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Project 107

SEXUAL OFFENCES

DISCUSSION PAPER 85

SEXUAL OFFENCES: THE SUBSTANTIVE LAW

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INTRODUCTION

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

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PREFACE

The Commission has decided that the most effective way of dealing with the myriad issues that have arisen during the investigation into sexual offences is to publish three separate discussion papers in an attempt to:

- C codify the substantive law relating to sexual offences in an easily accessible and workable act;
- C develop efficient and effective legal provisions for the reporting, management, investigation and prosecution of sexual offences, which will protect the rights of victims as well as ensure the fair management and trial of persons (including children) suspected, accused and convicted of committing a sexual offence; and
- C provide workable legal solutions for the problems surrounding adult prostitution and pornography.

This is the first discussion paper (which reflects information gathered up to the end of July 1999). It has been prepared by the research staff of the Commission and members of the project committee established for this investigation to elicit responses and together with those responses, to serve as a basis for the Commission's deliberations. The discussion paper, which includes a draft Bill, 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 focused submissions before the Commission. In the discussion paper some progressive, preliminary recommendations on the reform of the substantive law relating to sexual offences are made. The views, conclusions and recommendations which follow should therefore not at this stage be regarded as the Commission's final views.

The Commission will assume that respondents agree to reference by the Commission to responses received and the identification of respondents, unless representations are marked confidential. Respondents should be aware that the Commission may be obliged to release information contained in representations under the Constitution of the Republic of South Africa, Act 108 of 1996, pursuant to the constitutional right to freedom of information.

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Structure of the Discussion Paper

As this discussion paper is fairly lengthy, the structure will be explained briefly to make the document more accessible.

The discussion paper starts with an executive summary of all the main recommendations contained in the paper. The recommendations will appear in framed paragraphs throughout the document.

Chapter one introduces the topic and explains the background and limitations of the investigation.

Chapter two sets out the underlying principles, refers to the source documents and develops principles for the management of sexual offences.

Chapter three deals with the role of criminal law, the question of codification and the sexual offences dealt with in Issue Paper 10. The general format of the sections dealing with the offences is as follows: an introduction, the current legal position, submissions made to the Commission, a comparative analysis, evaluation and recommendations. Finally, where appropriate, statutory measures are proposed and framed.

Chapter four deals with criminal offences not dealt with in Issue Paper 10. The general format of this section is as follows: an introduction, comparative analysis and recommendation.

Respondents are requested to submit written comments, representations or requests to the Commission by 29 October 1999 at the address appearing on the first page.

EXECUTIVE SUMMARY

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

It became clear during the course of the investigation that any proposed changes to the law relating to sexual offences will have a far-reaching effect on the position not only of children but of adults as well. As a result and because of various requests the Commission decided to expand the scope of the investigation to include sexual offences against adults. The investigation was subsequently renamed 'sexual offences'.

As part of an incremental approach the Commission is releasing this discussion paper on the substantive law relating to sexual offences, the first of a three-part series, for general information and comment. The second discussion paper will deal with matters of process and procedure, while the third will address the controversial issues of adult commercial sex work (prostitution) and adult pornography. Both these discussion papers should be released later this year.

This discussion paper contains a draft Bill which embodies some progressive recommendations for the reform of the substantive law relating to sexual offences. However, the discussion paper does not contain the final views of the Commission and comments and submissions are invited.

The essence of the recommendations proposed in this discussion paper is (references to paragraph numbers refer to the full discussion paper):

- ° In order to ensure that South Africa complies with its obligations in terms of international law an audit should be undertaken. Such an audit should include an overview of other international instruments not yet signed or ratified by South Africa. On the basis of such an audit an informed decision can be made as to what other instruments South Africa needs to sign, ratify or accede to protect children and women more effectively (par 2).

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- The Commission does not recommend amendments to the Constitution, including section 28 on the rights of children, despite the criticisms raised as to the vagueness of certain key phrases and concepts. The Commission is of the opinion that the general and specific constitutional protection accorded to children is flexible enough to allow the court to interpret legislation in 'the best interests of the child'. As gender-based discrimination goes beyond the parameters of violence against women *per se*, the Commission believes it is best addressed in general equality legislation (para 2.2.5.5 & 2.3.11).
- A set of guiding principles is considered imperative for the formulation of both the substantive and procedural law with regard to sexual offences. Such a set of guiding principles for children is proposed. The Commission also recommends that the principles be developed further to encompass both an adult and child focus and suggests some options for what can be done with such a comprehensive set of principles once developed (par 2.4).
- The Commission recommends using the criminal law as the appropriate mechanism to address sexual exploitation, abuse and violence of women and children in particular (par 3.2).
- The Commission does not recommend the repeal of all the common law sexual offences. However, the Commission does propose the adoption of one comprehensive new sexual offences act. Matters of process and procedure (the subject matter of the next discussion paper) should form an integral part of this comprehensive new sexual offences act (par 3.3).
- In terms of our common law, **rape** is committed by a man having intentional unlawful sexual intercourse with a woman without her consent. Non-consensual anal or oral penetration does not constitute rape in common law, although it can constitute indecent assault. Sexual intercourse is restricted to the penetration of the vagina by the penis. The Commission proposes the repeal of the common law offence of rape and its replacement with a new gender-neutral statutory offence. The essence of the Commission's proposal on rape centres around 'unlawful sexual penetration'. The Commission says sexual penetration is unlawful *per se* when it occurs under coercive circumstances. Coercive circumstances include the application of force, threats, the

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abuse of power or authority, the use of drugs, etc. Sexual penetration is defined very broadly by the Commission to include the penetration 'to any extent whatsoever' by a penis, any object or part of the body of one person, or any part of the body of an animal into the vagina, anus, or mouth of another person. Simulated sexual intercourse is also included under the Commission's definition of 'sexual penetration' (par 3.4.7.1).

- In terms of the Commission's recommendations oral, anal or vaginal penetration or even simulated sexual intercourse under coercive circumstances can constitute rape. This means that both men and women can be rape victims and perpetrators.
- To provide better protection for children, the Commission proposes that the sexual penetration of any child below the age of 12 years should constitute rape.
- In terms of the current definition of rape, the State must prove beyond a reasonable doubt the fact that the woman did not consent to sexual intercourse. In the public perception, this creates the impression that the victims of rape are put on trial to prove the absence of consent to sexual intercourse on their part. In terms of the Commission's recommendations, absence of consent to sexual intercourse will no longer be an element of the offence. The accused can obviously still raise consent to sexual intercourse as justification for his or her unlawful conduct, but will carry the burden of proof in this regard (par 3.4.7.3).
- In the Commission's draft Bill a provision is included that 'no marriage or other relationship' shall be a defence against a charge of rape. This makes it clear that a husband can be convicted of raping his wife (para 3.4.7.7.2 and 3.12).
- In the *National Coalition for Gay and Lesbian Equality* case the Constitutional Court declared the common law offence of **sodomy** unconstitutional. The Commission's proposals on a gender-neutral definition of rape also cover anal penetration under coercive circumstances.
- The Commission does not recommend the repeal of the common law offence of **incest**. However, in order to make the offence gender-neutral and to expand the ambit of sexual intercourse, it is recommended that the proposed statutory definition of an 'act of sexual penetration' be made applicable to the common law offence of incest (par 3.6).

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- The Commission does not recommend the repeal of the common law offence of **bestiality** (par 3.8.2), but does propose the inclusion of a statutory provision in a new sexual offences act to cover forced or manipulated sexual activity between persons (children and adults alike) and animals (par 3.8.2.4).
- The Commission does not express any opinion on whether the common law crime of **unnatural sexual offences** still exists and what sexual conduct it prohibits (par 3.8.3).
- The Commission does not recommend the repeal of the common law offence of **crimen iniuria** or the enactment of a special form of statutory *crimen iniuria* which contains an element of sexual impropriety (par 3.9).
- The Commission does not recommend the codification of the common law offence of **indecent assault** as this offence is particularly flexible and adequately covers a wide variety of acts. It is also a competent verdict on an number of offences and is gender-neutral (par 3.10).
- The Commission recommends the enactment of a statutory provision called '**child molestation**' aimed at prohibiting sexual acts with children below 16 years of age. Consent by a child under 16 years of age to any sexual act is not a defence to a charge under this provision. This proposal goes much further than the present statutory rape provisions of section 14 of the Sexual Offences Act (par 3.13.3.3).
- As most cases of intra-familial sexual abuse take place repeatedly and over long periods of time, child victims often have difficulty recalling precise details of the time and place when and where the alleged offences are said to have occurred. As a consequence, state prosecutors sometimes accept a guilty plea to a single incident of sexual abuse well knowing that the incident was not an isolated one. It is for this reason that the Commission recommends the enactment of a statutory provision in the new sexual offences act to make the **persistent sexual abuse of a child** a separate offence (par 4.2).
- The Commission recommends a complete prohibition on the **commercial sexual exploitation of children** in the new sexual offences act (par 3.7.8). Commercial sexual exploitation includes child prostitution, child pornography and trafficking in children. The

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Commission is convinced that the commercially sexually exploited child is a victim in need of care and protection and not a criminal (par 3.7.5.5). As a consequence, the Commission specifically proposes that any person who commits a sexual act with a child for financial or other reward, favour or compensation be guilty of an offence; that any person who invites, persuades or induces a child to allow any person to commit a sexual act with a child for financial or other reward, favour or compensation be guilty of an offence; and that any person who participates in, or is involved in, the commercial sexual exploitation of a child be guilty of an offence.

- The Commission also proposes to make it an offence to keep a brothel for child prostitution; to offer or engage a child for commercial sexual exploitation; to facilitate or allow the commercial sexual exploitation of a child; and to receive consideration from the commercial sexual exploitation of a child.
- The Commission is also of the opinion that the trafficking in or transporting of a child from the place where the child is usually resident to another destination, whether within the country or abroad, for the purposes of commercial sexual exploitation, constitutes commercial sexual exploitation and should therefore be a crime (par 3.7.11).
- Although the Commission supports a total prohibition of child pornography, it nevertheless does not include provisions on child pornography in the new sexual offences act. The prohibition on child pornography is appropriately placed in the Films and Publication Act and the Commission therefore does not recommend any legislative amendments at this stage pending the review of the Films and Publications Act (par 3.7.12).
- In order to combat child sex tourism and the other forms of commercial sexual exploitation, the Commission believes that it is necessary to provide for effective national legislation which has extra-territorial application (par 3.7.13). The Commission therefore proposes to give extra-territorial jurisdiction to the new sexual offences act on the basis that the wrongdoer is a citizen or permanent resident of the Republic. Legal entities incorporated or doing business in South Africa are also included in the scope of persons who can be prosecuted under the new sexual offences act (par 3.7.14).

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- The Commission also proposes certain auxiliary measures to ensure the eradication of the commercial exploitation of children. Amongst these are the withdrawal of operating licences of any travel agent or bureau found to have organised or planned organised sex tours within the borders of South Africa or abroad, the deportation after serving his/her sentence of all foreign nationals for committing a sexual offence in South Africa, and the withdrawal of the passport of any South African citizen convicted of a sexual offence while abroad (par 3.7.14).
- While recognising the fact that mentally impaired persons do have sexual rights, the Commission nevertheless recommends the enactment of specific provisions to deal with **sexual offences against mentally impaired persons**. The Commission proposes to use the term 'mentally impaired' instead of the derogatory words 'idiot' and 'imbecile' presently used in the Sexual Offences Act (par 3.13.3.4). The term 'mentally impaired person' is defined in the draft Bill as a person affected by any mental disability irrespective of its cause, whether temporary or permanent, to the extent that such person is unable to appreciate the nature of a sexual act, or is unable to resist the commission of such an act, or is unable to communicate his or her unwillingness to participate in such an act.
- The Commission proposes a complete overhaul of the present **Sexual Offences Act, 1957**. The Commission recommends, for instance, that the current section 18 of the Sexual Offences Act, which makes it an offence to use drugs for purposes of defilement, and which can offer protection against exploitation in circumstances where the actions of the perpetrator would not amount to rape or attempted rape, nor to one of the other sexual offences, is necessary and should be included in a new sexual offences act (par 3.13.3.5). On the other hand, the Commission does not recommend the retention of the current section 18A of the Sexual Offences Act (which prohibits the manufacture, sale or supply of articles which are intended to be used to perform an unnatural sexual act) in a new sexual offences act (par 3.13.3.6).
- The Commission recommends that **cultural and religious practices harmful to children** should be prohibited in child care legislation and not in the proposed new sexual offences act (par 3.14).

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- In the light of the research undertaken by the Project Committee on HIV/AIDS on **harmful HIV-related behaviour and the compulsory HIV testing of persons arrested for having committed sexual offences**, no proposals concerning the criminalising of harmful HIV-related behaviour and the HIV testing of persons arrested for committing sexual offences are made. The Commission, however, does recognise the strong public demand for the provision of HIV post-exposure prophylactic treatment to victims of sexual violence and will deal with this particular aspect in a subsequent discussion paper on process and procedural issues (par 4.4).
- The Commission recognises that a clear need exists for specific legislation criminalising **stalking (or harassment)** and recommends that a specific investigation be conducted in this regard (par 4.5).
- The Commission does not recommend the inclusion of provisions on **sexual harassment** in a new sexual offences act. The Commission is of the opinion that adequate legal remedies exist by means of which sexual harassment in the workplace can be addressed (par 4.6).
- The Commission recommends the enactment of a new statutory offence to criminalise **compelled sexual acts**. This will result in the criminalisation of the actions of a person who compels another person to engage in sexual acts with that person, a third person, or the compelled person himself or herself (par 4.7).
 - The Commission does not recommend the introduction of legislation to prohibit **female genital mutilation** at this stage. The Commission invites comment on this issue (par 4.3).

Copies of the full discussion paper on the substantive law relating to sexual offences are available free of charge from the office of the Law Commission. The address and contact details of the Law Commission are:

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The full discussion paper and this executive summary are also available on the Internet at:
<http://www.law.wits.ac.za/salc/salc.html>

The closing date for comment is **29 September 1999**.

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CHAPTER ONE

1. BACKGROUND AND INTRODUCTION

1.1 INTRODUCTION

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

1.1.2 It is with this focus that the Commission proposes changes to the criminal justice system and to the substantive and procedural laws that underpin it in order to encourage victims of sexual violence to approach the system for assistance and to improve the experiences of these victims who choose to enter into the criminal justice system.

1.2 ORIGIN OF THE INVESTIGATION

1.2.1 The investigation has as its roots a particular focus on children and the investigation was originally titled 'Sexual Offences by and against children' to reflect this particular point of departure. This is not, however, the only investigation relating to children on the Commission's programme.¹ The Commission has taken cognizance of this fact and has attempted to integrate the work of other Project Committees of the Commission into its process, deliberations and in its proposed draft legislation.

