with his or her testimony at any stage of the proceedings.**

(2) The court shall, prior to hearing evidence given by a witness referred to in subsection (1), enquire from the prosecutor whether the witness has been informed as contemplated in that subsection and shall note the witness's response **[in the court file] on the record of the proceedings,** and if the witness indicates that he or she has not been so informed, the court shall ensure that the witness is so informed.

CHAPTER 5

EVIDENTIARY ISSUES RELATING TO SEXUAL OFFENCES

5.1 Introduction

In this Chapter the Commission considers certain evidentiary issues relating to sexual offences. These include aspects of the cautionary rules, the rules of corroboration, evidence of previous consistent statements and the first opportunity rule, evidence of the psycho-social effects of sexual offences, character evidence, evidence of previous sexual history, similar fact evidence, and disclosure of personal records.

5.2 Abolition of cautionary rules

5.2.1 Proposals in Discussion Paper 102

In Discussion Paper 102 the Commission discussed the cautionary rules applicable to complainants in sexual offence cases, single witnesses and children. The so-called cautionary rules require presiding officers to exercise extra caution before accepting the evidence of certain witnesses on the grounds that such evidence is inherently potentially unreliable.¹ The following cautionary rules were discussed:

- **Complainants in sexual offence cases**

The Supreme Court of Appeal² has removed the *obligation* to treat evidence of victims of sexual offences with caution, though the *discretion* to do so remains. Accordingly the Commission recommended in Discussion Paper 102 that a clause providing for the abolition of the cautionary rule in sexual offence cases should be included in the Sexual Offence Act.

¹ See also Saras Jagwanth and PJ Schwikkard 'An unconstitutional cautionary rule' (1998) 11 **SACJ** 87 on the constitutionality of the cautionary rule applicable to sexual offences.

² **S v Jackson** 1998 (1) SACR 470 (SCA).

- **Child witnesses**

The Commission could find no proof that children are prone to lie more than adults, that they have more sexual fantasies than adults or that they have more motive than adults to lay false charges. The Commission recommended that as the cautionary rule relating to children is so entrenched in the daily application of law in our courts, the proposed Bill should clearly state that this rule should no longer be applied.

- **Single witnesses**

Section 208 of the Criminal Procedure Act, 51 of 1977 provides that an accused may be convicted of any offence on the single evidence of any competent witness. The law is clear on this point, yet the testimony of single witnesses (especially in sexual offence matters) has mostly been treated with the utmost caution. The Commission opined that the court should have the opportunity of weighing the evidence of the single witness, without first cautioning itself of the fact that the witness is a single witness, and should consider its merits and demerits and, having done so, should decide whether it is satisfied that the truth has been told.

The Commission therefore recommended that the Sexual Offences Bill should clearly state that this rule should no longer be applied.

In order to give effect to the above recommendations the following clause was included in the draft Bill:

Abolition of cautionary rule

20. Notwithstanding the provisions of the common law, any other law or any rule of practice, a court may not treat the evidence of a witness in criminal proceedings involving the alleged commission of a sexual offence pending before that court with caution merely because that witness is -

- (a) the complainant in such proceedings;
- (b) less than 18 years of age; or
- (c) the only witness to the offence in question.

5.2.2 Evaluation of comment

A few respondents argue that this clause should be deleted from the Bill in its entirety.³ Attorney Francois Luyt stated that the ratio for the rules seems to have been misunderstood and that although the cautionary rules may need to be refined, they do not need to be abolished. However the bulk of the submissions received support the inclusion of the above provision.⁴ This recommendation is specifically endorsed in the Report of the Parliamentary Task Group on the Sexual Abuse of Children.

Ms Helen Alexander, the Legal Advocacy Co-ordinator at SWEAT, explains that to allow judicial officers discretion to apply the cautionary rules in certain sexual offence cases would be unfair and result in diverse applications of this discretion. Ms Alexander specifically states that she is concerned that if allowed this discretion, judicial officers would use it in cases where the complainant is perceived to fall into a certain category, for example, sex workers. She opines that there is no justification for assuming that all sex workers are unreliable or that they are liable to lie and that the reliability of each witness should be ascertained according to the normal procedures without the judicial officer having to be cautioned.

Certain respondents argue that the cautionary rule as applied to single witnesses should be retained.⁵ The Law Society of the Cape of Good Hope argues that depending on the

³ Edmund Szundrahi, DPP, KwaZulu-Natal; Silas I M Nawa, National Department of Education.

⁴ Adv R Meintjes and Adv Henning SC, Office of the Director of Public Prosecutions: Transvaal; Ms Combrinck, Gordon's bay expert consultation; Mollie Kemp, School Social Worker, Department of Education and Culture, KwaZulu-Natal; Lulama Nongogo & Teboho Maitse, Commission on Gender Equality; Dr Johanna Kehler, Project Director (Acting), Nadel Human Rights Research & Advocacy Project; Helen Alexander, Legal Advocacy Co-ordinator, SWEAT; Carol Bower, Executive Director, Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN); Prof P.W.W. Coetzer, Chief Specialist Medunsa; Mr Prometheus Mabuza, Save the Children, Sweden; Dr Katrin Muller, Gauteng Health Department, Chief Medical Officer; Ms Irene Filander, Social Worker, Child Welfare, Vereeniging; CGE Umtata workshop; Ms Mokgabi Mmola, Maboloka HIV/AIDS Awareness Organisation (MAHAAO); Koos Strauss, Rape Intervention Project GRIP; Ntomoboxolo Dyantjie, Provincial Coordinator, Eastern Cape Network on violence Against Women; Michael Mokwena, SAPS: Commander CSC; N Mbophane, Masonwabisane Women Support Centre; Standing Together to Oppose Pornography (STOP); Thusanang Advice Centre; Ms M Humn, Tshwaraganang Women Organisation; Nolitha Mazwai, Rape Crisis Cape Town; FC Shaw, Welfare Forum Durban and South Region; M Hakala, Chief Social Worker, Department of Social Services; and representations from Mabopane.

⁵ Judge Eberhard Bertelsmann, Pretoria High Court; Judge Belinda van Heerden, Cape High Court; Dr Karen Müller, Vista University, Department of Procedural Law; joint submission by the Children's Rights Project, Community Law Centre, University of the Western Cape; Department of Forensics and Toxicology, University of Cape Town; Gender, Law & Development Project, Institute of

circumstances of each case there may be justifiable reasons to treat a single witness with caution. Dr Karen Müller agrees and opines that it would be discriminatory to grant sexual complainants this advantage over other single witnesses.

Proffs J Burchell and PJ Schwikkard of the Department of Criminal Justice, University of Cape Town, submit jointly that the merit of each cautionary rule should be dealt with separately. They argue that the cautionary rule applicable to sexual offences has already been abolished; that the cautionary rule in relation to children should be abolished in all cases and not just in relation to sexual offences and lastly that the single witness rule has a separate rationale and should be retained.⁶

In its Report on the Preliminary Investigation into the Review of the Rules of Evidence,⁷ the Commission states that although it can be argued that the cautionary rule applicable to complainants in sexual offences cases has already been abolished by the Supreme Court of Appeal in **S v Jackson**, there can be no harm in giving legislative confirmation to the fact that the common law has been repealed. Legislative confirmation may have a significant normative value. In relation to the cautionary rule applicable to children the Report on the Preliminary Investigation into the Review of the Rules of Evidence recommends that it would be in the interests of logic and consistency that this rule be abolished in respect of all offences.

With regard to the recommendation that the cautionary rule applicable to single witnesses be abolished, the Report on the Preliminary Investigation into the Review of the Rules of Evidence,⁸ submits that the Commission has arrived at this conclusion through the conflation of the cautionary rules applicable to complainants in sexual offence cases, children and single witnesses. It further states that the cautionary rules applicable to sexual complainants and children are flawed in that their existence is largely attributable to an irrational belief as to the mendacity of such witnesses. On the other hand, it notes, that the single witness rule is not based on the premise that a

Criminology, University of Cape Town; Gender Project, Community Law Centre, University of Western Cape; Women's Legal Centre.

⁶ Their submission is supported by the discussions held at the Gordon's Bay Expert Consultation.

⁷ Report on the Preliminary Investigation into the Review of the Rules of Evidence, Project 126, The Review of the Rules of Evidence June 2002.

⁸ At page 26.

certain category of witness is more mendacious than any other, rather it constitutes a recognition of the difficulties in assessing credibility in the absence of an independent measure. The above Report concludes that there can be no justification for abolishing the cautionary rule applicable to single witnesses in relation to sexual offences only.

In the Western Cape joint submission⁹ it is submitted that although the obligation to apply the cautionary rules in relation to sexual offence matters may no longer exist, the discretion to apply the rules still does. They therefore endorse the clear abolition of the cautionary rules relating to sexual offence victims and children. However they suggest that the cautionary rule in relation to single witnesses should not be tampered with. They argue that the constitutional arguments and the allegations that the cautionary rule as applicable to women is discriminatory on the basis of sex or gender would not be an argument which could readily be used in relation to the cautionary rule in respect of single witnesses. They further contend that the single witness position is different and would not amount to discrimination and even if so, would probably fall within the limitation clause and amount to a “reasonable and fair” limitation in terms of section 36 of the Constitution.

In evaluating the recommendations contained in Discussion Paper 102 which underpin this clause, the Commission *inter alia* has reassessed the significance of the judgement in the **Jackson** case and subsequent cases dealing with the application of the cautionary rules which relate to sexual offence matters. In relation to the cautionary rule in sexual offence matters the **Jackson** case clearly states that “the evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule”. The case confirms that a complainant’s evidence should not be treated with caution merely because of the nature of the offence and that the application of caution would need to be preceded by an evidential basis for suggesting that the witness may be unreliable. This position has been confirmed in subsequent cases.¹⁰ The Commission is of the opinion that a discretion to apply caution where it is warranted does not amount to the retention of a residual cautionary rule

⁹ The Children’s Rights Project, Community Law Centre, University of the Western Cape; the Department of Forensics and Toxicology, University of Cape Town; the Gender, Law & Development Project, Institute of Criminology, University of Cape Town; the Gender Project, Community Law Centre, University of Western Cape, and the Women’s Legal Centre.

¹⁰ **S v M** 1999 (2) SACR 548 (SCA); **S v M** 2000 (1) SACR 484 (W).

allowing a presiding officer to generally apply the rule if he or she should so decide. The Commission is of the opinion that although the abovementioned developments clearly do not necessitate legal reform, there can be no harm in giving legislative confirmation to the repeal of the common law. The Commission recommends that this confirmation be retained in the Sexual Offence Bill as is proposed in clause 20.

The Commission confirms its finding in relation to the general cautionary rule applied to the testimony of children. It is still of the opinion that the general application of this rule of practice is inherently discriminatory in that children are disadvantaged merely on the basis of their age. This recommendation is largely aimed at terminating the general application of this cautionary rule in cases where it is applied as a result of out-dated beliefs regarding the cognitive ability and credibility of children. The Commission is mindful though that children are not miniature adults and agrees with Prof Schwikkard¹¹ that the formal jettisoning of this cautionary rule on its own is unlikely to improve the quality of fact-finding where presiding officers have not been subjected to intensive education campaigns around the stages and issues of child development.

As is succinctly argued above, the Commission recommends that in the interests of logic and consistency legislation should provide that the cautionary rule applicable to children no longer applies in respect of all offences and not just in relation to sexual offence matters. Drawing a distinction between child victims generally and child victims of sexual abuse would be artificial.

A strong argument is made out above against tampering with the cautionary rule on single witnesses. To reiterate, Professor Schwikkard states that the rule on single witnesses is based on a separate rationale i.e. it constitutes recognition of the difficulties in assessing credibility in the absence of an independent measure. The Western Cape joint submission also states that the position in relation to single witnesses is different from the cautionary rules in relation to victims of sexual offences and children. The joint submission argues that treating a single witness with caution would not amount to discrimination and even so, would probably fall within the limitation clause and amount to a “reasonable and fair” limitation in terms of section 36 of the Constitution. Additionally it

¹¹ PJ Schwikkard ‘The abused child: A few rules of evidence considered’ (1996) **Acta Juridica** at 155.

could be argued that attempting to draw a distinction between single witnesses generally and a single witness in a sexual offence matter would be artificial.

It is the view of the Commission that the recent development of our case law confirms that a presiding officer may not caution him or herself as a matter of course. For instance in **S v Sauls**¹² it was held that the exercise of caution must not be allowed to displace the exercise of common sense and further that the court should weigh the evidence of the single witness and should consider its merits and demerits and, having done so, should decide whether it is satisfied that the truth has been told. Kirk-Cohen J found in **Director of Public Prosecutions v S**¹³ that the proper judicial approach is not to insist on the application of the cautionary rules but to consider each case on its own merits.

The Commission is mindful of the fact that a particular case may call for a cautionary approach and submits that by legislating against the general use of the cautionary rules applied to sexual offence complainants and children that the court will not be precluded from following a cautionary approach where necessitated to. The Commission therefore recommends that legislative confirmation should be given to recent case law which has established that the cautionary rules of practice should not be applied as a matter of rote.

5.2.3 Recommendation

The Commission thereby recommends that a provision be included in the proposed Bill to preclude the automatic application of the cautionary rules pertaining to sexual offence victims and children and further extends the application of the proposed clause to all children.

For the wording of the clause, see par 5.3.3 below.

¹² 1981 (3) SA 172 (A) at 180.

¹³ 2000 (2) SA 711 (T).

5.3 Abolition of rules of corroboration

5.3.1 Proposals in Discussion Paper 102

In Discussion Paper 102 the Commission averred that presiding officers mostly insist that the testimony of children be corroborated in both civil cases and criminal prosecutions. The Commission argued that in sexual offence matters this is rarely possible as children are generally abused in secret, without the presence of other witnesses to substantiate the child's evidence. Observable injury or distress is not always evident and delay in the child complaining is common¹⁴ – with the result that medical evidence implicating the accused person is often non-existent.

The Commission asserted that in recent years research had been published which challenged the conventional views regarding the unreliability of children's testimony. The Commission cited research by psychiatrists and psychologists who demonstrated in empirical studies that the memory of children is as accurate as that of adults, that children do not lie more than adults, and that children can discern fact from fantasy particularly in the context of acts of abuse.

The Commission concluded its assessment of the law in relation to corroboration by stating that although there is no requirement as a matter of law that the evidence of children has to be corroborated, in practice some form of corroboration is routinely required. The Commission recommended the inclusion of a provision clearly prohibiting the application of the rules of corroboration. Clause 21 of the proposed Bill read as follows:

Abolition of rules of corroboration

21. (1) Any rule of law or practice requiring the corroboration of evidence or requiring the presiding officer in criminal proceedings to remind himself or herself that it is dangerous to convict a person on the uncorroborated evidence of a witness is abolished to the extent that such rule applies to or in relation to evidence given by the complainant in criminal proceedings involving the alleged commission of a sexual

¹⁴ On delayed criminal prosecutions for childhood sexual abuse and the need for corroboration, see Lewis and Mullis 'Delayed criminal prosecutions for childhood sexual abuse: Ensuring a fair trial' (1999) 115 *LQR* 265; Mike Redmayne 'A corroboration approach to recovered memories of sexual abuse: A note of caution' (2000) 116 *LQR* 147.

offence.

(2) Nothing in this section shall be construed as affecting the power of the presiding officer in criminal proceedings involving the alleged commission of a sexual offence to make observations regarding the unreliability of any evidence.

5.3.2 Evaluation of comment

Whilst acknowledging the concern voiced by the Commission in this regard, the participants at the Gordon's Bay expert consultation indicated that the use of the word 'abolish' was incorrect as the rule of corroboration is a rule of practice and not a rule of law.

A few respondents submit that they are not in favour of the proposed clause.¹⁵ Judge Bertelsmann opines that this is an education and training issue and that legislation is not the appropriate vehicle to use to address this problem. Judge Van Heerden agrees and states that the solution lies in proper training of judicial officers to correctly apply the rules of evidence.

In its Report on the Preliminary Investigation into the Review of the Rules of Evidence, the Commission opines¹⁶ that this clause would appear to be superfluous as corroboration is only required in one instance, i.e. where a conviction is sought on the basis of the evidence of a single confession. In the Report the Commission submits that the normative value of legislating in this regard would appear to be minimal as there have been no corroboration requirements for over 20 years.

The majority of the respondents note their support of the clause.¹⁷ Advocates Meintjes and Henning SC state that the abolition of the rule of corroboration follows naturally

¹⁵ Judge Belinda van Heerden, Cape High Court; Mr Prometheus Mabuza, Save the Children, Sweden; Judge Eberhard Bertelsmann, Pretoria High Court; Proffs J Burchell & PJ Schwikkard, Department of Criminal Justice, University of Cape Town; Michael Mokwena, SAPS: Commander CSC; Silas I M Nawa, National Department of Education; Mmabatho Lesho; and Edmund Szndrauhi, DPP, Kwazulu-Natal.

¹⁶ Report on the Preliminary Investigation into the Review of the Rules of Evidence, Project 126, The Review of the Rules of Evidence June 2002.

¹⁷ Prof P.W.W. Coetzer, Chief Specialist Medunsa; Dr Karen Müller, Vista University, Department of Procedural Law; Carol Bower, Executive Director, Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN); Ms Mokgabi Mmola, Maboloka HIV/AIDS Awareness Organisation (MAHAAO); Koos Strauss, Rape Intervention Project GRIP; Ntomoboxolo Dyantjie, Provincial

since corroboration together with caution might still be called for unduly. They suggest grammatical amendments to clause 21 and propose that subclause 2 be deleted as it is unnecessary. They also suggest that clause 21 be combined with clause 20 which provides for the abolition of the cautionary rules.

The Western Cape joint submission endorses the recommendation made by the Commission that the corroboration requirement be abolished. However, they agree with the submission made above that subclause (2) be excluded from the formulation of the clause. They argue that rules relating to relevance apply to all evidence and judicial officers are required to assess relevance on this basis. Further that the inclusion in this provision may lead to judicial officers concluding that because there is no corroboration, the evidence is unreliable. They also argue that if evidence is unreliable, a basis for such unreliability should be argued and should not in any way relate to corroboration.

In the above joint submission the statement is made that the courts often look for corroboration even though it is not formally required. They illustrate their argument by mentioning the recent case of **S v Nqsuma and Another**¹⁸ where the court *inter alia* held that -

“It is always dangerous to rely on the uncorroborated evidence of a child. That does not mean that a court can never convict on the evidence of a child. Corroboration can be found in the evidence of another child . . . Corroboration can also be found in the untruthful evidence of the accused if those lies cannot be explained for another reason . . . Especially lies directly connected to evidence material to the commission of the offence or identification will be important.”¹⁹

The Commission concedes to the fact that the use of corroboration is as a result of the application of a rule of practice and not a rule of evidence and that the use of the word

Coordinator, Eastern Cape Network on violence Against Women; N Mbophane, Masonwabisane Women Support Centre; Standing Together to Oppose Pornography (STOP); Thusanang Advice Centre; Ms M Humn, Tshwaraganang Women Organisation; Nolitha Mazwai, Rape Crisis Cape Town; FC Shaw, Welfare Forum Durban and South Region; M Hakala, Chief Social Worker, Department of Social Services; Age-in-Action; joint submission by the Children’s Rights Project, Community Law Centre, University of the Western Cape; Department of Forensics and Toxicology, University of Cape Town; Gender, Law & Development Project, Institute of Criminology, University of Cape Town; Gender Project, Community Law Centre, University of Western Cape; Women’s Legal Centre; and representations from Mabopane.

¹⁸ 2001 (1) SACR 408 (T).

¹⁹ At 412 A-D.

'abolish' was incorrect. In the ideal circumstances it also grants that the correct application of this rule of practice could be brought about by way of training and in certain instances re-training of presiding officers. However, current reality indicates that the application of the corroboration warning rule for child victims makes successful prosecution a difficult task. The Commission is aware of the complexities involved in training judicial officers and is not satisfied that recommending training in this regard will address the current application of this rule of practice. Internationally examples abound of legislative confirmation that specifically where a person is tried for a sexual offence or an offence in relation to a child, no corroboration of the complainant's evidence is necessary for that person to be convicted.

Research undertaken in Victoria (Australia) and in Western Australia supports the conclusion that the lack of corroborative evidence in cases where the victim is a young child results in many cases not proceeding to prosecution. It would be fair to suggest that this is also the case in South Africa. Despite the fact that corroboration is in fact a rule of practice the **Australian Capital Territory Evidence Act, 1971**²⁰ has subsequently abolished the rule of practice requiring children's evidence to be corroborated. So too the Law Reform Commission of Victoria²¹ has recommended that the corroboration warning rule be abolished. The Western Australia Consolidated Acts **Evidence Act 1906**,²² the New Zealand **Evidence Act, 1908**, all American States and Canada²³ have also abolished this rule of practice.

5.3.3 Recommendation

The Commission recommends that the essence of the clause prohibiting the use of corroboration as a matter of rote in relation to sexual offences and matters relating to children should be retained. It further recommends that clauses 20 and 21 be combined with the necessary amendments required. The Commission is of the opinion that

²⁰ Section 64.

²¹ **Report No. 18 Sexual Offences against Children**, para 236 – 242 and Recommendation 33(b).

²² <http://www.austlii.edu.au/au/legis/wa/consol>.

²³ Bronwyn Naylor 'Dealing with child sexual assault: Recent developments' (1989) 29(4) **British Journal of Criminology** 395 – 407.

prohibiting the incorrect application of this rule of practice in legislation will have a dual educative and confirmatory effect.

Our proposal in this regard reads as follows:

[Abolition of cautionary rule] Application of caution and requirement for corroboration

20. Notwithstanding the provisions of the common law, any other law or any rule of practice, a court **[may]** shall not treat the evidence of a witness in criminal proceedings **[involving the alleged commission of a sexual offence]** pending before that court with caution and shall not call for corroboration of evidence merely because that witness is -

- (a) the complainant **[in such proceedings]** of a sexual offence; or
- (b) **[less than 18 years of age]** a child. [or
- (c) **the only witness to the offence in question.**]

5.4 Evidence of previous consistent statements and evidence of period of delay between sexual offence and laying of complaint

5.4.1 Current law

The common law rule against ‘narrative’ or ‘self-corroboration’ essentially prohibits the admission of statements that were made by witnesses prior to their giving evidence during a criminal trial. One of the exceptions to this rule includes the admission of evidence that the complainant in a sexual case made a complaint soon after the alleged offence, the so-called “first report”. Where the complainant did not make a statement at what is regarded as “the first reasonable opportunity”, the defence usually advances the argument that a negative inference should be drawn about the credibility of the complainant: if the sexual offence were really committed, the complainant would have filed a complaint as soon as possible.

5.4.2 Proposals in Discussion Paper 102

In the discussion paper, it is stated that the fact that a negative inference is accepted at all by the courts reflects assumptions about the psychological effects of rape and other sexual offences and the conduct expected of a 'reasonable' complainant which are not borne out by recent empirical studies in this area. It was noted that it is now widely recognised that there are many psychological and social factors which may inhibit a complainant from reporting a sexual offence 'at the first reasonable opportunity'. This militates against the theory that the absence of an earlier complaint should, of necessity, have a negative bearing on the reliability of the complainant.

The Commission noted that there had been some recognition by the courts of the invalidity of the assumption that 'no earlier report means there was nothing to report'. It consequently recommended that provisions be included in the Sexual Offences Bill that clearly states that such a negative inference may not be drawn only from the absence of a complaint or a delay in making the complaint but that it should only be one of the factors the presiding officer should consider in weighing up the evidence. This recommendation would thereby retain the present requirement that a complaint must have been made at the first reasonable opportunity, which may result in evidence about the complaint not being admissible and therefore not being placed before court - this would result in the 'absence of a complaint' for purposes of trial evidence. On the other hand, it eliminates a negative inference based *solely* on the timing of the complaint. (It would be problematic to state that the court may never draw a negative inference, since this would interfere with a trial court's broad powers to evaluate evidence.)

Accordingly the following clauses were introduced into the proposed Bill in Discussion Paper 102:

Evidence of previous consistent statements

17. Evidence relating to relevant previous consistent statements by a complainant shall be admissible in criminal proceedings at which an accused is charged with a sexual offence: Provided that no inference may be drawn only from the fact that no such previous statements have been made.

Evidence of period of delay between sexual offence and laying of complaint

19. In criminal proceedings at which an accused is charged with a sexual offence, the court shall not draw any inference only from the length of any delay between the alleged commission of a sexual offence and the laying of the complaint in connection with such offence.

5.4.3 Evaluation of comment

- **Evidence of previous consistent statements**

A number of respondents indicate their support of the inclusion of this provision in the draft Bill.²⁴ A few respondents oppose the inclusion of this clause and state respectively that the common law is adequate²⁵ and that this clause is unacceptable as it amends the normal rules of evidence.²⁶

The SOCA Unit of the National Prosecuting Authority argues that although this clause does not add to the common law position, it should be retained in the draft Bill. Advocates Meintjes and Henning SC state that the clause should be expanded so as to allow more than one previous consistent statement in line with the process of disclosure. They also suggest that clauses 17 and 19 be combined or should follow each other as they deal with related aspects.

In a different vein Professors Burchell and Schwikkard recommend that the exception relating to sexual offence matters be abolished but that the common law exception application in relation to allegations of recent fabrication be retained. In Prof

²⁴ Judge Belinda van Heerden, Cape High Court; Dr Karen Müller, Vista University, Department of Procedural Law; Prof P.W.W. Coetzer, Chief Specialist Medunsa; Mr Prometheus Mabuza, Save the Children, Sweden; Ms Irene Filander, Social Worker, Child Welfare, Vereeniging; Carol Bower, Executive Director, Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN); Koos Strauss, Rape Intervention Project GRIP; Ntomoboxolo Dyantjie, Provincial Coordinator, Eastern Cape Network on violence Against Women; Michael Mokwena, SAPS: Commander CSC; Silas IM Nawa, National Department of Education; N Mbophane, Maonwabisane Women Support Centre; Standing Together to Oppose Pornography (STOP); Ms MJ Mmola, Maboloka HIV/AIDS Awareness Organisation (MAJAAO); Thusanang Advice Centre; Ms M Humn, Tshwaraganang Women Organisation; Ms BJ Matshego, probation officer, Department of Safety Services and Correctional Supervision.

²⁵ Judge Eberhard Bertelsmann, High Court, Pretoria.

²⁶ Law Society of the Cape of Good Hope; Edmund Szndrauhi, Director of Public Prosecutions, KZN.

Schwikkard's opinion the present rationale for retaining this evidentiary practice is rooted in the belief that it is a product of centuries of judicial experience, which has shown that the evidence of a complainant in a sexual offence case must be treated with suspicion. Consequently, in order to overcome this suspicion, the courts should be permitted to take previous consistent statements into account. She states that the negative inference that may be drawn from the complainant's failure to complain timeously reflects attitudes formulated at a time when there was little understanding of the psychology of the rape survivor. She concludes that as the absence of a complaint is an unreliable criterion for assessing credibility and that from the accused's point of view such evidence is very easy to manufacture, the retention of this evidentiary provision is difficult to comprehend. She opines that by abolishing this exception but at the same time retaining the exception of admitting previous consistent statements where it is suggested that a witness's story is a recent invention, will ensure that adjudicators are not deprived of relevant evidence. This approach would be similar to the measures adopted in Canada and the Australian Capital Territories.

Prof Schwikkard also points out that the admission of a previous consistent statement in a sexual offence case will never be considered as corroborative evidence as this would clearly infringe the rule against self-corroboration.

- **Evidence of period of delay between sexual offence and laying of complaint**

As noted above in relation to clause 17, a number of respondents indicate their support of a clause of this nature.²⁷ RAPCAN emphasises the importance of such a provision and submits that a victim of sexual assault is frequently only able to lay charges once

²⁷ Judge Belinda van Heerden, Cape High Court; Dr Karen Müller, Vista University, Department of Procedural Law; Prof P.W.W. Coetzer, Chief Specialist Medunsa; Mr Prometheus Mabuza, Save the Children, Sweden; Ms Irene Filander, Social Worker, Child Welfare, Vereeniging; Carol Bower, Executive Director, Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN); Koos Strauss, Rape Intervention Project GRIP; Ntomoboxolo Dyantjie, Provincial Coordinator, Eastern Cape Network on violence Against Women; Michael Mokwena, SAPS: Commander CSC; N Mbophane, Masonwabisane Women Support Centre; Standing Together to Oppose Pornography (STOP); Ms MJ Mmola, Maboloka HIV/AIDS Awareness Organisation (MAJAAO); Thusanang Advice Centre; Ms M Humn, Tshwaraganang Women Organisation; Ms BJ Matshego, probation officer, Department of Safety Services and Correctional Supervision; Age-in-Action; Mmabatho Lesho; Ms Suchilla Leslie, National Programme Manager Child Protection, SA National Council for Child Welfare; joint submission by the Children's Rights Project, Community Law Centre, University of the Western Cape; Department of Forensics and Toxicology, University of Cape Town; Gender, Law & Development Project, Institute of Criminology, University of Cape Town; Gender Project, Community Law Centre, University of Western Cape, Women's Legal Centre.

the victim has had time to process what has occurred. In the Western Cape joint submission it is submitted that legislative intervention is required as in their opinion the courts have been drawing negative inferences and attaching undue weight to the delay between the commission of the offence and the reporting thereof.

Although in favour of such a provision, the Law Society of the Cape of Good Hope recommends that the phrase “shall not draw” should be replaced with “may not draw”. The Law Society argues that the burden should be removed from the court as it may have justifiable reasons to act contrary to the rules of evidence.

Advocates Meintjes and Henning SC propose that the words “laying of complaint” be substituted with the words “reporting thereof”. They confirm their recommendation made in relation to clause 17 that clause 17 and 19 should be combined. The latter recommendation is endorsed by other respondents.²⁸

5.4.4 Recommendation

The Commission is of the opinion that by abolishing the exception relating to sexual offence matters and legislating that previous consistent statements in sexual offences are made subject to the general common law rule that such statements are irrelevant except to rebut an allegation of recent fabrication, would result in the inadmissibility of a first report during the leading of the complainant’s evidence. The Commission concedes that the origin of the common law exception, as pointed out by Professor Schwikkard, is unacceptable. However, the rule has evolved and today evidence as to the first report is routinely admitted when the State presents its evidence-in-chief. To avoid any possible confusion, the Commission recommends that the Bill clearly provide that no negative inference be drawn solely from the fact that a previous consistent statement does not exist.

As was suggested by Advocates Meintjes and Henning SC, the Commission recommends that clauses 17 and 19 be replaced by a single provision which is to provide that no inference should be drawn only from any delay between the commission

²⁸ Proffs J Burchell & PJ Schwikkard, Department of Criminal Justice, University of Cape Town; Judge Belinda van Heerden, Cape High Court.

of the sexual offence and the laying of the complaint or from the fact that no previous consistent statements were made.

The amended clause reads as follows:

Evidence of previous consistent statements and delay in reporting

18. A court, in criminal proceedings involving the alleged commission of a sexual offence, may not draw any inference only from –

(a) the fact that no previous consistent statements have been made;

(b) the length of any delay between the alleged commission of such offence and the reporting thereof.

5.5 Evidence of the psycho-social effects of sexual offences

5.5.1 Proposals in Discussion Paper 102

In Discussion Paper 102 the Commission submitted that the purpose of expert testimony in sexual offence cases should not only be to assist the court in understanding the experiences of sexual offence complainants, but to explain the context in which an individual sexual offence complainant acted and thus the possible reasons for this action. While expert evidence is often used as impact evidence at sentencing, the Commission recommended that expert evidence also be adduced for other purposes, even at the pre-trial phase.

The Commission opined that the use of experts in the fields of social work, psychology and psychiatry in sexual offence trials should be limited to matters relating to specialised clinical judgement, unless the expert has some specialisation in the area of sexual offences, such as Sexual Assault Trauma Syndrome. The Commission noted that some confusion as to the role (and credibility) of these professionals in sexual offence cases seems to exist and the Commission therefore submitted that the explanation of the

sequence of behaviour of sexual offence complainants could credibly and reliably be done by trained and experienced lay counsellors.

Apart from the decision on the admissibility of evidence led by specific experts, two additional problem areas were identified by the Commission, namely the leading of conflicting expert evidence by two or more experts, and the inherent contradiction which is presented to the presiding officer having to assess expert evidence.

The Commission noted that the possibility of using neutral experts deserved consideration. However, given the present courtroom practice of leading conflicting expert evidence the Commission was not convinced that this would be a viable option.

The Commission concluded that a presiding officer is placed in an unenviable position where experts are called to lead conflicting evidence and he or she is expected to adjudicate the helpfulness and admissibility of this evidence, or in the event where an expert is called to present evidence which falls outside of the presiding officer's frame of reference. The Commission identified two possible solutions relating to the introduction of expert evidence in this regard. Firstly, the presiding officer could subpoena an expert as a witness in terms of section 186 of the Criminal Procedure Act to present evidence on the symptoms surrounding a sexual offence. Secondly the presiding officer could appoint an expert assessor, in terms of section 145 of the Criminal Procedure Act, who specialises in this field and has practical experience with victims of sexual offences. In concurrence with the discussion on the use of lay persons being used to give expert evidence, the Commission also recommended that assessors not be required to have formal qualifications, but preferably have these qualifications coupled to recent practical experience. Although two options were presented, the Commission confirmed that neither the prosecution nor the defence would be precluded from calling their own expert witnesses. If a presiding officer were to follow the first option on its own, he or she could, in the worst case scenario, be presented with three conflicting expert opinions. If the second option is followed, the door is open to employing the first option in addition to the second option. In other words, where an assessor is appointed to assist the presiding officer, although the assessor does not lead evidence, he or she may call for evidence to be led by an expert.

The Commission encouraged South African courts to appoint assessors whose contribution is not limited to their knowledge as it pertains to the accused or criminal law in general, but rather to new fields of endeavour that seek to explain and understand the responses of victims of sexual abuse. For this reason the Commission recommended specific inclusion in the Criminal Procedure Act of the possibility of an expert leading evidence of the effects of a sexual offence.

The Commission concurred with the opinion that it is not desirable for court time and other resources to be drained by a battle of the experts. It is suggested that the category of assessors need not be limited to a psychologist or psychiatrist, but should involve other professions such as child care workers, social workers, lay ministers, and persons who have experience in dealing with sexual abuse. However, the Commission cautioned that it may be just as, or even more harmful, to allow 'expert evidence' on sexual violence where such an expert has no training coupled to practical experience in this field.

In order to give effect to these recommendations the following provision was included in the draft Bill in Discussion Paper 102:

Evidence of psycho-social effects of sexual offence

18. (1) Evidence of the psycho-social effects of any sexual offence upon a complainant may be adduced at criminal proceedings where such offence is tried in order to -

- (a) show that the sexual offence to which the charge relates is likely to have been committed
 - (i) towards or in connection with the complainant concerned;
 - (ii) under coercive circumstances as referred to in section 2;
- (b) prove, for purposes of imposing an appropriate sentence, the extent of the harm suffered by that complainant.

(2) In determining the weight to be attached to evidence adduced in terms of subsection (1), the court shall have due regard to -

- (a) the qualifications and practical experience of the person who has given such evidence in matters relating to sexual offences; and
- (b) all other evidence given at the proceedings.

The following amendments to the Criminal Procedure Act and Magistrates' Courts Act were proposed:

The amendment of section 145 of the Criminal Procedure Act by the substitution for subsection (1)(b) of the following subsection:

- (b) An assessor for the purposes of this section means a person who, in the opinion of the judge who presides at a trial, has experience in the administration of justice or skill in any matter which may be considered at the trial, and in the case of an accused charged with the commission of a sexual offence, has experience and knowledge of -
- (i) the effects of sexual abuse and trauma related to such abuse upon victims;
 - (ii) any recognised syndrome associated with such abuse and trauma; or
 - (iii) the inclination of a person to commit sexual offences repeatedly.

The amendment of section 93ter of the Magistrates' Courts Act by the substitution for subsection (1) of the following subsection:

- (1) The judicial officer presiding at any trial may, if he deems it expedient for the administration of justice-
- (a) before any evidence has been led; or
 - (b) in considering a community-based punishment in respect of any person who has been convicted of any offence, summon to his assistance any one or two persons who, in his opinion, may be of assistance at the trial of the case or in the determination of a proper sentence, as the case may be, to sit with him as assessor or assessors: Provided that if an accused is standing trial in the court of a regional division on a charge of murder, whether together with other charges or accused or not, the judicial officer shall at that trial be assisted by two assessors unless such an accused requests that the trial be proceeded with without assessors, whereupon the judicial officer may in his discretion summon one or two assessors to assist him: Provided further, that if an accused is standing trial on a charge of having committed any sexual offence, whether together with other charges or not, the judicial officer may at that trial be assisted by at least one assessor who has experience and knowledge of -
- (i) the effects of sexual abuse and trauma related to such abuse upon victims;
 - (ii) any recognised syndrome associated with such abuse and trauma; or
 - (iii) the inclination of a person to commit sexual offences repeatedly.

5.5.2 Evaluation of comment

The introduction of a clause regulating the admission of evidence of the psycho-social effects of a sexual offence²⁹ and the extension of the definition of assessor to include a

²⁹ Ms Irene Filander, Social Worker, Child Welfare, Vereeniging; Carol Bower, Executive Director, Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN); Koos Strauss, Rape Intervention Project GRIP; Ntomoboxolo Dyantjie, Provincial Coordinator, Eastern Cape Network on violence Against Women; Michael Mokwena, SAPS: Commander CSC; N Mbophane, Masonwabisane Women Support Centre; Standing Together to Oppose Pornography (STOP); Ms MJ Mmola, Maboloka HIV/AIDS Awareness Organisation (MAJAAO); Thusanang Advice Centre;

person with experience and knowledge of the effects of abuse and sexual trauma³⁰ are widely supported. The SOCA Unit of the National Prosecuting Authority specifically indicates its support of the extended role of experts during bail applications and confirms that an expert should be called to lead evidence as to the risk that the accused may pose to the victim or society. It also endorses the recommendation that expert opinion should be canvassed regarding the most appropriate treatment and rehabilitation programme. The Commission welcomes this endorsement and after closer evaluation has concluded that it would be necessary to include a substantive provision in the Bill which specifically grants a sex offender a right to access to appropriate evaluation, treatment and rehabilitation. The Commission also recommends that any such treatment or rehabilitation programme should be accredited. This matter will receive specific attention in the sentencing provisions.

RAPCAN states that evidence of this nature should be led as early in the trial as possible so as to enhance the State's case beyond just having an impact at sentencing alone. However, RAPCAN emphasises that expert evidence should be given by an expert who has practical experience in relation to the specific impact of a sexual offence on a victim.

Ms M Humn, Tshwaraganang Women Organisation; Ms BJ Matshego, probation officer, Department of Safety Services and Correctional Supervision; Age-in-Action; Mmabatho Lesho; Ms Suchilla Leslie, National Programme Manager Child Protection, SA National Council for Child Welfare; joint submission by the Children's Rights Project, Community Law Centre, University of the Western Cape; Department of Forensics and Toxicology, University of Cape Town; Gender, Law & Development Project, Institute of Criminology, University of Cape Town; Gender Project, Community Law Centre, University of Western Cape, Women's Legal Centre; Umtata workshop participants.

³⁰ Judge Eberhard Bertelsmann, Pretoria High Court; Prof P.W.W. Coetzer, Chief Specialist Medunsa; Dr Karen Muller, Vista University; Judge Belinda Van Heerden, Cape High Court; Mr Prometheus Mabuza, Save the Children, Sweden; Ms Irene Filander, Social Worker, Child Welfare, Vereeniging; Ms Suchilla Leslie, National Programme Manager Child Protection, SA National Council for Child Welfare; CGE Umtata Workshop; Ms Mollie Kemp, School Social Worker, Department of Education and Culture, Kwazulu-Natal; Carol Bower, Executive Director, Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN); Koos Strauss, Rape Intervention Project GRIP; Ntomoboxolo Dyantjie, Provincial Coordinator, Eastern Cape Network on violence Against Women; Michael Mokwena, SAPS: Commander CSC; N Mbophane, Masonwabisane Women Support Centre; Standing Together to Oppose Pornography (STOP); Ms MJ Mmola, Maboloka HIV/AIDS Awareness Organisation (MAJAAO); Thusanang Advice Centre; Ms M Humn, Tshwaraganang Women Organisation.

In the Western Cape joint submission³¹ the conclusion is drawn that leaving the task of deciding whether or not to admit expert evidence in relation to a sexual offence victim to the courts, may produce conflicting results. They opine that expert evidence of this nature should not be used as a diagnostic tool to prove that a woman or a child was sexually assaulted or abused but should be used as an explanatory tool to rebut defence claims in relation to an inconsistency or a victim's deceit. Although endorsing the inclusion of this clause they caution that the words 'recognised syndrome' may be problematic as it is not defined. They opine that this uncertainty may lead to conflicting expert opinions and consequently conflicting judgments. They also suggest that an office such as the Family Advocate's Office be created to assist with expert evidence. The Commission takes heed of the inherent problem of classifying expert evidence of this nature as a syndrome and will amend the clause accordingly. The Commission also sees the practicality, in relation to a reduction of court time and greater certainty, of using one expert opinion as would be the case if one body were responsible for assisting with expert evidence as is suggested. However the Commission does not endorse this submission. The Commission explored the option of using a court appointed expert in Discussion Paper 102³² and found that it would not preclude the state or the defence from still calling their own expert witnesses.

Dr Müller suggests that the recommendation be expanded to provide that panels of multi-disciplinary experts convene to assess dossiers before a trial commences so as to advise the prosecutor on the need for expert witnesses, eg. a psychologist, forensic expert etc. The Commission acknowledges this recommendation as an endorsement of the non-legislative recommendations relating to the convening of a multi-disciplinary consultation between the various role-players responsible for the investigation of a case.

The debate between experts attending the Gordon's Bay Conference on the necessity of a clause regulating the admission of evidence of the psycho-social effects of a sexual offence centred on two issues, namely, a desire not to legislate unnecessarily and the perceived need to educate people through the legislation. At this conference Judge

³¹ By the Children's Rights Project, Community Law Centre, University of the Western Cape; the Department of Forensics and Toxicology, University of Cape Town; the Gender, Law & Development Project, Institute of Criminology, University of Cape Town; the Gender Project, Community Law Centre, University of Western Cape; and the Women's Legal Centre.

³² At par 33.6.15.11.

Bertelsmann opined that the existing law is adequate and that training will ensure proper implementation. Judge Van Heerden stated that the proposed amendments to section 145 of the Criminal Procedure Act and section 93 *ter* of the Magistrates' Courts Act should reflect that an assessor does not have to have knowledge and experience of sexual abuse, thereby implying that an assessor may be desirable in appropriate cases but not mandatory. She also suggests that the amendments to the Criminal Procedure Act be rephrased so that both assessors need not have expert knowledge. Dr Karen Müller of Vista University opines that knowledge and/or experience of an assessor should extend to skills in child language and communication in order to assist the court in the formulation of questions.

Advocates Meintjes and Henning, SC also request that the proposed amendments to the Criminal Procedure Act and the Magistrates' Courts Act be adapted. They opine that the proposed wording is biased in that it presupposes trauma and repeat offending. They suggest that the wording be replaced as follows:

Which, where an accused is charged with a sexual offence, may include experience and knowledge of child development, the impact of sexual offences on victims and or characteristics of sexual offenders.

Advocates Meintjes and Henning, SC caution that by legislating in this regard, other kinds of expert evidence, or expert evidence of the same kind, but proving something different, may be deemed to be excluded. They suggest that if the Commission proceeds to include a substantive clause in the draft Bill that this section should include some limitation on the number of assessments that children may be subjected to. They argue that apart from the detrimental effect that repeated assessments may have on the child, certainly the value to be attached to the findings must necessarily decrease. The Commission would like to point out that an assessment of the complainant would not be a prerequisite to leading expert evidence on the expected impact of a particular offence on such complainant and limiting the court from repeatedly ordering for the assessment of the complainant will not impact on the ability of the defence to request such assessments. The Commission is of the opinion that the court should be able to request that a complainant be assessed to determine the impact of the offence and suggests that the number of assessments to which a victim of a sexual offence may be subjected to as a result of a court order should be limited.

Advocates Meintjes and Henning SC further recommend that reference be made “to a person against whom” rather than to a “complainant” for purposes of consistency and also because the term complainant would imply that the victim is also the complainant and will be testifying. They explain that in the case of small children they are not complainants and in some instances the victim might not be testifying at all. In the latter instance, the evidence might of course, include hearsay evidence. The Commission is mindful of the above submission and of the fact that the term ‘complainant’ is not defined in the Criminal Procedure Act. However, the Commission is satisfied that the meaning of the word ‘complainant’ has and will by way of common parlance and assimilation into the Criminal Procedure Act (as is demonstrated by section 154(2)(a) of said Act) be interpreted to mean the victim of the offence, whether or not the victim physically laid the complaint or testifies. To avoid any hint of confusion and so as not to create a forum for wordplay by the defence the Commission also recommends that the term “complainant” be defined in the Sexual Offence Bill.

Advocates Meintjes and Henning, SC argue in closure that the whole of the proposed clause be replaced with a clause which they have drafted. They opine that their proposed clause indirectly allows the evidence and explains the purpose thereof. The clause reads as follows:

Notwithstanding that evidence of the psycho-social assessment of a person against whom a sexual offence has been committed is relevant and may be received by the court to prove, amongst others, whether a sexual offence is likely to have been committed

- towards or in connection with the person concerned;

- by the accused; or

- under coercive circumstances as referred to in section 2,

the court may not order that such a person be so assessed except, for purposes of imposing an appropriate sentence, to establish the extent of the harm, if any, suffered by the person concerned.

No court may order that an assessment be performed unless the person concerned or the person’s guardian in the case of a child or mentally impaired person consents to such assessment, and no child of 12 years and below shall be subjected to repeat assessments unless the assessment will be in the interests of the child concerned.

Regional Magistrate RCA Henney of Wynberg does not support the inclusion of this clause in the Bill. He refers to the decision of **S v Nel**³³ and requests the Commission to consider an excerpt from this judgment in which Judge Marais avers that when it comes to assessments of witnesses capabilities, it is an evidential Pandora's box which the court are being invited to open. The Commission is of the opinion that the expert evidence sought in this particular case is not comparable to the evidence which would be sought to be lead in terms of the proposed clause in the Bill. In the above-mentioned case the accused sought to lead psychiatric evidence to the effect that a defence witness who was ostensibly normal was "mildly to moderately mentally retarded". The Commission is essentially proposing that evidence of the psycho-social effect of a sexual offence upon the victim of a sexual offence be admissible. The application of this clause does not extend to the accused or defence witnesses.

Ms Linda Dobbs, QC, submits that in her opinion, there are great dangers in getting an expert to interpret behaviour and give possible reasons for so acting. She opines that witnesses need to explain why they did what they did, as they are the witnesses to the fact. She states that even if expert testimony of this nature proves helpful, the availability of sufficient experts to fulfill this role remains questionable. Ms Dobbs also places a question mark over responsibility for payment of these experts.

5.5.3 Recommendation

The Commission recommends that provision be made in the proposed Sexual Offences Bill for adducement of evidence regarding the surrounding circumstances and impact of any sexual offence upon a complainant. Evidence relating to the surrounding circumstances of a sexual offence will address issues such as the cause of a late disclosure and the context in which a child sexual abuse victim finds him or herself as opposed to evidence merely portraying the result of the sexual offence.

Our proposal reads as follows:

³³ 1990 (2) SACR 136 (C).

Evidence of [psycho-social effects] surrounding circumstances and impact of sexual offence

19. (1) Evidence of the **[psycho-social effects]** surrounding circumstances and impact of any sexual offence upon a complainant may be adduced at criminal proceedings where such offence is tried in order to prove -

(a) **[show that the]** whether a sexual offence **[to which the charge relates]** is likely to have been committed -

(i) towards or in connection with the **[complainant]** person concerned;

(ii) under coercive circumstances as referred to in section 3(3);

(b) **[prove,]** for purposes of imposing an appropriate sentence, the extent of the harm suffered by **[that complainant]** the person concerned.

[(2) In determining the weight to be attached to evidence adduced in terms of subsection (1), the court shall have due regard to - the qualifications and practical experience of the person who has given such evidence in matters relating to sexual offences; and all other evidence given at the proceedings.]

(2) A court, in criminal proceedings referred to in subsection (1), may, subject to subsections (3) and (4), order that the complainant be assessed by a suitably qualified person in order to establish the impact of the offence being tried upon such complainant.

(3) A court may not order that the complainant be assessed as referred to in subsection (2) unless such complainant, or if he or she is mentally impaired or a child, his or her parent or guardian, consents to the assessment.

(4) In ordering the assessment of a child of the age of 12 years or less, the court must establish whether such child has been assessed before, and if so, must consider the harmful impact of a further assessment upon that child.

