

SOUTH AFRICAN LAW COMMISSION

PROJECT 107

SEXUAL OFFENCES: PROCESS AND PROCEDURE

EXECUTIVE SUMMARY

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EXECUTIVE SUMMARY: DISCUSSION PAPER ON SEXUAL OFFENCES

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. 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 that any proposed changes to the law relating to sexual offences will have a far-reaching effect on the position not only of children but of adults as well. The scope of the investigation was subsequently expanded to include sexual offences against adults and renamed 'sexual offences'.

As part of an incremental approach, the South African Law Commission is releasing the discussion paper on process and procedure relating to sexual offences, the second of a four-part series, for general information and comment. The first discussion paper,¹ published in August 1999, dealt with the substantive law relating to sexual offences, while the third and fourth papers will address the controversial issues of adult prostitution and pornography.

The discussion paper contains a draft Bill (attached as Annexure A), also attached to this summary as Annexure A, which embodies some progressive recommendations for the reform of the law relating to sexual offences. Although the discussion paper concentrates on aspects of the procedural law in relation to sexual offences the Bill which accompanies the discussion paper includes substantive law provisions, all of which have been revised following the integration of submissions received on the discussion paper on the substantive law. An explanation of the amendments to the draft Bill, with an indication of some of the respondents who influenced the Commission's thinking in a significant way precedes Annexure A. The release of the discussion paper on process and procedure relating to sexual offences will be followed by a joint report on both the substantive and procedural law relating to sexual offences. The joint report on sexual offences will contain the final recommendations of the Commission and will be accompanied by a Bill on Sexual Offences. The report and the Bill will, once approved by the Commission, be handed to the Minister for Justice and Constitutional Development for his consideration.

The discussion paper does, however, not contain the final views of the Commission and

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South African Law Commission (Project 107) **Discussion Paper 85: Sexual Offences: Substantive Law** (hereinafter Discussion Paper 85).

comments and submissions are invited. For the purpose of submissions, it is advised that the discussion papers on the substantive law and process and procedure be read together.

The paper includes a discussion of the various agencies or service providers responsible for dealing with the victims and offenders of sexual offences and the procedures for disclosure, reporting, investigation, the court hearing, rules of evidence and sentencing of the sexual offender.

The paper 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. Also included in the paper are recommendations which are non-legislative in nature. These recommendations will 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 will be encouraged by the appropriate government structures and that communities will be galvanised to participate in the fight against this form of violence.

The essence of the recommendations proposed in the discussion paper is briefly contained below.

Guiding principles

A set of guiding principles is 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 is recommended that a set of guiding principles for the management of sexual offence cases be included in the proposed new Sexual Offence Act as a substantive clause in the Act.

A strategy for the multi-disciplinary intervention of sexual offences (Protocols and Memoranda or codes of good practice)

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. There is therefore 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 is of the opinion 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 is suggested 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,² it is further suggested that provision should be made in legislation for the development of such a basic framework and its purpose.

National Government must ensure compliance with a national framework of this nature. 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. In-house regulations, codes or memoranda of good practice must reflect each role-player's commitment and accountability in this regard. 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. A multi-disciplinary co-ordinating committee must be established to monitor, supervise and evaluate the implementation of such a framework, on an ongoing basis.

Case management

Owing to the nature of sexual crimes and the devastating effects to the victim's life, the sooner the criminal justice process (from the point of first disclosure to that of the finalisation of the criminal court process) can render support to the victim, the sooner the victim can start to rebuild his or her life. Victims of sexual offences and those persons involved with supporting these victims on a day-to-day basis are generally critical of the delays which are inherent within the present criminal justice system.

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Inclusion in legislation could lead to non-flexibility and rigidity which may work against the very purpose of such agreements.

The Commission recommends -

- G the introduction of 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;
- G that 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;
- G that non-compliance with the case-flow management strategy (including time-limits) should be met with sanction. It is proposed that an investigation be undertaken to determine the viability of introducing a system of costs in criminal proceeding;
- G that 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.

Agencies or service providers

The discussion paper identifies agencies or service providers who are involved with or play a key role in the prosecution of a sexual offence case, including those tasked with providing services to victims of sexual offences. Each agency discussed is subjected to a critical analysis of existing practices followed, where applicable, by recommendations for change. These recommendations will be reflected below.

South African Police Service

- G 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 that should receive attention include the fact that police members do not have a discretion in accepting a charge of sexual assault; that no sworn statement should be taken immediately from the victim; that the case must 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 must ensure that the medical examination is completed; that the investigating officer must keep the victim informed of all developments regarding the case; and so forth.

- G 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.
- G 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.
- G 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.
- G The role of SAPS forensic social workers must be clarified and formalised as a matter of urgency.

Medico-legal services

- G It is recommended that all appropriately trained medical personnel,³ in the first consultation, should conduct a proper medical examination of and treat or refer the victim of sexual violence for specialised treatment or counselling, where appropriate. It is further recommended that 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 and the injuries sustained during the attack. Medical personnel should also advise the investigating team on what other possible evidence could be collected, etc.

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We do not recommend that doctors be the only persons to conduct medico-legal examinations.

- G** 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. This can ensure greater accountability and clear lines of responsibility for, *inter alia*, the provision of crime evidence collection kits and training. The Commission therefore recommends 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. The Commission also recommends that mechanisms be developed to ensure that the national and provincial Departments of Health and the various controlling bodies⁴ in the medical field co-operate with SAPS in this program as it pertains to the medical aspects of evidence collection.
- G** It is recommended that the victim⁵ 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.
- G** Despite the risk of contracting HIV or STD's through being sexually assaulted, district surgeons are not procedurally obliged to raise the issue with such victims. Aside from the potential health consequences, if it is not established at the time of the sexual offence that the victim is HIV-negative and he or she later contracts HIV, it would be impossible to raise this at the trial as evidence or as an aggravating factor in the sexual assault. It is recommended that 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.
- G** The Guidelines are silent on support mechanisms for medical practitioners who have to examine victims of sexual offences and on reporting mechanisms available to victims where an examining practitioner has conducted the examination in an inappropriate fashion. It is recommended that provision be made for debriefing or counselling of

⁴ Such as South African Medical and Dental Council, the South African Nursing Council, etc.

⁵ Or the caregiver of the victim in the case of a young child or mentally disabled person.

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.

- G** However, given present day realities, the Commission recommends that, irrespective of the fate of the district surgeency, 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. 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. We further recommend that the Health Professions Council of South Africa (the former Medical and Dental Council) should develop the necessary training manuals and oversee the training.
- G** It is recommended that one stop centres be officially endorsed and implemented. We believe the preliminary stages of the investigation would be considerably aided by the availability of all the role-players within walking distance of one another.
- G** The Commission recommends that 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. 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, etc.
- G** To conclude, it is recommended that 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.

Public prosecutors

- G** In the light of the Commission's recommendation that the SAPS National Instruction

22/1998 be revisited and reviewed, if appropriate, it is also recommended that the NDPP Policy Directives be revisited and reviewed, if appropriate, ideally with input from SAPS, the health professions and victim support groups. In this context it is very important to be consistent: A situation where one agency is issued with *instructions* and another agency with mere *guidelines* is clearly untenable, especially when the aim is to ensure greater co-operation and interaction between those agencies. It is equally important to ensure that whatever is agreed upon, be it instructions, guidelines or directives, carries the same legal force to ensure that non-compliance can be addressed.

- G** The Commission has no hesitation in supporting the roll-out of specialised sexual offences courts. However, the new courts must be sustainable both as far as human and financial resources and commitment are concerned. Obviously the roll-out must be accompanied by intensive training programmes of all court officials involved, including the magistrates. However, should the original 'Wynberg Sexual Offences Court-model' continue to serve as blueprint for the new sexual offences courts being rolled out, we wish to point out that this model has been evaluated and that certain shortcomings have been identified. These shortcomings of the 'Wynberg Sexual Offences Court-model' must be addressed in the roll-out of the new courts in order to prevent the replication of inadequacies already identified.

Correctional Services

- G** The Department of Correctional Services National Guidelines provides that a victim's views may be taken into account at parole hearings. However tracing of victims is problematic in that victims do not always inform the Commissioner of their most recent addresses. Where a victim initially elects not to have his or her particulars recorded, it is recommended that a mechanism be put in place whereby the victim may have his or her details recorded at a later time. It is 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. Reprisal attacks by the offender once he or she has been released and intimidation by the family and friends of the offender are not

uncommon.

- G** 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.
- G** It is recommended 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.

Social Welfare Agencies, NGO involvement, support, counselling, and advocacy services

- G** NGOs play an important role in the management of sexual offence cases. Excellent services are provided by some of these NGOs. It is 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 and that standards or codes of good practice be developed in order to ensure quality service.

Joint intervention

It is generally agreed that victims of sexual violence need many diverse services: emergency shelter, medical care, protection, financial assistance and counselling services, to name but a few. Since one agency alone cannot offer all these services, it is imperative that services are well co-ordinated and that the various professionals understand how other agencies view the problem and deal with it.

However, it is equally clear that there is a lack of co-operation between the various government

services, such as the police, the courts, social welfare and health. There is also a lack of co-operation between various government agencies and the NGOs working in the field. This lack of collaboration between agencies results in services for victims of sexual abuse being prone to fragmentation, discontinuity and inaccessibility.

There is ample precedent in South Africa for the creation of joint or inter-agency teams for the investigation and prosecution of high priority crimes. 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 need for a multi-disciplinary, multi-sectoral approach in responding to the needs of victims of sexual offences is clear. The Commission accordingly recommends that:

- G 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.
- G 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.
- G The categorisation of 'serious sexual offences' should be made with reference to Schedule 6 of the **Criminal Procedure Act 51 of 1977**.
- G Only specially trained medical personnel, police officers, prosecutors, magistrates and counsellors should deal with serious sexual offences.
- G 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.
- G Preferably all serious sexual offences 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.

- G 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.

Disclosure of the offence by the victim

The 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. It is possible, however, to make recommendations that facilitate disclosure and support persons in their disclosure of sexual offences. Accordingly the Commission recommends that:

- G 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. Ongoing life skills programmes should also be introduced as part of the fixed syllabus in schools.
- G 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 instill confidence in a responsive authoritative protection system in order to make it easier for such victims to report incidents of sexual violence.
- G 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.
- G 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.

Reporting and referral

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. No recommendations for legislative intervention are made in this regard.

Pending finalisation of the investigation into the Review of the Child Care Act, the Commission refrains from making any recommendations on the reporting of suspected child ill-treatment by certain professionals and other persons.

Post exposure prophylaxis (PEP) following a sexual offence

South Africa is a country of limited resources, and the provision of PEP to rape victims has accordingly become a contentious issue. It is acknowledged that the cost implications of providing all victims of sexual violence with PEP treatment would be extremely high. However, the cost of not providing PEP will assuredly be much higher and will affect the public health care system and have a ripple effect on the economy. The exact impact of non-provision of PEP is difficult to quantify but will nevertheless be profound. The Commission holds the opinion that it is the responsibility of the state to provide the financial means to cover the cost of PEP for victims of sexual violence as these complainants have been exposed to a life threatening disease through no choice of their own. The Commission accordingly recommends the enactment of legislation to provide that in sexual offence cases -

- G All victims of rape⁶ should receive HIV testing, the best possible medical care, treatment, and counselling.
- G As it is the duty of the state to protect its citizens, the state should cover all costs for treatment and counselling required by the victim of a rape as a result of the assault, including the provision of PEP, HIV-antibody testing and counselling.
- G We further recommend 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

⁶ This provision must be confined to 'rape' victims as per our new definition (penetrative offences) and should not apply to victims of sexual offences in general.

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 -
 - G available information on the HIV status of the perpetrator;
 - G the type of exposure;
 - G the nature of the physical injuries; and
 - G 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 -
 - G the existence of PEP drugs;

- G the purpose of the drugs;
 - G the possible side effects of the drugs; and
 - G 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.

The need for a statutory offence for harmful non-consensual HIV-related behaviour

Although it is recognised that an integrated public health approach has an important role to play, public health measures in themselves are insufficient to deal with the situation where persons deliberately put others at risk of HIV-infection. The Commission is of the opinion that the criminal law undoubtedly has a role to play in protecting the community and punishing those who transgress.

The Commission recommends that criminal sexual activity compounded by deliberate or reckless exposure to HIV/AIDS should be subject to criminal sanction. Two options seem viable in this context. Firstly, to introduce practical measures to ensure successful prosecution of harmful HIV-related behaviour in terms of existing common law crimes⁷ or, secondly, to create a separate offence specifically criminalising harmful HIV-related behaviour in the context of the commission of a sexual offence.

The Project Committee provisionally endorses 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. Comment is invited.

Police investigation

Over recent years, considerable efforts have been made to improve police practices and procedures in relation to sexual offence victims. Despite major gains, several problem areas remain. In view of this finding the following recommendations are made:

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As suggested in the Commission's Fifth Interim Report on aspects of the law relating to AIDS.

- G 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. It is also recommended that the Sexual Offences Act should place a positive obligation on the police to accept and register all complaints of sexual offences.
- G That the police should not have a discretion as to 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.
- G 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 reaction⁸ of the complainant that he or she is unaffected by the sexual assault or is lying.
- G 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.
- G 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.
- G That SAPS National Instruction 22 / 1998 on Sexual Offences provide comprehensive

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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.

guidelines on the charging of victims of sexual offences for laying false charges, making false statements, obstructing the course of justice, perjury, etc. 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.

- G** 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.
- G** 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.
 - (c) 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. An option worth pursuing is the establishment of attaching a designated Victim Liaison Officer to the office of the Director of Public Prosecutions.
 - (d) 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.
 - (e) 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.

- G 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. The Commission, however, invites suggestions as to the best ways to limit delays in relation to medical examinations

- G 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. Without being unduly prescriptive the Commission recommends that a witness be entitled to be accompanied by a support person and that this provision be included in the above National Instruction. 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.

- G 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.

The compulsory HIV-testing of persons arrested for sexual offences

The Commission believes that instead of advocating for the testing of accused sexual offenders, we should concentrate on the health of the victim. Rather than the State paying for the HIV-testing of persons arrested on suspicion of having committed a sexual offence, the Commission feels that the money can be much better used by providing, at State expense, free HIV-testing and PEP to all victims of rape⁹ regardless of what the HIV-status of the suspect is or was.

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Not all sexual offences bring the risk of HIV infection. It is therefore important to limit HIV-testing and the provision of PEP to those instances where there is a risk of HIV-transmission.

Medical examination

It is 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.

Protection of and assistance to victims and witnesses before trial

In view of the recent developments surrounding the development of a Victim's Charter by the Department of Justice and Constitutional Development and the fact that the **Witness Protection Act**, No 112 of 1998 is still in its infancy, the Commission is not in a position to make substantive recommendations regarding the protection of or assistance to witnesses.

The Commission recommends that the crucial aspect of emergency child care be addressed in the Victim's Charter. If provision is not made for child care, the participation of witnesses in criminal judicial matters will be curtailed.

The Commission assumes that distribution of information relating to access to the witness protection program will accompany or follow the final approval of the Victim's Charter.

Bail

The release on bail of alleged perpetrators of sexual offences is a highly contentious issue which has elicited much public debate. The increasing public concern about the spiraling crime rate has resulted in demands that criminals be dealt with effectively. There is a realistic concern that victims of sexual offences are not safeguarded sufficiently against continued violence and intimidation by perpetrators who are released on bail. An additional cause of anxiety to victims of sexual offences is uncertainty about the arrest of the suspect, whether or not he has been released from bail, which conditions have been imposed and the procedure to be followed in the event of a breach of the bail conditions.

The Commission considers 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. The Commission therefore recommends that victims and other state witnesses be informed of and participate in bail applications if they should choose to.

The Commission further recommends that 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, the Commission recommends that this aspect be included in the SAPS National Instruction: *Sexual Offences: Support to Victims and Crucial Aspects of the Investigation* as well as the Policy Guidelines for the National Director of Public Prosecutions.

The Commission finds it troubling that although the existing legislation regulating bail seems theoretically sound, somehow the theory does not meet with the experience of complainants and other witnesses who should or do participate in bail proceedings in practice. A possible solution would be to include legislative provisions similar to those set out in section 18 of the **Domestic Violence Act** 116 of 1998, that require *inter alia* that the SAPS and prosecuting authority formulate detailed instructions and directives on how to deal with issues of bail in sexual offence cases. Such provisions could be accompanied by a requirement that statistics should be kept of the number of Schedule 5 and 6 bail applications as well as the number of successful applications and reasons for release on bail, and that such statistics should be submitted to Parliament bi-annually. Comment is invited on this point.

Irrespective of the option followed, the Commission recommends that training and guidance be given to all officials dealing with bail applications so as to enhance the implementation of the amended legislation (which the Commission deems to be adequate).

Although in specific circumstances it may be in the best interest of a child to remove him or her from home for his or her own safety, the Commission does not recommend the automatic removal of a child victim of a sexual offence solely to enable the breadwinner/offender to be released on bail so as to remain economically active. An option whereby the alleged offender can remain economically active and thereby financially responsible toward his or her family but at the same time not exposing the victim to the alleged offender, would be the creation of bail hostels. The Commission deems it appropriate to refrain from making proposals in this regard pending the findings of the Commission on Gender Equality.

Adversarial versus inquisitorial types of criminal procedure

The Commission has had to consider the system of criminal procedure that should govern the conduct of trials in relation to sexual offences. The present South African system is a hybrid system of criminal procedure. Although largely adversarial it nevertheless contains numerous inquisitorial elements. The Commission recognises that in relation to sexual offences there certainly is a need to revise various rules of evidence and procedure. The Commission does not propose to change the entire mode of criminal procedure as it pertains to sexual offences. The issue is how to make the present system work better.