1.2.2 In an attempt to minimise overlap, the Commission originally decided to limit its investigation to sexual offences against children as the Project Committee on Juvenile Justice deals specifically with the juvenile offender. This was then the scope of the Issue Paper. However, in the opinion of the Commission, supported by some of the submissions to the Issue Paper, the problem of the young sexual offender does require inclusion in this discussion paper

1 The other related investigations on the programme of the Commission are: Project 106 - **Juvenile Justice** and Project 110 - **The Review of the Child Care Act**.

as juvenile sexual offending has been identified as a serious social problem and one that requires the specialised attention of the Project Committee on Sexual Offences.

1.2.3 It also became clear during the course of the investigation and at the workshops held on the Issue Paper that any proposed changes in particular to the substantive law relating to sexual offences will have a far reaching effect on the position not only of children but adults as well. Organisations such as *Rape Crisis (Cape Town), Women & Human Rights Project (Community Law Centre, UWC) and the ANC Parliamentary Women's Caucus*,² for instance, note that whilst certain fundamental differences between sexual offences against children and (adult) women are acknowledged, they ultimately believe that the crucial conceptual issues are overlapping and in many instances indistinguishable.³ Should it be recommended, for instance, that the definition of the common law offence of 'rape' be changed, then common sense dictates that the same definition should apply to adults and children alike. As one respondent remarked at a workshop in Nelspruit: 'It makes no difference whether an eight year old child gets raped or whether an eighty year old woman gets raped. Rape is rape'.

1.2.4 This opened a lively debate as to whether all sexual crimes, including those against adults, should be covered by this investigation. Submissions on the Issue Paper and participants at the workshops are divided with regard to this issue. On the one hand, some respondents⁴ suggest expanding the scope of the investigation to include adults for the following reasons:

- C Sexual crimes against adults and children both involve the abuse of power.
- C All sexual crimes should take into account power relationships.
- C If women are in danger children are in danger.⁵

2 The three organisation made a joint submission.

3 See also Alice Armstrong *et al* 'Towards a cultural understanding of the interplay between children's and women's rights: An Eastern and Southern African perspective' 1995 **International Journal of children's Rights** 333 - 368.

4 Such as the **Department of Health and Welfare, Mpumalanga; Tshwaranang Legal Advocacy Centre; the Department of Local Government, Mpumalanga, and Mr Leonard I Carr.**

5 The **Tshwaranang Legal Advocacy Centre** states it in the following terms: 'The Commission ought to locate its inquiry around children within the social context of violence against women. There is a need to recognise that the reason why children are in danger, is because women are in danger. Our strongest recommendation is therefore, that the scope of the inquiry be extended to look at women and children experiencing violence and abuse'.

One the other hand, some respondents⁶ feel that by extending its scope the investigation might lose its child-orientated focus and become too wide.

1.2.5 However, this debate largely became irrelevant after the Commission received a request from the Justice Parliamentary Portfolio Committee and the Deputy Minister of Justice to consider the position of adults affected by sexual violence. In the light of these developments, the Commission decided to expand the scope of the investigation to include sexual crimes against adults and the investigation was renamed 'Sexual Offences'.

1.2.6 The Commission is acutely aware of the fact that the vast majority of victims of sexual violence are children (of both sexes) and women, while the majority of perpetrators are men. Without losing sight of this fact, the Commission nevertheless approaches its task from a gender neutral basis and accepts that men can also be, and are, victims of sexual violence.

1.2.7 The issue of whether or not to include other forms of child abuse - physical, emotional as well as the issue of child neglect - in this investigation has also been debated extensively, and was proposed in some discussions, workshops, and some submissions.⁷ There was, however, no agreement as to the inclusion of the other forms of child abuse in this investigation. It is noted that changes in legislation relating to the management of sexual offences by and against children would also relate to other forms of abuse, especially procedural management of such offences. It was decided, however, not to address the other forms of child abuse specifically as the Project Committee on the Review of Child Care Act will address these aspects in their investigation.⁸ We stress, however, that by developing specific legislation on sexual offences by and against children (and adults) we do not intend to minimise the negative effects of other forms of abuse.

1.3 BACKGROUND TO THE INVESTIGATION

6 Respondents such as **Professors Snyman and Swanepoel** of the Department of Criminal Law, UNISA, argued along these lines.

7 As, for example, by the **National Council of Women of South Africa**.

8 See also Project 100: Domestic Violence and the **Domestic Violence Act** 116 of 1998.

1.3.1 The South African Government has made a particularly strong commitment to children. President Mandela with his Cabinet 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 former 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 the commitment sets into motion the process towards fulfilling the objectives of the UN Convention on the Rights of the Child, which was ratified by South Africa on 16 June 1995.

1.3.2 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). 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.

1.3.3 The NPA makes specific provision for the protection of children. The goals relating to child protection measures as contained in the NPA Framework are to ensure that the best interests of the child are protected within the criminal and civil justice system; that every child has the right to security and the relevant social services and the right not to be subject to neglect or abuse; and to address the problems related to children who are involved in all forms of abuse, including sexual abuse.

1.3.4 At an 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.

1.3.5 The process was further strengthened by the outcomes of a number of important conferences, seminars and workshops held before and after the publication of the Issue Paper.⁹

9 Some of the conferences included '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, the SASPCAN conferences of 1993 (Cape Town) and 1995 (Johannesburg); 'Child prostitution in Southern Africa: A search for legal protection' held at the HSRC on 26 - 28 March 1996, the conference 'Secondary Abuse of the Abused Child' held at the Westville Prison in June 1996; and the National Conference against Sexual Exploitation of Children in South Africa, 17 - 18 March 1999.

1.3.6 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.¹⁰ The proposed National Strategy on Child Abuse and Neglect (NSCAN) is designed to begin to address the problem areas outlined in Chapter 3 of the Issue Paper. The document¹¹ was finalised in May 1997 and submitted to the national Minister of Welfare and Population Development. This process has also fed into the deliberations of the Project Committee.

1.3.7 The NSCAN document is divided into eight chapters, of which the first two describe the context of the proposed strategy, including the current policy and legislative framework relating to child abuse in South Africa. The third chapter deals with prevention, and argues that there is a need to integrate preventative measures within the broader child protection service delivery system to achieve a more effective balance between protective actions and prevention. The fourth chapter deals with the management of child protective services. It deals with a wide range of service delivery issues, including the responsibilities of all role players, and emphasises co-ordination and cross-sectoral and inter-disciplinary efforts towards effective child abuse case management. Chapter 5 deals with the need to generate, apply and disseminate more and better knowledge. Proposed structures to ensure effective service delivery are discussed in Chapter 6. Chapters 7 and 8 provide specific recommendations and action steps for the implementation of the NSCAN on the national, provincial and local levels.

1.3.8 During 1995 the findings and recommendations of research conducted by Dr September were shared with child protection stakeholders. The research included a situational analysis on child protection services in the Western Cape. With the many other conferences, discussions, and processes, this contributed the impetus for the development of a framework for the multi-disciplinary management of child abuse in the Western Cape. As the Western Cape's Forum on Child Abuse was convinced that a record of agreement among all service providers regarding their roles and responsibilities in instances or suspected instances of child abuse was not negotiable, and a multi-disciplinary protocol¹² for the Western Cape was

10 The Blueprint was drafted by Dr R September and Dr J Loffell.

11 The document has since been published. See September and Loffell **Managing Child Abuse - A Proposed National Strategy on Child Abuse and Neglect** Cape Town: Institute of Child and Family Development, UWC, 1998.

12 The word 'protocol' as used here refers to a formal agreement among all service-providers regarding their roles, responsibilities, procedures followed, standards of service and codes of behaviour.

subsequently developed. The Protocol was launched by the National Minister of Justice and the Provincial Minister for Health and Welfare in December 1996.

1.3.9 Support was received to initiate similar initiatives in all the other eight provinces and a proposal was drafted to develop protocols for the multi-disciplinary management of child abuse in all provinces. The Institute for Child and Family Development at the University of the Western Cape was contracted to facilitate the process under the auspices of NCCAN¹³ and provincial and regional Child Protection Committees were established in all nine provinces.

1.3.10 At a two-day national workshop held in Johannesburg on 16 -17 March 1998, representatives from the Provincial Child Protection Committees presented their action plans towards the implementation of key aspects of the NSCAN. The action plans covered a combination of three main components of the national strategy, i.e. service delivery, training, and protocol development. The development of protocols for the multi-disciplinary management of child abuse is central to all the action plans.¹⁴

1.3.11 In KwaZulu Natal, the Multi-Disciplinary Protocol for Child Abuse and Neglect has reached its final stage through a process of consultation and discussion.¹⁵ The protocol is designed to ensure that children are protected from abuse and neglect through a speedy and efficient response to the report of the abuse. It introduces the concept of Child Protection Services which indicates a co-ordinated, well-organised delivery of child protection services based on consultation and collaboration between all stakeholders.

1.3.12 South Africa ratified the UN Convention on the Elimination of Discrimination against Women (CEDAW)¹⁶ on 15 December 1995. This Convention is regarded as the definitive international instrument on the human rights of women. Although this Convention does not

13 The National Committee on Child Abuse and Neglect.

14 See also the D Phil thesis of Dr September **The Development of a Protocol for the Management of Child Abuse and Neglect**, University of the Western Cape, 1998.

15 The draft was compiled by Ms E Singh.

16 UN Doc A/RES/34/180 (1980). The Convention was adopted for signature and ratification and accession by the UN General Assembly on 18 December 1979 and entered into force on 3 September 1981.

contain any provisions which expressly address violence against women,¹⁷ the Committee on the Elimination of Discrimination against Women has compiled a general recommendation stating how CEDAW should be interpreted to cover violence against women and explaining the nature of government obligations to address such violence.¹⁸

1.3.13 On 25 November 1996, International Day of No Violence Against Women, the then Minister of Justice, Dr A M Omar, MP¹⁹ and the then Deputy Minister of Justice, Dr M E Tshabalala-Msimang, MP²⁰ launched a public campaign on preventing violence against women. The campaign was developed as a result of deep concern for the epidemic problem of violence against women in South Africa and fitted within the context of the commitments which the Department of Justice made in respect of implementing the Platform of Action which emanated from the United Nations Fourth World Conference on Women held in Beijing in 1995.

1.3.14 The campaign comprised two distinct components: public awareness and strategic planning within the Department of Justice and other relevant Departments. At the strategic level the Department of Justice organised a number of meetings with relevant role players to devise practical plans for improving the treatment of women within the legal system.

1.3.15 One recommendation which emerged was the need to establish a high level inter-sectoral task team to develop uniform national guidelines for all role-players handling rape and other sexual offence cases. Such a task team was convened and given the mandate to compile a set of guidelines which would facilitate the development of an integrated and holistic approach across government and the NGO sector to deal with sexual offences.

1.3.16 Completed sets of the National Policy Guidelines for Victims of Sexual Offences were forwarded to the central offices of the relevant Departments on a national and provincial level and to other places where they are accessible to people working in the field of sexual violence. The idea is to make available to departmental personnel at ground level the Guidelines which apply to their daily work (eg. Police stations to have the police guidelines, health clinics to have

17 It has been argued that at least six articles of the Convention (viz Articles 2, 3, 6, 11, 12, and 16) relate to violence against women. See J Fitzpatrick 'The use of international human rights norms to combat violence against women' in R Cook (ed) **Human Rights of Women: National and International Perspectives** (1994) 532.

18 General Recommendation 19 19 (11th session, 1992), UN Document CEDAW/C/1991/L/1/Add.15 (1992).

19 Now the Minister of Transport.

20 Now the Minister of Health.

the health guidelines, etc.). The Guidelines also contain an information brochure for victims which sets out in simple language the basic steps involved in the legal process.

1.3.17 A clear exposition of the government's commitment to implement changes to the law relating to rape is found in the Gender Policy Statement published by the Department of Justice in March 1999. The Gender Policy Statement takes a critical look at some of the ways in which the legal system fails women and how this results in severe injustices. In its Chapter 1, the Statement acknowledges some of the shortcomings in the legal system:

- C Systemic inequalities, resulting from centuries of legalised injustice against women.
- C The failure of the legal system to accommodate some of the fundamental differences in the social experiences of men and women and the imposition of rules on women that are based on men's experiences.
- C The legal system's operating on supposedly 'neutral' principles of law and criminal justice, instead of responding meaningfully to the specific justice needs of women.

1.3.18 Strategic areas of intervention are identified within the Gender Policy Statement. In relation to sexual violence, the Justice Department commits itself to developing a legal framework for addressing sexual violence. This framework includes the following:

- C Reviewing the substantive and evidential laws on sexual violence;
- C reviewing legal procedures related to sexual violence;
- C improving service provision for victims; and
- C designing structures to ensure justice for victims and a fair trial for the accused.

1.3.19 In the review of sexual offences legislation the Gender Policy Statement also commits itself to removing gender bias and bringing the definition of rape closer to the experiences of rape victims.

1.3.20 During March 1999, the previous Deputy Minister of Justice, Dr Manto Tshabalala-Msimang, MP invited a task team²¹ to address and to make proposals for amendments to the laws relating to rape. This task team prepared a very comprehensive ***Discussion Document***

21 The members of the task team were Ms Bronwyn Pithey, Ms Lillian Artz, Ms Heléne Combrinck and Ms Nicolette Naylor.

on the Legal Aspects of Rape in South Africa dated 30 April 1999. The Discussion Document presents an analytical framework, deals with the commitments of the State to address the legal aspects of rape and the substantive definition of rape, recommends law reform to make the rape complainant an ancillary prosecutor, proposes amendments to the Criminal Procedure Act, 51 of 1977 to allow for the exclusion of certain persons from rape trials, proposes protective measures for the testimony of the complainant, deals with the application of the cautionary rules in rape cases and other evidentiary matters such as expert evidence and the production of records, makes recommendations regarding sentencing guidelines and the introduction of 'victim impact statements' for purposes of sentencing, and HIV Post-Exposure Prophylaxis following rape. This discussion document has been fed into the current process and is drawn on extensively in both this paper and subsequent documents dealing with the process and procedural issues.

1.3.21 Various other policy statements and protocols have been, and are being, developed by other Departments, even at provincial level. One such document is the Policy and Protocol on the Treatment of Child Abuse Victims by the Gauteng Provincial Department of Health in 1998. It forms part of a broader policy document on Clinical Medico-Legal Services and aims to address the need for uniform and comprehensive health care services to victims of child abuse. The document clearly spells out policy on child abuse on who should be seen in the public health sector, who in the health sector should see the abused child and when and where victims of child abuse should be seen. It also provides general examination guidelines and a protocol for health care practitioners and prescribe how the medico-legal report (J 88) must be completed.

