SOUTH AFRICAN LAW COMMISSION

ISSUE PAPER 10

Project 108

SEXUAL OFFENCES AGAINST CHILDREN

31 May 1997

Closing date for comment: 31 August 1997

ISBN: 0-621-27352-X

INTRODUCTION

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

The members of the Commission are -

The Honourable Mr Justice I Mahomed (Chairman)
The Honourable Mr Justice P J J Olivier (Vice-Chairman)
The Honourable Madam Justice Y Mokgoro
Adv J J Gauntlett SC
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PREFACE

This issue paper (which reflects information gathered up to the end of April 1997), was prepared by the project committee on sexual offences against children and the research staff of the Commission to elicit responses, and with those responses, to serve as a basis for the Commission's deliberations. The views, conclusions and recommendations it contains should not be regarded as the Commission's final views. The issue paper is published in full so as to provide persons and bodies wishing to comment or make suggestions for the reform of this particular branch of the law with sufficient background information to enable them to place focussed submissions before the Commission.

Workshops are an integral part of the working methods of the Commission and, for a start, we plan to workshop this paper extensively.

The Commission will assume that respondents agree to the Commission's quoting from or referring to comments and attributing comments to respondents, unless representations are marked confidential. Respondents should be aware that the Commission may have to release information contained in representations under the Constitution of the Republic of South Africa, Act 108 of 1996.

Respondents are requested to submit written comments, representations or requests to the Commission by 31 August 1997 at the address appearing on the previous page.

The project leader responsible for this project is Ms Joan van Niekerk and the researcher, who may be contacted for further information, is Mr Gordon Hollamby

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GLOSSARY OF TERMS

"Child" means a person under the age of 18 years;

"Sexual offences against children" refers to common law and statutory crimes involving prohibited sexual activity with or against children;

"offence" means an unlawful human act, which is accompanied by a blameworthy state of mind, and which is punishable by the State;

"Sexual abuse" describe the behaviour which is, or should be, prohibited by the offences; it is any act which results in the exploitation of a child, whether with their consent or not, for the purposes of sexual or erotic gratification;

"Common law" is the law of the land created by customs and judicial decisions but excluding that created by legislation;

"Statutory law" is the law of the land created by legislation;

"Substantive law" determines what type of human behaviour constitutes a crime and lays down the punishment for such crimes;

"Procedural law" prescribes how a person accused of a crime must be called to account for his or her actions and how the punishment imposed must be carried out.

CHAPTER 1

INTRODUCTION

1.1 Introduction

1.1.1 The South African Law Commission's investigation into sexual offences against children emphasises the need to address the pressing and complex problems relating to the sexual abuse of children.

1.2 Origin of the investigation

1.2.1 The South African Government has made a particularly strong commitment to children. President Mandela with his Cabinet has spearheaded a process to ensure that South Africa's children are not left behind in the process of reconstruction and development. This commitment reflects the goals President Mandela and Mr F W de Klerk endorsed when they signed the World Summit Declaration on the Survival, Protection and Development of Children on 12 December 1993. In particular it sets into motion the process towards fulfilling the objectives of the UN Convention on the Rights of the Child ratified by South Africa on 16 June 1995.

1.2.2 In 1994, Cabinet established the National Steering Committee on the Development of a National Plan of Action for the Children of South Africa (the NPA). This committee constitutes the Directors-General of the following seven core departments: Health, welfare, education, finance, foreign affairs, justice and the RDP.[1] Following months of inter-sectoral co-ordination and consultation, a National Programme of Action for Children in South Africa was endorsed and launched by Cabinet on 31 May 1996.

1.2.3 The NPA makes specific provision for the protection of children. The goals relating to child protection measures as contained in the NPA Framework read as follows:

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1 The Reconstruction and Development Programme.

1. To ensure that the best interests of the child are protected within the criminal and civil justice system.
2. To ensure that the child has the right

    * to security and the relevant social services
    * not to be subject to neglect or abuse
    * not to be subject to exploitative labour practices nor to be required or permitted to do work which is hazardous or harmful to the child's education or well-being
    * in criminal matters, to be treated in a way that takes account of his or her age.

3. Within the framework of 1 and 2 above, to

    * establish a separate juvenile criminal justice system
    * address the problems related to children who are involved in all forms of abuse, including sexual abuse
    * protect children from using and trafficking in narcotic drugs
    * address problems relating to children of divorcing, divorced or separated parents and to children of single parents
    * eliminate any form of racial, gender or geographic discrimination or imbalances still existing in the criminal and civil justice system in respect of children
    * promote justice that is sensitive to children, with an emphasis on the training of personnel who work with children in the justice system.

4. In the attainment of the above, to promote and strengthen the partnerships within state departments and between state departments and organisations in civil society which are involved in the administration of justice.
5. To link the entire question of children in the civil and criminal justice system to broader developmental issues.
6. To promote the Convention on the Rights of the Child within the broader framework of a human right culture and to make the public and people in the justice system aware of it.

1.2.4 At a NPA Steering Committee workshop held during February 1995, a task team recommended that the Justice Sectoral Working group should, amongst other things, look at the exploitation, sexual abuse and sentencing of offenders, including children who themselves are offenders. It was further decided that the Commission should be used as the structure through which the envisaged legislative reforms be researched and advanced.

1.2.5 The process was further strengthened by the outcomes of a number of important conferences held during this time. These included a conference on "Sexual offences against

children, the legal system and the management of the offender and the victim" presented jointly by the Department of Criminology of the University of Durban-Westville and the Human Science Research Council as well as the SASPCAN conferences of 1993 (Cape Town) and 1995 (Johannesburg).[2]

1.2.6 During 1996, the National Committee on Child Abuse and Neglect, a multi-sectoral committee functioning under the auspices of the National Department of Welfare was called upon to develop a discussion paper on a Blueprint for an Effective National Strategy on Child Abuse and Neglect (NSCAN).[3] This document is designed to begin to address the problem areas outlined in Chapter 3 of this issue paper. The Blueprint identifies the following components as being essential to the national strategy: research; clarification of the responsibilities of government and non-governmental structures; the resourcing and co-ordination of all components of the child protection system; the balancing of preventative, development and treatment approaches; reporting and data collection; standardised management protocols; advocacy; policy development and legal reform; and monitoring. The strategy is designed to set up processes in terms of which all of these components will have been addressed in a concerted manner by the turn of the century.

1.2.7 Policy development, reviewing existing and drafting new legislation is at the heart of the above processes. The Minister of Justice endorsed and directed the Commission to conduct this investigation.[4] In June 1996 the Commission accorded the investigation the highest possible priority rating and recommended that a project committee be appointed to assist the Commission in its task. In December 1996 the Minister appointed the following persons to the project committee:

Ms Joan van Niekerk (Childline, Durban)
Ms Rose September (Institute for Child and Family Development, UWC)
Ms Charlotte McClain (Community Law Centre, UWC)
Ms Edmara Mthombeni (Department of Correctional Services, Westville)

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2 Some of the other conferences were "Child prostitution in Southern Africa: A search for legal protection" held at the HSRC on 26 - 28 March 1996 and the conference "Secondary Abuse of the Abused Child" held at the Westville Prison in June 1996.

3 The Blueprint was drafted by Ms R September and Ms J Lofell.

4 The Minister of Justice approved the inclusion of the investigation in the Commission's programme on 13 April 1996.

Ms Evanthe Schurink (HSRC, Pretoria)
Mr Thumba Pillay (Practising attorney, Durban)

1.2.8 The Commission's designated member who acts as chairperson of the committee is Ms Zubi Seedat, a practising attorney from Durban.

1.2.9 The Commission takes this opportunity to sincerely thank the members of the project committee for the work they have done.

1.3 **The scope of the investigation**

1.3.1 This issue paper is titled "sexual offences against children". As such it covers a range of offences found in various enactments as well as in the common and customary law with a particular focus on children. This reflects the judgment of the community that sexual activity by children, particularly with adults, may be psychologically and physically harmful to them.

1.3.2 There is no statutory definition of child abuse in South African law. The Child Care Act, 1983 does not comprehensively define child abuse but rather provides instances of punishable behaviour.[5] Nor is the Prevention of Family Violence Act, 1993 of any assistance: It does not define crucial concepts such as "family violence" or "ill-treatment of children". The term "sexual offence" on the other hand presupposes a clearly defined criminal act.

1.3.3 At this early stage the Commission believes it should not confine its investigation to the narrow realm of existing (statutory) sexual offences against children. It includes the whole spectrum of child sexual abuse both in the intra- and extra-familial context. The Commission believes there is a compelling case for imposing severe legal sanctions on people who exploit children's dependence or immaturity to engage in sexual activity with them. In our opinion, the issue is not **whether** the law should prohibit sexual activity with children, but when and how the prohibitions should operate.

1.3.4 On the other hand some overlap with other investigations of the Commission such as those into juvenile justice,[6] maintenance,[7] domestic violence,[8] the review of the Child Care

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5 For example section 50 of the Child Care Act, 1983 provides for punishment of parents or guardians who ill-treat or abandon their children. No attempt is made to define what constitutes ill-treatment. Section 14 of the same Act provides examples of parental behaviour which the Children's Court can take into account when deciding the fitness or otherwise of a parent or guardian.

6 Project 106: Juvenile justice.

Act,[9] and sentencing[10] is unavoidable. To minimize overlap the Project Committee has decided to limit this investigation to sexual offences **against** children as the Project Committee on Juvenile Justice in their investigation[11] deals specifically with the juvenile offender. For the same reason this investigation does not deal with the Prevention of Family Violence Act, 1993 as it forms the subject matter of the Commission's investigation into domestic violence.[12] Some changes to the law will obviously affect adults as well. Should the Commission recommend changes to the common law of rape, for instance, the impact on adults will also have to be considered.

1.3.5 As the scope of the investigation will have a fundamental bearing on the investigation, we need guidance as to the following questions:

What should the scope of the investigation be? Should it only include a review of the existing statutory offences and / or should it also include a review of the common law and customary law? Should it be limited to offences (even in the broad sense) and not include an investigation of child abuse and neglect or the ill-treatment of children? Should the investigation focus on children and exclude adults or should the scope of the investigation be broadened to include all sexual offences, whether it involves a child or not?

1.4 **Limitations of the investigation**

1.4.1 It is important to point out that the Commission's focus is on law reform. We are acutely aware that sexual offences are not committed in a vacuum and that in order to eliminate sexual abuse it is necessary to address and improve the socio-economic circumstances of the

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7 Project 100: Family law and the law of persons: Maintenance.

8 Project 100: Family law and the law of persons: Family violence.

9 Project 110: Review of the Child Care Act, 1983.

10 Project 82: Sentencing.

11 Project 106: Juvenile justice.

12 Project 100: Family law and the law of persons: Family violence.

majority of our people. We know that the family and the community are central to the well-being of the child and that massive preventative and educational programmes are needed. However, we must warn that the legal system has its own inherent limitations. By transforming what amount to moral precepts into law, the matter does not become simply one of having the will to enforce the law against those who hold out against it.

1.4.2 Inadequacies in the legal system that destabilise or destroy family life cannot be tolerated. Although the legal system cannot, for instance, guarantee stable family environments, healthy family support systems, the protection of children against abuse and neglect, etc., it must reinforce and uphold these values.

1.5 The Commission's working methodology

1.5.1 The methodology used in this investigation is inclusive of multi-disciplinary and multi-sectoral interests.

1.5.2 This issue paper introduces the investigation into sexual offences against children. Its purpose is to provide a basis for discussion of the topic among all interested parties, including victims and offenders. For this reason this paper does not contain clearly defined recommendations for reform coupled with proposed draft legislation.

1.5.3 In order to facilitate a focused debate, the factual position is first discussed briefly. Where appropriate, this discussion is followed by some questions, boxed in the text. Respondents are invited to respond to the factual position and or to the questions, to comment on any other issues, to suggest solutions, and to indicate whether there are other questions, issues or options that should also be investigated.

1.5.4 Following this issue paper, a discussion paper will be prepared. The discussion paper will take the submissions on the issue paper into account, will contain draft legislation and a comparative study and will again be circulated for general comment. On the strength of these submissions elicited a report will be prepared which will be submitted to the Minister of Justice for his consideration.

CHAPTER 2

THE UNDERLYING PRINCIPLES

2.1 Introduction

2.1.1 It is believed that this investigation - with its focus on changes to the present system, structure, process and legislation - should be guided by some basic principles relating to children and their special needs. The Project Committee would like to highlight the desirability of such a set of principles and include for discussion such a set of principles at the end of this Chapter. The principles are derived from the UN Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child, 1990, the Constitution of the Republic of South Africa, 1996, and workshops and should be debated extensively.

2.2 The UN Convention on the Rights of the Child, 1989

2.2.1 On 16 June 1995 the South African Government of National Unity ratified the United Nations Convention on the Rights of the Child.[13] In order to fulfil our international obligations under the Convention, we are bound to the monitoring, promoting, protecting and reporting of the status of our country's children.

2.2.2 For present purposes, two provisions of the Convention are of particular importance. First, Article 19 of the Convention, which reads as follows:

> 1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
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> 2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

13 For the text, see Van Bueren (ed) **International Documents on Children** 7 *et seq*.

2.2.3 Article 34 of the Convention, in turn, reads as follows:

> States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:
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> (a) the inducement or coercion of a child to engage in any unlawful sexual activity;
> (b) the exploitative use of children in prostitution or other unlawful sexual practices;
> (c) the exploitative use of children in pornographic performances and materials.

What should be done to ensure that South Africa complies with its international obligations in terms of the UN Convention on the Rights of the Child? What other international instruments signed, acceded to or ratified by South Africa can play a role in preventing and responding to the sexual abuse of children?

2.3 **The African Charter on the Rights and Welfare of the Child, 1990**[14]

2.3.1 The Organisation of African States has adopted the first regional declaration and treaty on the rights of the child.[15] Article 16 of the African Children's Charter follows the wording of Article 19 of the UN Convention on the Rights of the Child and protects children against abuse and torture. Article 27 of the African Children's Charter likewise repeats the content of the prohibition on the sexual exploitation of children contained in Article 34 of the UN Convention quoted above.

2.3.2 What is interesting about the African Children's Charter is that the rights of children are placed in cultural perspective. Children are, for instance, protected against harmful social and cultural practices.[16] Article 21 of the African Children's Charter reads as follows:

> 1. States Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:

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14 For the text, see Van Bueren (ed) **International Documents on Children** 33 *et seq*.

15 The possibility of a Community Charter of Rights of Children is being discussed within Europe: European Parliament Doc. EN\PR\122138.

16 In accordance with African tradition, the responsibilities of children are also recognised. See Article 31 of the African Charter on the Rights and Welfare of the Child, 1990.

(a) those customs and practices prejudicial to the health or life of the child; and
(b) those customs and practices discriminatory to the child on the grounds of sex or other status.

2. Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be eighteen years and make registration of all marriages in an official registry compulsory.

2.4 **The impact of the Constitution of the Republic of South Africa, 1996**

2.4.1 South Africa's ratification of the UN Convention on the Rights of the Child can in many respects be seen as a logical corollary to the inclusion of a section dealing with children's rights in the Constitution, 1993.[17] This tandem development is bound to extend the influence of international norms over many areas of our domestic law dealing with children. The Constitution, 1996 is the supreme law of the land and any law or administrative act in conflict with any of its provisions can be declared invalid. Children are entitled to all the constitutional guarantees, the cornerstone of which is respect for human dignity and equality before the law.

2.4.2 Children receive special protection in terms of the Constitution, 1996. Section 28 of the Constitution, 1996 reads as follows:

(1) Every child has the right-

(a) to a name and a nationality from birth;
(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
(c) to basic nutrition, shelter, basic health care services and social services;
(d) to be protected from maltreatment, neglect, abuse or degradation;
(e) to be protected from exploitative labour practices;
(f) not to be required or permitted to perform work or provide services that-

(i) are inappropriate for a person of that child's age; or
(ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;

17 For a description of the genesis of the section on children's rights, see Lourens du Plessis and Hugh Corder **Understanding South Africa's Transitional Bill of Rights** 186. The section was incorporated basically unchanged as section 28 of the new Constitution, 1996. See further Julia Sloth-Nielsen "Chicken soup or chainsaws: Some implications of the constitutionalisation of children's rights in South Africa" 1996 **Acta Juridica** 7 *et seq*.