The Commission recommends that, as it pertains to sexual offences, the undermentioned rules of evidence and procedure must be assessed in a manner that takes account of the current problems experienced, as well as possible new provisions to solve the difficulties (which may either be adversarial or inquisitorial in nature or a combination thereof):

- G Cross-examination: the current rules, their efficacy and cross-examination of the victim by the accused personally;
- G obligatory use of an intermediary in the case of certain witnesses;
- G protective measures: those currently available in the **Criminal Procedure Act 51 of 1977** and the possibility of new measures;

- G the viability of the introduction of victim representation;
- G introduction of different verdicts;
- G defence disclosure and production of personal records;
- G methods to encourage the accused to participate in the trial: plea bargaining and diversion;
- G the abolition of the cautionary rules in sexual offence cases;
- G disallowing the evidence of previous sexual history of the complainant;
- G allowing expert evidence in sexual offence cases;
- G admitting previous consistent statements;
- G allowing hearsay evidence of children;
- G considering the competence requirements before a witness is allowed to testify and the necessity of corroborating unsworn evidence; and
- G admitting similar fact evidence.

Territorial operation and jurisdiction

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.

The courts have consistently accepted that the doctrine of effectiveness, that is the power of the court to give an effective judgement, is the basis of jurisdiction.

The question of extra-territorial jurisdiction is important in cases where a sexual offence has been committed as these offences are committed by or against South Africans in other jurisdictions. Further, this has particular significance for child victims of sexual offences due to problems that children have in regard to memory in terms of time and place.

A practical problem arises when an accused commits a number of offences against a particular victim in a number of jurisdictions. The prosecution will usually charge the accused in terms of section 94 of the **Criminal Procedure Act**. However, it may be difficult to establish which particular court should hear the matter where more than one court have jurisdiction. Currently, to clarify which court should hear the case, the State brings a centralisation application in terms of sections 111(1)(a) and (3) of the **Criminal Procedure Act**. This is a formal process and sometimes delays proceedings unnecessarily.

The Commission is of the opinion that it is of the utmost importance to take all necessary steps to ensure access to the courts and justice.

It is clear to the Commission that the technical provisions relating to jurisdiction should not hinder the State in the presentation of its case so as to result in a miscarriage of justice by the acquittal of guilty persons or to make the presentation of the case logistically impossible for the State to manage. At the same time the provisions creating or conferring jurisdiction should not result in the accused being legally prejudiced.

However, as this issue is clearly one involving simplification of our criminal procedure the Commission recommends that it be referred to the Project on the Simplification of Criminal Procedure for further investigation.

Prescription

Prescription refers to either the acquisition or the extinction of a right or claim by the lapse of time. The length of time differs depending on the nature of the claim. Prescription is intended to bring an end to disputes and to create legal certainty. If a claim has prescribed, in effect it means that the merits are not considered and although there may be a claim, the lapse of time excludes prosecution or civil liability.

Prescription problems can arise because of the difficulties that the victims of sexual abuse have

in instituting legal proceedings until many years after the events in question.

For our purposes, two aspects related to prescription are relevant. The first is the prescription of crimes which prevents the State from charging an accused. The second is prescription of a civil debt arising out of a sexual offence.

Prescription of the right to institute criminal prosecutions appears not to be problematic, as very serious offences such as rape never prescribe. Practical considerations such as the loss of evidence as a result of the delay in bringing a prosecution present greater difficulties. However, if our recommendation regarding the redefinition of 'rape' as proposed in the draft Bill contained in the Discussion Paper is accepted, then the question will arise whether it is necessary to include the redefined offence of 'rape' under the exceptions listed in section 18 of the Criminal Procedure Act 51 of 1977. We would naturally argue for such inclusion.

In the case of childhood sexual abuse it might not be prudent to rely too much on the outcome of a criminal trial, if there is going to be one, which in itself might be a doubtful event. It is worth remembering also that some victims consciously do not want to follow the criminal route.

This still leaves victims 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. It is in this context that problems with prescription can and will arise.

Contrary to the international trend, the Commission is of the opinion that victims of sexual abuse should not be subject to the ordinary prescription rules, but to special rules. Accordingly we recommend 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 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.

Pre-trial processes

The unfolding of the course of events prior to the commencement of the trial will in effect map the sequence and subsequent success of the trial. The pre-trial processes are centred around and in fact predetermined by the amount of planning undertaken by the prosecutor prior to, during and following the prosecutor exercising his or her discretion to prosecute.

The Commission recommends that specific reference be made in the NDPP Policy Directives to the convening of a multi-disciplinary consultation. In this context a multi-disciplinary consultation is an informal meeting between various role-players primarily responsible for the investigation. The aim of the meeting is to assist the prosecutor to arrive at a decision whether or not to prosecute. For purposes of accountability it is recommended that a prosecutor should note his or her decision with regard to the need for such a consultation. Where a consultation is held, the outcome of the meeting must also be noted. These procedures should be contained in the appropriate sexual offence management protocol.

The conventional criminal justice system is widely regarded as having severe limitations in dealing with sexual offenders. The extent of concern about the shortcomings of the conventional system has led to the development of new approaches. One such approach is the pre-trial diversionary approach which is characterised by a case management consultation. In terms of this approach, a person charged with an offence who meets specified criteria is offered a programme of treatment, counselling, and mediation before the trial is held. There are an equal number of advantages and disadvantages to this approach. Yet, in order to protect as many victims and potential victims as possible, the Commission recommends that a case management consultation linked to diversion be provided for sexual offences by expanding the proposals made by the Project Committee on Simplification of Criminal Procedure in relation to out-of-court settlements. It is recommended that the Project Committee on Simplification of Criminal Procedure should include an out-of-court settlement option for certain sexual offences.

However, the Commission recommends that in order to retain a sense of the severity of sexual offences, it must be a prerequisite to convening a case management consultation that the offender makes an admission of guilt. The Project Committee on Simplification of Criminal Procedure is requested to explore this possibility in relation to sexual offences. This recommendation differs from the proposed amendments to the **Criminal Procedure Act** made by the Project Committee on the Simplification of Criminal Procedure in relation to out-of-court

settlements. The advantage of such an admission is that if the offender should renege on any condition contained in the diversion agreement, the prosecutor is in a position to re-institute proceedings and the testimony of the victim will not be necessary. In so doing a public perception that a diversion option of this nature is beneficial to the offender alone will not be validated. The Commission sees the option of an out-of-court settlement as only being applicable to offences at the lower end of the scale of severity and to offenders who are suitable candidates for diversion. The Commission does not see a role for diversion where the offence is one of rape or any other sexual offence where violence or force was used. However, a difficulty arises in relation to intra-familial sexual abuse cases, which due to the nature of these cases, are serious. Often these cases are extremely difficult to prosecute, leaving the family with no option of intervention, bar the removal of a child. By enabling a prosecutor to make use of a diversionary mechanism such as an out-of-court settlement, the offender may receive rehabilitative treatment, the dysfunctionality of a family may be rectified or ameliorated and the source of income is not necessarily cut off. The need for expert assessment and involvement in matters of this nature cannot be over emphasised. It is recommended that the Project Committee on Simplification of Criminal Procedure includes legislative guidance in their proposals as to which sexual offences could be dealt with by way of an out-of-court settlement.

The Commission would, in relation to sexual offences, prefer to exclude the finding made by the Project Committee on Simplification of Criminal Procedure that an out-of-court settlement would only be permitted if the court would probably not impose imprisonment as its primary sentence, or would probably not impose a term of more than one year's imprisonment. Further, the proposed clause 104A (1)(b) of the Criminal Procedure Amendment Bill should not apply in sexual offence matters. The Project Committee on Sexual Offences recommends that the proposed clause 104A (5) should be amended so as to change the prescribed two year period to at least three years and that an additional condition be built into clause 104A (5) which provides that in the event of intra-familial abuse, the offender is to reside in alternate accommodation for the duration of the settlement. Certain sexual offences may also warrant a condition that prohibits certain conduct such as frequenting schools.

The Commission recommends that the discretion of whether to embark on this 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.

The Commission wishes to draw attention to the fact that numerous recommendations are made in the discussion paper which impact directly on the way in which complainants will be assisted to interact with the court and the manner in which the complainant may be dealt with. The primary aim of all of these recommendations is to alleviate trauma experienced by complainants in the present judicial system. The enactment of these recommendations will go a long way to bolstering the testimony of a complainant who is not so robust. For this reason the Commission recommends that the a case management consultation linked to diversion should be used in exceptional cases only.

Although the Commission recommends that the consultation should be convened by the prosecutor, it wishes to refrain 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 Commission recommends that 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.

Legal representation

Legal representation plays an important role in enabling persons to enforce their rights, for rights have no meaning unless the people who have those rights are aware of them, their significance, and how to use them effectively. However, the right and capacity to participate in a criminal trial may be undermined by the fact that legal representation is generally too costly for the majority of South Africans.

The question is whether a victim should be entitled to such representation.

It should be recognised that with regard to the investigation and prosecution of sexual offences, the interests of the complainants are different to those of the State.

The question is whether allowing the victim to participate in the trial as an ancillary prosecutor is the best manner in which to solve the problems inherent in a sexual offence trial conducted within a largely adversarial system.

The Commission takes 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 interests in a sexual offence trial than to introduce the victim as an ancillary prosecutor. The Commission is further of the view that the recommendations contained in the Discussion Paper will greatly assist complainants and advance the protection of their interests in a manner consistent with the constitutional imperatives applying to the State.

Pleas and plea bargaining

Pleas

The plea tendered in response to a charge serves an important dual purpose in that it determines, first, the ambit of the dispute between the accused and the prosecution and, secondly, the procedure to be adopted.

Plea bargaining

There are various definitions of plea bargaining. One such definition is the following:

Plea bargaining consists of the exchange of official concessions for a defendant's act of self conviction. Those concessions may relate to the sentence imposed by the court or recommended by the prosecutor, the offence charged, or a variety of other circumstances.

Plea bargaining is a highly controversial issue as the accused is, as a result of a plea agreement, charged with a lesser offence. It is a situation where both the prosecution and the accused compromise: the prosecution charges the accused with a less serious offence, in return the accused does not put the State to the proof of the offence charged. Although not formally provided for, plea bargaining does take place in South Africa.

The option of plea bargaining is frequently viewed by the public as "being soft on criminals".

There exists a very real tension between the public desire to protect the victim and the public demand to impose a heavy sentence on sex offenders. What is often not appreciated by the public is that:

- G Due to the nature of and evidence in sexual offence trials it is often difficult to secure convictions. In the face of these factors and when the prosecutor has doubts about the strength of the case, it is deemed to be in the interests of safety that a plea of guilty to a less serious charge be accepted rather than running the risk of an acquittal. Should an accused be acquitted, he or she is outside the system of criminal justice. This may be highly dangerous, and even more so when the offence is intra-familial and the custodian parent is the accused person.
- G When the complainant is young or particularly vulnerable it may be in their long term interests to avoid having to give evidence and in such a case plea bargaining can protect them and promote their recovery.
- G Plea bargaining could make an important contribution to the acceleration of the criminal justice process.
- G It is imperative to bring the offender into the system.

The Commission recommends that:

- G Prosecutors handling sexual offence cases should receive training on plea bargaining and innovative sentencing options aimed at community protection.
- G Provision should be made in the plea bargaining process to consult the complainant, or in the case of a minor, the minor complainant and his or her parent, guardian or *person in loco parentis*.

Disclosure of personal records

In light of the foundation laid by **Shabalala v The Attorney-General of the Transvaal & Another**¹⁰ the general view is that the aim of disclosure is to afford an accused a fair trial. Prosecutors are appointed to assist in the ascertainment of truth, not simply to obtain a conviction. For this reason prosecutors should not object to the inspection of documents simply

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1996 (1) SA 725 (CC).

because they may provide the accused with the opportunity of discovering a truth and pursuing a proper and fruitful course in cross-examination. Part 14 of the Policy Guidelines of the NDPP adequately regulates disclosure by the prosecution. The Commission deems it unnecessary to embody these guidelines in legislation.

It is 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. It is also recommended that 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 witnesses's statement and testimony. It is also suggested that the age of the witness, if he or she is under 18 years of age, be brought about on the front of the statement. This will indicate to the prosecutor whether provision for protective measures for a child witness should be made. Furthermore, the Commission recommends that 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.

Defence disclosure

The Commission considered the critical question as to whether an obligation to disclose his or her defence could be imposed on an accused while at the same time ensuring that the accused receives a fair trial and that the rights afforded to him or her by the Constitution are upheld, more specifically the right to be presumed innocent, to remain silent, not to testify during the proceedings, and the right not to be compelled to give self-incriminating evidence.

The Project Committee on the Simplification of Criminal Procedure has recently made recommendations in this regard.¹¹ This Committee notes that, to some degree, section 115 of the **Criminal Procedure Act** is directed towards assisting to isolate the true issues and to enable a trial to be conducted more expeditiously. Section 115 of the Act facilitates defence disclosure if the defence chooses to make such disclosure. The Committee proceeds to state

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South African Law Commission Discussion Paper 96 Project 73 Simplification of Criminal Procedure (A more Inquisitorial Approach to Criminal Procedure - police questioning, defence disclosure, the role of judicial officers and judicial management of trials 2001.

that while there is no realistic mechanism to compel an accused to make disclosures, there is scope for enhancing the judicial officer's powers of questioning in terms of section 115 of the Act. The Committee notes that there is some merit in providing for a formal structure within which, particularly in more complex cases, proper and serious attempts can be made to isolate issues, and generally regulate the conduct of the case. The Committee then recommends that provision be made in the **Criminal Procedure Act** for an amendment of section 115 of the Act which enhances the powers of judicial officers and creates a procedure for the holding of a conference in appropriate cases before the trial. The Project Committee on Sexual Offences agrees with this recommendation and the Commission therefor deems it necessary to make these provisions applicable to sexual offences. The proposed recommendations made by the Project Committee on the Simplification of Criminal Procedure are submitted for comment.

Section 115 of the **Criminal Procedure Act** facilitates defence disclosure if the defence chooses to make such disclosure. Compelling the accused to speak before a *prima facie* case has been established severely compromises the right to remain silent as a necessary corollary of the privilege against self-incrimination. The undefended accused would be placed in an even more precarious position. Based on the evaluation and the preliminary findings of the Simplification of the Criminal Procedure Act Project Committee, this Committee does not recommend legislative intervention at either the investigative stage or the stage after indictment but prior to pleading. The principle objection to requiring defence disclosure is that it will not be capable of being enforced in any meaningful way. The possibility of exposing the accused to any threat of punishment for failing to disclose his or her defence is a matter which warrants further discussion and we leave it to the Project Committee on the Simplification of the Criminal Procedure Act.

The production of personal records of victims of sexual offences

Many victims of sexual offences seek assistance, support and advice. This assistance is sought from a variety of people, including rape counsellors, traditional healers, religious leaders, psychologists and psychiatrists. The concern arises that if victims of sexual offences know that their private thoughts, expressed to such persons, are going to become a matter for open debate in a public court of law, they may be deterred from reporting the offence to the police and may be discouraged from seeking the support they need. However, 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 is 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.

The Commission does, however, take note of developments in international jurisprudence and deems it prudent to make a recommendation in the alternate providing for a more formalised approach to be followed in order to access personal records. This approach would entail a two-stage approach contained in sexual offence legislation. The defence should have to demonstrate that the information contained in the records is 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 is satisfied that the information is likely to be relevant, then the analysis proceeds 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 should so order. Then, after examining the records, the judge should balance the conflicting constitutional rights to determine whether and to what extent production to the defence should be ordered.

The Commission further recommends that identifying information, for example contact details and personal particulars not relevant to the case, should not be disclosed. The Commission is of the opinion 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.

Further particulars

The accused is entitled to request such further particulars as are necessary to enable him or her to plead to the charge. The purpose is to adequately inform the accused of the State's case against him or her. The particulars supplied must have a bearing upon the evidence which the

State intends to call.

Since the decision of the Constitutional Court in case of **Shabalala v The Attorney-General of the Transvaal & Another** 1996 (1) SA 725 (CC) requests for further particulars are few and far between as the State usually makes Section A of the docket available and that is taken to constitute further particulars. In the case of **Shabalala** the Constitutional Court held, *inter alia*, that a blanket privilege on the docket was unconstitutional and that the accused should be entitled to those documents in the docket that he or she may require for the purpose of enabling the accused to properly exercise his or her rights to a fair trial in terms of section 25(3) of the Constitution.

The Commission is of the opinion that there are no problems with the current provisions and makes no recommendation in this regard.

The vulnerable witness

The vulnerability of witnesses and especially the vulnerability of children have led to a variety of changes in court practices and procedures that are aimed at making it easier for them to give evidence. However, 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.

The Commission believes that it will be in the interests of justice to create a category of vulnerable witness. The Commission aligns itself with the international move towards making special measures automatically available to all victims of sexual offences who are required to give evidence in criminal proceedings. In addition to this category, any other witness to a sexual offence may apply for protective measures to be invoked so as to reduce the trauma of testifying.

The benefit of this approach would be that the court will be obliged to consider the matter formally and that those witnesses found to be vulnerable witnesses will be identified at an early stage in the investigation and will have their needs met accordingly. Decisions on the measures to be used would be made binding so as to ensure that the witness knows in advance of the trial what assistance he or she will be receiving, including the way in which he or she will be giving evidence. In addition to the benefit of a witness being able to give his or her best evidence,

secondary victimisation that usually occurs during the trial process will be reduced significantly.