1.4 **PROGRESS**

1.4.1 The previous Minister of Justice²² directed the Commission to conduct this investigation.²³ 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:

22 Dr A M Omar, MP.

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

Ms Joan van Niekerk (Childline, KwaZulu Natal)
 Dr Rose September (Institute for Child and Family Development, UWC)
 Ms Charlotte McClain (formerly at the Community Law Centre, UWC, now with UNICEF)
 Ms Edmara Mthombeni (Department of Correctional Services, Westville)
 Ms Evanthe Schurink (HSRC, Pretoria)
 Mr Justice Thumba Pillay (A former practising attorney from Durban, now judge)²⁴

1.4.2 In order to bring in additional expertise on criminal law, the adult perspective, and specifically the perspective of survivors, three additional members were appointed to the Project Committee in July 1999.²⁵ These members are:

Ms Lebogang Malepe (Tshwaranang Legal Advocacy Centre)
 Professor John Milton (School of Law, University of Natal)
 Ms Bronwyn Pithey (Rape Crisis, Cape Town)

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

1.4.4 The Project Committee began its work in January 1997. An Issue Paper on Sexual Offences against children was researched and developed and then released by the Law Commission on 31 May 1997.

1.4.5 The Issue Paper highlights the problems encountered by all sectors involved in the management of sexual offences against children, establishes a tentative set of principles for the management of this problem, and attempts to stimulate thinking and discussion around solutions and changes to policy and legislation relating to this matter.

1.4.6 The Issue Paper was widely distributed to all sectors involved with managing sexual offences by and against children, as well as non-government and community based organizations. Comments and submissions on the Issue Paper were invited.

1.4.7 A number of workshops were held with at least one workshop in each of the nine provinces, as is set out in the following table:

24 Mr Justice Pillay was appointed to the Bench (Natal Provincial Division) in 1998.

25 Although only appointed in July 1999, the additional members started contributing to this process earlier. We express our sincere gratitude to them for their willingness and support.

Province	City and or Town	Date
Western Cape	1. Cape Town (UWC)	20/8/97
	2. Atlantis	19/8/97
	3. Oudtshoorn	21/8/97
Eastern Cape	1. Umtata	18/8/97
	2. Port Elizabeth	19/8/97
Northern Cape	Kimberley	14/8/97
Northern Province	Pietersburg	18/9/97
Mphumalanga	Nelspruit	14/8/97
Gauteng	1. Pretoria	22/8/97
	2. Soweto	17/9/97
KwaZulu-Natal	1. University of Zululand	11/8/97
	2. Westville	28/8/97
Free State	Bloemfontein	15/9/97
Northwest Province	Mmabatho	21/8/97

1.4.8 The workshops were financed by Rädä Barnen to which the Commission sincerely expresses its thanks.

1.4.9 An attempt was made to ensure that there was both rural and urban representation at the workshops. Participants were asked their opinions on questions raised in the Issue Paper and were requested to give input on other issues that they thought had been omitted or neglected. Participants were also invited to submit further comment to the Commission in writing. Participants at the workshops included representatives from the Departments of Welfare, Justice, Correctional Services, Education, Health, the South African Police Services, NGO's and community based organizations, some of which represented the interests of victim groups.

1.4.10 Response to the workshop process was enthusiastic and participants expressed appreciation of their inclusion in this process. Some organisations such as the **South African**

National Council for Child and Family Welfare started their own initiatives²⁶ and several other organisations and NGO's went back to their constituencies to further workshop the Issue Paper. We sincerely thank all involved (organisers and participants alike) for taking the initiative and making the process their own. However, it is envisaged that when the Committee workshops this Discussion Paper, a wider pool of input and comment will be solicited, building on the contacts established during the first round of workshops conducted to discuss the Issue Paper. Obviously, we also will have to involve victims and women and their organisations.

1.4.11 The Project Committee joined forces with the Project Committee on the Review of the Child Care Act in what has become known as the 'child participation process'. The child participation process aims to elicit the opinions of children on matters affecting them directly. With the financial and technical expertise of Save the Children (UK) and the generous funding of Rädna Barnen six training workshops were held throughout the country to train partner organisations. Several focus group discussions involving children from different settings and circumstances were planned at these training workshops and close to sixty focus group discussions with children were conducted during March - June 1999. The input of the children will feed directly into both investigations mentioned. The Commission is honoured to have contributed to this process of involving children in law reform.

1.4.12 This Discussion Paper and the draft legislation have thus developed from a process of consultation and a synthesis of all the submissions received in response to the Issue Paper.

1.4.13 The investigation suffered a serious set-back in 1998 because of capacity problems and the development of the discussion paper with draft legislation was regrettably delayed by almost a year.

1.4.14 The Commission takes this opportunity to sincerely thank the members of the Project Committee for the work they have done.

1.5 PLANNING THE INVESTIGATION

26 The **S A National Council for Child and Family Welfare** compiled its own questionnaire containing 144 questions based on the Issue Paper. The questionnaires were distributed at the Council's cost to all its affiliates and a report was compiled on the basis of the completed questionnaires, which was submitted to the Commission.

1.5.1 A considerable amount of time and energy was spent on the planning of the investigation. Questions on whether one or more discussion papers are needed and what the scope or focus of those discussion papers should be were debated. On the one hand, some felt that a particular focus (on children, for instance) might be lost in one, general discussion paper. On the other hand, practical considerations and political and other pressure made it imperative to deliver soon. In the end the Commission decided to publish three separate discussion papers with draft legislation, where necessary. The first discussion paper (this document) addresses the substantive law relating to sexual offences and contains a draft sexual offences act. It has both a child and adult focus. The second discussion paper will deal with matters concerning process and procedure and will again have both an adult and child focus. The third discussion paper will have a particular adult focus and will concentrate on adult commercial sex work (prostitution) and pornography.

1.5.2 The Commission plans to workshop all these discussion papers.

1.5.3 The three Discussion Papers and draft legislation (where appropriate) will thus attempt to:

- C codify the substantive law in an easily accessible, understandable, effective and workable act;
- C develop efficient and effective legal provisions for the reporting, management, investigation and prosecution of sexual offences, which will protect the rights of victims, give them access to justice in such a way that their experience of secondary trauma at the hand of the justice system is minimised, as well as ensure the fair management and trial of persons (including children) suspected, accused and convicted of committing a sexual offence; and
- C provide workable legal solutions for the problems surrounding adult prostitution and pornography.

1.6 LIMITATIONS OF THE INVESTIGATION

1.6.1 It is essential to note that the increasing incidences of rape and sexual offences cannot be addressed solely through the development of legislation. The high levels of sexual abuse and violence in this country are related to a wide spectrum of social factors many of which were

indirectly and directly caused and / or exacerbated by the gross human rights violations of this country's past.

1.6.2 In order to make an impact on the problem of sexual abuse and sexual violence, legislative change thus needs to be accompanied by

- C the development of a human and children's rights culture;
- C changes in attitudes towards children and women, in particular;
- C the strengthening of organisations at grass-roots level that promote and protect persons vulnerable to sexual abuse and violence;
- C policy development, especially in relation to the development of and commitment to inter-sectoral protocols in order to ensure well-informed and well-coordinated management of the problem by all professional and occupational groups involved;
- C broad educational initiatives that will focus on prevention of abuse and the development of life skills;
- C resource development and poverty alleviation;
- C broad social policy initiatives that will address the social conditions and situations that contribute to the increased vulnerability of children and women to exploitation and abuse, *inter alia*, poverty, unemployment, protective traditions, etc.;
- C capacity building linked to ongoing staff training and skills development;
- C infra-structural development and resource allocation;
- C political commitment to the law reform process;
- C responsible and informative media coverage on matters affecting sexual behavior and sexual offences generally.

1.6.3 The legal system cannot guarantee stable family and community environments, healthy family support systems, the protection of children and women against abuse, neglect, and violence, etc. However, it must support and reinforce these values. The legal system and legislation also have the responsibility of ensuring that where rape and other acts of sexual violence do undergo investigation and management within the Criminal Justice System, the victim and family experience this process in such a way that secondary trauma is reduced or obviated and the long term protection and safety of children and women in their families and communities are enhanced.

1.6.4 It is noted, however, that given certain circumstances, judicial management of sexual abuse and sexual violence cases may not be considered the exclusive or best option for the victim and family, and other avenues of management may be applied to protect the safety and well-being of children, women, and their families and communities. The processes for making decisions in this respect need to be developed and implemented through inter-sectoral protocols for the management of sexual abuse and sexual violence.²⁷

1.6.5 It is also noted that unless legislative change in the management of sexual offences is accompanied by the allocation of resources to enable the legal provisions to be implemented, the changes will do little to ease the plight of the victims of sexual abuse and to prevent repeat offences by offenders, both juvenile and adult.

1.6.6 The members of the Commission were therefore faced with the dilemma of whether to make recommendations that are congruent with the present availability of resources and capacity of the State and civil society to provide services, or whether to make recommendations that may not be immediately implementable as there is a gap between available resources and the ideal situation. The opinion was expressed that legislative changes dealing with the management of sexual offences should take the latter course, and that gaps in resource availability and social security provisions that serve to protect children and victims generally will be addressed as and if the socio-political and economic situation of the country improves. On the other hand, it is realised that impracticable 'pie-in-the sky'-legislation will not be worth the paper it is written on.

1.7 GENERAL COMMENT

1.7.1 This is an investigation into a topic which has stimulated the expression of many differing ideas and opinions as to 'best management' of sexual offences. The Commission has attempted to synthesise these disparate opinions into practical and workable legislative reforms that will protect children and victims of acts of sexual violence, protect the rights of the accused / offender, minimise trauma as well as facilitate, where possible, processes of healing of the victim and rehabilitation of the offender.

27 See, for instance, the Memorandum of Good Practice on the video evidence for Children prepared by the Home Office, United Kingdom.

1.7.2 The Issue Paper covered a range of sexual offences found in various enactments as well as in the common and customary law with a particular focus on children. We will again cover the sexual offences in statutory law, the common law, and customary law, albeit with both an adult and child focus. This simplifies matters and enables the Commission to expand on the issues identified and raised in the Issue Paper. Such an approach has found support in a number of submissions received.²⁸

1.8 THE COMMISSION'S CONTINUING WORKING METHODOLOGY

1.8.1 This discussion paper and draft legislation presents the present thinking and opinion of the Commission on the substantive law relating to sexual offences as it has been informed by research, consultation, at local, national and international levels, as well as the workshopping process and by the submissions received. However, at this stage the proposals put forward are still tentative and once again the opportunity exists for further consultation and submissions on the proposed reforms.

1.8.2 The Commission would like to 'throw the net' for further opinion as widely as possible and again invites submissions and discussion on this discussion paper and the draft legislation. This is of particular importance as the Issue Paper had a particular focus on sexual offences against children. This discussion paper will be workshopped on the same basis as the Issue Paper and interested parties are invited to avail themselves of this opportunity to influence the drafting of legislation at this early stage.

1.8.3 After submissions and input from the workshopping process have been integrated into the proposals and draft legislation, a report will be prepared which will be submitted to the Minister of Justice for his consideration. The Commission and the members of the Project Committee on Sexual Offences would like to thank all workshop participants and all who made submissions in response to the Issue Paper for their invaluable contribution to this process.

28 Notably in the submissions received from the **Dr JA d'Oliveira SA**, assisted by **Adv Meintjies**, the former Attorney-General: Transvaal; the **Johannesburg Child and Family Welfare Society**; the **Gauteng Provincial Department of Safety and Security**; and **Mr Neil van Dokkum**.

CHAPTER TWO

2. THE UNDERLYING PRINCIPLES

2.1 INTRODUCTION

2.1.1 It will be recalled that the Commission promoted a set of basic principles relating to children and their special needs in the Issue Paper.²⁹ These principles were 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 Act, 1996, ('the Constitution') and inputs made at various workshops. This approach reflected the particular child focus of the Issue Paper.

2.2 THE SOURCE DOCUMENTS UNDERLYING SEXUAL OFFENCES BY AND AGAINST CHILDREN

2.2.1 Introduction

2.2.1.1 Changes in legislation relating to the management of sexual abuse of children may alleviate the trauma of children who enter the criminal justice system only if those who administer the law understand the ethos and intention behind the legislation and therefore respond to the child in a child-centered way. It is therefore not enough to make law, one also needs to clarify the rationale and principles that underpin the legislative provisions.

2.2.1.2 For the benefit of the reader, we revisit the relevant international instruments and the constitutional provisions before we present the deliberations on the set of principles proposed in the Issue Paper.

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

2.2.2.1 On June 16, 1995, the United Nations Convention on the Rights of the Child was ratified by the South-African Government of National Unity. By ratifying the Convention, South

29 See Chapter 2 of the Issue Paper.

Africa undertook to monitor, promote, protect and report on the status of the country's compliance with the provisions of this Convention.

2.2.2.2 At least seven articles of the Convention are of relevance to sexual offences by and against children:

C Article 19.1 provides that 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, whilst in the care of parent(s), legal guardian(s) or any other person who has care of the child'.

According to this Article, such protective measures should, as appropriate, include effective procedures for the establishment of social programs 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, and, as appropriate, for judicial involvement.³⁰

C Article 34 states that '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:

- 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'.

C Article 35 of the Convention obliges States Parties to take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

C Article 36 of the Convention makes it mandatory for States Parties to protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

C Article 37 of the Convention reads as follows:

30 Article 19.2 of the Convention on the Rights of the Child.

States Parties shall ensure that:

- a. no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
- b. no child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
- c. every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interests not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
- d. every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

C Article 39 of the Convention places an obligation upon States Parties to take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. The Convention prescribes that such recovery and reintegration must take place in an environment which fosters the health, self-respect and dignity of the child.

C Article 40 of the Convention deals with the child who is alleged to have infringed the penal law and will be referred to in more detail in the section that deals with the child sex offender in the next Discussion Paper.

2.2.3 The African Charter on the Rights and Welfare of the Child, 1990

2.2.3.1 The African Charter on the Rights and Welfare of the Child is the first regional declaration and treaty on the rights of the child.³¹ 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's Children's Charter repeats the essence of the content of the prohibition on the sexual exploitation of children contained in Article 34 of the UN Convention.

2.2.3.2 The African Children's Charter, however, does have some novel provisions not found in the UN Convention on the Rights of the Child. Article 21 of the African Children's Charter obliges States Parties to the Charter to take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child.³² Article 31 of the African Children's Charter recognises that a child has certain responsibilities or duties³³ towards his/her family and society, the State and other legally recognised communities and the international community.