In addition, the Commission recommends that the following amendments be affected to the Criminal Procedure Act and the Magistrates' Courts Act respectively:

The amendment of section 145 of the Criminal Procedure Act by the substitution for paragraph (b) of subsection (1) of the following paragraph:

(b) An assessor for the purposes of this section means a person who, in the opinion of the judge who presides at a trial, has experience in the administration of justice or skill in any matter which may be considered at the trial, including, in the case where an accused is charged with a sexual offence, experience or knowledge of child development, the impact of sexual offences on victims of such offences, the characteristics of sexual offenders, or knowledge of the circumstances that may contribute to the vulnerability of victims of sexual offences.

The amendment of section 93ter of the Magistrates' Courts Act by the substitution for subsection (1) of the following subsection:

(1) The judicial officer presiding at any trial may, if he deems it expedient for the administration of justice-

(a) before any evidence has been led; or

(b) in considering a community-based punishment in respect of any person who has been convicted of any offence, summon to his assistance any one or two persons who, in his opinion, may be of assistance at the trial of the case or in the determination of a proper sentence, as the case may be, to sit with him as assessor or assessors: Provided that if an accused is standing trial in the court of a regional division on a charge of murder, whether together with other charges or accused or not, the judicial officer shall at that trial be assisted by two assessors unless such an accused requests that the trial be proceeded with without assessors, whereupon the judicial officer may in his discretion summon one or two assessors to assist him: Provided further, that if an accused is standing trial on a charge of having committed any sexual offence, whether together with other charges or not, the judicial officer may at that trial be assisted by at least one assessor who has experience or knowledge of child development, the impact of sexual offences on victims of such offences, the characteristics of sexual offenders, or knowledge of the circumstances that may

contribute to the vulnerability of victims of sexual offences.

5.6 Evidence of character and previous sexual history

5.6.1 Proposals in Discussion Paper 102

In Discussion Paper 102 the Commission explained that despite the enactment of section 227 of the Criminal Procedure Act, which is intended to restrict evidence or questions relating to a complainant's sexual history, presiding officers still have the unfettered discretion to determine the admissibility of such evidence on the broad and subjective basis of relevance.³⁴

The Commission opined that evidence that the complainant had engaged in consensual sexual conduct on other occasions (including past sexual conduct with the accused) should not be admissible solely to support the inference that the complainant is by reason of such conduct more likely to have consented to the sexual conduct at issue in the trial or less worthy of belief as a witness. The Commission submitted that evidence offered about the particular incident should inform the outcome of the proceedings, not evidence related to earlier events in the complainant's life.

The Commission proposed that section 227 of the Criminal Procedure Act be amended to delineate the circumstances under which evidence of previous sexual history may be adduced. It further opined that the proposed provision would not impinge on the right of the accused to a fair trial as evidence of sexual history that is of direct relevance would still be admissible. The proposed amendment to section 227 of the Criminal Procedure Act read as follows:

Section 227 of the Criminal Procedure Act is amended -

(a) by the substitution for the heading of the following heading:

Evidence of character and previous sexual history ;

³⁴ See also Thea Illsey "Sexual history evidence in South Africa: A comparative enquiry" (2002) 15(2) SACJ 225.

(b) by the substitution for subsection (1) of the following subsection:

(1) Evidence as to the character of an accused or as to the character of any **[female] person** against or in connection with whom any offence of an indecent nature is alleged to have been committed, shall, subject to the provisions of subsection (2), be admissible or inadmissible if such evidence would have been admissible or inadmissible on the thirtieth day of May, 1961. ;

(c) by the substitution for subsection (2) of the following subsection:

(2) No evidence as to any previous sexual [intercourse by, or any sexual] experience or conduct of any [female] person against or in connection with whom any offence of a sexual nature is alleged to have been committed, other than evidence relating to sexual experience or conduct in respect of the offence which is being tried, shall [not] be adduced, and [such female shall not be questioned] no question regarding such sexual [intercourse or sexual] experience or conduct, [except with the leave of the court, which leave shall not be granted unless the court is satisfied that such evidence or questioning is relevant: Provided that such evidence may be adduced and such female may be so questioned in respect of the offence which is being tried] shall be put to such person or any other witness at the proceedings pending before the court unless the court has, on application by any party to the proceedings, granted leave to adduce such evidence or to put such question.

(d) by the substitution for subsection (3) of the following subsection:

(3) Before an application for leave contemplated in subsection (2) is heard, the court **[shall] may** direct that any person, including the complainant, whose presence is not necessary may not be present at the proceedings **[and the court may direct that a female referred to in subsection (2) may not be present]. ;**

(e) by the insertion after subsection (3) of the following subsections:

(3A) The court shall, subject to subsection (3B), grant the application referred to in subsection (2) if satisfied that such evidence or questioning -

- (a) relates to a specific instance of sexual activity relevant to a fact in issue;
- (b) is likely to rebut evidence previously adduced by the prosecution;
- (c) is likely to explain the presence of semen or the source of pregnancy or disease or any injury to the complainant, where it is relevant to a fact in issue;
- (d) is not substantially outweighed by its potential prejudice to the complainant's personal dignity and right to privacy; or
- (e) is fundamental to the accused's defence.

(3B) The court shall not grant an application referred to in subsection (2) if, in its opinion, such evidence or questioning -

- (a) relates to the sexual reputation of the complainant and is intended to challenge or support the credibility of the complainant;

<p>(b) <u>is sought to be adduced to support an inference that by reason of the sexual nature of the complainant's experience or conduct, the complainant -</u></p> <p style="padding-left: 40px;">(i) <u>is more likely to have consented to the offence being tried;</u></p> <p style="padding-left: 40px;"><u>or</u></p> <p style="padding-left: 40px;">(ii) <u>is less worthy of belief. ;</u></p> <p>(f) and by the deletion of subsection (4).</p>
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5.6.2 Evaluation of comment

An overwhelming majority of the respondents endorsed the proposal to amend section 227 of the Criminal Procedure Act.³⁵ This recommendation was also specifically endorsed in the Report of the Parliamentary Task Group on the Sexual Abuse of Children.

Ms Helen Alexander of SWEAT submits, however, that the sexual history of a complainant should not be considered relevant evidence in a sexual offences trial. She voices the concern that the proposed grounds in section 227(3)(a) – (e) would allow the judge a significant discretion with regards to admitting such evidence. She suggests that past sexual history should never be admitted.

Dr Johanna Kehler, Project Director (Acting), Nadel Human Rights Research & Advocacy Project, recommends that the prior sexual history of the complainant in a sexual offence case be inadmissible under all circumstances based on the conviction

³⁵ Proffs J Burchell & PJ Schwikkard, Department of Criminal Justice, University of Cape Town; Judge Eberhard Bertelsmann, High Court, Pretoria; Prof P.W.W. Coetzer, Chief Specialist Medunsa; Dr Karen Müller, Vista University, Department of Procedural Law; Judge Belinda Van Heerden, Cape High Court; Mr Prometheus Mabuza, Save the Children, Sweden; Irene Filander, Social Worker, Child Welfare, Vereeniging; Ntomboxolo Dyantjie, Provincial coordinator, Eastern Cape Network on Violence Against Women; Martha Humn, Tshwaraganang Women Organisation; Mokgabi Mmola, General Secretary, Maboloka HIV/AIDS Awareness Organisation (MAHAAO); Moipone Hakala, Chief Social Worker, Dept of Social Services; Carol Bower, Executive Director, Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN); Dr Katrin Müller, Gauteng Health Department, Chief Medical Officer & Medical Advisor; Suchilla Leslie, National Programme Manager Child Protection, SA National Council for Child Welfare; E.M. Setai, paralegal, Thusanang Advice Centre; Ms B.J. Matshego, probation officer, Department of Safety Services and Correctional Supervision; Dr Rachel Jewkes; Adv R Meintjes, Adv Henning SC, Office of the Director of Public Prosecutions, Transvaal; Gordon's Bay Expert Consultation; Koos Strauss, Rape Intervention Project (GRIP); FC Shaw, Welfare Forum Durban and South Region; Michaela Mokwena, Commander SAPS CSC; Nolitha Mazwai, Rape Crisis, Cape Town; N Mbophane, Masonwabisane Women Support Centre; Age-in-Action; Edmund Szndrauhi, DPP, Kwazulu-Natal; Mmabatho Lesho; Standing Together to Oppose Pornography (S.T.O.P.); and representations from Mabopane.

that such evidence cannot be relevant in sexual offence cases. She argues that the very fact of the possibility of the victim's prior sexual history being admissible as evidence suggests that there are circumstances within which rape, as one of the sexual offences, would be 'acceptable, justifiable' or less of a crime. According to Dr Kehler this implies further that the victim's prior sexual behaviour before the rape has bearing on the occurrence of the rape. She states that such an implication is not only unacceptable, it also minimizes the seriousness of rape as a criminal offence suggesting that the right to be free from all forms of violence and abuse might be limitable for the victims of such abuse based on her or his prior sexual behaviour. She states that with regard to child rape and sexual abuse of children this is especially unacceptable and that whether a minor is sexually active prior to being raped is totally irrelevant to the fact of child rape. She concludes that the rape victim's prior sexual history, as well as that of victims of other sexual offences, can never be relevant in a sexual offences case and should therefore be inadmissible under all circumstances.

If the above recommendations were to be heeded, the effect would be that even evidence of sexual history that is of direct relevance to the matter at hand would be inadmissible. This would assuredly impinge on the right of the accused to a fair trial. In the Commission's view such result would be untenable.

The Commission has also found confirmation of the acceptability of the proposed amendment to section 227 of the Criminal Procedure Act in a recent decision in the matter of **Johannes Myeni v The State** (Case No 397/01). *In casu* the Supreme Court of Appeal per Heher AJA found that the purpose of adducing evidence of sexual intercourse between the complainant and her alleged boyfriend in the appeal brought by her father against a conviction of rape could only be to attack the credibility or character of the complainant. The court noted that section 227 seemed to be more honoured in breach than in observance and that it was not aware of any instance where section 227(2) had been applied in this country. The court deemed it apt to make comment on the proper application of the section. It made reference to the legal position in comparative jurisdictions and to the chapter dealing with previous sexual history contained in Discussion Paper 102. With reference to the proposed draft amendment to section 227 the court noted that whether or not the proposal becomes the subject of legislation in due course, the matters identified in the proposed subclause 3A and 3B

should be regarded as considerations of great importance in arriving at a properly-considered judgment on admissibility in terms of section 227(2). The Supreme Court of Appeal found that when the trial in the case under consideration was reopened, no application was made to the magistrate under section 227 and the evidence was led without demur or apparent consideration of its relevance. Having regard to the force of the prohibition, its purpose, the public policy involved and the manifest absence of relevance, the Supreme Court of Appeal concluded that the proper approach at this stage would be to rule that the whole of the testimony containing evidence of the complainant's sexual history with her boyfriend was wrongly taken and should be regarded as struck from the record.

5.6.3 Recommendation

The Commission confirms its recommendation in relation to the amendment of section 227 of the Criminal Procedure Act. In order to avoid any ambiguity the Commission includes the accused by name as a person from whom evidence relating to the sexual experience or conduct of the complainant which is unrelated to the offence in question may not be adduced.

The proposed amendment to section 227 of the Criminal Procedure Act reads as follows:

The amendment of section 227 of the Criminal Procedure Act-

(a) by the substitution for the heading of the following heading:

“Evidence of character and previous sexual history” ;

(b) by the substitution for subsection (1) of the following subsection:

“(1) Evidence as to the character of an accused or as to the character of any **[female] person** against or in connection with whom any offence of an indecent nature is alleged to have been committed, shall, subject to the provisions of subsection (2), be admissible or inadmissible if such evidence would have been

admissible or inadmissible on the thirtieth day of May, 1961.” ;

(c) by the substitution for subsection (2) of the following subsection:

“(2) No evidence as to any previous sexual [intercourse by, or any sexual] experience or conduct of any [female] person against or in connection with whom any offence of a sexual nature is alleged to have been committed, other than evidence relating to sexual experience or conduct in respect of the offence which is being tried, shall [not] be adduced, and [such female shall not be questioned] no question regarding such sexual [intercourse or sexual] experience or conduct, [except with the leave of the court, which leave shall not be granted unless the court is satisfied that such evidence or questioning is relevant: Provided that such evidence may be adduced and such female may be so questioned in respect of the offence which is being tried] shall be put to such person, the accused or any other witness at the proceedings pending before the court unless the court has, on application by any party to the proceedings, granted leave to adduce such evidence or to put such question.” ;

(d) by the substitution for subsection (3) of the following subsection:

“(3) Before an application for leave contemplated in subsection (2) is heard, the court [shall] may direct that any person, including the complainant, whose presence is not necessary, may not be present at the proceedings [and the court may direct that a female referred to in subsection (2) may not be present].”;

(e) by the substitution for subsection (4) of the following subsection:

“(4) The court shall, subject to subsection (3B), grant the application referred to in subsection (2) if satisfied that such evidence or questioning –

(a) relates to a specific instance of sexual activity relevant to a fact in issue;

(b) is likely to rebut evidence previously adduced by the prosecution;

(c) is likely to explain the presence of semen or the source of pregnancy or

- disease or any injury to the complainant, where it is relevant to a fact in issue;
- (d) is not substantially outweighed by its potential prejudice to the complainant’s personal dignity and right to privacy; or
- (e) is fundamental to the accused’s defence.
- (f) by the addition of the following subsection:
- (5) The court shall not grant an application referred to in subsection (2) if, in its opinion, such evidence or questioning –
- (a) relates to the sexual reputation of the complainant and is intended to challenge or support the credibility of the complainant;
- (b) is sought to be adduced to support an inference that by reason of the sexual nature of the complainant’s experience or conduct, the complainant –
- (i) is more likely to have consented to the offence being tried; or
- (ii) is less worthy of belief.”

5.7 Evidence of similar fact

5.7.1 Proposals in Discussion Paper 102

Discussion Paper 102³⁶ reflected the current status of our law by stating that similar fact evidence may be received if it is sufficiently relevant to warrant its reception and if it has a relevance other than one based solely upon character. The Discussion Paper also stated that presently, as with all other evidence, when similar fact evidence is sought to be adduced the presiding officer has to distinguish the probative force of the evidence from its prejudicial effect.

³⁶ At page 592.

In theory this area of the law did not seem problematic. However, concerns were raised in the Discussion Paper that the rule of excluding similar fact evidence was being used to exclude highly probative evidence. More specifically that cited cases reflected the failure to recognise the distinction between probative force and prejudicial effect which affects not only the determination of the appropriate test of admissibility, but its application and the consideration of the necessity or practicability of other safeguards.

Cognisance was had to the fact that similar fact evidence had already authoritatively been sanctioned to establish identity, to prove intent and to disprove innocent association. Similar fact evidence has also been admitted to show a propensity to criminal conduct where, on the facts, disposition was highly relevant to the issue.³⁷

Amidst a plethora of arguments abounding in favour of and against the admission of similar fact evidence, the Commission found in Discussion Paper 102 that the benefit of admitting similar fact evidence in sexual offence trials and thereafter allowing the court to determine the relevance thereof would outweigh any detriment alleged to be experienced by the accused.

The Commission recommended that the developments in the United Kingdom in this regard should be followed and that the prosecution should be allowed to raise an accused's previous convictions and acquittals at trial, provided that the probative value of such evidence outweighs the prejudicial effect thereof.

In Discussion Paper 102 the Commission dealt with the argument that the accused is frequently taken by surprise by this type of evidence and that the investigation into the collateral issues that arise from the introduction of such evidence may lengthen the trial substantially. Seen in the light of the present system of disclosure between the prosecution and the defence, the Commission opined that the element of surprise would be negligible.

The Commission identified the concern that if the complaints of a number of victims against one person are not heard in one trial, it would be necessary for the same witness

³⁷ See page 606 of Discussion Paper 102.

to testify at more than one trial in order to introduce the similar fact evidence that the State wishes to rely on. In view of the fact that repeat trauma is inevitable in such matters, the Commission recommended that similar fact evidence be allowed in those matters and that multiple appearances in court by the same witness in different trials be avoided wherever possible.

In Discussion Paper 102 the Commission also addressed the argument that introducing similar fact evidence may undermine the administration of justice. This argument entails that the police might be tempted to rely on a suspect's antecedents rather than investigating the facts of the matter. As a consequence the police may only focus on past offenders. In view of the fact that investigative guidelines and procedures coupled to departmental sanction for non-compliance are in force within SAPS, the Commission opined that this argument is unsound. Naturally a suspect's *modus operandi* and antecedents would form a crucial part of the investigation where the suspect has not yet been apprehended, is unknown, or where the police have a number of similar crimes that may have been committed by one person. However, each case investigated by the police will require different investigative techniques.

The Commission found that the tendency to regard similar fact evidence as evidence of bad character or evidence of criminal or bad disposition, was highly misleading. Similar fact evidence is evidence of a feature associated with an accused person or his or her circumstances which exists independently of the circumstances surrounding the commission of the alleged offence and which is relevant to the offence charged. Any probative value that similar fact evidence possesses arises from its descriptive quality while the prejudicial effect arises primarily from its moral quality.

The Commission concluded that a provision be included in the new Sexual Offences Act providing for the admission of similar fact evidence in sexual offence trials. This recommendation was based on the view that admitting the evidence, where strongly probative, subject to safeguards, is an effective compromise least distorting to the criminal justice process. The motivation behind this recommendation was to encourage the introduction and evaluation of similar fact evidence.

The provision included in the draft Bill in Discussion Paper 102 read as follows:

Evidence of similar offences

16. (1) A court before which criminal proceedings are pending where the accused is charged with the commission of any sexual offence, shall, subject to the provisions of subsection (2), admit evidence of the commission or alleged commission of similar offences by the accused upon application made to such court and may consider such evidence in relation to any matter to which it is relevant.

(2) The court may only admit evidence as referred to in subsection (1) if such evidence -

- (a) has significant probative value that is not substantially outweighed by its potential for unfair prejudice to the accused; and
- (b) is not intended merely to prove the character of the accused.

(3) The court shall record the reasons for its decision to admit or to refuse evidence as referred to in subsection (1) as part of the proceedings.

5.7.2 Evaluation of comment

Participants of the Gordon's Bay expert consultation opine that clause 16 should be omitted from the Bill as it is merely a codification of the common law. Individual submissions from some participants³⁸ endorse this finding.

Without elaborating, some of the respondents³⁹ indicate that they are in favour of the provision, whilst others suggest that the provision be amended. The SOCA Unit of the National Prosecuting Authority recommends that the heading of the section be changed from "evidence of similar offences" to "similar fact evidence" to accurately reflect that evidence of alleged offences may also be admissible. Advocates Meintjes and Henning

³⁸ Proffs J Burchell & PJ Schwikkard, Department of Criminal Justice, University of Cape Town; Judge Eberhard Bertelsmann, High Court Pretoria; Dr Karen Müller, Vista University, Department of Procedural Law; Judge Belinda van Heerden, Cape High Court.

³⁹ Mollie Kemp, School Social Worker, Department of Education and Culture, KwaZulu-Natal; Prof P.W.W. Coetzer, Chief Specialist Medunsa; Mr Prometheus Mabuza, Save the Children, Sweden; Ms Irene Filander, Social Worker, Child Welfare, Vereeniging; Ms Suchilla Leslie, National Programme Manager Child Protection, SA National Council for Child Welfare; Carol Bower, Executive Director, Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN); Koos Strauss, Rape Intervention Project GRIP; Ntomoboxolo Dyantjie, Provincial Coordinator, Eastern Cape Network on violence Against Women; Michael Mokwena, SAPS: Commander CSC; FC Shaw, Welfare Forum Durban and South Region; Silas IM Nawa, National Department of Education; N Mbophane, Maonwabisane Women Support Centre; Standing Together to Oppose Pornography (STOP); Ms MJ Mmola, Maboloka HIV/AIDS Awareness Organisation (MAJAAO); Thusanang Advice Centre; Ms M Humn, Tshwaraganang Women Organisation; Ms BJ Matshego, probation officer, Department of Safety Services and Correctional Supervision.

SC recommend an amended clause but at the same time caution that care should be taken not to appear to exclude or regulate that which already exists.

There is considerable merit in the submissions that the Commission's preliminary recommendation to include a clause allowing for the introduction of similar fact evidence in sexual offence trials is merely a restatement of the common law. The Commission concedes that such a provision does not develop the law in any way. In fact the codification of this area of the law may in fact have the deleterious effect of restricting or excluding the application or development of the common law in this regard.

5.7.3 Recommendation

In the Commission's view sensitisation and training of prosecutors and presiding officers in this area of the law is indispensable. The clause as it was proposed might bring this area of the law to the attention of the court but the manner in which the presiding officer actually considers and applies the evidence of this nature would of course still remain beyond legislative control.

As no reform of the law is effected by this clause and as the Commission does not wish to codify this area of the law and thereby possibly restrict the application thereof in relation only to sexual offence proceedings, the Commission, upon further reflection, recommends that this clause be omitted from the Bill. The Commission, however, remains of the opinion that similar fact evidence may occasionally be an important element in the overall circumstances of a case and that training in the reception of such evidence should be undertaken by the relevant bodies. In this regard the Commission sees potential for the common law to further develop.

5.8 Disclosure of personal records

5.8.1 Proposals in Discussion Paper 102

A concern that, if victims of sexual offences know that their private thoughts, expressed to persons such as counsellors, traditional healers and religious leaders may become a matter for open debate in a public court of law, they may be deterred from reporting the

offence to the police and consequently be discouraged from seeking support, was discussed in Discussion Paper 102. The Commission found that before a court will order a witness to disclose evidence which he or she has obtained in confidence, the presiding officer will need to determine the relevance of such evidence. A trial within a trial will then ensue - the result of which could be an order for the witness to disclose the requested evidence. The Commission concluded that it was satisfied that the rights of the complainant and the accused would be adequately protected by this procedure in that a witness will only be ordered by a court to disclose personal information relating to a third person (in this case the complainant) if the court deems such evidence to be relevant to the case at hand.

However, in the interest of open debate and acknowledgement of recent developments in international jurisprudence, the Commission made a recommendation in the alternate providing for a more formalised approach to be followed in order to access personal records. The approach contained in clause 15 of the Bill accompanying Discussion Paper 102 entailed two stages. The defence would have to demonstrate that the information contained in the records would be likely to be relevant either to an issue in the proceedings or to the competence of the subject of the records to testify - based on evidence and not on speculative assertions or on discriminatory or stereotypical reasoning. If the court was satisfied that the information would be likely to be relevant, then the analysis would proceed to the second stage, which has two parts. First, if the accused can show that the salutary effects of producing the documents to the court for inspection outweigh the deleterious effects of such production, the court could so order. Then, after examining the records, the presiding officer should balance the conflicting constitutional rights to determine whether and to what extent production to the defence should be ordered.

In conjunction with the recommendation which was made in the alternate, the Commission further recommended that identifying information, for example contact details and personal particulars not relevant to the case, should not be disclosed. In this regard the Commission acknowledged that the person who made the confidential communication could consent to disclosure of personal records. Also that information acquired by a registered medical practitioner by physical examination (including communications made during the examination) in relation to the commission or alleged

commission of the sexual offence or a communication made, or the contents of a document prepared, could be adduced for the purpose of a legal proceeding arising from the commission or alleged commission of the sexual offence.

The following provision was included in the draft Bill reflecting the recommendation made in the alternate:

Disclosure of personal records

15. (1) Subject to the provisions of subsections (3) and (5), no personal record may be adduced as evidence in criminal proceedings involving the alleged commission of a sexual offence.

(2) For purposes of subsection (1) a personal record refers to a record of communications, written or oral, made by a person against whom a sexual offence was alleged to have been committed in confidence to a registered medical practitioner or registered counsellor and includes a record that existed prior to the alleged commission of a sexual offence against that person.

(3) A court may, upon application by any interested party, order disclosure of a personal record in full or in part in any manner that the court deems fit after it has considered any potential prejudice to the dignity, privacy and security of the person to whom the record relates, including the nature and extent of any harm that would be caused to such person and if it is satisfied that -

- (a) the evidence contained in such record will, on its own or in conjunction with any other evidence, have substantial probative value to a fact in issue;
- (b) no other evidence that has similar probative value to the fact in issue is available; and
- (c) the public interest outweighs the protection of the dignity, privacy and security of such person.

(4) The application referred to in subsection (3) must satisfy the court that

- (a) a personal record exists and is held by an identified record holder;
- (b) such record contains information which is likely to be relevant to a fact in issue at the proceedings pending before the court or to the competence of a witness to give evidence;
- (c) the grounds upon which the party making the application relies to establish that the contents of such record is likely to be relevant are sufficient to warrant consideration of disclosure; and
- (d) granting the application will be in the interests of justice and in the interests of the person to whom such record relates.

(5) A court may, notwithstanding the provisions of subsection (3), order disclosure of a personal record if the person to whom the record relates consents to such disclosure or if a personal record has been prepared for purposes of any legal proceedings arising from the commission or alleged commission of a sexual offence.

(6) A court shall, upon receipt of a personal record after its disclosure, consider the contents of such record prior to granting access to that record to any party and may, upon furnishing reasons, grant or refuse access to that record.

5.8.2 Evaluation of comment

Although some respondents⁴⁰ were in favour of the alternate approach, many⁴¹ were opposed to it. Numerous problems were identified with the provision.

Submissions opposing the provision can be divided into two categories, namely, those questioning the validity of including such a provision in the Bill, and those who have difficulty with the manner in which the provision has been drafted.

Prof PA Carstens, Department of Public Law, University of Pretoria, questions the legitimacy of the provision in relation to the Promotion of Access to Information Act, 2 of 2000 by asking whether this provision is in harmony with that Act and to what extent the right to access of information as articulated in terms of the Act is accommodated by the proposed clause 15. The concerns expressed by Professor Carstens have been considered by the Commission. In Discussion Paper 102⁴² it concluded that provisions relating to the access of records contained in the Promotion of Access to Information Act may only be invoked before the commencement of proceedings. If the defence should request the disclosure of records at this point in time, they would in all likelihood be

⁴⁰ Prof P.W.W. Coetzer, Chief Specialist Medunsa; Prometheus Mabuza, Save the Children, Sweden; Irene Filander, Social Worker, Child Welfare Vereeniging; Suchilla Leslie, National Programme Manager Child Protection, SA National Council for Child Welfare; Mollie Kemp, School Social Worker, Department of Education and Culture, Kwazulu-Natal; Carol Bower, Executive Director, Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN); Koos Strauss GRIP; FC Shaw (Welfare Forum Durban and South Region); Michael Mokwena, SAPS : Commander CSC; Mmabatho Lesho; Standing Together to Oppose Pornography (S.T.O.P); N Mbophane, Masonwabisane Women Support Centre; Ms MJ Mmola, Maboloka HIV/AIDS Awareness Organisation (MAJAAO); Thusanang Advice Centre; Ms M Humn, Tshwaraganang Women Organisation; Ms BJ Matshego, probation officer, Department of Safety Services and Correctional Supervision.

⁴¹ SOCA Unit, National Prosecuting Authority; Judge Eberhard Bertelsmann, High Court Pretoria; Law Society of the Cape of Good Hope; Judge Belinda van Heerden Cape High Court; Expert Consultation Gordon's Bay; Edmund Szndrauhi, Director of Public Prosecutions, KwaZulu-Natal; Silas I M Nawa, National Department of Education; Prof PA Carstens, Department of Public Law, University of Pretoria; Adv R Meintjes and Adv Henning SC, Office of the Director of Public Prosecutions: Transvaal.

⁴² At page 328.

embarking on a fishing expedition. In accordance with section 7 of the above Act, once the proceedings have commenced the provisions contained in this Act would not apply.

Despite voicing grave concerns relating to the provision under discussion, Advocates Meintjes and Henning SC submit an alternative formulation which reformulates the existing legal position. However, the gist of their submission indicates that the current law is adequate and that this provision could be interpreted to infringe the accused's right to a fair trial. This position is endorsed by the SOCA Unit, National Prosecuting Authority.

5.8.3 Recommendation

From the submissions received, the inference could be drawn that a provision regulating the disclosure of personal records could be included in the Bill. However, the Commission is unable to identify a real need for law reform in relation to this facet of the law and takes cognizance of the fact that section 278 of the Canadian Criminal Code, on which the proposal in the discussion paper was modelled, has been the subject of repeated constitutional challenge.⁴³ The Commission confirms that it is satisfied that the rights of the complainant and the accused would be adequately protected by the current procedure in that a witness will only be ordered by a court to disclose personal information relating to a third person (in this case the complainant) if the court deems such evidence to be relevant to the case at hand. Naturally the ordinary rules governing professional privilege still apply. Consequently it is recommended that clause 15 be omitted from the draft Bill.

⁴³ Inter alia **R v Mills** [1999] 3 S.C.R. 668.

CHAPTER 6

IMPROVING THE POSITION OF VICTIMS OF SEXUAL OFFENCES

6.1 Introduction

The focus of this Chapter is victims of sexual offences. Aspects receiving attention include the rights of victims, the provision of treatment and counselling to victims, the right to institute private prosecutions and legal representation for victims of sexual offences.

6.2 The rights of victims of sexual offences

6.2.1 Introduction

Throughout this investigation a victim friendly approach was adopted. This is first evidenced in Chapter 2 where several of the objectives underlying the draft Sexual Offences Bill relate specifically to victims. This section of the report expands on the general tenet that the outcome for sexual offence victims in the criminal justice system must improve. As such it also builds on other initiatives by the Commission for greater victim involvement in the criminal justice process.¹

6.2.2 Proposals in Discussion Paper 102

In order to better protect victim's rights, the Commission put forward five options in Discussion Paper 102. These options were:

- I. Amend the Constitution to include a section on victims' rights. It is proposed that these rights be included not in order merely to balance the rights given to the 'offender' but rather in order to enshrine an uncompromising commitment to the

¹ See e.g. the Commission's Report on Sentencing (A new Sentencing Framework) on victim involvement at sentencing, restitution and victim compensation, and a victim compensation scheme. See also the Department of Justice and Constitutional Development's draft Victim's Charter.

empowerment of victims. As constitutionally entrenched victims' rights would have to cast its net over all victims and not just those of sexual offences, it was recommended that if this option is preferred the "victims' rights" subcommittee of the Project Committee on Sentencing would be the correct vehicle to make proposals in this regard. Including victims' rights in the Constitution would give these rights the added protection that they may only be limited in accordance with the limitation clause.²

2. Adopt specific legislation on the rights of victims of crime as was done in Canada. By providing for victims' rights in a separate Act, the same objective as including rights in the Constitution would hopefully be achieved, i.e. fostering an inherent respect for victims' rights.
3. Similarly rights of victims of sexual offences could be incorporated into specific sexual offence legislation. Sanctions for non-compliance in the same fashion as the Domestic Violence Act would give uncooperative officials the necessary motivation to comply. One of the benefits of this option is that, as needs and circumstances change, amendments could be made to the Act without the complicated procedures which precipitate a constitutional amendment.
4. Adopt a Victims' Charter as was done in the United Kingdom. Such a Charter could be regularly updated without the procedures involved in amending legislation. A Charter would be able to address wider concerns relating to victims of crime and would be able to tabulate the responsibilities of the different professions, including non-governmental organisations. However the status and enforceability of such a Charter is unsure.
5. Review all aspects of criminal procedure regarding victims so that legislation appropriate to victim's rights can be incorporated in general criminal procedure. This option would weave victims' rights into the heart of criminal procedure. Once again if this option is chosen, it was recommended that the "victims' rights" subcommittee of the Project Committee on Sentencing would be the correct

² Section 36 of the Constitution.

vehicle to make proposals in this regard.

In addition, the Commission did make various other recommendations ranging from informing the victim of bail applications by the accused to the mandatory consideration of victim impact statements at sentencing.

6.2.3 Evaluation of comment

A number of respondents support all the options presented above.³ Others support particular options or combinations thereof.⁴ Judge Belinda van Heerden and Professor Coetzer are in favour of a review of criminal procedure regarding victims so that legislation appropriate to victims' rights can be incorporated into general procedure.⁵ They are not in favour of an amendment to the Constitution or the adoption of victim specific legislation (with perhaps an exception for a Victims Compensation Scheme). Professor Coetzer is not, unlike Judge Van Heerden, in favour of the inclusion of the rights of victims in sexual offence specific legislation and the adoption of a victims' charter.

Ms Nolitha Mazwai (Rape Crisis Cape Town) is in favour of all the recommendations put forward in Discussion Paper 102 except the introduction of a victims' charter as she does not believe that this will be enough. She is of the view that the interests of victims will best be served by specific legislation as it will have more force than a charter.

Mr Silas I M Nawa is in favour of amending the Constitution to include a section on victims' rights and adopting specific legislation on the rights of victims' of crime. S.T.O.P (Standing Together to Oppose Pornography) is, in addition, in favour of incorporating the rights of victims of sexual offences into specific sexual offence legislation.

³ Ms I Filander; Ms Leslie; RAPCAN; F C Shaw (Welfare Forum Durban and South Region); Age-in-Action; Michael Mokwena (SAPS: Commander CSC); Eastern Cape Network on Violence Against Women Koos Strauss (Rape Intervention Project GRIP); Thusanang Advice Centre.

⁴ Dr K Muller (amend the Constitution); Ms B J Matshego (amend the Constitution, adopt a victims' charter, and review criminal procedure); SOCA Unit (adopt a victims' charter and specific legislation); Judge Betelsmann (specific legislation, adopt a victims' charter, and review criminal procedure); Ms Mollie Kemp (adopt a victims' charter).

⁵ As are Professors Burchell and Schwikkard and Mr P Mabuza (Save the Children Sweden).

6.2.4 Recommendation

The Commission takes heed of the comments and shares the view that not enough is done to empower victims in general and to secure victims' rights in particular by only incorporating specific aspects of the rights of victims of sexual offences into the draft Sexual Offences Bill. It is obviously necessary to do this in the context of sexual offences where the majority of victims are particularly vulnerable. In this regard the Commission is confident the various measures proposed such as vulnerable witness status and the various protective measures would go a long way to improve outcomes for victims.

On the other hand, it is equally clear that all victims need better protection. However, it is not within the scope of this investigation to develop fully such proposals as it runs the risk that various issues, possibly pertinent to victims' rights, may not have been canvassed properly. The Commission therefore recommends that the various options mooted in respect of the better protection of the rights of victims be further investigated.

6.3 Provision of treatment and counselling to victims of sexual offences

6.3.1 Proposals in Discussion Paper 102

The Commission recommended in Discussion Paper 102 that treatment and counselling should not only be offered to the victim alone, but should include the victim's family. In view of the fact that:

- the commission of a sexual offence will in many cases involve injury of some kind, whether it be physical or psychological;
- many of the victims of sexual offences do not have the means to pay for treatment and the failure to provide treatment would as a result marginalise the poor; and
- victims and their families, like other persons in South Africa, have a constitutional right to physical and psychological integrity.

The Commission recommended in Discussion Paper 102 that the right of a person

injured as a result of a sexual offence to adequate medical treatment and counselling be embodied in legislation and that the State bear the cost thereof. The State's liability in this regard was to be of an interim nature pending the possible establishment of a State Compensation Fund. In addition a host of non-legislative recommendations were put forward.

The following clause was proposed in Discussion Paper 102:

Provision of treatment

22. (1) If it has been established that a person has sustained physical or psychological injuries as a result of a sexual offence, such person shall, as soon as is practicable after the offence, receive adequate medical care, treatment, and counselling as may be required for such injuries.

(2) The State shall bear the cost of the medical care, treatment and counselling referred to in subsection (1).

Given the extent of the HIV/AIDS pandemic in South Africa, one of the first issues to be decided by a victim of sexual violence is whether he or she is going to request some kind of post exposure treatment.⁶ It was therefore necessary to deal with the provision of 'Post Exposure Prophylaxis' (PEP) to victims of sexual violence in incidences where there is the possibility of HIV/AIDS transmission. PEP is a type of preventive antiviral therapy for the human immunodeficiency virus (HIV) that is designed to reduce (but not eliminate) the possibility of infection with the virus after a known exposure.⁷

In considering whether to use PEP, time is of the essence for the victim. In order for the PEP treatment to be effective, the drugs must be taken for 28 days after exposure to HIV. The Centre for Disease Control and Prevention in the United States recommends starting PEP within 2 hours of exposure. However, this agency also recommends PEP for some individuals presenting 36 hours or more after exposure.⁸ It should be clear that

⁶ The request for post exposure treatment implies prior knowledge of the availability of treatment options and the dangers of HIV/AIDS transmission on the part of the victim. This is not necessarily a valid assumption in the South African context.

⁷ Rick Sowadsky 'MSPH Post-Exposure Prophylaxis (PEP) For Sexual Exposures' (June 1998) Website: www.thebody.com/plaintant/cgi/safeans.html .

⁸ Centre for Disease Control and Prevention 'Update: Provisional Public Health Service

not all sexual offences (such as fondling or indecent exposure) pose the risk of HIV/AIDS transmission. Consequently the Commission recommended in Discussion Paper 102 that the provision of PEP should be limited to those instances where there is a serious risk of HIV/AIDS transmission.⁹ Due to the cost implications, the Commission argues that the provision of PEP at state expense should be restricted to those incidences defined as 'rape' in Discussion Paper 102.

6.3.2 Evaluation of comment

From the comments received three broad issues became apparent. The first was the general principle of whether treatment should be provided by the State and who should pay therefore. Secondly, should persons other than the victim be entitled to receive treatment? Thirdly, State provision of anti-retroviral medication where there is a possibility of exposure to the HIV/AIDS virus.

The majority of respondents are in favour of a duty on the State to provide treatment to persons injured, either physically or psychologically, as a result of a sexual offence.¹⁰ Some of these respondents are of the opinion that this should be an interim measure only, pending the establishment of a State Victim Compensation Fund. Some respondents caution against the possible difficulty in managing such a scheme as it may be abused. Ms Helene Combrinck¹¹ expresses concern as to what will transpire should the accused be acquitted and whether treatment will be continued. One possibility obviously is to proceed civilly to recover any losses sustained as a result of fraud or abuse.

recommendations for chemoprophylaxis after occupational exposure to HIV' (1996) 45 **MMWR** at 468 - 472.

⁹ We do realise, however, that there is a danger that some persons might claim to have been 'raped' or 'sexually assaulted' in order to qualify for the free supply of the PEP drugs to victims of sexual assault as we would like to propose.

¹⁰ Mr P Mabuza (Save the Children: Sweden); Ms I Filander; Ms Leslie; Thusanang Advice Centre; M Hakala (Dept. Of Social Services, chief social worker); Ms M Humn - Tshwaraganang Women Organisation; Ms M J Mmola (Maboloka HIV/AIDS Awareness Organisation); Ms B J Matshego (probation officer, Dept. of Correctional Services); RAPCAN; Koos Strauss (Rape Intervention Project GRIP); Silas I M Nawa (National Department of Education); N Mbophane (Masonwabisane Women Support Centre); Michael Mokwena (SAPS: Commander CSC); F C Shaw (Welfare Forum Durban and South Region); Eastern Cape Network on Violence Against Women; Mmabatho Lesho; Age-in-Action; S.T.O.P (Standing Together to Oppose Pornography); Judge Bertelsmann.

¹¹ Women's Legal Centre, University of the Western Cape.

At the Gordon's Bay Expert Consultation one delegate expressed uncertainty as to the precise objective behind this clause.¹² The objective of the clause is to ensure that persons injured as a result of a sexual offence are placed in a position where they have the choice of accessing treatment for their injuries without them being placed under the additional stress of having to find funds, resources or treatment. Should the injured person wish to access private health care they would have that choice.

Advocates R Meintjes and Henning, SC,¹³ are of the view that the provision of treatment clause is a 'nice to have', but should rather be included as an objective as they have concerns regarding who will establish whether the harm resulted from the offence, when and whether steps can be taken to enforce this and what sanction follows in the case of non-compliance. Other respondents, on the other hand, expressed the concern that if the provision of treatment is not a substantive clause in the Bill, it will remain an objective without it being realised in practice. The purpose of including it in the Bill is to grant an enforceable right to a person injured as a result of a sexual offence as well as to ensure formal resource allocation for this purpose. The failure to make it possible for a person to exercise that right may firstly result in claims for damages as a result of the failure to provide treatment. This will have the effect of encouraging departmental compliance. Secondly, disciplinary steps would be required to be taken against individual officials who fail to provide the required treatment or frustrate the application of this clause.¹⁴ Rape Crisis (Cape Town) submits that the poor and marginalised are disproportionately represented as victims of sexual offences and suggests that in addition subsidisation of transport may be necessary.

One respondent, Doctor Coertzer,¹⁵ disagrees *in toto* with the provision of treatment at State expense for victims of sexual offences. He argues that there are many other justified claims for State medical treatment and a mandatory provision for State treatment of persons injured as a result of a sexual offence will divert medical resources away from other pressing needs. This is true, and ideally all victims of all offences should be able to rely on the State to provide treatment and counselling, both medical

¹² Mr K Govender, State Attorney, KwaZulu-Natal.

¹³ Office of the Director of Public Prosecutions: Transvaal.

¹⁴ In this regard the inter-sectoral national protocol will ensure that sanctions are put in place.

¹⁵ Medunsa.

and psychological. However, Government has the constitutional obligation to progressively realise socio-economic rights and the Commission regards the provision of treatment and counselling services to victims of sexual offences as but the first step in such a realisation process.

The second major issue that arose from the consultation process was who, other than the complainant, should be entitled to receive treatment. Once again there was widespread support for extending the provision of treatment to any person injured as a result of a sexual offence, particularly family members who may be traumatised by the offence. Further, there was majority support for extending the definition of 'harm or loss' to include psychological harm. These aspects are being dealt with in other investigations of the Commission.¹⁶

The third major issue involves the State provision of medication or anti-retrovirals where there is a possibility of exposure to STDs or the HIV/AIDS virus.

Mr Mabuza¹⁷ agrees with provision of treatment, including the provision of anti-retrovirals, but maintains that the choice of testing for STDs or HIV/AIDS should rest with the victim. Captain L Evans¹⁸ is of the opinion that the provision of free PEP to victims of sexual offences is an absolute necessity and should be implemented without undue delay. In her experience all victims of sexual offences (rape) are petrified of contracting HIV/AIDS, and testing and treatment will serve to ameliorate their fears. She argues that it is the duty of the State to protect its citizens, and thus the costs of these treatments should be carried by the State. She concludes that the cost for free HIV tests for victims of sexual offences should also be carried by the State.

The joint Western Cape¹⁹ submission fully endorses the Commission's recommendation that legislation is enacted to provide victims with **the option of** HIV testing, the best

¹⁶ Project 82: Sentencing.

¹⁷ Save the Children (Sweden).

¹⁸ SAPS.

¹⁹ Children's Rights Project, Community Law Centre, University of the Western Cape; Department of Forensics and Toxicology, University of Cape Town; Gender, Law & Development Project, Institute of Criminology, University of Cape Town; Gender Project, Community Law Centre, University of the Western Cape; Women's Legal Centre.

possible medical care, treatment and counseling. They also fully endorse the recommendation that the state should cover all costs for treatment and counseling required by the victim of rape as a result of the assault, including the provision of PEP, HIV-antibody testing and counseling. They also agree with the recommendation that the provisions regarding the provision of treatment be embodied in the proposed legislation. However, they argue that the provision of PEP **must not** depend on reporting the offence to the police or following through with criminal charges.

Ms A Allen and Associates express the view that the risk of HIV infection during sexual intercourse is in the region of 1000 to 8000 contacts i.e. effectively zero. With all other STDs it is in the region of 1 to 4 contacts. They take the view and dispute the reasoning behind this clause on the basis that PEP is only provided for HIV and question why an exception should be made in relation to HIV. The Commission's response is that HIV is the most serious and life-threatening sickness that may be contracted through a sexual offence. It is an epidemic that may debilitate South Africa. Further, the risk of contracting HIV as a result of a sexual offence cannot be compared to statistics on the risk of contracting HIV during consensual sexual intercourse as the risk is much higher due to the violence and lesions that frequently accompany such offences. In addition, other possible STDs should also receive treatment.

Ms Allen and Associates submit that no antiretroviral is licensed for PEP; that it is beyond the Commission's mandate to support the "off license" use of drugs and suggests that the entire section be deleted. They point out that anti-retroviral drugs are not licensed for PEP treatment and are unlikely to ever be. This is as a result of the fact that to be so licensed requires the conduct of tests that will be unethical due to the fact that the control group would not be given PEP treatment.

Ms Allen and Associates submit that the phrase "All victims of rape must be examined and assessed as to the risk of HIV infection" should be changed by deleting the acronym "HIV" and inserting in place thereof "STD". The Commission has no difficulty in adding "STDs", but nevertheless argues that there is considerable merit in highlighting HIV to ensure that an assessment in this regard takes place.

All other respondents fully endorse the recommendations of the Commission in regard to

the testing and treatment of persons injured during a sexual offence and where there is a risk of HIV infection.²⁰ The National Association of Democratic Lawyers (NADEL),²¹ for instance, strongly support the provision of PEP and HIV testing to victims of sexual offences, since, amongst other things, it acknowledges the fact that the “victim” has been exposed to a life threatening disease by circumstances that were beyond their control and not by choice. They say that this clause also seems to recognize the importance of concentrating on the health of the ‘victim’ rather than on establishing the HIV status of persons arrested for sexual offences through compulsory testing.

NADEL goes on to submit that it can be argued that considering the high levels of unemployment and poverty in South Africa, the fact that the financial responsibility of providing PEP is placed on the State facilitates not only the availability, but also the accessibility of medical care, treatment and counseling to victims - especially since a vast number of ‘victims’ of sexual offences would due to socio-economic conditions have no means of accessing PEP and treatment. The inaccessibility of treatment and counseling due to the victim’s lack of financial resources constitutes not only further victimization, but also further violate their basic human rights, such as the right to access to health care.

However, NADEL strongly recommend that the State be legally obligated to provide adequate funds and resources for the provision of PEP to ‘victims’ of sexual offences. The necessary budgetary provisions are of the utmost importance to provide the ‘best possible’ medical care, treatment and counseling. The meaning of the term ‘best possible treatment’ should therefore be defined by available medical procedures and treatments and not by the availability of allocated funds.

NADEL further supports the recommendation that binding protocols for medical practitioners and health care professionals have to be developed and put in place to provide the necessary care and treatment required specifically for rape ‘victims’. They recommend that funds be allocated specifically for the implementation procedures and structures, especially since there is a high possibility that without adequate budgetary

²⁰ Mollie Kemp, School Social Worker, Department of Education and Culture, KwaZulu-Natal; Commission for Gender Equality (Umtata workshop Group 3).

²¹ Dr Johanna Kehler, Acting Project Director, on behalf of NADEL.

allocation the access to these services will remain limited due to the financial constraints of particular care facilities (i.e. community clinics in rural areas). They therefore recommend that the appropriate departments, such as the Department of Health, be made responsible for providing adequate funds and resources needed to implement such protocols adequately and efficiently. NADEL concludes that rape victims' equal access to treatment, including counseling, can only be ensured as and when appropriate funds are allocated to all health care facilities.

SWEAT²² fully supports the Commission's view that resources should be targeted at providing PEP for rape victims rather than testing the accused. This approach is not only more practical, it also provides more meaningful support for the victim and avoids violating the accused's right to privacy.

6.3.3 Evaluation and recommendation

The Commission received general support during the entire investigation for its recommendation that treatment and counselling should be offered to the victim and the victim's family. The possibility to allow family members of victims to receive treatment and counselling is specifically provided for – the word “person” will allow such an interpretation, subject of course to the proviso that such person must have sustained injuries as the result of a sexual offence. “Injuries” are broadly defined to include physical, psychological or other injuries. To make it very clear that treatment is not limited to **medical** treatment, the Commission has opted to delete the references to “medical” in the final version.

Respondents felt strongly that the offender should be held liable for the cost of such treatment or counselling wherever possible. Where the offender do not have the means, respondents argued that funds for treatment and counselling should be obtained from the State or a victim compensation fund. Similarly, many respondents were of the view that the offender should not be entitled to such state sponsored treatment or counselling. In this regard, the Commission recommends that the State should bear the cost relating to treatment and counselling. The imposition of such a duty on the State –

²² Helen Alexander, Legal Advocacy Co-ordinator, on behalf of SWEAT.

and not the alleged offender - would also avoid the problem alluded to by Ms Combrinck earlier. She posed the question as to whether the treatment of the victim would end should the accused be acquitted. Nothing would prevent the victim or the State to sue the alleged offender civilly in his or her personal capacity for the cost of treatment and counselling provided to the victim and or his or her family.

The Commission is also of the view that if treatment and counselling of the victim were to be limited to affordability for the offender, very few victims would ever receive treatment or counselling. The Commission regards it as secondary traumatisation if a victim has to look to the person who has offended against him or her for funds for treatment and counselling.