(g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be-

(i) kept separately from detained persons over the age of 18 years; and
(ii) treated in a manner, and kept in conditions, that take account of the child's age;

(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
(i) not to be used directly in armed conflict, and to be protected in times of armed conflict.

(2) A child's best interests are of paramount importance in every matter concerning the child.

(3) In this section 'child' means a person under the age of 18 years.

2.4.3 This section now serves as the benchmark against which all legislation and administrative conduct dealing with children have to comply. It constitutionalises the "best interest of the child"-concept and provides additional guarantees to children to be detained.

Does this constitutional provision sufficiently protect our children with regard to sexual offences? How can this provision be made more effective? How can, for instance, the guarantee in the Constitution, 1996 that every child has the right to be protected from maltreatment, neglect, abuse or degradation be implemented and enforced? What does it mean to a child to have a right to family care or parental care, or "to appropriate alternative care when removed from the family environment"? And what does it mean for a child not to be detained except as a measure of last resort? Why is the child not afforded the constitutional right to legal representation assigned by the state, and at state expense, in all criminal, civil, and administrative proceedings affecting the child? How should the principle "the child's best interests are of paramount importance" find application in our law? What does the phrase mean?

2.4.4 Constitutional guarantees provide a vehicle for implementation of children's rights in practice. The problem is, however, that children as legal subjects are unlikely litigants by reason of their status as children. Furthermore, the Constitution, 1996 and especially the Bill of Rights also impact on existing legislation dealing with children.[18] Likewise, the right to a fair trial and the presumption of innocence; the rights of accused, detained and convicted persons; etc. are accorded not only the juvenile sexual offender, but also the previously multiple convicted paedophile.

How should the rights of victims of sexual abuse be protected both before, during and after the criminal and the children's court process without compromising the rights of the accused?

2.5 **Developing a set of principles**

2.5.1 The following principles were originally developed by a working group in Kwa-Zulu Natal that got together after the conference "Sexual offences against children, the legal system and the management of the offender and the victim" held at the University of Durban-Westville in 1994. The Project Committee believes these principles can be used as a basis for discussion and would like to advance it. It reads as follows:

PRINCIPLES FOR THE MANAGEMENT OF SEXUAL OFFENCES AGAINST CHILDREN

Any person involved with the management of sexual offences against and / or by children shall be guided by the following principles:

1. The best interests of children shall be paramount in all actions.
2. Unless the safety of the child and the community requires otherwise, restorative and rehabilitative alternatives should be applied.
3. As abused children have suffered trauma, the avoidance of secondary trauma through systems involved in the management of abuse is of paramount importance.
4. All professionals and role players involved in the management of sexual offences against children should be appropriately trained.
5. Children may not be discriminated against, either directly or indirectly, on the grounds of race, colour, gender, ethnic or social origin, sexual orientation, age

18 See, for instance, **Fraser v Children's Court, Pretoria North** 1997 2 SA 218 (T) on the constitutionality of section 18(4)(d) of the Child Care Act, 1983.

and developmental level, disability, religion, conscience, belief, culture or language.

6. The vulnerability of children entitles them to special protection and provision by all disciplines during all phases of the investigation and court process, including the implementation and implications of sentencing the sexual offender.
7. Children 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.
8. Together with all due process and constitutional rights, children have these additional rights:
    a. To have present at all decisions affecting them a person or persons important to their lives, except where that participation would not be in the best interests of the child or where the safety of the community requires otherwise;
    b. To have matters explained to them in a clear understandable manner appropriate to their age and in a language which they understand;
    c. Where it is in the best interests of the child, the child remains in the family during the investigation and whilst awaiting a final resolution of the matter. However, there should be periodic review of placement.
    d. A child is entitled to have procedures dealt with expeditiously in time frames appropriate to that child and the offence.
    e. Children have the right to legal representation in civil, criminal, and administrative proceedings.
9. The family and the community are central to the well-being of the child. Therefore in any decisions consideration should be given to:
    a. Ensuring that the family, community and other significant role players are consulted in all decisions relating to the child.
    b. How decisions affecting the offender will affect the child, family and community.
    c. The particular relationship between the offender and the child must be considered.
    d. Keeping disruptive intervention into child, family and community life to a minimum in order to avoid secondary victimisation of the child.
10. A person who commits a sexual offence must be held accountable for his or her actions and should be encouraged to wholly accept responsibility for his or her behaviour, and to develop insight into the impact of such behaviour on the child and family.
11. In deciding sanctions for a person who has been found guilty of committing a sexual offence against a child:
    a. The sanctions applied should ensure the safety and security of the child, family and community;
    b. The sanctions should promote the restoration of the child, family and community.

    In addition

    c. The young sexual offender bears special consideration in respect of sanctions and rehabilitation.
    d. In considering the long-term goal of safety and security of children, families and communities, the possibility of rehabilitating the sexual offender should be considered.

e. The interests of the victim should be considered in any decision regarding sanctions.

12. In all actions, in the investigation, the procedures, penalties and other actions, there should be awareness of, respect for, and cognizance taken of the needs, values and beliefs of particular cultural and ethnic groups applicable to the victim, the offender, and to their communities.
13. The victim has the right to protection from publicity about the offence.
14. The child and family 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.

2.6 **Conclusion**

2.6.1 The principles embodied in the UN Convention on the Rights of the Child, 1989; the African Children's Charter, 1990; the Constitution, 1996; and the above set of principles should underlie all legislative reforms. It should further guide the conduct of all actors involved in this field.

CHAPTER 3

THE PROBLEMS

3.1 Introduction

3.1.1 Throughout the world there is a general awareness that child abuse and neglect is a serious and growing problem. However, as recently reflected in the media,[19] the rate of child abuse in South Africa is appalling.[20] Furthermore, existing services dealing with sexual offences are fragmented, under-resourced or non-existent. Large parts of the country and especially the rural areas are under serviced. The standards of services vary greatly and there is a shortage of suitably qualified and trained staff. Organisations experience serious financial difficulties.

3.1.2 Because there are no policy guidelines regarding management protocol, there is no guarantee that a child entering the system will be dealt with in terms of the acceptable procedures or protected against further abuse. No co-ordinated and comprehensive prevention and management strategies exist. Consequently there is no guarantee that abused or neglected children will receive adequate service, and the risk of the child being abused in the system (secondary abuse) is very high.

3.2 The extent of the problem

3.2.1 The figures on prevalence are staggering: In 1996, the Child Protection Unit (CPU) alone dealt with 35 838 cases of crimes against children, which represents an average increase of 36% per year since 1993.[21] During 1995 to 1996, the officially reported cases of

- rape of children increased from 10 037 to 13 859 (38%);
- sodomy of children increased from 660 to 893 (35%);
- incest involving children increased from 221 to 253 (15%);

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19 "7 000 Children abused in 3 years" **Sowetan**, 4 September 1996, p. 2; "Staggering statistics on child and teenage sex" **Pretoria News**, 9 September 1996, p. 5; "Strategy to protect children from violence, rape and abuse" **The Star**, 11 September 1996, p. 2; "Child sex crimes on priority list" **The Citizen**, 11 September 1996, p. 10; "Child prostitution is on the rise - report" **Pretoria News**, 21 August 1996, p. 11; "The horror of child abuse" **The Star**, 23 August 1996, p. 16; "Paedophilia a growing business as both demand and secrecy escalates" **The Star**, 20 August 1996, p. 8.

20 Evanthe Schurink "Statistics of shame: SA child protection system disintegrating" 1996 (4) **In Focus Forum** 6.

21 See also, "Misdaad teen kinders styg 108%" **Beeld**, 8 April 1997 p. 2; "Child abuse 'a disgrace'" **The Citizen**, 8 April 1997, p. 3; "Lenient treatment for child abuse offenders" **Pretoria News**, 10 April 1997, p. 7.

- sexual offences under the Sexual Offences Act, 1957 increased from 1121 to 1160 (4%);
- attempted murder of children increased from 244 to 283 (16%);
- serious assault of children increased from 2 272 to 3 841 (69%);
- common assault of children increased from 3 768 to 4 502 (20%); and
- offences under the Child Care Act, 1983 increased from 3 499 to 3805 (9%).

3.2.2 Many, if not most, reported cases are dealt with by structures other than the police, particularly the social services. Child Welfare Societies affiliated to the S A National Council for the Child and Family, which form only one of the relevant social service groupings, dealt with an average of 9 398 cases per month involving severe neglect (77%) or physical or sexual abuse (23%). Furthermore, it is a well-known fact that only a very small percentage of crimes against children are reported. Under-reporting and the lack of systematic research, co-ordinated record-keeping and a centralised register are all contributing factors causing the true extent of child abuse and neglect to be unknown.[22] Neither are there common definitions on which to base the collection of data.[23]

3.3 **Problems in the criminal law**

3.3.1 Given that many forms of child abuse and neglect are crimes, the relevant aspects of criminal law as well as the associated processes, procedures, structures and resources are crucial components of the child protection system. An overview of newspaper reports show that there is increased awareness in civil society of the phenomenon of child sexual abuse and the inadequacy of the legal and other systems that manage and interact with the sexually abused child and the child's family. There have also been recent instances reported in the media of some communities taking the law into their own hands and effecting their own justice upon the sexual offender. These incidences highlights a justice system under threat.

3.3.2 Common law covers a wide range of criminal offences including homicide, physical assault, indecent assault, rape and incest, and is the basis for prosecution in offences against children as well as adults in such cases. There is no criminal offence labelled "child abuse", "child sexual abuse" or even "child neglect" in South African law. Evidence is difficult to obtain, as the offence usually occurs in conditions of secrecy. The State's case will often rest on

22 Evanthe Schurink "Statistics of shame: South Africa's child protection system disintegrating" 1996 (4) **In Focus Forum** 8.

23 Levett "Contradictions and confusions in child sexual abuse" 1991 (4) **SACJ** 11.

the testimony of the victim alone, who frequently is a severely traumatised young child, and sometimes the evidence of the medical practitioner who conducted the medical examination of the victim. Such medical evidence is often non-existent.[24] Even if medical evidence exists, it does not necessarily link the victim to a specific offender. Furthermore, the physical effects of abuse are variable and depend very much on the nature of the abuse and the period over which that abuse has occurred.

3.3.3 The Sexual Offences Act, 1957 covers some specific aspects and forms of child sexual abuse, e.g. child prostitution, procuration or abduction of a minor for sexual purposes, conspiracy or fraud or the use of drugs or alcohol to involve a female victim in sexual activities, and sodomy. In addition, section 14 defines the age of consent, below which some forms of child abuse amount to statutory rape. Several of the relevant provisions of the Act are formulated in archaic terms unsuited to the present context, and or discriminate unfairly between male and female victims. In particular there is dissatisfaction about the discrepancy between the ages of consent applicable to males and females - i.e. 16 and 19 respectively. There is also a contradiction between the age of consent for girls in terms of this Act and the implication in section 14(b)(iii) of the Child Care Act, 1983 that a parent may be found "unfit" if he or she allows a child under eighteen years of age to be exposed to sexual activity. The Act does not address problems such as "sex tourism" which is growing in South Africa. In general the Act is considered to be defective in the protection it affords children.[25]

3.3.4 The Prevention of Family Violence Act, 1993 allows the presiding officer to grant an interdict preventing assaults or threats against an applicant or a child living with either the applicant or offender or both. An offender who contravenes such an order may be arrested. This Act is thus the basis for removing perpetrators rather than victims of child abuse from their homes. Many difficulties are, however, being experienced with the implementation of the Act which is not serving as effective a protective purpose for women as was hoped; it is in addition not in common use as a means specifically of preventing child abuse.[26] An ongoing reluctance in many police officers to involve themselves in issues of family violence is part of the problem,

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24 In most instances of indecent assault of children, no medical evidence is available. Sexual fondling of a child, for instance, leaves no physical injuries but may leave emotional scars.

25 **Protecting our Children: Blueprint for an effective national strategy on child abuse and neglect** (third draft) p. 10.

26 See also the Commission's Discussion Paper 70 on Domestic Violence.

while bureaucratic delays and log-jams are further serious stumbling blocks.[27]

3.3.5 The Films and Publications Act, 1996 prohibits the production, possession and distribution of pornographic material depicting children who are younger than sixteen years, and provides for the protection of children from exposure to pornographic material. There is, however, concern about the role being played by the Internet in disseminating vast amounts of pornographic material for use by paedophiles, and there are calls for controls to be extended to this medium.[28]

3.3.6 It is an unfortunate fact that children (persons under the age of 18 years) also commit offences and even very serious offences. What is even more unfortunate is that our present criminal justice system is not catering adequately or is failing in its treatment of the juvenile offender. This aspect is dealt with in the Commission's investigation into the juvenile justice system.[29]

3.4 **Difficulties experienced with the criminal justice processes**

3.4.1 Multiple problems are experienced when child abuse cases are brought to court. The special difficulties involved in the present system in obtaining convictions for crimes against children and the resulting collapse of cases lead to ongoing and sometimes heightened risk to the victim and to other children. These relate mainly to (a) the secondary abuse suffered by children who are required to give testimony[30] in adversarial courts which are designed for adults; (b) difficulties associated with the functioning of the courts, including lack of appropriately trained personnel at all phases of the investigative and judicial process; (c) the endless delays and remands due to the congestion of the court system; (d) problems experienced with the law of evidence; (e) the lack of independent (legal) representation for the child victim; (f) the absence of effective policies and procedures for bail and sentencing; (g) the lack of provision to enable victims and their families to survive and to ensure their safety if they pursue criminal charges;

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27 **Protecting our Children: Blueprint for an effective national strategy on child abuse and neglect** (third draft) p. 10.

28 **Protecting our Children: Blueprint for an effective national strategy on child abuse and neglect** (third draft) p. 11.

29 Project 106: Juvenile justice.

30 Including the question of whether children should direct evidence at all.

and (h) lack of the backup resources needed to enable the courts to make orders which are in the best interests of children and their families.[31]

3.4.2 In cases of a child sexual abuse it is imperative that the child be examined as soon as possible by specialised health care workers to determine the nature of the child's injuries. In order to protect their children from the secondary trauma of undergoing a medical examination immediately after sexual abuse, parents often refuse to consent to the medical examinations. In some instances, one of the parents is the perpetrator and it is unlikely that such a parent will readily consent to a medical examination. The circumstances under which parental authority can be waived needs to be clearly defined in law and the process needs to be simple and swift.[32]

3.4.3 The criminal law and the criminal procedure, as it currently stands, as a mechanism to protect children from abuse is to a great extent ineffective. Convictions are infrequent, and an acquittal may be seen by the perpetrator as a vindication of the legitimacy of his or her behaviour. This in turn makes therapeutic intervention impossible. Successful prosecutions, on the other hand, do not necessarily act as deterrents but tend instead to confirm the perpetrator in his or her "negative self-image" which is so common to sexual offenders. Finally, prosecutions divide families and what public interest may exist in seeing justice done will be outweighed by a disinclination to submit other people (and especially the breadwinner) to a punitive criminal process.

3.5 **Problems with the Child Care Act, 1983 and the children's courts**

3.5.1 Many cases of sexual abuse of children take place in the intra-familial context. These cases then often form the subject of a children's court inquiry in terms of the Child Care Act, 1983, as well as a criminal process.[33] It is also possible that child sexual abuse might come to light as part of a different judicial process, such as a maintenance hearing, a divorce matter, or at an application for custody or access. Furthermore, these processes might be conducted simultaneously or in parallel. Not only is guidance lacking as to what process takes preference, but it appears that the best interest of the child does not always take precedence. However, we

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31 **Protecting our Children: Blueprint for an effective national strategy on child abuse and neglect** (third draft) p. 11.

32 See also section 39 of the Child Care Act, 1983.

33 Only a limited number of criminal cases reported actually reaches the criminal trial stage.

accept that any policy changes suggested in this regard will have to dovetail with the proposed new Family Court structure.