2.2.4 The impact of the Constitution of the Republic of South Africa, 1996

2.2.4.1 Children are entitled to all the guarantees enshrined in the Constitution of the Republic of South Africa as well as the special protection accorded them by section 28. Section 28 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;

31 South Africa has signed the African Children's Charter.

32 See section 3.14 above for a discussion of the impact of customary law.

33 This includes the duty to work for the cohesion of the family, to respect his or her parents and elders at all times and to assist them in case of need; to serve his/her national community by placing his/her physical and intellectual abilities at its service, to preserve and strengthen social and national solidarity, etc.

- (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.

2.2.5 Submissions to the Issue Paper

2.2.5.1 Compliance with South Africa's international obligations in terms of the UN Convention on the Rights of the Child

2.2.5.1.1 In response to the question posed in the Issue Paper on 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, the *Tshwaranang Legal Advocacy Centre* says that the South African government must be made accountable at an international level for actions taken, as well as omissions to act, and public interest groups must be empowered to monitor the fulfilment of its international obligations. The same sentiments are expressed by the *Johannesburg Child Welfare Society*.³⁴ The Society states:

Internal structures should be put in place to monitor implementation and ensure ongoing accountability beyond the current national reporting process, and to maintain continuous links with the international monitoring mechanism. Organs of civil society such as welfare organizations, NGO's etc. must play an active role in these processes. Specific, properly functioning provision for children's issues within the justice system could be broken up into a set of indicators of progress in terms of the NPA.

34 Dr J M Loffell prepared the input.

2.2.5.1.2 South Africa as a country has adhered to its international commitments as prescribed by the UN Convention,³⁵ in that the Government has submitted its first country report, as is required,³⁶ to the UN Committee on the Rights of the Child in 1997.³⁷ The report contains an overview of the measures taken by the South African Government, building on the work previously undertaken by civil society, to meet the requirements of the UN Convention. It spells out the constitutional rights of the child and list legislation passed, as well as legislation currently tabled in Parliament or in preparation. It details other measures such as other international instruments ratified, policy developments, and research projects affecting children.³⁸

2.2.5.1.3 Ratification of the UN Convention on the Rights of Children has brought about expectations that the provisions of the UN Convention will be translated directly into domestic law. The *Department of Local Government, Housing and Administration of the Mpumalanga Provincial Government* expresses the opinion that domestic legislation adopting the UN Convention must be put in place providing for the necessary civil structures to help implement the provisions of the UN Convention. Such legislation must also take into account the provisions of the Constitution relating to the rights of the child. In their submission, the *Department of Justice*³⁹ states that prohibitions in the UN Convention on the Rights of the child should be adapted to our criminal law, especially acts of abuse and violence against children.

2.2.5.2 **Other possible international instruments that can play a role**

35 Contra the submission by the **Department of Public Safety and Security, Gauteng Provincial Government** who argues that the 'South African Government has not yet fully succeeded in ensuring that the UN Convention on the Rights of the Child is complied with'. The respondent argues that compliance can be ensured by clearly defining the role of government, in particular each department, and funding them appropriately. It is further submitted that structures like the NPA and NCPS can serve a co-ordinating function in this regard. Lastly, it is maintained that the role of civil society should also be clearly delineated in assisting government to achieve the rights of children.

36 See Article 44 of the UN Convention on the Rights of the Child.

37 See the Initial Country Report - South Africa in terms of the Convention on the Rights of the Child, November 1997.

38 It should be noted that according to Childline, the NGO sector were not satisfied with this report and therefore compiled their own.

39 The input was prepared by Ms Thuli Madonsela.

2.2.5.2.1 In responding to the question posed in the Issue Paper on what other international instruments can play a role in preventing and responding to the sexual abuse of children, the **Department of Justice** refers to the African Charter on the Rights and Welfare of Children. The Department submits that the African Children's Charter has a 'more emphatic relevance to cultural issues of exploitation of children' as it addresses harmful cultural practices. The **Johannesburg Child Welfare Society**, in turn, identifies the following international instruments:

The Declaration and Agenda for Action of the World Congress Against Commercial Sexual Exploitation of Children, held in Stockholm in August 1996, can play a role in addressing certain manifestation of child sexual abuse. Apparently South Africa is likely to sign the African Charter on the Rights and Welfare of the Child in the near future. There are several other international instruments which would have relevance to the commercial sexual exploitation of children; however we are not aware whether or not South-Africa is a signatory to them - if not, perhaps the necessary steps should be taken for this purpose. These include: the 1949 Convention on the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others; the 1956 Supplementary Convention on the Abolition of Slavery; the 1961 Hague Convention on the Protection of Children; and the ILO's Minimum Age Conventions. In addition there is a proposal for an Optional Protocol on the Rights of the Child which would address the sale of children, child prostitution and child pornography, providing a basis for international cooperation to implement the relevant provisions of the CRC.

2.2.5.2.2 The Commission was also referred to the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) as an international instrument which can play a role in preventing and responding to the sexual abuse of children.⁴⁰

2.2.5.3 **The role of the Constitution, 1996**

2.2.5.3.1 **Rape Crisis (Cape Town), Women & Human Rights Project (Community Law Centre, UWC) and the ANC Parliamentary Women's Caucus**⁴¹ rightly show in their submission that the Commission has omitted to make any reference to the constitutional right to freedom from violence from both public and private sources.⁴² We regret this omission and thank the respondents for showing that this right, as do all the other rights in the Constitution, also clearly applies to children.

40 **Tshwaranang Legal Advocacy Centre.**

41 The submission was prepared by Ms Bronwyn Pithey, Ms Heléne Combrinck, and Ms Pamela Shifman.

42 Section 12(1)(c) of the Constitution, 1996.

2.2.5.3.2 A few respondents argue for the inclusion of certain additional rights as part of section 28 of the Constitution. The **South African Police Service Social Work Services**,⁴³ for instance, argues for the inclusion of the right of the child to be protected against sexual exploitation. It can be argued, however, that such a right is already entrenched as a children's right in section 28(1)(d) of the Constitution.⁴⁴

2.2.5.3.3 Although the majority of respondents⁴⁵ believe that the Constitution adequately protects the rights of the child, some respondents state that section 28 of the Constitution does not protect or adequately protect children. The **Tshwaranang Legal Advocacy Centre**, for instance, states in its submission that the 'guarantee in the Constitution does not "protect" children. It is merely an ideal to which society aspires'. **Tshwaranang** identifies three factors that must be present in order to make the constitutional guarantees effective:

Firstly, legislation must be enacted to protect women and children which places specific obligations on state officials and law enforcement agents to act, and which imposes penalties upon them for failure to act when the safety and well-being of children is at stake. Secondly, interdepartmental co-operation is needed in order to enforce these undertakings. And finally and most importantly, budgets must be made available for the implementation of programmes and policies to protect children.

2.2.5.3.4 **Professors C R Snyman** and **J P Swanepoel**⁴⁶ are of those respondents who argue that section 28 of the Constitution does not go far enough. They believe it is necessary to have a separate South African charter to define and specify the rights of children in greater detail than the existing UN Convention on the Rights of the Child or the African Children's Charter. They concede that such a charter must accord with the principles proclaimed in the Constitution, but 'it has to recognise the child's inherent dignity and the equal rights of all members of a human family - aspects which the Constitution has underplay or does not afford the child'.

43 Head office, Pretoria.

44 It provides for the right to be protected from maltreatment, neglect, abuse or degradation.

45 **Department of Justice; Department of Local Government, Housing and Land Administration, Mpumalanga Provincial Government; Department of Public Safety and Security, Gauteng Provincial Government.**

46 Department of Criminal and Procedural Law, UNISA.

2.2.5.3.5 In its submission, the **Department of Justice** points out the Constitution provides ground rules and that it is not meant to cover every aspect of life. The Department maintains that is why there remains a need for other statutes to address specific issues such as sexual offences. The **Johannesburg Child Welfare Society** points out that, in principle, section 28 of the Constitution signifies that the State takes responsibility for ensuring that all the basic needs of children are met. The Society says these functions can be carried out in partnership with the private sector, but ultimately remain the responsibility of the state. The Society also maintains that the constitutional provisions can only be effective if they are translated into the necessary allocations for prevention, protection and remediation in the national and provincial budgets, plus the necessary action to ensure that the nation's child protective mechanisms are in place and operating properly.

2.2.5.3.6 **Mr Neil van Dokkum** submits that it is futile to argue whether section 28 of the Constitution adequately protects children from sexual abuse. He argues that, on a broad reading of section 28, it sufficiently protects children, but warns that constitutional provisions should never be interpreted in isolation. He continues:

Rather than debate about the efficacy of Section 28, child advocates should be taking test cases to the Constitutional Court and urging that court to adopt an activist role in the protection of children. For example, it is significant that the drafters of the Constitution have not described any other right as "paramount", whereas Section 28(2) holds that the child's best interests are of paramount importance. This seems to be sending a clear message to the legislature and the judiciary, and that message should be exploited to its fullest extent by child advocates, who should be arguing that the intention of the legislature clearly was to place the rights of the child at the top of the heap, at least in matters concerning the child's interest.

2.2.5.3.7 If we take our cue from **Mr Van Dokkum**, as we believe we should, it becomes unnecessary to deal with the meaning of phrases such as 'the right to family or parental care', 'the right to appropriate alternative care when removed from the family environment' and 'the right not to be detained except as a matter of last resort' found in section 28 of the Constitution,⁴⁷ as such a task rather belongs with the Constitutional Court.

47 Several respondents expressed opinions on the meaning of particular phrases found in section 28 of the Constitution. See, for instance, the submissions by **Tshwaranang Legal Advocacy Centre**; the **Department of Justice**; **Johannesburg Child Welfare Society**, etc.

2.2.5.4 **The right to be assigned legal representation by the state and at state expense**

2.2.5.4.1 The question posed in the Issue Paper on the constitutional right to legal representation assigned by the state, and at state expense, in criminal, civil and administrative proceedings affecting the child, elicited strong reaction. Section 28(1)(g) of the Constitution provides for the assignment of legal representation by the state and at state expense, in **civil proceedings** affecting the child, if substantial injustice would otherwise result. The Constitution also provides for the assignment of legal representation by the state, and at state expense, if substantial justice would otherwise result, to all **detained⁴⁸ and accused⁴⁹ persons**, including detained and accused children.⁵⁰

2.2.5.4.2 In civil proceedings, however, the state is not obliged to inform the child of this right to legal representation as is the case in criminal proceedings facing a particular child. The child victim or complainant (as the adult victim or complainant) in criminal proceedings also has no constitutionally recognised right to be assigned legal representation. Children affected by administrative action such as adoption proceedings, foster care placements, removal proceedings, etc. also have no constitutionally enforceable legal right to be assigned legal representation by the state and at state expense.

2.2.5.4.3 **Professors C R Snyman and J M Swanepoel** argue the provision on the right to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, is discriminatory to children involved in criminal proceedings. They base their argument on the absence of appropriate legal protection for the child, in the form of a legal practitioner assigned to the child for any criminal proceedings at state expense, irrespective of whether the child is a witness or an accused in such proceedings. This argument is not well founded as regards children as accused persons in criminal proceedings as **all** detained and accused persons (including children) have, as we have seen, the right to have a legal representative assigned to them by the state and at state expense, if substantial injustice

48 Section 35(2)(c) of the Constitution, 1996.

49 Section 35(3)(g) of the Constitution, 1996.

50 See also the submission by **Ms W L Clark**, a senior public prosecutor from Verulam.

would otherwise result.⁵¹ Professors Snyman and Swanepoel have a point, however, when they say the common assumption that the child's parents or state prosecutor will look after the interests of the child⁵² during criminal proceedings is a myth, and places a great burden on the prosecutors, 'some of whom lack sufficient experience to prosecute, let alone look out for children's rights'. They are also right in arguing that it is unfair to the child to allow a parent of that child to try to assist the child if such parent is in any manner involved with the accused. As solution to the problem, they suggest the appointment of a child public protector and defender.⁵³

2.2.5.4.4 **Ms W L Clark**⁵⁴ has a different perspective on the role of the public prosecutor. She says:

In criminal proceedings where a child has been a victim, he/she is represented by a prosecutor. In most of the main centres and certainly at the Verulam Court, the prosecutor who deals with child abuse cases is a specialist in such matters. He or she has at least as much experience as most practitioners in private practice when it comes to dealing with such matters and in fact, frequently has more experience of child abuse cases than attorneys or advocates. The comment that a child is "not legally represented" is to my mind an insult to prosecutors and indicative of the contempt with which prosecutors are viewed. Before one starts making allegations that child victims are unrepresented, perhaps one should rather look at addressing the problem of improving the status of prosecutors so that they can be afforded some of the respect they deserve! Prosecutors who deal exclusively with these distasteful cases are dedicated to their work and take these matters very seriously.

2.2.5.5 In the 'best interests of the child'

2.2.5.5.1 The **Tshwaranang Legal Advocacy Centre** and many others⁵⁵ are critical of the vagueness surrounding the concept 'the best interests of the child'. **Tshwaranang** says

51 See sections 35(2)(c) and 35(3)(g) read with section 28(1)(g) of the Constitution, 1996.

52 We assume Professors Snyman and Swanepoel refer to the child **witness or complainant** in criminal matters where they refer to the 'child'.

53 This proposal will be pursue in the subsequent discussion paper on process and procedural law.

54 Senior Public Prosecutor, Verulam.

55 **Mr K Worrall-Clare**, for instance, states in his submission that provision must be for a comprehensive study of the concept 'the best interests of the child' and says this 'allusive concept proves difficult for members of the judiciary to understand, and as a result presiding officers tend to interpret the concept within pre-conceived notions of justice'.

‘the best interests of the child’ has ‘always meant what the judge (without training on child psychology or child development) decides is the best interests of the child’.

2.2.5.5.2 In a discussion of the concept of ‘*the best interest of the child*’ in the *Manual of Practice Guidance for Guardians ad litem and Reporting Officers*⁵⁶ the following important statement appears:

Two basic points should be made about the best interest of children:

Firstly, as Brenda Hoggett said in her book *Parents and Children*, “any child whose future has to be decided in litigation has already been deprived of his best interests”. What we are looking for is the “least detrimental alternative” as defined in **Beyond the best interests of the child** (Freud, Goldstein and Solnit 1973).

Secondly, it must be stressed that there is no one formula or course of action which can guarantee a child’s best interests. “What is best for a particular child is indeterminate and speculative and is not demonstrable by scientific proof but is instead a matter of values” (Mnookin and Szwed 1983).