The Commission takes the view that it is clearly within the scope of the sexual offences investigation to make recommendations in regard to testing and treatment for injuries sustained due to the commission of a sexual offence. The Commission does not make recommendations in relation to precisely what drugs or treatment should be given as this is constantly subject to change due to medical research and advances in treatment regimes. Further, the Commission is of the view that if disputes should arise as to whether treatment is appropriate or adequate, the courts will be best placed to make that determination based on the requirements of clause 22 as a base line, taking into account the multitude of relevant issues.²³ The Commission maintains the view that both the testing and treatment of a person injured as a result of a sexual offence should be the choice of the person concerned.

In order to ensure that victims are in a position to exercise their right to treatment and counseling, the Commission recommends the imposition of a statutory duty on medical practitioners and health care professionals to advise the victims of certain sexual offences of the possibility of being tested for sexually transmissible infections and access to treatment and care. Sexually transmissible infections obviously include HIV/AIDS.

To conclude, the Commission has elected to:

²³ See e.g. **Minister of Health and others v Treatment Action Campaign and others** (CCT8/02), date of judgment, 5 July 2002.

- Retain the general nature of the clause on the immediate provision of treatment and counselling to victims of sexual offences. In addition to creating an enforceable right, this will allow for the development of the protocols and directives necessary for practical implementation without unnecessarily restricting the broad range of treatment and counselling that may be required;
- To have a separate clause on the testing of persons who may have been exposed to STI's (including HIV/Aids) as a result of a being victims to sexual offences;
- To ensure that consistent and adequate information is given to victims of sexual offences in relation to the possibility of having contracted or being further exposed²⁴ to HIV; and
- Recommend that such treatment and counselling be provided to victims at State expense.

The Commission therefore recommends the incorporation of the following clause in the proposed Bill:

Provision of treatment

21. (1) **[If it has been established that]** Where a person has sustained physical, **[or]** psychological or other injuries as the result of an an alleged sexual offence, such person shall, **[as soon as is practicable]** immediately after the offence, receive **[adequate]** appropriate medical care, treatment and counselling as may be required for such injuries.

(2) If a person has been exposed to the risk of being infected by a sexually transmissible infection as the result of an alleged sexual offence, such person shall, immediately after the reporting of the offence to the South African Police Services or to a health care facility -

(a) be advised by a medical practitioner or a qualified health care professional of the possibility of being tested for such infection; and

(b) have access to all possible means of prevention, treatment and medical care in

²⁴ A person who is HIV positive and is exposed to the virus is at risk of increasing their viral load.

respect of possible exposure to a sexually transmissible infection.

[(2)](3) The State shall bear the cost of the [medical] care, treatment, testing, prevention and counselling as referred to in [subsection (1)] this section.

6.4 Enhancing victim rights – the right to private prosecution

6.4.1 Current law

In terms of section 7(1) of the Criminal Procedure Act, “any private person who proves some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the commission of the said offence” may institute and conduct a (private) prosecution in any case in which the National Director of Public Prosecutions declines to prosecute.²⁵ Such (private) prosecution may only be brought once a certificate *nolle prosequi* has been obtained. The Criminal Procedure Act further prescribes that the person²⁶ instituting a private prosecution must provide security to ensure that the charge against the accused is prosecuted to conclusion without undue delay and to secure the costs which may be incurred in respect of the accused’s defence to the charge.²⁷ For the rest, a private prosecution must be proceeded with in the same manner as if it were a prosecution at the instance of the State.²⁸

6.4.2 Proposals in Discussion Paper 102

The Commission did not specifically consider the issue of the right to institute a private prosecution in sexual offence cases and therefore made no preliminary recommendation

²⁵ See also **Phillips v Botha** 1999 (2) SA 555 (SCA).

²⁶ A company is not a “private person” in terms of this section: **Barclays Zimbabwe Nominees (Pty) Ltd v Black** 1990 (4) SA 720 (AD).

²⁷ Section 9(1) of the Criminal Procedure Act.

²⁸ Section 12(1) of the Criminal Procedure Act. The proviso to this section state that the person in respect of whom the private prosecution is instituted shall be brought before the court only by way of summons (in the case of a lower court) or an indictment (in the case of a superior court).

in this regard.

6.4.3 Evaluation of comment

Mr JG van Zyl²⁹ suggests that the right to institute private prosecutions should be extended to all complainants in cases where it is not the intention of the Director of Public Prosecutions or his designated officer to proceed with prosecution. This will mean that complainants in rape, robbery, fraud etcetera cases and other organisations like municipalities will have the right to bring a (private) criminal prosecution before a court using a private prosecutor (attorney or advocate) acting under the watchful eye of the Director of Public Prosecutions or his designated officer.

Mr Van Zyl set outs the following advantages of such a system:

- A lot of prevailing criticism will be diverted away from the state and its organs.
- Cases will be depoliticised e.g. where it is alleged that a member of a political party has stolen donor funds the donor will be able to appoint a private prosecutor.
- Complainants will, from the outset, be able to appoint private prosecutors to assist them to protect their rights.
- The quality of investigations will improve due to the assistance that private prosecutors will be able to give to investigating officers.
- Tremendous savings will be incurred due to many private prosecutors that will prefer to take witness statements themselves.
- It will lead to a dramatic reduction of prosecutorial manpower and administrative costs.
- It will increase the quality of prosecutions.
- It will set positive examples that will assist in the training of public prosecutors.
- It will enhance equal rights for victims.
- The public will be less inclined to take the law into their own hands, knowing that they are protected by a justice system that is more tuned to protect them.

²⁹ Regional Magistrate: Heidelberg.

Mr Van Zyl concedes, however, that such a system will mainly benefit the rich, who will be able to buy their own brand of criminal justice. He argues though, that market forces will dictate the cost of private prosecutions and in any event no existing right is affected. He further submits that the poor will also benefit due to the fact that prosecutors will have more time available to attend to their cases. Financial savings can result in the appointment of far more experienced prosecutors, which will also benefit the system. Jobs will be created in the private sector.

6.4.4 Recommendation

The Commission does not propose to address this issue as it is clearly not confined to sexual offence trials. For the record, however, we share the concern that such a system would mainly benefit the rich and create a dual system of criminal justice. The Commission also takes cognisance of the fact that the Department of Justice and Constitutional Development and the National Director of Public Prosecutions have considered similar proposals to expand the right to institute private prosecutions and are not in favour thereof.

6.5 Legal representation for victims of sexual offences

6.5.1 Current law

In terms of our current adversarial system of criminal justice, a victim in a sexual offence case is not a party to the proceedings, but usually the principal witness for the State. As such, a victim / witness has no legal standing in the matter and plays no active part in the conduct of the criminal case. A witness is therefore not allowed, for instance, to appoint his or her own legal representative to introduce the evidence of the witness in court or to question the accused – that is the role assigned to the prosecutor.

6.5.2 Proposals in Discussion Paper 102

The discussion of the complainant in sexual offence cases acting as an ancillary prosecutor was based in Discussion Paper 102 on the German *Nebenklager* model. This model allows the complainant to apply to court by way of affidavit to participate in

the criminal trial as an ancillary prosecutor once the State has instituted proceedings against the accused. Once permission is granted by the court, the complainant becomes a party to the proceedings and receives treatment equal to that of the accused. He or she acquires the right to be present throughout the proceedings and can actively participate in the legal proceedings through his or her legal representative.

In the discussion paper, the Commission contended that the adoption of the German *Nebenklager* procedure is not the only manner in which to improve the quality of and experience of testimony of sexual offence complainants (and thus ensure a higher conviction rate). The Commission took the view that it is sounder, in law, to introduce measures aimed directly at the harmful and often unhelpful rules and regulations that are the real obstacles to the protection of a victim's / complainant's interests in a sexual offence trial. The Commission was further of the view that the recommendations contained in Discussion Paper 102 will greatly assist complainants and advance the protection of their interests in a manner consistent with the constitutional imperatives applying to the State. The Commission concluded that although all victims suffer individual trauma, crimes are committed against society at large. It is therefore proper that the State, and not the victim, prosecute offenders.

6.5.3 Evaluation of comment

The Western Cape joint submission put forward a detailed argument in favour of limited legal representation for victims of sexual offences, which they distinguish from the notion of the victim as an 'ancillary prosecutor'. What they have in mind is the appointment of a victim's lawyer or legal representative. This is not a question of semantics, but rather an indication of the substance of the role that such a person can be envisaged as fulfilling. They believe that the introduction of legal representation for rape victims, within clearly defined parameters, will not only serve to strengthen victims' rights, by substantially addressing a number of the inequities raised in the Discussion Paper, but will serve to improve efficient and effective management of cases throughout the criminal justice process. It will also serve to further recognise that although rape is a crime against society, it is uniquely personal in nature, placing victims as witnesses in a particularly vulnerable position. They recommend therefore that a legal representative for the victim be present throughout the pre-trial process, at the trial (where necessary and

appropriate) and at sentencing.

Legal representation for victims of sexual offences is found in a number of jurisdictions.³⁰ The Western Cape joint submission requests the Commission to consider alternative models to that considered in Discussion Paper 102 and draw the Commission's attention to the approach taken in Denmark, Norway and Ireland.³¹

- **Denmark**

Although the Danish criminal justice model contains a number of inquisitorial elements, it is essentially adversarial in nature. Section 171 of the Danish Administration of Procedure Act of 1980 introduced legal representation for rape victims, a provision considered so successful that it has since been extended to cover victims of other crimes.

Broadly speaking, this system of legal representation works as follows: A duty is placed on the police to inform the victim when she first reports the rape and before she makes a statement that she has a right to legal representation. The police are under a duty to keep the victim informed of the investigation and of the process which will be followed. A legal representative is then appointed. This person ensures that, in practice, the victim is kept informed of the progress in the police investigation and the criminal justice process. The lawyer has access to the police investigation and all evidence prior to an arrest and may discuss these with the victim.

At trial, the victim's lawyer may only be heard on matters directly affecting the victim. Thus, the lawyer may not ask for additional witnesses to be called, nor cross-examine the accused or any of the witnesses. Nor may the victim's lawyer make submissions to the court on points of law. He or she only has the right to be present at the trial while the victim is giving evidence. At this stage he or she may object to questions put to the victim by both the defence and the prosecution. The lawyer may also ask that the victim

³⁰ Spain, the Netherlands, Luxembourg, Finland, Italy, Austria, Sweden, Norway, Germany, Ireland, France and Belgium all allow for some level of legal representation to be afforded to rape victims.

³¹ The analysis of the alternative models submitted by the Western Cape joint submission is set out in full.

give evidence behind closed doors or be cross-examined without the defendant being present.

At sentencing, the victim's lawyer may call witnesses and lead evidence in respect of the impact that the crime has had on the victim and the issue of compensation, but may not address the court on the question of sentence.

That the victim's lawyer may not act as a second prosecutor is emphasised in the memo accompanying the original Bill that introduced this concept. This means, it is suggested, that the victim's lawyer may not concern himself or herself with 'questions of guilt, innocence or sentence'.³² Rather, the lawyer acts only to protect the interests of the victim.

The Western Cape joint submission strongly recommend that the Law Commission consider the introduction of a system of legal representation for rape victims based on this model.

- **Norway**

As in the example of Denmark, victims must be informed of their right to legal representation at the time a rape is reported and are entitled to have their legal representative present at the police interview. Again, the lawyer serves to ensure that necessary information reaches the victim and prepares her for the court case. The legal representative may appeal against a decision by the police or prosecution to drop a case.

At trial the lawyer has the right to be present whenever his or her presence is necessary to offer support and assistance to the victim. The lawyer may intervene in respect of procedural issues affecting his or her client and ensure that questioning is not improper or irrelevant. He or she also has the right to appear at sentencing along similar lines to the Danish model.

³² Bacik, Maunsell and Gogan **The Legal Process and Victims of Rape** Dublin: Dublin Rape Crisis Centre and School of Law, Trinity College, 1998, p.199.

- **Ireland**

Section 26(3) of the Irish Civil Legal Aid Act, 1995 gives rape victims the right to obtain legal advice. This was extended in 2001 by means of the Sex Offenders Act which provides, in section 34, for an amendment to the Criminal Law (Rape) Act of 1981. By means of this amendment the legislature has introduced legal representation for complainants in cases where the defence seeks to adduce evidence about the sexual experience of the complainant. Although limited the Western Cape joint submission believe that this represents an important recognition that there are times during the trial process where the victim must be allowed, in order to protect his or her own rights and interests, to participate in the trial as something more than a witness. They point the Commission to the fact that this is similar in effect to the Ohio model considered briefly in Discussion Paper 102. That model provides for legal representation for the victim where the admissibility of evidence is in question.³³

To conclude, the Western Cape joint respondents are of the view that many points in the process through which a rape victim travels, from first reporting the offence to the police to sentencing of the perpetrator, are considered necessary and appropriate times for her voice to be heard. Where this is so, it follows that legal representation is appropriate. Furthermore, they say that there are additional functions which might conceivably be fulfilled by such a representative, thereby relieving some of the load which currently rests on the shoulders of police and prosecutors. Indeed, they believe that a victim's lawyer will often complement the roles of other criminal justice personnel and can only be of assistance to the court. Below is the brief discussion on aspects of the process at which, in their opinion, legal representation might be appropriate:

* *Pre-trial*

The pre-trial stage includes reporting the offence to the police and making a statement, trial preparation, plea bargaining and bail hearings. At this stage lack of information and general communication with the victim throughout the process has been identified as particularly problematic.

³³ Discussion Paper 102, Chapter 16 at 16.8.1.

* *Information and communication*

Lack of access to information on the legal process, the role players involved, the conduct of the trial and the investigation acts to substantially add to the trauma that victims' experience. The research of those involved in the Western Cape joint submission on the Domestic Violence Act³⁴ points to the chronic capacity problems within the SAPS. Likewise, prosecutors often do not have the time to meet with complainants for any length of time prior to the trial. Staff turnover means that often the same prosecutor will not even be present for the duration of the trial. One of the primary functions of a victim's lawyer would be, following the lead of numerous other jurisdictions, to act as an information source for the victim from the time that the offence is reported, through the trial process. This in no way detracts from the duty which we propose to impose on investigating officers and prosecutors to ensure that victims are fully informed throughout the process and properly prepared for trial. Rather, they believe that a victim's lawyer would complement that duty. As a legally trained person he or she would bring an understanding of the process to interactions with the criminal justice system, greatly facilitating the flow of information to the victim whose interests he or she is serving.

Furthermore, the presence of a victim's lawyer at the time that a statement is taken would help to ensure that the victim is properly and appropriately interviewed, serving to address, in a small measure, the difficulties identified in respect of the quality of statements taken by investigating officers, that medico-legal services are made available and provide the victim with a measure of support. The presence of a legally trained person may also serve to ameliorate some of the difficulties that are identified in relation to 'unfound' cases, balancing the potential vagaries of police and prosecutorial discretion.

As such, they would recommend that the victim be informed by the police, at the time that he or she first reports the offence, of the right to have an attorney present when he or she makes her statement. To this end the police should keep a list of attorneys who are prepared to function as victim's lawyers. Although legal representation in such a

³⁴ Parenzee, Artz and Mout (2001) **Monitoring the Implementation of the Domestic Violence Act** Cape Town: Institute of Criminology (UCT). See also the Report on the Implementation of the Domestic Violence Act and the Maintenance Act in the Courts compiled by Ms Joyce Maluleke, Gender Directorate, Department of Justice and Constitutional Development, 28 August 2000.

case should ideally be state-funded, they are cognisant of the difficulties faced by the Legal Aid Board. They suggest that in addition to the option of state-funding, the possibility of *pro deo* representation be canvassed with the profession.

* *Plea Bargaining*

In Discussion Paper 102 the Commission recognises that plea bargaining may be problematic in respect of victims' rights.³⁵ The Commission recommended that a prosecutor only be permitted to enter into a plea bargain agreement after consultation with the investigating officer and after considering, 'circumstances permitting', representation from the victim or her representative.³⁶

The Western Cape joint respondents are of the opinion that legal representation for the victim when a plea bargain is being considered will substantially improve the quality of that interaction and the subsequent decision on the matter. Likewise, they believe that the presiding officer can only be placed in a position to make a full and proper assessment of the appropriateness of a plea agreement if he or she has access to the views of the victim and this process will be further improved if the victim's views are presented in a cogent and accessible way by the victim's legal representative.

* *Bail Hearings*

In the Western Cape joint submission the problematic nature of bail in respect of sexual offences is highlighted. They say that to a great extent these problems are due to inadequate protection of the victim's rights and interests. They argue that legal representation for the victim will ensure that the victim is informed, in the first place, of the hearing and that, at that at those hearings, the victim's fears and concerns are voiced. Such a representative would also complement the prosecutor in ensuring that all relevant facts are placed before the court, a prosecutorial duty the importance of which was affirmed in both the facts presented and judgement handed down in **Carmichele v Minister of Safety and Security and another (Centre for Applied Legal Studies**

³⁵ Discussion Paper 102, par. 17.2.7.

³⁶ Discussion Paper 102, par. 17.2.4.

Intervening).³⁷

* *Trial*

In the Western Cape joint submission it is stated that courts are, for numerous and varied reasons, intimidating places. Testifying in a court is often a frightening experience. This is even more so when the witness has been victim to and is required to recount details of an offence of a deeply personal nature. In this respect research conducted in the European Union has found that:

“The presence of a victim's lawyer...had a highly significant effect on a victim's level of confidence when giving evidence, and meant that the hostility rating for the defence lawyer was much lower”.³⁸

In other words, they say that the quality of testimony improves and the adversarial nature of the process is mitigated should the victim have access to legal representation.

The Western Cape joint respondents emphasise that the victim's lawyer is not a second prosecutor. As such, the concern of this lawyer during the trial process should not be around questions of innocence, guilt or sentence, but rather to ensure that the victim's 'story' is properly told and that procedural and evidentiary rules as they pertain to the victim are properly enforced. That is, the victim's lawyer is there to help *the victim* in court. Cases in which this might be appropriate in terms of the proposed Bill would include deliberations as to whether the victim should be declared a vulnerable witness and applications by the accused for disclosure of the victim's personal records. They argue that the victim's lawyer might also appropriately apply for the victim's evidence to be heard *in camera* or in the absence of the defendant.

The Western Cape joint respondents argue that the legal assistance given to the victim by his or her legal representative can be very narrowly circumscribed, but nonetheless be effective as may be seen from the Danish, Norwegian and Irish models discussed

³⁷ 2001 (4) SA 938 (CC), also reported at <http://www.concourt.gov.za/cases/2001/carmichelesum.shtml> .

³⁸ Bacik, Maunsell and Gogan **The Legal Process and Victims of Rape** Dublin: Dublin Rape Crisis Centre and School of Law, Trinity College, 1998, p. 17.

above.

* *Sentencing*

The Western Cape joint submission suggest that, following the Danish model described above, the victim's lawyer should be permitted to address the court in respect of victim impact and compensation at sentencing stage. They point out that the Danish model does not allow such a representative to speak directly to the issue of sentencing, but argue that legal representation for the victim would substantially complement not only the existing compensation regime (as limited as it is), but also that proposed by the Commission in its Report on Sentencing. There is likewise such a role to play for a legal representative in respect of the Commission's recommendation that the court be obliged to consider victim impact statements when determining sentences.³⁹

* *Parole*

The Western Cape joint respondents endorse the Commission's preliminary recommendation in Discussion Paper 102 that the victim's input be used to determine parole conditions. It should be noted that the arguments made above in respect of the role that a legal representative can play in providing access to information, victim support and facilitating the victim's participation and testimony apply equally in respect of parole hearings.

The joint respondents refer to a 1998 research report entitled **The Legal Process and Victims of Rape** jointly published by Trinity College, Dublin and the Dublin Rape Crisis.⁴⁰ This research documents the rape law process in 15 European Union countries. A statistical analysis to determine the effect on the victim of having legal representation at pre-trial and trial stages revealed the following:⁴¹

- (i) participants experienced significantly fewer difficulties in obtaining information about case developments;

³⁹ Discussion Paper 102, par 40.16.6.

⁴⁰ Bacik, Maunsell and Gogan **The Legal Process and Victims of Rape**, p. 17.

⁴¹ Ibid, p. 151.

- (ii) participants had a significantly clearer understanding in relation to their role at trial;
- (iii) participants reported higher levels of confidence and were more articulate when testifying;
- (iv) participants rated the attitude of the accused's lawyer as significantly less hostile;
- (v) the impact of the trial process on the participant's family was considered to be significantly less negative;
- (vi) participants were overall significantly more satisfied with the legal process than were participants who did not have their own legal representative during the trial process.

As such, the research report strongly recommends the introduction of victims' lawyers in all jurisdictions, both adversarial and inquisitorial. This view is endorsed by UN High Commissioner for Human Rights, Mary Robinson, in her forward to the report.⁴²

In conclusion, the Western Cape joint respondents argue that in relation to sexual offences cases victims' lawyers have the potential to fill a substantial gap created by the reality that existing role-players fulfil pre-allocated roles within the process and that our criminal justice system suffers from chronic under-resourcing and often serious attitudinal problems. The joint respondents believe that legal representation for the victim of sexual offences, if narrowly and clearly circumscribed, would withstand constitutional scrutiny. This is not least because providing support to the victim and assisting such victim in a way that ensures that he or she testifies cogently and coherently can only serve to benefit the process. Likewise, reducing delays will impact substantially on both the victim and the accused and reduces potential prejudice to both. It will also go to improving efficiency and decreasing postponements if the victim is allowed to question unjustified delays on the part of either the prosecution or the defence. Furthermore, the Western Cape joint respondents suggest that improved efficiency and victim participation may serve to improve prosecution of sexual offences, increasing their deterrent effect. They are of the firm opinion that their recommendation does not in any way infringe on the due process rights of the accused⁴³ as it would be

⁴² Bacik, Maunsell and Gogan **The Legal Process and Victims of Rape**, p. pxii

⁴³ Any infringement would, in any event, be open to limitation under section 36(1) of the Constitution.

ludicrous to base a defendant's right to due process or to a fair trial on a victim's incoherence, disempowerment and alienation from the process. Qualified legal assistance to the victim can only assist the court in its quest for the truth, to the benefit of both the victim and the accused.

The Western Cape joint submission recommends that the Commission makes provision for a victim's right to legal representation in the Sexual Offences Bill as follows:

- That a positive duty should be placed on any member of the SAPS taking down a rape complaint to inform the victim before making a statement or before the initial interview that he or she has the right to legal representation.
- That a provision be placed in the Bill specifying that:
 1. A victim of a sexual offence shall have a right to obtain legal representation.
 2. Such a legal representative may represent the client -
 - (a) in all dealings with the SAPS and NDPP;
 - (b) in respect of bail hearings;
 - (c) at the time that the victim is giving evidence and whenever appropriate and reasonable during the trial process to directly protect the rights or interests of the victim; *(these circumstances may be clearly defined and circumscribed in the legislation itself)*;
 - (d) at sentencing in respect of the impact that the crime has had on the victim and when speaking to the issue of compensation;
 - (e) at parole hearings in respect of the conditions to be attached to an offender's release;
 - (f) at any other time during the process where appropriate and reasonable to directly protect the rights and interests of the victim.

6.5.4 Recommendation

The Commission is highly appreciative of the detailed and thorough research conducted

in the preparation of the Western Cape joint submission, but is nevertheless not persuaded that the victim of a sexual offence should have legal representation (albeit in a limited form). Currently, the State funded legal aid system does not have sufficient funds and other resources to ensure that every accused person has legal representation and children appear in court without legal assistance. Should such legal representation for victims be privately funded, the same problem arises as that raised in connection with the suggestion above that private prosecutions be allowed. In other words, a dual system will operate where rich victims will have access to legal representation and the poor victims will have to do without.

Against this background, the Commission does not deem it appropriate to recommend legal representation for victims of sexual offences. The Commission is of the view that many of the problems referred to by the Western Cape joint respondents and which will, in their opinion, be solved by limited legal representation for victims is addressed by the recommendations contained in this Report.

CHAPTER 7

TREATMENT AND SENTENCING OF SEX OFFENDERS

7.1 Introduction

In this Chapter the Commission focuses on the sex offender. Aspects covered include testing and treating sex offenders for drug and alcohol abuse, sex offender orders, supervision of dangerous sex offenders, treatment and counseling of sex offenders, community notification upon release of a sex offender and registers of sexual offenders.

Limited attention is given to the sentencing of the sexual offender. In this regard the reader is referred to the discussion of the provisions of the Criminal Law Amendment Act, 105 of 1997) in Discussion Paper 102 and Chapter 3 above. The Criminal Law Amendment Act 1997 sets out certain minimum sentences for persons found guilty of having committed certain sexual offences.

7.2 Drug and alcohol treatment and testing orders

7.2.1 Current law

There is currently no provision dealing with the prevention and treatment of drug and alcohol dependency which is linked to the commission of a crime in the Sexual Offences Act, 23 of 1957.¹

Section 296 of the Criminal Procedure Act provides that a court convicting a person of any offence may in addition or in lieu of any sentence order that the person be detained at a treatment centre established under the Prevention and Treatment of Drug Dependency Act, 1992, if the court is satisfied from the evidence or from other information placed before it (including the report of a probation officer) that such person is a person as is described in section 21 (1) of the latter Act. Consequently, in terms of

¹ However, see also the Commission's report on Offences committed under the influence of liquor or drugs (Project 49), 1985, and the Criminal Law Amendment Act (Act No 1 of 1988), which gave effect to the Commission's recommendations.

the latter Act read with section 296 of the Criminal Procedure Act, a person will be eligible for admission to a treatment centre if the person is dependent on drugs and in consequence thereof squanders his means or injures his health or endangers the peace or in any other manner does harm to his own welfare or the welfare of his family or fails to provide for his own support or for that of any dependant whom he is legally liable to maintain.

There is a further proviso to section 296 of the Criminal Procedure Act that states that such order shall not be made in addition to any sentence of imprisonment (whether direct or as an alternative to a fine) unless the operation of the whole of such sentence is suspended.

In terms of section 52 of the Correctional Services Act, 111 of 1998 persons on parole may be subjected to community corrections (provided that the person who is to be subjected to community corrections agrees to the stipulated conditions and undertakes to co-operate in meeting them).² A community correction may stipulate that the person concerned takes part in treatment, development and support programmes or refrains from using or abusing alcohol or drugs.³

Further, section 67 of the Correctional Services Act provides that where there is a reasonable suspicion that a person has used or abused alcohol or drugs in contravention of a community correction order,⁴ a correctional official may require such person to allow a designated medical officer to take blood and urine samples in order to establish the presence of alcohol or drugs in the blood or urine.

Drug and alcohol abuse are major contributing factors in the commission of crime and sexual crimes in particular.⁵ Curbing acts of sexual violence and treatment of sexual offenders can be strengthened by requiring the sexual offender to refrain from using drugs and/or alcohol and to submit to regular testing to determine whether drugs are

² Sections 51 (1) and (2).

³ Section 52(1)(a) - (q) of the Correctional Services Act, 111 of 1998.

⁴ Section 52(1)(k).

⁵ According to Dr J Loffell approximately 90% of cases of reported child abuse involve alcohol abuse by the offender.

being misused.

7.2.2 Proposals in Discussion Paper 102

In Discussion Paper 102 the Commission proposed that a court convicting an accused of a sexual offence may, if the accused is dependent or has a propensity to abuse drugs or alcohol, order that the accused submit for a specified time, to a treatment programme aimed at reducing or terminating such misuse or dependency. The Commission qualified the power of the court to make such orders by requiring the Director-General of the Department of Social Development to notify the court that such programmes are available in the area where the convicted offender is to submit for treatment.

The following clause was proposed in Discussion Paper 102:

Drug and alcohol treatment and testing orders

23. (1) A court may, upon conviction of a person of having committed a sexual offence and if satisfied that the convicted person is dependent on or has the propensity to misuse alcohol or any drug and may benefit from treatment, grant an order, subject to the provisions of subsection (2), requiring such person to –

- (a) submit, for a specified period of time, to treatment by or under the direction of a specified person or institution with the required qualifications for purposes of reducing or terminating the convicted person's dependency on or propensity to misuse alcohol or drugs; and
- (b) provide samples, at any time during the period of treatment referred to in paragraph (a), as may be determined by the person or institution providing treatment for purposes of testing whether the convicted person is continuing to use alcohol or drugs.

(2) A court may not issue an order referred to in subsection (1) unless it has been notified by the Director-General of the Department of Social Development that facilities for the implementation of such an order are available in the area where the convicted person is intended to submit to treatment.

7.2.3 Evaluation of comment

The introduction of drug and alcohol testing orders is seen by respondents as a viable

and helpful solution in both treating offenders and discouraging re-offending.⁶ Judges Bertelsmann and Van Heerden raise concerns in relation to resources and affordability. While it is conceded that resources are limited, sight must not be lost of the potential cost in not providing for drug and alcohol rehabilitation of sex offenders and offenders in general.⁷

Rape Crisis (Cape Town) makes the important point that these orders will assist in determining how effective the treatment is. Mr P Mabuza points out that in assessing this clause, one must take a long term view and, in his view, the clause will be effective in the long run. RAPCAN agrees that in the South African situation drugs and alcohol have been shown to play a significant role in the commission of sexual offences. However, it expresses a concern that this should not be viewed as a mitigating circumstance. The Parliamentary Task Group on the Sexual Abuse of Children endorses this view and states that the influence of alcohol and drugs should be considered an aggravating factor in the sentencing of sexual offenders.

Advocates R Meintjes and Henning SC, point out that it must be made clear in the legislation that a drug and alcohol order will be made **in addition** to a sentence or part of a sentence. The Commission agrees with this point and proposes to amend the provision accordingly due to the fact that without some form of compulsion, sex offenders would not attend treatment programmes or stay in such programmes.

Age-in-Action, while agreeing with the introduction of the clause in principle, request that subclause (2) should not be a bar to the court making the order. They are of the view that it would be more appropriate for the court, if necessary, to make a referral to another facility where the offender can receive treatment. There is considerable merit in

⁶ Judge Bertelsmann; Professor Coertzer; Mr P Mabuza; Judge Van Heerden; SOCA Unit of the National Director of Public Prosecutions; Ms I Filander; Ms Leslie; Dr K Muller; RAPCAN; Advocates R Meintjes and Henning, SC, Director of Public Prosecutions: Transvaal; S.T.O.P (Standing Together to Oppose Pornography); Mmabatho Lesho; Eastern Cape Network on Violence Against Women; N Mbophane (Masonwabisane Women Support Centre); Michael Mokwena (SAPS: Commander CSC); F C Shaw (Welfare Forum Durban and South Region); Silas I M Nawa (National Department of Education); Koos Strauss (Rape Intervention Project GRIP); Nolitha Mazwai (Rape Crisis Cape Town); M Hakala (Dept. of Social Services, chief social worker); Ms M J Mmola (Maboloka HIV/AIDS Awareness Organisation); Ms B J Matshego (probation officer, Dept. of Correctional Services); Ms M Humn - Tshwaraganang Women Organisation; Thusanang Advice Centre.

⁷ As was suggested by Ms I Filander and Mr E Szndrauhi.

this proposal, but the concern falls away in view of the fact that the Commission no longer see a need for such a provision.

7.2.4 Recommendation

The Commission has reconsidered the existing provision namely section 296 of the Criminal Procedure Act, which provides that a court convicting a person of any offence may in addition or in lieu of any sentence order that the person be detained at a treatment centre established under the Prevention and Treatment of Drug Dependency Act, 1992. Further, the proviso to section 296(1) of the Criminal Procedure Act states that such an order will not be made in addition to any sentence of imprisonment unless the operation of the whole of such sentence is suspended.

The Commission is of the view that the above provisions cater adequately for the prevention of drug and alcohol abuse by sex offenders. It is therefore not necessary to include detailed provisions in the draft Sexual Offences Bill to provide for the submission to treatment for drug or alcohol abuse or for the taking of samples by convicted sex offenders. What is required, however, is a provision to allow the courts the power to require convicted sex offenders to undergo such treatment in addition to a sentence of imprisonment, as was suggested by Advocates Meintjes and Henning, SC. Consequently, the Commission has elected to amend the clause that was proposed in Discussion Paper 102. This is done by linking treatment for drug and alcohol abuse to section 296 of the Criminal Procedure Act and to allow the court the latitude to order that the sex offender undergo treatment in addition to a sentence of imprisonment.

The Commission therefore recommends the incorporation of the following clause in the proposed draft Bill:

Drug and alcohol treatment [and testing] orders

22. (1) A court may, upon conviction of a person of having committed a sexual offence and if satisfied that the convicted person is dependent on or has the propensity to misuse alcohol or any drug and may benefit from treatment, grant an order in terms of section 296 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977): Provided that such an order may be made in addition to any sentence, including a sentence of imprisonment which is not suspended **[subject to the provisions of subsection (2), requiring such person to -**

- (a) submit, for a specified period of time, to treatment by or under the direction of a specified person or institution with the required qualifications for purposes of reducing or terminating the convicted person's dependency on or propensity to misuse alcohol or drugs; and
- (b) provide samples, at any time during the period of treatment referred to in paragraph (a), as may be determined by the person or institution providing treatment for purposes of testing whether the convicted person is continuing to use alcohol or drugs.

(2) A court may not issue an order referred to in subsection (1) unless it has been notified by the Director-General of the Department of Social Development that facilities for the implementation of such an order are available in the area where the convicted person is intended to submit to treatment.]

7.3 Sex offender orders

7.3.1 Current Law

Neither the Sexual Offences Act, 23 of 1957 nor the Criminal Procedure Act, 51 of 1977 makes provision for a court to make a sex offender order.

7.3.2 Proposals in Discussion Paper 102

In Discussion Paper 102 the Commission proposed the introduction of sex offender orders. In terms of the proposal a court, upon application by a defined category of persons, may "grant an order prohibiting a person convicted of a sexual offence, notwithstanding the fact that the convicted person has lodged an appeal or instituted review proceedings regarding his or her conviction or sentence, from acting in a way that is intended to cause serious harm to any particular person or members of the public; frequenting any specified location; or establishing or attempting to establish contact with any specified person". It was further recommended that the order could be made notwithstanding the fact that the person concerned has completed his or her sentence *in toto*.

Essentially such an order is designed to protect the community or individuals by limiting the movement of convicted sex offenders or with whom they associate ostensibly to avoid the commission of a further offence before it occurs.

The following clause was proposed in Discussion Paper 102:

Sex offender orders

24. (1) A court may, upon application by a person referred to in subsection (2), grant an order prohibiting a person convicted of a sexual offence, notwithstanding the fact that the convicted person has lodged an appeal or instituted review proceedings regarding his or her conviction or sentence, from -

- (a) acting in a way that is intended to cause serious harm to any particular person or members of the public;
- (b) frequenting any specified location;
- (c) establishing or attempting to establish contact with any specified person.

(2) An application referred to in subsection (1) shall be made on affidavit to the magistrate's court in whose area of jurisdiction it is alleged that the convicted person is or was acting in a way referred to in that subsection, and may be brought by -

- (a) a police official;
- (b) a police reservist;
- (c) a director or authorised employee of a non-governmental or community based organisation;
- (d) any member or employee of a private security institution;
- (e) a social worker;
- (f) a medical officer; or
- (g) an official designated by a local authority.

(3) Any person may request a person referred to in subsection (2) to bring an application as contemplated in this section and may, upon failure of such person to bring an application within 48 hours of the request without good reason, make such application to the court referred to in subsection (2).

(4) The court hearing the application for an order as contemplated in this section may only grant such order if it is satisfied that the person in respect of whom the order is sought has been convicted of a sexual offence and that the order is necessary for the purpose of protecting any particular person or members of the public from serious harm by the convicted person and may, if so satisfied, direct that the convicted person is prohibited from acting in any way which the court deems fit.

(5) An order contemplated in this section shall have effect for a period of at least five years from the date of the order or for such longer term as may be prescribed in the order, and may only be revoked by the court within a shorter period of time upon application by the person who first obtained the order or by the convicted person with the consent of the person who first obtained the order.

(6) A convicted person in respect of whom an order has been issued by a court as contemplated in this section, and who contravenes any prohibition or direction stipulated in such order, is guilty of an offence and shall be liable, upon conviction, to a fine or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

7.3.3 Evaluation of comment

The Commission's preliminary recommendation drew a mixed response. While many respondents are essentially in favour of the provision,⁸ others raised the following potential problems: it might constitute double jeopardy,⁹ it might be unconstitutional,¹⁰ the principle of *audi alteram partem* apparently does not apply, the clause is too restrictive in regard to who may bring the application, (it was suggested, for instance, that a doctor or victim should be able to bring the application directly), the order should rather be linked to bail (in anticipation of future harm), it is unclear whether this order is of a civil or criminal nature¹¹ and difficulties in implementation.¹²

According to Advocates Meintjes and Henning, SC,¹³ these provisions will have to be linked to either an offender register or to the court proceedings which led to the conviction. Further, they say that such a prohibition should be provided for from the start of the proceedings. They point out, however, that the present formulation is problematic: it pre-supposes that the convicted offender is released; no time period is stipulated within which an application is to be brought; the *audi alteram partem* principle does not appear to apply; provision is not made for informing the offender of an order having been made; who is to know, without an offender register provided for, that the person has previously offended and that an order might therefore be applied for; how will it be proved that the person was convicted of a sexual offence; who will know that such an order was made for purposes of enforcement; etcetera.

⁸ Age-in-Action; Koos Strauss (Rape Intervention Project GRIP); Nolitha Mazwai (Rape Crisis Cape Town); Silas I M Nawa (National Department of Education); F C Shaw (Welfare Forum Durban and South Region); Michael Mokwena (SAPS: Commander CSC); N Mbophane (Masonwabisa Women Support Centre); Eastern Cape Network on Violence Against Women; Mmabatho Lesho; S.T.O.P (Standing Together to Oppose Pornography); Thusanang Advice Centre; Ms M Humn - Tshwaraganang Women Organisation; Ms M J Mmola (Maboloka HIV/AIDS Awareness Organisation); M Hakala (Department of Social Services, chief social worker); RAPCAN; Ms I Filander.; Dr K Müller (Gauteng); Ms Leslie; Professor Coertzer; Dr K Muller; Mr P Mabuza.

⁹ Professor Burchell and Judge Bertelsmann.

¹⁰ Judge Bertelsmann.

¹¹ Gordon's Bay Expert Consultation.

¹² Mr Edmund Szndrauhi (Director Public Prosecutions, KZN); Mr P Mabuza (Save the Children: Sweden); Ms B J Matshego (probation officer, Dept. of Correctional Services).

¹³ Office of the Director of Public Prosecutions: Transvaal.

The SOCA Unit¹⁴ submits that after vigorous debates surrounding this provision, they agree with the general difficulties raised at the Gordon's Bay Expert Consultation and are of the opinion that this section needs to be reconsidered. In regard to subclause (2), they agree that the prosecutor should be the person charged with the responsibility to bring the application. He or she may do so at the request of those persons listed in (a) – (g). With reference to subclause (3) which refers to “without good reason” they agree that this is very vague and that it should be redrafted. The Unit shares the views listed as to the potential difficulties which may be encountered with sexual offender orders (e.g. vigilante groups, double jeopardy etc.).

Professors Burchell and Schwikkard¹⁵ are not in favour of this provision as the clause provides for an additional penalty for someone who has already been convicted and sentenced. They are of the view that the double jeopardy implications of the clause could lead to a successful constitutional challenge. They suggest that it is better to deal with sex offender orders as a condition of bail. They go on to say that if the clause is retained it should be reworded along the lines of similar orders made under the UK Crime and Disorder Act, i.e. more as a protective order where there is reasonable cause to believe that the person's post-conviction behaviour makes it necessary to issue such an order to protect the public from serious harm.

The Western Cape joint submission¹⁶ supports the introduction of the clause, but strongly recommends that the order be used either as a condition of release on parole or to supplement a sentence of correctional supervision and not as a sentencing option. Further, they support the notion that a failure to comply with such an order should be an offence.

7.3.4 Recommendation

The Commission is of view that it is not necessary to provide that a sex offender order

¹⁴ National Director of Public Prosecutions.

¹⁵ Department of Criminology, University of Cape Town.

¹⁶ The Children's Rights Project, Community Law Centre, University of the Western Cape; the Department of Forensics and Toxicology, University of Cape Town; Gender, Law & Development Project, Institute of Criminology, University of Cape Town; Gender Project, Community Law Centre, University of the Western Cape; Women's Legal Centre.

be a condition of parole or bail as the substantive content of such an order can already be ordered and is frequently ordered.

The Commission shares the general unease that many respondents expressed in relation to possible double jeopardy, potential implementation difficulties and problems relating to constitutionality. Although sex offender orders may potentially play a preventative role, there appears to be too many serious objections to warrant the inclusion of the clause.

Accordingly, the Commission is of the view that this clause should not be promoted in the draft Bill and that it be deleted.

7.4 Supervision of dangerous sex offenders

7.4.1 Current law

Neither the Sexual Offences Act nor the Criminal Procedure Act makes provision for identifying dangerous sex offenders and their long-term supervision. The Correctional Services Act, 111 of 1998, however, has elaborate provisions on community corrections and release from prison and placement under correctional supervision and on day parole and parole.¹⁷

In the Commission's proposed Sentencing Framework Bill provision is made to abolish the current provision of the Criminal Procedure Act in terms of which a repeat offender may be declared a habitual offender and to insert in place thereof a new category of offender – the dangerous offender. However, to be a declared a dangerous offender there must have been, in the commission of the offence for which the offender is convicted, *inter alia*, the threat or use of force.

7.4.2 Proposals in Discussion Paper 102

The Commission recommended the introduction of a clause that would provide for a new

¹⁷ On the treatment of sex offenders in prison, see Lucia Zedner 'Sexual Offences' in Stockdale and Casale (eds) **Criminal Justice under Stress** London: Blackstone Press 1992 265 at 274 *et seq.*

category of sex offender – a dangerous sex offender. This was deemed necessary due to the fact that existing law does not provide for long term supervision of sex offenders. The Commission was of the view that, in regard to sexual offences, certain offences may be committed without the threat of or use of force, but may nevertheless be serious and may pose a real risk of re-offending. Consequently, the Commission concluded that it was necessary to recommend the inclusion of a substantive clause in the proposed sexual offence legislation dealing with a dangerous sex offender.

The following clause was proposed in Discussion Paper 102:

Supervision of dangerous sexual offenders

25. (1) Whenever a dangerous sexual offender has been convicted of a sexual offence and sentenced by a court to imprisonment without the option of a fine, the court may order, as part of the sentence, that when such offender is released either after completion of the term of imprisonment or on parole, the Department of Correctional Services shall ensure that the offender is placed under long term supervision by an appropriate person.

(2) For purposes of subsection (1) a *dangerous sexual offender* includes an offender who has -

- (a) more than one conviction for a sexual offence;
 - (b) been convicted of a sexual offence which was accompanied by violence or threats of violence; or
 - (c) been convicted of a sexual offence against a minor
- and *long term supervision* means supervision of a rehabilitative nature for a period of not less than five years.

(3) A long term supervision order given by a court in terms of this section must be reviewed by that court within three years from the date on which the order was given or within such shorter period as the court may direct.

(4) Upon giving a long term supervision order in term of this section, the court must explain to the complainant in the proceedings, including the next of kin of a deceased complainant, that they have the right to be present at the review proceedings referred to in subsection (3) and to make representations on the duration of the long term supervision order.

(5) Failure by a dangerous sexual offender to comply with a long term supervision order is an offence and the offender shall be liable, upon conviction, to a fine or to imprisonment for a period of two years or to both such fine and such imprisonment, or to a community sentence which may include correctional supervision or community service.

Further, the Commission recommended that the Department of Correctional Services should, as a matter of priority, introduce and administer treatment and rehabilitation programmes for offenders and sexual offenders in particular. It was further recommended that personnel that provide assessment and treatment services in the Correctional Services environment should be adequately trained and supported in this specialised field of work.

7.4.3 Evaluation of comment

The majority of respondents are in favour of introducing long-term supervision of dangerous sex offenders.¹⁸

Advocates R Meintjes and Henning, SC, are of the view that the possible terms of a long-term supervision order should be described, as it is currently too vague. The Commission concurs with this view and proposes to amend the clause by the addition of a further subclause to the effect that the court imposing the long term supervision order *must* specify that the offender:

- (a) undergo a certain number of hours per month of rehabilitative supervision;
- (b) takes part in treatment, development and support programmes;
- (c) the type of rehabilitative programme to be attended; and
- (d) refrains from using or abusing alcohol or drugs.

Further, the court *may* order that the offender –

- (a) refrains from visiting a specified place;
- (b) refrains from seeking employment of a specified nature;
- (c) refrains from threatening a specified person or persons by word or action; and
- (d) is subjected to a specified form of monitoring.

¹⁸ Serious and Violent Crime Head Office, Pretoria S D Schutte; Judge Bertelsmann; Prof. Coetzer; Judge van Heerden; CGE Umtata workshop; Ms Leslie; Dr K Müller (Gauteng); Ms I Filander; Mmabatho Lesho; Eastern Cape Network on Violence Against Women; Michael Mokwena (SAPS: Commander CSC); F C Shaw (Welfare Forum Durban and South Region); Silas I M Nawa (National Department of Education); S.T.O.P (Standing Together to Oppose Pornography); Koos Strauss (Rape Intervention Project GRIP); Age-in-Action; RAPCAN; M Hakala (Department of Social Services, chief social worker); Ms M J Mmola (Maboloka HIV/AIDS Awareness Organisation); Ms M Humn - Tshwaraganang Women Organisation.

These conditions have been adapted from the recommendations made by the Commission in the **Sentencing: (A New Framework) Report**¹⁹ which were based on an analysis of the relevant case law.

The Commission is of the view that before the court makes a long term supervision order it will be necessary for certain requirements to be met that will ensure that the court is best placed to specify the terms of the order. Consequently, the Commission recommends that a provision similar to that contained in clause 34 of the Sentencing: (A New Framework) Report be included. That clause requires that a court consider a report by one of a number of designated persons containing recommendations on which conditions the sentence²⁰ should be imposed, recommendations on how those conditions can be used to achieve the objectives of the sentence, the reasons why the accused is a person suitable to undergo a community penalty, a proposed programme for the person concerned, the reasons why the person concerned would benefit from the sentence, information on the family and social background of the person concerned and any matter that the court may request the designated person reporting to the court to consider.

The Commission proposes to adopt this provision in regard to the requirements before a court may impose a long term supervision order. In addition it is deemed necessary that a court be empowered to vary or alter the terms of a long term supervision order.

In regard to subclause (3) Advocates Meintjes and Henning, SC, put forward the suggestion that the Commissioner of Correctional Services should be authorised to refer a review of the long term supervision order to a court. The Commission concurs with this view and adapts the subclause accordingly.

Advocates Meintjes and Henning, SC, recommend that in subclause (5) provision should be made that the Commissioner of Correctional Services or the appointed appropriate person may order terms or conditions attaching to a long term supervision order. The Commission does not agree with this view as the court is the sentencing body and it is important to ensure that these conditions or terms are consistent and not arbitrary.

¹⁹ Project 82 November 2000 at p 123.

²⁰ The sentence referred to in clause 34 is a community penalty.

Further, Advocates Meintjes and Henning SC point out that the provision in subclause (5) that makes the failure to comply with a long-term supervision order a criminal offence may create difficulties and should not be part of the original sentence. The Commission takes this point and recommends that the subclause be amended to rather provide that on breach of the terms of a long-term supervision order, the matter shall be referred back to the court or to a court of similar jurisdiction for reconsideration of the original sentence.

Mr P Mabuza is not in favour of this clause as he sees it potentially infringing the right to privacy and may constitute double jeopardy. The Commission does not concur with the view that this clause may constitute double jeopardy, but does recognise that it may infringe on the privacy of a released offender. It must be borne in mind that it is a balancing of interests that is involved. In this regard the Commission takes into account the need to take proactive steps in curtailing the commission of sex offences, the fact that the supervision may be designed so as to minimise unnecessary intrusions into the private life of the released offender and that a court has discretion to make the order in appropriate cases. The Commission concludes that to make provision for the long-term supervision of a certain released offenders is necessary.

Ms Nolitha Mazwai²¹ makes the point that in the commission of sex offences cruelty is often used. She proposes that clause 26(2)(b) should be amended to include “threats of violence or extreme cruelty”. The Commission does not concur with this proposal and is of the view that the proposed definition of “dangerous sex offender” is adequate as currently formulated.

Ms B J Matshego²² supports the introduction of this clause, but questions whether the 5 year period is too long. The Commission does not view the 5 year period as too long in view of the fact that sex offenders often re-offend many years later.

7.4.4 Recommendation

The Commission recommends the incorporation of the following clause in the proposed

²¹ Rape Crisis Cape Town.