A witness suffering from a disability or any similar characteristic clearly needs to be treated in a manner which acknowledges this fact in order to enable him or her to give the best possible evidence. Similarly, witnesses suffering from impaired mental functioning are also particularly vulnerable as a result of their difficulty in communicating, their inability to recognise the source of their pain and the fact that they are often in residential care and may be highly dependent on the perpetrator. A number of other factors may contribute to making these witnesses more vulnerable than usual.

It is true that not every child or adult victim or witness of a sexual offence will necessarily be particularly vulnerable if required to give evidence by conventional means. Therefore not every victim or witness of a sexual offence requires special measures. Yet it cannot be denied that victims of a sexual offence are potentially more vulnerable as witnesses than other witnesses due to the very nature of the offence. 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, the Commission deems it prudent to recommend that any person older than ten years of age should have the choice to waive the automatic provision of protective measures.

The Commission has carefully considered whether the accused should be included in the category of vulnerable witnesses - thereby making him or her eligible for protective measures. The Commission has found that numerous protective measures are already afforded to an accused. In addition to the constitutionally entrenched rights of arrested, detained and accused persons,¹² numerous protective measures are to be found in the **Criminal Procedure Act**.¹³

As a result the Commission concludes that accused persons are afforded considerable safeguards in criminal proceedings to ensure a fair trial and should not be considered a vulnerable witness.

The Commission recommends that the Sexual Offences Act should provide for a category of vulnerable witness and that such witness should be accorded, in addition to the existing

¹² Section 35 of the Constitution of the Republic of South Africa, 1996.

¹³ 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.

protective measures provided for in the **Criminal Procedure Act**, the other protective measures recommended in the discussion paper.

Legislating for procedural reform: protective measures, rules of evidence and other procedural issues

The Commission is of the opinion that it is justifiable to make specific provision for protective measures for witnesses in sexual offence trials due to the traumatising and intimate nature of the offences. Given the existing protective measures presently contained in the **Criminal Procedure Act** 51 of 1977, the question arises as to where these existing (and new protective measures) should be located.

There is a problem with the effectiveness of various protective measures within sections already in place in the **Criminal Procedure Act**: this relates to a lack of knowledge by potential applicants and a failure on the part of certain public prosecutors to inform witnesses of the availability of measures provided for under these sections.

The Commission recommends introducing into the new Sexual Offences Act a witness notification system. In addition, the Commission also makes the following non-legislative recommendations:

- G** 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.
- G** 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.
- G** The National Director of Public Prosecutions should develop guidelines which places 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 hearings

A complainant in a sexual offence case may find it extremely embarrassing to testify in open court. However, the obvious remedy - excluding the public - conflicts with the basic principle that the judicial process should be conducted as openly as possible.

Section 153 of the **Criminal Procedure Act** provides for circumstances in which criminal proceedings may not take place in open court. Section 153(3) provides that in cases involving charges of a sexual offence, the court may at the request of the victim, or, if he is a minor, at the request of his parent or guardian, order an *in camera* hearing.

In addition, section 153(4) provides that where an accused is under the age of 18 years, no person, other than such accused, his legal representative and parent or guardian or a person *in loco parentis*, may be present at such proceedings, unless such other person's presence is necessary or if the court orders otherwise. A criminal court may also extend this protection to any witness under the age of eighteen years.

South African courts currently make a case by case determination as to whether a hearing should be held *in camera*. It has been reported that while a court will generally order that a rape victim's testimony be heard behind closed doors, there is in practice very little control over the movement of people in and out of court, even when a child victim is giving evidence. It also appears from the submissions received by the Commission to Issue Paper 10 that there are a number of practical problems.

Section 153(3) of the **Criminal Procedure Act** does not apply to all criminal cases, and for the purposes of the discussion paper, it deals with an indecent act or conduct that procures or furthers an indecent act. The subsection provides that the court has a discretion and **may** order in camera hearings, on the request of the person against whom the indecent act was committed (or their parent or guardian if that person is a minor).

The advantage of this subsection is that it does not require that any harm or stress be established for the court to exercise its discretion. Inherent in this formulation is the assumption that it will be stressful for a victim of an indecent act to give evidence in open court.

Although section 153 (3A) of the **Criminal Procedure Act** explicitly provides for the exclusion

of persons “*unless the witness requests otherwise*” experience has that prosecutors seldom inform victims of this option with the result that family members or counsellors of victims are also excluded. In addition, presiding officers are reluctant to allow these requests because of an (incorrect) assumption that section 153(3) implies a “blanket” exclusion.

To avoid the “blanket” exclusion approach, the Commission recommends that a cross reference be made in section 153(3A) of the **Criminal Procedure Act** to the clause in the proposed draft Bill (on sexual offences) providing for support persons to witnesses of a sexual offence.

Movement of persons in and out of court during an *in camera* hearing as in fact little control exercised over the movement of people in and out of sexual offence trials in general. This is problematic as the testimony of a witness may be inaccurate or markedly inhibited through fear, emotional trauma, etc. This is particularly problematic if the witness is vulnerable as it is highly likely to compound their experience of vulnerability.

The Commission recommends 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 do not require legislation, but should be enforced administratively by the Department of Justice: Courts Division.

Prohibition of publication of certain information relating to criminal proceedings.

Section 154 of the **Criminal Procedure Act** prohibits publication in a number of circumstances. The circumstances are as follows:

- G When a court has ordered an *in camera* hearing;
- G in criminal proceedings which involve charges of an indecent act, no information may be published that might reveal the identity of the complainant;
- G in cases of indecency, no details may be published about the charge before the accused

has both appeared and pleaded;

- G no information may be published which may reveal the identity of accused persons and witnesses under 18 years of age.

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 was committed or any act for the purpose of procuring or furthering an indecent act. This section applies prior to the identity of an accused being established. Section 154(2)(b) 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.

The court has a 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.

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 and/or the alleged offender and/or graphic details of the assault.

The Commission is of the opinion that the law, as it currently stands, is adequate. However, 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.

The Commission recommends that -

- G The sexual offence unit of the office of the National Director of Public Prosecutions focuses on prosecuting recalcitrant publishers of such details.
- G The penalty portions, as currently set out in of sections 154 and 335A of the **Criminal Procedure Act**, be revised to provide penalties for publishing information about victims. It should be more serious to publish details of child complainants or any other information that may lead to revealing of the identity of that child and should carry a

higher penalty in the form of a monetary fine. Further, such penalty provisions should be included in the new sexual offence legislation.

The Commission also recommends 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 after a finding of guilt in terms of section 154(5) of the **Criminal Procedure Act**. Such an order would be in favour of the complainant or the accused (provided that the latter has not been identified or charged). The court may make such an order on its own accord, or at the request of the State, or the complainant of the alleged offence (or in the case of a minor, their parent, guardian or person *in loco parentis*) or an alleged accused who has not been identified or charged and is subsequently not charged.

Closed Circuit Television

In 1996 section 158(2) and (3) of the **Criminal Procedure Act**, was enacted as a result of recommendations made by the South African Law Commission. 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.

There are two jurisdictional requirements that need to be considered in relation to the court's jurisdiction to order the use of closed circuit television.

Firstly, section 158(3) provides that a court may order that a witness gives evidence by way of closed circuit television, only if facilities therefor are readily available or obtainable.

G The Commission recommends 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 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.

Secondly, the first three criteria of section 158(3) are concerned with expediency. These are:

- (a) prevent unreasonable delay;
- (b) save costs;
- (c) be convenient.

G The Commission is satisfied that this formulation grants the court a sufficiently wide discretion to provide protection to those witness's who need it.

Using videotaped statements as evidence in sexual offence cases

Video testimony of child abuse victims for legal and investigatory purposes has become quite popular over the past few years and is used in criminal proceedings in a number of international jurisdictions.

As pointed out above section 158(2) and (3) of the **Criminal Procedure Act** provides for the use of closed circuit television to relay a live appearance and examination by the witness.

Courtroom testimony is a frightening experience for most victims and child victims in particular. Ways must therefore be found to make this process less traumatising. It is in this context that the idea is mooted (rather than having victims testifying in court) that pre-recorded video recordings of the evidence in-chief of such victims be submitted during trial.

Videotaped testimony of child witnesses offers the potential of using that videotape at the trial in place of live testimony.

The Commission is aware, however, that videotaping the testimony of the (child) victim will not necessarily prevent the child from being subject to cross-examination.

Further, the practical difficulties with videotaping testimony and using it in lieu of live testimony in court are numerous. Disclosure is a process, not an event. The question then arises what

should be videotaped: the first interview or subsequent interviews?

Delaying videotaping until a later interview session is further recommended because it is common for some sexually abused children to disclose details of abuse gradually over several sessions. This is due to the fact that even skilled interviewers of sexually abused children may need several sessions to elicit the child's account because abuse is a process and there are numerous social, psychological and environmental factors that may affect a child's ability and willingness to divulge the abuse. Therefore, videotaping will not necessarily reduce the number of interviews.

The quality of the videotaped account may have a tremendous effect upon trial proceedings.

Videotaping can preserve a great deal of evidence that would otherwise be lost and can counteract the effect of a child's memory fading over time. However, videotaping of evidence may still not avoid the problem of exposing the child witness to the court process because it may be necessary to clarify issues or raise new points of contention.

The Commission deems it proper 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. The mastery of these basic skills are the ground-work necessary before effective videotaping of evidence should be considered. Furthermore, the Commission is of the opinion 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.

G It is 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.

Use of an intermediary

An intermediary is 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 jargon employed in courts. This means that the child does not give direct evidence and is not 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.

There are a number of issues that need to be considered in relation to the operation of the current system of intermediaries in terms of section 170A of the **Criminal Procedure Act**:

Use of experts

Since the courts lack expert knowledge in regard to social science issues, it may be necessary to enable the court, the prosecution, the accused or the witness concerned to call an expert to advise the court as to whether there is a need for a witness to give evidence with the assistance of an intermediary. The Commission has come to the conclusion that it is important that the court be empowered to call for expert input in this regard and recommends that the court may on its own initiative, or on the request of the prosecution or the witness concerned, call for expert input regarding the question of whether it is necessary, beneficial or appropriate to appoint an intermediary to assist the relevant witness.

Discretion

Section 170A of the **Criminal Procedure Act** currently gives the court a discretion to order the use of an intermediary when the witness is under 18 years of age and if such a witness would be exposed to 'undue mental stress or suffering' when giving testimony.

The Commission recognises that a court's discretion may have a role to play, but is aware of the problems that such discretion may create for a young witness if the court is unable to appreciate the child's experience of the offence and of trauma associated with testifying unassisted in court.

G The Commission is of the opinion that an intermediary should automatically be provided for the child witness in criminal proceedings involving a sexual offence, unless the court has reason to believe that exceptional circumstances exist that justify not appointing an intermediary for a particular child witness, in which case reasons should be given for the

refusal to appoint an intermediary. It should, however, be subject to the proviso that the child (if he or she is over the age of ten years), may after careful explanation, choose otherwise.

Should intermediaries only be available to assist child witnesses?

Currently only witnesses under 18 years of age are entitled to the use of an intermediary. The question thus arises whether an adult witness who is declared vulnerable should be able to be assisted by an intermediary.

- G** The Commission is of the opinion that there may well be cases where a vulnerable adult witness should be assisted by an intermediary and accordingly recommends so.

Role confusion of intermediaries

There is confusion among intermediaries as to their precise role in court. The only indication in subsection 170A(2)(b) of what is expected of intermediaries in court is that of conveying the general purport of questions to the relevant witness.

- G** After consideration the Commission concludes that it is appropriate that the court should be able to draw on the knowledge and experience that an intermediary brings to court. As such it is recommended 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.

Practical problems

Even in courts where the intermediary system is available, intermediaries are not requested timeously by prosecutors, or the intermediary is elsewhere engaged or does not attend court on time.

- G** The Commission regards such administrative problems seriously and recommends that should an intermediary not be 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 has been subpoenaed, as should be the case, failure to appear

in court will entitle the presiding officer to issue a warrant of arrest for that intermediary.

Cross-examination too harsh

Intermediaries have requested the Commission to consider the issue of too great a leeway being given to defence lawyers and counsel in court in cross-examining a child complainant. This issue is covered in the chapter dealing with cross-examination.

Lack of persons to be appointed as intermediaries

A further problem is the general lack of available persons to be appointed as intermediaries. This is put down to the (low) day fee payable to intermediaries and the small pool of available intermediaries. In the absence of an accrediting body which can hold intermediaries professionally accountable, the regulations provide that only certain professionals can be appointed as intermediaries. Accountability of intermediaries is therefore assured in a round about way. Realistically, before medical practitioners and some psychologists or even social workers in private practice start queuing for positions as intermediaries, the current fee structure for intermediaries will have to improve dramatically. The low fees limit the pool of prospective intermediaries effectively to social workers, child and youth care workers and educators. The availability of intermediaries dramatically affects access to justice. This problem may be resolved by the recent amendment to the regulations which will allow **retired** educators to act as intermediaries.

G The Commission would prefer to adopt this route (i.e. formalising the intermediary profession) rather than tinker with the current regulations. This possibility will be referred to the secondary legislation section in the Department of Justice and Constitutional Development as they are planning a complete re-assessment of the regulations to section 170A.

Who should be appointed to act as an intermediary ?

This question involves an assessment of persons who are competent to assist the child witness to give evidence in court. We have already expressed our opinion on the need to

professionalise the intermediary (see the discussion under the heading) and leave the matter there.

A related issue is the enquiry by the court to determine competence of a person to be appointed as an intermediary. Determining competence is a difficult issue. There are two possible ways to proceed to assess competence:

G The Commission recommends that competence 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.

G Further, the Commission proposes that the following criteria be used to establish competence of an intermediary who is to act as such in criminal proceedings involving a sexual offence:

- G**
- (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.

Extended use of intermediaries

There is no formalised provision for the use of intermediaries prior to trial. It may be necessary for a prosecutor to have the assistance of an intermediary 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.

- G The Commission is of the opinion that such a provision would not be problematic, provided that the same intermediary is not used in the trial and recommends accordingly.

- G Further, 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. Furthermore, it is recommended that 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 use of anatomical dolls

An anatomically correct doll is one equipped with parts resembling genitalia. Anatomical dolls are used to assist child witnesses to demonstrate any sexual abuse they have suffered. Such dolls are provided as a set consisting of adult dolls of each gender and child dolls, also of each gender. They vary in colour, shape and size and detail, and some have features of mature sexual development, such as chest and underarm hair. Dolls that have mouth, vaginal and anal openings, which children can use to demonstrate acts of penetration, are considered more useful. More recently, dolls with individual fingers have appeared; this is a recommended feature as it may facilitate demonstration of digital penetration.

Our law does not make special provision for the use of anatomical dolls in court as an evidentiary tool, but the use of anatomical dolls is permitted in terms of section 161 of the **Criminal Procedure Act**.

The Commission recommends that:

- G it is not necessary to legislate specifically for the use of anatomically correct dolls as it is adequately provided for in section 161(2) of the Criminal Procedure Act. The matter should be left to the discretion of the prosecutor to determine when it is appropriate to make use of tools as each case should be judged on its merits.

- G 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:
 - G their training needs in the use of anatomically correct dolls;
 - G 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;
 - G 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;
 - G which role players should be involved in the drafting of such a protocol; and
 - G if such a protocol is necessary, whether it should be reviewed to ensure that training is kept current.

Surrogate witness

A surrogate witness is a person who interviews a child victim out of court and then attends court on behalf of that victim and presents the child's evidence to the court. This option is presently not available in South Africa.

The Commission has identified a number of problems with the surrogate witness system. Firstly, the court will be unable to assess demeanour. Secondly, the surrogate witness may not have put all the questions to the complainant that the defence may seek to cover. Thirdly, it is a costly option requiring additional state resources and court time. Fourthly, there are less drastic and more workable alternatives to protecting the child witness and recommendations in this regards are set out elsewhere in the discussion paper.

- G The Commission recommends that the system of surrogate witnesses or youth investigators should not be introduced in the proposed sexual offence legislation or the

Criminal Procedure Act 51 of 1977.**Support persons**

For the purposes of the current investigation, we consider a support person to be someone who accompanies either a witness or the accused through the criminal justice process. This person is to strengthen and encourage the witness emotionally by his or her physical presence.

Section 73(3) of the **Criminal Procedure Act** provides for the assistance of accused persons, while no specific provision is made for the presence of a support person for other witnesses. Further, section 153(3A) does not indicate what support the person(s) who remain in court may give to the complainant.

It is widely recognised that testifying in court is a traumatic event, particularly when giving evidence in a sexual offence. As a support person may render a service to both the court and a witness, it is necessary to consider whether there is a need to introduce specific primary legislative provisions that establishes a court's power to authorise the presence of a support person and whether that person's role should be described.

- G** The Commission recommends the introduction of a clause in the new sexual offence legislation that will provide that all witnesses in criminal proceedings involving an alleged sexual offence will be entitled to the presence of a support person of their choice, who may be seated beside that witness while he or she is giving evidence. 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 the support person should not interfere with the witness while they are giving evidence.
- G** The Commission recommends that the new clause should make provision for a witness to be heard on the issue of the presence and choice of a support person.
- G** In relation to a child witness, the Commission is of the opinion that it is important for child input to be heard and so it is necessary that the proposed new clause should include a provision that the child witness be afforded the opportunity to express his or her opinion on whether he or she wants a support person in court, and in particular who that person should be.