3.5.2 Children's court inquiries have their own problems. At the child's first appearance in the children's court, the commissioner will decide whether the child is to be the subject of an inquiry which may drastically affect his or her long-term future and, in the short-term pending the inquiry, the commissioner may well decide to have the child detained in a place of safety.

3.5.3 It is a matter of concern that the Child Care Act, 1983 does not afford a child (if old enough and otherwise competent) a clear right to describe his or her circumstances and wishes at both the "opening" and the inquiry should he or she wish to do so. This is an example of the lack of child-centredness in the Child Care Act, 1983.[34]

3.5.4 There are still some basic difficulties which arise with regard to the right to legal representation for children in Children's Court inquiries.[35] Not only is legal representation still discretionary, but the guidelines for Commissioners of Child Welfare who do consider the issue of legal representation for children (which guidelines were included in the February 1996 draft), have been omitted from all subsequent versions.[36] Furthermore, a key legislative mechanism designed to test the efficacy of decision making in this regard, namely the court's obligation to record reasons for not providing legal representation for a child, has also not been included in the final Act.[37]

3.5.5 Child commissioners who are particularly concerned about the serious

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34 Carmel Matthias and Noel Zaal "Can we built up a better Children's Court? Some recommendations for improving the processing of child-removal cases" 1996 **Acta Juridica** 53.

35 Julia Sloth-Nielsen and Belinda van Heerden "The Child Care Amendment Act 1996: Does it improve children's rights in South Africa?" 1996 (12) **SAJHR** 649 - 651. See also Carmel Matthias and Noel Zaal "Can we built up a better Children's Court? Some recommendations for improving the processing of child-removal cases" 1996 **Acta Juridica** 56 - 58.

36 Article 12.2 of the UN Convention on the Rights of the Child prescribes that children shall be provided the opportunity to be heard in any judicial and administrative proceedings affecting them, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law. Article 37(d) of the same Convention inter alia provides that every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance. See also Article 4.2 and Article 17.2.(c)(iii) of the African Charter on the Rights and Welfare of the Child, 1990 for similar provisions.

37 Julia Sloth-Nielsen and Belinda van Heerden "The Child Care Amendment Act 1996: Does it improve children's rights in South Africa?" 1996 (12) **SAJHR** 650.

interference with the rights of the child by the deprivation of liberty tend to allow a maximum of about eight weeks between the initial appearance and the date set down for the inquiry. The purpose of having a delay between the two dates is to allow the designated social worker to undertake an investigation into the child's circumstances. Research has shown, however, that many commissioners do not insist upon an early date for the inquiry.[38] This leads to the situation that the time period between the commencement and the finalisation of the inquiry varies between eight weeks and approximately sixteen weeks, or even longer. Given the fundamental nature of a child's right to liberty, any delay in finalising of court proceedings is a matter for serious concern.

3.5.6 This difference in approach by child commissioners underlies an even greater concern. Child commissioners are not specifically trained to deal with children or to solve problems within the family. This is not surprising considering that the majority of commissioners are drawn from the ranks of the magistracy.[39]

3.5.7 Even after the children's court has made an order for the placement of a child, uncertainty about his or her future often remain. When the court has ordered that the child be sent to a children's home or school of industries in terms of section 15(c) or (d) of the Child Care Act, 1983, respectively, the Director-General of Welfare has to find a place for the child in such an institution. Most unfortunately, it often takes the Director-General so long to find such a place that even after two years (the maximum period for which a children's court order may run) the child is still awaiting placement. So serious and widespread has this problem become that section 15 of the Child Care Act, 1983, was drastically amended in 1991 to permit the Minister to effect a change to a children's court placement in a home or a school of industries in order to try to facilitate some kind of long-term institutional accommodation as soon as possible.[40]

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38 Carmel Matthias and Noel Zaal "Can we built up a better Children's Court? Some recommendations for improving the processing of child-removal cases" 1996 **Acta Juridica** 54.

39 In terms of section 6(1) of the Child Care Act, 1983 every magistrate shall be a commissioner of child welfare for the district of which he or she is a magistrate.

40 Carmel Matthias and Noel Zaal "Can we built up a better Children's Court? Some recommendations for improving the processing of child-removal cases" 1996 **Acta Juridica** 60: "It is a sad reflection on the overloaded state institutions for children, and also on the efforts of those who work under the Director-General of Welfare and Population Development, that such provisions should be thought necessary. Sections 15(5)(a) and (b) of the Child Care Act constitute a legislative admission of a welfare system that is breaking down, and a condonation of inefficiency that erodes what should be a basic right on the part of needy children to receive care in appropriate institutions."

3.5.8 However, it would appear that those children who do manage to find a place in a home or a school of industries may not necessarily be better off. A recent report to Cabinet by the Inter-Ministerial Committee on Youth at Risk reveals the shocking state of affairs in many state-controlled places of safety which fall under the jurisdiction of the Department of Welfare.[41] Punitive disciplinary regimes, widespread use of isolation cells, unhygienic sanitary facilities, claims by children in all the residential facilities visited of physical and sexual abuse, render the inspection of such places and minimum standards of care imperative. Although the Act continues to provide for extension of the inspection procedures to state-run children's institutions, the legislation does not really enhance the establishment of an effective, efficient and accountable monitoring system.[42]

3.6 **Conclusion**

3.6.1 From this brief overview it is clear that the investigation into sexual offences against children needs to address a multitude of problems. In order to solve these problems innovative and appropriate action is needed.

41 "In whose best interests", Report on Places of Safety, Schools of Industry and Reform Schools, dated July 1996.

42 Julia Sloth-Nielsen and Belinda van Heerden "The Child Care Amendment Act 1996: Does it improve children's rights in South Africa?" 1996 (12) **SAJHR** 652 - 653.

CHAPTER 4

ISSUES FOR REFORM OF THE SUBSTANTIVE LAW

4.1 Introduction

4.1.1 Against the background of the problems discussed in the previous chapter it is now necessary to consider possible issues for reform of the substantive law.

4.2 The criminal law

4.2.1 There has been considerable debate about the role which the criminal law should play in responding to child sexual abuse. The specific criticisms of the criminal justice system in this regard are that it pays no attention to the needs of the victim and his or her family, and that it focuses on punishment rather than the treatment of the offender. Another criticism of the present system is that government tends to rely on the criminal law as a response to sexual abuse of children, but that the law is of limited preventative or remedial value. It fails to address basic causes such as the attitudes of males to females and entrenches gender inequalities.

4.2.2 The criticism made of the criminal justice system has not led us to believe that the criminal law has no proper role to play, or that its only real purpose is to punish the small proportion of offenders who are detected and successfully prosecuted. Whatever its present drawbacks and inherent limitations, the criminal justice system must continue to be a central element in the community's response to child sexual abuse.

4.2.3 A child may be the victim of various general sexual offences which can be committed on both adults and children. We start our discussion with an overview of the common law offences, and then deal with the statutory offences.

4.3 Common law sexual offences

4.3.1 The common law recognises various offences of a sexual nature. Each of these has its own requirements necessary to secure a conviction and consequently each has its own problems in practice. Two important questions must be addressed in this regard:

Should the common law be codified? Should there be a distinction between penetrative and non-penetrative offences?

4.4 **Rape**

4.4.1 Rape is defined as the intentional unlawful sexual intercourse with a woman without her consent.[43] Sexual intercourse presupposes penetration of the female sexual organ by the male's penis. The offence is gender specific[44] in that it can only be committed by a man.[45] There is an irrebuttable presumption that a girl under the age of 12 years is incapable of consenting to sexual intercourse.

Should the common law offence of rape be retained? What constitutes sexual intercourse? Should rape be gender neutral? In other words, should non-consensual homosexual intercourse not be regarded as rape? Is there a need for the presumption that a girl under the age of 12 years is incapable of consenting to sexual intercourse? Should the presumption not be extended to boys under the age of 12 years?

4.4.2 In Australia, section 2A(1) of the Crimes Act, 1958 defines rape as including the introduction of the penis of a person into another person's vagina, anus, or mouth, or the introduction of any object other than part of the body into another person's vagina or anus.

Should we not introduce a similar statutory offence in South Africa? If we do, is there still a place for common law rape? Should the ambit of such a section not be widened to include the introduction of other body parts e.g. fingers or objects? What should the statutory prohibition entail?

4.4.3 It is not necessary to deal with the presumption that a boy under the age of 14

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

44 See also Louise Fryer "Law versus prejudice: Views on rape through the centuries" 1994 (7) **SACJ** 60; J I Welch "Verkragting, met verwysing na die transseksueel wat 'n geslagsverandering ondergaan het" 1991 (4) **SACJ** 164.

45 A woman who acts as the accomplice of a man who commits rape can on that basis be convicted of rape. See **R v M** 1950 4 SA 101 (T) and **R v Jackelson** 1920 AD 486. Likewise X is guilty of rape if he or she forces Y to submit to intercourse with Z, even if Z honestly thinks Y has freely consented: **R v D** 1969 2 SA 591 (RAD).

years is incapable of sexual intercourse as the Law of Evidence and the Criminal Procedure Act Amendment Act, 1987 now provides that evidence of sexual intercourse by a boy under the age of 14 years may be adduced.

4.5 **Rules of evidence in rape cases**

4.5.1 As for the rules of evidence, the following three issues are germane to the crime of rape: the laying of a complaint, the corroboration of the rape victim's evidence; and evidence of the moral character of the rape victim.

◦ Complaints in rape cases[46]

4.5.2 The complaint must have been made "without undue delay but at the earliest opportunity which, under all the circumstances, could reasonably be expected, to the first person to whom the complainant could reasonably be expected to make it".[47] A great deal depends on the victim's age and understanding.[48]

4.5.3 Complaints in rape cases are admitted to show consistency and to negate a defence of consent,[49] but not as proof of their contents nor to corroborate the complainant.[50] But it is not essential that consent should be in issue; the complainant may, for instance, be a girl of under 12 years of age.[51]

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46 **R v Osborne** [1905] 1 KB 551 at 559 per Ridley J: " ... in early times it was incumbent on the woman who brought an appeal of rape to prove that while the offence was recent she raised "hue and cry" in the neighbouring towns, and shewed her injuries and clothing to men, and that the appellee might raise as a defence the denial that she raised the hue and cry". For a detailed treatment of the present law, see Labuschagne "Die klagte by seksmisdade" 1978 (11) **De Jure** 18 at 19 -20.

47 **R v C** 1955 4 SA 40 (N).

48 In **R v Gannon** 1906 TS 114 the time elapsed was ten days, in **R v T** 1937 TPD 389, six weeks, and in **R v P** 1967 2 SA 497 (R), several years had elapsed since the first act of intercourse. But everything depends on the circumstances and in an appropriate case two days might be too long.

49 **R v M** 1959 1 SA 352 (A).

50 **De Beer v R** 1933 NPD 30.

51 **R v C** 1955 4 SA 40 (N).

Is there still a need for this rule of evidence? Isn't this just one of the factors a judge or presiding officer should consider in weighing up the evidence?

° Corroboration

4.5.4 In rape cases, a cautionary rule "not materially different from that ... applicable in the case of accomplices" applies. Corroboration is not mandatory, but "the trier of fact should have clearly in mind that ... cases of sexual assaults require special treatment, that charges of the kind are generally difficult to disprove, and that various considerations may lead to their being falsely laid".[52]

4.5.5 If corroboration[53] is relied upon as the necessary guarantee of trustworthiness it must be evidence which confirms the complainant on a point tending to show the guilt of the accused. Thus it must tend to show the commission of the act charged,[54] or the identity of the offender, or the absence of consent,[55] according to which of these facts is in dispute. Evidence that a complaint was made immediately after the alleged offence is not corroboration of the complainant's evidence,[56] nor is it regarded as one of the residual features which may be used to confirm the truth of his or her story.[57] It must be realised, however, that the cautionary rule merely lays down how a court should approach evidence and that it should never be applied in a rigid and formalistic manner.[58]

52 **R v W** 1949 3 SA 772 (A) at 780 per Watermeyer CJ.

53 By corroboration is meant evidence other than that of the complainant which tends to show the accused's guilt. See also Milton **South African Criminal Law and Procedure** (Volume 1) 449.

54 **R v W** 1949 3 SA 772 (A).

55 **R v D** 1951 4 SA 450 (A).

56 **R v De Beer** 1933 NPD 30.

57 Hoffmann and Zeffertt **South African Law of Evidence** (fourth edition) 580.

58 **R v J** 1966 1 SA 88 (RAD).

Is there a need for this rule of evidence when dealing with sexual offences against children? Isn't this also one of the factors a judge or presiding officer should consider in weighing up the evidence?

° Character

4.5.6 The complainant's reputation for chastity is relevant to the issue of consent, and evidence of particular instances of unchastity as well as of her general reputation in that regard may be given.[59] There appear to be two grounds for the existence of this rule:

(a) that the essence of the offence is the protection of chastity; and
(b) that a person who has previously engaged in sexual activity does not need or deserve protection from rape.[60]

Is there a need for this rule of evidence when dealing with sexual offences against children?

° Evidence of sexual history

4.5.7 The common law relating to the admissibility of evidence of the sexual history of a complainant is not entirely clear. Fortunately, since the enactment of section 227(2) of the Criminal Procedure Act, 1977 evidence relating to the sexual experience of the complainant (outside the act complained of) will be inadmissible, and cross-examination of the complainant on such matters impermissible, without the leave of the court, which leave will not be granted "unless the court is satisfied that such evidence or questioning is relevant." The court's notion of what is relevant, then becomes the sole criterion in determining admissibility, and any eccentricities that there may have been in the common law may be jettisoned.[61]

Does the application of section 227(2) of the Criminal Procedure Act, 1977 cause problems in practice? If so, what sort of problems and what can be done about it?

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59 Milton **South African Criminal Law and Procedure** (Volume 1) 450. See also sections 197 and 227 of the Criminal Procedure Act, 1977 for the circumstances in which evidence of the accused's or complainant's character is admissible.

60 See also New Zealand Law Commission **Preliminary Paper 27: Evidence Law - Character & Credibility** February 1997.

61 Du Toit *et al* **Commentary on the Criminal Procedure Act** 24-100B.

4.6 **Incest**

4.6.1 Incest is the unlawful and intentional sexual intercourse between two persons who on account of consanguinity, affinity or adoptive relationship may not marry one another.[62] As the offence can also be committed by persons who are not blood relatives, it would seem that the offence is not founded upon biological reasons (such as the prevention of in-breeding), but rather in the protection of certain moral considerations with regard to sexual intercourse between members of a family.

Should the common law offence of incest be retained?

4.6.2 The relationships of consanguinity, affinity and adoption which determine whether incest is committed are co-extensive with those accepted by the private law as determining legal capacity to intermarry. Should the legislature enlarge or decrease the category of *affines* or *consanguines* or persons related by adoption who may not intermarry, the category of persons between whom incest is possible is corresponding enlarged or decreased.[63] In the Australian Capital Territory, for example, the offence of incest can be committed by a person who is *in loco parentis* in relation to a child, that is, a person "who assumes the liability for providing for a minor in the way a parent would do".

Should the offence called incest be limited to intra-familial sexual abuse of children in the nucleus family or should the category of persons between whom incest is possible not include *in loco parentis* parenting figures who are not the biological parents of the child?

4.6.3 Consent is no justification: where both parties have consented, both are guilty of committing the offence. A child below the age of 7 years has absolutely no capacity to act, nor is such a child criminally liable or responsible in delict for his or her acts. Such a child can obviously not consent, and therefore cannot be convicted of the offence. From 7 to 14 years there exists a rebuttable presumption that a child is not criminally liable or responsible in delict and such a child has limited capacity to act. If the presumption is rebutted, the child will be guilty of committing the offence. At the age of 14 years a rebuttable presumption arises that the child is criminally liable or responsible in delict.

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62 Milton **South African Criminal Law and Procedure** (Volume 1) 257; Snyman **Strafreg** (third edition) 383.

63 Section 238(1) of the Criminal Procedure Act, 1977 creates a statutory presumption in incest cases. It provides that at criminal proceedings at which the accused is charged with incest it shall be sufficient to prove that the women or girl on whom and by whom the offence is alleged to have been committed is reputed to be the linear ascendant or descendant or the sister, stepmother or stepdaughter of the other party to the incest.