²² Probation officer, Department of Correctional Services.

draft Bill:

Supervision of dangerous sexual offenders

23. (1) A court may declare a person who has been convicted of a sexual offence a dangerous sexual offender if such person has -

- (a) more than one conviction for a sexual offence;
- (b) been convicted of a sexual offence which was accompanied by violence or threats of violence; or
- (c) been convicted of a sexual offence against a child, unless such person is a child himself or herself.

[(1)](2) Whenever a dangerous sexual offender has been convicted of a sexual offence and sentenced by a court to imprisonment without the option of a fine, the court may order, as part of the sentence, that when such offender is released [either] after [completion] serving part of a term of imprisonment imposed or on parole, the Department of Correctional Services shall ensure that the offender is placed under long term supervision by an appropriate person, for the remainder of the sentence.

[(2)](3) For purposes of subsection [(1)] (2) **[a dangerous sexual offender includes an offender who has -**

- (a) more than one conviction for a sexual offence;**
- (b) been convicted of a sexual offence which was accompanied by violence or threats of violence; or**
- (c) been convicted of a sexual offence against a child**

and] long term supervision means supervision of a rehabilitative nature for a period of not less than five years.

(4) A court may not make an order referred to in subsection (2) unless the court had regard to a report by a probation officer, social worker or other person designated by the court, which report must contain an exposition of –

- (a) the suitability of the offender to undergo a long term supervision order;
- (b) the possible benefits of the imposition of a long term supervision order on the offender;
- (c) a proposed rehabilitative programme for the offender;
- (d) information on the family and social background of the offender;
- (e) recommendations regarding any conditions to be imposed upon the granting of a long term supervision order; and
- (f) any other matter as directed by the court.

(5) An order referred to in subsection (2) must specify –

- (a) that the offender is required to take part in a rehabilitative programme;
- (b) the nature of the rehabilitative programme to be attended;
- (c) the number of hours per month that the offender is required to undergo rehabilitative supervision; and
- (d) that the offender is required, where applicable, to refrain from using or abusing alcohol or drugs.

(6) An order referred to in subsection (2) may specify that the offender is required to –

- (a) refrain from visiting a specified location;
- (b) refrain from seeking employment of a specified nature; and
- (c) subject himself or herself to a specified form of monitoring.

[(3)](7) A long term supervision order [given] made by a court in terms of this section must be reviewed by that court within three years from the date on which the order was [given] implemented or within such shorter period as the court may direct: Provided that the Commissioner of Correctional Services may refer such an order to that court for review at any time.

[(4)](8) Upon [giving] making a long term supervision order in term of this section, the court must explain to the [complainant in the proceedings] victim, including the next of kin of a deceased [complainant] victim, that they have the right to be present at the review proceedings referred to in subsection [(3)] (7) and to make representations [on the duration of the long term supervision order].

[(5) Failure by a dangerous sexual offender to comply with a long term supervision order is an offence and the offender shall be liable, upon conviction, to a fine or to imprisonment for a period of two years or to both such fine and such imprisonment, or to a community sentence which may include correctional supervision or community service.]

(9) A court which has granted a long term supervision order in terms of this section may, upon evidence that a dangerous sexual offender has failed to comply with such order or with any condition imposed in connection with such order, direct that such offender -

- (a) be warned to appear before that court or another court of similar or higher jurisdiction at a specified place and on a specified date and time; or
- (b) be arrested and brought before such court.

(10) Upon the appearance of a dangerous sexual offender at a court pursuant to the provisions of subsection (9), such court shall conduct an inquiry into the reasons for such offender's failure to comply with a long term supervision order or with any condition imposed in connection with such order and may -

- (a) confirm the original order and any conditions imposed in connection with such order;
- (b) vary or withdraw such order or any such condition;
- (c) impose an additional condition or conditions;
- (d) review the original sentence and impose an alternative sentence; or
- (e) make any other order as the court deems fit.

(11) If a court has directed that a dangerous sexual offender is required to take part in a rehabilitative programme as contemplated in this section, the court may order that such offender, upon being found by the court to have adequate means, must contribute to the costs of such programme to the extent specified by the court.

7.5 Treatment of sex offenders

7.5.1 Proposals in Discussion Paper 102

In general, the Commission is of the view that courts should consider the treatment and rehabilitation of all sexual offenders as part of the sentencing process. In addition there is a concern that the period of correctional supervision provided for in section 276(3) of the Criminal Procedure Act is too short for sex offenders for it to be effective. The Commission accordingly proposed in Discussion Paper 102 to amend section 276 of the Criminal Procedure Act by providing that a person convicted of any sexual offence shall, if practicable and if the convicted person demonstrates the potential to benefit from treatment, include the attendance of and participation in a sex offence specific accredited treatment programme, the cost of which shall be borne by the convicted person himself or herself or the State if the court is satisfied that the convicted person has no adequate means to bear such cost.

The Commission further stated in the Discussion Paper that although section 276(3) of the Criminal Procedure Act provides that a sentencing court may impose imprisonment together with correctional supervision, it must be realised that the rehabilitation of sexual offenders is a long term strategy. Correctional supervision, on the other hand, is a rather short term solution as it can only be imposed for a fixed period. To address the concern raised regarding the shortness of the period for which correctional supervision may be imposed, the Commission recommended that the period of correctional supervision be extended from three years to five years.

The following amendment to the Criminal Procedure Act was proposed in Discussion Paper 102:

The amendment of section 276A of the Criminal Procedure Act -

(a) by the insertion after subsection (2) of the following subsection:

(2A) Punishment imposed under subsections (1)(h) or (1)(i) of section 276 on a person convicted of any sexual offence shall, if practicable and if the convicted person demonstrates the potential to benefit from treatment, include the attendance of and participation in a sex offence specific accredited treatment programme, the cost of which shall be borne by the convicted person himself or herself or the State if the court is satisfied that the convicted person has no adequate means to bear such cost. ;

(b) by the substitution for paragraph (b) of subsection (1) of section 276A of the

following paragraph:

(b) for a fixed period not exceeding **[three]** five years

7.5.2 Evaluation of comment

The majority of those who responded to this clause are in favour of the proposed amendments.²³ RAPCAN expresses concern that this may detract from resources available for victims, but acknowledge that the proposed amendments will contribute towards the reintegration of offenders and lessen the risk that they will re-offend.

Judge Bertelsmann supports the proposed amendments, but questions whether the court is the correct medium. He says that sentencing of sexual offenders should be dealt with by judicial officers in a better informed environment. The Commission agrees with this view which is also expressed in the proposed Sentencing Framework Bill. Judge Bertelsmann does, however, express scepticism at the likelihood of these amendments being implemented due to the lack of structure, money, resources and grossly overcrowded prisons. The Commission acknowledges the limitation of resources, but is of the view that it is imperative, for the purpose of increasing community protection and indicating a commitment to that purpose, that these amendments are enacted as it will require budgetary reallocation of resources and must be seen in comparison to the extremely high cost of crime itself.

Professor Coetzer²⁴ takes a contrary position. His view is that the proposed amendments will result in a waste of taxpayer's money as rapists and paedophiles do not benefit from treatment. The Commission acknowledges that certain offenders cannot be rehabilitated. This category of offender is catered for in the Sentencing Framework Bill by a declaration as a dangerous criminal with indefinite confinement. However, the Commission is of the view that there is a category of sex offenders who may benefit from attendance at a treatment programme. For this reason the proposed amendment includes a reference to offenders "who show potential to benefit from attendance of and participation in a sex offence specific accredited treatment

²³ SOCA Unit; Dr K Muller; Judge Van Heerden; Mr P Mabuza (Save the Children: Sweden).

²⁴ Community Medicine: Medunsa.

programme”.

Advocates Meintjes and Henning, SC,²⁵ suggest defining a “sex offence specific accredited treatment programme” in the proposed amendment to section 276A or alternatively, simply referring to an appropriate programme. The Commission believes that it is important that some form of accreditation takes place to ensure quality and efficacy of treatment programmes as it will be a waste of resources if sex offenders attend inappropriate and ineffective rehabilitation programmes. The Commission therefore proposes that the manner in which a sex offender treatment programme is accredited and the content of such programmes be defined by regulations.²⁶

Advocates Meintjes and Henning, SC, also question what will happen if the State cannot pay. The Commission has elected to make it mandatory (in certain circumstances) for treatment to be provided at State expense as it believes that this is a critical aspect of the State’s duty to ensure safety of persons in its jurisdiction.

7.5.3 Recommendation

As there are no submissions that persuade the Commission to deviate from its recommendations contained in Discussion Paper 102, the Commission recommends the following amendments to section 276A the Criminal Procedure Act:

The amendment of section 276A of the Criminal Procedure Act -

(a) by the insertion after subsection (2) of the following subsection:

“(2A) Punishment imposed under paragraphs (h) or (i) of subsection 276(1) on a person convicted of any sexual offence shall, if practicable and if the convicted person demonstrates the potential to benefit from treatment, include the attendance of and participation in a sex offence specific accredited treatment programme, the cost of which shall be borne by the convicted person himself or herself or the State if the court is satisfied that the convicted person has no adequate means to bear such cost.” ; and

(b) by the substitution for paragraph (b) of subsection (1) of section 276A of the following paragraph:

²⁵ Office of the Director of Public Prosecutions: Transvaal.

²⁶ This definition will be defined in Regulations.

“(b) for a fixed period not exceeding **[three]** five years.”

7.6 Sentencing of sex offenders

7.6.1 Proposals in the discussion paper

In the Discussion Paper the Commission highlights a number of problems in relation to the sentencing of sex offenders.²⁷ Many of those issues are of a general nature applicable to sentencing of all offenders. Those issues have been effectively dealt with by the Commission in its investigation into Sentencing.²⁸ However, there are a number of other problems relating to sentencing specific to sex offenders. These challenges must be addressed against the background of the need to protect victims and the community.

When considering sentencing in relation to sexual offenders, it is important to bear in mind that sex offenders are not a homogeneous group. The differences are illustrated by considering a teenage gang rapist as opposed to a paedophile. Consequently, sentencing of sex offenders needs to take into account various levels of sexually criminal behaviour and have different strategies to deal with those differences. Sentencing, in general, has recently been the focus of much attention in the media with an outcry from the community both for more stringent punishment and for offenders to serve a more realistic portion of the sentences imposed by our courts.

The Commission has a dedicated Project Committee on Sentencing. This Project Committee has as its mandate sentencing reform in general and also to consider the position of victims in the criminal justice system. The Project Committee on Sexual Offences has taken note of these developments and attempts were made to limit discussions to the sentencing of sexual offenders specifically.

In Discussion Paper 102, the Commission recommended:

²⁷ See also E Snyman and S du Toit 'Defining and evaluating plea bargaining' (2000) 13 **SACJ** 191.

²⁸ The **Sentencing Framework Bill** is currently on the legislative programme of the Department of Justice and Constitutional Development.

- That the Sentencing Council, as proposed by the Project Committee on Sentencing, should make use of specific input by persons skilled in the management of sexual offenders.
- The Sentencing Council should bear in mind that sexual offenders are not a homogeneous group and that there are different kinds of sexual offenders which requires a differential approach.
- The Sentencing Council should, in relation to sexual offences, consider if there is a need to develop sentencing guidelines on a community protection model which entails long term supervision of dangerous offenders after normal parole and the need to engage sex offenders in treatment programmes.

The sentencing of child offenders is elaborately regulated in the Child Justice Bill, now before Parliament.²⁹ In terms of this Bill, the purposes of sentencing children are to encourage the child to be accountable for the harm caused by the child; to promote an individualised response which is appropriate to the child's circumstances and proportionate to the circumstances surrounding the harm caused by the offence; to promote the reintegration of the child into the family and community; and to ensure that any necessary supervision, guidance, treatment or services which forms part of the sentence can assist the child in the process of reintegration. In view of the detailed recommendations made in the Report on Juvenile Justice, the Commission made no further recommendations in Discussion Paper 102 in this regard.

While generally in favour of the imposition of appropriate and heavy sentences for sexual offenders, the Commission specifically excluded (chemical) castration as a sentencing option.

7.6.2 Evaluation of comment

During the child participation process children were asked to respond to the following questions:

²⁹ See also Jean Redpath "Child sex offenders in custody in South Africa" October 2002 Vol 4 No 3 **Article 40** 8; Anne Louw and Ferdinand van Oosten 'Diverting children from the criminal courts: Some proposals' (1998) 61 **THRHR** 123.

“What should happen to sexual offenders (upon conviction)? Should they always be put in prison or be treated to help them change their behaviour?”

Interestingly, there was a fairly even split in response to the first question, but slightly more children felt that the offender should be treated to help them change their behaviour. However, most of the children felt that such treatment should only be administered once the offender had been removed from society or the family. There were also some very strong responses from the children with suggestions favouring castration and the death penalty for sex offenders.³⁰

At the Commission for Gender Equality’s workshop there was a resounding call for heavier sentences for sex offenders. This call was a recurring theme throughout the investigation.

7.6.3 Recommendation

The Commission is of the view that the penalty and sentencing provisions in the proposed Sexual Offences Bill give expression to a balance between the community’s demand for retribution, fairness to the accused and community protection. No further legislative intervention is required here save as to link the new statutory offences (rape, sexual violation, etc) to the minimum sentencing framework prescribed by the General Law Amendment Act.

As far as the other aspects of sentencing are concerned, the Commission abides by its decisions as embodied in the Report on Sentencing (A Sentencing Framework). The same applies to the sentencing of juvenile sex offenders, as set out in the Report on Juvenile Justice.

The Commission affirms its preliminary view that (chemical) castration is not a suitable sentencing option for sex offenders.

7.7 Community notification and register of sex offenders

³⁰ Report on Children’s Rights, p. 16.

7.7.1 Current Law

Community notification refers to the distribution of information regarding released sex offenders to law enforcement agencies, citizens, prospective employers and community organisations. For community notification to be effective the system usually relies on some form of register of sexual offenders.³¹ Much depends, however, on the purpose of the registration system. In this regard it is worth pointing out that registers can also be used to track the (child) victims through the care and protection system, rather than the offender through the criminal justice system.

There is no provision for community notification of the impending release of a convicted sexual offender or a register of sexual offenders in either the Child Care Act, 1983 or the Sexual Offences Act, 1957. Regulation 39B of the Child Care Act, 1983 does however, provide for a National Child Protection Register.³² The relevant part of this regulation reads as follows:

(1) The Director-General shall keep a National Child Protection Register for the sole purpose of protecting children as provided for in this regulation in which the following shall be entered:

- (a) All notifications, in terms of section 42(1) of the Act, of possible ill-treatment of or deliberate injury to children which are transmitted to the Director-General together with the corresponding reports as contemplated in regulation 39A(2)(c);³³
- (b) all convictions as contemplated in regulation 39A(4)(a); and
- (c) all determinations of the children's court as contemplated in regulation 39A(4)(b).

(2) The register referred to in sub-regulation (1) shall contain:

- (a) Identifying details of the child concerned;
- (b) particulars of the place, date and time of the incident, including any children's home, place of care, place of safety, school of industries or shelter;
- (c) particulars of the parent, guardian, foster parent or other custodian of the child;
- (d) the nature and extent of the ill-treatment of or deliberate injury inflicted on the child;

³¹ See also Cathy Cobley 'Keeping track of sex offenders – Part I of the Sex Offenders Act 1997' (1997) 60 **Modern LR** 690.

³² Inserted by GN R 416 of March 1998.

³³ Regulation 39A provides for the notification of suspicions of ill-treatment of or injury to children and of children suffering from nutritional deficiency diseases.

- (e) identifying details and address of the convicted perpetrator;
- (f) details of the relationship between the child and the perpetrator; and
- (g) details of the court, case number, conviction and sentence in respect of such perpetrator.

The efficacy and purpose of this National Child Protection register is discussed fully in the Commission's report on the Review of the Child Care Act.

7.7.2 Proposals in Discussion Paper 102

The Commission felt it important to stress that notification by and registration of sexual offenders should be seen as only one part of a network of measures and good practice to protect children and the community from those who might harm them. Any system of registration and notification can only identify people who have been found guilty of a criminal offence or have been through some sort of legal process - it cannot predict criminal behaviour. It is therefore important to point out that notification and registration requirements should not generate a false sense of security. There is no substitute for other essential recruitment and good practice procedures in selecting people to work with children such as taking up references.

Discussion Paper 102 set out the arguments for and against community notification and registration programmes.³⁴ Briefly, the arguments in favour are:

- (i) Creating a registry assists law enforcement as it is a tool that can be used both to solve crimes and prevent them.
- (ii) Registration laws may establish legal grounds to detain known offenders who do not comply with registration and are later found in suspicious circumstances.
- (iii) Deterring sex offenders from committing new offences because once registered, offenders know that they will be monitored. Some believe that the possibility of being registered may discourage first-time sex offenders.
- (iv) Offering the community information is intended as a means of public protection, particularly for parents to protect their children.

Arguments against such regimes are:

³⁴ Discussion Paper 102, p. 752.

- (i) Registration creates a false sense of security. The public may rely too heavily on the register, not realising that the majority of sex offenders never appear on registration lists. The reasons for this are numerous and include low reporting and conviction rates, plea bargaining, failure by sex offenders to register, etcetera.
- (ii) By forcing sex offenders to register, society sends a message to these individuals that they are bad and not to be trusted. Such a message can work against efforts to rehabilitate offenders and can encourage further criminal behaviour. For example, "If society thinks I'm a permanent threat, I guess I am and there's nothing I can do to stop myself".
- (iii) Sex offender registration encourages sex offenders to evade the attention of the law and accordingly, not comply with the law and so make the investigation of offences more difficult.
- (iv) Registration programmes are inconsistent with the goals of a society committed to protecting individual liberties. Released sex offenders have paid their debt to society.
- (v) Registration of sex offenders implies that these offenders are the most dangerous, whereas other types of offenders present similar or greater risks - for example, a released murderer or drug dealer.
- (vi) Registration will encourage public vigilantism. Where the registration list is public, the community may threaten to take action against offenders or their family members.
- (vii) If made public, a list of registered sex offenders may inadvertently disclose the identity of victims, particularly in cases of incest.
- (viii) The cost of creating a list of sex offenders and maintaining it is enormous. Funds could better be spent on such areas as treatment of incarcerated sex offenders to reduce the risk of re-offending or intense supervision of a smaller group of the most serious sex offenders, such as rapists. This is a strong argument when one bears in mind that a considerable number of sex offenders are never registered.³⁵
- (ix) Disclosure of names of sex offenders may create a threat of public disorder.

³⁵ The arguments for and against referred to above were drawn from Matson S and Lieb R **Sex Offender Community Notification: A Review of Laws in 32 States** Washington State Institute for Public Policy April 1996 at p 2-4.

- (x) It may lead to the possibility of attacks on innocent persons who resemble the offender.
- (xi) It may cause damage to the property of the offender or others.
- (xii) It may cause the offender to disappear underground and thereby excluded from the system of monitoring and rehabilitation.

In Discussion Paper 102 the Commission recommended against the introduction of community notification legislation along the lines of Megan's law in South Africa. The Commission was of the view that an integrated approach should rather be followed where punishment and treatment of the sexual offender, as well as risk assessment should be so closely linked that it need not be necessary to trace sexual offenders once released from prison or once they complete their treatment programme. However, once a sexual offender has served his or her sentence (which should, in our opinion, include a substantial treatment portion) the offender has paid his or her dues to society and is a free person. To subject such a person to notification and registration requirements after the expiry of his or her sentence, seems to be constitutionally suspect. Provision has also been made in the draft Bill for long-term supervision of what will be considered a "dangerous sex offender".³⁶

The Commission also warned of the danger and the false sense of security inherent in notification and registration systems. As previously stated, no notification or registration system can predict criminal behaviour. There is also a real threat that communities might take the law into their own hands and cleanse neighbourhoods from offenders, even on the slightest of rumours.³⁷

The introduction of a register of sexual offenders and the imposition of community notification obligations on sexual offenders have been topical in South Africa for some time now.³⁸ The debate has not been focussed and it is not always clear what the purpose or scope of a register should be. For instance, it has been argued that a

³⁶ See clause 23.

³⁷ See also 'Megan's Law accomplishes nothing other than the promotion of vigilantism' at www.netscape.org/users/herald/issues/020598/aclu.f.html .

³⁸ The previous Minister for Welfare and Population Development, Ms Geraldine Fraser-Moleketi, already announced in 1997 that her Ministry was considering the establishment of a register of sexual offenders. See also the proceedings of a perpetrators' workshop held by the Department of Welfare and Population Development in Pretoria on 31 March 2000. Some private individuals are also campaigning for the establishment of a national sex offender register in South Africa: See 'Call for register of paedophiles' **Pretoria News**, 1 August 2000, p. 4.

register should not only contain the details of **convicted** sexual offenders, but **alleged** sexual offenders as well. Besides the constitutional arguments against including **alleged** offenders on a register, this also begs the question of what should be done with the victim once the offender's name is placed on the register. Linked to this is lack of clarity as to what the purpose of such a register of sexual offenders (whether convicted or not) should be. If deterrence is the objective of a register, it makes no sense to restrict access to the information on the register.

In Discussion Paper 102 the Commission recommended the extended use of the existing SAPS Criminal Records Centre. The Commission expressed the view that by adapting the SAP 69 and SAP 62 forms and grouping the relevant sex offences under a general category, the existing SAPS Criminal Records Centre can be used effectively as the base for a register of convicted sexual offenders. Besides presenting a record of previous convictions, it should be possible for such a register to be used for purposes of preventing unsuitable persons from working with children or screening potential job applicants for positions that give them access to children. As such the Commission was not in favour of creating a *new* register or index of *convicted* sexual offenders. However, it should be clear that an integrated approach such as that proposed by the UK Interdepartmental Working Group on Preventing Unsuitable People from Working with Children and Abuse of Trust discussed below, will be far more effective and useful.

Further, the Commission did not support any register or index of sexual offenders with the sole function to blame and shame sexual offenders. It is unconstitutional to try (and therefore punish) a person twice for the same offence. Such a register will surely encourage vigilantism. It has no justification, no rehabilitative effect, its deterrent value is suspect and it will drive "predatory" sexual offenders further underground, while at the same time giving 'clean' communities a false sense of security.

The Commission was also not in favour of a register of *alleged* sexual offenders, even though we recognise that in some cases 'guilty' sex offenders do go free on mere legal technicalities. That is the price we pay in a democracy with a justiciable bill of rights where the rule of law prevails.

The Commission further recommended that the existing system of criminal records held

and operated by the SAPS Criminal Records Centre should form the core of such an integrated system and that the Departments of Education, Social Development and Health develop their own systems and lists of people unsuitable to work with children.³⁹ These systems and lists should be linked to each other and to the SAPS Criminal Records Centre.

The Commission also recommended the screening of employees and managers who are required to work with children, for offences committed against children. To this end it was proposed that the register of convicted sexual offenders be checked to screen potential job applicants for positions in the child care field. Obviously not all convicted sex offenders are *per se* unsuitable for work in the child care field, but we can think of nothing more dangerous than to employ a convicted paedophile as the manager or gardener of a children's home. It was proposed that such a system be introduced first on a voluntary basis and, perhaps later, on a mandatory basis.

The following possibilities were also raised:

- The linking of welfare subsidies and grants to the screening of employees and managers of child care facilities.
- To follow the UK proposal and make it a criminal offence for a person deemed unsuitable to work with children to apply for work, accept work or continue to work with children.⁴⁰
- To make it a criminal offence for any organisation to employ a person with certain previous convictions in the child care field.

The Commission did not recommend the introduction of any legislative measures to provide for retrospective checks to be made in respect of people who are already in employment. It will be open to an employer to make such checks on any employee with his or her agreement. It is, however, important to make it clear that such checks are no substitute for continued vigilance and monitoring against abuse.

³⁹ It is possible to think of situations where adults deserve protection (women in jail) and where unsuitable persons (jail-wardens convicted of rape) should not be allowed to work with them.

⁴⁰ See the **Report of the Interdepartmental Working Group on Preventing Unsuitable People from Working with Children and Abuse of Trust**, par 5.41 at www.homeoffice.gov.uk/cpd/sou/wgpup.htm .

There are also issues of both practicality and enforcement. On practicality, a blanket approach to checking all existing employees could quite simply bring any system to a halt, and the Commission recommends against it on these grounds alone. On enforcement, there may be occasions where an employee has submitted a misleading or inaccurate application to obtain the job some time previously, or where what is revealed is sufficiently grave to justify action in itself. But without any present cause for concern, this is an area where any employer would need to tread extremely cautiously. The Commission accordingly recommended that organisations should only do checks on existing employees after careful consideration as to whether this is justified.

The Commission was of the view that a system of regular checks on individuals subsequent to their appointment would be a matter of good practice and should be voluntary. The Commission emphasised that such checks are no substitute for continued vigilance and monitoring against abuse.

It is fairly common at present in disputed divorce actions and in nearly all contested custody, access, maintenance or family disputes where children are involved, that allegations regarding sexual abuse or impropriety are made.⁴¹ In this regard, the Commission has recommended in its report on the Review of the Child Care Act that such divorce actions or family disputes stand down pending an investigation into allegations of child abuse and neglect.

In addition, the Commission recommended in the Child Care Act investigation that a register be established (called the National Child Protection Register) in terms of which the details of persons found to be unsuitable to work with children would be captured. The opinion was expressed that there is much to be said for introducing such an integrated system in South Africa which will clearly identify, through a central access point, people who are deemed unsuitable to work with children, and introduce a new criminal offence to prevent those people from seeking to work with children.

7.7.3 Evaluation of comment

⁴¹ Personal communication with the office of the Family Advocate: Pretoria.

The Western Cape joint respondents⁴² agree with the Commission's recommendation that there should not be community notification along the lines of Megan's Law,⁴³ that there should not be a register of sexual offenders solely to blame and shame sexual offenders,⁴⁴ and that there should not be a register of alleged sexual offenders⁴⁵. Their rationale for these decisions is set out as follows:

- In regard to the latter two registers they do not feel that these types of registers will hold up to constitutional scrutiny. As far as the Megan's Law community notification register is concerned, they feel there are pressing arguments that could be made out to indicate that such a system is not practical in the South African situation.

They point out that criticism is leveled at the system of community notification by organisations in the United States itself.⁴⁶ The Association for the Treatment of Sexual Abusers⁴⁷ states, *inter alia*, that:

The level of protection of these laws is limited and community notification does not guarantee protection from harm. While community notification is dependant upon risk assessment of the individual sex offender there is little evaluative data addressing validity and reliability of the risk assessment rating techniques being developed or used in the United States. Notification to the community at large in the case of a sexual offender who abused a family member could result in the victim's and/or family's identity being revealed and therefore potentially causing further victimisation.

The Centre for Sex Offender Management⁴⁸ has noted that there are few studies on the effectiveness of community notification in the United States. One study (the Washington State Recidivism Study) revealed there was no significant statistical difference between the recidivism patterns of adult sex offenders who were subject to community notification

⁴² By the Children's Rights Project, Community Law Centre, University of the Western Cape; the Department of Forensics and Toxicology, University of Cape Town; Gender, Law & Development Project, Institute of Criminology, University of Cape Town; Gender Project, Community Law Centre, University of the Western Cape; Women's Legal Centre.

⁴³ Discussion Paper 102 paragraph 42.7.7.7.

⁴⁴ Discussion Paper 102 paragraph 42.7.8.4.

⁴⁵ Discussion Paper 102 paragraph 42.7.8.5.

⁴⁶ See also Linda Greenhouse "States' listing of sex offenders raise a tangle of legal issues" **New York Times**, 3 November 2002, accessed on 12 November 2002.

⁴⁷ Community Notification Position Statement available on www.atsa.com.

⁴⁸ Community Notification and Education (April 2001).

(level III) and similar sex offenders released prior to the implementation of the law.

The Centre also notes the negative effects of community notification:

- The potential for vigilantism by the community towards offenders.
- Difficulties experienced by states in complying with the registration requirements – e.g. inaccurate offender addresses.
- Victim identification.

The Western Cape joint submission explains that if one looks at these problems coupled with the resources used in the United States to implement community notification – internet, media releases, door-to-door flyers, mailed flyers, the offender placing an advertisement in a local newspaper, posting of signs on an offender's home, CD-rom lists - they submit that South Africa will not be able to implement an effective system of community notification. They believe that South Africa does not have the resources that are available in the United States. The discrepancies between urban and rural life and informal housing arrangements would make community notification impractical. The vast potential for victim identification and the lack of research on notification available militates against the introduction of such a system.

The Western Cape joint respondents acknowledge that the sentiment behind such a system is laudatory – to prevent further harm. However, they are of the opinion that there is insufficient evidence to support the view that such a system will, in the South African context, prevent further harm.

In regard to community notification and sex offender registers, one respondent requested that he remain anonymous. He is the father of a victim and writes on behalf of himself and on behalf of his daughter. He does not support the introduction of a sex offender register. He explains that they have spent a year going through the trial and are trying to get their lives back on track. If a list of offenders is drawn up for the community to see he fears that they will become victims again. He is of the view that a sex offender register and community notification will discourage victims from coming forward and lodging complaints. He also raises the potential problem that may arise: the erroneous listing of a person as a sex offender or of an innocent person with the

same name as a sex offender. The respondent would rather that an effort be made to put social programmes in place that will help in assisting potential sex offenders to come forward for help before they commit offences.

The Democratic Alliance requested that the Commission reconsider its rejection of a register of sex offenders for South Africa. It says that sex offender registers are already in place in other countries and would help in protecting children from abuse in South Africa.⁴⁹ The Alliance says if a register prevents even one child from becoming the victim of rape, it would be worth it. It is pointed out that 15 children around the country are raped over a given weekend, and the fact that it fails to make the front page of any newspaper shows exactly how far we have to go in combating the problem of sexual assault of children.

Mr Slabbert argues that a register of sex offenders has been put in place in several countries, including the United States and England. Putting one in place in South Africa would not only assist the police, schools and social workers to keep children out of the way of convicted offenders, but it would also help to create a culture in which the sexual assault of young children is taken seriously. He says that the problem of vigilantism identified by the Commission could be overcome by including various categories within the register. Information on low-risk offenders would be accessible only to the police, while information on higher-risk individuals would be accessible by a wider range of people and neighbours would be notified only where a high-risk offender lived nearby.

Advocates Meintjes and Henning, SC,⁵⁰ also do not agree with the Commission's arguments against the keeping of a child offender register. They argue that if it is properly prescribed it will not necessarily be such a costly and unmanageable exercise, or that the advantages to be gained are not worth the effort. They say that there should in any event be a duty on certain institutions to access such a register before appointing a person in a position of authority or a relationship of trust in regard to a child. They acknowledge that such a register will take time to develop. They argue that the right to privacy and whatever other right that might come into play, is of no consequence due to the fact that whenever an accused appears in court, the proceedings are accessible to

⁴⁹ The Citizen, Wednesday 13 March 2002.

⁵⁰ Office of the Director of Public Prosecutions: Transvaal.

the public and the conviction is public knowledge. It follows that information which is made public at any stage, remains with the public domain.

Advocates Meintjes and Henning, SC, are of the view that the keeping of a register simply means that the information is consolidated for purposes of easy access. If a section in the Sexual Offences Act ensures that the fact of the accused having been convicted of a sexual offence committed against a child of 12 years and under is entered on the relevant SAP 69, this information can be utilised by Correctional Services for purposes of rehabilitation programs, by SAPS for purposes of keeping the register and *inter alia* by relevant institutions who wish to appoint persons in positions of authority or trust, such as teachers, those in charge of places of safety, etcetera. They propose the following section to be included in the Bill:

Information for purposes of a Child Offender Register

Whenever an accused is convicted of a sexual offence committed against a child of 12 years and below, the court shall record such fact on the court record and also on the relevant prescribed forms (SAP 69 and warrant of committal) to be forwarded to the Departments of SAPS, for attention of the SA Criminal Bureau and Correctional Services.

Advocates Meintjes and Henning, SC, propose further that a clause should be included in the Bill to the effect that any person applying for employment or a position of authority and/or care of children, or when offering or agreeing to take care of or supervise children, and that person fails to disclose that he or she has been convicted of a sexual offence committed against a child of 12 years and below, shall be guilty of the offence of non-disclosure of a criminal offence. The Commission concurs with this view and inserts a clause to this effect in the Bill.

The Report of the Parliamentary Task Group on the Sexual Abuse of Children recommends specifically that a task team comprising of the Departments of Correctional Services, Safety and Security, Social Development and Justice and Constitutional Development be convened to investigate the establishment of a register of sex offenders. The Task Group states that should a register of sex offenders be established the purpose should be to keep sex offenders out of schools, designated child care services and youth organisations.

7.7.4 Recommendation

The Commission does support the view that the SAPS 69 form should be amended to make it clear that the offender in question has sexually offended against **a child** and that a separate register should be kept as this will make it quicker and easier to access information. The Commission does not favour the creation of a new register. However, the Commission does recommend the amendment of the SAP 69 form so that it clearly specifies that the offender has been convicted of a sexual offence (**not only those offences committed against children**). However, in view of the non-legislative recommendation that the form SAP 69 be amended it is not necessary to include a substantive clause to that effect in the Bill.

The existing register can then be accessed and used in conjunction with the National Child Protection Register.⁵¹ The latter register will contain two parts. Part A will list the names of children in need of care and protection. Part B will be a register of those found unfit to work with children by either a court or an administrative forum in disciplinary proceedings.

The Commission does not support the view that such a register be open to the public in general, but it should be open to prospective employers of persons who will or may, in any manner whatsoever, work with children, supervise children or be in a position of authority, trust or responsibility over or in regard to children. In so doing the Commission is of the view that the concerns of the Parliamentary Task Group raised above will be addressed.

The Commission recommends the incorporation of the following clause in the draft Bill:

Non-disclosure of conviction of sexual offence

26. Any person who has been convicted of a sexual offence and who fails to disclose such conviction when applying for employment that will place him or her in a position of authority or care of children, or when offering or agreeing to take care of or supervise children, shall be guilty of an offence and liable, upon conviction, to a fine or to

⁵¹ Recommended by the Commission in its investigation into the Review of the Child Care Act (Project 110).

imprisonment for a period not exceeding three years or to both such fine and such imprisonment.

CHAPTER 8

MISCELLANEOUS MATTERS

8.1 Introduction

In this chapter the Commission considers the following matters: prescription of sexual offences, extra-territorial jurisdiction, penalties and repeals of and amendments to existing legislation.

8.2 Prescription of sexual offences

8.2.1 Proposals in Discussion Paper 102

Discussion Paper 102 indicated that problems in relation to prescription could arise due to difficulties that victims of sexual abuse have in instituting legal proceedings many years after the events in question.¹ The Commission identified two aspects related to prescription as relevant. The first was the prescription of crimes which prevented the State from charging an accused after a period of time has elapsed. The second was prescription of a civil debt arising out of a sexual offence.

It found that prescription of the right to institute criminal prosecutions appeared not to be problematic, as very serious offences such as rape never prescribe. Section 18 of the Criminal Procedure Act provides that the right to institute a prosecution for the offences of murder, treason, aggravated robbery, child-stealing and rape does not prescribe. Further that all other offences prescribe after 20 years. Practical considerations such as the loss of evidence as a result of the delay in bringing a prosecution present great difficulties. The Commission noted that if its recommendation regarding the redefinition of 'rape' as proposed in the draft Bill contained in the Discussion Paper was accepted, it could be argued that it would be necessary to include the redefined offence of 'rape' under the exceptions listed in section 18 of the Criminal Procedure Act, 51 of 1977.

¹ See also JMT Labuschagne 'Die effek van tydsverloop op strafregtelike aanspreeklikheid' (1987) 50 **THRHR** 211, 'Tydsverloop, omstandigheidsverjaring en seksuele misbruik van kinders' (1996) 17 **Obiter** 328, 'Seksuele misbruik van kinders en die vraagstuk van verjaring van misdade' (1997) 22(1) **TRW** 98.

The Commission found that in the case of childhood sexual abuse it might not be prudent to rely too much on the outcome of a criminal trial. It was pointed out that despite various evidential barriers, some victims consciously choose not to follow the criminal route.

Victims of sexual abuse who choose not to follow the criminal route are still left with the option of a civil claim. In such proceedings the victim has far greater control over the conduct of the case (the victim is usually the claimant and a party to the case) and another standard of proof applies: while the State has to prove all the elements of the crime beyond a reasonable doubt, the burden of proof in civil matters is that of a balance of probabilities. The Commission explained that it is in this context that problems with prescription can and will arise.

In concluding the exposition in the Discussion Paper, the Commission opined that victims of sexual abuse should not be subject to the ordinary prescription rules, but to special rules. Accordingly it recommended amending section 12 of the Prescription Act, 68 of 1969 by inserting three subsections to provide (a) that the basic limitation period does not run while the person who has a claim is incapable of commencing the proceeding because of his or her physical, mental or psychological condition, (b) that the person who has the claim is presumed to have been incapable of commencing the proceeding earlier than it was in fact commenced with because of his or her dependence on or intimate relationship with the defendant, and (c) that the person who has a claim based on sexual abuse is presumed to have been incapable of commencing the proceeding earlier than it was commenced.

The proposal read as follows:

The amendment of section 12 of the Prescription Act (Act 68 of 1969) -

(a) by the substitution for subsection (1) of the following subsection:

(1) Subject to the provisions of subsections (2) **[and]** (3), (4), (5) and (6), prescription shall commence to run as soon as the debt is due;

(b) by the insertion after subsection (3) of the following subsections:

(4) Prescription shall not commence to run in respect of a debt based on sexual abuse during the time in which the creditor is unable to institute proceedings because of his or her physical, mental or psychological condition.

(5) Unless the contrary is proved, a creditor to whom a debt based on sexual abuse is due shall be presumed to have been unable to institute proceedings earlier than it was actually instituted if at the time of the abuse one of the parties to the abuse had an intimate relationship with the creditor or had been someone on whom the creditor was dependent, financially or otherwise.

(6) Unless the contrary is proved, a creditor to whom a debt based on sexual abuse is due shall be presumed to have been unable to institute proceedings earlier than it was actually instituted.

8.2.2 Evaluation of comment

General support can be deduced from the positive response² from some respondents and the overall absence of any criticism. Constructive criticism was received, with participants of the Gordon's Bay Expert Consultation opining that the proposed subclause (5) be deleted as it is tautologous and the participants of the CGE Workshop in Umtata requesting that no prescription runs in relation to sexual offences and that the draft Bill be applied retrospectively. Although the essence of subclause (5) is repeated in subclause (6), subclause (5) also defines specific circumstances which must exist for the exercise of the presumption. The inclusion of specific circumstances in subclause (5) could be interpreted to be overly restrictive.

In a joint submission the Children's Rights Project, Community Law Centre, University of the Western Cape; the Department of Forensics and Toxicology, University of Cape Town; the Gender, Law & Development Project, Institute of Criminology, University of Cape Town; the Gender Project, Community Law Centre, University of Western Cape, and the Women's Legal Centre endorse the proposed amendments made by the Commission. They argue that the proposal should apply in situations where a rape victim (who is not a victim of child abuse) has been prevented from instituting action by virtue of her physical, mental or psychological condition. They confirm that by providing for an extension to all victims of sexual offences, the issue of gang-related violence where a victim is too afraid to come forward as she fears for her life or her family's life in relation to threats received, is addressed. The provision would allow for situations

² Mollie Kemp, School Social Worker, Department of Education and Culture, KwaZulu-Natal; Lulama Nongogo & Teboho Maitse, Commission on Gender Equality; CGE Workshop in Umtata, Group 1.

whereby the victim may “after the fact” (when she has managed to overcome her fear or has moved out of that community) still proceed civilly.

In the above joint submission the Commission is requested to consider the issue of retrospectivity. They suggest that this aspect be dealt with specifically in order to allow for the exceptions created to be retrospective, in order to prevent an artificial time line being set to the effect that a complainant has only become equipped to commence proceedings once the amendment has come into effect. Pending the outcome of a specific investigation focussing on the Prescription Act the Commission reserves comment on this matter.

The Commission confirms its recommendation that the redefined offence of ‘rape’ be included under the exceptions listed in section 18 of the Criminal Procedure Act, 51 of 1977.

8.2.3 Recommendation

The Commission is in agreement that subclause 6 sufficiently covers the content of subclause 5 and therefore is of the opinion that subclause 5 should be omitted from the Bill.

It is recommended that section 12 of the Prescription Act be amended as follows:

The amendment of section 12 of the Prescription Act -

(a) by the substitution for subsection (1) of the following subsection:

“(1) Subject to the provisions of subsections (2), **[and] (3), (4) and (5)**, prescription shall commence to run as soon as the debt is due.” ; and

(b) by the addition of the following subsections:

“(4) Prescription shall not commence to run in respect of a debt based on sexual abuse during the time in which the creditor is unable to institute proceedings because of his or her physical, mental or psychological condition.

“(5) Unless the contrary is proved, a creditor to whom a debt based on sexual abuse is due shall be presumed to have been unable to institute proceedings earlier than it was actually instituted if at the time of the

abuse one of the parties to the abuse had an intimate relationship with the creditor or had been someone on whom the creditor was dependent, financially or otherwise.]

[(6))(5) Unless the contrary is proved, a creditor to whom a debt based on sexual abuse is due shall be presumed to have been unable to institute proceedings earlier than it was actually instituted.]

It is also recommended that section 18 of the Criminal Procedure Act be amended as follows:

18 Prescription of right to institute prosecution

The right to institute a prosecution for any offence, other than the offences of –

- (a) murder;
- (b) treason committed when the Republic is in a state of war;
- (c) robbery, if aggravating circumstances were present;
- (d) kidnapping;
- (e) child-stealing; **[or]**
- (f) rape;
- (g) oral genital sexual violation; or
- (h) sexual violation

shall, unless some other period is expressly provided for by law, lapse after the expiration of a period of 20 years from the time when the offence was committed.

8.3 Extra-territorial jurisdiction

8.3.1 Current law

Jurisdiction is the extent of a court's power to entertain a matter or hand down a sentence. It may take many forms, for example geographical, over persons residing or being within the area of jurisdiction of the court, foreign judgements, immovable property or may relate to the nature of the cases the court may entertain or the limits of the

sentence it may impose. Jurisdiction is an important aspect of sovereignty. Sovereignty empowers a state to exercise the functions of a state within a particular territory to the exclusion of other states.³ Extra-territorial jurisdiction as a concept extends our courts' jurisdiction, in respect of South Africans, who commit a sexual offence (in terms of our law), in another country.

Currently, the jurisdiction of our courts is limited to South African territory and does not extend to offences committed by South Africans in other jurisdictions. South African "territory", for purposes of criminal jurisdiction, includes South African territorial waters, air space, any offence committed on board a South African ship on the high seas or in a South African aircraft above the high seas or a foreign territory.⁴

Universal jurisdiction allows any nation to prosecute offenders of certain crimes even when the prosecuting state lacks a traditional nexus with the crime, the alleged offender, or the victim. However, "classical international law does not exclude a State's power in some cases to exercise its judicial jurisdiction over offences committed abroad".⁵

In the sexual offence field, extra-territorial jurisdiction is receiving renewed attention from lawmakers in an attempt to curb sex tourism, child pornography and trafficking of persons for purpose of commercial sexual exploitation. Twenty three countries currently have extraterritorial laws.⁶ In some of the countries the extra-territorial jurisdiction is confined to specific offences, while in others it covers all offences.

Extra-territoriality of laws must be distinguished from extradition of persons accused or convicted of the commission within the jurisdiction of the Republic or a foreign state of an extraditable offence in terms of the Extradition, Act 1962 (Act No. 67 of 1962). Extradition in terms of this Act is dependent upon the terms of the extradition agreement

³ J Dugard **International Law A South African Perspective** Juta & Co, 1994: Kenwyn at p 116.

⁴ Ibid, p. 118.

⁵ Per Judge President Guillaume **Democratic Republic of Congo v Belgium** International Court of Justice: Press Release 14 February 2002.

⁶ Australia, Austria, Belgium, Canada, China, Denmark, Finland, Germany, Iceland, Italy, Japan, Morocco, Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Taiwan, United Kingdom and United States of America. <http://www.thefuturegroup.org/youwillbecaught/laws.Html> .

and a request for extradition. Extra-territoriality will imbue South African courts with inherent jurisdiction.

8.3.2 Proposals in Discussion Paper 102

The Commission was of the view that children and adults are in need of increased protection as far as sexual offences are concerned - both locally and internationally. In addition, the Commission was of the view that South African citizens and residents who commit sexual offences in foreign countries should be liable for prosecution of those offences in South Africa. It was therefore recommended in Discussion Paper 102 that South African courts should have extra-territorial jurisdiction in the case of offences committed in terms of the Sexual Offences Act.

In order to reiterate the principle in our law that a person should not be penalised more than once for the same offence, a provision was incorporated to exempt a person from criminal liability in South Africa if that person has already been convicted in the destination country of the action which would have constituted an offence in South Africa. The proposed clause further requires the consent of the Director of Public Prosecutions (DPP) before a prosecution can be instituted and to make it clear which DPP and which court have jurisdiction. It was proposed that the court in South Africa that should have jurisdiction would be the court in the area where the alleged offender is ordinarily resident.

The following clause was proposed in Discussion Paper 102:

Extra-territorial jurisdiction

27. (1) Any person who, while being a citizen of or permanently residing in the Republic of South Africa, commits any act outside the Republic which would have constituted an offence under this Act or a sexual offence at common law against a person had it been committed inside the Republic, is guilty of the offence which would have been so constituted and is liable to the same penalty prescribed for such offence.

(2) A person may not be convicted of an offence contemplated in subsection (1) if such person has been convicted of the act that would have constituted an offence in terms of this Act in the country where the act was committed.

(3) No prosecution may be instituted under this section without the

written consent of the Director of Public Prosecutions who has jurisdiction in the area where the person contemplated in subsection (1) is ordinarily resident.

(4) If the consent of the Director of Public Prosecutions to institute prosecution has been obtained as referred to in subsection (3), prosecution may be instituted in any appropriate court within such Director's jurisdiction.

8.3.3 Evaluation of comment

This clause did not elicit much response from respondents. Those who did comment support the recommendation that any permanent resident or citizen of South Africa, who commits in another country what would have been an offence under the proposed legislation, be found guilty of that offence, as this provision will deter those sex offenders who travel to other jurisdictions to commit sexual offences.⁷

Customary international law permits every state to apply its jurisdiction against its own citizens even when they are situated outside its boundaries.⁸ However, as there is a presumption against the extra-territorial operation of criminal laws,⁹ the Commission has elected to retain the proposed clause on extra-territorial application of the proposed legislation and common law relating to sexual offences.

None of the respondents objected to the lack of the double criminality principle inherent in the proposed clause. Double criminality requires that the offence in question be an offence in both the country where the offence was committed and in the home country. The Commission has elected to retain that aspect of the clause by reason of the fact that there may be other countries where the specific act complained of is not an offence, for example, a country where the age of consent is lower than in South Africa.

Some respondents raised the difficulty of double jeopardy arising if the accused person is acquitted in the country where the offence is committed. The Commission notes this difficulty and proposes to clarify the clause by amending subclause (2) by the addition of the words "acquitted or" before the word "convicted".

⁷ Lulama Nongogo & Teboho Maitse, Commission on Gender Equality.

⁸ Per Gubbay J in **S v Mharapara** 1986 (1) SA 556 (ZS) at 559E-G.

⁹ **S v Maseki** 1981 (4) SA 374 (T).

Advocates Meintjes and Henning, SC,¹⁰ suggest that it is necessary to go further than has been done in clause 27 by including an explicit provision conferring jurisdiction on the court. The Commission concurs with this view and adopts the formulation proposed by the respondents.

8.3.4 Recommendation

Extra-territorial provisions should not be the primary preventative measure to combat the commercial sexual exploitation of children or sexual offences in general in other countries. The country where the offence was committed has the primary responsibility for ensuring that offenders, including non-nationals, are prosecuted in that country. Where such prosecutions are not instituted in the country where the offence was committed, extra-territoriality provisions can enable the mother country of the alleged offender to prosecute for the same offence. This echoes the sentiments of organisations such as ECPAT that states “we will find you”. Care must be taken, however, to prevent extra-territorial prosecutions from usurping the legitimate role of the country in which the offence was committed to prosecute and punish, according to the laws of that country, the alleged offender. In this regard, the impression is gained that some countries prefer to use extra-territorial provisions to prosecute their nationals for offences committed in countries where the penalty is death or very severe.¹¹

It is also recognised that it is difficult and expensive to bring successful prosecutions under extra-territorial laws. Finding and tracing victims in the home country, language and cultural differences, different approaches to taking and leading evidence, different crime definitions and standards of proof, transcription and transmission of formal court records, problems with dual citizenship or lack of nationality, the potential for political meddling, etcetera are some of the factors which make it such a difficult and costly exercise. The effective enforcement of extra-territorial laws further requires the

¹⁰ Office of the Director of Public Prosecutions: Transvaal.