- G** 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 recommends 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.

Evidence: the general rules and their implications for victims of sexual offences

Our law of evidence consists of a complex body of technical rules that serve to exclude evidence that would otherwise be admitted in a less stringent or free system of evidence. This results in complex legal arguments about the admissibility of evidence in trials within a trial and the unnecessary prolongment of matters.

Courts often automatically exclude evidence without questioning the reason for the existence of certain rules of evidence. The question which should be asked is whether the current rules of evidence governing the conduct of sexual offence trials assist or hinder the truth-seeking process, and whether it is the most appropriate system with particular reference to the child victim of a sexual offence. Although the Commission is in favour of a general admission of relevant legally obtained evidence, it has also found it necessary to consider each rule of evidence as well as the application thereof individually.

The Commission is of the opinion that the function of the law of evidence is to guide the court to the correct decision. To decide whether a particular rule of evidence is fulfilling this function, it is also necessary to consider the nature and purpose of the proceedings before the court. As will be pointed out below, some of the rules of evidence are inappropriate for sexual offence proceedings. Accordingly the Commission recommends, as a ground rule, that all relevant evidence be admitted in sexual offence cases. 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 cautionary rules

The so-called cautionary rule requires presiding officers to exercise extra caution before accepting the evidence of certain witnesses on the ground that such evidence is inherently

potentially unreliable. The cautionary rule has evolved over a period of time largely as a consequence of the judiciary's own interpretation of the content of the rule as it is not coupled to a statutory obligation. The cautionary rule traditionally applies to a select category of witnesses. Of importance to this investigation is the rules' application to complainants in sexual offence cases, single witnesses and children.

G Complainants in sexual offence cases

The basis of the objections against the cautionary rule in sexual offence cases is primarily that its use rests on the assumption that complainants in sexual offence cases and particularly female complainants have an 'innate' inclination to lie in matters relating to sexual offences. This contention, which has found no empirical support in studies comparing the prevalence of false claims in sexual offence cases with those in other criminal offences, is based on nothing more substantial than the age-old stereotyping of women.

It is also contended that the cautionary rule is based on the principle that an allegation of a sexual offence is easy to make and difficult to refute. On the contrary the opposite seems to be true. An allegation of a sexual offence is not easy to make. A sexual offence victim is often blamed for the crime, with reference to the particular clothes worn by the victim at the time the offence was committed.

The Supreme Court of Appeal¹⁴ has removed the *obligation* to treat evidence of victims of sexual offences with caution, though the *discretion* to do so remains. The cautionary rule in sexual cases is confusing in itself, and therefore leads to uneven interpretation. The court is first required to believe the complainant, and then to search for reasons not to believe the complainant. The cautionary rule, in effect, places a victim of sexual assault in an unequal position in that such victim's evidence is viewed as suspect and the offender's evidence is viewed with an open mind. No scientific, reasonable or justifiable basis for the retention of this cautionary rule could be found.

Accordingly it is recommended that this rule should be abolished and that a clause providing for the abolition of the cautionary rule in sexual offence cases should be included in the Sexual Offence Act.

¹⁴

S v Jackson 1998 (1) SACR 470 (SCA).

G Child witnesses

Until recently, it has widely been believed that children had poor memories, were untrustworthy and were incapable of discerning fact from fantasy. Children who asserted that they had been sexually, physically or psychologically abused were not considered to be credible. Judges cautioned themselves regarding the unreliability of children's testimony.

In the sexual abuse cases that come before our courts, children are obliged to overcome significant legal obstacles in order to testify. Unlike their adult counterparts, children are required to convince the judge that they understand the meaning of the oath in order to give sworn testimony. Thereafter they face the sometimes insurmountable task of having their testimony believed. Presiding officers mostly insist that the testimony of children be corroborated in both civil cases and criminal prosecutions. 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.

In recent years research has been published that challenges the conventional views regarding the unreliability of children's testimony. Psychiatrists and psychologists 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.

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 burden becomes greater when the child happens to be a single witness in a case relating to a sexual offence matter.

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 recommends that the cautionary rule relating to children should be abolished unequivocally. It is clear that an awareness of recent advances in the discipline of psychology and the application thereof are prerequisite to reaching an 'intelligent conclusion' regarding the evidence of children. As the cautionary rule relating to children is so entrenched in the daily application of law in our courts, it is recommended that the Sexual Offences Act

should clearly state that this rule should no longer be applied.

G 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. Based on the progressive dilution of the application of the cautionary rules as a whole by our courts it is recommended that the cautionary rule relating to single witnesses in sexual offence cases should be abolished unequivocally. 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 recommends that the Sexual Offences Act should clearly state that this rule should no longer be applied.

Evidence of the previous sexual history of the complainant

Traditionally, evidence on the previous sexual history of complainants in rape cases was believed to be relevant to consent and credibility of the complainant as a witness. This rule provides a stark exception to the general rule that the character of a witness is not relevant to credibility (or lack thereof), and implies that the complainant who has previously engaged in sexual activity is more likely to consent to sexual activity on any other occasion. It further implies that the complainant is also generally more inclined to be untruthful and thus unreliable as a witness.

The character of the complainant is normally at the centre of sexual offence cases. It is believed to reflect on the truthfulness of the complainant. Often the evidence relevant to truthfulness crosses the ill-defined borderline to evidence relevant to the issue, particularly when the issue is consent (as is often the case in sexual offence cases). Because absence of consent is difficult to establish, there is frequently a contest of credibility between the complainant and the accused. The accused often seeks to show, on the basis of the complainant's sexual behaviour on other occasions, that she is more likely to have consented. The complainant's character often becomes the focus of the trial. Introducing evidence of sexual history may divert the

attention of the fact-finder from the behaviour of the accused at the time of the offence, to the behaviour of the complainant on earlier, unrelated occasions. As a result, complainants in sexual cases often feel that they are on trial, not the defendant.

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. This seems to be a large part of the problem.

The Commission is of the opinion that evidence that the complainant has 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. 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 proposes that section 227 of the **Criminal Procedure Act** be amended to delineate the circumstances under which evidence of previous sexual history may be adduced. The Commission is of the opinion that the proposed provision will not impinge on the right of the accused to a fair trial as evidence of sexual history that is of direct relevance will still be admissible.

Expert evidence in sexual offence cases

The Commission submits 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 to explain the possible reasons for this action. Without an expert opinion, otherwise legitimate responses to a sexual offence may be interpreted as irrational or confusing conduct on the part of the complainant, thereby affecting the complainant's credibility.

In order to avoid expert evidence being used solely as impact evidence at sentencing, the Commission recommends that a request for expert evidence be made at the pre-trial phase and that such evidence should be led as early in the trial as possible.

Some SAPS appointed social workers have undergone forensic training in the field of sexual abuse of children. These forensic social workers assess child sexual abuse victims at the request of the SAPS Family Violence, Child Protection and Sexual Offence (FCS) Units and aim at compiling a neutral report based on the assessment (in other words including facts which are in favour and to the detriment of the state or the defence). No therapeutic service is delivered to the victim. The Commission provisionally recommends that SAPS re-evaluate the position of these employees and perhaps seek instead to enhance the State's case by using these assessments to assist with the investigation done by the FCS Units. Alternatively, if the objectivity of the forensic social worker's assessment can be established or if the leading of such evidence is agreed to by the defence, the court may even choose to appoint such person as an expert in order to determine whether the child victim is capable of testifying or not.

The Commission is of the opinion 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. Some confusion as to the role (and credibility) of these professionals in sexual offence cases seems to exist and the Commission therefore submits that the explanation of the *sequelae* of behaviour of sexual offence complainants could credibly and reliably be done by trained and experienced lay counsellors. Prosecutors and judicial officers, however, must be prepared to establish the credibility of counsellors in the courtroom and ask questions designed to demonstrate the competence, expertise and trustworthiness of these witnesses.

Apart from the decision on the admissibility of evidence led by specific experts, two additional problem areas have been identified, 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 possibility of using neutral experts deserves consideration. The State and the defence could share the costs of a neutral expert. However, if one of the parties were not amenable to the import of the evidence of a particular expert, the parties may reach a deadlock as to which expert should be allowed to lead evidence. Given the present practice of leading conflicting expert evidence the Commission is not convinced that this is a viable option.

The Commission concludes 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 is totally outside of the presiding officer's frame of reference. The Commission identifies 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, it is also recommended that assessors not be required to have formal qualifications, but preferably have these qualifications coupled to recent practical experience. Although two options are presented, the Commission wishes to highlight the fact that neither the state nor the defence are 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 encourages 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 recommends specific inclusion in the **Criminal Procedure Act** of the possibility of an expert leading evidence of the effects of a sexual offence. The emotional and psychological consequences of sexual abuse are areas outside the knowledge and expertise of most courts. This is particularly important as the emotional responses and consequences of these offences turns conventional wisdom on its head and what would often be regarded as a 'normal' response is in fact most unlikely.

The Commission concurs with the opinion that it is not desirable for court time and other resources to be drained by a battle of the experts, but would go further to suggest 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 child sexual abuse. However, the Commission would like to sound a word of caution, 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.

Admissibility of previous consistent statements

Where the complainant did not make a statement at what is regarded as 'the first reasonable opportunity', the defence usually succeeds with an argument that a negative inference should be drawn about the credibility of the complainant: if the rape really happened, the complainant would have complained as soon as possible.

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 advances in this area. 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.

There has been some recognition by the courts of the invalidity of the assumption that 'no earlier report means there was nothing to report'.

The manner in which the common law rules governing early complaint evidence have been dealt with in other jurisdictions suggests that there are three possible strategies for reforming the common law:

- G** The first option is for legislation to state clearly that the rule allowing for the admissibility of evidence on earlier complaints should no longer be recognised, and that previous consistent statements may only be admitted under the general rules which allow for the admissibility of previous consistent statements under certain narrowly defined exceptions.

This approach, which would be similar to the measures adopted in Canada and the Australian Capital Territories, implies that no evidence may be led on earlier complaints, unless the evidence falls under one of the other recognised exceptions to the rule that previous consistent statements are inadmissible, for example, where a previous

consistent statement is allowed to counter an allegation that the version of the witness is a recent fabrication.

- G** The second option is to allow evidence of earlier complaints, but to dispense with the rule that the complaint must have been made at the first reasonable opportunity. This option, which is found in Section 6 of the Namibian **Combating of Rape Act** No 8 of 2000, implies that all earlier complaints, irrespective of any delay in the reporting, would be admissible, provided that the other requirements for admissibility have been complied with. However, this would not eliminate the possibility that the presiding officer may draw a negative inference where there was a delay in making a complaint of rape.
- G** The third option is to state clearly that such a negative inference may not be drawn only from the absence of a complaint or a delay in making the complaint. It would only be one of the factors the presiding officer should consider in weighing up the evidence. This would 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.)

The Commission believes that the third option is preferable, because it directly addresses the problem that exists at present, without unduly curtailing judicial discretion to evaluate evidence. The Commission therefore recommends the inclusion of provisions similar to sections 6 and 7 of the Namibian **Combating of Rape Act** in the Sexual Offence Act.

Hearsay evidence of children

Over the last ten years, most common law jurisdictions have proposed reforming the rule which excludes hearsay evidence. In the same vein, by way of legislation, section 3 of the **Law of Evidence Amendment Act** No 45 of 1988, has brought about a relaxation of the hearsay rule in South Africa. The common law on hearsay, which together with the cautionary rules were often applied together to exclude the hearsay evidence of children, has clearly been repealed.

In the course of this investigation it has become clear to the Commission that certain evidentiary and procedural rules have frustrated the effective prosecution of sex offenders while submitting the complainant, child and adult alike, to a prolonged ordeal in court or denying the complainant access to justice due to the fact that important evidence, was disallowed. Many adjustments to the law have already been made to ameliorate this situation. However, despite the recent law reform regarding the admissibility of hearsay evidence, uncertainty seems to exist as to whether the court will exercise its discretion in terms of section 3(1)(c) of the **Law of Evidence Amendment Act** so as to allow the hearsay evidence of children who do not testify in the proceedings. It is clear that a presiding officer may admit such evidence if the criteria in section 3(1)(c) of the abovementioned Act is met. From the lack of reported judgements relating to this aspect of the law, it is unclear whether a problem indeed exists in practice and, if so, whether the hearsay evidence of children is being excluded by presiding officers who are not exercising the discretion given to them in terms of the above-mentioned Act or whether presiding officers are not afforded the opportunity of exercising this discretion as a result of prosecutors not pursuing cases of child sexual abuse where the child is not available or able to testify. Prosecutorial uncertainty as to whether the court will exercise its discretion in favour of admitting hearsay evidence could impact negatively on the prosecutor's decision as to whether to proceed to trial.

The Commission is of the opinion that the existing legal vehicle for allowing hearsay evidence seems to be in line with, if not actually ahead of, an international move towards admitting such evidence and in fact seems to be more lenient than the provisions contained in comparable jurisdictions. If the very wide criteria of section 3 of the **Law of Evidence Amendment Act** are met, the hearsay evidence of children and adults who are unable to testify by reason of, for example, incompetence or mental incapacity, could be admitted by a presiding officer exercising his or her discretion in this regard. The Commission is not in favour of recommending amendments to legislation, with the sole purpose of stating the obvious, i.e, that the hearsay evidence of children in sexual offence matters who are unable to testify may be admitted if the evidence meets the criteria set in section 3 of the above Act. The Commission also does not see a need at this time for the creation of an additional statute to regulate the admissibility of extra-judicial declarations of unavailable child witnesses as recommended above, due to the fact that such evidence is already admissible in terms of the Act under discussion and that it would be highly unlikely for a presiding officer to convict an accused solely on such evidence. The Commission is of the opinion that corroborative evidence of the offence would be required thereby protecting the countervailing interests of the accused.

However, in light of the apparent disparity between the *de facto* and *de iure* position relating to the admissibility of hearsay evidence in sexual offence matters, the Commission welcomes submissions pertinent to this issue.

The Commission also wishes to elicit comment as to whether the definition of 'hearsay evidence' as contained in section 3(4) of the **Law of Evidence Amendment Act** should be amended in keeping with advancing technology. Currently it is defined as follows:

'hearsay evidence' means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence.

The Commission is aware that account needs to be taken of the role of computer technology particularly in relation to child pornography and pedophile use of the Internet. This matter will receive the Commission's attention in the fourth discussion paper on sexual offences.

The necessity of a finding of competence before testifying

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 quite accurately be able to tell the court what happened to him or her and may be capable of understanding questions put to him or her and be able to 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.

It is unclear why the courts need to test whether a potential witness can understand the duty to tell the truth. It is trite that not everyone who takes the oath or affirmation tells the truth, and conversely, it does not follow that failing to make a promise, or failing to articulate the nature of a promise adequately, will result in a person lying. Excluding the often conclusive 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.

From the comparative analysis and the submissions received it is clear that a presiding officer is not well placed to make an assessment of a witness's cognitive ability. A similar conclusion was reached in the chapters in the discussion paper dealing with the cautionary rules. Conclusions regarding the testimony of witnesses who were either victims of a sexual offence, were single witnesses, children or, in the worst case scenario, all three, based on erroneous assumptions were until recently the order of the day. Many victims of sexual offences are still denied justice as a result. 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 to court. If, for example, a child cannot display to the court that he or she grasps what it is to tell the truth and is admonished appropriately, his or her evidence is discarded. This is done without assessing whether the child can understandably relay the events which are in issue to the proceedings. Recent research has shown 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. Similar justifications exist regarding the testimony of physically or mentally disabled persons.

The Commission is of the opinion that the option of training magistrates to aid them in determining whether a witness is competent to testify or not will be of limited value. Firstly, one has to recognise that the presiding officer cannot be expected to be or be trained to be a psychologist or behavioural specialist. The role of experts in the field of child psychology, counselling of sexual offence victims and such like is crucial in many sexual offence matters and it is important to recognise the role they have to play. Training or sensitising of magistrates to this field would naturally be beneficial and would enhance the quality of the decisions made by presiding officers, but in the opinion of the Commission this is not the answer to the problem presented. 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**.

G The Commission recommends 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. Instead it is 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.¹⁵ Such a witness will then give unsworn evidence. If the evidence appears as it unfolds to be unsatisfactory, then 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 such evidence is not relevant. It will be for the presiding officer to 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 still believes that a witness should be enjoined to tell the truth.

- G The Commission therefore recommends that section 164(1) of the Criminal Procedure Act be amended. Training of court officials will also be essential in order to give effect to these recommendations.
- G The Commission further recommends 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 corroboration of unsworn evidence

Although the rule of corroboration of the unsworn evidence of a witness (including a child) is not a statutory requirement in South African law, it is so firmly entrenched in practice that legislative intervention is necessary. The application of the corroboration warning rule for child victims generally makes successful prosecution a difficult task and its retention must be questioned.

The practice of requiring children about to give evidence to explain abstract concepts such as truth and lies, in our opinion gives no valid indication of truthfulness or reliability as a witness. Indeed, even those who have no difficulty in explaining the concepts are not necessarily truthful and reliable.

- G The Commission recommends the inclusion of a section in the new Sexual Offences Act which abolishes the rules of corroboration in relation to sexual offences.

¹⁵

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 witnesses testimony accessible to the court.

Similar fact evidence

The rule dealing with the admissibility of similar fact evidence is undoubtedly complex. Its effect in any given case will depend very much on the facts of that case. This should not be seen necessarily as a defect in the rule. The value of the rule seems to lie in its flexibility to serve two competing purposes: to admit evidence that is genuinely relevant to the question of the accused's guilt; and to exclude evidence that is simply prejudicial to the interests of the accused.