2.2.5.5.3 The *RP Clinic*⁵⁷ gives a practical example of the application of the principle ‘in the best interest of the child’. It states:

In the case of sexual abuse by a parent, if one parent is working with one or more professionals having one idea of the matter and the other parent works with one or more professionals having another point of view, the result is never in the best interest of the child. To overcome this problem, the RP Clinic always assesses the child ‘blind’, without information of the parents or other professionals. After the assessment, the parent who brought the child is provided with feedback. The other parent and involved persons, eg the perpetrator, are also provided with feedback at a later stage.

2.2.5.6 The definition of a ‘child’

2.2.5.6.1 The *SAPS Area Commissioner, Legal Services, East Rand*, in responding to the definition of a ‘child’ in section 28(3), is of the view that it is going overboard to fix the age limit at 18 years, considering the rate of child involvement in criminal activities.⁵⁸ The Commissioner proposes that children 16 years and older be incarcerated for serious offences

56 British Department of Health, 1992, p. 107.

57 The RP Clinic is the brainchild of Dr Renée Potgieter.

58 The **National Council for Persons with Physical Disabilities** in South Africa is of a similar opinion and suggests lowering in the definition of a ‘child’ the age to 16 years to bring it in line with school leaving and work permitted age.

committed. It suffices to say that the Constitution does not prevent the Police from detaining or arresting any child, whatever his or her age, provided the detention is a matter of last resort.⁵⁹

2.2.6 Recommendations

2.2.6.1 *We do not recommend any amendments to section 28 of the Constitution despite the criticisms raised as to the vagueness of certain key phrases and concepts. We believe the constitutional protection accorded to children is flexible enough to allow our courts to interpret legislation in 'the best interests of the child'.*

2.3 THE SOURCE DOCUMENTS UNDERLYING SEXUAL OFFENCES BY AND AGAINST ADULTS, AND IN PARTICULAR WOMEN

2.3.1 Introduction

2.3.1.1 In this section, our focus is on the adult and the adult woman in particular. We recognise that acts of sexual violence against men and women constitute a violation of their human rights and fundamental freedoms and impair or nullify their enjoyment of those rights and freedoms. We do, however, recognise that violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.⁶⁰

2.3.1.2 Some of the key international instruments, initiatives, and national documents in this regard are the Convention on the Elimination of All Forms of Discrimination Against Women, the United Nations Declaration on the Elimination of Violence Against Women, the

59 See section 28(1)(g) of the Constitution. See also the 1994 and 1996 amendments to section 29 of the **Correctional Services Act 8 of 1959** and Chapter 7 of the Discussion Paper on **Juvenile Justice**.

60 See also the publication by Human Rights Watch / Africa **Violence against Women in South Africa - The State response to Domestic Violence and Rape** New York: Human Rights Watch 1995.

African Platform for Action, the Beijing Platform for Action, the South African Constitution and other South African policy and protocol documents.

2.3.2 The UN Convention on the Elimination of All Forms of Discrimination Against Women, 1979

2.3.2.1 In December 1995, South Africa ratified,⁶¹ without reservation, the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (hereinafter called CEDAW).

2.3.2.2 In general terms, CEDAW obliges States Parties to take all appropriate measures to eliminate discrimination against women. As such, it does not explicitly address violence against women. However, Article 6 of CEDAW states that States Parties must take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women. Gender-based violence has been identified as prohibited 'discrimination against women'⁶² by the United Nations Committee responsible for monitoring the implementation of CEDAW.⁶³

2.3.2.3 In addition, the Committee on the Elimination of Discrimination Against Women⁶⁴ has compiled a general recommendation stating how CEDAW should be interpreted to cover violence against women and explaining the nature of government obligations to address such violence.⁶⁵ General Recommendation No 19⁶⁶ sets out specific recommendations regarding the duties resting on States Parties:

61 This means that in terms of international law, South Africa is bound by the obligations created by the CEDAW.

62 See Article 1 of CEDAW for a definition of the term 'discrimination against women'.

63 See also **The Work of CEDAW - Reports of the Committee on the Elimination of Discrimination against Women (CEDAW)**, various volumes, New York: United Nations.

64 This Committee is tasked with overseeing the implementation of the Convention.

65 General Recommendation 19 (11th session, 1992), UN Document CEDAW/C/1991/L/1/Add.15 (1992).

66 As General Recommendation No 19 does not form part of the body of CEDAW it does not constitute a legally binding provision.

- C States Parties should ensure that laws against family violence and abuse, rape, sexual assault, and other gender-based violence give adequate protection to all women, and respect their integrity and dignity.
- C States Parties should also take all legal and other measures that are necessary to provide women with effective protection against gender-based violence, including:
 - C Effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence;
 - C Preventive measures, including public information and education programmes to change attitudes concerning the role and status of men and women; and
 - C Protective measures, including refuges, counselling, rehabilitation and support services for women who are the victims of violence or at risk of violence.

2.3.2.4 Progress made in the implementation of the Convention is monitored by a Committee⁶⁷ of experts on the basis of reports submitted to the Secretary General of the United Nations. Such reports must include a review of the legislative, judicial, administrative or other measures which a country has adopted to give effect to the provisions of CEDAW.⁶⁸ South Africa submitted its first report in 1997.⁶⁹ In the discussion of government actions relevant to Recommendation No 19, the Government's statement that 'all laws regarding rape' will be subjected for review is significant.⁷⁰

2.3.3 The UN Declaration on the Elimination of Violence Against Women

2.3.3.1 At its 85th plenary meeting on 20 December 1993, the UN General Assembly recognised violence against women as a human rights issue and adopted this Declaration,⁷¹ the first international document to deal with violence against women as a human rights issue.

67 The Committee on the Elimination of Discrimination against Women. See Article 17 of CEDAW.

68 Article 18(1) of CEDAW.

69 See www.polity.org.za/govdocs/reports/cedaw1.html for a copy of the report.

70 See **First South African Report** Discussion of General Recommendations 19.

71 Declarations are mere statements of intent and does not per se create internationally enforceable legal rights. It does, however, convey the concerns of the international community and often leads to the adoption of legally binding international conventions.

2.3.3.2 'Violence against women' is defined in the Declaration as 'any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life'.⁷² Besides the already wide definition given to 'violence against women', it is further broadened to include physical, sexual and psychological violence occurring in the family, within the general community, or perpetrated or condoned by the State, wherever it occurs.⁷³

2.3.3.3 States are placed under obligation to condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect of its elimination. States also should pursue by all appropriate means and without delay a policy of eliminating violence against women.⁷⁴

2.3.3.4 In 1994, the United Nations Commission on Human Rights appointed the first Special Rapporteur on Violence Against Women. The duty of the Rapporteur is to *inter alia* make recommendations on national mechanisms to be put in place to do away with violence against women. With regard to state responsibility, the special rapporteur's first report stated that:

In the context of norms recently established by the international community, a State that does not act against crimes of violence against women is as guilty as the perpetrators. States are under a positive duty to prevent, investigate and punish crimes associated with violence against women.⁷⁵

2.3.4 The African Platform for Action, 1994

72 Article 1 of the Declaration. For the text of the Declaration, see A/RES/48/104 85th plenary meeting, 20 December 1993.

73 Article 2 of the Declaration. These forms of violence include rape, battering, sexual abuse, female genital mutilation, dowry related violence, trafficking in women and forced prostitution. See also par D. 113 of the Fourth World Conference on Women Platform for Action at www.un.org/womenwatch/daw/beijing/platform/violence.htm for a similar definition.

74 Article 4 of the Declaration.

75 Preliminary Report Submitted by the Special Rapporteur on Violence Against Women, its causes and consequences, UN Document E/CN.4/1995/42, November 22, 1994, p 18 as quoted in the publication Human Rights Watch/Africa **Violence against Women in South Africa - State response to Domestic Violence and Rape** New York: Human Rights Watch 1995.

2.3.4.1 In preparation for the Fourth World Conference on Women: Action for Equality, Development and Peace, an African Platform of Action was adopted by the Fifth Regional Conference on Women, held at Dakar from 16 - 23 November 1994.⁷⁶ The African Platform of Action is a synthesis of regional perspectives and priorities and a framework for action for the formulation of policies and implementation of concrete and sustainable programmes for the advancement of women. It was developed in consonance with the Nairobi Forward-looking Strategies, the Abuja Declaration and the Kampala Action Plan. The African Platform aims to accelerate the social, economic, and political empowerment of all women at all levels and at all stages of their lives. The operating principle of the African Platform is the integration of the gender perspective in all policies, plans and actions directed towards the achievement of equality, development and peace and equal partnership between women and men is the ultimate goal.

2.3.5 The UN Beijing Declaration and Platform for Action, 1995

2.3.5.1 South Africa was an active participant in the Fourth World Conference on Women in September 1995. The Beijing Declaration and Platform for Action is an agenda for women's empowerment. It upholds the Convention on the Elimination of All Forms of Discrimination against Women and builds upon the Nairobi Forward-looking Strategies for the Advancement of Women.⁷⁷ The Platform reaffirms the fundamental principle set forth in the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, that the human rights of women and of the girl child are an inalienable, integral and indivisible part of universal human rights. The formulation of the Platform is aimed at establishing a basic group of priority actions that should be carried out during the next five years.

2.3.5.2 In the Platform for Action, violence against women⁷⁸ is seen as an obstacle to the achievement of the objectives of equality, development and peace. It is said that violence against women both violates and impairs or nullifies the enjoyment of women of their human

76 E/CN.6/1995/5/Add.2, 29 December 1994.

77 See, in this regard, the Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace held in Nairobi on 15 - 26 July 1985 and the Second Review and Appraisal of the Implementation of the Nairobi Forward-Looking Strategies for the Advancement of Women by the Commission on the Status of Women (E/CN.6/1995/3).

78 The focus is on gender-based violence and not sexual violence per se.

rights and fundamental freedoms and that women and girls, in all societies, to a greater or lesser degree, are subjected to physical, sexual, and psychological abuse that cuts across lines of income, class and culture. The low social and economic status of women can be both a cause and a consequence of violence against women.⁷⁹

2.3.5.3 In the Platform for Action,⁸⁰ three strategic objectives, and actions to be taken, are formulated for dealing with violence against women. These strategic objectives are:

- C To take integrated measures to prevent and eliminate violence against women;
- C to study the causes and consequences of violence against women and the effectiveness of preventative measures;
- C to eliminate trafficking in women and assist victims of violence due to prostitution and trafficking.

2.3.5.4 The actions to be taken by Government include:⁸¹

- C Enact and enforce legislation against perpetrators of violence against women and children;
- C provide gender-sensitive services centres for those who have suffered from gender-based violence;
- C retrain the police and all law enforcement personnel to be gender sensitive in dealing with cases of gender violence;
- C ratify, without reservation, and implement CEDAW and other human rights conventions and declarations;
- C refrain from engaging in violence against women and exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the state or by private persons;

79 Paragraph D. 112 of the Fourth World Conference on Women Platform for Action at www.un.org/womenwatch/daw/beijing/platform/violence.htm .

80 Although the Beijing Platform is not a legally binding document, it does embody solemn political commitments by states, including South Africa.

81 Paragraphs D. 124 -130 of the Fourth World Conference on Women Platform for Action at www.un.org/womenwatch/daw/beijing/platform/violence.htm .

- C enact and/or reinforce penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs done to women and girls who are subjected to any form of violence, whether in the home, the workplace, the community or society;
- C adopt and/or implement and periodically review and analyse legislation to ensure its effectiveness in eliminating violence against women, emphasizing the prevention of violence and the prosecution of offenders;
- C take measures to ensure the protection of women subjected to violence, access to just and effective remedies, including compensation and indemnification and healing of victims, and rehabilitation of perpetrators;
- C provide women who are subjected to violence with access to the mechanisms of justice and, as provided for by national legislation, to just and effective remedies for the harm they have suffered and to inform women of their rights in seeking redress through such mechanisms;
- C create or strengthen institutional mechanisms to report acts of violence against them in a safe and confidential environment, free from the fear of penalties or retaliation, and file charges;
- C create, improve or develop as appropriate and fund the training programmes for judicial, legal, medical, social, educational and police and immigrant personnel, in order to avoid the abuse of power leading to violence against women and sensitize such personnel to the nature of gender-based acts and threats of violence so that fair treatment of female victims can be assured;
- C allocate adequate resources within the government budget and mobilize community resources for activities related to the elimination of violence against women, including resources for the implementation of plans of action at all appropriate levels;
- C provide well-funded shelters and relief support for girls and women subjected to violence, as well as appropriate assistance to enable them to find a means of subsistence;
- C disseminate information on the assistance available to women and families who are victims of violence;
- C provide, fund and encourage counselling and rehabilitation programmes for the perpetrators of violence and promote research to further efforts concerning such counselling and rehabilitation so as to prevent the recurrence of such violence.

2.3.6 African Charter on Human and Peoples' Rights

2.3.6.1 The African Charter does not contain specific provisions on violence against women. Article 18(3) of the African Charter, however, provides that the State must ensure the elimination of discrimination against women and also ensure the protection of the rights of women and children as stipulated in international declarations and conventions.

2.3.6.2 Steps are being taken to better protect women in the context of the African Charter. Article 4 of the 'Draft Protocol to the African Charter on Human and Peoples' Rights Concerning the Rights of Women' protects the integrity and life of the person. This includes protection against all forms of violence against women, including those that take place in private life.

2.3.6.3 The draft Protocol further requires that countries who are parties to the African Charter should take steps to:

- C prohibit all forms of violence against women,
- C identify the cause of violence against women and take steps to eliminate it,
- C punish perpetrators of such violence, and
- C provide for reparation to victims of such violence.

2.3.7 Addendum to the SADC Declaration on Gender and Development

2.3.7.1 At their summit meeting held during September 1998, the SADC Heads of State adopted an addendum to the SADC Declaration on Gender and Development⁸² that is specifically aimed at the prevention and eradication of violence against women (and children). The Addendum, signed on 14 September 1998, forms an integral part of the 1997 SADC Declaration on Gender and Development.

2.3.7.2 Although the SADC Declaration on Gender and Development again does not constitute a legally binding document, its provisions (similar to those of the Violence Declaration) sets a 'regional' standard which SADC member states should follow.

82 The SADC Declaration on Gender and Development was signed by the SADC Heads of State or Government on 8 September 1997.