¹¹ In a well-known extra-territorial case of a Dutch national who was convicted for having sex with two Philippine girls aged 9 and 14 years respectively, the Dutch national was sentenced to 2 years imprisonment of which 8 months were suspended on the condition that he received psychiatric treatment. It is doubtful whether the accused would have received the same sentence had he been prosecuted in the Philippines.

dedicated services of highly skilled prosecutors and police officials *au fait* with all the international dimensions.

While recognising these difficulties and provided it is understood that extra-territorial laws are the measure of last and not first resort, the Commission still sees such provisions as a very useful preventative and safety-net measure: the knowledge that the laws of the country travels with you would certainly deter sex tourists from exploiting children. The Commission therefore recommends the incorporation of the following clause in the proposed Bill:

Extra-territorial jurisdiction

25. (1) Any person who, while being a citizen of or permanently residing in the Republic of South Africa, commits any act outside the Republic which would have constituted [**an offence under this Act or a sexual offence at common law against a person**] a sexual offence had it been committed inside the Republic, is guilty of the offence which would have been so constituted and is liable to the same penalty prescribed for such offence.

(2) A person may not be convicted of an offence contemplated in subsection (1) if such person has been acquitted or convicted, [**of the act that would have constituted an offence in terms of this Act**] in the country where the act was committed[.], of the act that would have constituted a sexual offence inside the Republic of South Africa.

(3) No prosecution may be instituted under this section without the written consent of the Director of Public Prosecutions who has jurisdiction in the area where the person contemplated in subsection (1) is ordinarily resident.

(4) If the consent of the Director of Public Prosecutions to institute prosecution has been obtained as referred to in subsection (3), prosecution may be instituted in any appropriate court [**within**] designated by such Director[**'s jurisdiction**] and such court shall have jurisdiction to try the matter as if the offence or offences had been committed within its jurisdiction.

8.4 Penalties

8.4.1 Proposals in Discussion Papers 85 and 102

The draft Bill accompanying Discussion Paper 85 contained a provision that made it possible to prescribe different penalties for the contravention of specific clauses of the Bill. In an explanatory memorandum contained in Discussion Paper 102 it was explained that apart from listing fines and imprisonment as the only sentencing options, no suggestions were made as to the number of years of imprisonment that may be imposed.

One submission to Discussion Paper 85 pointed out that the Criminal Law Amendment Act, 105 of 1997 may have an impact on the penalties clause as originally drafted.¹² This Act, in sections 51 and 52, prescribes mandatory minimum sentences for certain serious offences such as rape. The aim is to ensure that some serious offences are punished more severely and also to establish a measure of uniformity in the sentencing process. In Discussion Paper 102 the Commission stated that section 53 of the Act, however, makes it clear that the mandatory minimum sentencing provisions are only temporary as it provides that they will cease to have effect after the expiry of two years from the date of commencement of the Act (the 1st of May 1998), with the proviso that they may be extended by the President with the concurrence of Parliament for one year at a time.

In Discussion Paper 102 the Commission referred to the Commission's investigation on sentencing (Project 82), where it had recommended that Parliament should adopt an entirely new sentencing framework. The Commission stated that recommendations, embodied in its proposed draft *Sentencing Framework Bill*, had been handed to the Minister for Justice and Constitutional Development towards the end of 2000 and was at that stage under consideration by the Department of Justice and Constitutional Development. Further that importantly, the Bill repeals sections 51 to 53 of the Criminal Law Amendment Act referred to above. It was explained in Discussion Paper 102 that the Bill, which establishes an independent Sentencing Council which will be responsible for supplementing the sentencing principles already articulated in the legislation by developing sentencing guidelines, also encourages the different arms of government to

¹² By Advocates Meintjes and Henning SC.

enter into a partnership. It also requires a new partnership between the State and the public in general and victims of crime in particular. The key to this partnership is improved provision for victim involvement in the sentencing process and recognition of victim concerns in the type of substantive sentences that are handed down. Chapter 3 of the draft Bill lists the proposed sentencing options as follows: imprisonment, fines, community penalties, reparation and caution and discharge. Community penalties are expanded by further provision for correctional supervision and community service. The conditions that may be attached to such sentences are spelt out and the procedures for imposing them simplified. More emphasis is placed on restitution and compensation for victims of crime. The new proposed sentence of reparation includes elements of both restitution and reparation. There is also provision for victim impact statements to be presented to the courts so that they may learn what impact the crime had in practice.

The Commission recommended in Discussion Paper 102 that when imposing sentences for sexual offences, courts should have regard to the provisions of the Sentencing Framework Bill as proposed by the Commission, which it envisaged would, by the time that the Sexual Offences Bill is adopted, already have been enacted. Clause 28 of the revised Bill therefore contains a reference to the Sentencing Framework Act. Further that if it transpires that such an Act has not been adopted by the time that legislation on sexual offences is enacted, or if it is adopted under a different title, the Department of Justice's legislative drafters will make appropriate amendments to the clause as it was formulated.

Clause 28 read as follows:

28. Any person who is convicted of an offence in terms of this Act, must be sentenced in accordance with the provisions of Chapter 3 of the Sentencing Framework Act, Act No. xx of 20xx.

8.4.2 Evaluation of comment

The Commission received a useful, albeit solitary, submission on the issue of penalties. Advocates Meintjes and Henning SC submit that explicit sentences should be prescribed for reasons which they enumerate, namely: the Bill cannot be implemented in the absence of a provision dealing with sentence and, should the Sentencing Framework

Act be delayed for any reason, it will automatically delay the implementation of this Bill. Furthermore, explicit sentences give an indication of the seriousness with which the lawmaker regards the offences and this always serves as an excellent sentencing guideline. They opine that it would address some other concerns if it is explicitly stated that the sentence for a crime of rape in terms of this Bill is to be the same as that which can be imposed for common law rape. They reason that this will immediately alert all that all acts embraced in this Bill under rape are to be regarded as equally serious and the need to address the minimum sentences provisions might simultaneously fall away. They suggest that a similar provision should be enacted with reference to crimes created by section 4, equating them with the common law offence of indecent assault. It is further proposed that offences in terms of clauses 6 to 8 should be punishable with up to 10 years imprisonment and offences in terms of clause 9 should be punishable with up to 20 years imprisonment. Advocates Meintjes and Henning SC state that this is in line with present sentencing provisions in the current Sexual Offences Act, where a maximum of 6 years can be imposed for section 14 offences and even life imprisonment in the case of parents prostituting their child of below the age of 12 years. They conclude that such broad sentencing provisions will also be easy to deal with.

The concern regarding the consequences to the proposed Sexual Offences Bill should the Sentencing Framework Bill be delayed for any reason, has proved to be valid. On 12th February 2002 the Department of Justice and Constitutional Affairs tabled its extended legislative programme before the Justice Portfolio Committee.¹³ At this meeting it was decided that the Sexual Offences Bill should resort under "Bills to be introduced into parliament during the last 6 months of 2002" whereas the Sentencing Bill resorted under "Other Bills to be introduced into parliament as soon as circumstances permit, either during 2002 or later". Given this turn of events, the recommendation contained in the Discussion Paper that if the Sentencing Framework Bill has not been adopted by the time that legislation on sexual offences is enacted, or if it is adopted under a different title, the Department of Justice's legislative drafters will make appropriate amendments to the clause as was formulated, will clearly be inadequate.

Recommendations relating to various offences and the penalty clause were based on the premise that the Sentencing Framework Bill, which proposes to repeal the minimum

¹³ [Http://www.pmg.org.za/docs/2002/viewminute.php?id=1321](http://www.pmg.org.za/docs/2002/viewminute.php?id=1321).

sentencing provisions found in the Criminal Amendment Act, 105 of 1997, would be passed by the time that the Sexual Offences Bill would be considered by Parliament. The Commission is therefore bound by the provisions of the Criminal Amendment Act, 105 of 1997 and have had to adapt the recommendations relating to the proposed offences and penalties accordingly. Subsequently, as stated earlier, the Commission has decided that it should differentiate between certain degrees of sexual penetration for purposes of sentencing in terms of the currently applicable provisions on minimum sentences. However, as the Criminal Amendment Act is not applicable to all the offences contained in the Sexual Offences Bill the Commission is necessitated to list specific penalties for such offences in the Bill itself. In determining the minimum penalties as set out below, the Commission has had regard to the penalties contained in the Sexual Offence Act of 1957 and the proposed amendments to the Criminal Amendment Act of 1997 as discussed earlier.

8.4.3 Recommendation

The Commission deems it expedient to include specific penalties in the clause to which it relates in the Bill. Clause 28 will therefore be omitted. Where the minimum sentencing provisions are applicable the relevant penalties are contained in the Criminal Law Amendment Act, 105 of 1997. For the sake of clarity the last mentioned offences and the relevant penalties contained in the Criminal Law Amendment Act are reflected below:

Life imprisonment for the following offences:

- * Rape
- resulting in death of victim;
 - by more than one person or more than once;
 - by person with two or more convictions or rape;
 - by person who knowingly has AIDS;
 - if victim is a *girl*¹⁴ below 16 years of age;
 - if victim is physically disabled;

¹⁴ Should the Commission's recommendation regarding the redefinition of rape be accepted, the word 'girl' should be replaced by the word 'person'.

- if victim is mentally impaired;
- involving infliction of grievous harm.

- * Oral genital sexual violation of a person under the age of 16 years.
- * Sexual violation of a person involving the infliction of grievous harm.

A minimum sentence of 10 years imprisonment for a first offender, 15 years imprisonment for a second offender, and 20 years imprisonment for a third or subsequent offender for:

- * sexual violation.
- * oral genital sexual violation where the victim was 16 years of age or older.

8.5 Repeal and amendment of laws

8.5.1 Proposals in Discussion Papers 85 and 102

In Discussion Paper 102 the Commission explained that one of the goals of Discussion Paper 85 on Substantive Law, published in August 1999, was to assess whether a single Sexual Offences Act was necessary or whether *ad hoc* amendments should be proposed. It pointed out, however, that this was not consistently reflected in Discussion Paper 85. It concluded that the intention of the project committee was ultimately not to recommend the repeal of all common law sexual offences, but to recommend statutory intervention, by way of a single Sexual Offences Act, to address problems in the common law and existing law.

Although the previous draft Bill purported to repeal the Sexual Offences Act, 23 of 1957 in its entirety, the Commission acknowledged that it did not deal with all the provisions in that legislation, namely male party offences, the management and the position of brothels and adult prostitution. The Commission also explained that only three common law offences would be affected by the provisions of both the previous and the revised Bills. They are rape (which it proposed to codify), incest (which it proposed should be amended to incorporate the codified definition of sexual penetration) and sodomy (which

it suggested would amount to rape if non-consensual penetration takes place between males).

In Discussion Paper 102 the Commission emphasised that its vision is ultimately to repeal the entire Sexual Offences Act (and other statutory provisions governing sexual offences) and to replace it with one comprehensive piece of legislation that regulates all statutory sexual offences, including provisions on practice and procedure. It submitted that it would be premature to include a provision on the repeal of the whole of the Sexual Offences Act in the revised Bill on substantive law if there is no clarity yet as to the Commission's recommendations on adult prostitution, which is the subject of a different Paper. The Commission stated that repeal of laws should only be considered once the entire investigation into sexual offences was completed, including the aspects on practice and procedure, adult prostitution and pornography. The Commission explained that a provision had therefore been inserted in the revised Bill which refers to a schedule that will reflect which laws are to be repealed. Further that the full schedule would only be devised upon completion of the investigation.

As far as male party offences are concerned, the Commission pointed out that section 20A of the Sexual Offences Act was declared unconstitutional by the Constitutional Court.¹⁵ No counterpart to section 20A was provided for in the revised Bill. The revised Bill, as contained in Discussion Paper 102 without incorporating provisions on adult prostitution, effectively replaced the following provisions of the Sexual Offences Act:

- * Section 9 (parent or guardian procuring defilement of child or ward) is replaced by clause 9 (child prostitution).
- * Section 10 (procuration) is replaced by clause 9 (child prostitution) insofar as it relates to children, and clause 4 (inducement to commit indecent act).
- * Section 11 (conspiracy to defile) is partly replaced by clause 4 (inducement to commit indecent act) and will be covered by the offence of conspiracy as contained in the Riotous Assemblies Act.

¹⁵ In **National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others** 1998 BCLR 1517 (CC).

- * Sections 12 (detention for purposes of unlawful carnal intercourse) and 12A (assistance for purposes of unlawful carnal intercourse) is replaced by clause 9 (child prostitution) insofar as it relates to children.
- * Section 14 (sexual offences with youths) is replaced by clause 6 (acts of sexual penetration or indecent acts with consenting minors).
- * Section 15 (sexual offences with idiots or imbeciles) is replaced by clause 7 (indecent acts or acts of sexual penetration with mentally impaired persons).
- * Section 17 (owner or occupier permitting on his premises the defilement of a female or any offence against this Act) is replaced by clause 9 (child prostitution) insofar as it relates to children.
- * Section 18 (use of drugs, etcetera, for purposes of defilement of females) is replaced by clauses 3 (rape) and 4 (inducement to commit indecent act).
- * Section 20 (persons living on earnings of prostitution or committing or assisting in commission of indecent acts) is replaced by clause 9 (child prostitution) insofar as it relates to children.

The following offences in the Sexual Offences Act which related neither to brothels nor to adult prostitution or male party offences were not addressed in the revised Bill:

- * section 13 (abduction);
- * section 18A (manufacture, sale or supply of article which is intended to be used to perform an unnatural sexual act);
- * section 19 (enticing to commission of immoral acts); and
- * section 21 (presumptions).

As far as section 13 was concerned, the Commission held that it was debatable whether the provision should be retained. Although it was submitted that the revised Bill adequately provided for the combating of the sexual exploitation of children, comment was invited on the question whether abduction as provided for in the Sexual Offences Act or a similar provision should be incorporated in the draft Bill.

Discussion Paper 85 contained a recommendation that section 18A be excluded from the proposed legislation. Respondents did not object to the exclusion of this section in

Discussion Paper 85 and the provision was therefore omitted in the Bill accompanying Discussion Paper 102.

The Commission opined in Discussion Paper 102 that section 19 did not draw a distinction between children and adults and that the adult aspect would be dealt with in a separate Paper on adult prostitution. Regarding the enticement or solicitation by children for immoral purposes, the revised Bill did not criminalise such actions, but criminalised the actions of clients who make use of the services of child prostitutes. Comment was invited on the question whether children should be penalised as contemplated in the Sexual Offences Act.¹⁶ The Commission noted that the second part of section 19 related to indecent public exposure. It submitted that the offence was adequately covered by the common law offence of public indecency. It explained that the offence, at common law, is defined as unlawfully, intentionally and publicly committing an act which tends to deprave the morals of others or which outrages the public's sense of decency and propriety. The offence would also be dealt with in the Discussion Paper on adult prostitution (e.g. prostitutes loitering on street corners, etcetera).

The Commission concluded that as the provisions of section 20 deal with presumptions related to prostitution the desirability of retaining them would be dealt with in the Discussion Paper on adult prostitution.

The repeal clause read as follows:

Repeal and amendment of laws

The Acts specified in the Schedule are hereby repealed or amended to the extent set out in the third column of the Schedule.

8.5.2 Evaluation of comment and recommendation

As no comment was received in this regard, the Commission abides with the above recommendations contained in Discussion Paper 102. However, as a question

¹⁶ HW Moldenhauer (Chief Magistrate, Pretoria) contended that a child used for child prostitution should not be made a criminal but is a child in need of care and must therefore be dealt with in terms of the Child Care Act, 1983.

regarding the necessity of retaining section 13 of the Sexual Offences Act was posed in the Discussion Paper the Commission deems it apt to include a brief exposition of the rationale behind the recommendation to repeal this section. In the Discussion Paper the Commission merely stated that the revised Bill adequately provided for the combating of the sexual exploitation of children. According to Milton¹⁷ the enactment of statutory abduction as provided for in section 13 of the Sexual Offences Act did not repeal the common law offence of abduction. Milton makes the point that where the accused intends taking the complainant away for the purpose of sexual intercourse the offence constitutes common law and statutory abduction. He explains that abduction has its origins in a time and society in which women were considered to be an economic asset to the family. Milton opines that it is unclear what useful social purpose the crime of abduction serves today. It does not prevent the sexual seduction of young women, and the crime of kidnapping is available to punish men who take and detain young girls for immoral or other purposes. Milton concludes that at most the crime protects a parent's power to consent to the marriage of a child. The Commission therefore recommends that section 13 of the Sexual Offences Act be repealed.

Concerning the Commission's recommendation that section 18A should be repealed, the Commission has given due regard to the Constitutional Court judgements in **Case and Another v Minister of Safety and Security and others; Curtis v Minister of Safety and Security and others**¹⁸ and the **National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others**.¹⁹ In the former case the Court found that the statutory prohibition of possession of sexually explicit material which extends to prohibiting the possession of such material in a person's own home and for his or her own personal use invades the right to privacy contained in section 13 of the Interim Constitution. In this case it is also noted that the courts had struggled for decades with the meaning of the phrase *indecent or obscene* as the proscription took the form of an open-ended nonexclusive listing, without clear outer parameters. It is contended that although section 18 A does not proscribe possession of articles which are intended to be used to perform an unnatural sexual act, the reference in section 18 A to "unnatural

¹⁷ JRL Milton **South African Criminal Law and Procedure Volume II Common-law Crimes** Juta 1996 (third edition).

¹⁸ 1996 (5) BCLR 609 (CC).

¹⁹ 1998 (12) BCLR 1517 (CC).

sexual act” is obscure. This is confirmed by the fact that very little has been written about this provision by commentators on the criminal law and that our case law contains scant information from which to infer what the law should regard as an ‘unnatural sexual act’.

However, whilst not wanting to enter the arena of adult access to sex articles the Commission is of the opinion that children deserve legislative protection in this regard. The Commission’s attention has been drawn to the practice used by certain sex offenders of grooming a child prior to committing a sexual offence with the said child. The process of grooming may include the provision of or display of such articles to children. So as to extend further protection to children, the Commission recommends that a substantive clause therefore be introduced into the Bill which should *inter alia* proscribe the manufacturing and display of such articles to children. The wording ‘display to and towards’ a child would for example exclude the discovery of an article used for a sexual act negligently left in a parent’s bedroom. Such clause should read:

Promotion of a sexual offence with a child

11. Any person who manufactures or distributes an article that promotes or is intended to promote a sexual offence with a child, or who sells, supplies or displays to and towards a child an article which is intended to perform a sexual act, is guilty of the offence of promoting a sexual offence with a child and liable, upon conviction, to a fine or to imprisonment for a period not exceeding six years or to both such fine and such imprisonment.

The Commission also confirms its recommendation to repeal sections 9, 11, 14, 15, 18, 18A, and 20A of the Sexual Offences Act, 1957, for the reasons stated in the discussion papers.²⁰

²⁰ See the Schedule to the draft Bill in Annexure A below.

CHAPTER 9

NON-LEGISLATIVE RECOMMENDATIONS

9.1 Introduction

In keeping with the expanded mandate given to the Sexual Offence investigation, Discussion Paper 102 also contained recommendations which were non-legislative in nature. The Discussion Paper stated that the purpose of these recommendations was to encourage action by the appropriate government structures and to galvanise communities to participate in the fight against this form of violence.

The non-legislative recommendations made in the Discussion Paper will briefly be explicated below, followed by an evaluation of the submissions received in this regard. Thereafter, the final non-legislative recommendations will be listed in accordance with the structure which would be accountable for the implementation of the recommendation.

9.2 Proposals in Discussion Paper 102

For ease of reference and where appropriate the headings used in the Discussion Paper will be retained for purposes of the brief overview of the non-legislative recommendations made in the Paper. In the Discussion Paper the attention of critical role players within the Criminal Justice system and auxiliary services was drawn to specific recommendations relating to their sphere of responsibility and in this regard the recommendations are grouped under the name of the responsible agency.

9.2.1 A strategy for the multi-disciplinary intervention of sexual offences (protocols and memoranda or codes of good practice)

The Commission found that despite mounting public and official concern about sexual offences and rape specifically, South Africa has no clear strategy for inclusively dealing with child and adult victims of sexual offences, either on a primary, preventative level or on a secondary, protective level. It therefore concluded that there is no guarantee that a victim of a sexual offence entering the criminal justice system will be dealt with in terms of acceptable procedures or be protected from further harm. The Commission recommended that a national strategy for multi-disciplinary intervention relating to sexual offences should be agreed upon by incumbent government departments and non-governmental organisations

working in the field of sexual offences in partnership with civil society. It proposed that this strategy should include the development of a basic framework, be it called a national multi-disciplinary protocol or memorandum of good practice, and that this inter-sectoral binding agreement should provide the basis for provincial or regional multi-disciplinary agreements or codes of practice. In order to ensure accountability without embodying such an agreement in legislation,¹ it further proposed that provision should be made in legislation for the development of such a basic framework and its purpose.

The Commission stated that National Government must ensure compliance with a national framework of this nature and that all public structures responsible for formal intervention in sexual offence cases and non-government bodies which are mandated to perform this task, must deliver services which are prompt, sensitive, effective, dependable, fully co-ordinated and integrated, and carefully designed to avoid secondary trauma. Further, that in-house regulations, codes or memoranda of good practice must reflect each role-player's commitment and accountability in this regard. It also recommended that provision must be made in the budgets of all relevant government departments on national, provincial and local government level for the effective implementation and operation of the national framework. In order to supervise and evaluate the implementation of such a framework on an ongoing basis, the Commission recommended that a multi-disciplinary co-ordinating committee be established.

9.2.2 Disclosure of the offence by the victim

In Discussion Paper 102 the Commission acknowledged that disclosure of a sexual offence by most victims is a slow and painful process. The circumstances and manner in which the disclosure occurs are not predictable and it is therefore not possible to legislate as to when and how disclosure must take place. The Commission stated that it is possible, however, to make recommendations that facilitate disclosure and support persons in their disclosure of sexual offences. Accordingly the Commission recommended that:

- awareness campaigns be conducted by schools and local government structures to make it comfortable and acceptable for children to speak out with confidence in a responsive child protection system;

¹ Inclusion in legislation could lead to non-flexibility and rigidity which may work against the very purpose of such agreements.

- ongoing life skills programmes should also be introduced as part of the fixed syllabus in schools; and
- awareness, information and education programmes be launched and conducted by the appropriate government department(s) for all levels of civil society about what to do and where to go when a person discloses sexual abuse

9.2.3 Department of Safety and Security

In Discussion Paper 102 the Commission recommended that the SAPS National Instruction No 22 / 1988 *Sexual Offences: Support to Victims and Crucial Aspects of the Investigation* should be revisited, amended if necessary, and brought to the attention of all police officers. Aspects already addressed in the National Instruction which the Commission felt should receive further attention included the fact that:

- Police members should have no discretion in accepting a charge of sexual assault.
- No sworn statement should be taken immediately from the victim.
- The case should immediately be allocated to a specially trained investigating officer from a Family Violence, Child Protection and Sexual Offence (FCS) unit who has the responsibility of explaining the various procedures to the victim and who must ensure that the medical examination is completed.
- The investigating officer should be obliged to keep the victim informed of all developments regarding the case.

The following recommendations were also made:

- More sophisticated and appropriate, obligatory mechanisms relating to the screening, selection, training and debriefing of SAPS members serving in or wanting to serve in specialised units dealing with sexual offences must be established. In addition to having received training on how to deal with a victim of a sexual offence, all inexperienced police members should receive 'on-the-job' training by being assigned to an experienced colleague for a set period of time.
- A culture enforcing the need for regular debriefing in the SAPS must be encouraged. Police members should have the freedom of electing whether to be

debriefed by professionals either retained in-house or externally, but not from within their own unit.

- The specialised investigation of sexual offence cases must be enhanced by the obligatory facilitation of contact, information sharing and collection of evidence for the purposes of trial between the investigating officer and the prosecuting authority prior to the advent of the trial.²
- The role of SAPS forensic social workers must be clarified and formalised as a matter of urgency.
- The Commission found that there seems to be considerable merit in formalising the relationship between the police and the health services responsible for the collection of the medical evidence, so as to ensure greater accountability and clear lines of responsibility for, *inter alia*, the provision of crime evidence collection kits and training. The Commission therefore recommended that SAPS must develop and administer a program to train all medical personnel involved with the collection of forensic medical evidence in the correct use and application of the appropriate crime evidence collection kits.
- Warrants of committal to prison do not contain details of the specific offence committed by the offender. These details are crucial to assess the suitability of offenders for rehabilitation programmes and for purposes of parole. It is recommended that SAPS amends the SAP 69 form to include details of the offence which may be required to make an informed decision regarding the rehabilitation programme made available to the offender. It is important that this and any other relevant information be conveyed from the Departments of Justice and Safety and Security to the Department of Correctional Services in a confidential manner. Access by the offender to this information will be subject to the provisions contained in the Access to Information Act, No 2 of 2000.
- Awareness campaigns for adult victims (both male and female) of sexual violence be conducted by the Departments of Safety and Security and Justice and Constitutional Development to instil confidence in a responsive, authoritative protection system in order to make it easier for such victims to report incidents of sexual violence.

²

This recommendation is endorsed by Key Recommendation 8 contained in the South African Human Rights Commission **Report on Sexual Offences Against Children** April 2002.

- Police training and protocols should acknowledge the reality that disclosure for victims of sexual abuse is likely to be a process which will take place over a period of time and sometimes even years after the event.
- In order to encourage victims of sexual violence to report the incident to the police, it is obvious that the public at large should have confidence in the police specifically and in the criminal justice system in general. Victims must have the confidence that their complaints will be taken seriously before they will lay charges with the police. Raising public awareness will lead to an increase in the number of cases reported to the police, provided that the system remains responsive to the needs of victims. Training of the police therefore plays a vital role.

Specifically in relation to the actual police investigation, the Commission stated that over recent years considerable efforts have been made to improve police practices and procedures in relation to sexual offence victims. However, it found that despite major gains, several problem areas remain. In view of this finding the Commission made the following recommendations:

- That the police should review procedures for recording and following up 'unfounded' cases and cases where the victim wishes to withdraw the matter. Once these procedures have been settled, they should be incorporated into the National Instruction on Sexual Offences.
- That the Sexual Offences Act should place a positive obligation on the police to accept and register all complaints of sexual offences.
- That the police should not have the discretion to decide whether or not to proceed with an investigation even when requested not to proceed by the victim. The sole discretion not to proceed with an investigation should be that of the prosecuting authority. To give effect to this recommendation, the SAPS National Instruction on Sexual Offences should clearly spell out that all sexual offence cases must be investigated fully, that charges may not be withdrawn at police station level even when requested to do so by the victim or the victim's family, and that any decision not to proceed with a police investigation falls with the relevant prosecuting authority.
- In order to formalise the position with regard to 'false reports', that the SAPS National Instruction 22 / 1998 on Sexual Offences be amended to provide

specifically that police investigators should not infer from the reaction³ of the complainant that he or she is unaffected by the sexual assault or is lying.

- That the new Sexual Offences Act should provide that the Director of Public Prosecutions be solely responsible for making a decision not to initiate an investigation into a sexual offence allegedly committed against that victim. This decision may only be made after the DPP has consulted with the investigating officer.
- That a positive duty should be placed on the police (the investigating officer) to inform the victim of the right to ask the Director of Public Prosecutions to review any decision not to initiate or proceed with an investigation into an alleged sexual offence allegedly committed against that victim. This can be done by amending the National Instruction.
- That SAPS National Instruction 22 / 1998 on Sexual Offences provide comprehensive guidelines on the charging of victims of sexual offences for laying false charges, making false statements, obstructing the course of justice and perjury.
- In addition, the National Instruction should provide that before a complainant in a sexual offence case can be charged with any of the offences related to laying false charges, authorisation must be obtained from the relevant Unit or Station Commander.
- That a docket monitoring system be introduced at station level with regard to reports of sexual offences. Until such time as the information contained in the docket is captured electronically, it is recommended that critical documents be filed in duplicate.
- To provide for a better flow of information to victims, the Commission proposes the following actions:
 - a) a statement of duties of individual police officers in relation to the provision of information to victims should be formulated and incorporated into a police code of good practice;
 - b) a docket monitoring system should be established together with a system which ensures that duplicate copies of all important information contained in the docket are kept in safe keeping;

³

Some victims appear very composed and able to calmly discuss the assault. Others may be in a very distressed state and may not be able to relate details of the incident in an accurate or chronological manner.

- c) information pamphlets should be supplied routinely to victims at the time of reporting the crime, prior to the first appearance of the accused, and again following the date set down for trial. These pamphlets should provide basic information about the next stages of the process;
- d) responsibility for distributing information pamphlets should lie with the organisation that has the primary responsibility for the case, i.e. at the reporting and investigation stage, information sheets should be distributed by the police; prior to and following the first appearance of the accused in court, information sheets should be distributed by the office of the Director of Public Prosecutions.
- The decision whether to take the victim for a medical examination immediately or to proceed with another critical aspect of the investigation is dependent on circumstances which are unique to each sexual offence investigation. No recommendation is made in this regard, save that SAPS must give priority to having a medical examination done in order to ameliorate the anxiety experienced by victims prior to the examination.
- That the existing police practice rules and forms (especially Form SAP 329) be revised, be codified in a National Instruction on identity parades and that such a National Instruction be operationalised as soon as possible.
- That a witness is entitled to be accompanied by a support person and that this be provided for in the above National Instruction. The Commission cautioned that a support person must, however, be informed that his or her role is solely to support the witness and that he or she may in no way interfere with the witness during the holding of the identity parade.
- That the envisaged new National Instruction on identity parades should spell out clearly that it is not appropriate for any victim or witness to have to physically touch a suspect in order to identify a suspect, whether it be a sexual offence case or not.
- As knowledge surrounding a bail application is often integral to the ability of the victim to prevent being re-victimised, the Commission recommends that this aspect be included in the SAPS National Instruction: *Sexual Offences: Support to Victims and Crucial Aspects of the Investigation*.

9.2.4 Department of Health

In the assessment of medico-legal services the Commission made specific recommendations surrounding the medical services provided by government appointed professionals, but in so doing did not aim to exclude the regulation of medical services offered by private practitioners. The Commission recommended that:

- In the first consultation all appropriately trained medical personnel⁴ should conduct a proper medical examination of and treat or refer the victim of sexual violence for specialised treatment or counselling, where appropriate.
- Medical personnel should link up with the investigating team to share information on the crime scene, the evidence collected or to be collected from the victim and/or the alleged offender and the injuries sustained during the attack. Medical personnel should also advise the investigating team on what other possible evidence could be collected.

The Commission found that there seems to be considerable merit in formalising the relationship between the police and the health services responsible for the collection of the medical evidence, so as to ensure greater accountability and clear lines of responsibility for, *inter alia*, the provision of crime evidence collection kits and training. The Commission therefore recommended that:

- All medical personnel involved with the collection of forensic medical evidence must receive training from SAPS in the correct use and application of the appropriate crime evidence collection kits.
- Mechanisms be developed to ensure that the national and provincial Departments of Health and the various controlling bodies⁵ in the medical field co-operate with SAPS in this program as it pertains to the medical aspects of evidence collection.

It was also specifically recommended that:

⁴ We do not recommend that doctors be the only persons to conduct medico-legal examinations.

⁵ Such as South African Medical and Dental Council, the South African Nursing Council, etc.

- The victim⁶ should be given information regarding the reason for the examination and what it entails, information on possible pregnancy as a result of the attack, an explanation of any medication given and possible side-effects, the results or outcome of the medical examination and information about HIV.⁷
- At the very least victims should be tested and counselled for HIV or referred to an organisation or hospital which deals with the issue. Referrals from district surgeons or medical personnel may include referrals for follow-up medical care, for HIV or STD testing, or for counselling and advice.
- Reporting mechanisms be made available to victims where an examining practitioner has conducted the examination in an inappropriate fashion.
- Provision must be made for support mechanisms such as debriefing or counselling of medical practitioners as they, similar to all other persons who regularly work with victims of sexual violence, are not left unscathed by the continuous exposure to human depravity.
- One stop centres be officially endorsed and implemented nationally so as to enhance the preliminary stages of the investigation. The Commission noted that the criminal investigation would be considerably aided by the availability of all the role-players within walking distance of one another.
- The appropriate health instructions address the role of medical staff on duty in a casualty ward when attending to a victim of a sexual offence. Further that these instructions should also oblige such medical staff, when requested to do so, to conduct medical examinations on both victims and alleged offenders in sexual offence cases, to regulate the manner in which medical evidence is to be collected and treated.
- All medical personnel, whether in private practice or not, should be specifically trained to deal with cases of sexual abuse. The training should extend to the performance of medico-legal examinations, the correct use of the crime kit and the significance thereof, the completion of the required forms (such as the J88), police procedure and the legal aspects surrounding the presentation of such evidence in court.

⁶ Or the caregiver of the victim in the case of a young child or mentally disabled person.

⁷ This recommendation is endorsed by Key Recommendation 7 contained in the South African Human Rights Commission **Report of Sexual Offences Against Children** April 2002.

Faced with the imminent demise of the district surgeony the Commission also recommended that medical practitioners and other categories of health care practitioners such as nurses should be empowered to examine victims of sexual assault, provide the necessary medical treatment and give expert evidence in court. The Commission noted that obviously all health care practitioners, including medical doctors, should first receive the necessary training and ongoing support in order to enable them to fulfil this function. The Commission further recommended that the Health Professions Council of South Africa (the former Medical and Dental Council) should develop the necessary training manuals and oversee the training.

In conjunction with the recommendation that the state provide post exposure prophylaxis to victims of sexual violence, the Commission also recommended that:

- The Department of Health, in consultation with other sectors, should develop and implement binding protocols for medical practitioners and health care professionals as to the appropriate steps to be taken when victims of rape present themselves for treatment.
- Such protocols should provide that:
 - (a) appropriate measures be taken to protect the privacy and dignity of victims presenting themselves at a hospital following a sexual offence and that measures be taken to expedite the proceedings;
 - (b) all victims of rape must be examined and assessed as to the risk of HIV-infection by a district surgeon, medical practitioner or health care professional immediately after reporting the assault to the police. Victims who do not report the sexual assault to the police but present at a medical facility must be examined and assessed by a medical practitioner or health care professional immediately after presenting;
 - (c) all victims of rape who present at a medical facility (including those who are examined by a district surgeon) must be informed by the medical practitioner or health care professional of the risk of being HIV-infected as a result of the sexual assault;
 - (d) all victims of rape must be individually assessed as to the risk of HIV-infection, taking into consideration -
 - available information on the HIV status of the perpetrator;
 - the type of exposure;

- the nature of the physical injuries; and
 - the number of times that the victim was sexually assaulted.
- (e) all victims of rape must be informed after assessment of the risk of HIV-infection and a recommendation must be made to them whether PEP treatment is appropriate. Regardless of the recommendation of the medical practitioner or health care professional, the choice of whether to take PEP or not remains that of the victim;
- (f) all victims of a rape must be informed of -
 - the existence of PEP drugs;
 - the purpose of the drugs;
 - the possible side effects of the drugs; and
 - the consequences of not taking the drugs.
- (g) PEP drugs ought to be available at all medical facilities. Should the drugs not be available at the medical facility where the victim presents, the victim must be assisted by the medical facility, the attending medical practitioner or the health care professional in obtaining the drugs.
- It was also recommended that the victim should always be provided with medical treatment by the same person collecting the forensic evidence and that the victim not be referred to another practitioner or facility. The opinion is held that it is crucial for the Department of Health to establish a National Code or Memorandum of Good Practice. Such directives should be obligatory and any practitioner not complying with them should be subject to discipline.
- The Commission further recommended that identifying information, for example contact details and personal particulars not relevant to the case, should not be disclosed. The Commission opined that consent to disclosure of personal records by the person who made the confidential communication be acknowledged. Also that information acquired by a registered medical practitioner by physical examination (including communications made during the examination) in relation to the commission or alleged commission of the sexual offence or a

communication made, or the contents of a document prepared, may be adduced for the purpose of a legal proceeding arising from the commission or alleged commission of the sexual offence.

9.2.5 Department of Justice and Constitutional Development

In Discussion Paper 102 the Commission pointed out that delays which seem to be inherent within the present court system are an additional source of anxiety to victims of sexual offences. In this regard the Commission recommended that:

- Case-flow management techniques which are flexible enough to be adapted to the needs of individual sexual offence cases, but have the overall purpose of reducing delay and increasing efficiency be introduced.
- A case-flow management strategy, including time-frames, must be developed inter-sectorally and initiatives such as the 'e-justice' programme should be incorporated in order to reduce delays in the criminal procedure process.
- Non-compliance with the case-flow management strategy (including time-limits) should be met with sanction. Further that an investigation be undertaken to determine the viability of introducing a system of costs in criminal proceeding.
- Non-compliance with the case-flow management strategy should neither affect the manner in which the case is heard nor result in the case being dismissed or charges withdrawn.

In the light of the Commission's recommendation that the SAPS National Instruction 22/1998 be revisited and reviewed it was also recommended that the NDPP Policy Directives be revisited and reviewed, ideally with input from SAPS, the health professions and victim support groups. In this context the Commission stated that consistency was essential: A situation where one agency is issued with *instructions* and another agency with mere *guidelines* was found to be untenable, especially when the aim is to ensure greater co-operation and interaction between those agencies. The Commission recommended that it was equally important to ensure that whatever was agreed upon, be it instructions, guidelines or directives, that they carry the same legal force to ensure that non-compliance can be addressed uniformly.

The Commission fully supported the roll-out of specialised sexual offences courts, with the proviso that the new courts had to be sustainable both as far as human and financial resources and commitment are concerned. The Commission emphasised that the roll-out must be accompanied by intensive training programmes of all court officials involved, including the magistrates. However the Commission noted that certain shortcomings had been identified in the 'Wynberg Sexual Offences Court-model' and therefore cautioned that these shortcomings should be addressed in the roll-out of the new courts in order to prevent the replication of inadequacies already identified.

The Commission also recommended that the Office of the Director of Public Prosecutions should formally assume responsibility, from the first appearance of the accused onwards, for directly communicating relevant information to the victim, rather than this being done through members of the police. The Commission suggested that an office of designated Victim Liaison Officer be established and attached to the office of the Director of Public Prosecutions.

In order to better inform the victim of a sexual offence of the procedures to be followed, the Commission suggested that information pamphlets be developed and distributed. It suggested that the responsibility for distributing information pamphlets should lie with the organisation that has the primary responsibility for the case, i.e. at the reporting and investigation stage, information sheets should be distributed by the police; prior to and following the first appearance of the accused in court, information sheets should be distributed by the office of the Director of Public Prosecutions.

In relation to bail the Commission recommended that:

- Victims and other state witnesses be informed of and participate in bail applications if they should choose to as the Commission found that the adoption of a system which allows for the victim to be informed of and participate in all stages of the proceedings (including a bail application by the accused) may address some of the concerns.
- Where a witness is the complainant in the matter or a person below the age of 18 years and such witness is called to or wishes to participate in the bail application, such witness must be declared a vulnerable witness and be afforded such protective measures as the court may deem necessary. Where any other

witness appearing at the bail application is likely to be vulnerable on account of age, intellectual impairment, trauma or cultural differences, or the possibility of intimidation or is likely to suffer severe trauma, an application for declaration as a vulnerable witness must be made. The declaration of vulnerable status as well as the finding in relation to the appropriate protective measures will remain in place unless the trial court should find otherwise. Experts may be called to establish the vulnerability of the second category of witnesses and the need for specific protective measures for both categories where necessary. However, the role of expert witnesses should not be restricted to determining vulnerability of witnesses. Expert witnesses should also be called to lead evidence as to the risk that the accused might pose to the complainant and/or society, if released.

- As knowledge surrounding a bail application is often integral to the ability of the victim to prevent being re-victimised, this aspect be included in the Policy Guidelines for the National Director of Public Prosecutions.
- Training and guidance be given to all officials dealing with bail applications so as to enhance the implementation of the existing legislation regulating bail (which the Commission deems to be adequate).

In relation to pre-trial processes the Commission recommended that the discretion of whether to embark on a pre-trial process should be shouldered by the responsible prosecutor and he or she should be obliged to note the reasons for exercising this discretion in favour of convening a case management consultation as well as the results of the consultation. The procedure to be followed should be contained in the relevant sexual offence management protocol.

In relation to case management consultations linked to diversion, the Commission recommended that this option should be followed only in exceptional cases. The Commission stated that numerous recommendations contained in the discussion paper were aimed at enhancing the way in which complainants would be assisted to interact with the court and the manner in which the complainant would be dealt with. The primary aim of all of these recommendations was to alleviate trauma experienced by complainants in the present judicial system. The Commission opined that the enactment of these recommendations would go a long way to bolstering the testimony of a complainant who is not so robust. In those exceptional cases the Commission recommended that:

- The consultation should be convened by the prosecutor. However, the Commission refrained from being prescriptive regarding the constitution of the consultation, bar that trained personnel who have assessed the participants must be involved. An expert assessment of the participants during the consultation and the need for expert guidance of the consultation is imperative to its success.
- The prosecutor be tasked to draw up the diversion contract. Guidance for the drafting of such contracts should be contained in the protocols. For example, a contract could contain a provision which separates the offender from a child victim or other prospective victims during the period of diversion. It should be a standard pre-requisite that the offender must be willing to submit him or herself to a sex offence specific rehabilitation programme or treatment.
- Prosecutors handling sexual offence cases should receive training on plea bargaining and innovative sentencing options aimed at community protection.
- Provision should be made in the plea bargaining process to consult the complainant, or in the case of a child, the child complainant and his or her parent, guardian or *person in loco parentis*.

The Commission further recommended that:

- The Policy Guidelines of the NDPP be amended to ensure that full disclosure has been made by the police, thereby ensuring that the prosecution is able to make full disclosure to the defence. In order to counter-balance this provision, a provision which assures the police that personal material will not be disclosed to the defence without prior consultation must also be included.
- Personal particulars which do not adversely affect the accused's right to a fair trial should not be divulged to the defence by way of a witness's statement and testimony.
- The age of the witness, if he or she is under 18 years of age, be brought about on the front of any statement. This will indicate to the prosecutor whether provision for protective measures for a child witness should be made.
- The provisions contained in section 153 of the Criminal Procedure Act be invoked more often in order to protect witnesses, especially victims of sexual offences, where a real possibility exists for revictimisation or recurring violence.
- Identifying information, for example, contact details and personal particulars not relevant to the case, should not be disclosed.

- Consent to disclosure of personal records by the person who made the confidential communication be acknowledged.
- Information acquired by a registered medical practitioner by physical examination (including communications made during the examination) in relation to the commission or alleged commission of the sexual offence or a communication made, or the contents of a document prepared, may be adduced for the purpose of a legal proceeding arising from the commission or alleged commission of the sexual offence.

Additionally that:

- The Department of Justice and Constitutional Development should develop and establish a training programme to be attended by prosecutors and presiding officers to ensure proper training in regard to witness notification. In this context the term 'presiding officers' refers to both magistrates and judges.
- The Department of Justice and Constitutional Development should task its communication section to launch a victim empowerment programme to inform witnesses, possibly by way of pamphlet, of the protective measures (including the use of an intermediary) that may be requested.
- The National Director of Public Prosecutions should develop guidelines which place a duty on prosecutors to notify witnesses of the protective measures that they may request, failure of which will lead to a disciplinary inquiry.

Recommendations pertaining to *in camera* hearings stated that:

- The movement of both court officials and private persons in and out of the court whilst a vulnerable witness is testifying should be strictly monitored. This provision should be enforced and adhered to by requiring that all courts hearing sexual offence cases shall, when the matter is being held *in camera*, have a notice to that effect on the public doors to the court.
- The movement of court officials whose presence is necessary for the trial should be limited to that which is necessary and a duty placed on court officials to limit their movement in and out of court when such a hearing is taking place. These recommendations should be enforced administratively by the Department of Justice: Courts Division.

The Commission opined that the law regarding the prohibition of publication of certain information relating to criminal proceedings, as it currently stands, was found to be adequate. However, the Commission identified problems with the enforcement of the law and subsequently recommended that:

- The sexual offence unit of the office of the National Director of Public Prosecutions should focus on prosecuting recalcitrant publishers of such details.
- A court which finds any person guilty of publishing information in contravention of the provisions of sections 154 or 335A of the Criminal Procedure Act, may make a compensatory financial order after a finding of guilt in terms of section 154(5) of the Criminal Procedure Act and that such an order should be in favour of the complainant or the accused (provided that the latter has not been identified or charged).

The Commission noted that section 158(3) provides that a court may order that a witness may give evidence by way of closed-circuit television only if facilities therefore are readily available or obtainable. Subsequently the Commission recommended that if a court is of the opinion that a witness should give evidence by way of closed-circuit television and there are no closed-circuit television facilities available at that court, that court should be able to transfer the criminal proceedings in question to another court with the required facilities. Such a transfer should be done in consultation with the court to which the case is to be transferred. In making an order for a transfer to a court with closed-circuit television facilities, the court should take into account the need to protect the person who is to give evidence by means of closed-circuit television or similar electronic media from traumatisation; the wishes of the person who is to give evidence by means of closed-circuit television or similar electronic media; the wishes of other persons who are to give evidence in the proceedings; the costs of having the proceedings transferred; inconvenience to the complainant in the proceedings; and unreasonable delay that would be brought about by such transfer.

In relation to videotaping of evidence the Commission recommended that resources should be allocated to improving basic skills such as effectiveness of specialist interview procedures, general interviewing skills and innovative questioning techniques rather than to video technology when basic skills still need to be developed or improved on. Furthermore, the Commission opined that the subject of videotaping of evidence should be an investigation on its own with extensive consultation on the development of a memorandum to guide interviewers.

Generally the Commission recommended that the Department of Justice and Constitutional Development should take urgent steps to ensure that the protective measures already provided for in the Criminal Procedure Act are properly and professionally implemented.

In relation to the appointment of intermediaries and related matters the Commission specifically recommended that:

- The current fee structure for intermediaries be revised.
- The intermediary profession be formalised rather than tinker with the current regulations and that this recommendation receive the attention of the secondary legislation section in the Department of Justice and Constitutional Development.
- An assessment of persons who are competent to assist the child witness to give evidence in court should be done.
- The competence of a person to be appointed as an intermediary be assessed through a process prior to appointment to a specific case, but after the person has satisfied the requirement of falling within one of the categories determined by the Minister for Justice and Constitutional Development, by way of regulation, of who may be appointed as intermediaries in terms of section 170A(4)(a); alternatively, after going through an accreditation process. This option implies establishing cross sectoral selection, a process of selection and possibly registration as an intermediary. If this approach is followed it will not be necessary for the court to assess competence as prior selection and registration will guarantee competence. This option has the advantage of avoiding delays in court.
- The following criteria be used to establish competence of an intermediary who is to act as such in criminal proceedings involving a sexual offence:
 - (a) the training and qualifications of such person;
 - (b) the duration of such person's experience in working with children;
 - (c) the extent of such person's experience in working with children of the same age group and culture background as the witness;
 - (d) if such person is retired, the extent to which such person has retained the skills to work with children;
 - (e) factors that may disqualify such person from being appointed as an intermediary, including the fact that such person has been-
 - (i) convicted of a sexual offence involving children;
 - (ii) the subject of a domestic violence protection order;

(iii) the subject of disciplinary action taken during the course of such person's career.

- Where necessary an intermediary (not the same person to be used in the trial) be available to assist the prosecutor to establish rapport with the child witness prior to the trial and to improve both the prosecutor's and the child's understanding of what they are communicating to each other.
- The Commission recommends that the Departments of Justice and Constitutional Development and Social Development should be tasked to ensure the availability of intermediaries to all courts hearing sexual offence cases, as soon as is practicably possible. Such implementation must take into account adequate training for intermediaries if there is a lack of expertise or experience. In addition, the said Departments should develop a timetable for selection, training and appointment of intermediaries on a permanent basis.
- The Minister for Justice and Constitutional Development should report annually to Parliament on the level of implementation until such time as the intermediary system is fully in place.

The Commission found that the use of anatomically correct dolls is adequately provided for by section 161(2) of the Criminal Procedure Act and that the decision to use anatomically correct dolls should remain within the discretion of the prosecutor. The Commission however made practical recommendations relating to anatomical dolls. They read as follows:

- That an inter-sectoral project be established, to be housed in the Department of Justice and Constitutional Development, that is tasked with undertaking a consultation process with all role-players to assess:
 - their training needs in the use of anatomically correct dolls;
 - whether there is a need for standardised dolls to be used as there is potentially substantial variation in the types of anatomically correct dolls that are used;
 - whether there is a need for guidelines to be developed for effective use of anatomically correct dolls to be set forth in a written protocol;
 - which role players should be involved in the drafting of such a protocol; and
 - if such a protocol is necessary, whether it should be reviewed to ensure that training is kept current.