Much can be written about the admissibility of similar fact evidence, but sufficient for present purposes is that the use of similar fact evidence has authoritatively been sanctioned in this country 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.

A plethora of arguments abound in favour of and against the admission of similar fact evidence. After weighing these arguments, the Commission finds 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.

G The Commission recommends 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.

It is argued that the accused is frequently taken by surprise by this type of evidence and that the investigation into the collateral issues that arise out of 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 element of surprise is negligible. However, careful management of the trial will necessitate that the court will have to determine whether there should be one trial or whether there should be separate trials for each charge. As stated above, if the complaints of a number of victims against one person are not heard in one trial, it will be necessary for the same witness to testify at more than one trial in order to introduce the similar fact evidence that the State wishes to rely on.

- G In view of the fact that repeat trauma is inevitable in such matters, the Commission recommends that similar fact evidence be allowed in those matters and that multiple appearances in court be avoided wherever possible.

It is also argued 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 and may also 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 is of the opinion that this argument is unsound. Naturally a suspect's *modus operandi* and antecedents will form a crucial part of the investigation where the suspect has not yet been apprehended, is unknown, and 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 finds the tendency to regard similar fact evidence as evidence of bad character or evidence of criminal or bad disposition, as 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 out of its descriptive quality while the prejudicial effect arises primarily out of its moral quality.

- G The Commission recommends 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 is based on the view that admitting the evidence, where strongly probative, subject to safeguards, is an effective compromise which is least distorting to the criminal justice process.

Discharge of the accused and the defence case

If at the close of the State's case at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he or she may be convicted on the charge, it may return a verdict of not guilty. The words 'no evidence' in section 174 of the **Criminal Procedure Act 51 of 1977** has been interpreted to

mean no evidence upon which a reasonable person acting carefully *may* convict.

This issue is extensively argued in the South African Law Commission Discussion Paper 96 'Simplification of Criminal procedure (A More Inquisitorial Approach to Criminal Procedure - Police Questioning, Defence disclosure, The Role of the Judicial Officers and Judicial Management of Trials). Consequently, the Commission makes no recommendation, in the discussion paper on process and procedure, on the accused's right to silence.

Examination of witnesses

Examination of witnesses implies the questioning of a witness. Examination of witnesses is conducted either in person or through a legal representative. When a witness is questioned by the party (or parties) who did not call him or her, it is known as cross-examination. Cross-examination of witnesses is seen by some as a cornerstone of the right to challenge the accuser. In fact it is one of many ways in which that challenge may be launched. The purpose is to elicit evidence favourable to the party cross-examining or to challenge the truth or accuracy of the evidence. This is done primarily through questions that are aimed at sowing confusion and obtaining contradictory responses to questions. The victim does not have the right to cross-examine or re-examine defence witnesses or any other witness. The State, the accused and the court have the right to cross-examine witnesses that they have not called. The presiding officer has a limited role and may ask questions of a witness, but may not compromise his or her impartiality.

Cross-examination of witnesses

In South African law, the conduct of cross-examination is governed by a combination of legislation, ethical rules and case law.

Despite these legal and ethical rules, and extensive case authority on the limits of cross-examination and on the imperative of curial courtesy, the humiliation and intimidation of witnesses is a fairly common occurrence in South African courts. Cross-examination often takes the form of attacking, either directly or indirectly, the character and credibility of the victim.

Victims are frequently so traumatised by the process that they do not give the best evidence that they could resulting in doubt as to the veracity of their version of the events and acquittals.

Many victims have to endure days in the witness box during which the defence repeatedly tries to break them down by suggesting that they are lying, putting spurious reasons to them to suggest that they have cause to lie and generally attempting to establish the accused's innocence by destroying a victim's version through confusing, repeated questions that undermines the victim's credibility, attacks their personality and attempts to undermine their integrity. This frequently results in the court concluding that it cannot convict as the victim's evidence is too confusing. The very nature of cross-examination is to discredit a witness and although "cross-examination need not always be aggressive to be effective" it frequently is.

- G The Commission proposes to introduce firstly, in the form of primary legislation, a prohibition on questions in cross-examination that are scandalous, insulting or vilifying. This will empower the court to forbid any question it regards as 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 bullying or are needlessly offensive in form, although such questions may be proper in a different context.
- G Secondly, the Commission recommends 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.
- G Thirdly, the Commission poses the question of whether a person accused of a sexual offence should be prohibited from **personally** cross-examining the complainant. The Commission makes no recommendation in this regard and calls for comment on this option.
- G Fourthly, the Commission is concerned that if there are a number of co-accused who repeatedly ask questions on the same points, the victim will suffer unnecessary trauma and confusion. However, the Commission has come to the conclusion that each accused should be entitled to put the same question to the witnesses. As such the Commission makes no legislative recommendation in this regard.
- G Fifthly, the Commission is concerned about the use of repetitive questions to confuse witnesses. The Commission recommends that repetitive, pointless questioning should

not be allowed. Further, that the witness, or the State, may object thereto.

Victim rights, the treatment of victims and ways to involve victims in the process of sentencing the offender

Demands made by victims and their families may be divided into two broad categories: claims for restitution and services and claims for procedural rights. Restitution involves calls for compensation in some form or another. The call for services includes the need for counselling, therapy, support and treatment, information on the process of legal proceedings and the provision of facilities for complainants, victims, and their families, who are required to participate in legal proceedings or wish to observe them. The claim for procedural rights refers to the desire of victims to be part of and be acknowledged in the legal process.

The rights of victims

In recent years victims of crime have raised questions about the lack of support, the absence of compensation and their diminished role in the criminal justice system. The criminal justice process appears to be predominantly oriented towards the offender and the victim is deemed relatively superfluous. From the moment that the decision is made to prosecute until the time that sentence is passed, the victim is an outsider to the process and has a limited role to play.

Victims' rights refer to a variety of rights and services which victims of crime should be afforded, such as information regarding available financial and social services, notification of case status, protection from harassment and intimidation, separate court waiting rooms, the speedy return of property and being treated with compassion by criminal justice officials.

The mandate of this investigation limits its influence to the strengthening of the procedural position of the victim and more specifically the sexual offence victim. In meeting this mandate and as far as victims' rights are concerned, the following options present themselves. It must be emphasised, however, that these options are not mutually exclusive.

- G** 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 empowerment of victims.

- G 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.
- G Similarly rights of victims of sexual offences could be incorporated into specific sexual offence legislation.
- G Adopt a Victims' Charter which could be regularly updated without the procedures involved in amending legislation.
- G Review all aspects of criminal procedure regarding victims so that legislation appropriate to victims' rights can be incorporated in general criminal procedure. This option would weave victims' rights into the heart of criminal procedure.

Comment is invited on which option would be the most appropriate mechanism to entrench the rights of victims of sexual offences.

The treatment of victims

In response to questions in the Issue Paper as to whether treatment and counselling should be offered to the victim alone or whether it should be extended to the victim's family and who should bear the cost of the counselling and treatment, the majority of submissions supported the idea that counselling should be extended to the victim's family, excluding the offender if the offender is a family member. It was submitted if the offender could bear the costs, funds for counselling should be obtained from the State or a victim compensation fund to which all offenders who have an income should contribute.

There is currently no State Compensation Fund to assist victims of crime although a State President's Fund for Victims of Terrorism was established on 20 May 1983.

Section 300 of the **Criminal Procedure Act** 51 of 1977 makes provision for the payment of compensation to victims of crime at the request of the prosecutor. Claims for damage or loss are limited to damage or loss of property and, in order to determine the amount of compensation, the court may refer to the evidence and the proceedings at the trial or hear

further evidence.

The **Criminal Procedure Act**, however, does not make provision for compensation to victims for injuries sustained as a result of crime nor for the payment of compensation to the family if the victim was killed.

A first step towards resolving this unsatisfactory situation within a restorative justice framework, would be to clarify the **current legal position of victims** in South Africa. Treatment and counselling should not only be offered to the victim alone but should include the victim's family. Furthermore the definition of *victim* should not only include *direct* and *indirect victims* such as family, but be extended to include the following:

- G A person who has suffered direct harm, or threatened with harm, whether it be physical, emotional or pecuniary, as a result of the commission of a sexual offence, including, in the case of a victim who is under 18 years of age, or a victim who is incompetent, or incapacitated, or deceased, or one of the following: a spouse; a legal guardian; a parent; a child; a sibling; another family member; or another person designated by the court; and in the case of a victim that is an institutional entity, or an authorised representative of the entity, that entity.

- G A State Compensation Fund to assist victims of crime similar to the State President's Fund for Victims of Terrorism should be established. Such a fund should also make provision for travel expenses and the financing of counselling and treatment costs of victims of sexual offences. No means test for victims should apply. All offenders and perhaps society in general should contribute to this fund in one way or another. The offender therefore does not pay for the treatment or counselling of the victims of his or her crime, but for the treatment and counselling of victims in general through the State Victim Compensation Fund.

- G If treatment and counselling of the victim were to be limited to affordability for the offender, very few victims would ever receive treatment and/or counselling. The Commission also views 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.

Pending finalisation of the discussion paper on a compensation fund for victims of crime by the

Project Committee on Sentencing, the Commission would recommend to that Committee that a definition of 'victim' in the Compensation Fund for Victims of Crime Bill should be included. The Commission also argues for an extension of the notion of 'victim' in such a Bill.

Further, the concepts of "harm or loss" should be sufficiently wide to cater for the issues that may arise following the commission of a sexual offence.

Calling the victim as a witness to testify at sentencing

The Project Committee on Sentencing is considering introducing a provision similar in scope to section 274(1) of the **Criminal Procedure Act 51 of 1977** in the draft Sentencing Bill. In the light of the recommendations made by that Project Committee we do not recommend any changes to section 274(1) of the Criminal Procedure Act 51 of 1977.

Introducing 'victim impact statements' for purposes of sentencing

It is very difficult for any person, even a highly trained and experienced person such as a judge, to fully comprehend the range of emotions and suffering a particular victim of sexual violence might have gone through. It is also very difficult, if not impossible, to make a prognosis of what the effect of a particular act of sexual violence will have on a particular victim in future.

The Project Committee on Sentencing defines 'victim impact statement' in the draft Bill accompanying the discussion paper on **Sentencing (A New Sentencing Framework)**. This definition reads as follows:

"Victim impact statement" means a written statement by the victim or someone authorised by the Act to make a statement on behalf of the victim which reflects the impact of the offence, including the physical, psychological, social and financial consequences of the offence for the victim.

The use of victim impact statements can be seen as a measure to give victims an opportunity to voice their opinion about the case. Although a victim impact statement usually takes the form of a written statement that is presented to the court as part of the pre-sentence proceedings, it can also be submitted in the form of an oral statement made in court by the victim prior to sentencing.

We support, with the reservations listed below, the inclusion of a clause on victim impact statements, in either oral or written form, in the draft Sentencing Framework Bill.

- G In the light of the significance that information on the impact of the sexual offence *should* have the Commission recommends the introduction of a legislative provision that *directs* the consideration of such information by the court for sentencing purposes, rather than allowing the court to use its discretion about whether or not to consider the information. The Commission recommends the inclusion of such a clause on victim impact statements, in either oral or written form, be included in the draft Sentencing Framework Bill;
- G 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;
- G Evidence from victims on parole may be given via closed circuit television and / or with the assistance of an intermediary;
- G 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;
- G Parole conditions should take into account the safety and well-being of the victim and family;
- G 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;
- G 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.

- G The Commission further endorses the recommendation contained in the Report on Sentencing that the proposed Sentencing Council 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.
- G We further recommend 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.
- G The Commission recommends that 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.

Should the victim impact statement include the victim's opinion on sentence?

- G The Commission recommends that 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.

Duty to prepare a victim impact Statement

- G 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.

State compensation scheme

There is at present no state-funded compensation scheme for victims of violent crime in operation in South Africa.

Similar to the Project Committee on Sentencing, we recognise the enormous financial burden

that a scheme of this nature may have on the state. We also know that the physical, emotional and psychological damage to a rape victim is unquantifiable and cannot really be measured in monetary terms. Moreover, we are concerned about the ramifications of monetary compensation in relation to acts of sexual violence.

In this regard the Project Committee on Sentencing recommend that by the year 2002, or sooner if possible, limited compensation for rape survivors be implemented to assist them medically and to ensure that they receive the appropriate social and psychological support. The amount of R2000 is proposed. This could be used by the survivor at his or her own discretion for the purchase of services and support not currently available through the State (or their private medical aid).

The Commission recommends that -

- G Until a compensation scheme is operational and is proved to serve as more than a mere symbolic gesture to victims of crime, the state bears the cost of any medical and/or psychological treatment incurred by the victim/survivor;
- G Clause 37 of the of the draft Sentencing Framework Bill be amended to include the words "compensation and future loss, whether direct or indirect".

Other sentencing and treatment options for sexual offenders

Some sentencing and treatment options specific to sexual offenders have been considered. Amongst these are the possibility of introducing sexual offender and drug and alcohol treatment and testing orders, chemical castration, the imposition of notification and registration requirements on sexual offenders, and preventing unsuitable persons from working with children.

Sexual offender and drug and alcohol treatment and testing orders

Drug and alcohol abuse are major contributing factors in the commission of crime and sexual crimes in particular. 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 being misused.

In the United Kingdom the **Crime and Disorder Act** 1998 provides for the so-called 'sex offender order' and the 'drug treatment and testing order'. Briefly the sex offender order provides that the magistrates court may make a sex offender order on application by a chief officer of police, who may apply to such court if it appears to him that the following conditions are fulfilled with respect to any person in his police area, namely -

- (a) that the person is a sex offender; and
- (b) that the person has acted, since the relevant date, in such a way as to give reasonable cause to believe that an order under this section is necessary to protect the public from serious harm from him. The court making a sex offender order may prohibit the defendant from doing anything described in the order.

The prohibitions that may be imposed by a sex offender order are those necessary for the purpose of protecting the public from serious harm from the defendant.

Further, if without reasonable excuse a person does anything which he is prohibited from doing by a sex offender order, he shall be liable - on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both; or on conviction on indictment, to imprisonment for a term not exceeding five years or to a fine, or to both.

A drug testing order is an order a court may make which has effect for a period specified in the order of not less than six months nor more than three years ('the treatment and testing period'. and

The court shall not make a drug treatment and testing order in respect of the offender unless it is satisfied -

- (a) that he is dependant on or has a propensity to misuse drugs; and
- (b) that his dependency or propensity is such as requires and may be susceptible to treatment.

Further, a drug treatment and testing order shall include a requirement ('the treatment requirement') that the offender shall submit, during the whole of the treatment and testing period, to treatment by or under the direction of a specified person having the necessary qualifications or experience ('the treatment provider') with a view to the reduction or elimination of the offender's dependency on or propensity to misuse drugs.

South African legislation does not cater for either sex offender orders or drug or treatment and testing orders.

G The Commission is of the opinion that the additional protection provided to the public by such orders would be an important step towards reducing sex crimes as it can prevent further offences before they are committed. The Commission would, however, include alcohol testing in such an order due to the high incidence of alcohol abuse and the correlation with the commission of sexual offences. Accordingly, the Commission recommends the introduction of sex offender orders and drug and alcohol treatment and testing orders.

Chemical castration

While the Commission understands that it is natural for victims of sexual offences and their families and friends to react by calling for extreme responses, we believe the real test for the judicial system lies in increasing the conviction rate and creating certainty and consistency about apprehension and punishment. Manifestations of this call for extreme measures range from demands to reinstate the death penalty, the administering of chemical castration and forced amputation.

Arguments advanced in support of mandatory chemical castration are:

- It prevents the future victimisation of children.
- There is a high incidence in recidivism with sexual offenders.
- Chemical castration is cheaper¹⁶ than keeping offenders in jail.
- Chemical castration relieves the offenders of their criminal sexual fantasies and is therefore beneficial to the offender.

The desire to want to punish severely sexual offenders who commit sexual offences repeatedly is wholly understandable and legitimate. To give effect to this clear need, Government has

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According to Peter J Gimino III 'Mandatory chemical castration for perpetrators of sex offences against children: Following California's lead' 1997 (25) **Pepperdine LR** 67 at 101 the cost of chemical castration is estimated at 'only' US \$ 2400 per year per parolee. According to the California Department of Corrections, it would have cost an estimated US \$ 1, 6 million to chemically castrate the 687 sex offenders paroled between 1993 and 1995 in California.

adopted the **Criminal Law Amendment Act** 105 of 1997. This **Minimum Sentences Act**, as the Act is commonly known, provides for compulsory minimum sentences to be imposed where a person is convicted of certain serious offences. Section 51 of the Act provides, for instance, for a compulsory sentence of life imprisonment when a person convicted of a second rape offence or when rape is committed involving the infliction of grievous bodily harm. Should judicial officers apply the clear provisions of this Act properly, then chemical castration would not be an issue as a second offender will spend the rest of his life behind bars.

It is also important to point out that rape is not about sex. It is about violence and power. Should the drug used in chemical castration have the required effect, then the sexual offender will simply resort to other means to degrade and humiliate women and children. Such an offender could then resort to inserting bottles or sticks or knives into the sexual organs of his or her victim. Chemical castration alone will not stop sexual offenders who prey upon victims because of their desire for domination and power.

The scientific community is divided about whether chemical castration really solves the problem of recidivism among sex criminals. In addition, in order for the drug to work, an injection has to be administered every seven to ten days.