Is it fair to brand the child victim in an incestuous affair a criminal? Should consent be a defence where both parties are below a certain age? If so, what should the age of consent be?

4.7 **Indecent assault**

4.7.1 Milton[64] defines indecent assault as an assault[65] which is itself of an indecent character. Snyman,[66] on the other hand, defines indecent assault[67] as the unlawful and intentional assault of another with the intent to commit an indecent act. What appears from these two definitions is that indecent assault is one of the three species of assault with intent.

Should the common law offence of indecent assault be retained? Should indecent assault be prohibited by statute? If so, how? When is an assault "indecent"?

4.8 **Unnatural sexual offences**

4.8.1 South African practice at an early stage subdivided the unnatural offences into three separate categories: first, sodomy, consisting in anal intercourse between males; secondly, bestiality, consisting in intercourse between a male or female human and an animal; and thirdly, a residual group of proscribed 'unnatural' sexual acts referred to generally as "unnatural offences".

° Sodomy

4.8.2 Verschoor[68] defines sodomy as the unlawful and intentional sexual relation *per anum* between two men. The crime presupposes two parties, an active and a passive party. The

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64 **South African Criminal Law and Procedure** (Volume 1) 494.

65 The author defines assault as the unlawful and intentional applying of force to the person of another, or inspiring a belief in that other that force is immediately to be applied to him.

66 **Strafreg** (third edition) 458.

67 This author defines assault as follows:

"Aanranding is die wederregtelike en opsetlike (a) regstreekse of onregstreekse toevoeging van geweld aan die liggaam van 'n ander persoon, of (b) dreigemente van onmiddellike persoonlike geweld aan 'n ander onder omstandighede waarin die bedreigde beweeg word om te glo dat die persoon wat dreig die opset en die vermoë het om sy dreigement uit te voer."

68 **Misdaad, Verweer en Straf** 166.

act consists of the penetration by the penis of the active party into the anus of the passive party. Without penetration the crime is no more than attempted sodomy or else one of the miscellaneous unnatural offences. It follows that sodomy is restricted to males.[69]

Should consent above a certain age be a defence to a charge of sodomy? If so, what should that age of consent be? Should the common law offence of sodomy be restricted to males? Should same-sex relationships between minors be regulated or should children only be protected from sexual abuse, in whatever form, if committed by adults?

˚ Bestiality

4.8.3 Bestiality consists of unlawful and intentional sexual intercourse by a person with an animal.[70]

4.8.4 Although we are not aware of any reported cases, it is not inconceivable that an adult may force a child to submit to sexual intercourse[71] with an animal.[72] Plainly, coercion will deprive the conduct of the child of unlawfulness, and bestiality is not committed by the child. The adult person can, however, in such circumstances be convicted of bestiality as an accomplice.

Is there a need to introduce a statutory offence to cover forced or manipulated sexual activity between children and animals? Should penetration be a requirement for such an offence?

˚ Unnatural sexual offences (other than sodomy and bestiality)

4.8.5 It is impossible to define the limits of unnatural sexual offences. Plainly, however, the modern conception of what are "unnatural" sexual acts is considerably narrower[73]

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69 This is one of the prime examples of gender bias in our law.

70 See also Milton **South African Criminal Law and Procedure** (Volume II) 274.

71 Penetration is required.

72 It does not matter what kind of animal is involved, provided penetration is possible.

73 Although it still exists. In **R v Mateba** 1950 2 PH H130 (G) a conviction of sodomy was substituted for a conviction of the commitment of an unnatural act. In **R v L** 1951 4 SA 614 (A) at 622 B - C the Appeal Court talks of "an unnatural sexual crime such as sodomy". In **S v Matsemela** 1988 2 SA 254 (T) two males voluntarily committed certain sexual acts with each other without committing sodomy. The court held *obiter* that they may have committed

than that held in Roman-Dutch times.[74] Faced with the common and widespread Black *metsha* custom, our courts have accepted that acts whereby a male obtains sexual gratification by friction of the penis between a female's thighs or against some other part of her body or by insertion into her mouth or anus is not a crime.[75] Similarly it now seems clear that self-masturbation is not criminal.[76] There are no reported cases dealing with unnatural acts between consenting females.

Does this common law crime still exist? If so, should it be retained? What is an "unnatural sexual act"?

4.9 ***Crimen injuria***

4.9.1 *Crimen injuria* consists in unlawfully, intentionally and seriously impairing the *dignitas* of another.[77]

4.9.2 It is very difficult to lay down a general definition of what acts, what exact form of conduct, or what amount of repetition of objectionable conduct would constitute *crimen injuria*.[78] The criminal or innocent character of the acts would depend upon very many circumstances, such as the place where the acts are committed, the time of the commission, the relation between the parties, their sex,[79] age[80] and social standing, etc. Conduct which impairs

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an unnatural act.

74 All Roman-Dutch writers regarded unnatural acts between human males, and between human beings and animals involving penetration as qualifying. There seems to be no doubt that the crime included unnatural acts between males which occurred without penetration of the anus. Differences of opinion are to be found regarding self-masturbation. An interesting indication of the concept is the fact that some jurists regarded ordinary sexual relations between Jews and Christians as sodomy.

75 **R v N** 1961 3 SA 147 (T).

76 **R v Curtis** 1926 CPD 385 at 386.

77 Milton **South African Criminal Law and Procedure** (Volume 1) 525. See also Snyman **Strafreg** (third edition) 465.

78 See the comments of De Villiers JP in **R v Van Meer** 1923 OPD 77 at 81.

79 The law would naturally be always more studious to protect girls and women against insults from men than it would be in the case of insult offered by one man to another or by one woman to another: **R v Van Meer** 1929 OPD 77 at 80.

80 An act may be aggravated by the fact that it is committed in respect of a young person. In **R v S** 1955 3 SA 313 (SWA) at 316, for instance, the court emphasised that the complainant was a young girl, who had been accosted in her home by a strange man.

dignitas and which contains an element of "sexual impropriety" is usually seriously regarded. It is not, of course, suggested that an element of "sexual impropriety" is always essential: In many reported cases seriously insulting or degrading treatment without any suggestion of "sexual impropriety" has been regarded as criminal.[81]

4.9.3 *Crimen injuria* and assault overlap,[82] for an act which impairs bodily integrity may also seriously impair *dignitas*. Indecent assault will invariably also constitute *crimen injuria*, but of course the converse does not hold true.

Should a special form of *crimen injuria* which contains an element of sexual impropriety be created by statute?

4.10 **Statutory sexual offences**

4.10.1 The scope of the traditional common-law prohibitions has been supplemented by legislative provisions aimed particularly at the regulation of sexual activity involving children and other vulnerable persons, homosexuality and the various manifestations of prostitution. These statutory prohibitions upon sexual activity are essentially contained in the Sexual Offences Act, 1957. The Act prohibits "unlawful sexual intercourse" which is defined as carnal intercourse otherwise than between husband and wife.[83] Other very important pieces of domestic legislation for the protection of children are the Child Care Act, 1983 and the Prevention of Family Violence Act, 1993. We will also briefly deal with child pornography.

4.10.2 In this regard, the following important questions must be addressed:

Is there a need for a single sexual offences act for children? If not, does the Sexual Offences Act, 1957 adequately deal with sexual offences against children? Do we need to look at the whole of the Sexual Offences Act, 1957 or should this investigation concentrate on those provisions of the Act specifically dealing with children?

81 Milton **South African Criminal Law and Procedure** (Volume 1) 531.

82 As does *crimen injuria* and defamation. See also Milton **South African Criminal Law and Procedure** (Volume 1) 524 - 525.

83 Section 1 of the Sexual Offences Act, 1957.

Should sexual offences against children not form part of child care and accordingly be dealt with in terms of the Child Care Act, 1983? Should the mandatory reporting of sexual offences committed in the family context be dealt with in terms of the Prevention of Family Violence Act, 1993?

4.11 The Sexual Offences Act, 1957

4.11.1 According to its long title, the Sexual Offences Act, 1957 consolidates and amends the "laws relating to brothels and unlawful carnal intercourse and other acts in relation thereto." As such the Act does not specifically focus on sexual offences by and against children. Some of the provisions of the Act do, however, proscribe certain sexual conduct with youths.

4.11.2 In most legal systems sexual intercourse with young persons is subject to strict prohibition controls.[84] Sexual intercourse with prepubescent children is regarded as the serious common law crime of rape and punished as such. Sexual intercourse with pubescent youths is regulated by fixing a so-called 'age of consent' which determines the age at which consensual intercourse with youths is permitted. Sexual intercourse with a youth who has not yet arrived at the age of consent is penalised by statute. This is also the case in South Africa.

° Section 14 of the Sexual Offences Act, 1957

4.11.3 Section 14(1) of the Sexual Offences Act, 1957, for instance, reads as follows:

> Any male person who -
> (a) has or attempts to have unlawful carnal intercourse with a girl under the age of 16 years; or
> (b) commits or attempts to commit with such girl or with a boy under the age of 19 years an immoral or indecent act; or
> (c) solicits or entices such a girl or boy to the commission of an immoral or indecent act,
> shall be guilty of an offence.

4.11.4 Subsections 14(3) and (4) of the Sexual Offences Act, 1957 deals with precisely the same conduct as that dealt with under subsections 14(1) and (2) of the same Act, the only difference now the reversal in sexes. The result is that there is no discrimination in section 14 between males and females: what is prohibited for the one sex, is also prohibited for the other

84 See generally R Card "Sexual relations with minors" 1975 ( ) **Criminal Law Review** 370.

sex.

4.11.5 The offences created by section 14 are important. It means that if the accused is charged with rape, but the evidence shows that the complainant, who is not yet 16 years old, consented to sexual intercourse, then the accused is guilty of contravening either section 14(1)(a) or 14(3)(a) of the Sexual Offences Act, 1957.[85] If the accused has "carnal intercourse" with a girl under the age of 12 years, he commits, in addition to rape, also a contravention of section 14(1)(a). Carnal intercourse, which is not defined in the Sexual Offences Act, 1957, is generally understood as a legislative euphemism for copulation between a man and a woman by penetration of the vagina by the penis.[86]

What should the age of consent be? Is section 14 of the Sexual Offences Act, 1957 an effective mechanism to prevent the sexual abuse of children? Why restrict "carnal intercourse" to penetration of the vagina by the penis?

4.11.6 The offences created in sections 14(1)(b) and 14(3)(b) can only be committed **with** youths. In other words it is not sufficient for an immoral or indecent act to be committed in the presence of the young person.[87] An immoral or indecent act is associated with sexual behaviour. In relation to sexual matters the concept of immorality normally denotes extra-marital sexual intercourse. The term "indecent" would, on the other hand, seem to comprehend acts ranging from "external" sexual intercourse,[88] masturbation,[89] and oral-genital intercourse,[90] to the baring of the body for purposes of inciting sexual desire[91] or facilitating sexual activity, to

85 Contravening section 14(1)(a) is a competent verdict on a charge of rape. See section 261(1)(e) of the Criminal Procedure Act, 1977.

86 Milton **South African Criminal Law and Procedure** (Volume 3) E 3 - 11. See, however, the definition of "unlawful carnal intercourse" in section 1 of the Sexual Offences Act, 1957.

87 **R v H** 1959 1 SA 343 (C); **S v M** 1970 4 SA 647 (N); **S v A** 1990 2 SACR 266 (ZS) at 268 G.

88 *Coitus inter femora*. Cf. **R v D** 1956 4 SA 277 (N) at 278.

89 Provided it is performed "with" the child. Self-masturbation, at common law at least, is no crime: **R v Curtis** 1926 CPD 385 at 386.

90 Although such intercourse is not a crime at common law, it has been held to amount to an indecent act for these purposes: **R v Abrahams** 1947 3 SA 181 (C).

91 Cf. **R v H** 1959 1 SA 803 (T).

kissing and fondling or touching of erogenous parts of the body in a way that incites lust,[92] but falls short of or not involving actual sexual intercourse.

Should the scope of the offences created by section 14(1)(b) and 14(3)(b) of the Sexual Offences Act, 1957 be broadened to include intentional exposure of a child to an immoral or indecent act? Is there any justification in requiring a different age of consent (19 years) when it comes to immoral or indecent acts as opposed to sexual intercourse (16 years)? What should the age of consent be?

4.11.7 Sections 14(1)(c) and 14(3)(c) penalize also an inchoate form of corruption of young persons by prohibiting under penalty the "solicitation" or "enticement" of boys or girls to commit immoral or indecent acts. Solicitation involves asking or earnestly inviting and thus connotes beguiling, alluring or petitioning.[93] The notion of enticement involves the alluring or attracting of persons by hope of pleasure or profit. The term connotes particularly a petitioning. Any offer or proposal made involves an enticing.[94]

4.11.8 The offences in section 14 are not committed if:[95]

(a) the parties are married;[96]
(b) the accused was deceived as to the girl or the boy's age;[97]
(c) the girl or the boy at the time of the commission of the offence was a prostitute, the accused was at the said time under the age of 21 years[98] and it was the first occasion on which the accused has been charged[99] with this offence.

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92 Cf. **R v E** 1960 4 SA 445 (C) at 448 C.

93 **R v F** 1958 4 SA 300 (T).

94 Milton **South African Criminal Law and Procedure** (Volume 3) E 3 - 63.

95 The defences are set out in sections 14(2) and 14(4) of the Sexual Offences Act, 1957 respectively.

96 Carnal intercourse is unlawful if it is intercourse otherwise than between husband and wife. See section 1 of the Sexual offences Act, 1957 quoted above.

97 Section 14(2)(c) of the Sexual Offences Act, 1957. See also **R v T** 1960 4 SA 685 (T) at 686; **S v F** 1976 4 SA 639 (W) at 642, 644 - 5.

98 See also J R L Milton "The young man's defence" 1991 (4) **SACJ** 172.

99 All that is required is a charge; the fact that there was no conviction on the charge is not relevant.

Is there any merit in retaining these defences?

4.11.9 Snyman[100] criticises the formulation of the offences created by section 14(1) and the defences set out in section 14(2). He shows that the Act used to provide that it was a sufficient defence to a charge under this section that the accused at the time of the commission of the offence was under the age of 16 years.[101] The defence was abolished in 1988.[102] This leads to the unsatisfactory situation that a boy of say, twelve, thirteen years who has sexual intercourse with a girl nearly sixteen is guilty of committing this offence, even if the girl took the initiative.[103]

4.11.10 According to the interpretation given by the courts to section 14(2) the accused cannot rely on his error in regard to the girl's age. If, for example, the girl was nearly 16 years old, physically more developed than her peers, and the accused simply *bona fide* believed that she was 16 years old, then his lack of knowledge - and accordingly his lack of intent - cannot save him harmless from conviction. According to our courts, the legislature specifically created the defences in section 14(2) and thereby excluded other defences, such as error in regard to the girl's age by implication. Section 14(1) is then one of the so-called strict-liability offences where culpability is not required.[104] For Snyman this is a pity as he believes there is no reason why the general fault principle should not also apply in this instance.[105]

4.11.11 Insofar as the prohibition pertains to immoral and indecent acts with girls under the age of 19 years, its effect is to proscribe certain lesbian forms of sexual activity. It is not clear to Snyman[106] whether this offence[107] is committed by both females or whether it is

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100 **Strafreg** (third edition) 397.

101 For the origin and history of this defence, see J L R Milton "The young man's defence" 1991 (4) **SACJ** 172.

102 By section 5 of the Immorality Amendment Act, 1988. In **S v M** 1992 1 SACR 124 (N) the court expressed its surprise that this should have been done.

103 Snyman **Strafreg** (third edition) 397.

104 **R v V** 1957 2 SA 10 (O); **R v V** 1957 3 SA 633 (O); **R v V** 1960 1 SA 117 (T).

105 **Strafreg** (third edition) 398.

106 **Strafreg** (third edition) 399.

committed only by the "active" party (i.e. the female older than 19 years of age). He then submits that it was the intention of the legislature to protect women under the age of 19 years from such immoral or indecent acts and that the girl under the age of 19 years should be regarded as the victim and should not be guilty of committing the offence.[108] Snyman[109] further shows that it is not clear whether this section is contravened when both females are under the age of 19 years. He submits that it appears that the section does not preclude such a possibility. What is clear, however, is that the offence cannot be committed if both females are older than 19 years.