A very real problem for persons accompanying witnesses to court is the lack of funds to pay for transport expenses. For this reason the Commission recommended that the State should bear transport costs, in the form of a transport allowance, for one support person per witness who is giving evidence in court in sexual offence cases.

The Commission recommended, as a ground rule, that all relevant evidence be admitted in sexual offence cases. Further that the presiding officer should consider all such evidence and must use his or her judicial discretion as to the proper weighting to be given to such evidence.

- The Commission found that the benefit of admitting similar fact evidence in sexual offence trials and thereafter allowing the court to determine the relevance thereof, outweighs any detriment alleged to be experienced by the accused. It therefore recommended that the prosecution should be allowed to raise an accused's previous convictions and acquittals at trial, provided that the probative value of such evidence outweighs the prejudicial effect thereof.

In relation to cross-examination the Commission recommended that:

- A witness, the accused or the State may object to questions which are scandalous, insulting or intended to annoy, or to the manner in which the cross-examination is being conducted.
- Repetitive, pointless questioning should not be allowed. Further, that the witness, or the State, may object thereto.
- The proposed Sentencing Council, contained in the Report on Sentencing, should facilitate and establish a programme of judicial education on sentencing and recommends that judicial officers receive appropriate training and information on the potential impact of sexual crimes on victims generally.

The Commission recommends that:

- Judicial officers should assess, and take into account, the offender's knowledge, use and manipulation of the particular victim's vulnerability for the purpose of sentencing.
- Uncontested victim impact statements be admissible evidence on production thereof. If the contents of a victim impact statement are disputed, the author and / or the victim must unfortunately be called as a witness.
- A court allow a victim to make recommendations regarding an appropriate sentence

to the presiding officer, provided that it is well understood that the presiding officer is under no obligation to follow this recommendation.

- In terms of responsibility for the preparation of the victim impact statement, it is proposed that the prosecution should have the ultimate duty to ensure that such evidence or statement is available for submission in court.

In Discussion Paper 102 the Commission stated that it was imperative, for the protection of victims and the community in general, that courts should consider the treatment and rehabilitation of all sexual offenders as part of the sentencing process. With regard to sentencing and related matters the Commission specifically recommended that:

- As part of the original sentence of the court, all sexual offenders should be required to undergo treatment in an accredited treatment programme, preferably in a community setting, when released on parole or under correctional supervision.
- More extensive use be made of section 274(1) of the Criminal Procedure Act, 51 of 1977 and expert opinion should be canvassed by the court when determining the appropriate treatment programme.
- The offender should, as far as possible, be liable for the costs of the treatment. If the offender does not have the means, then the State should bear the responsibility for the cost of treatment as a way of ensuring long term community protection.
- Provision be made for the monitoring of the sentencing magistrate's treatment order. At present the sentencing magistrate may order rehabilitation as part of a prison sentence, but this may not be followed through by the prison staff, due sometimes to the lack of resources in the prison to which the offender is admitted, or the lack of insight of the prison staff as to the need for rehabilitation of the sexual offender.
- Treatment and rehabilitation programmes be made available to all offenders.
- As rehabilitation of sexual offenders is a long term strategy, that the period of correctional service be extended from three years to five years.

9.2.6 Department of Correctional Services

Where a victim initially elects not to have his or her particulars recorded for purposes of being notified of the parole hearing, the Commission recommended that a mechanism be put in place whereby the victim may have his or her details recorded at a later time. The Commission further recommended that the Correctional Services National Guidelines be amended to provide that a sexual offender should not be allowed access to a copy of this report or the disclosure of the victims' particulars. Access to the particulars of the victim

could make the victim particularly vulnerable towards the offender, especially where the offender did not know the victim's identity at the time he or she committed the offence.

The following specific recommendations were also made:

- Warrants of committal to prison do not contain details of the specific offence committed by the offender. These details are crucial to assess the suitability of offenders for rehabilitation programmes and for purposes of parole. It is recommended that SAPS amends the SAP 69 form to include details of the offence which may be required to make an informed decision regarding the rehabilitation programme made available to the offender. It is important that this and any other relevant information be conveyed from the Departments of Justice and Safety and Security to the Department of Correctional Services in a confidential manner. Access by the offender to this information will be subject to the provisions contained in the Access to Information Act, No 2 of 2000.
- That the Guidelines be amended to place an obligation on the Department of Correctional Services to inform victims of sexual offences of the programmes which the offender has attended or is involved in.

In Discussion Paper 102 the Commission made specific recommendations relating to the involvement of victims in the process of sentencing the offender. The Commission recommended that:

- Evidence from victims be used to assist both the Correctional Supervision and Parole Board in determining the conditions of parole, rather than determining parole itself.
- Evidence from victims on parole may be given via closed-circuit television and / or with the assistance of an intermediary.
- Evidence from significant others working or interacting with the victim and his or her family must be available to the Correctional Supervision and Parole Board where it is available and appropriate.
- Parole conditions should take into account the safety and well-being of the victim and family.
- The victim, or the next of kin of a deceased victim, should be kept informed by the Department of Correctional Services of decisions made in relation to both parole itself as well as the conditions of parole.
- The victim, or the next of kin of a deceased victim, should be given information about

where, and the process of how to inform a parole officer should the offender violate parole conditions. Local police stations should be informed by Correctional Services of all released parolees in their area. The local police station should serve as the reporting body where reporting is a condition of parole and the place of reporting if a released offender violates his or her parole conditions. The latter service should be available 24 hours a day.

- The Department of Correctional Services should, as a matter of priority, introduce and administer treatment and rehabilitation programmes for offenders and sexual offenders in particular. Staff providing assessment and treatment services in the Correctional Services environment should be adequately trained and supported in this specialised field of work.

9.2.7 Social Welfare Agencies, NGO involvement, support, counselling, and advocacy services

The Commission stated in Discussion Paper 102 that NGOs play an important role in the management of sexual offence cases. The Commission recommended that all persons who work in the field of servicing victims of sexual offences and NGOs who wish to assist sexual offence victims or offenders should undergo an accredited training course. It also recommended that standards or codes of good practice be developed in order to ensure quality service.

9.2.8 Joint intervention

In Discussion Paper 102 the Commission asserted that victims of sexual violence need many diverse services: emergency shelter, medical care, protection, financial assistance and counselling services, to name but a few. The Commission stated that one agency alone cannot offer all these services and that it was imperative that services are well co-ordinated and that the various professionals understand how other agencies view the problem and deal with it.

The Commission held that a lack of collaboration between agencies resulted in services for victims of sexual abuse being prone to fragmentation, discontinuity and inaccessibility. It further recommended that ample precedent existed in South Africa for the creation of joint or inter-agency teams for the investigation and prosecution of high priority crimes. The Commission recommended that the model upon which these teams should be established

should approximate that used for the establishment of the Investigating Directorates in terms of the National Prosecuting Authority Act, 32 of 1998.

The Commission accordingly recommended that:

- A National Investigating Directorate be established for 'serious sexual offences', structured in the same way as the other Investigating Directorates. An amendment to the National Prosecuting Authority Act 32 of 1998 would be necessary to facilitate the formation of such an additional Investigating Directorate.
- The criminal investigation of all serious sexual offences should be performed by a team comprised of specialised police officers and prosecutors, supervised by a prosecutor. This team should be able to call upon the services of health care practitioners, social workers, and other professionals or service providers where necessary.
- The categorisation of 'serious sexual offences' should be made with reference to Schedule 6 of the Criminal Procedure Act, 51 of 1977.
- Only specially trained medical personnel, police officers, prosecutors, magistrates and counsellors should deal with serious sexual offences.
- Personnel should be carefully selected - only those who show a particular interest in and aptitude for this type of work should be allowed to do it.
- Preferably all serious sexual offence cases must be prosecuted in special Sexual Offences courts. Where special courts are not available, sexual offence cases must still be dealt with in the appropriate fashion.
- All child victims in sexual offence cases in need of care and protection should be able to rely on a responsive welfare system. The issue of children in need of care is, however, addressed in the investigation into the Review of the Child Care Act.

9.3 Evaluation of comment

9.3.1 A strategy for the multi-disciplinary intervention of sexual offences (protocols and memoranda or codes of good practice)

Respondents⁸ were generally in favour of the Commission's recommendation that a national strategy for multi-disciplinary intervention relating to sexual offences should be agreed upon by incumbent government departments and non-governmental organisations working in the field of sexual offences, in partnership with civil society. Ms Kemp⁹ opined that the National Programme of Action for Children could be utilized as vehicle to monitor the implementation of the process.

In a joint submission the Children's Rights Project, Community Law Centre, University of the Western Cape; the Department of Forensics and Toxicology, University of Cape Town; the Gender, Law & Development Project, Institute of Criminology, University of Cape Town; the Gender Project, Community Law Centre, University of the Western Cape; and the Women's Legal Centre proposed that positive duties should be placed on government officials dealing with sexual offences to act in a prescribed manner. They proposed that these positive duties should be encapsulated in a Code of Good Practice or regulations so as to allow for flexibility in the management process and regular review and amendment where necessary. They opined that this would form part of the national strategy for multi-disciplinary intervention relating to sexual offences to be agreed upon by government departments and NGOs.

9.3.1 Disclosure of the offence by the victim

Mollie Kemp¹⁰ explains that the Life Skills & HIV/AIDS education programme within the Department of Education is part of the Life Orientation Learning Area of Curriculum 2005. She notes her support of the Commission's recommendations pertaining to disclosure and in so doing emphasizes the importance of and recommends the appointment of Guidance

⁸ Lulama Nongogo & Teboho Maitse, Commission on Gender Equality; Joint submission by: Children's Rights Project, Community Law Centre, University of the Western Cape; Department of Forensics and Toxicology, University of Cape Town; Gender, Law & Development Project, Institute of Criminology, University of Cape Town; Gender Project, Community Law Centre, University of the Western Cape; Women's Legal Centre, and Mollie Kemp, School Social Worker, Department of Education and Culture, KwaZulu Natal.

⁹ Mollie Kemp, School Social Worker, Department of Education and Culture, KwaZulu-Natal.

¹⁰ School Social Worker, Department of Education and Culture, KwaZulu Natal.

Teachers/ Life Orientation Educators at all schools in order to ensure on-going life skills as part of the fixed syllabus at schools, as well as to ensure on-going support for the child victim at school.

9.3.2 Department of Safety and Security

Captain Evans of the SAPS Serious and Violent Crimes supports the Commission's recommendation regarding mandatory debriefing for members whose sole responsibility it is to investigate sexual offences. She further suggests that members attached to such units should not be allowed to remain at these units for a period exceeding three years, unless regular debriefing sessions are attended by such member(s). She also draws the Commission's attention to the fact that 'on the job' training of new recruits to the FCS units by experienced police officers may be problematic due to large scale restructuring within the police service.

Ms Helen Alexander, the Legal Advocacy Co-ordinator of SWEAT, endorses the provision contained in the National Instructions which states that complaints regarding a sexual offence can be made at any police station. She identifies the filtering of complaints as a point of non-accountability that requires urgent attention and states that the proposed institutional monitoring complemented with community based monitoring is inadequate.

SWEAT further fully supports the recommendation that the police should review procedures for recording and following up 'unfounded' cases and cases where the victim wishes to withdraw the matter. SWEAT suggests that once these procedures have been settled, they should be incorporated into the National Instruction on Sexual Offences. It also recommends that:

- The Sexual Offence Act should place a positive obligation on the police to accept and register all complaints of sexual offences, including complaints made by prostitutes.
- All complainants be taken seriously and be treated with respect and dignity.
- An accessible procedure be developed for reporting instances where police fail to accept and register the complaint.
- Only the Director of Public Prosecutions may make the decision whether or not to follow-up with an investigation of a complaint.

- The phrase “never presume an allegation is false until it has been thoroughly investigated” be inserted into the National Instruction.
- The requirement that “police investigators should not infer from the reaction of the complainant that he or she is unaffected by the sexual assault or is lying” be amended to require that police should not infer from the complainant’s dress or reputation that he or she is lying.

Ms Artz, a criminologist at the Institute of Criminology at the Faculty of Law of the University of Cape Town, refers the Commission to the CIETafrica’s study. She opines that the reported “station to station variability” should serve as evidence that despite national instructions, standing orders and directives, the Commission should provide clear provisions in the Act to reduce variability and discretion. She further opines that the imposition of enforceable positive duties not only limits the discretionary power of police to unfound cases, but it provides a comprehensive and consistent set of legislative guidelines for the management and investigation of rape cases. She states that imposing specific duties on police will not only reduce discretion, but improve the evidentiary standards of investigations and instill ‘quality control’ of the information imparted to the prosecutor. She opines that resource and attitudinal issues remaining an acute problem.

Ms Artz continues in her submission to state that the recommendation by the Commission that the National Instruction No. 22/1998 be revisited and amended where necessary is not sufficient to ensure the integrity of police interventions in rape cases. She endorses the recommendation made in Discussion Paper 102 that a national strategy which includes legislation that supports and enforces all aspects of a national framework on sexual offences, *and which is accompanied by specific accountability and measuring mechanisms for enforcement*, is vital to the effective management of sexual offence cases. Ms Artz opines that internal protocols and regulations can act to effect structural and systemic changes, where they are well conceived, by inculcating a specific approach to the work in question. She states that if implemented over a sustained period such protocols have the promise of bringing about a change in work ethic. However, certain duties are so critical to the immediate management of and investigation of sexual offences cases and the crisis that we face in addressing this issue is so acute, that these duties demand the full weight of legislative backing and enforcement. She states that National Instructions, Standing Orders and other regulations should act to clarify and expressly implement duties imposed by legislation.

She strongly recommends that one of the central objectives of the proposed Bill should be to develop clear and distinct procedures to shift the current methods of pre-trial processing of reported rape complaints.

Ms Artz concludes by recommending that the following guidelines from the instructions be included as provisions within the Sexual Offences Bill:

1. Where a complainant reports a case of rape, the first reporting member of the SAPS must, *except where compelling reasons exist*:
 - a) Inform the complainant that she has the right to report the rape and/or request an investigation into the rape;
 - b) Inform the complainant, if she wishes to lay a charge of rape, that she has the right to make a statement;
 - c) Establish if the complainant is in need of immediate medical assistance and arrange for the complainant to obtain medical assistance;
 - d) Open a skeleton docket and take a basic statement from the complainant before she obtains a medical examination;
 - e) Contact an investigating officer and remain with the complainant until the investigating officer arrives;
 - f) Ensure that the complainant obtains a medical examination.

2. The SAPS must inform the complainant of his or her right to:
 - a) Make a supplementary statement at a later stage;
 - b) To make a full statement after his/her medical examination;
 - c) Have his or her statement taken in private;
 - d) Have a female member of the SAPS take the statement, where reasonably possible to do so;
 - e) Have his or her statement taken in the company of a support person;
 - f) Have the statement taken in the language of the complainant's choice and, where the statement is translated, to ensure that the complainant is satisfied with the contents of the statement;
 - g) Lay a criminal charge and to have the matter investigated or to have the incident recorded without an investigation;
 - h) The complainant must sign an affidavit to waive her right to have an investigation of the sexual assault undertaken.

3. In the investigation of rape cases, the investigating officer must, *except where compelling reasons exist*:
 - a) Register the case docket prior to the complainants medical examination;
 - b) Escort the complainant to the health care practitioner for examination;
 - c) Obtain a brief description of the incident and explain the procedures which will follow the complainant's statement;
 - d) Explain the role of the investigating officer;
 - e) Explain the purpose of the medical examination;
 - f) Ensure that the SAP 308 is filled out completely and correctly;

- g)** Ensure that an in-depth statement is taken from the complainant, once the complainant is sufficiently ready to do so;
- h)** Make suitable arrangements to ensure the immediate safety of the complainant;
- i)** Investigate the matter fully;
- j)** Obtain relevant information from the complainant in order to oppose a bail application and/or the imposing of conditions on the accused;
- k)** Inform the complainant:
 - i)** When the accused is arrested;
 - ii)** If the suspect has been released on bail;
 - iii)** The conditions of bail imposed on the accused;
 - iv)** The procedures to follow if the accused has breached the conditions of bail;
 - v)** Whether the complainant is required to attend an identification parade;
 - vi)** On the progress of the investigation of the case;
 - vii)** The date, time and location of the trial;
 - viii)** That she may request assistance to get to court on the day of the trial;
 - ix)** When the complainant will be required to give evidence in court about the sexual assault.

4. *Compelling reasons* to unfound a case of sexual assault may not include:

- a)** Assumption of risk (and reasonability of perceived risk) of further harm
- b)** Assumption of provocation or consent
- c)** Characteristics of the victim (race, gender, socio-economic position, known user of substance abuses, community status, 'credibility')
- d)** Perceived cooperativeness
- e)** Reporting factors (length of time after assault; reasons for reporting)
- f)** Caseloads (extent of investigation)
- g)** Criminogenic or crime related factors which influence the disposition of a case (use of drugs or gang involvement)
- h)** Corroborating evidence (extent and constitution of, even if not a legal requirement)
- i)** Likelihood of finding or arresting the offender
- j)** Level of resistance offered by victim/use of force by perpetrator
- k)** Absence or extent of injury to the victim (including what constitutes 'injury')
- l)** Voluntary vs. involuntary interaction with the accused ("willingness")
- m)** Results of forensic/medico-legal examination
- n)** Plausibility of the rape or suspected 'false reporting'
- o)** Aggravated vs. non-aggravated ('simple rape') circumstances
- p)** Perceived danger of the accused to the community or to the victim
- q)** [Nature of] prior relationship with the accused ('claim of right' argument)¹¹
- r)** Perceived intentions for laying a charge of rape
- s)** Consistency of statement(s)
- t)** Possibility of 'alternative resolutions' (i.e. victim-offender mediation)
- u)** Relationship of accused to SAPS member

¹¹

See S Estrich 'Real Rape' at 24

In relation to jurisdiction she recommends that the following clause be included in the Bill:

Where the complaint falls outside the jurisdiction of the station at which the crime was reported, the investigating officer shall nevertheless be obliged to open a docket, take a preliminary statement and refer the complainant for a medical examination before forwarding the matter to the station having jurisdiction.

Ms Artz further recommends that the proposed Bill should also include the following provisions, as embodied in the Domestic Violence Act, 1998 (Act No. 116 of 1998):

Failure by a member of the South African Police Service to comply with an obligation imposed in terms of this Act or the National Instructions, constitutes misconduct as contemplated in the South African Police Service Act, 1995, and the Independent Complaints Directorate, established in terms of that Act, must forthwith be informed of any such failure reported to the South African Police Service.

Unless the ICD directs otherwise in any specific case, the South African Police Service must institute disciplinary proceedings against any member who allegedly failed to comply with an obligation referred to in paragraph ...

She states that National Instructions, Standing Orders and other regulations should act to clarify and expressly implement duties imposed by legislation.

Ms Artz supports the Commission's recommendation that the police should review procedures for recording and following up unfounded cases and cases in which the complainant requests to withdraw the matter. She recommends that the state develop criteria for the withdrawal of cases by complainants, or at least provide guidelines to establish why cases are withdrawn (e.g. threats, duress, socio-economic implications). She opines that the criteria should balance the rights of the complainant with the duty of the state to protect the complainant and the community at large. These criteria should be made a matter of public record.

Ms Artz further supports the recommendation that the discretion of the police as to whether or not to proceed with an investigation should be removed, even when requested not to proceed by the complainant and that this decision should be that of the prosecuting authority. She also supports the recommendation regarding the decision not to initiate investigations as well as the recommendation regarding informing the victim of her right to ask the DPP to review decision not to proceed with investigation. However, Ms Artz opines that these provisions need to be embodied within the proposed Bill as well as in the SAPS National Instruction on Sexual Offences.

Ms Artz contends that the Commission's recommendation that a statement of duties of individual police officers in relation to the provision of information to victims should be formulated and incorporated into a police code of good practice is inadequate. She states that at best a Code of Good Practice can provide general guidelines for appropriate conduct, giving rise to a presumption that it should be followed, but that it cannot impose specific duties.¹² She recommends that, in order to ensure consistency, specific role-players must be delegated responsibility for ensuring that, at each stage of the process, the victim is adequately informed of certain specified information. Implementation of this section can properly be regulated through secondary means such as regulations and National Instructions, providing, for example, for publication and dissemination of pamphlets containing requisite information.

9.3.3 Department of Health

Dr L.J. Martin, Forensic Pathologist, Department of Forensic Medicine and Toxicology, University of Cape Town and Ms Lillian Artz, Criminologist, Institute of Criminology, Faculty of Law, University of Cape Town made joint recommendations¹³ regarding the role of the medico-legal fraternity in sexual offence matters and made pertinent remarks regarding the non legislative recommendations.

Dr Martin confirms that the District Surgeon system in South African has been abolished in all provinces except the Western Cape. She states that with the phasing out of District Surgeons no transfer of services was implemented to ensure that the expertise needed to perform sophisticated clinical forensic examinations (rape, child abuse, drunken driving) remained in the health service.

Dr Martin and Ms Artz opine that the management of rape cases by medical practitioners ought to be embodied within the proposed Bill. They endorse guiding principle 2(p) of the Bill that states that "all professionals and role players involved in the management of sexual offences must be properly and continuously trained after going through a proper selection and screening process". They see the training and accreditation of health practitioners as

¹² See Du Toit et al's (p378) discussion of the Code of Good Practice: Dismissals. This Code has, perhaps even greater significance than that recommended by the Commission in that it is appended and referred to in the text of the LRA (s188(2)).

¹³ Mollie Kemp, School Social Worker, Department of Education and Culture, KwaZulu-Natal gave her general support to the non legislative recommendations contained in Discussion Paper 102.

an incremental process and opine that the mid-to-long term goal of the Department of Health and associated training institutions in South Africa should be the establishment of a national system of accreditation for health care practitioners in the management of sexual offences. They refer to these practitioners as sexual assault care practitioners and propose that the system should work towards:

- (a) formulating a curriculum on the management of sexual assault victims;
- (b) developing a training programme, in consultation with the provinces, for accredited health care practitioners;
- (c) ensuring that the programme meets pre-determined criteria for accreditation;
- (d) ensuring that provincial departments implement the programme;
- (e) ensuring that the training is ongoing and continuous;
- (f) and approved by the Health Professions Council of South Africa.

Dr Martin and Ms Artz further recommend that the accreditation body should consist of individuals who have been identified as experts in the management of sexual offences and that the accreditation body must be affiliated with a recognised academic institution(s). They submit that health care practitioners who have been trained and accredited through this process be given the designation "Sexual Assault Care Practitioners".

They recommend that the National Department of Health should be responsible for developing guidelines for training health care practitioners and overseeing the implementation of such guidelines. The National Department of Health should also ensure that provinces report back to parliament, within a year of promulgation of the Act, on activities relating to the development and implementation of such a system.

Until sexual assault care practitioners are accredited, it is recommended that health care practitioners are bound by an examination and treatment protocol which Dr Martin and Ms Artz refer to as "Positive Duties on Health Care Practitioners".

Dr Martin and Ms Artz opine that legal reform of medico-legal practices in rape cases should be based on the following arguments and principles presented by the Commission:

1. Medical practitioners need to be sensitised to prevent secondary victimisation of rape complainants.

2. Forensic medical evidence is crucial for the successful prosecution of sexual offence cases.
3. Medical evidence is only of value if the examination is properly conducted and all the specimens for forensic analysis are collected. Such evidence is frequently badly taken or incomplete.
4. There are often lengthy delays before a victim is examined by a medical practitioner.
5. ... all appropriately trained medical personnel ... [must] conduct a proper medical examination of and treat or refer the victim of sexual violence for specialised treatment or counselling, where appropriate.
6. ... medical personnel [should] link up with the investigating team to share information on the crime scene, the evidence collected or to be collected from both the victim and or the alleged offender, the injuries sustained during the attack and to advise the investigating team on what other possible evidence could be collected. Proper interaction between the investigating officer and the medical practitioner is crucial.
7. Victims are often not told what the examination will entail and the reasons for conducting certain tests. The victim should be given information regarding the reason for the examination and what it entails, information on possible pregnancy ... medication given and possible side effects ... HIV ... regardless of what kind of medical officer conducts the examination.
8. Uniform services should be provided ... and ... coupled with appropriate sanctions for non-compliance.
9. Without appropriate training, the use of registered nurses to perform clinical forensic duties may not be ethical. The same argument applies to general practitioners and other medically qualified persons who have not undergone forensic training.

10. All health care practitioners should receive the necessary training and ongoing support in order for them to be able to examine victims of sexual assault, provide the necessary medical treatment and give expert evidence in court.

Dr Martin and Ms Artz request the Commission to take its acknowledgment in the Discussion Paper that the skills of medical practitioners who examine victims of sexual assault and collect the necessary forensic evidence varies considerably, seriously.

They continue this part of their submission by recommending that provisions which place positive duties on health care practitioners be embodied in the Bill. These duties include the manner in which the forensic examination is to be conducted. Dr Martin and Ms Artz further recommend that these duties should be accompanied by a set of regulations developed in terms of the Sexual Offences Bill by the Department of Health.

Dr Martin and Ms Artz recommend that minimum standards of care should also be developed and that such standards should include the following principles:

- The physical, emotional and psychological **safety, health and well being** of a survivor of sexual assault is given precedence over all other matters. This means that the treatment of injuries or life threatening injuries takes precedence over the collection of forensic evidence and informing the survivor of legal remedies. However, it is acknowledge that the collection of biological specimens is of critical importance in cases of this nature and all attempts must be made to secure such evidence.
- Standardised evidence collection and injury documentation procedures must be developed nationally and used in all sexual assault cases.
- Survivors of sexual assault must receive the same quality of assistance and treatment regardless of where the assault occurs.

More specifically, the Standards require that the sexual assault health care practitioner:

- Has the ability to recognize, document and appropriately interpret injuries or the lack thereof;
- Has the ability to collect and package the appropriate forensic specimens as per the new **Sexual Assault Examination Collection Kit (SAECK)**.

They also recommend a process whereby the continuing medical education of health care practitioners is monitored and evaluated.

* **J88**

Dr Martin and Ms Artz opine that the J88 although appropriate for the purposes of prosecution (evidentiary issues), is totally inadequate for the medical management of a sexual offences victim. They opine that medical management of sexual offence victims cannot be only guided by this form and recommend that a national protocol be developed, with guidelines, preferably part of a provincial policy. They suggest an amendment of the J88 to reflect relevant health related issues.

* **The Uniform National Health Guidelines**

Dr Martin and Ms Artz state that they recognise that the Guidelines are an important first step in ensuring the physical and mental integrity of rape complainants, but are well aware that basic infrastructure and policy directives have not been attached to the aforementioned guidelines. Further that 'guidelines' and 'policies' are often unenforceable and there is limited recourse where the guidelines are not adhered to. They restate their submission that the Commission should impose positive legal duties on the health care sector in the provision of health related services to survivors of sexual assault.

Reporting mechanisms

Dr Martin and Ms Artz comment that the Commission recognises that the Guidelines are silent on reporting mechanisms available to victims where an examining practitioner has conducted the examination in an inappropriate manner, but does not provide recommendations relating to the establishment of complainant's mechanisms. They therefore submit that the proposed Bill consider a section to deal with complainant's

mechanisms that are accessible to victims where state officials and other practitioners do not comply with designated duties, or act inappropriately towards victims.

In the case of a medical practitioner who fails to comply or acts inappropriately towards a complainant they recommend that:

1. The superintendent or doctor in charge of the medical facility ensure that adequate complaints mechanisms exist, where a medical practitioner does not comply with the duties imposed in the management of sexual assault cases or treats the complainant in an inappropriate manner.
2. Where complaints are lodged against the medical practitioner by someone other than the complainant, the superintendent or doctor in charge of the facility must ensure that the complaint is registered and that the matter is investigated and dealt with in the established internal disciplinary structure.
3. The complainant must be informed of the results of the investigation and disciplinary hearing.

The Western Cape Model

Dr Martin and Ms Artz state that the Department of Health Western Cape has coordinated an inter-sectoral, multi-disciplinary rape reference group that has subsequently formulated policy, standardised guidelines and a sexual assault examination protocol on the management of survivors of rape. To facilitate implementation of the above mentioned protocol, a training sub-committee was established and a training manual was subsequently developed. They recommend that the implementation of the National Guidelines be modeled on the Western Cape initiative.

One-Stop Medico-Legal Centres

Dr Martin and Ms Artz endorse the recommendation of the Commission for a One-Stop Medico-Legal Centre, but advise that the Commission refer to “designated health care facilities” for the management of sexual assault cases.

Casualty wards

Dr Martin and Ms Artz recommend that if the complainant is ambulatory, she/he must be referred to a designated health care facility. They explain that by “referral” they mean “arranging transport” for the complainant. If the complainant cannot be transferred (for example, because of potential life-threatening injuries), a health care practitioner must attend the patient in the casualty ward.

Medical practitioners in private practice

Dr Martin and Ms Artz recommend that if a private medical practitioner has not been trained to undertake a forensic examination on sexual assault survivors, the practitioner refers the complainant to a designated health care facility (public or private) or to a health care practitioner qualified to do so.

Training of medical personnel

Dr Martin and Ms Artz refer the Commission to the **Western Cape Protocol** and programme for an example of a comprehensive training programme. They state that they concur with the Commission’s general comments made about specialized training at post-graduate level, but submit that the Commission should recommend that some introduction to gender issues and gender-based violence is addressed at the under-graduate level. They further recommend that only selected health care professionals should be trained to deal with cases of sexual abuse.

They endorse the Commission’s recommendation that training should extend to the performance of medico-legal examinations, the correct use of the sexual assault evidence collection kit and the significance thereof, the completion of the required forms, such as the protocol and the J88, police procedure and the legal aspects surrounding the presentation of such evidence in court. They request that exposure to appropriate social context training relating to the nature of sexual violence also be included in this recommendation. They further recommend that police officials, legal practitioners and other role players who provide services to victims of sexual violence receive training on the medical aspects of sexual violence.

The medical examination

Dr Martin and Ms Artz voice concern about the option of having the investigating officer present during the physical examination, regardless of whether the officer is of the same sex as the victim, set out in the Discussion Paper. They suggest that the investigating officer only be present during the physical examination if the patient requests the presence of the officer and where the officer is of the same sex.

They further recommend that the age of consent for a medical examination in terms of this Act should be 14 years, as per the Child Care Act, which sets out the age of consent for medical treatment at 14.

With reference to section 9.1.21 of the Discussion Paper where it states that “due to the fact that an adult victim may wish not to report the offence, he or she cannot be subject to medical sampling where he or she has indicated that they prefer not to report the incident to the police”, Dr Martin and Ms Artz submit that:

“Victims should be given the option of undergoing the full forensic examination, including the collection of medical evidence, and having it kept at the health care facility for a period of up 90 days to enable the victim to decide whether or not he or she would like to report the incident. This implies that the SAECK needs to be available at health care facilities before being assigned a CAS number by the investigating officer.”

Dr Martin and Ms Artz recommend that non-compliance and disciplinary measures only be taken in instances where the medical practitioner has been duly and reasonably informed of his or her obligations prescribed in the Act and accompanying regulations and fails to perform in terms of the Act.

9.3.4 Department of Justice and Constitutional Development

*** Bail**

Mr Prometheus Mabuza of Save the Children, Sweden, opines that the current bail provisions are effective, but that their application is not satisfactory as prosecutors do not fully make use of the provisions. He recommends that the Department of Justice should use its disciplinary measures against prosecutors who do not use the bail provisions

appropriately. He agrees that victims should be notified of and be allowed to participate at bail hearings if the victim is able to lead evidence opposing bail. He consequently endorses the recommendation in the Discussion Paper that a victim should already be declared a vulnerable witness¹⁴ at this stage of the proceedings. He also endorses the recommendation that expert evidence relevant to recidivism be lead at bail.

A divergent view is held by Linda Dobbs, QC, United Kingdom. She voices concern over the recommendation that the victim be allowed to participate in bail proceedings. She opines that whilst perhaps a statement could be taken from that person about their fears about possible intimidation or contact with the alleged offender - the tenor of this section seems to prejudge the issue (i.e. use of the word perpetrator without qualification) which somewhat offends the principle of the presumption of innocence. She contends that to actually have the victim physically participate in the proceedings is to take their right to protection too far, as it is capable of giving legitimacy to the victim and taking it away from the alleged offender, giving the appearance of prejudging issues. She distinguishes between bail proceedings and the impact statements by stating that at sentencing the alleged perpetrator has been proved to be the actual perpetrator and different considerations then apply. Ms Dobbs indicates that she is not opposed to calling expert witnesses to give evidence about the risk that the defendant might pose if released on bail, but would have thought it was obvious what the risk was.

A group of respondents state emphatically that sexual offenders should not be given bail at all.¹⁵

Keeping victims informed

Ms Helene Combrinck, Project Manager, Gender Project, Community Law Centre of the University of the Western Cape endorses the Commission's observation that the substance of existing legal provisions regarding bail is at odds with the experience of complainants in sexual offence cases. She opines that this disparity extends beyond the issue of being informed of bail proceedings and that a victim of a sexual offence should be kept informed of

¹⁴ Also supported by Mollie Kemp, School Social Worker, Department of Education and Culture, KwaZulu - Natal.

¹⁵ CGE Workshop in Umtata, Group 1.

the status of the case throughout the proceedings. In this regard she refers to the Declaration of Basic Principles of Justice for Victims of Crime.

Ms Combrinck argues for the imposition of positive duties in terms of the Sexual Offences Act. In so doing she uses Section 12 of the Namibian Combating of Rape Act¹⁶ which affords rape complainants the right to attend bail hearings and to request the prosecutor to present relevant information to the court. She adds that this section also imposes a duty on the police to inform complainants of the place, date and time of first appearance of the accused. If the complainant is not present at the subsequent hearing, the prosecutor has a duty to inform the complainant of the outcome of the hearing and the conditions of bail, if any. She further notes that section 13 of the above Act imposes an obligation on the presiding officer, where the accused in a rape case is released on bail, to add conditions to ensure that the accused will not make contact with the complainant.

Ms Combrinck consequently recommends the formulation of specific provisions setting out the rights of complainants as well as the concomitant duties of state officials. She also recommends that these provisions should be accompanied by measures to ensure effective implementation. She supports the proposal regarding training and guidance of state officials.

Ms Combrinck recommends the inclusion of the following provisions in the draft Bill:

“Rights of complainants

The complainant in a sexual offence case has the right to:

- a) be reasonably protected from the accused;
- b) be notified of all court proceedings, including bail hearings;
- c) attend all public court proceedings relating to the offence, unless the court determines that the evidence of the complainant would be materially affected if he or she heard the evidence of other witnesses either during the bail hearing or the trial;
- d) make a statement regarding the potential danger posed by the accused for the purposes of determining the pre-trial release of the accused or the conditions of such release;
- e) request the prosecutor to present information relevant to pre-trial release of the accused, conviction or sentencing to the court; and
- f) be kept informed about the pre-trial release, conviction, sentencing, imprisonment and release of the accused.

¹⁶ . Act 8 of 2000.

Duties of prosecutors

During the course of the prosecution, the prosecutor must –

- a) take steps, including the presentation at the bail hearing of evidence in the form of affidavits or *viva voce* evidence, to ensure the reasonable protection of the complainant;
- b) where an accused is released on bail or warning, request the imposition of appropriate conditions to ensure the reasonable protection of the complainant;
- c) make efforts to consult with the complainants prior to the bail hearing;
- d) notify the complainant about the outcome of the bail hearing if he or she is not present at such hearing;
- e) where the accused is conditionally released on bail or warning, take steps to ensure that the complainant is informed of the procedure to follow if the accused were to contravene any of these conditions; and
- f) inform the complainant, preferably in writing, of –
 - i) his or her role in the criminal justice process, including what the complainant can expect from the system and what is expected from the complainant; and
 - ii) the stages of the criminal justice process of significance to the complainant and the manner in which information about such stages can be obtained.

Contravention of bail conditions

Prosecutors must take immediate action against an accused who allegedly contravene the conditions of bail or who harass, threaten, injure or intimidate the complainant or other witnesses in sexual offence matters.”

*** Pre-trial processes**

The expert consultative meeting held in Gordon’s Bay opined that prosecutors should be compelled to involve social workers, caretakers or guardians in plea bargaining procedures. Judge Van Heerden states that a plea bargaining sentence does not necessarily equate to a custodial sentence as it may be an admission to a rehabilitative program.

The expert consultative meeting held in Gordon’s Bay recommended that the out of court settlements recommended in the Sentencing Framework Bill should be expanded to provide for longer diversion contracts for ‘minor’ sexual offences such as flashing. Further that diversion contracts should deal clearly with changes of address to ensure that the offender does not escape the conditions of the diversion contract.

Lulama Nongogo and Teboho Maitse of the Commission on Gender Equality recommend that in relation to sexual offence matters, safety measures should be put in place to ensure

that plea bargaining is properly implemented and is utilized in the correct cases. Hayley Galgut of the Gender Law Unit of Sonnenberg, Hoffman & Galombik Attorneys agrees that while the option of “plea bargaining” is viewed by the public as being “soft on criminals”, a procedure that provides for plea and sentence agreements will have important advantages for the criminal justice system. She also agrees with the Commission that a system which formalises plea agreements and which makes the outcome of cases more predictable will make it easier for practitioners to permit their clients who are guilty to plead guilty. She opines that this will certainly assist the courts in securing convictions of perpetrators of sexual offences and will certainly keep the perpetrators within the criminal justice system. In this way lengthy trials which may possibly result in an acquittal (especially when the victim is a child and is the only witness) can be avoided. Ms Galgut confirms that due to the nature of and evidence in sexual offence trials, it is often difficult to secure such convictions. She states that such a procedure will also protect victims against publicity and against having to be subjected to cross-examination in court.

Ms Galgut agrees with the recommendation that provision should be made in the plea bargaining process to consult the complainant or, in the case of a child, the child complainant and his or her parent, guardian or person in loco parentis. She states that this is in line with the principles of restorative justice in that the victim is given a say in the process. However, Ms Galgut says that this recommendation fails to stipulate as to which stage in the process the victim should be consulted. She proposes that a victim should be consulted immediately after the prosecution is made aware that the accused wishes to negotiate a plea and sentence agreement (even though these situations might be rare in sexual offences matters). Such consultation must happen before the agreement is finalised. She also proposes that the process and reasons as to why a plea and sentence agreement is being considered, be explained to the victim. The victim’s views and objections on the agreement should be obtained and considered.

Ms Galgut further proposes that when a plea and sentence agreement is being considered in respect of a sexual offence matter, the purpose and guidelines of the Sexual Offences Act should be kept in mind and applied throughout the process.

Ms Jacqui Gallinetti¹⁷ agrees with Ms Galgut that the promotion of case management consultations and out of court settlements is necessary and appropriate in certain cases

¹⁷ Senior Researcher, Child Rights Project, Community Law Centre, University of the Western Cape.

especially in light of the prioritisation of restorative alternatives as stated in clause 2 of the Bill. However, she notes her concern that the discussion of case management consultations and out of court settlements does not differentiate between child and adult offenders. She submits that both the Sexual Offences Bill and the Child Justice Bill are complementary when dealing with these issues and it would be unreasonable for child sex offenders to be dealt with outside of the new proposed child justice system. The only exception is that whereas the Sexual Offences Project Committee recommends that only certain sexual offences can be subject to out of court settlements, diversion in terms of the Child Justice Bill is theoretically available for all crimes. She further submits that this is nevertheless in line with the guiding principles of the Sexual Offences Bill as section 2 (i) enshrines the “best interests of the child“-approach without differentiating between victim or offender and section 2 (n)(iv) affords special considerations to a child sexual offender – albeit for sentencing purposes - but it is submitted this should be extended to pre-trial procedures as well.

* **Intermediary**

At the expert consultative meeting held in Gordon’s Bay, Mr du Rand of the Department of Justice and Constitutional Development and Mr Theron of the Department of Welfare and Social Development confirm that low remuneration of intermediaries is part of the existing problem as identified by the Commission. They suggest that the matter be resolved inter-departmentally and that a possible solution would be for the Department of Justice and Constitutional Development to employ a person as an intermediary and that such person should be employed as such to serve a network of courts.

Ms Mollie Kemp, a school Social Worker in the Department of Education and Culture, KwaZulu-Natal opines that this is a specialised service and should be treated as such. She endorses the recommendation made in Discussion Paper 102 that retired educators, especially primary and special education educators whose communication skills with younger children are normally very good, should be allowed to be appointed as intermediaries. She also supports the proposed extended use of intermediaries.

The SAVF North- West Province recommend that all magistrate courts should be furnished with facilities for intermediaries and that it should not be tolerated that children give evidence in the presence of the offender.

* **Anatomical dolls**

Judge Van Heerden endorses the finding that the use of anatomical dolls should remain within the discretion of the prosecutor. Ms Kemp agrees, but opines that cultural differences should be taken into account and that dolls should be representative of different cultural and race groups.

* **Legal training**

Judge Bertelsmann opines that specialised training will be necessary for presiding officers, judges, prosecutors and police officers. He recommends that as part of the implementation of the Act, training manuals for the various persons responsible for implementation of the Act must be prepared.

Ms Kemp¹⁸ agrees that training is imperative. She opines that such training should also include an understanding of the child's educational needs, especially the effect of the offence on the child's functioning at school. She states that educators can play an important role in providing background information of the victim as well as monitoring the child's ability to cope after the incidence of abuse.

* **Case management**

The recommendation that a case flow management strategy should be developed and implemented¹⁹ was met with approval. Advocates Meintjes and Henning SC, Office of the Director of Public Prosecutions: Transvaal however are pertinently of the view that the Bill should provide for prioritisation of at least those matters where the child is most vulnerable. They propose that the following be included in the Bill with the aim that the courts attention be focused on the import of speedy finalisation of these matters:

Case Management in respect of offences committed against a child of 12 years and below

¹⁸ Mollie Kemp, School Social Worker, Department of Education and Culture, KwaZulu Natal.

¹⁹ Mollie Kemp, School Social Worker, Department of Education and Culture, KwaZulu Natal; Linda Dobbs, Queens Counsel, London and Adv R Meintjes and Adv Henning SC, Office of the Director of Public Prosecutions: Transvaal.

- (1) The prosecutor shall, at the first appearance of an accused who is charged with a sexual offence in terms of this Act, allegedly committed against a child of 12 years and below, inform the court of such allegation and the court shall enter this on the record of proceedings, where-after,
- (a) the case shall be dealt with as a matter of priority and finalized as speedily as possible;
 - (b) the court shall enquire into the reasons for any request for a remand of the proceedings at each and every appearance of the accused; and
 - (c) the court may issue any such order it deems fit in order to expedite the finalization of the proceedings, including an order granting a postponement subject to any condition as the court may determine. Such condition may also include
 - (i) that the investigating officer report on the completion of the investigation;
 - (ii) the determination of a date of referral of the accused to a court that has jurisdiction or that has been designated to try the matter;
 - (iii) the determination of a date the charge sheet is to be served on the accused;
 - (iv) the determination of a date the accused shall file any request for disclosure of the statements contained in the police docket and or further particulars to the charge;
 - (v) the date on which the disclosure shall occur and or the particulars are to be furnished, including the date any objection thereto is to be argued;
 - (vi) the determination of a date for commencement of the trial; and
 - (vii) that the trial shall proceed till finalization as from the date it is to commence and on such consecutive days as may be necessary.
- (2) In the event of non compliance with any order made and/or any condition imposed in terms of sub-section (1), the court shall,
- (a) when taking any such steps as may be prescribed or authorized by any other law, ensure that these are in the best interests of the child against whom the offence has been committed;
 - (b) record each and every instance of non compliance on the record of the proceedings; and
 - (c) order that the fact of such non compliance be brought to the attention of any relevant authority that has the power to take disciplinary steps against the relevant court officer or any other person concerned, including the relevant entity that regulates the conduct of advocates and attorneys.
- (3) The clerk of the court must forthwith cause any order made in terms of sub section (2) to be forwarded to the appropriate authority or entity.

The SAVF North-West Province emphasise the importance of dealing with child sexual abuse cases speedily and efficiently. The SAVF reports that months may follow before cases are finalised and therapy is consequently postponed, causing secondary victimisation to the child. It specifically recommends that a child under the age of twelve should give evidence within 72 hours and not later than three weeks after the offence has taken place.

Linda Dobbs, QC, London concurs with the Commission's recommendation that non compliance with the case-flow management strategy should be met with sanction. She states that in the United Kingdom a system already exists which allows the court to make a wasted costs order against Counsel.

* **In camera hearings**

Ms Hayley Galgut of the Gender Law Unit in Sonnenberg, Hoffman & Galombik Attorneys opines that while the present formulation of Section 153 of the Criminal Procedure Act is sufficient to protect complainants in sexual offence proceedings, its effectiveness has been severely curtailed by the failure on the part of the prosecution and presiding officers to invoke the protections provided for therein and to inform those eligible for protection of their rights in this regard. She opines that the Bill should impose a positive duty on presiding officers to ensure the limitation of movement of court officials and private persons whilst a vulnerable witness is testifying. Accordingly, she recommends that presiding officers be directed to issue an order declaring the court closed for the duration of the testimony delivered by a vulnerable witness, which order must be enforced by the court orderly or similar official.

Ms Galgut also recommends that a positive duty should be placed upon the National Directorate of Public Prosecutions regarding the development and implementation of a plan for the training and use of closed-circuit television in sexual offence matters. Furthermore, the Directorate should be given a specific time frame within which to develop and implement this plan.

Ms Galgut endorses the Commission's proposal that the National Directorate of Public Prosecutions should ensure the prosecution of publishers of information pertaining to in camera hearings. She opines that the identification of child victims, who may or may not testify, is very serious and has enormous consequences on the healing of a victim. She states that even where victims are babies and prosecutions may not proceed to identify the victim, publication will still probably hold serious consequences for the victim in years to come. Ms Galgut is of the opinion that revealing information that can lead to the identification of the child is therefore secondary victimisation. She proposes that a statutory duty be placed on the NDPP for this purpose to ensure that the current situation of a lack of prosecutions does not continue.

* **Victim impact statement**

Ms Linda Dobbs, QC opines that whilst impact statements are useful in the sentencing process she does not think it appropriate that victims should make recommendations regarding sentence. She states that the case is brought in the name of the state, it is not a private case, the prosecutor is an agent of state and a minister of justice, not the lawyer for the victim - it will no doubt be through them that such recommendations will be made. She says that it would be more distressing for a victim of a sexual offence that a judge ignored his or her recommendations than to not have made any recommendation at all. She concludes that if a sentence has been too lenient in serious cases, the Attorney General has a right of appeal and the sentence can be increased by the court of appeal.

Ms Hayley Galgut of the Gender Law Unit in Sonnenberg, Hoffman & Galombik Attorneys agrees with the Commission that victims be provided with the right to submit victim impact statements either orally or in written form. However, she states that the provision of victim impact statements should be voluntary and victims should not be forced to submit these statements should they not wish to. The absence of a victim impact statement in a particular case should not result in a negative inference being drawn or to the conclusion that the crime did not cause any harm, loss, emotional suffering, etc, to the victim.

She further recommends that when the victim is a child, the services of a child psychologist be made available (where possible) to assist in explaining and describing the impact of the harm and emotional trauma suffered by the child as a result of the offence. She reasons that most times neither parents nor family members of the child may be able to comprehensively explain the extent of harm suffered by the child.

* **A dedicated judiciary, coupled with an inquisitorial process**

Judge Eberhard Bertelsmann of the Pretoria High Court proposes that a dedicated judiciary coupled with an inquisitorial process would deliver the best results in sexual offence matters. He opines that presiding officers and judges who are to deal with these cases must receive training to enable them to apply the law properly. He states that this must start with training in communication with child witnesses, and in particular traumatized children, proper use of intermediaries, of video taped evidence, of closed-circuit television and the handling of what will in essence be an inquisitorial process. He opines that debriefing and rotation may also

be necessary to such presiding officers to recuperate from exposure to the horrors of these occurrences. Judge Bertelsmann is of the opinion that optimal results will only be achieved if we adopt an inquisitorial process similar to the French or German criminal procedure. He explains that this would make a presiding officer responsible for the investigation from the earliest opportunity. Such an investigating officer should be called in as soon as a charge is laid, at the latest after an arrest has been made. The presiding officer would then ensure that:

- i. proper statements be taken from the child witness immediately;
- ii. the child receive proper medical treatment;
- iii. a proper medical investigation be conducted;
- iv. proper care be taken of the child's emotional, psychological and physical needs;
- v. the alleged offender obtain legal representation, should he desire same;
- vi. everybody who needed to become involved in the investigative process, was consulted at the appropriate time;
- vii. sociological services and social and medical intervention would be available;
- viii. the necessary funding be provided by whoever became involved (or ordered to participate) in the proceedings;
- ix. preliminary enquiries into the entire investigative procedure be held and properly overseen;
- x. all tests which might be required, such as DNA tests, blood tests, psychological tests, etcetera be undertaken;
- xi. a full assessment of the victim be prepared immediately after the occurrence, or as soon thereafter as possible;
- xii. a place of safety be found for the victim where this is required;
- xiii. a docket be prepared containing all witness statements, statements by the suspect, the suspect's reaction to questions put to him, and all other evidential material.