For the treatment to be effective, an offender needs to be injected every seven to ten days. In addition, the person needs intensive counselling to bring about the desired behavioural change. Chemical castration on its own therefore does not work. The question has to be answered of whether a criminal who is supposed to serve a compulsory life sentence deserve this kind of treatment? Further, whether chemical castration would be financially efficient and whether those resources should not be directed elsewhere.

It is also necessary to consider the human rights implications of chemical castration. Section 12(1)(e) of the Constitution of the Republic of South Africa Act 108 of 1996 secures for every person the right to freedom and security of the person, which includes the right not to be treated or punished in a cruel, inhuman or degrading way. This includes the sexual offender.

G The Commission does not support chemical castration as a sentencing option.

Notification and registers of sexual offenders and victims

Community notification refers to the distribution of information regarding released sex offenders to law enforcement agencies, citizens, prospective employers, and community organisations. Megan's Law is the prime example of a legislative provision that enables law enforcement agencies to notify communities or specific vulnerable groups that a released or paroled sex offender is living in their area.

It is also 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.

There is no provision for 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. It provides that 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:

- (1) all notifications of possible ill-treatment of or deliberate injury to children which transmitted to the Director-General together with the corresponding reports ;
- (b) certain categories of convictions; and
- (c) all determinations of the children's court as contemplated in regulation 39A(4)(b).

The register is to 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;
- (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 Director-General of Social Development may approve that the register be used for *bona fide* research purposes such as the collection of information on the occurrence, distribution and prevalence of cases of ill-treatment of or deliberate injury to children, or of the physical, emotional or sexual abuse of children, and of the various interventions made in such cases.

Although the National Child Protection Register will include details of the **convicted** perpetrator, it essentially follows the child victim and does not track the offender. Its sole purpose is to protect children and not adults. It must also be realised that the National Child Protection Register is not limited to the sexual abuse of children, but goes much wider. Besides the data in the register being used for research, it is not clear what the purpose of the register is or how it will protect children.

The issue of mandatory reporting of child abuse and neglect falls within the mandate of the Project Committee on the Review of the Child Care Act. We therefore refrain from making any recommendations in this regard.

It is also worth pointing out that the South African Police Service through its Criminal Records Centre is already maintaining a national register of all convicted offenders, including convicted sexual offenders.

There are extensive arguments, both for and against registration and notification systems.

The Commission has come to the following decisions -

- G** We do not recommend the introduction of community notification legislation along the lines of Megan's law in South Africa. 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. We also warn of the danger and the false sense of security inherent in notification and registration systems. No notification or registration system can predict criminal behaviour. There is a real threat that communities might take the law in their own hands and cleanse

neighbourhoods from offenders, even on the slightest of rumours.

- G** We recommend extended use of the existing SAPS Criminal Record Centre. We believe it is possible, by adapting the SAP 69 and SAP 62 forms and grouping the relevant sex offences under a general category, to effectively use the existing SAPS Criminal Records Centre 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 position that give them access to children. As such the Commission is not in favour of creating a *new* register or index of *convicted* sexual offenders.
- G** The Commission does not support any register or index of sexual offenders with the sole function to blame and shame sexual offenders. Such a register may encourage vigilantism. It has no justification, no rehabilitative effect, its deterrent value is suspect, and will drive 'predatory' sexual offenders further underground, while at the same time giving 'clean' communities a false sense of security.
- G** The Commission is 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.

Preventing unsuitable persons from working with children

In the United Kingdom, an Interdepartmental Working Group on Preventing Unsuitable People from Working with Children and Abuse of Trust has proposed the introduction of an integrated system for identifying people unsuitable to work with children. The Working Group has proposed that there should be a central access point (sometimes called a one-stop shop) and that this access point should be the Criminal Records Bureau.

There is much to be said for introducing such an integrated system in South Africa.

- G** It is therefor recommended that a joint task team consisting of members of the Departments of Justice, Education, Labour and Safety and Security be constituted to investigate the possibility of establishing a register of persons unsuitable to work with

children and to prepare the necessary legislative framework in this regard.

- G** We recommend 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. These systems and lists should be linked to each other and to the SAPS Criminal Records Centre.
- G** The screening of employees and managers, who are required to work with or children, for offences committed against children is recommended.
- G** We also propose 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. We propose that such a system be introduced first on a voluntary basis and, perhaps later, on a mandatory basis. The possibility of linking welfare subsidies and grants to the screening of employees and managers of child care facilities is an option worth pursuing. Another possibility is 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.¹⁷ Yet another possibility is to make it a criminal offence for any organisation to employ a person with certain previous convictions in the child care field.
- G** We do not recommend the introduction of any legislative measures to provide for retrospective checks, that is checks 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 clear that such checks are no substitute for continued vigilance and monitoring against abuse. We recommend that organisations should only make checks on existing employees after careful consideration as to whether this is justified.

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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 .

- G There is also the question of whether organisations should set in place a system of regular checks for individuals subsequent to their appointment. Again it needs to be emphasised that such checks are no substitute for continued vigilance and monitoring against abuse. We see this as a matter of good practice and do not make any recommendations in this regard.

The Sentencing of sexual offenders

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.

The Commission recommends -

- G 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.
- G 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.
- G 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 sexual offenders

The sentencing of child offenders is elaborately regulated in the proposed Child Justice Bill prepared by the Project Committee on Juvenile Justice. 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 makes no further recommendations in this regard.

The treatment of sexual offenders

Imprisonment on its own and other conventional forms of punishment are ineffective means of rehabilitating sexual offenders. After release from prison or other correctional institutions where treatment is not offered, as is usually the case, sexual offenders often return to the community with strong feelings of anger.

The prison environment itself may not be conducive to developing and supporting changes in sexual offending behaviour. Prisons are notoriously overcrowded, and there is little control over the sexual behaviour of prisoners. These experiences may reinforce the very behaviours which are targeted for change, as well as contribute to denial of the sexual offence by the sexual offender as a means of defending himself or herself against the sexual assaults of other prisoners.

The Commission therefore regards it 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.

G Due to the imperative to ensure victim and community protection, the Commission recommends 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.

- G** The Commission proposes to amend section 276A 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.
- G** The Commission recommends that 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. We further recommend that 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.

There is also a need to provide 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.

Obviously treatment and rehabilitation programmes cannot be limited to young sexual offenders or, for that matter, first time offenders. Hardened long term sexual offenders eventually do come out of prison, even when sentenced to life imprisonment. If no attempt was made to instill fundamental behavioural changes in that offender, it should not come as a surprise that that person soon finds himself or herself back beyond bars after committing a similar or worse offence.

Although the Commission recognises that section 276(3) of the **Criminal Procedure Act** 51 of 1977 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. For sexual offenders, this period may be too short to be really effective.

- G** To address the concern raised regarding the shortness of the period for which correctional service may be imposed, it is recommended that the period of correctional service be extended from three years to five years.

Supervision of dangerous offenders

Provision has been made in the new **Correctional Services Act** 111 of 1998 for community corrections and release from prison and placement under correctional supervision and on day parole and parole.

Further, the Sentencing Project Committee's published 'Report on A New Sentencing Framework' introduces measures aimed at dealing effectively with a 'potentially dangerous criminal'. When enacted this will apply to sexual offenders as well as other offenders. In terms of those provisions -

- C** where a High Court or regional court sentences a person to a fixed term of unsuspended imprisonment of 5 years or more and the offence is one that involved serious physical injury or the immediate threat of such injury that court, may in addition, hold an inquiry.
- C** After that inquiry and if the court is satisfied that there is a substantial risk that the person concerned may commit a further offence involving serious physical injury to another person, declare the person concerned a dangerous criminal.
- C** The consequences of such a declaration, are that after serving the full unsuspended term the person concerned must be brought before an appropriate court. The court must consider a report from the Correctional Supervision and Parole Board and determine whether that person is still a substantial risk.
- C** If that person is considered a substantial risk the court must confirm that the person is a dangerous criminal and the detention of that person continues for an indefinite period; and
- C** order that such person be brought before the court within a fixed period that may not exceed five years.

Despite these provisions, the Commission has concluded that there may be sexual offenders who do not fall into the category of 'dangerous criminal', but who may still pose a threat to society.

- G To cater for this scenario, the Commission recommends making provision for the long term supervision of certain sexual offenders.

- G The Commission proposes the introduction of a clause in the new Sexual Offences Act which introduces the notion of 'dangerous sexual offender. A dangerous sexual offender is to be defined as 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

- G Long term supervision is to be defined as supervision of a rehabilitative nature for a period of not less than five years.

- G It is further recommended that a long term supervision order given by a court 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 determine. The victim or their next of kin should also be advised of any review proceedings and be entitled to address the court on this issue.

- G Failure to comply with a long term supervision order should be an offence and the penalty should include a fine, or imprisonment, or a community sentence which may include correctional supervision or community service.

- G Further, the Commission recommends 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. Staff who provide assessment and treatment services in the Correctional Services environment should be adequately trained and supported in this specialised field of work.

EXPLANATION OF THE AMENDMENTS TO THE DRAFT SEXUAL OFFENCES BILL

Introduction

A substantial number of comments, totalling 63, have been received following the publication of Discussion Paper 85 **Sexual Offences: The Substantive Law**. The individuals, bodies and institutions who submitted comment on the Discussion Paper and the proposed draft Sexual Offences Bill, as contained in that Discussion Paper, are reflected in **Annexure B**. The Commission wishes to register its appreciation for the considerable amount of effort that evidently went into the compilation of the respective submissions. Due to these efforts the Commission was placed in a position to reconsider its original conceptualisation of the substantive law on sexual offences, and to make sensible adjustments to the proposed draft Bill. It should be clear to all that the original Bill has been revised substantially. What follows is an explanation of the amendments to the draft Bill contained in Discussion Paper 85, with an indication of some of the respondents who influenced the Commission's thinking in a significant way. The revised Bill is published in this Discussion Paper in order to furnish those who wish to respond to the redrafted provisions with an opportunity to do so. It should be noted that the revised Bill also contains the legislative provisions on practice and procedure proposed in this Discussion Paper.

Definitions (clause 1)

The definitions of *brothel* and *commercial sexual exploitation* that appeared in the proposed draft Bill published as an annexure to Discussion Paper 85 (hereafter "the previous Bill") have been omitted from clause 1 of the revised Bill contained in **Annexure A** to this Discussion Paper (hereafter "the revised Bill"). See the discussion under "child prostitution" below.

The definition of *child*, designating two different age categories for two different chapters of the previous Bill, has been omitted from the revised Bill.¹⁸ Where different age categories relating to children are applicable in the revised Bill, the respective clauses clearly indicate what the categories are.

¹⁸

In line with a submission from HM Meintjies (Deputy Director of Public Prosecutions, Transvaal).

The definition of *coercive circumstances* has been extracted from clause 1 of the previous Bill and moved to clause 3, as this is the only clause in the Bill that deals with coercive circumstances.

A new definition of *genital organs* has been included owing to diverse comment regarding the medical term “vagina”. It was contended that penetration of the vagina is not possible without first penetrating “the space or potential space between the labia majora”.¹⁹ Moreover, the female genital organs do not merely consist of the vagina, nor do the male genital organs only refer to the penis.²⁰ Some respondents called for the substitution of these terms with male or female genital organs or something similar.²¹ It has therefore been decided to eliminate references to both penis and vagina by making use of the term “genital organs”, and to specify that such term includes the whole or part of both male and female genital organs, as well as surgically constructed versions thereof (the previous Bill only referred to surgically constructed vaginas, while it is also possible to surgically construct a penis).

The definition of *mentally impaired person* has been amended to include an inability to appreciate the nature and consequences of a sexual act or an act of sexual penetration. The latter amendment has been effected owing to the newly proposed differentiation between these acts as discussed below.

A substantial number of respondents criticised the extended definition of *sexual penetration* in the previous Bill in that practical application could amount to the trivialisation of the offence of rape, especially if regard is had to the proposed extension of bodily orifices.²² Although support was expressed by some respondents for elevating acts of penetration of non-sexual orifices to rape, the

¹⁹ Prof Coertze and Dr Muller.

²⁰ As contended by Jill Sloan, on behalf of the Sex Worker Education and Advocacy Taskforce (SWEAT).

²¹ HM Meintjies (DPP’s Office, Transvaal); SAPS Office of the Provincial Head Detective Service (Western Cape); Dr LB Jacklin (Transvaal Memorial Institute).

²² R Louw (School of Law, University of Natal); submission emanating from SAPS CPU Workshop; joint submission from 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.

Commission was persuaded by the fact that the scenarios that would be possible under the original definition could indeed trivialise the offence to an undesired extent. It was decided that penetration by objects or human bodily parts should be limited to the anus and genital organs - in a manner which simulates sexual intercourse. In formulating the definition of sexual penetration, the question arose whether the definition should extend to penetration by animal bodily parts. It is submitted that if penetration by objects is to form part of the legal definition of sexual penetration, it would not make sense to exclude animals used as instruments for purposes of sexual penetration. In order to avoid any speculation as to whether the definition extends to animal bodily parts, it was decided to make it clear that objects include any part of the body of an animal. Moreover, the definition, as well as the definition of *indecent act*, discussed below, now provides for the indemnification of people who employ these acts for proper medical purposes.²³

The original definition of *sexual act* contained a reference to “any indecent act” which caused some respondents to express concern about the vagueness of the term.²⁴ It was decided to omit the term *sexual act* altogether and to replace it with *indecent act*, which is now defined. The specific acts that were originally included under the definition have been retained with the addition of one more specific act, viz exposure or display of pornographic material to children under 18 and persons against their will.²⁵ Moreover, calls for the criminalisation of the phenomenon known as “flashing” have been heeded by the specific inclusion of unjustified exposure or display of the genital organs of one person to another person as an indecent act.²⁶ It should be noted that the three specified acts mentioned under the definition of indecent act are not comprehensive, as it is clearly stated that an indecent act only includes (with the inference that it is not limited to) the three identified categories. In addition, it was decided to exclude sexual penetration explicitly from the ambit of the

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As called for by Prof Coertze and Dr Muller.

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Law Society of the Cape of Good Hope; 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).

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Called for by Adv N van Wyngaardt (Indecent Crimes Unit, SAPS); submission emanating from SAPS CPU Workshop; Rashid Patel and Co.

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Joint submission by the Institute for Security Studies, Nisaa Institute for Women’s Development, the Pretoria Maintenance Forum and Portia Mnisi.

definition of indecent act, as any act of unlawful sexual penetration will amount to rape which is dealt with separately.²⁷

The definitions clause in the previous Bill contained a subclause (2) which provided guidelines to establish when a person has knowledge of the fact that a child is below a certain age. It also placed a positive duty on a person to obtain information to confirm whether a child is below a certain age. Some respondents recorded concern regarding the practical application of this subsection.²⁸ The provision required that a court should be satisfied that a person “believed” that a child was below a certain age. If this is construed, it has been pointed out, to refer to the perpetrator’s subjective belief regarding the age of a child, he or she may be armed with the defence of a flat denial of any knowledge of the child’s true age. It was contended that this, coupled with an accused’s rights to be presumed innocent and to remain silent, could make it very difficult for the prosecution to rely on the proposed provision relating to constructive knowledge. After reconsideration it has been decided to omit subsection (2) from the revised Bill, in view also of the re-incorporation of the defence of deception as to age as discussed below.

Rape (clause 3; formerly clause 2)

The original list of factors indicating the presence of coercive circumstances has now been categorised in three categories, viz coercive circumstances; circumstances in which an act of sexual penetration is committed under false pretences or by fraudulent means, and finally, circumstances in which a person is incapable in law to appreciate the nature of an act of sexual penetration. The original list itemised these factors generally as if they were all constituting coercive circumstances, whereas closer scrutiny would reveal that some circumstances dealt with threats, force and the abuse of authority, others with mistake on the part of the victim and others still with mental incapacity and the incapacity to appreciate the nature of an act of sexual

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Supported by Prof Coertze and Dr Muller.

²⁸

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).

penetration. The amendment has been effected upon the suggestion of a respondent,²⁹ and it is thought that it will contribute towards making the intention behind the statutory redefinition of the common law offence of rape clearer. In addition, the original wording has been adapted in certain instances to provide for suggestions either from respondents or from the project committee's reconsideration of the original wording:

- * Concerning the application of force or the making of threats to any person or animal as a coercive circumstance, the word "animal" has been replaced by "any movable or immovable property".³⁰
- * As detention implies the deprivation of liberty, it was felt that abuse of authority even in a case of lawful (as opposed to unlawful) detention should constitute a coercive circumstance, hence the word "lawful" was added.³¹
- * The circumstances under which an act of sexual penetration can take place under false pretences or by fraudulent means have been extended to incorporate instances where there may be a mistaken belief on the part of the victim that sexual penetration will be beneficial to his or her physical, psychological or spiritual health.³²
- * As far as the category of persons who are incapable in law to appreciate the nature of an act of sexual penetration is concerned, the subcategory of people being unconscious has been added.
- * As it is the intention that there should be no defence that a child below the age of 12 years consented to an act of sexual penetration, and to guard against the

²⁹ Prof Coertze and Dr Muller.

³⁰ 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).

³¹ KS Jones; Prof Coertze and Dr Muller; 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).

³² Prof Coertze and Dr Muller.

possibility that a rebuttable presumption may be considered to exist in the presence of a rule that an act of sexual penetration is *prima facie* unlawful if committed in respect of a person who is incapable in law to appreciate the nature of an act of sexual penetration, a provision has been formulated to make it clear that children (both boys and girls) below the age of 12 years are incapable in law to appreciate the nature of an act of sexual penetration.