Is there merit in the criticisms offered by Snyman?

° Prostitution

4.11.12 The law (and society) has adopted an ambivalent attitude towards prostitution. On the one hand prostitution[110] is universally condemned as a social evil and the prostitute is condemned and penalized for the manner in which he or she carries on their profession. On the other hand, prostitution is tolerated to the extent that it is not forbidden to be a prostitute and the prostitute's customers are allowed to enjoy the prostitute's services with impunity.[111]

4.11.13 In South Africa, the child prostitute can be prosecuted in terms of the Sexual Offences Act, 1957 for a variety of offences relating to the practise of his or her trade[112] while the client walks away scot-free.[113] These provisions are not dealt with in this issue paper as the

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107 The commitment or the attempt to commit an immoral or indecent act with a girl under the age of 19 years by a female in terms of section 14(3)(b) of the Sexual Offences Act, 1957.

108 Snyman **Strafreg** (third edition) 399. See also the discussion by Milton "The Sexual Offences Act" 1988 (1) **SACJ** 269.

109 **Strafreg** (third edition) 399.

110 A prostitute is a person who engages indiscriminately in sexual relations for pecuniary reward: **R v Kam Cham** 1921 ELD 327 at 329.

111 Snyman **Strafreg** (third edition) 401. See also Milton "The young man's defence" 1988 (1) **SACJ** 269 at 271 - 273.

112 Various sections of the Sexual Offences Act, 1957 may find application. See, e.g. section 19 (soliciting); section 20(1)(a) (living of the earnings of prostitution); etc.

113 For a discussion of prostitution, see Snyman **Strafreg** (third edition) 401 - 402; Milton **South African Criminal Law and Procedure** (Volume 3) paras E3-77 *et seq*.

Commission condemns child prostitution in all forms.[114]

Should more stringent measures be adopted in the form of e.g. revoking trade licences, confiscation of property, fines, etc. to be invoked where children are being accommodated on premises for the purpose of prostitution? Is it fair to brand the child prostitute a criminal?

° Procuring of child or ward by parent or guardian for prostitution

4.11.14 It is an offence in terms of section 9 of the Sexual Offence Act, 1957 for any parent or guardian of any child under the age of 18 years to permit, procure or attempt to procure such child to have unlawful carnal intercourse or to commit any immoral or indecent act with any person other than the procurer. It is also an offence for any parent or guardian of any child under the age of 18 years to permit such child to reside in or to frequent a brothel.[115] It is further an offence for any parent or guardian of any child under the age of 18 years to order, permit, or in any way assist in bringing about, or receiving any consideration for, the defilement, seduction or prostitution of such child.[116] In terms of this section the term "guardian" includes any person who has in law or in fact the custody or control of the child.[117]

4.11.15 Unlike the other offences of procuration, these offences are committed in respect of both female and male children. The offences are, however, committed only if the child is under the age of 18 years.

° Child sex tourism

4.11.16 The widespread development of child sex tourism is a relatively recent phenomenon, which is not addressed at all by any of our current legislation. Initially concentrated in South East Asia, child sex tourism has now spread to many countries in Asia itself, South America, the Caribbean and Africa.[118] In foreign jurisdictions, laws are being

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114 According to newspaper reports, in hotels in central Johannesburg and on the streets of Cape Town children as young as four years old are being sold for sexual services. See **Mail & Guardian** 20 - 26 March 1997, p. 1, 5.

115 Section 9(1)(a) of the Sexual Offences Act, 1957.

116 Section 9(1)(b) of the Sexual Offences Act, 1957.

117 Section 9(3) of the Sexual Offences Act, 1957.

118 Communication from the Commission of European Communities on combatting child sex tourism, Brussels 27 November 1996.

enacted which provide for example for sanctions against child molesters for offences and crimes committed abroad.[119] Several countries have taken[120] or are[121] in the course of taking this line. The key elements in combatting child sex tourism would be the possibility of giving national courts extra-territorial jurisdiction for offences and crimes committed against children abroad, even where the presumed offence or crime is not provided for under the laws of the country in which it was committed.

Should South Africa follow the international trend and provide for sanctions to end and prevent child sex tourism?

4.12 **The Child Care Act, 1983**

4.12.1 In broad terms the Child Care Act, 1983 provides for the establishment of children's courts and the appointment of commissioners of child welfare, the protection and welfare of children in need, for the adoption of children, for the establishment of institutions and places of safety for the reception of children and for the treatment of children after such reception, and for contribution by certain persons towards the maintenance of certain children.[122] The Act does not focus on sexual offences by and against children.[123]

4.12.2 Children's courts are closely linked to the present magistrate's court system. Every magistrate's court doubles as a children's court[124] and every magistrate is a commissioner of child welfare.[125] However, a children's court sits in a room other than an ordinary court room,

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119 An overall view is given in the document **The International Legal Framework and Current National Legislative and Enforcement Responses**, submitted by ECPAT for the World Congress against Commercial Sexual Exploitation of Children (Stockholm, August 1996).

120 Sweden, Germany (1993), France (1994), and Belgium (1995).

121 Italy, Ireland, and the United Kingdom.

122 See also the comprehensive Australian Law Reform Commission **Report No. 18: Child Welfare** 1981.

123 See paragraph 5.3 below for a discussion of mandatory reporting in terms of the Child Care Act, 1993.

124 Section 5(1) of the Child Care Act, 1983.

125 Section 6(1) of the Child Care Act, 1983.

unless no such room is available or suitable.[126] The procedure adopted in children's court inquiries closely follows that of a criminal trial of a juvenile offender and allows for *in camera* proceedings, cross-examination of witnesses[127] and even legal representation of the child at state expense.[128]

Should every magistrate also be a commissioner of child welfare? What qualities should a commissioner possess and what training should he or she receive? How can the children's court be made more child-friendly? Should the children's court system be removed from the present criminal justice system? Where should the children's court fit in under the proposed Family Courts?

4.12.3 When a child[129] is brought before the children's court an inquiry is held to determine whether "the child is a child in need of care".[130] At such inquiry the children's court must determine whether the child is a child in need of care in that

(a) the child has no parent or guardian; or
(aA) the child has a parent or guardian who cannot be traced; or
(aB) the child -

(i) has been abandoned or is without visible means of support;
(ii) displays behaviour which cannot be controlled by his or her parents or the person in whose custody he or she is;
(iii) lives in circumstances likely to cause or conduce to his or her seduction, abduction or sexual exploitation;
(iv) lives in or is exposed to circumstances which may seriously harm the physical, mental or social wellbeing of the child;
(v) is in a state of physical or mental neglect;
(vi) has been physically, emotionally or sexually abused or ill-treated by his or her parents or guardian or the person in whose custody he or she is; or
(vii) is being maintained in contravention of section 10.[131]

126 Section 8(1) of the Child Care Act, 1983.

127 Section 8(7) of the Child Care Act, 1983.

128 Section 8A(4) of the Child Care Act, 1983. This provision still has to be put into operation by proclamation.

129 The Child Care Act, 1983 defines a "child" as any person under the age of 18 years.

130 Section 13(3) of the Child Care Act, 1983. This provision still has to be put into operation by proclamation.

131 Section 10 of the Child Care Act, 1983 provides for the maintenance of children apart from their parents.

4.12.4 A children's court which, after holding an inquiry, is satisfied that the child concerned is "a child in need of care" may order that the child be returned or remain in the custody of his or her parents. Alternatively the court may order that the child be placed in the custody of a suitable foster parent, or the court may order that the child be sent to a children's home or a school of industries.[132]

Should the decision of the commissioner be subject to appeal?

4.12.5 Chapter 8 of the Act creates a number of offences to prevent the ill-treatment of children and prohibits the employment of children below the age of 15 years.

4.13 **The Films and Publications Act, 1996**

4.13.1 The Films and Publications Act, 1996 attempts to protect children under the age of 18 years from being used or depicted in a pornographic manner in publications or films. In terms of section 27(1) of the Films and Publications Act, 1996 it is an offense for any person to knowingly produce, import or to possess[133] a publication[134] or a "XX-classified" film[135] which contains a visual presentation or scene(s), simulated or real of a person who is, or is depicted as being, under that age of 18 years, participating in, engaging in or assisting another person to engage in sexual conduct or a lewd display of nudity, explicit violent sexual conduct, bestiality, etc. No prosecutions shall, however, be instituted and no search warrant issued in terms of the Criminal Procedure Act, 1977 in respect of a publication or film which may be involved in such a contravention, without the written authority of the attorney-general.[136] Not only will it be difficult for the members of the Police Service to obtain the necessary evidence (even with a warrant) but it can be expected that the possession of child pornography will in many instances

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132 Section 15(1) of the Child Care Act, 1983.

133 In **Case v Minister of Safety and Security** 1996 3 SA 617 (CC) the Constitutional Court held that any ban imposed on the possession of erotic material kept within the privacy of one's home invaded the right to personal privacy guaranteed by section 13 of the interim Constitution, 1993. See also **Batista v Commanding Officer, SANAB, South African Police, Port Elizabeth** 1995 (8) BCLR 1006 (SE).

134 "Publication" is defined in very terms in section 1 of the Films and Publications Act, 1996. It inter alia includes computer software which is not film, the cover or packaging of a film, and any figure, carving, statute or model.

135 "Film" is also defined in very broad terms in the Act. It includes "any picture intended for exhibition through the medium of any mechanical, electronic or other devise.

136 Section 27(3) of the Films and Publications Act, 1996.

be justified in the name of art and science.[137]

4.13.2 Section 28 of the Films and Publications Act, 1996 makes it an offence for any person who knowingly distributes a publication which contains a visual presentation or a description, simulated or real, of a person who is, or is being depicted as being, under the age of 18 years, participating in, engaging in or assisting another person to engage in sexual conduct or a lewd display of nudity, explicit violent sexual conduct, bestiality, etc.

4.13.3 Schedule 11 of the Act defines "sexual conduct" as genitals in a state of stimulation or arousal; the lewd display of genitals; masturbation; sexual intercourse, which includes anal sexual intercourse; the fondling, or touching with any object, of genitals; the penetration of a vagina or anus with any object; oral genital contact; or oral anal contact.

Should there be a blanket prohibition on the production, importation, possession, and distribution of child pornography in terms of this Act notwithstanding the decision of the Constitutional Court in **Case v Minister of Safety and Security**?[138] Should legislation not be introduced to stop the dissemination of child pornography on the Internet?

4.14 **Customary law**

4.14.1 Child abuse must be examined in its cultural context.[139] For example, the practices of scarification[140] and male and female circumcision are accepted in many cultures, but would be considered abuse in many others. In contrast, the practice of forcing a child to undergo extensive, often painful, orthodontic treatment might be considered abusive by some cultures, but is again extensively practised and condoned in other cultures.

4.14.2 Section 8 of the Uganda Children Statute, 1996, for example, reads as follows:

> It shall be unlawful to subject a child to social or customary practices that are harmful to

137 See Schedules 5 and 9 for the art and science exemption for publications and films respectively.

138 1996 3 SA 617 (CC).

139 See also J A Robinson "Multi-kulturaliteit en die familiereg: Enkele gedagtes oor die posisie in Nieu-Seeland" 1996 (7) **Stellenbosch LR** 210.

140 The act of cutting the face or body to produce scars.

the child's health.[141]

The Act does not state what these practices are.

Should we follow suit and outlaw social or customary practices harmful to the child?

4.14.3 In economically developed, industrialised societies, while self-sufficient individualism is the ideal, children enjoy a privileged position. Biological parents are expected to bear full responsibility for rearing children. While still a minor, the child's interests are always preferred to its parents. When the child is old enough to leave home and make its own way in the world, most familial obligations for all practical purposes cease.

4.14.4 The African tradition is quite different. Here the welfare of the extended family predominates. Children have no especially favoured position in relation to their parents or other relatives; to the contrary, a child's interests might well be subordinated to those of the family.[142] Likewise certain customary practices[143] followed in relation to children might, if seen from another perspective, amount to assault[144] or even sexual abuse.[145]

4.14.5 Generally, however, children are not neglected in customary law to the extent that legal action is necessary. When a child is being insufficiently maintained, this means, as a rule, that his or her mother's house is being neglected; usually the mother will simply return to her own people with her children, and will be maintained there until her husband *phuthuma*'s[146] her, upon which the wife's guardian will be entitled to claim *isondlo*[147] for each child.[148]

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141 See also article 21 of the African Charter on the Rights and Welfare of the Child, 1990.

142 Bennett **Human Rights and African Customary Law** 96.

143 Such as the giving away of a daughter to discharge a debt, which amounts to the sale of a child.

144 Such as the practice of scarification or initiation followed in some customs.

145 Such as asking a girl to display her body at a gathering.

146 The Xhosa word *phuthuma* literally means to fetch; to come for; to search for; to pursue. It entails the husband making a formal request at the guardian of the wife's family home for the return of the wife. See also Bekker **Seymour's Customary Law in Southern Africa** (fifth edition) 181 - 192.

147 Reimbursement for maintaining a child.

148 Bekker **Seymour's Customary Law in Southern Africa** (fifth edition) 238.

4.15 **Conclusion**

4.15.1 From the above overview of the existing legal position it is clear that a multitude of legislative provisions find application in this investigation. What is also clear is that most of the provisions dealing with sexual offences against children need revision.

CHAPTER 5

ISSUES FOR REFORM OF THE PROCESS AND THE PROCEDURAL LAW

5.1 Introduction

5.1.1 This chapter deals with the process of managing sexual offences against children. It includes a discussion of the procedures for disclosure, reporting, registration, investigation, the court hearing, the sentencing of the sexual offender, and post trauma victim and offender rehabilitation. However, not all cases of child sexual abuse follow these steps or necessarily in this sequence. What is clear is that the process involves a number of disciplines, professions and structures. Consultation, co-ordination, and an explicit inter-disciplinary code of conduct are therefore essential. Selection, screening, specialised training, and debriefing of all role players involved in child sexual abuse cases are equally important.

5.2 Disclosure

5.2.1 Sexuality in general and sexual abuse specifically are topics that are difficult to discuss openly and honestly in any culture. This is even more true in cases of sexual abuse of children. Firstly, it should be recognised that a child often discloses his or her sexual abuse in a fragmented fashion. Disclosure for a child is a process and the full extent of the abuse will not be revealed when the child makes the first report. This opens up the child witness to attack in criminal trials[149] in that the child is often accused of fabrication[150] or susceptibility when giving evidence. Secondly, it should be realised that by the time the child formally lays a complaint with the police, it is likely that the child has been made to tell his or her story to various other people. In repeating the story to different people at different times it is inevitable that details are sometimes left out or that inconsistencies will creep in. The inconsistencies in the various reports are then used to discredit the child in the witness stand and this increases the secondary trauma

149 The question is often asked by defence attorneys why the child did not make full disclosure at the first available opportunity. This is often followed with a question why the report was not made to the police or somebody in an authoritative position.

150 A witness may not be asked in evidence in chief whether he or she has made some previous statement which tends to confirm his or her testimony. To this general rule, there is an exception in complaints of a sexual nature. See the discussion at paragraph 5.8 below.

suffered by the child. Thirdly, cases of child sexual abuse can be disclosed to any person. It often happens that the person to whom the report is made, determines the outcome and success of the investigation. No consistent intervention procedure is prescribed.

How can we make it easier for children to disclose sexual abuse? Is corroboration with respect to the unsworn evidence in child sexual abuse cases necessary? Should limits be placed upon the right to cross-examine children in sexual offence-cases on previous statements made?

5.3 **Reporting and registration**

5.3.1 It is a well-known fact that only a very small percentage of crimes against children are reported. Under-reporting and the lack of systematic research, co-ordinated record-keeping and a centralised register all contribute thereto that the true extent of child abuse and neglect remain unknown.