He continues that once the investigation is complete, it will be have to be handed over to the prosecution services and be heard by another presiding officer.

Judge Bertelsmann states that he believes that this is the only way in which an effective prosecution can be ensured which is fair to the society, protects the victim and ensures a fair process for the accused, while at the same time, and by virtue of the coercive authority of

the judicial function, obtains the cooperation of all those parties who are essential to a proper prosecution of an offense of this nature.

He suggests that the draft bill be amended to include sections dealing with the appropriate procedure, similar to the provisions which are contained in the amended Child Care Act, Act 74 of 1983, and particularly sections 11, 12, 13, 14 and 15. Further sections would have to be added, however, to provide for the trial before a presiding officer other than the investigating magistrate or judge, and for proper procedures, conviction and sentencing in case of a conviction.

* **Joint intervention**

In a joint submission²⁰ it is recommended that the National Directorate of Public Prosecutions, in consultation with the Department of Justice, establish specialised investigative teams at each sexual offences court within a year of the promulgation of the Sexual Offences Act.

Ms Jacqui Gallinetti²¹ supports the Commission's recommendations relating to joint intervention. However, she submits that joint intervention should include co-operation between the criminal justice process and the welfare process in particular cases concerning child victims of sexual offences who are also in need of care. She opines that this should become mandatory and any orders made in relation to a child victim in either the sexual offences court or children's court should be noted in each of their respective records. This is of particular relevance where the alleged perpetrator is a family member and conditions are set for bail.

She consequently proposes that a provision be included in the Bill which provides as follows:

“Any orders made by a sexual offences court and/or a children's court in relation to a matter involving the same child victim, should be communicated to the other court(s) and reciprocally noted in the other court's records”.

²⁰ Children's Rights Project, Community Law Centre, University of the Western Cape; Department of Forensics and Toxicology, University of Cape Town; Gender, Law & Development Project, Institute of Criminology, University of Cape Town; Gender Project, Community Law Centre, University of the Western Cape and the Women's Legal Centre.

²¹ Senior Researcher, Child Rights Project, Community Law Centre, University of the Western Cape.

9.3.5 Department of Correctional Services

Lulama Nongogo and Teboho Maitse of the Commission on Gender Equality endorse the Commission's initial findings related to bail hostels and recommend that Correctional Services in conjunction with Safety and Security hold abusers in bail hostels. They opine that whilst in these hostels the perpetrators would be allowed to continue working, but would return to these hostels in the evenings. Furthermore, on weekends they would be under house arrest as this would ensure that they do not have any contact with those whose rights they have violated. They further recommend that after hearing their case, and if found guilty, they should remain at these hostels until they have served their sentence. They opine that during this process they can be rehabilitated in preparation for their reintegration into society.

9.3.6 Social Welfare Agencies, NGO involvement, support, counselling and advocacy services

The Commission on Gender Equality²² states that it welcomes the Commission's realisation of the important role that NGOs and other stakeholders are playing in sexual offences cases and also welcomes the support that the Commission is giving to the NGOs continued involvement in sexual offence cases. Ms Kemp²³ agrees that only accredited bodies should deliver services and recommends that a training course should be registered with SAQA and that the related Standard Generating Body should be involved.

9.4 Recommendation

As a result of the overwhelmingly positive response to the non-legislative recommendations contained in the Discussion Paper and the absence of any substantive criticism in this regard, the Commission confirms the non-legislative recommendations contained therein. The Commission acknowledges that additional recommendations were made and where appropriate has endorsed them. The additional recommendations are reflected in bold.

A list of the final non-legislative recommendations follows below, grouped for ease of reference and accessibility under the structure which will be accountable for the

²² Lulama Nongogo and Teboho Maitse.

²³ School Social Worker, Department of Education and Culture, KwaZulu-Natal.

implementation of the recommendation. The Commission recommends that each responsible department or structure gives due regard to these recommendations and takes the appropriate steps to implement them, where appropriate, within internal protocols, as a matter of priority.

DEPARTMENT OF SAFETY AND SECURITY**Investigation of alleged sexual offences and amendment of National Instructions**

- Police members should have no discretion in accepting a charge of sexual assault.
- No sworn statement should be taken immediately from the victim.
- All complaints must be taken seriously and all complainants should be treated with respect and dignity.
- No inference regarding the incident should be drawn from the complainants dress or reputation.
- The case should immediately be allocated to a specially trained investigating officer from a Family Violence, Child Protection and Sexual Offence (FCS) unit who has the responsibility of explaining the various procedures to the victim and who must ensure that the medical examination is completed.
- The investigating officer should be obliged to keep the victim informed of all developments regarding the case.
- The specialised investigation of sexual offence cases must be enhanced by the obligatory facilitation of contact, information sharing and collection of evidence for the purposes of trial between the investigating officer and the prosecuting authority prior to the advent of the trial.
- Police training and protocols should acknowledge the reality that disclosure for victims of sexual abuse is likely to be a process which will take place over a period of time and sometimes even years after the event.
- The police should review procedures for recording and following up 'unfounded' cases and cases where the victim wishes to withdraw the matter.
- The SAPS National Instruction on Sexual Offences should clearly spell out that all sexual offence cases must be investigated fully, that charges may not be withdrawn at police station level even when requested to do so by the victim or the victim's family, and that any decision not to proceed with a police

investigation falls with the relevant prosecuting authority.

- The SAPS National Instruction 22 / 1998 on Sexual Offences be amended to provide specifically that police investigators should not infer from the reaction²⁴ of the complainant that he or she is unaffected by the sexual assault or is lying.
- An investigating officer must inform the victim of the right to ask the Director of Public Prosecutions to review any decision not to initiate or proceed with an investigation into an alleged sexual offence allegedly committed against that victim.
- Guidelines on the charging of victims of sexual offences for laying false charges, making false statements, obstructing the course of justice and perjury be developed.
- Before a complainant in a sexual offence case can be charged with any of the offences related to laying false charges, authorisation must be obtained from the relevant Unit or Station Commander.

Docket monitoring

- A docket monitoring system be introduced at station level with regard to reports of sexual offences. Until such time as the information contained in the docket is captured electronically, it is recommended that critical documents be filed in duplicate.

Provision of information

- To provide for a better flow of information to victims, the Commission proposes the following action:
 - a) a statement of duties of individual police officers in relation to the provision of information to victims should be formulated and incorporated into a police code of good practice;
 - b) a docket monitoring system should be established together with a system which ensures that duplicate copies of all important information contained in the docket are kept in safe keeping;

²⁴

Some victims appear very composed and able to calmly discuss the assault. Others may be in a very distressed state and may not be able to relate details of the incident in an accurate or chronological manner.

c) information should be supplied routinely to victims at the time of reporting the crime, prior to the first appearance of the accused, and again following the date set down for trial. This could include pamphlets which provide basic information about victim rights at all stages of the process;

d) responsibility for distributing information pamphlets should lie with the organisation that has the primary responsibility for the case, i.e. at the reporting and investigation stage, information sheets should be distributed by the police; prior to and following the first appearance of the accused in court, information sheets should be distributed by the office of the Director of Public Prosecutions.

The medical examination

- The decision whether to take the victim for a medical examination immediately or to proceed with another critical aspect of the investigation is dependent on circumstances which are unique to each sexual offence investigation. No recommendation is made in this regard, save that the SAPS must give priority to having a medical examination done in order to ameliorate the anxiety experienced by victims prior to the examination.

Support person

- In addition to the provisions contained in the National Instruction regarding support persons, it should expressly be stated that a witness is also entitled to be accompanied by a support person during the medical examination and that this be provided for in the above National Instruction. The Commission cautions that a support person must, however, be informed that his or her role is solely to support the witness and that he or she may in no way interfere with the witness during the holding of the identity parade.

Identity parades

- The envisaged new National Instruction on identity parades should spell out clearly that it is not appropriate for any victim or witness to have to physically

²⁵

The utilisation of forensic social workers is specifically recommended in Recommendation 12 of the South African Human Rights Commission **Report on Sexual Offences Against Children** April 2002.

touch a suspect in order to identify a suspect, whether it be a sexual offence case or not.

Complaint procedure

- An acceptable procedure should be developed for reporting instances where police fail to accept and register a complaint of a sexual nature.

Bail

- The complainant must be informed of an application for bail by the accused.
- The complainant must be informed that he or she has the right to attend the bail proceedings.
- The investigating officer must obtain relevant information from the complainant in order to oppose a bail application and/or the imposing of conditions of the accused, should he be released on bail.
- Where the complainant reports a breach of the bail conditions by the accused, to immediately take a statement from the complainant or other witnesses detailing the breach of the bail conditions; approach the prosecutor with the aim of an application to have the accused's bail revoked; and where necessary, take steps to ensure the safety of the complainant.
- Inform the complainant of the bail conditions imposed on the accused should he be released on bail and of the procedure to be followed if the accused breaches the bail conditions.

Selection, training and debriefing of SAPS members re: sexual offences

- More sophisticated and appropriate obligatory mechanisms relating to the screening, selection, training and debriefing of SAPS members serving in or wanting to serve in specialised units dealing with sexual offences must be established. In addition to having received training on how to deal with a victim of a sexual offence, all inexperienced police members should receive 'on-the-job' training by being assigned to an experienced colleague for a set period of time and should receive specific training on how to deal with sexual offenders.
- A culture enforcing the need for regular debriefing in the SAPS must be

encouraged. Police members should have the freedom of electing whether to be debriefed by professionals either retained in-house or externally, but not from within their own unit.

- The role of SAPS forensic social workers must be clarified and formalised as a matter of urgency.²⁵
- SAPS must develop and administer a program to train all medical personnel involved with the collection of forensic medical evidence in the correct use and application of the appropriate crime evidence collection kits.
- Members who are commissioned to specifically investigate sexual offences should not be allowed to remain at these units for a period exceeding three years, unless regular debriefing sessions are attended by such member(s).

Amendment of forms

- The SAPS should amend the SAP 69 form to include details of the offence which may be required to make an informed decision regarding the rehabilitation programme made available to the offender.
- The existing police practice rules and forms (especially Form SAP 329) should be revised, be codified in a National Instruction on identity parades, and that such a National Instruction be operationalised as soon as possible.
- The witness statement form should be amended as is portrayed in the Annexure to this document.

Education

- Awareness campaigns for adult victims (both male and female) of sexual violence should be conducted by the Departments of Safety and Security and Justice and Constitutional Development to instil confidence in a responsive authoritative protection system in order to make it easier for such victims to report incidents of sexual violence.

DEPARTMENT OF HEALTH**Forensic medical examination**

- In the first consultation all appropriately trained medical personnel should conduct a proper medical examination of and treat or refer the victim of sexual violence for specialised treatment or counselling, where appropriate.
- Medical personnel should link up with the investigating team to share information on the crime scene, the evidence collected or to be collected from the victim and/or the alleged offender and the injuries sustained during the attack. Medical personnel should also advise the investigating team on what other possible evidence could be collected.
- All medical personnel involved with the collection of forensic medical evidence must receive training from SAPS in the correct use and application of the appropriate crime evidence collection kits.
- The victim, or the caregiver of the victim in the case of a young child or mentally disabled person, should be given information regarding the reason for the examination and what it entails, information on possible pregnancy as a result of the attack, an explanation of any medication given and possible side-effects, the results or outcome of the medical examination and information about HIV.
- At the very least victims should be tested and counselled for HIV or referred to an organisation or hospital which deals with the issue. Referrals from district surgeons or medical personnel may include referrals for follow-up medical care, for HIV or STI testing, or for counselling and advice.
- The victim should always be provided with medical treatment by the same person collecting the forensic evidence and the victim should not be referred to another practitioner or facility.
- Identifying information, for example contact details and personal particulars not relevant to the case, should not be disclosed.
- The complainant must be informed of the results of the investigation and or the disciplinary hearing.
- If a victim of sexual assault is ambulatory, she/he must be referred to a designated health care facility. If the victim cannot be transferred then a health care practitioner must attend the patient in the casualty ward.
- An investigating officer should only be present during the physical examination if

the patient requests the presence of the officer and where the officer is of the same sex.

- Adult victims should be given the option of undergoing the full forensic examination, including the collection of medical evidence, and having it kept at the health care facility for a period of up to 90 days to enable the victim to decide whether or not he or she will report the incident.
- The medical practitioner should be placed under obligation to refer the victim to appropriate counselling.²⁶

Training, debriefing and related matters

- Mechanisms must be developed to ensure that the national and provincial Departments of Health and the various controlling bodies in the medical field co-operate with the SAPS in training programmes as it pertains to the medical aspects of evidence collection.
- Reporting mechanisms must be made available to victims where an examining practitioner has conducted the examination in an inappropriate fashion.
- Provision should be made for support mechanisms such as debriefing or counselling of medical practitioners as they, similar to all other persons who regularly work with victims of sexual violence, are not left unscathed by the continuous exposure to human depravity.
- All medical personnel, whether in private practice or not, should be specifically trained to deal with cases of sexual abuse.²⁷ The training should extend to the performance of medico-legal examinations, the correct use of the crime kit and the significance thereof, the completion of the required forms (such as the J88), police procedure and the legal aspects surrounding the presentation of such

²⁶ This recommendation is bolstered by the recommendation in the **Report of the Parliamentary Task Group on the Sexual Abuse of Children** 2002 that the Department of Health is to ensure a more equitable distribution of infrastructure to allow for access to suitable treatment facilities across the Republic. This includes comprehensive and informative counselling on all health related issues around infectious disease prevention and treatment, reproductive rights and pregnancy.

²⁷ This recommendation is endorsed by Recommendation 14 of the South African Human Rights Commission **Report on Sexual Offences Against Children** April 2002 where it is stated that a comprehensive child sexual abuse training programme for all health care professionals should be put in place.

evidence in court.

- Medical practitioners and other categories of health care practitioners such as nurses should be empowered to examine victims of sexual assault, provide the necessary medical treatment and give expert evidence in court.
- All health care practitioners, including medical doctors, should first receive the necessary training and ongoing support in order to enable them to fulfil this function.
- The Health Professions Council of South Africa (the former Medical and Dental Council) should develop the necessary training manuals and oversee the training.²⁸

Protocols

- The Department of Health, in consultation with other sectors, should develop and implement binding protocols for medical practitioners and health care professionals as to the appropriate steps to be taken when victims of rape present themselves for treatment.
- Such protocols should provide that:
 - (a) appropriate measures be taken to protect the privacy and dignity of victims presenting themselves at a medical facility following a sexual offence and that measures be taken to expedite the proceedings;
 - (b) all victims of rape must be examined and assessed as to the risk of HIV-infection by a district surgeon, medical practitioner or health care professional immediately after reporting the assault to the police. Victims who do not report the sexual assault to the police but present at a medical facility must be examined and assessed by a medical practitioner or health care professional

²⁸

This recommendation is endorsed by the **Report of the Parliamentary Task Group on the Sexual Abuse of Children** 2002 with the rider that the Department of Health, through the Health Professions Council for South Africa is to ensure that medical personnel responsible for dealing with survivors of abuse be adequately trained in forensic medicine to ensure that good quality evidence is meticulously documented as rapidly as possible.

immediately after presenting;

- (c) all victims of rape who present at a medical facility (including those who are examined by a district surgeon) must be informed by the medical practitioner or health care professional of the risk of being HIV-infected as a result of the sexual assault;

- (d) all victims of rape must be individually assessed and counselled as to the risk of HIV-infection, taking into consideration –

- (i) available information on the HIV status of the perpetrator;

- (ii) the type of exposure;

- (iii) the nature of the physical injuries; and

- (iv) the number of times that the victim was sexually assaulted.

- (e) all victims of rape must be informed after assessment of the risk of HIV-infection and a recommendation must be made to them whether PEP treatment is appropriate. Regardless of the recommendation of the medical practitioner or health care professional, the choice of whether to take PEP or not remains that of the victim;

- (f) all victims of a rape must be counseled around and informed of -

- (i) the existence of PEP drugs;

- (ii) the purpose of the drugs;

- (iii) the possible side effects of the drugs;

- (iv) the consequences of not taking the drugs; and

- (v) where it can be obtained.

- (g) PEP drugs ought to be available at all medical facilities. Should the drugs not be available at the medical facility where the victim presents, the victim must be assisted by the medical facility, the attending medical practitioner or the health care professional in obtaining the drugs.

- The Department of Health should establish a national system of accreditation for health care practitioners in the management of sexual offences.

- Health care practitioners who have been trained and accredited through this

process, be given the designation “Sexual Assault Care Practitioner”.

- Until sexual assault care practitioners are accredited, health care practitioners should be bound by an examination and treatment protocol.
- Minimum standards of care should be developed which include the following principles:
 - (a) the physical, emotional and psychological safety, health and well being of a survivor of sexual assault is given precedence over other matters;
 - (b) standardised evidence collection and injury documentation procedures must be developed nationally and used in all sexual assault cases;
 - (c) survivors of sexual assault must receive the same quality of assistance and treatment regardless of where the assault occurs;
 - (d) the health care practitioner must have the ability to recognize, document and appropriately interpret injuries, or the lack thereof;
 - (e) the health care practitioner must have the ability to collect and package the appropriate forensic specimens as per the new Sexual Assault Examination Collection Kit.
- The continued medical education of health care practitioners must be monitored and evaluated.
- Where a private medical practitioner has not been trained to undertake a forensic examination on sexual assault victims, the practitioner must refer the victim to a designated health care facility or to a practitioner who is qualified to do so.
- Under-graduate medical training should include gender based and gender violence training.
- Training should include exposure to appropriate social context training relating to the nature of sexual violence.
- A complaints mechanism must be established whereby victims of sexual offences can report state officials and other health practitioners who do not comply with designated duties, or act inappropriately towards the victim.

- The superintendent or doctor in charge of a medical facility must ensure that adequate complaints mechanisms exist.
- Where complaints are lodged the superintendent or doctor in charge must ensure that the complaint is registered, the matter is investigated and dealt with in the established internal disciplinary structure.

Health care facilities

- One stop centres should be officially endorsed and implemented nationally so as to enhance the preliminary stages of the investigation. The Commission is of the opinion that the criminal investigation would be considerably aided by the availability of all the role-players within walking distance of one another.
- The appropriate health instructions address the role of medical staff on duty in a casualty ward when attending to a victim of a sexual offence. Further that these instructions should also oblige such medical staff, when requested to do so, to conduct medical examinations on victims and alleged offenders in sexual offence cases and to regulate the manner in which medical evidence is to be collected and treated.

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

Case Management

- Sexual offence cases must be prioritised.²⁹
- Case-flow management techniques which are flexible enough to be adapted to the needs of individual sexual offence cases, but have the overall purpose of reducing delay and increasing efficiency be introduced.³⁰
- A case-flow management strategy, including time-frames, must be developed inter-sectorally and initiatives such as the 'e-justice' programme should be incorporated in order to reduce delays in the criminal procedure process.
- Non-compliance with the case-flow management strategy (including time-limits) should be met with sanction. Further that an investigation be undertaken to determine the viability of introducing a system of costs in criminal proceeding.
- Non-compliance with the case-flow management strategy should neither affect the manner in which the case is heard nor result in the case being dismissed or charges withdrawn.

Public prosecutors and amendments to the NDPP Policy Directives

- The NDPP Policy Directives must be revisited and reviewed, ideally with input from the SAPS, the Department of Social Development, health care professionals and victim support groups. In this context the Commission stated that consistency was essential: A situation where one agency is issued with *instructions* and another agency with mere *guidelines* was found to be untenable, especially when the aim is to ensure greater co-operation and interaction between those agencies. The Commission recommends that it was equally important to ensure that whatever was agreed upon, be it instructions, guidelines or directives, that they carry the same legal force to ensure that non-compliance can be addressed uniformly.

²⁹ This recommendation is endorsed by Key Recommendation 2 of the South African Human Rights Commission **Report on Sexual Offences Against Children** April 2002 where it is stated that sexual violence against children should be treated as a priority by government at national, provincial and local levels and criminal justice agencies involved in the fight against crime. It is also endorsed by the **Report of the Parliamentary Task Group on the Sexual Abuse of Children** 2002.

³⁰ This recommendation is endorsed by Specific Recommendation 29 of the South African Human Rights Commission **Report on Sexual Offences Against Children** April 2002.

- The Office of the Director of Public Prosecutions should formally assume responsibility, from the first appearance of the accused onwards, for directly communicating relevant information to the victim, rather than this being done through members of the police. The Commission suggests that an office of designated Victim Liaison Officer be established and attached to the office of the Director of Public Prosecutions.³¹

Specialised courts

- The Commission fully supports the roll-out of specialised sexual offences courts, with the proviso that the new courts have to be sustainable both as far as human and financial resources and commitment are concerned.³²
- The roll-out of specialised sexual offences courts must be accompanied by intensive training programmes of all court officials involved, including magistrates. The Commission notes that certain shortcomings have been identified in the “Wynberg Sexual Offences Court-model” and therefore cautioned that these shortcomings should be addressed in the roll-out of the new courts in order to prevent the replication of inadequacies already identified.

³¹ In essence this recommendation is endorsed by the **Report of the Parliamentary Task Group on the Sexual Abuse of Children 2002** with the difference that the Department of Justice and Constitutional Development are instructed to establish clear guidelines for the handling of cases involving sexual offences. Further that training in these guidelines be made mandatory for all levels of personnel in the courts system and that the guidelines are communicated clearly to all complainants and witnesses before the commencement of a trial.

³² Key Recommendation 10 of the South African Human Rights Commission **Report on Sexual Offences Against Children** April 2002 endorses the express roll out of specialised sexual offences courts. This recommendation is also endorsed by the **Report of the Parliamentary Task Group on the Sexual Abuse of Children 2002**.

³³ This recommendation is endorsed by Specific Recommendation 22 of the South African Human Rights Commission **Report on Sexual Offences Against Children** April 2002 where it is stated that the prosecution needs to investigate the possibility of establishing multidisciplinary teams prior to prosecution with a view to adopting a holistic approach to the case.

³⁴ This recommendation is endorsed by Specific Recommendations 20 and 31 of the South African Human Rights Commission **Report on Sexual Offences Against Children** April 2002.

³⁵ This recommendation is endorsed and expanded upon by Specific Recommendation 26 of the South African Human Rights Commission **Report on Sexual Offences Against Children** April 2002 where it specifically recommends that the NDPP should equip all courts with child friendly facilities, e.g., closed-circuit television and one-way mirrors.

³⁶ The enforcement of the existing law is endorsed by **Report of the Parliamentary Task Group on the Sexual Abuse of Children 2002**.

Education

- Information strategies including pamphlets should be developed and distributed. It is suggested that the responsibility for distributing information pamphlets should lie with the organisation that has the primary responsibility for the case, i.e. at the reporting and investigation stage, information sheets should be distributed by the police; prior to and following the first appearance of the accused in court, information sheets should be distributed by the office of the Director of Public Prosecutions.

Bail proceedings

- Victims and other state witnesses should be informed of and participate in bail applications if they should choose to as the Commission found that the adoption of a system which allows for the victim to be informed of and participate in all stages of the proceedings (including a bail application by the accused) may address some of the concerns.
- Where a witness is the complainant in the matter or a person below the age of 18 years and such witness is called to or wishes to participate in the bail application, such witness must be declared a vulnerable witness and be afforded such protective measures as the court may deem necessary. Where any other witness appearing at the bail application is likely to be vulnerable on account of age, intellectual impairment, trauma or cultural differences, or the possibility of intimidation or is likely to suffer severe trauma, an application for declaration as a vulnerable witness must be made. The declaration of vulnerable status as well as the finding in relation to the appropriate protective measures will remain in place unless the trial court should find otherwise.
- Experts may be called to establish the vulnerability of the second category of witnesses and the need for specific protective measures for both categories where necessary. However, the role of expert witnesses should not be restricted to determining vulnerability of witnesses. Expert witnesses should also be called to lead evidence as to the risk that the accused might pose to the complainant and/or society, if released.
- As knowledge surrounding a bail application is often integral to the ability of the victim to prevent being re-victimised, this aspect be included in the Policy

Guidelines for the National Director of Public Prosecutions.

- Training and guidance be given to all officials dealing with bail applications so as to enhance the implementation of the existing legislation regulating bail (which the Commission deems to be adequate).
- Prosecutors must take immediate action against accused who allegedly contravene the conditions of bail or who harass, threaten, injure or intimidate the complainant or other witnesses in sexual offence matters.

Pre-trial processes

- The discretion of whether to embark on a pre-trial process³³ should be shouldered by the responsible prosecutor and he or she should be obliged to note the reasons for exercising this discretion in favour of convening a case management consultation as well as the results of the consultation. The procedure to be followed should be contained in the relevant sexual offence management protocol.
- In relation to case management consultations linked to diversion the Commission recommend that this option should be followed only in exceptional cases. In those exceptional cases the Commission recommends that:
 - The consultation should be convened by the prosecutor. However the Commission refrains from being prescriptive regarding the constitution of the consultation, bar that trained personnel who have assessed the participants must be involved. An expert assessment of the participants during the consultation and the need for expert guidance of the consultation is imperative to its success.
 - The prosecutor be tasked to draw up the diversion contract. Guidance for the drafting of such contracts should be contained in the protocols. For example, a contract could contain a provision which separates the offender from a child victim or other prospective victims during the period of diversion. It should be a standard pre-requisite that the offender must be willing to submit him or herself to a sex offence specific rehabilitation programme or treatment.
 - Diversion contracts must clearly deal with changes of address to ensure that the offender does not escape the conditions of the diversion contract.

Plea bargaining

- Prosecutors handling sexual offence cases should receive training on plea bargaining and innovative sentencing options aimed at community protection.
- Provision should be made in the plea bargaining process to consult the complainant, or in the case of a child, the child complainant and his or her parent, guardian or *person in loco parentis*.
- A victim must be consulted immediately after the prosecution is made aware that the accused wishes to negotiate a plea and sentence agreement (even though these situations might be rare in sexual offences matters).
- The process and reasons as to why a plea and sentence agreement is being considered should be explained to the victim, and the victim's views and objections on the agreement should be obtained and considered.

Disclosure

- The Policy Guidelines of the NDPP should be amended to ensure that full disclosure has been made by the police, thereby ensuring that the prosecution is able to make full disclosure to the defence. In order to counter-balance this provision, a provision which assures the police that personal material will not be disclosed to the defence without prior consultation must also be included.
- Personal particulars which do not adversely affect the accused's right to a fair trial should not be divulged to the defence by way of a witness's statement and testimony.
- The age of the witness, if he or she is under 18 years of age, be reflected on the front of any statement. This will dictate to the prosecutor whether provision for protective measures for a child witness should be made.
- The provisions contained in section 153 of the Criminal Procedure Act be invoked more often in order to protect witnesses, especially victims of sexual offences, where a real possibility exists for revictimisation or recurring violence.
- Identifying information, for example, contact details and personal particulars not relevant to the case, should not be disclosed.
- Waiver of the right to confidentiality regarding disclosure of personal records by the person who made the confidential communication be acknowledged.
- Information acquired by a registered medical practitioner by physical examination

(including communications made during the examination) in relation to the commission or alleged commission of the sexual offence or a communication made, or the contents of a document prepared, may be adduced for the purpose of a legal proceeding arising from the commission or alleged commission of the sexual offence.

Training

- The Department of Justice and Constitutional Development should develop and establish a training programme to be attended by prosecutors and presiding officers to ensure proper training in regard to witness notification. In this context the term 'presiding officers' refers to both magistrates and judges.³⁴
- Specialised training on sexual offence matters should include an understanding of a child's educational needs and the effect of the offence on the child's functioning at school.
- Training must be developed and implemented on the use of closed-circuit television in sexual offence matters.³⁵

Education

- The Department of Justice and Constitutional Development should task its communication section in consultation with the Department of Social Development to launch a victim empowerment programme to inform witnesses, possibly by way of pamphlet, of the protective measures (including the use of an intermediary) that may be requested.

Protective measures

- The National Director of Public Prosecutions should develop guidelines which place a duty on prosecutors to notify witnesses of the protective measures that they may request, failure of which will lead to a disciplinary inquiry.

***In camera* proceedings**

- The movement of both court officials and private persons, in and out of the court whilst a vulnerable witness is testifying should be strictly monitored. This provision should be enforced and adhered to by requiring that all courts hearing sexual offence

cases shall, when the matter is being held *in camera*, have a notice to that effect on the public doors to the court.

- The movement of court officials whose presence is necessary for the trial should be limited to that which is necessary and a duty placed on court officials to limit their movement in and out of court when such a hearing is taking place. These recommendations should be enforced administratively by the Department of Justice: Courts Division.
- The National Prosecuting Authority should focus on prosecuting recalcitrant publishers for publishing prohibited information;³⁶
- a court which finds any person guilty of publishing information in contravention of the provisions of sections 154 or 335A of the Criminal Procedure Act, may make a compensatory financial order after a finding of guilt in terms of section 154(5) of the Criminal Procedure Act and that such an order should be in favour of the complainant or the accused (provided that the latter has not been identified or charged); and
- presiding officers must be directed to issue an order declaring the court closed for the duration of the testimony delivered by a vulnerable witness, which order must be enforced by the court orderly or similar official.

Closed-circuit television

- If a court is of the opinion that a witness should give evidence by way of closed-circuit television and there are no closed-circuit television equipment or facilities available at that court, that court should make every effort to have the necessary equipment transferred to it from another court or should transfer the criminal proceedings in question to another court with the required facilities. Such a transfer should be done in consultation with the court to which the case is to be transferred. In making an order for a transfer to a court with closed-circuit television facilities, the court should take into account the need to protect the person who is to give evidence by means of closed-circuit television or similar electronic media from traumatising; the wishes of the person who is to give evidence by means of closed-circuit television or similar electronic media; the wishes of other persons who are to give evidence in the proceedings; the costs of having the proceedings transferred; inconvenience to the complainant in the proceedings; and unreasonable delay that would be brought about by such transfer.

Interviewing skills

- Resources should be allocated to improving basic skills such as effectiveness of specialist interview procedures, general interviewing skills and innovative questioning techniques rather than to video technology when basic skills still need to be developed or improved on. The subject of videotaping of evidence should be an investigation on its own with extensive consultation on the development of a memorandum to guide interviewers.
- Urgent steps should be taken to ensure that the protective measures already provided for in the Criminal Procedure Act are properly and professionally implemented.

Intermediaries

- The current fee structure for intermediaries should be revised.
- All magistrate courts be furnished with facilities for intermediaries.
- The intermediary system be formalised rather than amend the current regulations and that this recommendation receive the attention of the secondary legislation section in the Department of Justice and Constitutional Development.
- An assessment of persons who are competent to assist the child witness to give evidence in court should be done.
- The competence of a person to be appointed as an intermediary should be assessed through a process prior to appointment to a specific case, but after the person has satisfied the requirement of falling within one of the categories determined by the Minister for Justice and Constitutional Development, by way of regulation, of who may be appointed as intermediaries in terms of section 170A(4)(a); alternatively, after going through an accreditation process. This option implies establishing cross sectoral selection, a process of selection and possibly registration as an intermediary. If this approach is followed it will not be necessary for the court to assess competence as prior selection and registration will guarantee competence. This option has the advantage of avoiding delays in court.

- The following criteria be used to establish competence of an intermediary who is to act as such in criminal proceedings involving a sexual offence:
 - (a) the training and qualifications of such person;
 - (b) the duration of such person's experience in working with children;
 - (c) the extent of such person's experience in working with children of the same age group and cultural background as the witness;
 - (d) if such person is retired, the extent to which such person has retained the skills to work with children;
 - (e) factors that may disqualify such person from being appointed as an intermediary, including the fact that such person has been-
 - (i) convicted of a sexual offence involving children;
 - (ii) the subject of a domestic violence protection order;
 - (iii) the subject of disciplinary action taken during the course of such person's career;

- Where necessary an intermediary (not the same person to be used in the trial) should be available to assist the prosecutor to establish rapport with the child witness prior to the trial and to improve both the prosecutor's and the child's understanding of what they are communicating to each other.

- The Departments of Justice and Constitutional Development and Social Development should be tasked to ensure the availability of intermediaries to all courts hearing sexual offence cases, as soon as is practicably possible. Such implementation must take into account adequate training for intermediaries if there is a lack of expertise or experience. In addition, the said Departments should develop a timetable for selection, training and appointment of intermediaries on a permanent basis.

- The Minister for Justice and Constitutional Development should report annually to Parliament on the level of implementation until such time as the intermediary system is fully in place.

Anatomically correct dolls

- In relation to the use of anatomically correct dolls an inter-sectoral project be established, to be housed in the Department of Justice and Constitutional

Development, that is tasked with undertaking a consultation process with all role-players to assess:

- their training needs in the use of anatomically correct dolls;
- whether there is a need for standardised dolls to be used as there is potentially substantial variation in the types of anatomically correct dolls that are used;
- whether there is a need for guidelines to be developed for effective use of anatomically correct dolls to be set forth in a written protocol;
- which role players should be involved in the drafting of such a protocol;
- if such a protocol is necessary, whether it should be reviewed to ensure that training is kept current; and
- anatomical dolls which are racially and culturally representative should be made available to prosecutors.

Support persons

- The State should bear transport costs, in the form of a transport allowance, for one support person per witness who is giving evidence in court in sexual offence cases.

Rules of evidence

- As a ground rule, all relevant evidence should be admitted in sexual offence cases. Further that the presiding officer should consider all such evidence and must use his or her judicial discretion as to the proper weighting to be given to such evidence.
- The prosecution should be allowed to raise an accused's previous convictions and acquittals at trial, provided that the probative value of such evidence outweighs the prejudicial effect thereof.
- The proposed Sentencing Council, contained in the Report on Sentencing, should facilitate and establish a programme of judicial education on sentencing and recommends that judicial officers receive appropriate training and information on the potential impact of sexual crimes on victims generally.
- Judicial officers should assess and take into account the offender's knowledge, use and manipulation of the particular victim's vulnerability for the purpose of sentencing.

Victim Impact Statements

- Uncontested victim impact statements should be admissible evidence on production thereof. If the contents of a victim impact statement are disputed, the author and / or the victim must unfortunately be called as a witness.
- A court allow a victim to make recommendations regarding an appropriate sentence to the presiding officer, provided that it is well understood that the presiding officer is under no obligation to follow this recommendation.
- In terms of responsibility for the preparation of the victim impact statement, it is proposed that the prosecution should have the ultimate duty to ensure that such evidence or statement is available for submission in court.
- In compiling a victim impact statement, the services of a child psychologist should be made available to assist in explaining and describing the impact of the harm and emotional trauma suffered by the child as a result of the offence.

Offender treatment

- As part of the original sentence of the court, all sexual offenders should be required to undergo treatment in an accredited treatment programme, preferably in a community setting, when released on parole or under correctional supervision.
- More extensive use be made of section 274(1) of the Criminal Procedure Act, 51 of 1977 and expert opinion should be canvassed by the court when determining the appropriate treatment programme.
- The offender should, as far as possible, be liable for the costs of the treatment. If the offender does not have the means, then the State should bear the responsibility for the cost of treatment as a way of ensuring long term community protection.
- Provision be made for the monitoring of the sentencing magistrate's treatment order. At present the sentencing magistrate may order rehabilitation as part of a prison sentence, but this may not be followed through by the prison staff, due sometimes to the lack of resources in the prison to which the offender is admitted, or the lack of insight of the prison staff as to the need for rehabilitation of the sexual offender.

- Treatment and rehabilitation programmes should be made available to all sexual offenders.
- As rehabilitation of sexual offenders is a long term strategy, the period of correctional service should be extended from three years to five years.

Dedicated judiciary

- The concept of a dedicated judiciary should receive the attention of the Judicial Services Commission and the Magistrates Commission.
- This could include the option of only allowing judges and magistrates who are certified to preside in sexual offence matters to do so.

Court records

- Any order made in relation to a child victim in either the sexual offences court or children's court should be noted in each of their respective records.

DEPARTMENT OF CORRECTIONAL SERVICES**Parole and victim involvement**

- Where a victim initially elects not to have his or her particulars recorded for purposes of being notified of the parole hearing, the Commission recommends that a mechanism should be put in place whereby the victim may have his or her details recorded at a later time.
- Evidence from victims should be used to assist both the Correctional Supervision and Parole Board in determining the conditions of parole, rather than determining parole itself.
- Evidence from victims on parole may be given via closed-circuit television and / or with the assistance of an intermediary.
- Evidence from significant others working or interacting with the victim and his or her family must be available to the Correctional Supervision and Parole Board where it is available and appropriate.
- Parole conditions should take into account the safety and well-being of the victim and family.
- The victim, or the next of kin of a deceased victim, should be kept informed by the Department of Correctional Services of decisions made in relation to both parole itself as well as the conditions of parole.
- The victim, or the next of kin of a deceased victim, should be given information about where, and the process of how to inform a parole officer should the offender violate parole conditions. Local police stations should be informed by Correctional Services of all released parolees in their area. The local police station should serve as the reporting body where reporting is a condition of parole and the place of reporting if a released offender violates his or her parole conditions. The latter service should be available 24 hours a day.
- Parole guidelines specifically relating to sexual offenders must be compiled.

Amendment of the National Guidelines

- The Correctional Services National Guidelines should be amended to provide that a sexual offender should not be allowed access to a copy of this report or the disclosure of the victims' particulars.

Rehabilitation programmes

- Warrants of committal to prison do not contain details of the specific offence committed by the offender. These details are crucial to assess the suitability of offenders for rehabilitation programmes and for purposes of parole. It is recommended that the SAPS amend the SAP 69 form to include details of the offence which may be required to make an informed decision regarding the rehabilitation programme made available to the offender. It is important that this and any other relevant information must be conveyed from the Departments of Justice and Safety and Security to the Department of Correctional Services in a confidential manner.
- The Guidelines be amended to place an obligation on the Department of Correctional Services to inform victims of sexual offences of the programmes which the offender has attended or is involved in.
- The Department of Correctional Services should, as a matter of priority, introduce and administer treatment and rehabilitation programmes for sexual offenders in particular. Staff providing assessment and treatment services in the Correctional Services environment should be adequately trained and supported in this specialised field of work.³⁷

Bail hostels

- The concept of bail hostels should be investigated and if feasible be established.

³⁷ This recommendation is broadly endorsed by the **Report of the Parliamentary Task Group on the Sexual Abuse of Children** 2002. However a call is specifically made to include mandatory responsibilities of different government agencies to ensure that rehabilitation programmes can be successfully implemented.

DEPARTMENT OF EDUCATION

- Awareness campaigns should be conducted by schools and local government structures to make it comfortable and acceptable for children to speak out with confidence in a responsive child protection system.³⁸
- Ongoing life skills programmes should also be introduced as part of the fixed syllabus in schools.
- Awareness, information and education programmes should be launched and conducted by the appropriate government department(s) for all levels of civil society about what to do and where to go when a person discloses sexual abuse.³⁹

SOCIAL WELFARE AGENCIES, NGO INVOLVEMENT, SUPPORT, COUNSELLING, AND ADVOCACY SERVICES

- All persons who work in the field of servicing victims of sexual offences and NGOs who wish to assist sexual offence victims or offenders should undergo an accredited training course;⁴⁰
- standards or codes of good practice must be developed in order to ensure quality service;
- training and guidance on the preparation and compilation of reports for submission to court must be included in the accredited training course.

³⁸ This recommendation is endorsed by the **Report of the Parliamentary Task Group on the Sexual Abuse of Children** 2002.

³⁹ These recommendations are endorsed by Specific Recommendations 41 and 43 of the South African Human Rights Commission **Report on Sexual Offences Against Children** April 2002.

⁴⁰ This recommendation is endorsed by Specific Recommendation 37 of the South African Human Rights Commission **Report on Sexual Offences Against Children** April 2002.

B I L L

To consolidate and amend the law relating to sexual offences; to provide for new procedures in respect of such offences; to provide for the repeal and amendment of certain laws; and to provide for matters connected therewith.

PREAMBLE

WHEREAS the Bill of Rights in the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), enshrines the rights of all people in the Republic of South Africa, including the right to equality, the right to privacy, the right to dignity, the right to freedom and security of the person which incorporates the right to be free from all forms of violence from either public or private sources, and the rights of children to have their best interests considered to be of paramount importance;

AND WHEREAS several international legal instruments including the United Nations Convention on the Elimination of all Forms of Discrimination Against Women, 1979, and the United Nations Convention on the Rights of the Child, 1989, place obligations on the Republic towards the eradication of violence against women and children;

AND WHEREAS there is a high incidence of sexual offences in the Republic which in turn has a particularly disadvantageous impact on vulnerable persons, the society and the economy;

AND WHEREAS women and children are particularly vulnerable to sexual offences including prostitution;

AND WHEREAS the South African common law and statutory law fail to deal effectively and in a non-discriminatory manner with activities associated with sexual offences, thereby failing to provide adequate protection against sexual exploitation to complainants of such activities;

IT IS THE PURPOSE of this Act to afford complainants of sexual offences the maximum and least traumatising protection that the law can provide, to introduce measures which seek to enable the relevant organs of state to give full effect to the provisions of this Act and to fortify the state's commitment to eradicate the pandemic of sexual offences committed in the Republic or elsewhere by its citizens.

B E IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:—

Objectives

1. In the application of the provisions of this Act, the following objectives must be considered:

- (a) Complainants should not be discriminated against, either directly or indirectly, on the grounds of race, colour, ethnic or social origin, birth status, sex, gender, sexual orientation, age and developmental level, disability, religion, conscience, belief, culture or language.
- (b) Complainants should be treated with dignity and respect.
- (c) Complainants should be ensured access to the mechanisms of justice.
- (d) Complainants should be informed of their rights and the procedures within the criminal justice system which affect them.
- (e) Complainants should have the right to express an opinion, to be informed of all decisions, and to have their opinion taken seriously in any matter affecting them.
- (f) In addition to all due process and constitutional rights, complainants should have the following rights-
 - (i) to have present at all decisions affecting them a person or persons important to their lives;
 - (ii) to have matters explained to them in a clear, understandable manner appropriate to their age and in a language and manner which they understand;
 - (iii) to remain in the family, where appropriate, during the investigation and whilst awaiting a final resolution of the matter and, if a child is removed from the family, to have the placement periodically reviewed;
 - (iv) to have procedures dealt with expeditiously in time frames appropriate to the complainant and the offence.

- (g) Complainants should have the right to confidentiality and privacy and to protection from publicity about the offence.
- (h) Complainants and their families should be entitled to receive such therapeutic assistance as is necessary to promote healthy functioning. Where possible the offender should make a financial or material contribution to such assistance.
- (i) The vulnerability of children should entitle them to speedy and special protection and provision of services by all role-players during all phases of the investigation, the court process and thereafter.
- (j) Since the family and the community are central to the well-being of a child, consideration should be given, in any decisions affecting a child, to -
 - (i) ensuring that, in addition to the child, his or her family, community and other significant role-players are consulted;
 - (ii) the extent to which decisions affecting the offender will affect a child, his or her family and community;
 - (iii) the particular relationship between the offender and a child;
 - (iv) keeping disruptive intervention into child, family and community life to a minimum in order to avoid secondary victimisation of the child.
- (k) Restorative and rehabilitative alternatives should be considered and applied unless the safety of the complainant and the interests of the community requires otherwise.
- (l) A person who commits a sexual offence should be held accountable for his or her actions and should be encouraged to accept full responsibility for his or her behaviour.
- (m) In determining appropriate sanctions for a person who has been found guilty of committing a sexual offence -
 - (i) the sanctions applied should ensure the safety and security of the victim, the family of the victim and the community;
 - (ii) the sanctions should promote the recovery of the victim and the restoration of the family of the victim and the community;
 - (iii) where appropriate, offenders should make restitution which may include material, medical or therapeutic assistance, to victims and their families or dependents;
 - (iv) the child sexual offender should receive special consideration in respect of sanctions and rehabilitation;
 - (v) the possibility of rehabilitating the sexual offender should be taken into account in considering the long-term goal of safety and security of victims, their families and communities;

- (vi) the interests of the victim should be considered in any decision regarding sanctions.
- (n) In order to avoid systemic secondary victimisation of the victim of sexual offences, binding inter-sectoral protocols following an inter-disciplinary approach should be followed.
- (o) All professionals and role-players involved in the management of sexual offences should be properly and continuously trained after going through a proper selection and screening process.
- (p) Cultural diversity should be taken into account in all matters pertaining to the victim, the offender and to their communities. The existence of cultural differences should be no justification for or licence to commit a sexual offence or to exclude a criminal justice process.

Definitions and interpretation of Act

2. In this Act, unless the context indicates otherwise-

- (i) “an act which causes penetration” refers to an act contemplated in sections 3, 4 and 5;
- (ii) “child” means a person below the age of 18 years;
- (iii) “complainant” refers to the alleged victim of a sexual offence;
- (iv) “genital organs” include the whole or part of male and female genital organs and further include surgically constructed or reconstructed genital organs;
- (v) “indecent act” means any act which causes -
 - (a) direct or indirect contact between the anus or genital organs of one person or, in the case of a female, her breasts and any part of the body of another person or any object, including any part of the body of an animal;
 - (b) exposure or display of the genital organs of one person to another person; or
 - (c) exposure or display of any pornographic material to any person against his or her will or to a child,
 but does not include an act which causes penetration;
- (vi) “mentally impaired person” means a person affected by any mental impairment irrespective of its cause, whether temporary or permanent, and for purposes of sections 3, 4, 5, 7, 8 and 9 means a person affected by such mental impairment to the extent that he or she, at the time of the alleged commission of the offence in question, was -

- (a) unable to appreciate the nature and reasonably foreseeable consequences of an indecent act or an act which causes penetration;
 - (b) able to appreciate the nature and reasonably foreseeable consequences of such an act but unable to act in accordance with that appreciation;
 - (c) unable to resist the commission of any such act; or
 - (d) unable to communicate his or her unwillingness to participate in any such act;
- (vii) “sexual offence” means any offence in terms of this Act, excluding the Schedule, and includes any common law sexual offence;
- (viii) “this Act” includes the regulations made under section 31.

Rape

3. (1) Any person who unlawfully and intentionally commits any act which causes penetration to any extent whatsoever by the genital organs of that person into or beyond the anus or genital organs of another person, or any act which causes penetration to any extent whatsoever by the genital organs of another person into or beyond the anus or genital organs of the person committing the act, is guilty of the offence of rape.

- (2) An act which causes penetration is *prima facie* unlawful if it is committed -
- (a) in any coercive circumstance;
 - (b) under false pretences or by fraudulent means; or
 - (c) in respect of a person who is incapable in law of appreciating the nature of an act which causes penetration.

- (3) Coercive circumstances, as referred to in subsection (2)(a), include any circumstances where -
- (a) there is any use of force against the complainant or another person or against the property of the complainant or that of any other person;
 - (b) there is any threat of harm against the complainant or another person or against the property of the complainant or that of any other person; or
 - (c) there is an abuse of power or authority to the extent that the person in respect of whom an act which causes penetration is committed is inhibited from indicating his or her resistance to such an act, or his or her unwillingness to participate in such an act.

(4) False pretences or fraudulent means, as referred to in subsection (2)(b), are circumstances where a person -

- (a) in respect of whom an act which causes penetration is being committed, is led to believe that he or she is committing such an act with a particular person who is in fact a different person;
- (b) in respect of whom an act which causes penetration is being committed, is led to believe that such an act is something other than that act; or
- (c) intentionally fails to disclose to the person in respect of whom an act which causes penetration is being committed, that he or she is infected by a life-threatening sexually transmissible infection in circumstances in which there is a significant risk of transmission of such infection to that person.

(5) The circumstances in which a person is incapable in law of appreciating the nature of an act which causes penetration as referred to in subsection (2)(c) include circumstances where such person is, at the time of the commission of such act -

- (a) asleep;
- (b) unconscious;
- (c) in an altered state of consciousness;
- (d) under the influence of any medicine, drug, alcohol or other substance to the extent that the person's consciousness or judgement is adversely affected;
- (e) a mentally impaired person; or
- (f) below the age of 12 years.

(6) A marital or other relationship, previous or existing, shall not be a defence to a charge of rape.

(7) The common law relating to -

- (a) the irrebuttable presumption that a female person under the age of 12 years is incapable of consenting to sexual intercourse; and
 - (b) the offence of rape, except where a person has been charged with, but not convicted of such offence prior to the commencement of this Act,
- is repealed.