One respondent called upon the Commission to include “economic abuse” in its original list of coercive circumstances.³³ It is pointed out that large numbers of black women live in poor socio-economic circumstances and are reliant on men for shelter, food, etc. The respondent concedes, however, that it remains very difficult to prove economic abuse particularly if the victim, due to economic necessity, continues to live in the home of the perpetrator. The Commission has duly taken the proposal into account, but is satisfied that abuse of power of authority, which is explicitly provided for as a coercive circumstance in clause 3 of the revised Bill, is broad enough to accommodate economic abuse.

The original wording precluded the existence of a marriage or other relationship from being a defence to a charge of rape. In the light of comment received, the provision has been reformulated to make it clear that an existing *or previous* marital or other relationship should exclude such a defence.³⁴

The creation of a statutory offence of rape would essentially repeal the common law pertaining to the definition of rape. It is submitted that the draft Bill should repeal the common law explicitly, and in addition, should repeal the irrebuttable common law presumption that only girls under the age of 12 years are incapable of consenting to sexual intercourse. (The provisions on repeal of the common law may be moved to the substantive clause on repeal of laws upon completion of the investigation). The new provision regarding consent of persons under the age of 12 is gender neutral, thus also making it applicable to boys under the age of 12. The desirability of retention of the common law presumption therefore falls away. To provide for instances where a person has

³³ Commission on Gender Equality.

³⁴ Commission on Gender Equality.

been charged with, but not convicted of common law rape prior to the commencement of the proposed legislation, the Bill now clearly provides that the common law is not repealed in those instances to ensure that there is no differentiation in the law regime applying at the time of both charge and conviction.

A number of respondents criticised the Commission for an inadequate differentiation between a burden of proof and an evidential burden.³⁵ Although the Commission attempted to displace the emphasis from the absence of consent on the part of the victim to coercive circumstances, the intention never was to limit any of the perpetrator's defences. It has been pointed out that the provision proposed by the Commission regarding the *prima facie* unlawfulness of sexual penetration if it is committed in coercive circumstances, amounts to no more than an evidential burden on the perpetrator. The Commission stands by its original recommendation and the provision has therefore been retained, save for the categorisation of coercive circumstances into three categories. However, in view of concerns that if the common law relating to rape is to be repealed, all defences at common law that may be raised by the perpetrator will also be repealed, a new provision has been inserted to make it clear that no common law defence (save for the defence that rape has been committed while the parties were married) is influenced by the codification of the offence of rape.

The Commission has been criticised for maintaining a fixation with penetrative sex, and ignored forced genital stimulation and orgasm as "the two great unspoken secrets of rape".³⁶ The respondent points to the fact that Namibia which is in the process of enacting new rape legislation, criminalises this secret of rape and includes cunnilingus and other forms of genital stimulation in its provision on rape. The Commission, however, does not recommend the abolition of the common law offence of indecent assault and has specifically included "direct or indirect contact between the anus, breasts or genital organs of one person and any part of the body of another person" as one

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Johan du Toit Attorneys; Prof SE van der Merwe (University of Stellenbosch); R Blumrick (DPP's Office, Pietermaritzburg; A White; 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).

³⁶

Charlene Smith.

of the acts that would constitute an indecent act. If such an act had been committed in conjunction with an act of sexual penetration (rape), nothing would preclude a victim from filing a charge of rape together with one of indecent assault (or the commission of a compelled or induced indecent act in terms of clause 4 of the revised Bill).

Another respondent called upon the Commission to criminalise, specifically, sexual relations between teachers and pupils, as the power relations involved mean that refusing sex can be very difficult and the potential for corruption of children through indicating that sex can be exchanged for favours, such as better grades, is great.³⁷ In the Commission's view the inclusion of abuse of power of authority in its proposed list of coercive circumstances, as a broad category, is sufficient to accommodate this concern. Power relations are not only manifested between pupils and teachers, but also between children and parents, patients and doctors or psychologists, members of a religious congregation and its leaders, etc. To single out a specific category or categories of vulnerable persons amidst a provision that is specifically designed to protect all vulnerable persons would appear to be artificial.

Finally, the Commission holds the view that the non-disclosure by a person that he or she is infected by a sexually transferrable disease prior to sexual relations with another (consenting) person would amount to sexual relations by false pretences and would constitute rape.

Compelled or induced indecent acts (clause 4; formerly clause 3)

The majority of respondents concurred with the formulation of this provision as proposed in the draft Bill. The provision has been redrafted to make it stylistically more presentable, easier to understand and to combine it with the provision on "inducement to allow sexual act" in the previous Bill (discussed below). The term "unlawfully" which has erroneously been omitted from the original draft, has also been included.³⁸ In addition another category, viz compelling or inducing another

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Dr R Jewkes (Medical Research Council).

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As pointed out in the 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

person to engage in an indecent act with *an object*, has been introduced³⁹ to allow, *inter alia*, for the vast array of sexually orientated equipment and aids that are available. Moreover, since “object” has been extended in the definition of sexual penetration to include any part of the body of an animal, similar wording has been used. The provision should of course be read with the amended definition of “indecent act” in clause 1 of the Bill, which now excludes acts of sexual penetration from its ambit. Thus clause 4 only pertains to compelled or induced indecent acts, and not to compelled or induced acts of sexual penetration. It is submitted that any *compelled* or *induced* act of sexual penetration will amount to rape, which is provided for in clause 3.

Inducement to allow sexual act (clause 4)

The provision as contained in the previous Bill did not elicit much response. It has been decided, in the interests of clarity, to combine the provision on induced indecent acts with the one on compelled indecent acts. One respondent, however, argued that inducement is not necessarily linked to fraud and that the provision in its original form goes against the case law that has developed in this regard.⁴⁰ The provision on compelled and induced indecent acts has consequently been adapted to widen the ambit of circumstances under which inducement can take place. Moreover, inducement now provides for the involvement of a third person, which had not been the case in clause 4 of the previous Bill.⁴¹

Administering substance for purposes of committing sexual act (clause 4; formerly clause 5)

Since the original provision was linked to inducing a person to commit an indecent act in circumstances where that person is under the influence of an administered substance, it was deemed appropriate to incorporate those provisions in the redrafted clause dealing with compelled

Magistrate’s Court).

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Called for by J Sloan (SWEAT).

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Adv K Worrall-Clare.

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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).

and induced indecent acts (clause 4). The reference to “administering a substance for purposes of committing an indecent act” has been omitted, since the circumstances under which inducement can take place have been widened to refer to circumstances in which -

- (a) a person would otherwise not have consented to the commission of an indecent act,⁴² or
- (b) a person is incapable in law of appreciating the nature of an indecent act.

It is submitted that these circumstances are wide enough to cover inducement to commit an indecent act both by false pretences or fraudulent means and by administering a substance.

Extension of common law incest (clause 5; formerly clause 6)

The Discussion Paper 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 should be revisited, although suggestions were received that the common law offence should be reviewed *in toto*.⁴³ In view of the inclusion of new provisions in the draft Bill that will 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 is satisfied that the *lacunae* foreseen by some respondents will be addressed adequately. The provision on incest has therefore been adapted only in respect of the heading, which now reflects the true purpose of the provision, and in respect of language, by eliminating the Latin expression originally used.

Acts of sexual penetration or indecent acts with consenting minors (clause 6; formerly clause 7)

The original formulation of this provision elicited divergent responses. The majority of respondents agreed with the rationale underlying the provision, namely an attempt to decriminalise experimental sexual behaviour between children. Of those who responded on this aspect, some were of the view

⁴² Advocated by the Law Society of the Cape of Good Hope.

⁴³ VCR Msolomba; L Cawood (Childline, Gauteng).

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.⁴⁴

The new formulation is based on the following points of departure:

First, section 14 of the Sexual Offences Act, 1957, has established 16 years as the minimum age of consent for sexual intercourse. Although there were minority calls for lifting this age to 18 years, the age of 16 has been retained in view of inadequate evidence that it should be adjusted.

Second, consensual sexual intercourse with someone below the age of 12 years amounts to rape. As provision is made for this in clause 3 (the rape clause), only the category of children between 12 and 16 years is 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. The common law principle has been repealed in clause 3 (as it only provided for *girls* under the age of 12).

Third, the defences available to someone accused of consensual sexual penetration of a minor (in the 12 to 16 years age category) has been extended in view of calls for broadening the leeway originally allowed.⁴⁵ 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 would increase the original two year age differential to a maximum of almost four years (in a 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,

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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.

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SL Kloppers (Public Prosecutor, Richmond); Dr JM Loffell (Johannesburg Child Welfare Society); Prof DAP Louw (University of the 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.

the defence in the Sexual Offences Act regarding deception of age has been reintroduced, as called for by some respondents.⁴⁶

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 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 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), 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". In view of the definitions of "sexual penetration" and "indecent act" in the revised Bill, the latter now explicitly excluding sexual penetration, there appears to be no reason to require a higher age limit for consent to an indecent act. The new provision affords the same defences to a perpetrator who has committed an indecent act with a minor than to one who has committed an act of sexual penetration. Since the common law principle regarding consent by girls under the age of 12 only applied (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.

Finally, a provision has been built in to exempt persons who are legally married to minors above

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

the age of 12 years from liability in terms of this clause.⁴⁷

Persistent sexual abuse of a minor (formerly clause 8)

There were mixed responses to the original wording of this provision. A number of respondents argued that the provision is unnecessary, in the light of section 94 of the Criminal Procedure Act, 1977, which allows an accused to be charged in one charge with the commission of the same offence on diverse occasions.⁴⁸ Others contended that if the aim with the provision is to cause sentences to be more severe, evidence about the repetition of a sexual offence over a period of time will in any event be taken into consideration upon sentencing.⁴⁹ Those who supported the provision called, almost without exception, for an extension of the proposed specified 12 month time period.⁵⁰

It is arguable that if at least one offence in terms of the proposed draft Bill or the common law can be proved beyond reasonable doubt, in the presence of additional proof that the same or similar offences occurred repetitively over a specified period of time, the provision would be unnecessary. However, to prove a single offence with all its elements adequately, especially in the case of young children where the offence or a variant thereof repeatedly occurred over time, is much more difficult. The reasons for this difficulty have been highlighted in the Discussion Paper. It is submitted that the mischief which the original proposal aimed to address lies in the following

⁴⁷ To address a concern expressed by Prof J Sloth-Nielsen (Community Law Centre, University of the Western Cape).

⁴⁸ Johan du Toit Attorneys; HM Meintjies (DPP's Office, Transvaal); R Blumrick (DPP's Office, Pietermaritzburg).

⁴⁹ 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).

⁵⁰ SL Kloppers (Public Prosecutor, Richmond); 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; joint submission by the Institute for Security Studies, Nisaa Institute for Women's Development, the Pretoria Maintenance Forum and Portia Mnisi.

quotation from the Western Australian Supreme Court decision in *Podirsky v The Queen* (1990) 3 WAR 128 at 136:

This means ... that there is a possibility that the more acts of intercourse or other acts of sexual abuse and the greater the length of time over which they occur, the more difficult it may be to establish that any one of a series of multiple offences has been committed. Some reform may be desirable to cover cases where there is evidence of such a course of conduct.

It is evident from the quotation that instances may arise where the nature of any particular sexual offence committed becomes vague due to overlapping with other similar offences or the passing of time. However, the project committee, after reconsidering its original proposal in the light of the comments received, is of the view that the provision as proposed or even in an amended form will be fraught with difficulties if it has to be applied in practice. It is submitted that it will be extremely problematic for the prosecution to prove that an “offence of a sexual nature” has persistently been committed in the absence of evidence indicating the date or dates on which it was allegedly committed, and in the presence of vagueness or uncertainty as to what offence precisely had been committed. It was therefore decided to abandon the proposal altogether.

Indecent acts or acts of sexual penetration with mentally impaired persons (clause 7; formerly clause 9)

An alteration has been made to the definition of *mentally impaired person* in clause 1 as pointed out above.

Some respondents who commented on this provision expressed a concern that the formulation will unduly interfere with mentally impaired persons’ rights of sexual expression.⁵¹ It was contended that indecent acts or acts of sexual penetration should not be punishable if no element of coercion was involved.

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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 should be pointed out that it is not the Commission's intention to curtail the rights of mentally impaired persons to sexual expression in any way. It has partly been the intention to eliminate the derogatory technical terms "imbecile" and "idiot" used in the Sexual Offences Act, 1957 and also to increase the protection of these vulnerable persons. 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 proposed definition 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 persons in this category (formerly known as idiots or imbeciles) 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.⁵² It is possible that the mentally impaired person himself or herself may induce the commission of such an act. The question is: should the law intervene in such cases where consent, by definition, is excluded?

The new formulation allows a defence in circumstances where the mentally impaired person - as defined - himself or herself induced an indecent act or an act of sexual penetration. Additionally, the defence will only be valid if the perpetrator was unaware of the fact that the mentally impaired person was so impaired. It is felt, however, that if the inducement was effected by such a person who is below the age of 16 years (ie a minor mentally impaired person), there should be no defence, unless the perpetrator was unaware of the mentally impaired person's true age. Comment is specifically invited on this provision.

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

Acts of sexual penetration or indecent acts committed in presence of minors or mentally impaired persons (clause 8; formerly clause 9(2))

The wording of clause 9 of the previous Bill made it an offence to commit an indecent act (the previous definition of sexual act, now indecent act, 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 minors.⁵³ The Commission concurs with this view, and a separate offence has now been established when an indecent act or act of sexual penetration is intentionally committed in the presence of a minor (ie someone below the age of 16 years) or a mentally impaired person.

Child prostitution (clause 9; formerly clauses 10 to 14)

Chapter 5 of the previous Bill was titled “Commercial sexual exploitation of children”, and a definition of this term was given in clause 1 of that Bill. 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.

Yet the thrust of the definition has been retained in a couple of instances in clauses 10 to 14 of the previous Bill, making the wording tautologous or repetitive.⁵⁴ In view of this, and also the fact that definitions contribute towards the complexity of legislation, it was decided to remove the definition from clause 1 and to clarify the proposed scope of prohibited activities in the appropriate clause itself.

The various clauses (10 to 13 of the previous Bill) all dealt with divergent role-players who are in some way involved in child prostitution, where the focus is on “financial or other reward, favour or compensation to the child or to any person”. It has been decided, in the interests of clarity and simplicity, to converge the various offences that targeted different role-players, yet all involved in

⁵³ Dr JM Loffell (Johannesburg Child Welfare Society).

⁵⁴ As pointed out by R Blumrick (DPP’s Office, Pietermaritzburg); D Bosch; Prof Coertze and Dr Muller.

child prostitution, including pimps, clients, brothel-keepers etc, into one universal offence, namely “involvement in child prostitution”. The potential role-players in this offence have in addition been extended to those who can be considered to be *trafficking* in children. Some respondents called upon the Commission to elevate trafficking to a separate and substantive offence.⁵⁵ It is submitted, however, that a trafficker is merely one of several potential participants in child prostitution. It is arguable whether the role played by one participant should be considered to be more blameworthy than that of another.

The previous definition of “brothel”, viz “any movable or immovable property where the commercial sexual exploitation of a child occurs”, has been omitted from the revised Bill⁵⁶ and a more general provision has been 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.

It is possible that someone charged with an offence relating to child prostitution may also be committing a separate offence at the same time. If the child concerned was below the age of 12 and an act of sexual penetration was involved, the perpetrator would in addition be 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 makes it clear that involvement in child prostitution is separate from any other act that would constitute a distinct offence.

Section 50A of the Child Care Act, 1983, which has been repealed in the previous Bill, makes it an offence for any person with knowledge of the fact that property is used for the commercial sexual exploitation of a child to fail to report it to a police station. A similar provision has not been included in the previous Bill.⁵⁷ 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 contains such

⁵⁵ Molo Songololo.

⁵⁶ As called for by J Sloan (SWEAT).

⁵⁷ As pointed out in the 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.

an extension.

The provisions which formerly appeared separately in clause 14 of the previous Bill relating to receiving consideration from commercial sexual exploitation have been incorporated as separate subclauses of clause 9 of the revised Bill. The wording has been amended to 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 who are not involved in child prostitution in any way. The rationale behind the inclusion of this provision is 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.⁵⁸

Concern was expressed by the respondent listed in footnote 41 that the original definition of commercial sexual exploitation was not wide enough to cover the sexual exploitation of a child where no tangible benefit has been received by the perpetrator, other than the gratification of his or her perverse personal desires. The Commission invites attention to the fact that financial or other reward, favour or compensation to the child concerned or to any person only arise in relation to the scenario where the child is acting as a prostitute. The provisions in the revised Bill that do not relate to child prostitution are, in the Commission's view, adequate to criminalise sexual relations with children, whether with or without their consent.

In response to calls by some respondents⁵⁹ for the inclusion of provisions prohibiting the organising or promoting of child sex tours, a provision has been 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 are based on similar provisions in the New Zealand Crimes Act of 1961, as amended.

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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).

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Dr JM Loffell (Johannesburg Child Welfare Society); HM Meintjies (DPP's Office, Transvaal).

Conspiracy or incitement to commit sexual offence (formerly clause 15)

In their comment on the provision in the previous Bill relating to conspiracy and incitement to commit a sexual offence, some respondents called upon the Commission to include a provision on attempting to commit a sexual offence.⁶⁰ Conspiracy and incitement to commit an offence, as well as an attempt to commit an offence, are presently regulated by section 18 of the Riotous Assemblies Act 17 of 1956. This section reads as follows:

Attempt, conspiracy and inducing another person to commit offence

(1) Any person who attempts to commit any offence against a statute or a statutory regulation shall be guilty of an offence and, if no punishment is expressly provided thereby for such an attempt, be liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.