5.3.2 In order to encourage the reporting of child abuse, many jurisdictions have enacted one or both of the following provisions:

- A law to encourage "voluntary" reporting, by protecting a person who reports in good faith from being sued for defamation, and from professional disciplinary action for disclosure in breach of ethics. In Victoria, this is provided by section 31(3) of the Community Welfare Services Act, 1970.

- A "mandatory" reporting law, requiring people in specified groups, or generally, to report if they suspect a child is being maltreated.

5.3.3 In South Africa, section 42 of the Child Care Act, 1983 obliges a range of health care workers and others[151] to report circumstances giving rise to the suspicion that a child has been ill-treated, or suffers from any injury, the cause of which probably might have been deliberate, or suffers from a nutritional deficiency disease.[152] Persons obliged to notify the

151 Dentists, medical practitioners, nurses, social workers or teachers, or any person employed by or managing a children's home, place of care or shelter.

152 Section 42(1) of the Child Care Act, 1983.

Director-General are indemnified from legal proceedings in respect of any notification given in good faith.[153] Section 4 of the Prevention of Family Violence Act, 1993 contains a similar provision.

5.3.4 Not all persons obliged to report circumstances giving rise to the suspicion that a child has been sexually abused, receive or undergo the necessary training to deal with the child when reports of this nature are made.[154] The secondary trauma suffered by the child victim is further exacerbated by the lack of any consistent management protocol prescribing what should be done once a report is made.

Should reporting of sexual abuse and neglect of children be mandatory or voluntary? Who should do the reporting? Should those persons obliged to report be indemnified from legal proceedings in respect of any reports made in good faith? To whom should the report be made? What should be done once a report is made?

5.3.5 If there is an obligation to report cases of sexual abuse and neglect of children then something should be done with the information. Besides using the information for research the idea has been mooted that a register be kept of all incidences of child sexual abuse.[155] Some go even further and suggest that a register be kept of all **alleged** sexual offenders.[156] The issue of the need and purpose of a register of sexual offenders need to be debated.

What would the purpose of keeping a register of sexual offenders be? If a register of **alleged** sexual offenders is to be established, will this not infringe the right of the alleged sexual offender to be presumed innocent until proven guilty? At what stage of an investigation would an offender's name be placed on such a register? Who would be responsible for such a register?

153 Section 42(6) of the Child Care Act, 1983.

154 For instance, not even all the members of the Child Protection Units have undergone the specialized training courses.

155 Resolution B2 of the conference "Sexual Offences against Children", 6 - 8 July 1994.

156 The **Australian Paedophile and Sex Offender Index**, for instance, names hundreds of Australian men, and some women, convicted of sex crimes against children in the past five years. The police keeps records of all convicted persons, including sexual offenders.

Who would have access to the information kept on such a register? Under what circumstances would such information be released? Would such a register include the names of juvenile and child sex offenders? If the register only consists of **convicted** sexual offenders, will this not infringe the right not to be tried twice for the same offence? What happens in the period after conviction but before the sexual offender's appeal is heard? At what stage, if any, will the names of persons on the register be expunged?

5.3.6 The idea has also been mooted that a register be established for victims of sexual abuse. The same questions as those listed in the box above then apply.

5.4 **Investigation**

5.4.1 Service providers[157] are often reluctant to involve the police in the early stages of the investigation of alleged child sexual abuse. The motives are understandable. In many cases the evidence is simply insufficient to warrant police involvement. In other cases, there may be a fear that parental consent to further examination of, or interview with, the child will not be forthcoming, or will be withdrawn if the parents know that the police are involved. There may be concern about the secondary traumatisation suffered by the child victim because of poor police management. There is also the prevailing ethos within the professions that the welfare of the patient / child should be the primary concern.

5.4.2 One caveat remains. During the investigation stage (and all subsequent stages) the psychological needs of the child victim and his or her family should not be neglected and the child needs to be prepared for each subsequent step in the process as well as the likely outcomes of such process.

° The police investigation

5.4.3 One of the consequences of excluding the police from the early stages of the investigation is that it may ultimately make it more difficult to mount a successful prosecution against the alleged offender. If disclosure by the child is first made in the context of a purely therapeutic interview without police involvement, there is a danger that any subsequent formal

157 Such as health care workers, educationalists, social workers, street committees, family group conferences, etc.

statement made by the child to the police may be attacked in court as tainted by the earlier interview(s). Another disadvantage of not involving the police at an early stage is that the number of interviews which the child may have to undergo is increased. In addition, those charged with the responsibility of caring for children fear the loss of control which comes from the institution of criminal proceedings. The criminal justice process, once triggered, frequently causes secondary trauma to the child victim in its pursuit of justice and this contributes to a reluctance on the part of service providers to report cases of child sexual abuse which have come to their notice.

5.4.4 The answer to the above problems seems to lie in effective service co-ordination. Joint intervention by the police, the social services, the health services, the education authorities, the judiciary, and correctional services is needed. Difficulties in joint investigations can be minimised by the selection of specialised staff who undergo specialised training and the establishment of protocols for joint investigation. All parties need to understand their responsibilities, the powers available to them and the different standards of proof that exist in relation to criminal and civil proceedings. Child Protection Units find that social workers are often not available after normal working hours to provide a service to children where this is needed.

5.4.5 As we have seen, the police may only become involve long after the sexual abuse has been disclosed. The problems associated herewith and the need for joint investigations with other service providers have been stressed above. We repeat that it is necessary for all members of the police to be adequately trained before they are assigned child sexual abuse cases. Obviously proper case management is necessary.

How should such joint intervention process be structured? Should joint intervention be prescribed by protocol or legislation? Should a specialised police unit for the management of child sexual abuse (such as the CPU) continue to exist? If so, should protocols for the screening, selection, training, and debriefing of such police officers not be adopted?

5.4.6 It might be necessary for the police to hold an identification parade as part of their investigation. In terms of section 37(1)(b) of the Criminal Procedure Act, 1977, the police are allowed considerable latitude in arranging such an identification parade. The rules of police

practice as regards identification parades are found in internal departmental orders and requires the identifying witness to make his or her identification by touching the shoulder of the suspect.[158]

Should this practice be allowed to be continued or is there an alternative?

° Medical examination of the child

5.4.7 Prompt medical examination of a child who has been sexually abused may be important for the discovery of forensic evidence. The general rule is that a doctor cannot examine a person without that person's consent. While a child has a right to give or withhold consent, it is unclear at what age this right can be exercised and how it relates to the rights of a parent or guardian.[159]

5.4.8 It has come to our attention that some district surgeons refuse to treat victims of sexual abuse unless the case has been reported to the police. In some communities, however, cases are for various reasons not reported to the police. The Commission believes the victim should never be refused medical attention on account of the matter not being reported to the police.

5.4.9 A child's legal capacity to consent to medical treatment, without parental consent, is determined not by age but by assessing whether the child is capable of forming a sound and reasoned judgment in the matter involved in the consent. However, doctors do not generally conduct an examination of a child without the consent of a parent.[160]

5.4.10 A parent's refusal to give consent may be circumvented by relying on the

158 See paragraph 17 of form SAP 329, the so-called "Identification Parade Form". See also Du Toit *et al* **Commentary on the Criminal Procedure Act** 3-5 - 3-14.

159 A child below the age of 7 years has absolutely no capacity to act, nor is such child criminally or delictually liable for his or her acts. Between the ages of 7 and 14 years the child has limited capacity to act which means that he or she can, for instance, enter into a contract with the due assistance of his or her parent or guardian. Children above the age of 10 years must consent to their adoption. See also section 5(3) of the Choice on Termination of Pregnancy Act, 1996 on the right of a pregnant minor to consent to an abortion. See further Barnard, Cronje and Olivier **The South African Law of Persons and Family Law** 59.

160 See also Strauss **Doctor, patient and the law** (third edition) 5 - 8.

provisions of section 39 of the Child Care Act, 1983. Section 39(4)(b) of the Child Care Act, 1983, for example, provides that any person over the age of 14 years shall be competent to consent, without the assistance of his or her parent or guardian, to the performance of any medical treatment.

Should medical personnel be specifically trained to deal with cases of sexual abuse? What specialised training or experience should medical personnel possess in order to qualify as an expert witness in cases of child sexual abuse? Should there be a change to the law under which a parent's or guardian's consent is generally required if a child is to be medically examined in relation to suspected or alleged abuse?

5.4.11 Children often experience the required medico-forensic examination as a repeat of the sexual abuse already suffered. Furthermore, the fact that no medical evidence of sexual abuse is found,[161] does not mean that the child cannot be severely traumatised by the sexual abuse or the medical examination.

° Protection of victims

5.4.12 Intimidation of victims and their families is a major concern in many areas.

5.4.13 It is important to ensure that a child who has allegedly been sexually abused is protected from possible further abuse and intimidation by the offender. This can be done by court order involving the alleged offender, the child victim, or both.

5.4.14 There are two main means by which a court can act against an alleged offender:

(a) Custody and bail conditions. If the alleged offender has been charged, a court may order that he or she be kept in custody until the matter has been tried, or may release him or her on bail subject to conditions. The accused has a fundamental right to be released from detention if the interests of justice permit, subject to reasonable conditions.[162] Bail is usually granted unless, for

161 Such as semen in the vagina or a ruptured hymen.

162 Section 35(1)(f) of the Constitution, 1996; section 60 of the Criminal Procedure Act, 1977. See also Du Toit *et al* **Commentary on the Criminal Procedure Act** 9-13 *et seq.*

example, the court is satisfied that there is an unacceptable risk that the accused will commit new offences or interfere with witnesses. The problem is that this risk assessment is not always done properly.

5.4.15 The purpose of bail is to strike a balance between the interests of society (the accused should stand his or her trial and there should be no interference with the administration of justice) and the liberty of the accused (who, pending the outcome of his or her trial, is presumed to be innocent).

5.4.16 It has been suggested that the victim and his or her family should be notified of the impending release from custody or on bail of the **alleged** offender.[163] Similar considerations whould obviously apply to the **convicted** offender.

Should the accused in sexual offence cases be entitled to be released on bail? What bail conditions should apply? Should the views of the victim be taken into account at the bail hearing?

5.4.17 In ordinary bail applications the onus is on the state to prove that it will not be in the interests of the justice to release an accused on bail. However, where the accused is charged with a Schedule 5 offence[164] or a Schedule 1 offence,[165] the latter which was allegedly committed whilst the accused was on bail, the court must order that the accused be detained in custody unless the accused can satisfy the court that it is in the interests of justice that he or she be released on bail. Simply put it means that in very serious cases the onus is placed on the accused to shown the court that it is in the interests of justice that he or she be released on bail. If sexual offences against children were to be classified as Schedule 5 offences, the onus would be on the

163 Resolution B9 of the Conference "Sexual Offences against Children", 6 - 8 June 1994.

164 Schedule 5 lists the following offences: Treason; murder, involving the use of a dangerous weapon or firearm; rape; robeery with aggravating circumstances and robbery of a motor vehicle; drug trafficking; any statutory offence relating to the traffiking of, dealing in or smuggling of firearms, explosives or armament, or the possession of an automatic or semi-automatic firearm, explosives or armament; and any offence relating to exchange control, corruption, fraud, forgery, uttering or theft involving amounts in excess of R500 000.

165 Schedule 1 lists the following offences: Treason; sedition; public violence; murder; culpable homicide; rape; indecent assault; sodomy; bestiality; robbery; kidnapping; childstealing; assault, when a dangerous wound is inflicted; arson; malicious injury to property; breaking or entering any premises, whether under the common law or a statutory provision, with intent to commit an offence; theft, whether under the common law or a statutory provision; receiving stolen property knowing it to have been stolen; fraud; forgery or uttering a forged document knowing it to have been forged; etc.

sexual offender to satisfy the court that he or she would be entitled to be released on bail.

Should sexual offences against children be classified as Schedule 5 offences?

(b) Interdict with regard to family violence. Under the Prevention of Family Violence Act, 1993, a judge or magistrate in chambers may grant an interdict in respect of a person alleged to have assaulted or threatened a family member.[166] The interdict may impose any restriction on the alleged offender that the court believes are necessary or desirable, including an order prohibiting him or her from remaining in the aggrieved family member's house.

5.4.18 A court may act to protect a child by making a protection order under the Child Care Act, 1983.[167] This places a child who has been maltreated, or is in danger of maltreatment, into the care of the Department of Welfare. A child found by a court to be in need of care and protection may be ordered to be removed from any place to a place of safety.

5.4.19 There is considerable community concern that taking an abused child into care may effectively mean punishing the victim rather than the offender.

5.5 **The court process**

5.5.1 If an accused is in custody proceedings in a lower court summary trial commence with the lodging of a charge sheet with the clerk of the court. Where the attendance of the accused is secured by means of a summons the prosecution is initiated and proceedings commence upon the issue of the summons.[168] In contrast to the situation in lower courts proceedings in a superior court commence with the service of the indictment on the accused and its being lodged with the registrar of the High Court.[169] This may not necessarily coincide with the first time the accused or the victim appears in court in that matter.

166 Section 2 of the Prevention of Family Violence Act, 1993.

167 Section 15 of the Child Care Act, 1983.

168 **R v Magcayi** 1951 4 SA 356 (E); **R v Friedman** 1948 2 SA 1034 (C).

169 Section 76(1) of the Criminal Procedure Act, 1977.

5.5.2 What may be needed is a procedure which allows service providers some degree of influence on the decision whether to institute criminal proceedings or not. Full co-operation with and involvement of the police in the early stages of the investigation is unlikely to come about unless service providers are convinced that prosecutions will not proceed without regard to the well-being of the child victim and his or her family. It may be a solution to develop a protocol which establishes the principles of joint decision making, multi-disciplinary partnerships, clarity of roles and boundaries, and victim and offender management.[170]

Should a family group conference or a child protection conference be made mandatory before the matter proceed to trial? How should such a conference be structured? Should the outcome of such a conference be binding on all parties concerned? When should this conference be held?

° Accusatorial versus inquisitorial types of criminal procedure

5.5.3 Legal systems adopt either the accusatorial or inquisitorial type of criminal procedure. The accusatorial system takes the form of an open and public confrontation between the accuser and the accused with the judge reduced to the role of a mere umpire who ensures that the rules of the trial are observed and who pronounces a verdict in accordance with the evidence presented. It comes first in the legal history of most systems as it symbolises and regularises the primitive duel. The accusatorial system usually gives way to the inquisitorial system, in which a secret inquiry replaces the open confrontation and the judge himself or herself actively conducts an investigation into the guilt of the accused. Neither of these systems is without its defects, with the result that modern systems of criminal procedure generally contains elements of both but are labelled as accusatorial or inquisitorial depending on whether they incline more towards the one or the other system.

What type of criminal procedure system is best suited to deal with sexual offences against children? What changes need to be made to our present "mixed' system to better accommodate children? How can we ensure more child-friendly courts? Where do the planned family courts fit in?

° The territorial operation of our laws

170 See also Plotnikoff and Woolfson **Prosecuting Child Abuse: An evaluation of the Government Speedy Progress Policy** 52; J A Robinson "An overview of child protection measures in New Zealand with specific reference to the family group conference" 1996 (7) **Stellenbosch Law Review** 313.

5.5.4 A matter related to the system of criminal procedure concerns the operation of our national laws. In terms of the doctrine of national sovereignty, persons committing crimes in South Africa are to be prosecuted in South Africa in terms of the relevant South African law. Likewise, South Africans who commit crimes in a foreign country are to be tried according to the laws of that foreign country. Increasingly foreign countries give their laws on sexual offences extra-territorial application.

5.5.5 In Australia, England, Wales and Scotland, for instance, it is an offence to conspire or incite anybody to commit sexual acts outside the home country.[171] In Germany, for instance, two German men were sentenced to jail in 1996 for producing pornographic films with young boys in Thailand and selling the films in Germany under a German law permitting the law enforcement agencies to pursue Germans who commit sex offences abroad.[172]

Should extra-territorial operation be given to our laws on sexual offences to make it possible to prosecute South Africans here for sexual offences committed abroad?

5.6 **Children giving evidence**

5.6.1 The major focus of debate and reform in relation to the prosecution of child sexual offences has been on the laws relating to the giving of evidence in court.[173] The key issues include the acceptability of children as witnesses; the weight to be given to their evidence; whether out of court statements should be admitted; and whether there should be special procedures to ease the stress of giving evidence in court.