(8) Subject to the provisions of this Act, any reference to "rape" in any law shall be construed as a reference to the offence of rape under this section, unless it is a reference to rape committed before the commencement of this Act which shall be construed to be a reference to the common law offence of rape.

(9) Nothing in this section may be construed as precluding any person charged with the offence of rape from raising any defence at common law to such charge, nor does it adjust the standard of proof required for adducing evidence in rebuttal.

Sexual violation

4. Any person who unlawfully and intentionally commits any act which causes penetration to any extent whatsoever by any object, including any part of the body of an animal, or part of the body of that person, other than the genital organs, into or beyond the anus or genital organs of another person, is guilty of the offence of sexual violation.

Oral genital sexual violation

5. Any person who unlawfully and intentionally commits any act which causes penetration to any extent whatsoever by the genital organs of that person, or the genital organs of an animal, into or beyond the mouth of another person, is guilty of the offence of oral genital sexual violation.

Applicability of provisions on rape to sexual violation and oral genital sexual violation

6. The provisions of section 3(2), (3), (4) and (5) relating to the circumstances in which an act which causes penetration is *prima facie* unlawful; the provisions of section 3(6) relating to marital or other relationships; and the provisions of section 3(9) relating to defences at common law apply, with such changes as may be required by the context, to the provisions of sections 4 and 5.

Compelled or induced indecent acts

7. Any person who unlawfully and intentionally compels, induces or causes another person to engage in an indecent act with -

- (a) the person compelling, inducing or causing the act;
- (b) a third person;
- (c) that other person himself or herself; or
- (d) an object, including any part of the body of an animal,

in circumstances where that other person -

- (i) would otherwise not have committed or allowed the indecent act; or
- (ii) is incapable in law of appreciating the nature of an indecent act, including the circumstances set out in paragraphs (a) to (f) of section 3(5),

is guilty of the offence of having compelled, induced or caused a person to engage in an indecent act and is liable, upon conviction, to a fine and to imprisonment for a period not exceeding five years.

Defences to indecent acts or acts which cause penetration with certain mentally impaired persons

8. It is a defence to a charge of an indecent act or an act which causes penetration with a person who is mentally impaired to the extent contemplated in paragraphs (a) to (d) of section 2(vi) if -

- (a) the mentally impaired person was over the age of 18 years at the time of the alleged commission of the offence and such mentally impaired person induced the commission of the act to which the charge relates; and
- (b) the accused reasonably believed that the person who induced the commission of the act to which the charge relates was not so impaired and was above the age of 18 years at the time of the alleged commission of the offence in question.

Acts which cause penetration or indecent acts committed within the view of certain children or certain mentally impaired persons

9. Any person who intentionally commits an act which causes penetration or an indecent act with another within the view of a child below the age of 16 years or a person who is mentally impaired to the extent contemplated in paragraphs (a) to (d) of section 2(vi), is guilty of the offence of having committed such an act within the view of a child or a mentally impaired person, as the case may be, and is liable, upon conviction, to a fine or to imprisonment for a period not exceeding two years.

Acts which cause penetration or indecent acts with certain children with their consent

10. (1) Any person who commits an act which causes penetration with a child who is older than 12 years of age, but below the age of 16 years is, notwithstanding the consent of that child to the commission of such an act, guilty of the offence of having committed such an act with a child and is liable, upon conviction, to a fine or to imprisonment for a period not exceeding six years or to both such fine and such imprisonment.

(2) It is a defence to a charge under subsection (1) if -

- (a) it is proved on a balance of probabilities that such child or the person in whose care such child had been, deceived the accused into believing that such child was over the age of 16 years at the time of the alleged commission of the offence; and
- (b) the accused reasonably believed that the child was over the age of 16 years.

(3) The provisions of subsection (2) do not apply if -

- (a) the accused is related to such child within the prohibited incest degrees of blood or affinity; or
- (b) such child lacked the intellectual development to appreciate the nature of an act of sexual penetration.

(4) Any person who commits an indecent act with a child below the age of 16 years is, notwithstanding the consent of that child to the commission of such an act, guilty of the offence of having committed an indecent act with a child and is liable, upon conviction, to a fine or to imprisonment for a period not exceeding four years or to both such fine and such imprisonment.

(5) It is a defence to a charge under subsection (4) if -

- (a) the accused was a person below the age of 16 years at the time of the alleged commission of the offence; and
- (b) the age of the accused did not exceed the age of such child by more than three years at the time of the alleged commission of the offence; or
- (c) it is proved on a balance of probabilities that such child or the person in whose care such child had been, deceived the accused into believing that such child was over the age of

16 years at the time of the alleged commission of the offence, and the accused reasonably believed that the child was over the age of 16 years.

(6) The provisions of subsection (5) do not apply if –

- (a) the accused is related to such child within the prohibited incest degrees of blood or affinity;
- (b) such child lacked the intellectual development to appreciate the nature of an indecent act; or
- (c) such child was below the age of 12 years at the time of the alleged commission of the offence.

(7) A person may not be charged under this section if a marriage existed between that person and a child as referred to in this section, unless the child concerned was below the age of 12 years at the time when any offence in terms of this section was allegedly committed.

Promotion of a sexual offence with a child

11. Any person who manufactures or distributes an article that promotes or is intended to promote a sexual offence with a child, or who sells, supplies or displays to and towards a child an article which is intended to perform a sexual act, is guilty of the offence of promoting a sexual offence with a child and liable, upon conviction, to a fine or to imprisonment for a period not exceeding six years or to both such fine and such imprisonment.

Child prostitution

12. (1) Any person who, in relation to a child, for financial or other reward, favour or compensation to such child or to any other person, intentionally -

- (a) commits an indecent act or an act which causes penetration with such child;
- (b) invites, persuades or induces such child to allow him or her or any other person to commit an indecent act or an act which causes penetration with that child;
- (c) makes available, offers or engages such child for purposes of the commission of indecent acts or acts which cause penetration with that child by any person;

- (d) supplies, recruits, transports, transfers, harbours or receives such child, within or across the borders of the Republic of South Africa, for purposes of the commission of indecent acts or acts which cause penetration with that child by any person;
- (e) allows or knowingly permits the commission of indecent acts or acts which cause penetration by any person with such child while being a primary care-giver as defined in section 1 of the Social Assistance Act, 1992 (Act No. 59 of 1992), parent or guardian of that child;
- (f) owns, leases, rents, manages, occupies or has control of any movable or immovable property used for purposes of the commission of indecent acts or acts which cause penetration with such child by any person;
- (g) detains such child, whether under threat, coercion, deception, abuse of power or force for purposes of the commission of indecent acts or acts which cause penetration with such child by any person; or
- (h) participates in, is involved in, promotes, encourages or facilitates the commission of indecent acts or acts which cause penetration with such child by any person

is, in addition to any other offence of which he or she may be convicted, guilty of the offence of being involved in child prostitution and is liable, upon conviction, to imprisonment for a period not exceeding 20 years with or without a fine.

(2) Any person who intentionally receives any financial or other reward, favour or compensation from the commission of indecent acts or acts of sexual penetration with a child by another person is guilty of the offence of benefiting from child prostitution and is liable, upon conviction, to imprisonment for a period not exceeding 20 years with or without a fine.

(3) Any person who intentionally lives wholly or in part on rewards, favours or compensation for the commission of indecent acts or acts of sexual penetration with a child by another person is guilty of the offence of living from the earnings of child prostitution and is liable, upon conviction, to imprisonment for a period not exceeding 20 years with or without a fine.

(4) Any person, including a juristic person, who-

- (a) makes or organises any travel arrangements for or on behalf of any other person, whether that other person is resident within or outside the borders of the Republic of South Africa, with the intention of facilitating the commission of any sexual offence against a child, irrespective of whether that offence is committed; or

(b) prints or publishes, in any manner, any information that is intended to promote or facilitate conduct that would constitute a sexual offence against a child, is guilty of the offence of promoting child sex tours and is liable, upon conviction, to a fine or to imprisonment for a period not exceeding 20 years.

(5) A person may not be convicted of an offence in terms of subsections (2) and (3) if that person is -

(a) a child; and

(b) not a person contemplated in paragraphs (a) to (h) of subsection (1).

Prostitution of mentally impaired persons

13. The provisions of section 12 relating to child prostitution apply, with such changes as may be required by the context, to the prostitution of any mentally impaired person.

Extension of common law incest

14. From the date of promulgation of this Act an act which causes penetration as contemplated in sections 3, 4, and 5 of this Act applies to the common law offence of incest.

Witness to be notified of protective measures

15. (1) The prosecution shall inform a witness who is to give evidence in criminal proceedings in which a person is charged with the alleged commission of a sexual offence, or if such witness is a child, such child, his or her parent, guardian or a person *in loco parentis*, of the possibility that he or she may be declared a vulnerable witness in terms of section 16 and of the protective measures listed in paragraphs (a) to (g) of section 16(4) prior to such witness commencing with his or her testimony at any stage of the proceedings.

(2) The court shall, prior to hearing evidence given by a witness referred to in subsection (1), enquire from the prosecutor whether the witness has been informed as contemplated in that subsection and shall note the witness's response on the record of the proceedings, and if the witness indicates that he or she has not been so informed, the court shall ensure that the witness is so informed.

Vulnerable witnesses

16. (1) A court, in criminal proceedings involving the alleged commission of a sexual offence, must declare a witness, other than the accused, who is to give evidence in that proceedings a vulnerable witness if such witness is -

- (a) the complainant in the proceedings pending before the court; or
- (b) a child.

(2) The court may, on its own initiative or on application by the prosecution or any witness, other than a witness referred to in subsection (1) who is to give evidence in proceedings referred to in subsection (1), declare any such witness, other than the accused, a vulnerable witness if in the court's opinion he or she is likely to be vulnerable on account of -

- (a) age;
- (b) intellectual, psychological or physical impairment;
- (c) trauma;
- (d) cultural differences;
- (e) the possibility of intimidation;
- (f) race;
- (g) religion;
- (h) language;
- (i) the relationship of the witness to any party to the proceedings;
- (j) the nature of the subject matter of the evidence; or
- (k) any other factor the court considers relevant.

(3) The court may, if in doubt as to whether a witness should be declared a vulnerable witness in terms of subsection (2), summon any knowledgeable person to appear before and advise the court on the vulnerability of such witness.

(4) Upon declaration of a witness as a vulnerable witness in terms of this section, the court must, subject to the provisions of subsection (5), direct that such witness be protected by one or more of the following measures -

- (a) allowing that witness to be accompanied by a support person as provided for in section 17;

- (b) allowing that witness to give evidence by means of closed-circuit television as provided for in section 158 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), irrespective of any additional qualifying criteria prescribed by that section;
- (c) directing that the witness must give evidence through an intermediary as provided for in section 170A of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), irrespective of any additional qualifying criteria prescribed by that section;
- (d) directing that the proceedings may not take place in open court as provided for in section 153 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), irrespective of any additional qualifying criteria prescribed by that section;
- (e) prohibiting the publication of the identity of the complainant as provided for in section 154 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), or of the complainant's family, including the publication of information that may lead to the identification of the complainant or the complainant's family; or
- (f) any other measure which the court deems just and appropriate.

(5) Once the court has declared a child a vulnerable witness the court must direct that an intermediary as referred to in subsection (4)(c) be appointed in respect of such witness unless the interests of justice justify the non-appointment of an intermediary, in which case the court must record the reasons for not appointing an intermediary.

(6) In determining which one or more of the protective measure or protective measures as referred to in subsection (4) should be applied to a witness, the court must have regard to all the circumstances of the case, including –

- (a) any views expressed by the witness: Provided that the court shall accord such views the weight it considers appropriate in view of the witness's age and maturity;
- (b) views expressed by a knowledgeable person who is acquainted with or has dealt with the witness;
- (c) the need to protect the witness's dignity and sense of safety and to protect the witness from traumatising; and
- (d) the question whether the protective measure or protective measures is or are likely to prevent the evidence given by the witness from being effectively tested by a party to the proceedings.

(7) The court may, on its own initiative or upon the request of the prosecution, at any time revoke or vary a direction given in terms of subsection (4), and the court shall, if such revocation or variation has been made on its own initiative, furnish reasons therefor at the time of the revocation or variation.

Appointment of support persons

17. (1) The police official responsible for the investigation of a charge relating to the alleged commission of a sexual offence shall, at the commencement of such an investigation, inform the complainant in such charge and any child witness or his or her parent, guardian or a person *in loco parentis*, of their right to be accompanied by a support person of the complainant's or witness's choice while making any statement, undergoing any examination, medical or otherwise, being interviewed or being questioned.

(2) A support person referred to in subsection (1) is not appointed by the court and may accompany the complainant or witness during any of the investigative steps contemplated in that subsection.

(3) Whenever criminal proceedings involving the alleged commission of a sexual offence are pending before any court and a child witness, including any complainant, is to give evidence in such court, the court may at any time on its own initiative or upon request by the prosecutor direct that such witness be accompanied by a support person of the witness's choice when giving evidence in court.

(4) If the court has appointed a support person in respect of a witness in terms of subsection (3) on its own initiative, such witness may waive the appointment of such support person: Provided that the court shall accord such waiver the weight it considers appropriate in view of the witness's age and maturity.

(5) The court may, notwithstanding a request in terms of this section, refuse the appointment of a support person of the witness's choice if the court is of opinion that the appointment of such person will not be in the interests of justice, and may, after consultation with such witness and upon furnishing reasons for its refusal, appoint another person as support person.

(6) A support person appointed in terms of this section may accompany and be seated with the relevant witness while such witness is making statements to any person, being interviewed or giving evidence in court.

(7) The court may, if it deems it to be in the interests of justice and in the best interests of the witness, at any time revoke the appointment of a support person and may appoint another person in his or her place.

(8) Whenever a witness in respect of whom a support person has been appointed is to give evidence in court, such person shall affirm to the court prior to giving support that he or she will -

- (a) assist the witness to the best of his or her ability; and
- (b) not in any manner interfere with the witness or the evidence being given.

(9) The State shall pay to a support person appointed in terms of this section the prescribed witness fees for the duration of the period that such person is required to assist a witness giving evidence in court.

Evidence of previous consistent statements and delay in reporting

18. A court, in criminal proceedings involving the alleged commission of a sexual offence, may not draw any inference only from –

- (a) the fact that no previous consistent statements have been made;
- (b) the length of any delay between the alleged commission of such offence and the reporting thereof.

Evidence of surrounding circumstances and impact of sexual offence

19. (1) Evidence of the surrounding circumstances and impact of any sexual offence upon a complainant may be adduced at criminal proceedings where such offence is tried in order to prove -

- (a) whether a sexual offence is likely to have been committed -
 - (i) towards or in connection with the person concerned;
 - (ii) under coercive circumstances as referred to in section 3(3);

(b) for purposes of imposing an appropriate sentence, the extent of the harm suffered by the person concerned.

(2) A court, in criminal proceedings referred to in subsection (1), may, subject to subsections (3) and (4), order that the complainant be assessed by a suitably qualified person in order to establish the impact of the offence being tried upon such complainant.

(3) A court may not order that the complainant be assessed as referred to in subsection (2) unless such complainant, or if he or she is mentally impaired or a child, his or her parent or guardian, consents to the assessment.

(4) In ordering the assessment of a child of the age of 12 years or less, the court must establish whether such child has been assessed before, and if so, must consider the harmful impact of a further assessment upon that child.

Application of caution and requirement for corroboration

20. Notwithstanding the provisions of the common law, any other law or any rule of practice, a court shall not treat the evidence of a witness in criminal proceedings pending before that court with caution and shall not call for corroboration of evidence merely because that witness is -

- (a) the complainant of a sexual offence; or
- (b) a child.

Provision of treatment

21. (1) Where a person has sustained physical, psychological or other injuries as the result of an alleged sexual offence, such person shall, immediately after the alleged offence, receive the appropriate medical care, treatment and counselling as may be required for such injuries.

(2) If a person has been exposed to the risk of being infected by a sexually transmissible infection as the result of a sexual offence, such person shall, immediately after the reporting of the alleged offence to the South African Police Services or to a health care facility -

- (a) be advised by a medical practitioner or a qualified health care professional of the possibility of being tested for such infection; and
- (b) have access to all possible means of prevention, treatment and medical care in respect of possible exposure to a sexually transmissible infection.

(3) The State shall bear the cost of the care, treatment, testing, prevention and counselling as referred to in this section.

Drug and alcohol treatment orders

22. (1) A court may, upon conviction of a person of having committed a sexual offence and if satisfied that the convicted person is dependent on or has the propensity to misuse alcohol or any drug and may benefit from treatment, grant an order in terms of section 296 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977): Provided that such an order may be made in addition to any sentence, including a sentence of imprisonment which is not suspended.

Supervision of dangerous sexual offenders

23. (1) A court may declare a person who has been convicted of a sexual offence a dangerous sexual offender if such person has -

- (a) more than one conviction for a sexual offence;
- (b) been convicted of a sexual offence which was accompanied by violence or threats of violence; or
- (c) been convicted of a sexual offence against a child, unless such person is a child himself or herself.

(2) Whenever a dangerous sexual offender has been convicted of a sexual offence and sentenced by a court to imprisonment without the option of a fine, the court may order, as part of the sentence, that when such offender is released after serving part of a term of imprisonment imposed or on parole, the Department of Correctional Services shall ensure that the offender is placed under long term supervision by an appropriate person, for the remainder of the sentence.

(3) For purposes of subsection (2) long term supervision means supervision of a rehabilitative nature for a period of not less than five years.

(4) A court may not make an order referred to in subsection (2) unless the court had regard to a report by a probation officer, social worker or other person designated by the court, which report must contain an exposition of –

- (a) the suitability of the offender to undergo a long term supervision order;
- (b) the possible benefits of the imposition of a long term supervision order on the offender;
- (c) a proposed rehabilitative programme for the offender;
- (d) information on the family and social background of the offender;
- (e) recommendations regarding any conditions to be imposed upon the granting of a long term supervision order; and
- (f) any other matter as directed by the court.

(5) An order referred to in subsection (2) must specify –

- (a) that the offender is required to take part in a rehabilitative programme;
- (b) the nature of the rehabilitative programme to be attended;
- (c) the number of hours per month that the offender is required to undergo rehabilitative supervision; and
- (d) that the offender is required, where applicable, to refrain from using or abusing alcohol or drugs.

(6) An order referred to in subsection (2) may specify that the offender is required to –

- (a) refrain from visiting a specified location;
- (b) refrain from seeking employment of a specified nature; and
- (c) subject himself or herself to a specified form of monitoring.

(7) A long term supervision order made by a court in terms of this section must be reviewed by that court within three years from the date on which the order was implemented or within such shorter period as the court may direct: Provided that the Commissioner of Correctional Services may refer such an order to that court for review at any time.

(8) Upon making a long term supervision order in term of this section, the court must explain to the victim, including the next of kin of a deceased victim, that they have the right to be present at the review proceedings referred to in subsection (7) and to make representations.

(9) A court which has granted a long term supervision order in terms of this section may, upon evidence that a dangerous sexual offender has failed to comply with such order or with any condition imposed in connection with such order, direct that such offender -

- (a) be warned to appear before that court or another court of similar or higher jurisdiction at a specified place and on a specified date and time; or
- (b) be arrested and brought before such court.

(10) Upon the appearance of a dangerous sexual offender at a court pursuant to the provisions of subsection (9), such court shall conduct an inquiry into the reasons for such offender's failure to comply with a long term supervision order or with any condition imposed in connection with such order and may -

- (a) confirm the original order and any conditions imposed in connection with such order;
- (b) vary or withdraw such order or any such condition;
- (c) impose an additional condition or conditions;
- (d) review the original sentence and impose an alternative sentence; or
- (e) make any other order as the court deems fit.

(11) If a court has directed that a dangerous sexual offender is required to take part in a rehabilitative programme as contemplated in this section, the court may order that such offender, upon being found by the court to have adequate means, must contribute to the costs of such programme to the extent specified by the court.

National Director of Public Prosecutions to decide whether police investigation should be discontinued

24. The decision as to whether the investigation by a police official of a complaint that a sexual offence has been committed should be discontinued, shall rest with the National Director of Public Prosecutions.

Extra-territorial jurisdiction

25. (1) Any person who, while being a citizen of or permanently residing in the Republic of South Africa, commits any act outside the Republic which would have constituted a sexual offence had it been committed inside the Republic, is guilty of the offence which would have been so constituted and is liable to the same penalty prescribed for such offence.

(2) A person may not be convicted of an offence contemplated in subsection (1) if such person has been acquitted or convicted, in the country where the act was committed, of the act that would have constituted a sexual offence inside the Republic of South Africa.

(3) No prosecution may be instituted under this section without the written consent of the Director of Public Prosecutions who has jurisdiction in the area where the person contemplated in subsection (1) is ordinarily resident.

(4) If the consent of the Director of Public Prosecutions to institute prosecution has been obtained as referred to in subsection (3), prosecution may be instituted in any appropriate court designated by such Director and such court shall have jurisdiction to try the matter as if the offence or offences had been committed within its jurisdiction.

Non-disclosure of conviction of sexual offence

26. Any person who has been convicted of a sexual offence and who fails to disclose such conviction when applying for employment that will place him or her in a position of authority or care of children, or when offering or agreeing to take care of or supervise children, shall be guilty of an offence and liable, upon conviction, to a fine or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment.

Implementation of this Act

27. This Act must be implemented by organs of state in the national, provincial and local spheres of government subject to –

- (a) any specific section of this Act and regulations allocating roles and responsibilities; and
- (b) the national policy framework published in terms of section 28.

National policy framework

- 28.** (1) The Minister for Justice and Constitutional Development must –
- (a) prepare a national policy framework to guide the implementation, enforcement and administration of this Act in order to secure acceptable and uniform treatment of all sexual offence matters;
 - (b) review the policy framework at least once every five years; and
 - (c) when required, amend the policy framework.

(2) The Minister must publish the national policy framework and each amendment of the framework by notice in the Government Gazette.

- (3) The national policy framework binds –
- (a) all organs of state in the national, provincial and local spheres of government; and
 - (b) any other organisations involved in programmes or projects concerning sexual offence matters.

Contents

- 29.** (1) The national policy framework must –
- (a) be a coherent policy directive appropriate for the Republic as a whole to guide the apprehension and prosecution of offenders and the protection of victims of sexual offences;
 - (b) provide for an integrated, co-ordinated and uniform approach by organs of state in all spheres of government and other organisations on which it is binding; and
 - (c) be consistent with the provisions of this Act.

(2) The national policy framework must reflect the following core components:

- (a) national objectives to ensure a uniform approach on how sexual offence matters should be dealt with;
- (b) priorities and strategies to achieve those objectives;
- (c) performance indicators to measure progress with the achievement of those objectives;

- (d) provide for uniform accountability and disciplinary mechanisms for all functionaries involved;
- (e) a framework for co-operative governance on a cross-functional and multi-disciplinary basis in the implementation of this Act;
- (f) the allocation to the different spheres of government and to different organs of state of primary and supporting roles and responsibilities in this regard;
- (g) the engagement of non-governmental organisations in the implementation, enforcement and administration of this Act and in the development and implementation of programmes and projects giving effect to this Act; and
- (h) measures to ensure adequate funds.

Consultative process

30. (1) In developing and publishing the national policy framework or any amendment to the framework, the Minister must-

- (a) generally follow a consultative process as may be appropriate in the circumstances;
- (b) consult with –
 - (i) Cabinet members whose departments are affected by the framework or amendment; and
 - (ii) organs of state in other spheres of government in accordance with the principles of co-operative government as set out in Chapter 3 of the Constitution; and
- (c) engage the participation of the public and non-governmental organisations in the process.

(2) The Minister may not publish the national framework, or any amendment to the framework, except with the concurrence of the Cabinet members whose departments are directly affected by the framework or amendment.

Regulations

31. The Minister for Justice and Constitutional Development, in consultation with the Ministers of Safety and Security, Correctional Services, Social Development and Health, may make regulations regarding -

- (a) any matter which is required or permitted by this Act to be prescribed by regulation;
- (b) the inter-sectoral implementation of this Act; and
- (c) any other matter which is necessary or expedient to prescribe in order to achieve or promote the objects of this Act.

Repeal and amendment of laws

32. The Acts specified in the Schedule are hereby repealed or amended to the extent set out in the third column of the Schedule.

Application of this Act in relation to Sexual Offences Act, 1957

33. In the event of any inconsistency between the provisions of sections 3, 10, 12, 12A, 20 and 21 of the Sexual Offences Act, 1957 (Act No. 23 of 1957), insofar as those provisions relate to children, and any of the provisions of this Act, this Act takes precedence.

Short title and commencement

34. This Act is called the Sexual Offences Act, 20.. and takes effect on a date fixed by the President by proclamation in the *Gazette*.

Schedule

Note: [] Words in **bold** type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

LAWS REPEALED OR AMENDED BY SECTION 32

No. and year of law	Short title	Extent of repeal or amendment
Act 23 of 1957	Sexual Offences Act	The repeal of sections 9, 11, 13, 14, 15, 18, 18A and 20A.
Act 51 of 1977	Criminal Procedure Act	<p>1. The amendment of section 18 by the substitution for that section of the following section:</p> <p style="text-align: center;">“Prescription of right to institute prosecution</p> <p>18. The right to institute a prosecution for any offence, other than the offences of –</p> <ul style="list-style-type: none"> (a) murder; (b) treason committed when the Republic is in a state of war; (c) robbery, if aggravating circumstances were present; (d) kidnapping; (e) child-stealing; [or] (f) rape; <u>(g) oral genital sexual violation; or</u> <u>(h) sexual violation</u> <p>shall, unless some other period is expressly provided for by law, lapse after the expiration of a period of 20 years from the time when the offence was committed.”</p> <p>2. The amendment of section 145 by the substitution for paragraph(b) of subsection (1) of the following paragraph:</p> <p>“(b) An assessor for the purposes of this section means a person who, in the opinion of the judge who presides at a trial, has experience in the administration of justice or skill in any matter which may be considered at the trial, <u>including, in the case where an accused is charged with a sexual offence, experience or knowledge of child development, the impact of sexual offences on victims of such offences, the characteristics of sexual offenders, or knowledge of the</u></p>

No. and year of law	Short title	Extent of repeal or amendment
Act 51 of 1977	Criminal Procedure Act	<p><u>circumstances that may contribute to the vulnerability of victims of sexual offences.</u>"</p> <p>3. The amendment of section 154 -</p> <p>(a) by the substitution for subsection (5) of the following subsection:</p> <p>“(5) Any person who publishes any information in contravention of this section or contrary to any direction or authority under this section or who in any manner whatever reveals the identity of a witness in contravention of a direction under section 153(2), shall be guilty of an offence and liable on conviction to a fine [not exceeding R1 500] or to imprisonment for a period not exceeding [one] <u>two years</u> or to both such fine and such imprisonment <u>if the person in respect of whom the publication or revelation of identity was done, is over the age of 18 years, and if such person is under the age of 18 years, to a fine or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment.</u>”</p> <p>(b) by the addition of the following subsection:</p> <p>“(6) <u>The provisions of section 300 are applicable, with the changes required by the context, upon the conviction of a person in terms of subsection (5) and if -</u></p> <p>(a) <u>the criminal proceedings that gave rise to the publication of information or the revelation of identity as contemplated in that subsection related to a charge that an accused person committed or attempted to commit any indecent act towards or in connection with any other person or any act for the purpose of procuring or furthering the commission of an indecent act towards or in connection with any other person; and</u></p> <p>(b) <u>the other person referred to in paragraph (a) suffered any physical, psychological or other injury or loss of income or support.</u>”</p> <p>4. The amendment of section 158 by the substitution for the introductory part of subsection (3) of the following introductory part:</p> <p>“(3) A court may make an order contemplated in subsection (2) only if facilities therefore are readily available or obtainable and if it appears to the court that to do so would <u>either</u> –“</p>

No. and year of law	Short title	Extent of repeal or amendment
Act 51 of 1977	Criminal Procedure Act	<p>5. The amendment of section 164 by the substitution for subsection (1) of the following subsection:</p> <p>“(1) Any person[, who from ignorance arising from youth, defective education or other cause, is found not to understand the nature and import of the oath or the affirmation,] may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person <u>is able to understand questions put to him or her and to respond to such questions in a manner which is intelligible; and provided further that such person</u> shall, in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth [, the whole truth and nothing but the truth].”</p> <p>6. The amendment of section 166 by the addition of the following subsection:</p> <p>“(4) <u>An accused in criminal proceedings involving the alleged commission of a sexual offence who has no legal representation shall put any questions to a vulnerable witness as contemplated by section 16 of the Sexual Offences Act, 20.. (Act .. of 20..) by stating the question to the court, which shall repeat the question accurately to the witness.</u>”</p> <p>7. The amendment of section 170A by the addition of the following subsections:</p> <p>“(5) <u>If a court has directed that a vulnerable witness as referred to in section 16 of the Sexual Offences Act, 20.. (Act xx of 20..), should be allowed to give evidence through an intermediary, such intermediary may -</u></p> <p>(a) <u>convey the general purport of any question to the relevant witness;</u></p> <p>(b) <u>inform the court at any time that the witness is fatigued or stressed; and</u></p> <p>(c) <u>request the court for a recess.</u></p> <p>(6) <u>An intermediary referred to in subsection (5) shall be summoned to appear in court on a specified date and at a specified place and time to act as an intermediary and shall, upon failure to appear as directed, appear before the court to advance reasons for such failure, upon which the court may act as it deems fit.</u>”</p>

No. and year of law	Short title	Extent of repeal or amendment
Act 51 of 1977	Criminal Procedure Act	<p>8. The amendment by the addition after section 192 of the following section:</p> <p><u>Children competent to testify in criminal proceedings</u></p> <p><u>192A.</u> (1) <u>All persons below the age of 18 years shall be presumed to be competent to testify in criminal proceedings and no such person shall be precluded from giving evidence unless he or she is found, at any stage of the proceedings, not to have the ability or the mental capacity, verbal or otherwise, to respond to questions in a way that is understandable to the court.</u></p> <p>(2) <u>The evidence given by a person referred to in subsection (1) shall be admissible in criminal proceedings contemplated in that subsection, and the court shall attach such weight to such evidence as it deems fit.</u></p> <p>(3) <u>The court shall note the reasons for a finding in terms of subsection (1) on the record of the proceedings.”</u></p> <p>9. The amendment of section 195 by the substitution for subsection (1)(a) of the following subsection:</p> <p>“(a) any offence committed against the person of either of them or of a child of either of them <u>or of a child that is in the care of either of them;</u></p> <p>(b) ...”</p> <p>10. The amendment of section 227 -</p> <p>(a) by the substitution for the heading of the following heading:</p> <p><u>“Evidence of character and previous sexual history “;</u></p> <p>(b) by the substitution for subsection (1) of the following subsection:</p> <p>“(1) Evidence as to the character of an accused or as to the character of any <u>[female] person</u> against or in connection with whom any offence of an indecent nature is alleged to have been committed, shall, subject to the provisions of subsection (2), be admissible or inadmissible if such evidence would have been admissible or inadmissible on the thirtieth day of May, 1961.”;</p>

No. and year of law	Short title	Extent of repeal or amendment
Act 51 of 1977	Criminal Procedure Act	<p>(c) by the substitution for subsection (2) of the following subsection:</p> <p>“(2) <u>No evidence as to any previous sexual [intercourse by, or any sexual] experience or conduct of any [female] person against or in connection with whom any offence of a sexual nature is alleged to have been committed, other than evidence relating to sexual experience or conduct in respect of the offence which is being tried, shall [not] be adduced, and [such female shall not be questioned] no question regarding such sexual [intercourse or sexual] experience or conduct, [except with the leave of the court, which leave shall not be granted unless the court is satisfied that such evidence or questioning is relevant: Provided that such evidence may be adduced and such female may be so questioned in respect of the offence which is being tried] shall be put to such person, the accused or any other witness at the proceedings pending before the court unless the court has, on application by any party to the proceedings, granted leave to adduce such evidence or to put such question.</u>” ;</p> <p>(d) by the substitution for subsection (3) of the following subsection:</p> <p>“(3) Before an application for leave contemplated in subsection (2) is heard, the court [shall] <u>may direct that any person, including the complainant, whose presence is not necessary may not be present at the proceedings [and the court may direct that a female referred to in subsection (2) may not be present].</u>”;</p> <p>(e) by the substitution of subsection (4) of the following subsection:</p> <p>“(4) <u>The court shall, subject to subsection (5), grant the application referred to in subsection (2) if satisfied that such evidence or questioning –</u></p> <p>(a) <u>relates to a specific instance of sexual activity relevant to a fact in issue;</u></p> <p>(b) <u>is likely to rebut evidence previously adduced by the prosecution;</u></p> <p>(c) <u>is likely to explain the presence of semen or the source of pregnancy or disease or any injury to the complainant, where it is relevant to a fact in issue;</u></p> <p>(d) <u>is not substantially outweighed by its potential prejudice to the complainant’s personal dignity and right to privacy; or</u></p>

No. and year of law	Short title	Extent of repeal or amendment
Act 51 of 1977	Criminal Procedure Act	<p>(e) <u>is fundamental to the accused's defence.</u></p> <p>(f) and by the addition of the following subsection:</p> <p><u>"(5) The court shall not grant an application referred to in subsection (2) if, in its opinion, such evidence or questioning –</u></p> <p>(a) <u>relates to the sexual reputation of the complainant and is intended to challenge or support the credibility of the complainant;</u></p> <p>(b) <u>is sought to be adduced to support an inference that by reason of the sexual nature of the complainant's experience or conduct, the complainant –</u></p> <p>(i) <u>is more likely to have consented to the offence being tried; or</u></p> <p>(ii) <u>is less worthy of belief."</u></p> <p>11. The amendment of section 238 by the substitution for subsection (1) of the following subsection:</p> <p><u>"(1) At criminal proceedings at which an accused is charged with incest –</u></p> <p>(a) <u>it shall be sufficient to prove that the [woman or girl] person on whom or by whom the offence is alleged to have been committed, is reputed to be the lineal ascendant or descendant or the sister, brother, stepmother, stepfather, [or] stepdaughter or stepson of the other party to the incest;</u></p> <p>(b) <u>the accused shall be presumed, unless the contrary is proved, to have had knowledge, at the time of the alleged offence, of the relationship existing between him or her and the other party to the incest."</u></p> <p>12. The amendment of section 276A -</p> <p>(a) by the insertion after subsection (2) of the following subsection:</p> <p><u>"(2A) Punishment imposed under paragraphs(h) or (i) of subsection 276(1) on a person convicted of any sexual offence shall, if practicable and if the convicted person demonstrates the potential to benefit from treatment, include the attendance of and participation in a sex offence specific accredited treatment programme, the cost of which shall be borne by the convicted person himself or herself or the State if the court is satisfied that the</u></p>

No. and year of law	Short title	Extent of repeal or amendment
Act 51 of 1977	Criminal Procedure Act	<p><u>convicted person has no adequate means to bear such cost. ; and</u></p> <p>(b) by the substitution for paragraph (b) of subsection (1) of section 276A of the following paragraph:</p> <p>“(b) for a fixed period not exceeding [three] five years.”</p> <p>13. The amendment of section 335A -</p> <p>(a) by the substitution for subsection (2) of the following subsection:</p> <p>“(2) Any person who contravenes the provisions of subsection (1) shall be guilty of an offence and liable on conviction to a fine [not exceeding R1 500] or to imprisonment for a period not exceeding [one] two years or to both such fine and such imprisonment <u>if the person whose identity has been revealed is over the age of 18 years, and if such person is under the age of 18 years, to a fine or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment.</u>”; and</p> <p>(b) by the addition of the following subsection:</p> <p>“(3) <u>The provisions of section 300 are applicable, with the changes required by the context, upon the conviction of a person in terms of subsection (2) and if the person whose identity has been revealed suffered any physical, psychological or other injury or loss of income or support.</u>”</p>
Act 32 of 1944	Magistrates' Courts Act	<p>14. The amendment of section 93<i>ter</i> by the substitution for subsection (1) of the following subsection:</p> <p>“(1) The judicial officer presiding at any trial may, if he deems it expedient for the administration of justice-</p> <p>(a) before any evidence has been led; or</p> <p>(b) in considering a community-based punishment in respect of any person who has been convicted of any offence,</p> <p>summon to his assistance any one or two persons who, in his opinion, may be of assistance at the trial of the case or in the determination of a proper sentence, as the case may be, to sit with him as assessor or assessors: Provided that if an accused is standing trial in the court of a regional division on a charge of murder, whether together with other charges or accused or not, the judicial officer shall</p>

No. and year of law	Short title	Extent of repeal or amendment
Act 32 of 1944	Magistrates' Courts Act	at that trial be assisted by two assessors unless such an accused requests that the trial be proceeded with without assessors, whereupon the judicial officer may in his discretion summon one or two assessors to assist him: <u>Provided further, that if an accused is standing trial on a charge of having committed any sexual offence, whether together with other charges or not, the judicial officer may at that trial be assisted by at least one assessor who has experience or knowledge of child development, the impact of sexual offences on victims of such offences, the characteristics of sexual offenders, or knowledge of the circumstances that may contribute to the vulnerability of victims of sexual offences.</u>
Act 68 of 1969	Prescription Act	<p>15. The amendment of section 12 -</p> <p>(a) by the substitution for subsection (1) of the following subsection:</p> <p>“(1) Subject to the provisions of subsections (2), [and] (3), (4) and (5), prescription shall commence to run as soon as the debt is due.”; and</p> <p>(b) by the addition of the following subsections:</p> <p>“(4) <u>Prescription shall not commence to run in respect of a debt based on sexual abuse during the time in which the creditor is unable to institute proceedings because of his or her physical, mental or psychological condition.</u></p> <p>(5) <u>Unless the contrary is proved, a creditor to whom a debt based on sexual abuse is due shall be presumed to have been unable to institute proceedings earlier than it was actually instituted.</u>”</p>
Act 71 of 1991	Businesses Act	<p>16. The amendment of Item 2 of Schedule 1 by the addition after subsection (h) of the following paragraph:</p> <p>“(i) providing facilities for persons to have sexual intercourse.”.</p>
Act 105 of 1997	Criminal Law Amendment Act	<p>17. The amendment of Schedule 2 -</p> <p>(a) by the substitution for Part I of the following Part:</p>

No. and year of law	Short title	Extent of repeal or amendment
Act 105 of 1997	Criminal Law Amendment Act	<p>“PART I</p> <p>Murder, ...</p> <p>Rape –</p> <p>(a) when committed -</p> <p>(i) ...</p> <p>(ii) ...</p> <p>(iii) ...</p> <p>(iv) ...</p> <p>(b) where the victim -</p> <p>(i) is a [girl] <u>person</u> under the age of 16 years;</p> <p>(ii) is a physically disabled [woman] <u>person</u> who, due to her or his physical disability, is rendered particularly vulnerable; or</p> <p>(iii) is a mentally ill [woman] <u>person</u> as contemplated in section 1 of the Mental Health Act, 1973 (Act 18 of 1973); or</p> <p>(c) involving the infliction of grievous [bodily] harm.</p> <p><u>Sexual violation involving the infliction of grievous harm.</u></p> <p><u>Oral genital sexual violation of a person under the age of 16 years.</u>”; and</p> <p>(b) by the substitution for Part III of the following Part:</p> <p>“PART III</p> <p>Rape in circumstances other than those referred to in Part I.</p> <p>Indecent assault on a child under the age of 16 years, involving the infliction of bodily harm</p> <p><u>Sexual violation.</u></p> <p><u>Oral genital sexual violation of a person 16 years of age or older.</u></p> <p>Assault with intent to do grievous bodily harm on a child under the age of 16 years.</p> <p>Any offence in contravention of section 36 of the Arms and Ammunitions Act, 1969 (Act 75 of 1969), on account of being in possession of more than 1000 rounds of ammunition intended for firing in an arm contemplated in section 39(2)(a)(i) of that Act.”.</p>

ANNEXURE B

LIST OF RESPONDENTS WHO COMMENTED ON DISCUSSION PAPER 85: THE SUBSTANTIVE LAW

1. R Freeth: Executive Committee of the Western Cape Network on Violence Against Women.
2. S Manson and L Fredman: Clinical Psychologists.
3. I Dala.
4. P Camay: Co-operative for Research and Education.
5. W Clark: Senior Public Prosecutor, Verulam.
6. M Mncadi: Secretariat for Safety and Security.
7. SEB Mazibuko: Mondlo Residents Committee.
8. KS Jones: Attorney.
9. Law Society of the Cape of Good Hope.
10. M Hove: KZN LGBT Youth.
11. P van Rensburg.
12. Adv N van Wyngaardt: Indecent Crime Unit, SAPS.
13. Rashid Patel and Company (Attorneys) and Natal Law Society.
14. D Stuurman: Kuilsriver Support Group.
15. HW Moldenhauer: Chief Magistrate, Pretoria.
16. Dr LB Jacklin: Transvaal Memorial Institute.
17. Commission on Gender Equality.
18. VCR Msolomba.
19. M Makhubo: Township AIDS Project.
20. C Smith.
21. A White.
22. An Australian observer: Anonymous.
23. AK Mahumani: Magistrate's Office, Giyani.
24. Submission emanating from SAPS CPU Workshop.
25. PA Palmer.
26. Office of the Provincial Head: Detective Service, Western Cape.
27. L Cawood: Childline, Gauteng.
28. M de Vos: Mosaic Training Service and Healing Centre for Women.
29. RH du Toit.

30. J Sloan: Sex Worker Education and Advocacy Taskforce.
31. Johan du Toit Attorneys.
32. Prof JMT Labuschagne: University of Pretoria.
33. Prof SE van der Merwe: University of Stellenbosch.
34. Prof J Sloth-Nielsen: University of the Western Cape.
35. R Louw: University of Natal.
36. HM Meintjies: Deputy Director of Public Prosecutions, Transvaal.
37. R Blumrick: Senior State Advocate, DPP's Office, Pietermaritzburg.
38. MS Ramaite: DPP, Transvaal.
39. SK Rajoo: KZN Network on Violence Against Women.
40. J Hicks: Provincial Parliamentary Programme.
41. M Seedat: Institute for Multi-Party Democracy.
42. C Edwards: KZN Network on Violence Against Women.
43. N Ramsden: Children's Rights.
44. F Zikalala: Commission on Gender Equality.
45. K Stone and N Thejane: SA Human Rights Commission.
46. B Ngwenya: Campus Law Clinic.
47. M O Brian: ECPAT International.
48. P Solomons: Molo Songololo.
49. Joint submission: Parow Clinic, Western Cape Education Department; Streets; The Homestead, UWC; Ilitha Labantu; Grassroots Education Trust; Safeline; SWEAT; Community Law Centre, University of the Western Cape; NADEL; Saystop; Rural Development Initiative; It's Your Move; the Parent Centre and Molo Songololo.
50. SL Kloppers: Public Prosecutor, Richmond.
51. PC Willis.
52. M Cornell: The AIDS Consortium.
53. Prof W Coertze, Medunsa and Dr K Muller, Chief District Surgeon.
54. B Gaffley.
55. G Cosme.
56. D Bosch: Consultant on Child Labour.
57. Dr R Jewkes: Medical Research Council.
58. Dr JM Loffell: Johannesburg Child Welfare Society.
59. Joint submission: Institute for Security Studies, Nisaa Institute for Women's Development, The Pretoria Maintenance Forum and Portia Mnisi.
60. Prof DAP Louw: University of the Free State.

61. Adv K Worrall-Clare.
62. Zehir Omar Attorneys.
63. Dr T Naidoo.

LIST OF RESPONDENTS WHO COMMENTED ON DISCUSSION PAPER 107: PROCESS AND PROCEDURE

1. Prof PWW Coetzer: Department of Community Health, Medunsa.
2. Dr K Müller: Department of Health, Gauteng Province.
3. Mr Prometheus Mabuza: Save the Children, Sweden.
4. Prof J Burchell: Department of Criminal Justice, University of Cape Town.
5. Prof PJ Schwikkard: Department of Criminal Justice, University of Cape Town.
6. Prof JMT Labuschagne: Department of Private Law, University of Pretoria.
7. Linda Dobbs: Queens Counsel, London.
8. Capt L Evans: Serious and Violent Crime, Detective Service, South African Police Service.
9. Francois Luyt: Attorney, Muizenberg.
10. Adv's P Smith and A du Plessis: Sexual Offence and Community Affairs Unit: National Prosecuting Authority.
11. Alan & Krystyna Smith.
12. Anita Allen.
13. Rev. Dr Peter Hammond & Jeanine McGill: United Christian Action.
14. Prof PA Carstens: Department of Public Law, University of Pretoria.
15. Dr Lorna Jacklin.
16. Dr Rachel Jewkes.
17. Dr Karen Müller: Unit for Child Witness Research and Training, Vista University.
18. Judge Eberhard Bertelsmann: Pretoria High Court.
19. Judge Belinda van Heerden: Cape High Court.
20. Mrs E M Van Deventer.
21. Anonymous submission by a sexual offence victim's parent.
22. Marius du Randt: Office of the Premier.
23. Suchilla Leslie: S.A National Council for Child Welfare.
24. Mollie Kemp: School Social Worker, Department of Education and Culture, Kwazulu-Natal.
25. Lulama Nongogo & Teboho Maitse: Commission on Gender Equality.

26. Zehir Omar Attorneys.
27. RCA Henney: Regional Magistrate, Wynberg Regional Court.
28. Participants of the Gender Equality Workshop in Umtata.
29. Mark Visser: Democratic Alliance.
30. Irene Filander: Child Welfare, Vereeniging.
31. Nolitha Mazwai: Rape Crisis, Cape Town.
32. Barbara Anne Frost: UNITRA.
33. Ntomboxolo Dyantjie: Eastern Cape Network on Violence Against Women.
34. Dr Susan Gräbe: RP Clinic.
35. Celestia Elizabeth Beswick: Volunteer Community Worker.
36. Johanna Kehler: NADEL Human Rights Research & Advocacy Project.
37. Carol Bouwer: Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN).
38. Helen Alexander: SWEAT.
39. Mev RE Leviny: Child Abuse Task Team Knysna.
40. Mrs D Petherbridge: A.C.V.V, George.
41. Marsh Levendal & Amanda Beukes: Creating Effective Families, Mossel Bay.
42. Koos Strauss: The Greater Rape Intervention Project (GRIP), Nelspruit.
43. Lilian Artz: Institute of Criminology, Faculty of Law, University of Cape Town.
44. Helene Combrinck: Community Law Centre, University of the Western Cape.
45. Jacqui Gallinetti: Children's Rights Project and Community Law Centre, University of the Western Cape.
46. Hayley Galgut: Sonnenberg Hoffmann & Galombik Attorneys.
47. Daksha Kassan: Children's Rights Project and Community Law Centre, University of the Western Cape.
48. Dr Lorna Martin: Department of Forensic Medicine & Toxicology, University of Cape Town.
49. Nikki Naylor: Women's Legal Centre, Cape Town.
50. Dee Smythe: Institute of Criminology, Faculty of Law, University of Cape Town.
51. Molo Songololo.
52. E.M. Setai: Thusanang Advice Centre.
53. Martha Humn: Tshwaraganang Women Organisation.
54. Mokgabi Mmola: Maboloka HIV/AIDS Awareness Organisation (MAHAAO).
55. Ms B.J. Matshego: Department of Safety Services and Correctional Supervision.
56. Moipone Hakala: Dept of Social Services.

57. Law Society of the Cape of Good Hope.
58. Edmund Szndrauhi: Director of Public Prosecutions, KZN.
59. Adv R Meintjes and Adv Henning SC, Office of the Director of Public Prosecutions: Transvaal.
60. Michael Mokwena: SAPS, Commander CSC.
61. FC Shaw: Welfare Forum Durban and South Region.
62. Representations from Mabopane.
63. Standing Together to Oppose Pornography (S.T.O.P).
64. SAVF North West Province

Witness Statement

Statement of.....

Age if under 18(If over 18 insert 'over 18')

This statement (consisting ofpages signed by me) is true to the best of my knowledge and belief and I make it knowing that, if it is tendered in evidence, I shall be liable to prosecution if I have wilfully stated in it anything which I know to be false or do not believe to be true.

Dated the Day of 20 . .

Signature

1.

Signature.....

Signature witnessed by

-2-

Full names.....

Home address:

.....

Home Telephone No Work telephone No.

Occupation Date and place of birth

Height ID No.....

Dates to be avoided. Delete dates of non-availability of witness (not police officer)

Month of

Month of

1	2	3	4	5	6	7	1	2	3	4	5	6	7
8	9	10	11	12	13	14	8	9	10	11	12	13	14
15	16	17	18	19	20	21	15	16	17	18	19	20	21
22	23	24	25	26	27	28	22	23	24	25	26	27	28
29	30	31					29	30	31				

Contact point, if different from above

Address.....

Telephone No.....

Statement taken by (print name).....

Station.....