(2) Any person who-

- (a) conspires with any other person to aid or procure the commission of or to commit; or
- (b) incites, instigates, commands, or procures any other person to commit,

any offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.

It is submitted that the provisions of section 18 of the Riotous Assemblies Act are wide enough to criminalise the actions of any person attempting, conspiring or inciting another to commit an offence under the proposed draft Sexual Offences Bill. Moreover, since attempt, conspiracy and incitement can be linked to any offence and not only those of a sexual nature, it would appear peculiar to reiterate the provisions of section 18 in the revised Bill making them specifically applicable to sexual offences. In addition, if attempt, conspiracy and incitement are to be provided for, it could be considered idiosyncratic not to provide for co-perpetrators, accomplices and common purpose as well. The provision on incitement and conspiracy has therefore been omitted from the revised Bill.

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HM Meintjies (DPP's Office, Transvaal); 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 should be noted that Professor CR Snyman, as far back as 1995, has proposed a draft criminal code for South Africa.⁶¹ He has attempted to show that it is by no means impossible to codify South African criminal law. In drafting the code, Professor Snyman incorporated the most recent developments in criminal law at the time. This has led him to reformulate the provisions on incitement and conspiracy in the Riotous Assemblies Act as follows:

Conspiracy

(1) A person is guilty of conspiracy to commit an offence if he unlawfully agrees with another person or persons to commit an offence or to promote or facilitate its commission.

(2) If a person who conspires with another to commit an offence is aware that such a person has conspired with a third person to commit the same offence, he is guilty of conspiring with such third person as well, whether or not he knows his identity, to commit that offence.

(3) A party to an agreement who is a person for whose benefit or protection the offence exists cannot be found guilty of conspiracy to commit such an offence.

- (4) A person may be found guilty of conspiracy to commit an offence even though-
- (a) there is no proof of the commission of any act in execution of the conspiracy;
 - (b) no other person has been or is charged with the conspiracy;
 - (c) the identity of any other party to the agreement is unknown;
 - (d) the commission of that offence is impossible, if it would be possible in the factual circumstances which he believes exist or will exist at the relevant time;
 - (e) had the offence been consummated and had he been a party to such consummation, he would not qualify as a perpetrator but only as an accomplice to such an offence.

(5) A person may be guilty of -

- (a) attempt or
- (b) incitement

to conspire to commit an offence.

Incitement

(1) A person is guilty of incitement to commit an offence if he unlawfully and intentionally incites another person or persons to commit an offence or to promote or facilitate its commission.

(2) The intention to incite referred to in subsection (1) includes an awareness that the incitee will act with the knowledge that is required for a conviction of the completed offence.

(3) A person for whose benefit or protection the offence exists cannot be found guilty

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CR Snyman *A Draft Criminal Code for South Africa* Cape Town Juta 1995

of incitement to commit such an offence.

- (4) A person may be found guilty of incitement to commit an offence even though-
 - (a) there is no proof of the commission of any act in execution of the purpose of the incitement;
 - (b) the identity of the person incited is unknown;
 - (c) the commission of that offence is impossible, if it would be possible in the factual circumstances which he believes exist or will exist at the relevant time;
 - (d) the incitee is not responsive to the incitement or susceptible to persuasion to commit the offence.

- (5) A person may be guilty of attempting to incite another to commit an offence.

It is submitted that if there is an insistence that provisions on conspiracy and incitement are to be retained in the proposed legislation, it should simulate the wording proposed by Professor Snyman. Professor Snyman also formulated provisions on *attempt* to commit a crime which could be incorporated in the proposed legislation if it is deemed necessary.

Extra-territorial jurisdiction (clause 27; formerly clause 16)

The previous Bill allowed for extra-territorial jurisdiction in respect of *all* offences under the Act and not only those committed in relation to children. Although some respondents submitted that extra-territorial jurisdiction should be limited to sexual offences committed in relation to children only,⁶² the project committee is firmly of opinion that children *and* adults are in need of increased protection as far as sexual offences are concerned - both locally and internationally. The provision as drafted also discards the double criminality principle in that there is no requirement to prove that the action committed abroad constituted an offence in both the destination country and the country of origin.

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 has been incorporated to exempt a person from liability in South Africa if that person has already been convicted in the destination country of the action which would

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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).

have constituted an offence in South Africa.

As pointed out by one respondent,⁶³ the provision in the previous Bill lacked particulars regarding jurisdiction. Upon the suggestion of this respondent, a provision has been inserted in the revised Bill to require the consent of the Director of Public Prosecutions (DPP) to institute prosecution under this clause and to make it clear which DPP and which court have jurisdiction. Although the suggestion read that *any* DPP and *any* court in the Republic should have jurisdiction, which would have made it possible for a person living in Cape Town to be tried in Pretoria, it was decided that jurisdiction should be linked to the area where the perpetrator is ordinarily resident.

Penalties (clause 28; formerly clause 17)

The previous Bill contained a provision that made it possible to prescribe different penalties for the contravention of specific clauses of the Bill. 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 respondent pointed out that the Criminal Law Amendment Act 105 of 1997 may have an impact on the penalties clause as originally drafted.⁶⁴ 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. 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. It should be noted that the Act is the subject of considerable opposition from judges in particular to its scheme of legislated fixed sentences.

In a separate investigation on sentencing (Project 82), the Commission has recommended that Parliament should adopt an entirely new sentencing framework. The Commission's recommendations, embodied in its proposed draft *Sentencing Framework Bill*, have been handed

⁶³ HM Meintjies (DPP's Office, Transvaal).

⁶⁴ HM Meintjies (DPP's Office, Transvaal).

to the Minister for Justice and Constitutional Development towards the end of 2000 and is currently under consideration by the Minister. Indications are that the Minister will promote the Bill in Parliament. Importantly, the Bill repeals sections 51 to 53 of the Criminal Law Amendment Act referred to above. The Bill, establishing 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 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.

It is submitted 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 should, 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. If, however, 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 currently formulated.

Repeal of laws (clause 29; formerly clause 18)

The Commission's project committee on sexual offences was established with a broad mandate to investigate issues relating to sexual offences and to formulate recommendations for the reform of this area of the law. The committee adopted a four-phased incremental approach to the investigation, with a view to publishing the following Discussion Papers:

- * The Discussion Paper on Substantive Law
- * The Discussion Paper on Process and Procedure
- * The Discussion Paper on Adult Prostitution
- * The Discussion Paper on Pornography

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. However, this was not consistently reflected in the Discussion Paper. Admittedly, erroneous and conflicting recommendations were made in that the Discussion Paper -

- * expressed an intention to codify the substantive law relating to sexual offences in an easy, accessible and workable Act;
- * expressed the vision of comprehensive sexual offences legislation;
- * did not recommend the repeal of all common law sexual offences, but recommended statutory intervention, by way of a single Sexual Offences Act, to address problems in the common law and existing law.

The third statement is more reflective of what the project committee sought to achieve. It does not recommend the codification of all common law sexual offences, but proposes legislative intervention to address problems with existing common law offences, while retaining others. Only three common law offences are affected by the provisions of both the previous and the revised Bills. They are rape (which is now codified), incest (amended to incorporate the codified definition of sexual penetration) and sodomy (which will amount to rape if non-consensual penetration takes place between males). The previous draft Bill purported to repeal the Sexual Offences Act 23 of 1957 in its entirety. However, 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.

It needs to be emphasised that the Commission's 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 is 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 Discussion Paper. Repeal of laws should only be considered once the entire investigation into sexual offences is completed, including the aspects on practice and procedure, adult prostitution and pornography. A provision has therefore been inserted in the revised Bill which refers to a Schedule that will reflect which laws are to be repealed. The Schedule will only be devised upon completion of the investigation.

As far as male party offences are concerned, section 20A of the Sexual Offences Act was declared unconstitutional by the Constitutional Court.⁶⁵ As stated, the ultimate aim is to repeal the whole Sexual Offences Act and therefore the provision on male party offences will fall away as it is not provided for in the revised Bill. The revised Bill, as it currently stands without incorporating provisions on adult prostitution, effectively replaces 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.
- * 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.

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In *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1998 BCLR 1517 (CC).

- * Section 18 (use of drugs, etc, 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 relate neither to brothels nor to adult prostitution or male party offences, have not been 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 is concerned, it is debatable whether the provision should be retained. Although it is submitted that the revised Bill as it currently stands adequately provides for the combating of the sexual exploitation of children, comment is 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.

The Discussion Paper contained a recommendation that section 18A be excluded from the proposed legislation. In view of the fact that respondents did not object to such an exclusion, the provision has been omitted.

Section 19 does not draw a distinction between children and adults. The adults aspect will be dealt with in the separate Discussion Paper on adult prostitution. Regarding the enticement or solicitation by children for immoral purposes, the revised Bill does not criminalise such actions, but criminalises the actions of clients who make use of the services of child prostitutes. Comment is invited on the

question whether children should be penalised as contemplated in the Sexual Offences Act.⁶⁶ The second part of section 19 relates to indecent public exposure. It is submitted that the offence is adequately covered by the common law offence of public indecency. 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 will also be dealt with in the Discussion Paper on adult prostitution (eg prostitutes loitering on street corners, etc.)

The provisions of section 20, dealing with presumptions, relate to prostitution and the desirability of retaining them will be dealt with in the Discussion Paper on adult prostitution.

Aspects not dealt with in the revised Bill

Sexual harassment

As pointed out in Discussion Paper 85, the Commission holds the view that adequate legal remedies exist in terms of which sexual harassment can be addressed within the workplace. Criminalising sexual harassment outside the workplace, as called for by some respondents,⁶⁷ is more problematic. As sexual harassment is an assertion of power by those with authority over those without it, it is by its very nature endemic to the work environment. Power relationships do however exist within families and social circles. It is submitted that the common law offence of *crimen iniuria* would be the main remedy for a person exposed to innuendos, unwelcome verbal or non-verbal conduct, gestures etc. in such an environment. However, more severe forms of invasion of dignity could result in other common law offences as well as offences dealt with in the revised Bill, such as compelled or induced indecent acts, sexual abuse or even rape. The Commission therefore abides by its view as articulated in Discussion Paper 85.

Stalking

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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.

⁶⁷

Commission on Gender Equality; joint submission by the Institute for Security Studies, Nisaa Institute for Women's Development, the Pretoria Maintenance Forum and Portia Mnisi.

A very informative exposition of the psycho-dynamics underlying the phenomenon of stalking has been received from Professor JMT Labuschagne of the University of Pretoria. In his view, this phenomenon can in the majority of cases be linked to power and the socio-juridical position of inferiority traditionally occupied by women. With reference to the legal status of stalking in various countries, he avers that the biopsychic autonomy of legal subjects, in the final instance, is in need of protection.

It was proposed in Discussion Paper 85 that a separate investigation be conducted to ascertain the need to enact comprehensive legislation to prohibit stalking since this phenomenon is not in all instances sexually motivated. There appears to be consensus with the Commission's view among the respondents who commented on this aspect.

Psycho-sexual behaviour

Prof DAP Louw of the University of the Free State alerted the Commission to certain "deviations" that are widely recognised by psychiatric classification systems such as the DSM-IV. These include exhibitionism, voyeurism, telephone scatologia (obscene telephone calls), necrophilia (sexual acts with corpses), fetishism, transvestic fetishism, frotteurism (rubbing against non-consenting persons to achieve sexual gratification), sexual sadism and sexual masochism.

It is submitted that both exhibitionism and frotteurism have been covered by the definition of indecent act in the revised Bill, and that the offence of necrophilia is covered both in terms of the common and statute law. It is further contended that the remaining sexual deviations, when performed in relation to non-consenting persons, could give rise to offences such as *crimen iniuria*, indecent assault or even rape and that no reform of the substantive law is required in this regard.

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 and 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 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 children are particularly vulnerable to sexual offences including commercial sexual exploitation;

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 the victims 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:—

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 will
 but 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 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.

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 a 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.

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
- (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.

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.

Extension of common law incest

5. 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.

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.

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 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 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.

Acts of sexual penetration or indecent acts committed in 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 mentally impaired person, as the case may be.

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.

(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).

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.

Court to establish the truth

11. It shall be the duty of the court, in criminal proceedings involving the alleged

commission of a sexual offence, to attempt to establish the truth.

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.

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 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 prerecorded 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 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.

(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.

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.

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.

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.

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 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.

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.

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.

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 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.

Provision of treatment

22. (1) If it has been established that a person has sustained physical or psychological injuries as the result of a sexual offence, such person shall, as soon as is practicable after the offence, receive the best possible 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 as referred to in subsection (1).

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.

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.

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.

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.

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.

Penalties

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.

Repeal and amendment of laws

29. The Acts specified in the Schedule are hereby repealed or amended to the extent set out in the third column of the Schedule.

Short title and commencement

30. This Act shall be called the Sexual Offences Act, ... and shall come into operation on a date fixed by the President 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 29

No. and year of law	Short title	Extent of repeal or amendment
Act 23 of 1957	Sexual Offences Act	The repeal of the whole (<i>subject to the completion of the investigation</i>).
Act 51 of 1977	Criminal Procedure Act	<p>1. The amendment of section 145 by the substitution for subsection (1)(b) of the following subsection:</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>and in the case of an accused charged with the commission of a sexual offence, has experience and knowledge of -</u></p> <p>(i) <u>the effects of sexual abuse and trauma related to such abuse upon victims;</u></p> <p>(ii) <u>any recognised syndrome associated with such abuse and trauma; or</u></p> <p>(iii) <u>the inclination of a person to commit sexual offences repeatedly.</u></p>

No. and year of law	Short title	Extent of repeal or amendment
Act 51 of 1977	Criminal Procedure Act	<p>2. The amendment of section 153 by the substitution for subsection (3A) of the following subsection:</p> <p>(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 <i>in loco parentis</i>, requests otherwise <u>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.</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</u> years 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 an adult, and if such person is under the age of eighteen years, to a fine or to imprisonment for a period not exceeding</u></p>

No. and year of law	Short title	Extent of repeal or amendment
Act 51 of 1977	Criminal Procedure Act	<p><u>imprisonment.</u></p> <p>(b) by the insertion after subsection (5) of the following subsection:</p> <p><u>(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.</u></p> <p>4. The amendment of section 158 by the insertion after subsection (3) of the following subsections:</p> <p><u>(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.</u></p>

No. and year of law	Short title	Extent of repeal or amendment
Act 51 of 1977	Criminal Procedure Act	<p>(3B) <u>When considering whether a transfer as referred to in subsection (3A) should be effected, the court shall take into account -</u></p> <p>(a) <u>the need to protect the person who is to give evidence by means of closed circuit television or similar electronic media from traumatisation.</u></p> <p>(b) <u>the wishes of the person referred to in paragraph (a);</u></p> <p>(c) <u>the wishes of other persons who are to give evidence in the proceedings;</u></p> <p>(d) <u>the costs of having the proceedings transferred;</u></p> <p>(e) <u>inconvenience to the complainant in the proceedings; and</u></p> <p>(f) <u>unreasonable delay that would be brought about by such transfer.</u></p> <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>

No. and year of law	Short title	Extent of repeal or amendment
Act 51 of 1977	Criminal Procedure Act	<p>6. The amendment of section 166 by the insertion after subsection (3) of the following subsection:</p> <p><u>(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.</u></p> <p>7. The amendment of section 170A by the insertion after subsection (4) of the following subsections:</p> <p><u>(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 -</u></p> <p><u>(a) convey the general purport of any question to the relevant witness;</u></p> <p><u>(b) inform the court at any time that the witness is fatigued or stressed; and</u></p> <p><u>(c) request the court for a recess.</u></p> <p><u>(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</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 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 [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. ;</p> <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</u> against or in connection with whom any offence of a sexual nature is alleged to have been committed, <u>other than evidence relating to sexual experience or conduct in respect of the offence which is being tried,</u> 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</p>

No. and year of law	Short title	Extent of repeal or amendment
Act 51 of 1977	Criminal Procedure Act	<p><u>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] may direct that any person, <u>including the complainant</u>, 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]. ;</p> <p>(e) by the insertion after subsection (3) of the following subsections:</p> <p><u>(3A) The court shall, subject to subsection (3B), 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> <p>(e) <u>is fundamental to the accused's</u></p>

No. and year of law	Short title	Extent of repeal or amendment
Act 51 of 1977	Criminal Procedure Act	<p>(3B) <u>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>(f) and by the deletion of subsection (4).</p> <p>9. 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 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. ;</u></p> <p>(b) by the substitution for paragraph (b) of subsection (1) of section 276A of the following paragraph:</p>

No. and year of law	Short title	Extent of repeal or amendment
Act 51 of 1977	Criminal Procedure Act	10. The amendment of section 335A -

No. and year of law	Short title	Extent of repeal or amendment
Act 32 of 1944	Magistrates' Courts Act	<p>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: <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 and knowledge of -</u></p> <ul style="list-style-type: none"> (i) <u>the effects of sexual abuse and trauma related to such abuse upon victims;</u> (ii) <u>any recognised syndrome associated with such abuse and trauma; or</u> (iii) <u>the inclination of a person to commit sexual offences repeatedly.</u>
Act 68 of 1969	Prescription Act	<p>1. 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), (5) and (6), prescription shall commence to run as soon as the debt is due. ;</p>

No. and year of law	Short title	Extent of repeal or amendment
Act 68 of 1969	Prescription Act	<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 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.</u></p> <p>(6) <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>