° Competency to testify

5.6.2 There is no minimum age in our law below which a child is declared incompetent

171 In terms of the Sexual Offences (Conspiracy and Incitement) Act 1996.

172 **Pretoria News**, 28 November 1996, p. 16.

173 See in general Zieff "The child victim as witness in sexual abuse cases - A comparative analysis of the law of evidence and procedure" 1991 (4) **SACJ** 21; Schwikkard "The child witness: Assessment of a practical proposal" 1991 (4) **SACJ** 44; Australian Family Law Council **Child Sexual Abuse (Report)** 47 *et seq*; Bottoms and Goodman (eds) **International Perspectives on Child Abuse and Children's Testimony** 114, 132, 145, 182, 201, 221, 266.

to testify.[174] Young children are competent witnesses if the presiding officer considers that they are old enough to know what it means to tell the truth and has sufficient intelligence to testify,[175] but it has frequently been emphasised that their evidence should be scrutinised with great care.[176] It has been assumed that children are highly imaginative and that their story may be the product of suggestion by others. Where the child is a single witness, or the complaint is of a sexual nature, the danger is, of course, even greater.[177]

5.6.3 A child's unsworn evidence is not necessarily any less trustworthy than if it had been sworn, as Schreiner JA has observed:[178]

> A child may not understand the nature or recognise the obligation of an oath or affirmation and yet may appear to the court to be more than ordinarily intelligent, observant and honest.

5.6.4 Section 164 of the Criminal Procedure Act, 1977 allows young persons to give evidence in criminal proceedings without taking the oath or affirmation after being admonished to speak the truth, the whole truth and nothing but the truth.

Should magistrates receive specialised training to determine the competency of the child to testify? Does the application of this rule or section 164 of the Criminal Procedure Act, 1977 cause problems in practice? If so, what sort of problems and what can be done about it?

5.7 **Making it easier for children to give evidence in court**

5.7.1 There is universal agreement that it is traumatic for children to give evidence of sexual abuse and that it is particularly disturbing when they have been victims of parental abuse

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174 **Ex parte Minister of Justice: In re R v Demingo** 1951 1 SA 36 (A) at 43 per Centlivres CJ.

175 It has been said that magistrates often lack any expertise in assessing the competency of children to testify. See, e.g. **S v F** 1989 1 SA 460 (ZH) where a 10 year old boy was charged with the indecent assault of a four year girl.

176 Hoffmann and Zeffertt **South African Law of Evidence** (fourth edition) 581; Du Toit *et al* **Commentary on the Criminal Procedure Act** 24 - 6.

177 **R v W** 1949 3 SA 772 (A) at 780.

178 In **R v Manda** 1951 3 SA 158 (A) at 163.

and are required to confront the abusing parent in court. This leads, understandably, to a desire to shield them from this experience and to a failure to report and or prosecute the crime. This in turn encourages further abuse.[179]

5.7.2 These considerations have led to a variety of changes in many jurisdictions in the relevant practices and procedures that are designed to make it easier for children to give evidence. Some measures, such as acquainting child witnesses before a trial with how a court looks and how a trial is conducted, and using furniture of appropriate size for child witnesses, do not require legislation and raise no issues of principle. Other measures are more controversial and would require legislation if they are to be adopted.

° Excluding the public from the trial

5.7.3 A complainant in a sexual 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.[180]

5.7.4 Section 153 of the Criminal Procedure Act, 1977, however, provides for the circumstances in which criminal proceedings shall not take place in open court. More particularly, section 153(3) of the Act reads as follows:

> (3) In criminal proceedings relating to a charge that the accused committed or attempted to commit-
>
> (a) any indecent act towards or in connection with any other person;
>
> (b) any act for the purpose of procuring or furthering the commission of an indecent act towards or in connection with any other person; or
>
> (c) extortion or any statutory offence of demanding from any other person some advantage which was not due and, by inspiring fear in the mind of such other person, compelling him to render such advantage,
>
> the court before which such proceedings are pending may, at the request of such

179 Ireland Law Reform Commission **Report on Child Sexual Abuse** 67.

180 Section 152 of the Criminal Procedure Act, 1977. See also Kriegler **Hiemstra Suid-Afrikaanse Strafproses** (fifth edition) 383 - 385.

other person or, if he is a minor, at the request of his parent or guardian, direct that any person whose presence is not necessary at the proceedings or any person or class of persons mentioned in the request, shall not be present at the proceedings: Provided that judgment shall be delivered and sentence shall be passed in open court if the court is of the opinion that the identity of the other person concerned would not be revealed thereby.

5.7.5 Where a witness at criminal proceedings before any court is under the age of eighteen years, the court may direct that no person, other than such witness and his or her parent or guardian or a person *in loco parentis*, shall be present at such proceedings, unless such person's presence is necessary in connection with such proceedings or is authorized by the court.[181]

5.7.6 No person shall publish any information which might reveal the identity of any complainant where the court has made an order in terms of section 153(3) of the Criminal Procedure Act, 1977.[182] Nor shall any person at any stage before the appearance of an accused in a court on a charge referred to in section 153(3) of the Criminal Procedure Act, 1977 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.[183]

Are additional measures necessary or desirable for child complainants? Should consideration be given to the child's needs with regard to who is present in court?

° Use of closed-circuit television and or screens

5.7.7 The courtroom environment is generally regarded as extremely intimidating for witnesses of any age, and particularly for children. One proposal is the use of closed-circuit television or screen, so that a child can give evidence in a separate room, but be seen and heard by everyone in the courtroom.[184] One of the main advantages claimed for closed-circuit television or screens is that it allows the child to give evidence without directly confronting the

181 Section 153(5) of the Criminal Procedure Act, 1977.

182 Section 154(2)(a) of the Criminal Procedure Act, 1977.

183 Section 154(2)(b) of the Criminal Procedure Act, 1977. See also section 335A of the Criminal Procedure Act, 1977.

184 Australian Law Reform Commission **Research Paper 1: The use of closed-circuit television for child witnesses in the ACT** 1.

accused person. There are also disadvantages and there is debate among experts whether closed-circuit television or screens will in fact greatly assist children.[185]

5.7.8 The use of electronic or other devices in South African courts at present is dependent on the appointment of an intermediary. Section 170A(3) of the Criminal Procedure Act, 1977 provides that court may direct that a witness gives his or her evidence at any place which is informally arranged to set the witness at ease; which is so situated that any person whose presence may upset that witness, is outside the sight and hearing of that witness; and which enables the court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through the medium of any electronic or other devices, that intermediary as well as that witness during his testimony **but only if the court appoints an intermediary**. If the court decides not to appoint an intermediary it would appear as if the child witness will have to confront the accused in open court.

Should the use of measures to shield the child witness from the accused be dependent upon the court exercising its discretion to appoint an intermediary?

° The use of anatomical dolls

5.7.9 Many foreign jurisdictions and our own allow the use of anatomical dolls to assist children in relating to their allegations of abuse. An anatomically correct doll is one equipped with parts resembling genitalia. One normally finds a set of dolls consisting of adult dolls of each gender and child dolls also of each gender. The child may demonstrate activity by using the dolls when the verbal skills are limited. Research findings on the use of anatomical dolls are controversial.[186]

Should the use of anatomically dolls be continued in child sexual abuse cases?

° Presenting evidence without the child's participation at the trial

5.7.10 There are two ways in which a child's evidence might be given without a

185 For a discussion of the arguments, see Law Reform Commission of Victoria **Report No. 18: Sexual Offences against Children** 103 - 105.

186 Harvey and Dauns **Sexual Offences against Children and the Criminal Process** 156.

requirement to appear at the trial. One is by using an intermediary or "surrogate witness". That is, someone who presents the child's evidence on the child's behalf. The second is by presenting the child's evidence in the form of a recording, such as a videotape.

(a) Surrogate witness

5.7.11 The best known example of the "surrogate witness" approach is that introduced in Israel in 1955.[187] Its main features are:

* A child victim of a sexual offence is interviewed at an early stage by a "youth interrogator"
* The child is not required to give evidence in court unless the interrogator gives permission. If the child does testify, the court may excuse the child if the interrogator considers continuation may cause emotional harm.
* If the child does not testify, the interrogator presents the evidence and may be cross-examined; an accused cannot be convicted on the evidence of the interrogator unless it is corroborated by additional evidence that the crime was committed and that the accused was guilty of it.

5.7.12 The major advantage of this approach is that it greatly restricts the exposure of the child to proceedings which may be harmful. The major disadvantage of the system is that the courts do not directly supervise the examination of the child, and have to relay upon the interrogator for interpretation and assessment of the evidence.

Should South Africa adopt a similar system?

(b) Intermediary

5.7.13 The intermediary system was introduced in South Africa in 1991 as section 170A of the Criminal Procedure Act, 1977. It reads as follows:

> (1) Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the age of eighteen years to undue

187 For a discussion of this system, see E Harnon "Examination of children in sexual offences - the Israeli law and practice" 1988 **Criminal Law Review** 263.

mental stress or suffering if he testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his evidence through that intermediary.

(2) (a) No examination, cross-examination or re-examination of any witness in respect of whom a court has appointed an intermediary under subsection (1), except examination by the court, shall take place in any manner other than through that intermediary.

(b) The said intermediary may, unless the court directs otherwise, convey the general purport of any question to the relevant witness.

....

5.7.14 The success of the intermediary system in South Africa has not been evaluated authoritatively. What appears necessary is that intermediaries should be experienced in interviewing children and specially trained in child language, psychology and the relevant law with particular emphasis on the law of evidence, which is not always the case. The supporting technological aids (video cameras, etc) are also not readily available at all sentra.

Is the intermediary system working effectively? Can a child, if old enough, refuse to testify through the intermediary? What are the criteria for appointment and necessary qualifications of the intermediary?[188] Are the relevant regulations in respect of intermediaries effective and appropriate?

(c) Video recordings

5.7.15 A number of American States have legislated to permit videotaped depositions to be used at trial instead of the witness giving testimony. In most of these States, the procedure is restricted to child victims. In Florida, for instance, the videotaped deposition may be used only if the trial court finds there is a substantial likelihood that the witness would suffer at least moderate emotional or mental harm if required to testify in open court.

5.7.16 More general admission of recorded interviews with child complainants has also been adopted in a few jurisdictions. It has been widely canvassed in the United Kingdom[189] and

188 See Government Notice No. R 1374 of 30 July 1993, as amended by Government Notice No. R 360 of 28 February 1997.

189 See also **R v Hampshire** [1995] 2 All ER 1019 (CA).

Australia. There are two models for laws of this type. The first permits a recording to replace or supplement the child's testimony, but requires the child to be available for cross-examination. The second allows the recording as a substitute for the child's participation in the trial.

Should provision be made for admitting a video-taped record of the child's evidence? Should the child still be available for cross-examination? Should the child be cross-examined at trial only if there are special circumstances? What should those circumstances be?

° Particulars of the offence

5.7.17 The prosecution must specify an offence, the conduct constituting the offence and the date on which it was committed. If the complainant cannot specify an exact date, the prosecution can allege that the offence was committed on an unknown day between stated dates. The dates might be determined by reference to certain events, such as a holiday, or where a child lived for a time.

5.7.18 The requirement that a charge be precise is vital to the accused's capacity to bring a proper defence. The rules create no problems where there has been a single offence which is reported fairly promptly. In the case of sexual abuse, particularly within the family, it is common for a large number of incidents to occur over a lengthy period, with no reporting until some time after the conduct has ceased or come to light. Understandably, a young victim may have considerable difficulty recalling the number of incidents and when they occurred. That can create significant problems for the prosecution. It cannot allege a number of offences of unknown dates unless it can specify an approximate date or identifiable period when each occurred, or otherwise identify a specific incident.[190] Otherwise there would be lack of certainty about which conduct relate to which offence.

How should this problem be solved?

5.7.19 One solution is to identify a particular incident and charge the accused only with that offence, even though others took place. This is unsatisfactory from the point of view of presenting a picture of the alleged offender's entire conduct in order to secure an appropriate sentence on conviction.

190 In terms of section 92(2) of the Criminal Procedure Act, 1977.

5.8 **The cautionary rules**

5.8.1 The cautionary rules in the law of evidence assist the court in deciding whether or not guilt has been proved beyond reasonable doubt.

° The single witness

5.8.2 Our courts have often said that the trier of fact should in general not be too ready to rely on the evidence of a single witness as there is some danger of relying exclusively on the sincerity and perceptive powers of such a person.[191] Section 208 of the Criminal Procedure Act, 1977 provides, however, that an accused may be convicted of any offence on the single evidence of any competent witness.

Does the application of this rule or section 208 of the Criminal Procedure Act, 1977 cause problems in practice? If so, what sort of problems and what can be done about it?

° Sexual cases

5.8.3 In sexual cases there exists a cautionary rule that the uncorroborated evidence of a complainant cannot be relied upon unless there is some other factor reducing the risk of a wrong conviction in cases which involve a sexual element.[192]

5.8.4 There is a widespread perception that the combination of the oath test and the corroboration requirement present a significant barrier to the prosecution of sexual offences against children.[193] That perception is supported by research undertaken.[194]

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191 **R v Mokoena** 1932 OPD 79 at 80. See also **R v Abdoorham** 1954 3 SA 163 (N) at 165; **R v Mokoena** 1956 3 SA 81 (A); **S v T** 1958 2 SA 676 (A) at 678; **S v Webber** 1971 3 SA 754 (A) at 758; **S v Sauls and others** 1981 3 SA 172 (A).

192 Hoffmann and Zeffertt **The South African Law of Evidence** (fourth edition) 579.

193 See also South African Law Commission **Project 45: Women and Sexual Offences in South Africa (Report)** par 3.70.

194 See D Brereton and G McCole "Obstacles to prosecution in child sexual assault cases - a report on some Victorian data" in Law Reform Commission of Victoria **Sexual Offences against Children - Research Reports** 43 *et seq*.

5.8.5 In Canada, the 1988-amendments to the Criminal Code and to the Canada Evidence Act eliminated the need for corroboration with respect to children's unsworn evidence in child sexual assault cases.[195]

Is there still a need for this rule of evidence? Isn't this also one of the factors a judge or presiding officer should consider in weighing up all the evidence?

◦ Children as witnesses[196]

5.8.6 Young children are competent witnesses if the magistrate considers that they are old enough to know what it means to tell the truth, but it has frequently been emphasised that their evidence should be scrutinised with great care.

5.8.7 The cautionary rule for children's evidence is similar to that for accomplices and sexual cases. The danger of acting upon such evidence must be borne in mind by the trier of fact. It makes no difference whether the child's evidence has been sworn or unsworn. The court is entitled to take into account the falsity or absence of evidence by the accused or any other features which show that the child's evidence is unquestionably true and the defence story false, but it should not ordinarily convict unless the evidence of the child has been treated with due caution. There is no requirement of law or practice that requires that the child has to be corroborated.[197]

5.8.8 There is no particular age below which the cautionary rule applies; this is obviously a matter of common sense to be applied in each particular case and the degree of corroboration or other factors required to reduce the danger of reliance on the child's evidence will vary with his or her age and the other circumstances of the case, but the courts have usually required substantial confirmation when very young children were concerned.[198] When the child is the only witness implicating the accused the dangers are even greater - particularly in a sexual case.[199]

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195 Harvey and Dauns **Sexual Offences against Children and the Criminal Process** 3.

196 See also paragraph 5.6 above.

197 **R v Manda** 1951 3 SA 158 (A); **Woji v Santam Insurance Co Ltd** 1981 1 SA 1020 (A) at 1027 H - 1028 A.