2.3.7.3 The Addendum sets out the following significant measures to be undertaken by SADC members:

- C Enacting such laws as sexual offences and domestic violence legislation making various forms of violence against women clearly defined crimes, and taking appropriate measures to impose penalties, punishment and other enforcement mechanisms for the prevention and eradication of violence against women and children;
- C Reviewing and reforming the criminal laws and procedures applicable to cases of sexual offences, to eliminate gender bias and ensure justice and fairness to both the victim and the accused; and
- C Providing accessible, affordable and specialised legal services, including legal aid, to ensure the just and speedy resolution of matters regarding violence against women and children.

2.3.8 The Women's Charter for Effective Equality

2.3.8.1 In February 1994, the Women's National Coalition - an umbrella body of over 90 women's groups countrywide - convened a Convention which adopted the 'Women's Charter for Effective Equality'. The preamble to the Charter states that South Africa's women are 'committed to seizing this historic moment to achieve effective equality in South Africa'. The Charter was presented to the political parties then engaged in the multi-party negotiation process. The Convention also insisted that every political party to the negotiations have at least one woman on their delegation.

2.3.9 The impact of the Constitution, 1996

2.3.9.1 The South African Constitution does not have a specific section enumerating the rights of women.⁸³ The founding provisions, set out in Chapter 1, assert that the democratic

83 See also Van Wyk, Dugard, De Villiers & Davis (eds) **Rights and Constitutionalism** Kenwyn: Juta 1994 517 et seq; Chaskalson et al **Constitutional Law of South Africa** Kenwyn: Juta 1996 14-26D et seq.

state is founded on the values of human dignity, the achievement of equality and advancement of human rights and freedoms; and non-racialism and non-sexism.⁸⁴ The Constitution also firmly entrenches equality in the country's value system and protects human dignity, life and personal liberty of all individuals in general terms. These rights are enshrined in sections 9, 10, 11 and 12 of the Constitution respectively.

2.3.9.2 The Constitution is a living document and has been and is being used to great effect to address discrimination and redress inequality as is evident from the cases that have been dealt with by the Constitutional Court.⁸⁵

2.3.10 National Gender Machinery⁸⁶

2.3.10.1 The Office on the Status of Women and the Commission for Gender Equality⁸⁷ are central machinery for the advancement of gender equality in South Africa. The broad function of the Gender Commission is to 'promote respect for gender equality and the protection, development and attainment of gender equality'.⁸⁸

2.3.11 Conclusion and Recommendations

2.3.11.1 South Africa has ratified CEDAW and the Constitution does provide effective mechanisms to address unfair discrimination. General equality legislation is being prepared to further enhance the constitutional provisions. Gender based discrimination, however, goes

84 Section 1 of the Constitution, 1996.

85 See, for instance, **Brink v Kitshoff NO** 1996 4 SA 197 (CC); **Fraser v Children's Court, Pretoria North** 1997 2 SA 261 (CC); **Prinsloo v Van der Linde** 1997 3 SA 1012 (CC); **President of the Republic of South Africa v Hugo** 1997 4 SA 1 (CC); **Harksen v Lane NO & others** 1998 1 SA 300 (CC); **Larbi Odam & others v Member of the Executive Council for Education (North West Province) & others** 1998 1 SA 745 (CC); etc.

86 See also the Gender Policy Statement, March 1999, prepared by the Department of Justice.

87 Established in terms of section 187 of the Constitution, 1996.

88 Section 187 (1) of the Constitution, 1996.

beyond the parameters of violence against women *per se* and is best addressed in gender specific legislation. **We do not therefore recommend any amendments to the Constitution, 1996.**

2.3.11.2 In the light of the foregoing and after some reflection, the Commission would like to submit, for consideration, the following general principles which we believe should underlie legislative reform in this field. These principles must be integrated with the principles on children presented in the Issue Paper and further developed at the workshops.

2.4 PRINCIPLES FOR THE MANAGEMENT OF SEXUAL OFFENCES

2.4.1 Introduction

2.4.1.1 The following principles promoted in the Issue Paper were originally developed by a working group in Kwazulu Natal that convened after the conference 'Sexual Offences Against Children, The Legal System and the Management of the Child and Offender' and were further refined through consideration of the relevant international instruments, the Constitution of the Republic of South-Africa, and the integration of comments offered at the workshops held in the nine provinces as well as the submissions to the Issue Paper.

2.4.1.2 A considerable amount of time and energy was spend during the consultative phase on the discussion of the said principles. Most of the respondents agreed with the stated principles.⁸⁹ Several suggestions for improving the formulation and wording were made and several respondents commented on the absence of a preventative approach to combatting child abuse.

2.4.1.3 With the expansion of the scope of the investigation to include sexual offenders and adult victims it has become necessary to consider whether such a set of principles - with its focus on changes to the present system, structure, process and legislation - can be extended to adults as well. The ideal would obviously be to have one set of principles underlying one new sexual offences act, but this issue needs to be discussed.

89 See, for instance, the submissions by the **National Council for Persons with Physical Disabilities in South Africa**; the **SAPS Provincial Commander, Serious Violent Crime, KwaZulu Natal**; **Mr Neil van Dokkum**; the **Johannesburg Child Welfare Society**, etc.

2.4.1.4 It is also important to point out that a set of guiding principles should not only underlie the substantive law, but also, and perhaps more importantly, the process and procedural law aspects. The following principles outlined below will guide the formulation of both the substantive and procedural law as regards sexual offences. We will therefore again raise the issue of a set of guiding principles in the discussion paper following this one.⁹⁰

2.4.2 The list of principles presented in the Issue Paper, as amended or supplemented

2.4.2.1 For the benefit of the reader, the principles as formulated in the Issue Paper are again presented. The list of principles has, however, been amended and supplemented to provide for principles applicable to victims generally and where necessary to children specifically. Principles 15 to 21 were not put forward for discussion in the Issue Paper and in the absence of specific submissions will therefore will not be discussed individually. These additional principles are in keeping with the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. Comment is welcomed on the inclusion of these Principles.

PRINCIPLES FOR THE MANAGEMENT OF SEXUAL OFFENCES

Any person involved with the management of sexual offences 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. To ensure the avoidance of systemic secondary victimisation of victims of sexual offences with the development and implementation of procedures to protect victims and by the establishment of an inter-sectoral, inter-disciplinary approach to the management of all sexual offences.
4. All professionals and role players involved in the management of sexual offences against children should be properly trained.
5. Victims may not be discriminated against, either directly or indirectly, on the grounds of race, colour, gender, ethnic or social origin, sexual orientation, age 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.

90 As stated in Chapter 1 of this Discussion Paper, we envisage another discussion paper on process and procedure and another on adult sex work and adult pornography.

7. Victims should be allowed to express their opinions and concerns, and 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, victims 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 victim 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 victim is entitled to have procedures dealt with expeditiously in time frames appropriate to that victim and the offence.
 - e. Victims should 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.
11. In deciding sanctions for a person who has been found guilty of committing a sexual offence:
 - a. The sanctions applied should ensure the safety and security of the victim, family and community;
 - b. The sanctions should promote the restoration of the victim, 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 victims, 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 victim 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.
15. Victims should be treated with compassion and respect for their dignity.
16. Victims should be ensured access to the mechanisms of justice.
17. Victims should be informed of their rights and the procedures within the system which affect them.
18. Victims should be provided proper assistance throughout the legal process.
19. Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependents.
20. Government should review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions.
21. Victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community based and other means.

2.4.3 Discussion of the principles

In the following section the principles are dealt with *seriatim* and due cognisance is taken of the respective submissions received and comments made at the workshops. Where appropriate, changes are recommended.

Principle 1: The best interest of children shall be paramount.

2.4.3.1 Most respondents⁹¹ do not query the importance of this constitutional principle, although several comment on the meaning, or lack of meaning, of the phrase ‘the best interest of the child’.⁹² It is also noted that ‘best interest’ of the child is often determined by judges and magistrates who are particularly untrained in child psychology and child development.⁹³ Multi-disciplinary input is required to determine what is in the best interest of a child.

2.4.3.2 There were also calls to define the ‘elusive’ concept ‘the best interests of children’ and suggestions are made to the effect that the definition of the phrase should include the mental, physical and emotional well-being of the child, and be derived through a holistic

91 Contra **Mr L I Carr** who says: ‘The concept of the best interests of the child is a standard used in our legal system and many other legal systems to inform the determination of decisions regarding children. While this sounds like a good principle, “the best interests of the child” is, in fact, a meaningless platitude that helps to conceal more than it reveals’.

92 **Tshwaranang Legal Advocacy Centre, Mr K Worrall-Clare, Department of Justice, Mr Leonard I Carr**

93 **Tshwaranang Legal Advocacy Centre.**

approach. Others are of a different view. **Ms W L Clark** says that logically the only meaning and application of the phrase should be a literal one. She says this should not be too difficult to apply in most instances. She further argues that where the child's constitutional rights conflict with those of another individual, then the child's rights should take precedence over that of the other individual, for the child is nearly always in a much more vulnerable position. Nonetheless, problems may be encountered in assessing what is in the best interest of any individual child, as this may differ from child to child. This calls for creative thinking. **Supt N Nilsson** and **Insp G Riedeman** of the SAPS Youth Desk, Western Cape argue that meaning of the phrase be determined in accordance with the test for the 'normal reasonable person'.

2.4.3.3 Another point made was that it is important to realise that the child's best interests must be paramount in all matters (civil, criminal and administrative) affecting the child and not only actions. We will take this issue into account in our reformulation.

2.4.3.4 *We therefore recommend:*

The best interests of the child shall be paramount in every matter concerning the child.

Principle 2: Unless the safety of the child and the community requires otherwise, restorative and rehabilitative alternatives shall be applied.

2.4.3.5 *From feedback gathered at the workshops it appears that the balance of the sentence is wrong. Alternatives were suggested and we concur with the following reformulation:*

Restorative and rehabilitative alternatives shall be prioritized and applied unless the safety of the child and the community requires otherwise.

Principle 3: To ensure the avoidance of systemic secondary victimisation of victims of sexual offences with the development and implementation of procedures to protect victims and by the establishment of an inter-sectoral, inter-disciplinary approach to the management of all sexual offences.

2.4.3.6 In its submission, the Association for Persons with Physical Disabilities, Northern Cape, proposes the establishment of a multi-disciplinary team stationed in a single place in order to avoid secondary trauma. A code of conduct should exist for such teams.⁹⁴

2.4.3.7 *We therefore recommend:*

To ensure the avoidance of systemic secondary victimisation of victims of sexual offences with the development and implementation of procedures to protect victims and by the establishment of an inter-sectoral, inter-disciplinary approach to the management of all sexual offences.

Principle 4: All professionals and role players involved in the management of sexual offences against children should be properly trained.

2.4.3.8 The need for selection and screening mechanisms and proper training of all role players and especially magistrates and judges was a recurring theme at all the workshops. This is also reflected in the submissions. **Supt N Nilsson** and **Insp G Riedeman**⁹⁵ state that training should be multi-disciplinary and cover all the sectors involved. **Mr L I Carr** says part of the training of professionals should be giving them an understanding of how they participate in systems of power and how their participation in systems of power may result in them colluding with structures in society which give rise to or facilitate or conceal abuse. Insight into how they contribute to abuse by claiming power based on expertise should be given. How such practices undermine and breakdown the existing knowledge in communities, thereby disempowering communities, would then become clear.

2.4.3.9 **Mr K Worrall-Clare** is of a similar view.⁹⁶ He says:

94 This was suggested in the combined report by the members of **Child Protection Units of the SAPS, KwaZulu Natal**.

95 **SAPS Youth Desk, Western Cape**.

96 See also the submission by the **National Council of Women of South Africa** who argues that magistrates with additional qualifications in dealing with children's matters should be entitled to an appropriate salary increase.

In pursuance of the “best interests of the child” judicial officers should be trained and re-trained in matters that concern the child. This training should also be extended to the Commissioner of the Child Welfare (which should have already been a priority seeing that it is the essential content of the occupation).

Judicial officers need training in the following areas of concern:

- (a) the needs of the victim and his or her family
- (b) the trauma of the child victim
- (c) the effects of judicial proceedings on the child
- (d) the evidence of the child witness
- (e) international developments in child law.

2.4.3.10 *We therefore recommend:*

All professionals and role players involved in management of sexual offences against and by children should be properly and continuously trained after going through a proper selection and screening process.

Principle 5: Victims may not be discriminated against, either directly or indirectly, on the grounds of race, colour, ethnic or social origin, sexual orientation, age and developmental level, disability, religion, conscience, belief, culture or language.

2.4.3.11 The inclusion of this constitutionally entrenched principle did not elicit any strong views. Participants at the workshops were of the view that the principle should make it clear that discrimination on the basis of disability includes discrimination on mental and physical disability. This point was also forcefully put by **DICAG**⁹⁷ in its submission:

People with severe intellectual or mental disabilities need very specific considerations in order to ensure adequate and relevant protection against sexual and gendered violence ...

2.4.3.12 We believe our reformulation of this principle should address these concerns and accordingly we propose:

97 The **Disabled Children’s Action Group**; submission prepared by Ms W Sait, the national director.

Victims may not be discriminated against, either directly or indirectly, on the grounds of race, colour, ethnic or social origin, sexual orientation, age, developmental level, physical or mental disability, religion, conscience, belief, culture or language.

Principle 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.

2.4.3.13 At the workshops, it was suggested that a multi-disciplinary team should be put in place before the matter goes to court; that protection and provision should be better defined; that all disciplines should be extended to include all involved parties. At the workshops and in the submissions the unacceptable long delays in bringing to court matters of child sexual abuse and finalising cases were repeatedly mentioned and the need for specialized equipment which would minimize court delays was emphasized. **Supt Nilsson** and **Insp Riedeman**⁹⁸ make the valid point in their submission that provision should be made for long-term after-care support of child victims.

2.4.3.14 *We therefore recommend:*

The vulnerability of children entitles them to speedy and special protection and provision by all disciplines and involved parties during all phases of the investigation, the court process, and thereafter, including the implementation and implications of sentencing the sexual offender.

Principle 7: Children should be allowed to express their opinions and concerns, and be involved in all decisions, and to have their opinion taken seriously in any matter affecting them.

2.4.3.15 The **Association for Persons with Physical Disabilities** concurs that children have the right to express an opinion and to be involved in all decisions affecting them directly.

The Association, however, does submit that the age and level of maturity of the child should be taken into consideration. At the workshops, and especially at the more rural ones, it was argued very firmly that children also have an obligation and responsibility to listen to their parents and other adults and elders. It was therefore argued that this principle should be limited as communication involves a two way process.

2.4.3.16 We do accept that children have responsibilities which become more as children develop and grow older, but acknowledge that action is not prescriptive on child's opinion and involvement. It is also recognised that child and adult victims alike should be accorded the same treatment in this regard.