198 See **R v Bell** 1929 CPD 478; **De Beer v R** 1933 NPD 30; **R v J** 1958 3 SA 699 (SR).

199 Hoffmann and Zeffertt **South African Law of Evidence** (fourth edition) 581.

5.9 **Treatment of offenders**

5.9.1 A variety of psychiatric, psychological and other means have been developed to "treat" sexual offenders generally, and sexual offenders against children in particular. At present there are various ways a child sexual offender may be given treatment. Two are outside the criminal justice system:

- Voluntary submission for treatment - there are a very small number of therapists active in this field and an even smaller number of sexual offender programmes. Of course, an offender who obtains treatment voluntarily cannot be compelled to remain in treatment as long as the therapist might believe it is required.
- Treatment under an "intervention order" - in Victoria, section 5(1)(g) of the Crimes (Family Violence) Act 1987 provides that a court may make an order which includes directing a defendant to participate in prescribed counselling. An order may be imposed for a maximum period of 12 months. We do not have a similar provision on our statute book.

Should legislation provide for the mandatory counselling of defendants? On what grounds and at what stage of the criminal proceedings should such an intervention order be granted?

5.9.2 There are several other ways, each related to the criminal justice system, in which treatment may be offered to a sexual offender:

- While in prison, an offender may be treated by staff from the Department of Correctional Services. To our knowledge, there is no formal (national) treatment programme for sexual offenders at present, and most offenders spend their whole prison sentence receiving no therapy.
- Where a court convicts a person, the court may postpone for a period not exceeding 5 years the passing of sentence and release on condition that the person perform community service, submit to correctional supervision or instruction or treatment, etc.[200]

- Where a court convicts a person, it may pass sentence but order the operation of the

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200 Section 297(1)(a) of the Criminal Procedure Act, 1977.

whole or any part of the sentence to be suspended for a period not exceeding 5 years and on condition that the person perform community service, submit to correctional supervision or instruction or treatment, etc.[201]

- In the community, an offender may be required to enter a treatment programme as a condition of a correctional supervision.[202] In **S v Ndaba**,[203] Kriegler AJA, as he then was, decided that a 28 year old school teacher had sexually molested a 9 year old girl and where the accused suffered from a regressive form of paedophilia, long-term treatment was needed to control the deviation and that, accordingly, the sentence of correctional supervision was appropriate in the circumstances.
- In the community, an offender may be required to enter a treatment programme as a condition of parole following a period of imprisonment.[204]
- Section 290(1) of the Criminal Procedure Act, 1977 provides that the court may order that the juvenile offender be placed under the supervision of a probation officer or a suitable person.

5.9.3 None of these interventions can guarantee that the offender will not re-offend.

Should treatment programmes be provided for sexual offenders? If so, at what stage in the criminal justice process should treatment programmes be available? If treatment were to be available as an alternative to imprisonment, should it be offered as part of a formal programme? Should the offender bear the cost of treatment?

5.10 **Treatment of victims**

5.10.1 The demands made by victims and their families may be divided into two broad categories: claims for services and claims for procedural rights. Services include counselling, support and treatment facilities, compensation from the offender or the State, information on the process of legal proceedings and the provision of facilities for complainants, victims, and their

201 Section 297(1)(b) of the Criminal Procedure Act, 1977.

202 Correctional supervision can be imposed in terms of section 276(1)(h) of the Criminal Procedure Act, 1977. See also section 63 of the Correctional Services Act, 1958.

203 1993 1 SACR 637 (A).

204 Section 65(2) of the Correctional Services Act, 1959.

families, who are required to participate in legal proceedings or wish to observe them.[205] Such demands are, for the most part, unanswerable.

Should treatment and counselling be offered to the victim alone or should it be extended to the victim's family? Who should bear the cost of the counselling and treatment? Should a victim compensation fund be established to finance the counselling and treatment of victims of sexual abuse?

5.10.2 Certain procedural claims, on the other hand, are more problematic. Some victims believe that they should have a say in matters such as the decision to prosecute, the sentence to be imposed and, if a custodial sentence is imposed on a convicted offender, to grant early release. This factor must be acknowledged, and strategies developed to ensure that victims do not suffer unduly from a sense of exclusion or alienation from the criminal process. The more difficult question, however, is whether complainants and victims should be allowed to influence the key decisions mentioned.

5.10.3 Here, however, an important distinction must be made between taking victim's views into account and granting victims an actual role in decision-making. Taking views and opinions into account almost invariably means affording some weight to those views when it comes to making the relevant decisions. To many victims and their support groups such developments seem entirely natural and acceptable. On the other hand, the accused person's constitutional right to a fair trial calls for absolute fairness and objectivity in the guilt-finding and sentencing processes.[206] The superimposition of victim's views would introduce an element of subjectivity which would not necessarily be compatible with these constitutional imperatives.

5.10.4 In Ireland, section 5 of the Criminal Justice Act, 1993 requires judges when imposing sentence for a violent or sexual offence to take the impact of the offence on the victim into account. This provision clearly envisages that a sentence may be increased if the offence had a particular adverse impact on the victim.[207]

5.10.5 Section 274 of our Criminal Procedure Act, 1977 provides that the court may,

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205 Maguire "'Victims' needs and victim services: Indications from research" 1985 (10) **Victimology: An International Journal** 539.

206 Very few human rights are absolute (human dignity and the right to life possibly the only exceptions). In any event, the rights in the Bill of Rights may be limited in terms of section 36 of the Constitution, 1996.

207 O'Malley **Sexual Offences: Law, Policy and Punishment** 414.

before passing sentence, hear such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed. The section further provides that the accused and the prosecution may address the court on any evidence adduced, as well as on the matter of the sentence. No specific provision is made to afford the victim the opportunity to address the court on sentencing.

How should the views of sexual abuse victims be taken into account in sentencing the sexual offender? Should victims be granted a role in decision-making, e.g. the decision to prosecute?

5.11 **Diversion systems and sentencing options**

5.11.1 The conventional criminal justice system is widely regarded as having severe limitations in dealing with sexual offenders. Some of the major limitations, a number of which have been described elsewhere in this paper, are:[208]

- Offences are difficult to prosecute successfully because of the complexities involved when children give evidence.
- The criminal justice process is not child-friendly and does not encourage the reporting or prosecution of child sexual abuse cases.
- Imprisonment and other conventional forms of punishment are ineffective means of rehabilitating offenders.
- The impact of the trial and punishment of an offender may irreparably damage a family that might otherwise be rehabilitated.
- The prospect of a harsh sentence for the offender makes families reluctant to report intra-familial sexual abuse, and offenders reluctant to plead guilty.

5.11.2 The extent of concern about the shortcomings of the conventional system has led to the development of new approaches, particularly in the United States of America.[209] Essentially, they comprise of programmes which offer psychiatric or counselling "treatment"[210] to eligible offenders within the criminal justice framework, that is, by court order. The treatment

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208 See also Law Reform Commission of Victoria **Discussion Paper No. 12: Sexual offences against children** 66.

209 For a description of a number of new schemes, see J Bulkley (ed) **Innovations in the prosecution of child sexual abuse cases (A report of the American Bar Association National Legal Resource Centre for Child Advocacy and Protection)** (third edition) 1983. See also Gelsthorpe, Nellis, Bruins and Van Vliet "Diversion in English and Dutch Juvenile Justice" in Fennell, Harding, Jörg, and Swart (eds) **Criminal Justice in Europe: A comparative study** 199.

210 The South Australian Child Sexual Abuse Task Force regarded the term "treatment" as inappropriate, because it suggests that sexual abuse is an illness which can be cured.

programs differ in the type of offender they accept, the form of treatment they offer, in the stage in the criminal justice system at which they operate, and the formal consequences they impose on the offender. Some programs also assist offenders outside the criminal justice system, that is, without a charge being laid and prosecuted, and on a voluntary basis.

Should the prosecution of a sexual offender be stopped if that person is willing to enter a treatment programme? Under what circumstances and conditions can this option be considered?

5.11.3 The majority of programmes formally linked to the criminal justice system appear to be concerned solely, or mainly, with offenders who sexually abuse a child within their own household. Because of their family focus a number of programmes offer services to all members of the family, as well as treating the offender. Other programmes, both those dealing with intra-familial and other offenders, offer treatment services only for offenders. Assistance for victims and their families may be available through independently provided services.

5.11.4 The forms of treatment of offenders vary, and can be described as of three main types - behavioural (re-training deviant sexual arousal), psychotherapeutic, and family therapy (aims to change behaviour of different family members, not only the offender). There is a considerable body of literature on the different forms of treatment and their outcomes, the detail of which is not directly pertinent to this paper.[211] Of greater significance is the question of at what stage in the criminal process diversion programmes should be available to the sexual offender.

5.11.5 A key variation between programmes is the stage at which offenders can participate in them. There are three major approaches: after a charge has been laid but before the trial (pre-trial); after the trial has begun but before judgment (delayed prosecution); after the trial and a verdict of guilty (sentencing). The different stages have significantly different formal consequences.[212] A brief outline of the three types of approach follows.

° Pre-trial diversion programmes

211 See, for example, Law Reform Commission of Victoria **Report No. 18: Sexual Offences against Children** 114.

212 Law Reform Commission of Victoria **Discussion Paper No. 12: Sexual Offences against Children** 68.

5.11.6 Under this approach, a person charged with an offence who meets specified criteria[213] is offered a programme of treatment, counselling, and mediation before the trial is held. To be accepted, accused persons have to formally admit that they have committed the offence. If the offender completes the programme the charge is withdrawn.[214]

5.11.7 The advantages of a pre-trial diversion programme are said to be:[215]

- It encourages increased reporting of offences because it does not carry the stigma associated with criminal prosecution.
- By being offered the possibility of complete avoidance of prosecution, offenders have a strong incentive to accept treatment.
- Children do not have to appear in court - even if the offender does not complete the treatment programme and is prosecuted, the admission of the offence can obviate the requirement for the victim to give evidence.
- Because it is a criteria for admission to the programme that the offender acknowledges his or her guilt, the credibility of the child victim is validated.

5.11.8 Disadvantages of a pre-trial diversion programme are said to be:[216]

- It may coerce admissions of guilt from innocent accused persons.
- Offenders may enter the programme to avoid trial and imprisonment rather than because they are committed to being treated, making it difficult to assess whether treatment has been effective.
- It denies the needs of victims - and perhaps of offenders, too - to feel that adequate punishment has occurred.

° Delayed prosecution programmes

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213 Among the criteria which would generally render offenders ineligible for a programme are that they have used violence, they have previously been convicted of a sexual offence, or they have previously been accepted into a programme and been discharged from it.

214 New South Wales has implemented a pre-trial diversion programme. See the Pre-trial Diversion of Offenders Act, 1985.

215 Law Reform Commission of Victoria **Discussion Paper No. 12: Sexual Offences against Children** 68.

216 Law Reform Commission of Victoria **Discussion Paper No. 12: Sexual Offences against Children** 68.

5.11.9 Under the delayed prosecution programme, the trial of an eligible accused who admits guilt is adjourned while the person participates in a programme. If the programme is successfully completed, the accused is convicted of a less serious offence and sentenced accordingly. If the programme is not completed, the trial is resumed and the accused is tried to the original charge. Compared with the pre-trial diversion programme, a delayed prosecution programme might offer less incentive to participate because the accused is convicted of a criminal offence, albeit a less serious one than the original charge. It does, however, provide the element of punishment not present in pre-trial diversion, and the admission of guilt which eliminates the involvement of the child at trial.

° Sentencing

5.11.10 In sentencing the sexual offender the safety of children should be the paramount consideration. Sentencing should furthermore be based upon a careful risk assessment of the sexual offender.

5.11.11 The sentencing approach involves the accused being charged and tried in the conventional manner. If the accused pleads guilty and is willing to participate in a programme, the court imposes an alternative sentence. If the sentence includes imprisonment, this is usually suspended or postponed while the offender participates in the programme, and may not be imposed at all if treatment is seen as successful. The sentence may also include the option of a fine, reparation, community service, etc. coupled with various conditions.[217]

5.11.12 A major advantage of this type of system is said to be the maintenance of a system of clearly defined responsibility by the offender for the act. This is also seen by some as its major disadvantage, because the fact that a criminal conviction and sentence are involved may reduce an offender's incentive to plead guilty or to participate in a programme.[218]

Should legislation establish a diversion programme and, if so, at what stage of the criminal process? How should such a programme be structured?

217 The court may, for example, impose the following conditions: the offender may not live in the family home; the offender may not be employed in a position of trust over children; etc.

218 Law Reform Commission of Victoria **Discussion Paper No. 12: Sexual Offences against Children** 69.

5.12 **Sentencing the sexual offender**

5.12.1 In **R v Noyes**,[219] Paris J set out what have been regarded as the fundamental sentencing principles when dealing with "non-violent" incest offenders and paedophiles. They are:

- protection of the public;
- rehabilitation; and
- innovative sentencing.

5.12.2 Protecting the public and especially children is possibly the most important factor in sentencing sexual offenders. The greater the harm resulting from the commission of an offence, the more important it becomes to protect the public from any further predatory acts by the offender. Expert evidence should be called to establish the extent of the harm done to the victim as it is not safe to assume that the harm is the greatest where the sexual act is particularly forceful or deviant.

5.12.3 The law has long allowed that where an offender abuses a position of trust in the commission of an offence, the courts will consider this an aggravating feature requiring judicial denunciation.

5.12.4 In sentencing an offender for particularly serious and predatory offences, rehabilitation of the offender becomes secondary to the protection of the public and the need for deterrence. Rehabilitation is nonetheless desirable and is a focus of concern for the courts and, in due course, for Correctional Services and the parole boards. This can be attempted in various ways.

5.12.5 In Canada, for instance, the court and the parole board could impose a treatment component to the release of the offender part of which may be a condition of release that the

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219 Unreported, 4 June 1991, BCSC. See also **S v Whitehead** 1970 4 SA 424 (A) at 436 E - F where Ogilvie Thompson JA remarked as followed: "In assessing an appropriate sentence, it is necessary to have regard, not only to the main purposes of punishment - viz. deterrent, preventative, reformative and retributive ... but also both the individual concerned and the circumstances of his crime." See further **S v Zinn** 1969 2 SA 537 (A); **S v Roux** 1975 3 SA 190 (A); **S v B** 1985 2 SA 120 (A).

offender enter drug treatment to decrease sexual drive (chemical castration). Of course, the problem then is one of monitoring an offender who is free within the community.[220] It was also a criminal offence in Canada for convicted sexual offenders to loiter "in or near a school ground, public park or bathing area".[221] In some countries, there is duty to inform the community into which a sexual offender is to be released of that offender's impending release.

Should we adopt similar strategies with regard to the sentencing of sexual offenders?

5.12.6 Where the complainant does not feel vindicated by the criminal process, he or she may seek satisfaction in the civil forum.

5.13 **Conclusion**

5.13.1 The process of managing sexual offences against children is complex and involves a multitude of disciplines, professions and structures. We reiterate that consultation, co-ordination, and an inter-disciplinary code of conduct are essential. Selection, screening, specialised training, and regular debriefings of persons involved in this field are also extremely important.

220 Harvey and Dauns **Sexual offences against children and the criminal process** 226.

221 In terms of section 179(1)(b) of the Canadian Criminal Code. This section was, however, declared unconstitutional by the British Columbia Court of Appeal in **R v Heywood** (1992) 77 CCC (3d) 502 (BCCA).

CHAPTER 6

THE WAY AHEAD

6.1 It is suggested that the issues and options outlined above ought to be debated thoroughly before any particular direction is embarked upon. Based on the outcome of such discussions legislation in respect of sexual offences against children will be proposed. The comments of all parties who feel that they have an interest in this topic or may be affected by the type of measures discussed in this paper are therefore of vital importance to the Commission. All respondents are invited to indicate their preferences in respect of the issues examined and to indicate whether there are other issues and or options that must be explored. All affected individuals, organisations and institutions that are likely to be affected by possible legislation should participate in this debate.

6.2 In addition to the questions already posed and in order to facilitate a focused debate, respondents are requested to formulate concise submissions with the following questions in mind:

- In what ways can the common law and the statutory law relating to sexual offences against children be made more effective?

- How can the process and procedural law in respect of sexual offences against children be made more effective?

- Is there a need for a single sexual offences law for children, or should sexual offences against children be dealt with at common law and in different pieces of legislation as is the case at present?

- Are there any issues that the paper has not addressed and if so, what are they?

6.3 The Commission has accorded this investigation the highest priority rating and it is regarded as a matter of urgency. Interested parties are accordingly requested to consider this paper and to respond before 31 August 1997.