2.4.3.17 *We therefore recommend:*

Victims have the right to express an opinion, to be involved in all decisions, and to have their opinion taken seriously in any matter affecting them.

Principle 8: Together with all due process and constitutional rights, victims have these additional rights:

- C 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.**
- C 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 the placement.**
- C A victim is entitled to have procedures dealt with expeditiously in time frames appropriate to that victim and the offence.**
- C Victims have the right to legal representation in civil, criminal and administrative proceedings.**

2.4.3.18 The majority of the respondents agree with this particular principle.⁹⁹ In its submission, the **Association for Persons with Physical Disabilities** points out, however, that principle 8(c) stands in contradiction to principle 1, the argument being that the best interest of the child should be the overriding concern, in all cases, including removal proceedings. The **Association** also points out that if the offender is a family member of the victim, then the offender should be removed from the family and not the child. The **Association** also submits that places of safety are not suitable and proposes that sexually abused children should rather be placed with a foster family if there is no other option but to remove the child.¹⁰⁰

2.4.3.19 Most submissions on this principle relate to 8(d) and it was suggested that specified and defined time frames be determined. As stated above, objections to the unacceptably long delays in bringing to court matters of child sexual abuse and finalising cases were repeatedly raised.¹⁰¹

2.4.3.20 Principle 8(e) might be superfluous in the light of the constitutional right of the child to legal representation discussed above.¹⁰²

2.4.3.21 *We therefore recommend:*

Together with all due process and constitutional rights, victims have these additional rights:

- (a) To have present at all decisions affecting them a person or persons important to their lives.*
- (b) To have matters explained to them in a clear understandable manner appropriate to their age and in a language which they understand.*

99 **Supt Nilsson** and **Insp Riedeman** of the SAPS Youth Desk, Western Cape suggest, as the ideal situation, the designation of a 'child worker' to support the child throughout the whole process.

100 See also the submission by **Mr L I Carr** who sees removal of victims as merely another form of secondary victimisation.

- (c) *That children may remain in the family during the investigation and whilst awaiting a final resolution of the matter and to periodic review of the placement.*
- (d) *To have procedures dealt with expeditiously in clearly defined time frames appropriate to that victim and the offence.*
- (e) *The right to legal representation in civil, criminal and administrative proceedings.*

Principle 9: The family and community are central to the well-being of the child. Therefor in any decision affecting the child consideration should be given to:

- C Ensuring that the family, community and other significant role-players are consulted in all decisions relating to the child.**
- C How decisions relating to the offender will affect the child, family and community.**
- C The particular relationship between the offender and the child.**
- C Keeping disruptive intervention into child, family and community life to a minimum in order to avoid secondary victimization to the child.**

2.4.3.22 In the discussion of this principle, concern was expressed about confidentiality and privacy. Some respondents question the justification for bringing in the family where the child prefer not to involve his or her family or even let the family know of the abuse. Regard must be had to the fact that the overriding concern remains the best interest of the child and that children should, in accordance with principle 7, be involved in all decisions affecting them directly. A decision to involve the family surely merits the approval or at least consultation with the child involved.

2.4.3.23 We do deal with the issues pertaining to privacy and confidentiality under principle 13 below and it is therefore unnecessary to propose any changes to the principle under consideration.

Principle 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.

2.4.3.24 Strong emphasis was placed at the workshops on offenders taking responsibility for their actions. **Mr L I Carr** says the shame and the responsibility must be left squarely on the abuser. He argues that the tendency to remove victims from the situation in which they are being abused in order to protect them merely implies a form of secondary victimisation.

2.4.3.25 In a different vein, the **Department of Local Government, Housing and Land Administration, Mpumalanga Provincial Government** calls for a radical review of the ethics and training of legal practitioners defending criminals (and sexual offenders) in keeping with the new constitutional dispensation. The Department states:

Presently, it is not a legal practitioner's duty to pass judgement on his/her client's legal blameworthiness. All he/she has to do according to the ethics is to defend his/her client to the best of his/her abilities. If we are to give meaning to principle 10, practitioners must be guided, in the discharge of their briefs, by a *minimum content of morality* in keeping with the *naturalistic* 'spirit and objectives' of the Constitution. Only then can practitioners - freed from the *narrow positivistic approach* - help build a society envisaged by the Constitution. (Emphasis in the original.)

2.4.3.26	<i>We do not recommend any amendments to the principle.</i>
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Principle 11: In deciding sanctions for a person who has been found guilty of committing a sexual offence:

- C** The sanctions applied should ensure the safety and security of the victim, family and community.
- C** The sanctions should promote the restoration of the victim, family and community.
- C** In addition:
- C** The young sexual offender bears special consideration in respect of sanctions and rehabilitation.

- C In considering the long-term goal of safety and security of victims, families and communities, the possibility of rehabilitating the sexual offender should be considered.**
- C The interests of the victim should be considered in any decision regarding sanctions.**

2.4.3.27 Workshop participants were very vocal on the appropriate sentence for sexual offenders. Suggestions ranged from reintroducing the death penalty, castration or amputation, a register for convicted sexual offenders or even alleged sexual offenders, to diversion and rehabilitation. It proved to be an extremely controversial issue with many differing opinions: Some favour harsher and longer sentences; others focus on the need for rehabilitation of offenders to protect the community from re-offending; while a third group seems to favour an integration of both harsher sentences with a strong rehabilitative component. The question of sentencing of sexual offenders will be developed in the second discussion paper on process and procedure which will be published shortly after this discussion paper.

2.4.3.28 Indicative of the tough approach is the submission of the **Association for Persons with Physical Disabilities**. The **Association** submits that persons who suffer from mental illness should also be held accountable for their actions, because people sometimes get away with their 'evil deeds claiming that they are mentally ill'. Such an approach will nullify our current concept of wrongfulness.

2.4.3.29 Workshop participants were also of the view that positive duties, perhaps linked to criminal sanctions, should be placed on those responsible for ensuring the safety and security of the child. Several participants, for example, blamed the police for not taking immediate action where the victim or his/her family are being threatened. It was argued that by placing a positive duty to act, failure to perform that duty can lead to criminal or civil law sanctions being applied. The idea is obviously to get the police to act (especially in cases typified as 'domestic squabbles'), but, as was pointed out by members of the SAPS attending the workshops, some members of the police would then not get involved at all for fear of prosecution.

2.4.3.30 It was also pointed out that the principles make no provision for participation of the child in either the pre-trial or the trial processes itself. It was felt that victims of sexual abuse were entitled to be informed of bail applications by the accused, to raise objections to bail being

granted, to be treated in a dignified manner in court proceedings, to be protected as a witness, to a speedy resolution of the trial, etc. This issue merits special consideration.

2.4.3.31 *As for the formulation of the existing principle, it is recommended that the provisions of principles 11(d) and (e) be made mandatory.¹⁰³ The rest of the principle can remain unchanged.*

Principle 12: Cultural diversity shall be taken into account in all matters pertaining to the victim, offender and to their communities.

2.4.3.32 Respondents and workshop participants were unanimous in their view that the existence of cultural differences is no justification for or licence to commit sexual offences. It was also strongly felt that the fact that the court often excludes customary forms of abuse and fails to incorporate cultural practices such as cleansing rituals and the payment of damages, should receive attention.

2.4.3.33 *We accordingly recommend that no changes be made to this principle.*

Principle 13: The victim has the right to protection from publicity about the offence

2.4.3.34 The issue of confidentiality and the right to privacy was also raised in the discussion of principle 9 above.

2.4.3.35 On the one hand, respondents were of the view that the identity of the victim must be protected as fear of exposure does affect the disclosure of many incidents of sexual abuse. This is particularly true of child victims.¹⁰⁴ On the other hand, some respondents felt that any publicity is good publicity as it creates public awareness of the broader issue and mobilises action. These two views are not necessarily incompatible.

103 The word 'should' in both principles 11(d) and (e) therefore becomes 'must'.

104 The example given at one of the workshops involves a girl of 15 years who went to a nightclub without the permission or knowledge of her parents. The girl is raped on the way home. Should her family be told or consulted about this ordeal if the girl explicitly asks that this not be done?

2.4.3.36 **Mr L I Carr** states in his submission that a victim has the right to protection from publicity surrounding the offence. He argues, however, that by protecting the victim by not publishing his/her name, it is implied that abuse is stigmatising. He believes victims must be given a choice in this regard. He continues:

By saying that victims need not to be protected from publicity is really implying that victimhood is a stigma and something to be hidden as if it is something to be ashamed of. This reinforces a belief system in our society that victims carry the blame for having been victimised.

2.4.3.37 We agree with **Mr Carr** that victims should be given the option to decide for themselves whether or when they want to speak out or not. This need not be reflected in the principle involved, as any person can waive any right.

2.4.3.38 We further recommend that this principle should come earlier in the list and be clarified further to emphasize the need to respect the wishes of the child and his/her rights to confidentiality and privacy.

2.4.3.39 *We therefore recommend:*

The victim has the right to confidentiality and privacy and to protection from publicity about the offence.

Principle 14: The victim 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.

2.4.3.40 The submissions and respondents at the workshops focussed on the practical application of this principle. Often the duty to provide reparation was placed upon the State, especially where the offender has no means. The idea of a victim compensation fund was also frequently mentioned.

2.4.3.41 *We therefore do not recommend any changes to this principle.*

2.4.4 Evaluation and recommendation

2.4.4.1 Women's or children's issues cannot be dealt with in isolation. Children are the men and women of tomorrow. Mothers, fathers and society influence the way children grow up and ingrain in their children the same stereotypes and gender biases the parents grew up with. It therefore makes sense to develop one set of principles to address the needs of victims of sexual offences. Such a set of principles places the focus on victims of sexual violence regardless of whether the victim is a child or an adult or a male or a female.

2.4.4.2 The principles should underlie all legislative reform and should be used as a yardstick by all role-players involved in the field of sexual offences. If we do reach broad consensus on the principles relating to children, as we believe we have, and if we do accept the need for such principles, as we believe we must, then the following questions remain:

- C *Can the principles developed with a particular child focus be made of universal application to cover adults as well?*
- C *How can these principles best be used? In other words, what do we do with these principles once we have them?*
- C *How do you legislate principles?*

2.4.4.3 We propose to re-open the debate and to discuss and develop a comprehensive set of principles underpinning sexual offences in general. This should include an adult focus. As for what we can do with these principles once developed, some of the options are:

- C Include the principles as the long title of the new sexual offences act.
- C Include the principles as the preamble of the new sexual offence act.
- C Include the principles as a substantive legal provision in the new sexual offences act.
- C Include the principles in a separate code of conduct.
- C Include the principles in a separate children's charter.
- C Include the principles in a separate victim's charter.

2.4.4.4 Adopting any of these approaches will have specific consequences and will warrant careful consideration. Comments are invited.

2.5 SUMMARY OF RECOMMENDATIONS

- C We believe there is merit in the proposal of the Johannesburg Child Welfare Society to undertake an audit of international instruments not yet signed or ratified by South Africa. On the basis of such an audit an informed decision can be made as to what other instruments South Africa needs to sign, ratify or accede to in order to better protect children and women.*
- C We do not recommend any amendments to section 28 of the Constitution, 1996.*
- C We do recommend specific changes to the principles for the management of sexual offences against and by children. We also recommend that the principles be developed further to encompass both the adult and child focus and suggest some options for what can be done with such a comprehensive set of principles once developed.*
- C On the rights of women, we do not recommend the inclusion of a specific clause on women's rights in the Constitution. We do, however, support the principle of equality legislation.*

CHAPTER 3

3. THE REFORM OF THE SUBSTANTIVE LAW

3.1 INTRODUCTION

3.1.1 This Chapter embodies the essence of this discussion paper. It is based on the analysis of the substantive law as set out in chapter 4 of the Issue Paper. It contains our deliberations on the substantive law relating to sexual offences and our recommendations on what we believe should be a sexual offence. Matters of process and procedure, as previously stated, will be addressed in a subsequent discussion paper.

3.2 THE ROLE OF THE CRIMINAL LAW

3.2.1 Criminal law is that branch of national law that indicates what actions expose a person to punishment by the state, and what that punishment will be.¹⁰⁵ Criminal law has its origin in the human instinct for vengeance, and the history of criminal law systems mostly consists of a process of replacing private vengeance with state punishment.¹⁰⁶ Its object is to promote the welfare of society and its members by establishing and maintaining peace and order.¹⁰⁷

3.2.2 *Crime* refers to conduct which society intuitively believes to be wrong, disapproves of and which is believed to deserve some form of retaliation or punishment.¹⁰⁸ Such conduct is then declared by the law (either common law or statutory law) to be criminal.¹⁰⁹ *Punishment* is

105 **LAWSA** Vol 6 3. See also Burchell & Milton **Principles of Criminal Law** (second edition) Kenwyn: Juta 1997 1.

106 Burchell and Milton **Principles of Criminal Law** 5.

107 Burchell and Milton **Principles of Criminal Law** 1-2. For comparative purposes it is useful to examine the American Law Institute's Model Penal Code (Article II,02(1)) regarding the general objectives of the criminal law in a modern legal system. They describe the purposes of criminal law as: a) to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests; b) to subject to public control persons whose conduct indicates that they are disposed to commit crimes; c) to safeguard conduct that is without fault from condemnation as criminal; d) to give fair warning of the nature of the conduct to be an offence; e) to differentiate on reasonable grounds between serious and minor offences (as quoted in Visser and Vorster **General Principles of Criminal Law through the Cases** 7-8.)

108 Burchell and Milton **Principles of Criminal Law** 1-2; **LAWSA** Vol 6 4.

109 **LAWSA** Vol 6 4.

the sanction that is inflicted by the state upon a person who has committed a crime. It involves deprivation or the infliction of suffering and may take the form of the loss of life, liberty or property or the infliction of physical pain.¹¹⁰ Punishment is justified on the grounds that it prevents crime either directly or indirectly through the threat of harm (*deterrence*); it reforms or *rehabilitates* criminals; and it effects *retribution* upon the criminal for contravening the law.¹¹¹ The criminal law is thus a social mechanism that is used to coerce members of society, through the threat of punishment to abstain from conduct which is harmful to various interests of society.

3.2.3 However, criminal law obviously does not serve to protect every societal interest. It has been contended that the interest in question should be so valuable that peaceful and orderly societal coexistence cannot be guaranteed without its protection through the criminal law, even though it may also be protected through other branches of the law.¹¹² The criminal law is also not a device whereby all social wrongs in society should, or even can, be corrected. Nor is it, according to the prevailing view, a device through which standards of morality can or should be endorsed.¹¹³ There are other less costly devices and institutions through which moral wrongdoing can be, and is,¹¹⁴ censured and treated, and whereby values are inculcated. These include the family, the peer group, schools, churches and welfare institutions.

3.2.4 The creation of statutory offences lies at the discretion of the legislature. Laws are made to protect certain values and interests. As society develops, its values and interests may change resulting in a need to regulate different forms of conduct.¹¹⁵ The principal interests that motivate the legislature to criminalise by law certain actions are the need to maintain or enhance human and civil rights; to maintain a common community morality; to advance the collective welfare; and to protect government interests. The decision to criminalise certain actions by law is a government decision which has important implications: it implies a social cost

110 **LAWSA** Vol 6 3; Burchell and Milton **Principles of Criminal Law** (second edition) Kenwyn: Juta 1997 1-2.

111 Burchell and Milton **Principles of Criminal Law** (second edition) 1-2; Snyman **Strafreg** (third edition) Durban: Butterworths 1992 8; **LAWSA** Vol 6 5.

112 **LAWSA** Vol 6 14.

113 See also Lötter A **Moraliteitswetgewing en die Suid-Afrikaanse Strafreg** LLD thesis, University of Pretoria 1991; Van Rooyen H J N **Polisiëring van Moraliteitsoortreders** MA thesis, UNISA 1987; Brits J J **Seksuele Misdrywe met Jeugdige** - 'n **Kritiese Beskouing** LLM thesis, UNISA 1994.

114 Jones J T R & Lupton M L 'Liability in delict for failure to report family violence' 1999 (116) **SALJ** 371.

115 Burchell & Milton **Principles of Criminal Law** (second edition) Kenwyn: Juta 1997 25.

for those who undergo punishment, namely the stigma attached to a conviction for a crime and the resultant 'criminal record' that follows the offender everywhere; and it carries the economic cost of maintaining and expanding a criminal justice system. If the benefits to society are not commensurate to the social or economic costs of having the particular crime, then the decision to criminalise cannot be justified.¹¹⁶

3.2.5 Not every standard of conduct that is fit to be observed is fit to be enforced through the law, more particularly the criminal law. This means that society should not be willing to utilise its 'most drastic legal weapon'¹¹⁷ to attempt to correct every type of deviant or antisocial conduct.¹¹⁸ Yet, there is a strongly supported view that moral wrongdoing must be criminalised if there is evidence of harm to society resulting from the incidence of such conduct.¹¹⁹

3.2.6 However, also significant, especially in the sexual offences context, is the symbolic or educative function of the criminal law.¹²⁰ The criminal law performs a vital role in the community by making significant moral denunciations of unacceptable conduct. In declaring certain types of sexual behaviour to be criminal, the law plays a crucial part in the development, maintenance, and perhaps even establishment, of community attitudes and expectations. This symbolic function may be particularly relevant in the sexual context because the law can and does influence community attitudes about relationships, particularly between women and men and adults and children.

3.2.7 The concepts of 'crime', 'punishment' and 'criminal' are closely interrelated in that crime is conduct in respect of which punishment is inflicted, while punishment is the sanction which is inflicted by the state upon a person who has committed a crime. For our purposes this

116 Burchell & Milton **Principles of Criminal Law** 25, 31 - 32.

117 The criminal sanction is the law's ultimate threat. It is at once uniquely coercive and uniquely expensive and should be reserved for what really matters. If it is over-utilised the more common place it becomes with a resultant diminishing of the stigma attached to conviction and to the moral authority of the criminal law: Burchell & Milton **Principles of Criminal Law** 32; **LAWSA** Vol 6 9-10.

118 **LAWSA** Vol 6 11.

119 **LAWSA** Vol 6 11. See also Burchell & Milton **Principles of Criminal Law** 34 - 37 for a background to the long and controversial debate on whether it is proper to enforce morality (sexual or religious) through the medium of the law.

120 See also the Law Reform Commission of Victoria **Discussion Paper 2: Rape and Allied Offences: Substantive Aspects** August 1986 par 1.13.

should be borne in mind, since subjecting certain conduct to punishment should not be inconsistent with the goals of punishment.¹²¹

3.2.8 Although the ultimate aim of the criminal law and of punishment may be the protection of society through the prevention of crimes, it must be realised that as long as the criminal law and punishment are employed to achieve this aim, one is not dealing with a neutral regulatory or correctional device, but with a tool - 'society's most drastic legal sanction' - which has a retributive character, implying the imposition of reproach and censure for reprehensible conduct.¹²²

3.2.9 In general, it has been said that there has been an over-utilisation¹²³ of the criminal sanction in modern westernised societies which resulted in an adverse effect upon the administration of criminal justice including *inter alia* lessening the authority of the criminal law; stigmatising individuals as criminals; and overloading the criminal justice system.¹²⁴ In view of the fact that criminalisation would thus not always be desirable, certain criteria indicating when it would be appropriate to criminalise conduct and when not, have been developed.¹²⁵ These ultimately turn on balancing the social gains that will accrue from the successful prevention or reduction of the conduct in question, against the social, human and financial costs of invoking the criminal sanction. There is little guidance on how this is determined.

3.2.10 The general rule is that, in addition to an unlawful physical condition (*actus reus*), criminal liability requires an unlawful mental condition (*mens rea*), for 'a crime is not committed if the mind of the person doing the act in question be innocent'.¹²⁶ The mental element for a

121 Burchell & Milton **Principles of Criminal Law** 33, 38 -49; Snyman **Strafreg** 19 - 27; **LAWSA** Vol 6 6 -7.

122 **LAWSA** Vol 6 5.

123 See also Lötter 'Decriminalisation: A principled approach' 1994 **Consultus** 130.

124 A proliferation of crimes with a consequent increase in the incidence of criminal acts that must be investigated and prosecuted will tend to clog the machinery of law enforcement possibly leading to selective and arbitrary enforcement and a general decline in the effectiveness of the system as a whole: Burchell & Milton **Principles of Criminal Law** 25; **LAWSA** Vol 6 9-10.

125 The Canadian Committee on Corrections **Towards Unity: Criminal Justice and Corrections** [1969] 11-12, for instance, suggested the following criteria for criminalisation: No act should be criminally proscribed unless its incidence, actual or potential, is substantially damaging to society; no act should be criminally prohibited where its incidence may be adequately controlled by forces other than the criminal process; and no law should give rise to social or personal damage greater than it was designed to prevent. See also Burchell & Milton **Principles of Criminal Law** 33.

126 Per Solomon JA in **R v Wallendorf** 1920 AD 383 at 394; cf **R v H** 1944 AD 121 at 125; **S v Oberholzer** 1971 4 SA 602 (A) at 610H; **S v De Blom** 1977 3 SA 513 (A) at 529A.

crime may be either intention (*dolus*) or negligence (*culpa*). **All common law crimes require mens rea in the form of intention except for culpable homicide for which negligence is sufficient.** The position is, however, different in the case of statutory offences as a statute may expressly exclude *mens rea* as a prerequisite of liability. The court may also conclude that the implied intention of the legislature was not to require *mens rea* as an element of the statutory offence in question. These are instances of ‘strict liability’.

3.2.11 Criminal law in its broadest sense also includes the *process* of detection, apprehension, trial and punishment according to which a person suspected of having committed an offence is brought before the court and which the court applies in determining whether or not he or she is to be found guilty.¹²⁷

3.2.12 The criminal justice system (by resort to arrest, trial and punishment) proceeds mainly by way of interference with basic civil rights of life, liberty and property. In modern Western liberal democracies, these interferences, while permitted, are subject to the Rule of Law, and in countries like South Africa, to the Bill of Rights as well. This implies that the nature and manner of the interference with civil rights is regulated by principles and laws designed to ensure that the criminal law is applied with respect for human rights and according to agreed norms of justice and fairness.¹²⁸

3.2.13 Any statutorily created crime will clearly have to pass the test of compatibility with the provisions of the Constitution: since the modern democratically representative legislature expresses the will of the majority of the people, it follows that the legislature in creating new crimes reflects the current values and attitudes of people in relation to the type of conduct that society considers to be harmful to itself and its members.¹²⁹

3.2.14 Several respondents were also of the view that the criminal law should be used as the mechanism to deal with sexual abuse, despite its flaws.¹³⁰ As **Mr A J van Wyk** puts it: ‘The criminal law is still the best tool and weapon with which to combat the attacks of thugs on the bodies of children’.

127 Cf Burchell and Milton **Principles of Criminal Law** 2-3; **LAWSA** Vol 5 Part 2 122.

128 Burchell and Milton **Principles of Criminal Law** 57; Snyman **Strafreg** 33.

129 Burchell and Milton **Principles of Criminal Law** 29.

130 The **SAPS Area Commissioner, Legal Services, East Rand**; **Mr P Nel** (public prosecutor, Port Elizabeth).

3.2.15 Recommendation

We obviously concur with these sentiments and see the criminal law as the appropriate mechanism to address sexual abuse and violence.

3.3 CODIFICATION OF THE COMMON LAW PROVISIONS RELATING TO SEXUAL OFFENCES

3.3.1 In the Issue Paper the question was posed whether the common law in respect of sexual offences should be codified.¹³¹ The response to this question is vast and varied and can loosely be categorized into two groups, namely those in favour of codification of the common law provisions and those not in favour. Some of those in favour of the retention of the common law offences nevertheless go on to suggest certain changes to some common law offences which will involve statutory intervention. A third group argues the need for a single umbrella sexual offences act to bring together all the common law offences and statutory offences related to sexual offences.¹³² Such a step would also involve statutory intervention, but on a much larger scale.

3.3.2 Proponents advocating the codification of the common law provisions relating to sexual abuse do so for a variety of reasons, the chief reasons being to address problems in the common law and to avoid inconsistency and overlapping.¹³³

131 **Professors Snyman and Swanepoel** make the point that the question posed in the Issue Paper can only relate to whether the common law **provisions** relating to sexual offences should be codified or not.

132 **Department of Public Safety and Security, Gauteng Provincial Government.** See also the gender critique of Queensland's **Criminal Code** with particular reference to the draft Criminal Code Bill, 1994 prepared by Ratus Z **Rougher than Usual Handling** (fully revised and updated second edition) p 19 - 20 on the structure of sexual assault laws within criminal codes.

133 **FAMSA; South African Council for Child and Family Welfare** (23 in favour); **Association for Persons with Physical Disabilities, Northern Cape; Professor CR Snyman and JP Swanepoel** (UNISA); the **Johannesburg Child Welfare Society.**

3.3.3 Proponents advocating the retention of the common law offences¹³⁴ are of the opinion that the common law is simple, clear and effective. They voice the concern that codification might lead to interpretation problems and or loopholes. It is also frequently stated that it is both undesirable and unnecessary to change the terminology relating to the various common law sexual offences.¹³⁵

3.3.4 Codification of the common law provisions relating to sexual offences need not be to the exclusion of the existing common law offences. It is not an either or situation. While we share the ideal to have one comprehensive sexual offences act for children and adults alike, we also see the merit in retaining some of the present common law offences. For one thing, it might be impossible to define a statutory offence to encompass what is now prosecuted as indecent assault or crimen iniuria. More importantly, however, is the fact that statutory law by its very nature lacks the internal dynamics and strength inherent in the common law to continuously adapt to changing circumstances.¹³⁶

3.3.5 Recommendations

<i>C</i>	<i>We do not recommend the repeal of all common law sexual offences.</i>
<i>C</i>	<i>We do recommend statutory intervention to address problems in the common law and the existing statutory law.</i>
<i>C</i>	<i>We do propose to adopt one single new sexual offences act.</i>
<i>C</i>	<i>Although this Discussion Paper and the draft bill contained in Chapter 5 focus on the substantive law relating to sexual offences, it is envisaged that matters of process and principle (the subject matter of the next discussion paper) will form an integral part of the eventual new sexual offences act.</i>

3.4 RAPE

134 **Ms R Blumrick; Ms Clark**; workshop 28 August 1997; **South African Council for Child and Family Welfare** (7 contra); **Sr M D Potter** (Agape School for Cerebral Palsied).

135 **Mr A J van Wyk; Mr P Nel**, Prosecutor, Port Elizabeth.

136 Statutes need continuos amendments to keep up with changing circumstances.

3.4.1 Introduction

3.4.1.1 Rape is a crime that is not comparable to any other form of violent crime.¹³⁷ Unlike other crimes against the person, rape not only violates a victim's physical safety, but their sexual and psychological integrity. It is a violation that is not only marked by violence, but by a form of 'sexual terrorism'. The act of rape is invasive, dehumanising, and humiliating. It is a crime that is akin to torture.

The boundary of the body itself is broken by force and intimidation, a chaotic but choreographed violence.¹³⁸

3.4.1.2 Force, violence and subordination are central to the act of rape. The consequences for the rape victim are severe and life-long, and include the loss of the ability to trust, of freedom and identity.¹³⁹ For the rape victim, restitution is never fully realised even if the offender is 'brought to justice'. Rape victims, unlike other victims of crime, are not venerated for their bravery in coming forward with their experiences. Instead they are ignored, dismissed, questioned and shamed by the very people meant to support them - their families, communities, the criminal justice system and civil society in general.

3.4.1.3 In the Canadian judgment in *R v Seaboyer; R v Gayme*, L'Heureaux-Dubé J remarked as follows:¹⁴⁰

Sexual assault is not like any other crime. In the vast majority of cases the target is a woman and the perpetrator is a man (98.7 percent of those charged with sexual assault are men....). Unlike other crimes of a violent nature, it is for the most part unreported. Yet, by all accounts, women are victimized at an alarming rate and there is some evidence that an already frighteningly high rate of sexual assault is on the increase. The prosecution and conviction rates for sexual assault are among the lowest for all violent crimes. Perhaps more than any other crime, the fear and constant reality of sexual

137 In our discussion on rape, we rely heavily on the Discussion Document commissioned by the previous Deputy Minister of Justice, Dr Tshabalala-Msimang, entitled **Legal Aspects of Rape in South Africa**, 30 April 1999. We will refer to the document as **Legal Aspects of Rape**.

138 Dworkin A **Life and Death** 23.

139 See also Allan A 'Psigiiese gevolge van verkragting' 1993 (6) **SACJ** 186; Hansson D **What is rape trauma syndrome?** (1992); **Rape Trauma Syndrome: A Psychological Assessment for Court Purposes** (1993).

140 L'Heureux-Dube J (dissenting judgment) in *R v Seaboyer; R v Gayme* 1991 2 **RCS** 648 - 649.

assault affects how women conduct their lives and how they define their relationship with the larger society. Sexual assault is not like any other crime.

3.4.1.4 The effects of a sexual assault such as rape are considerable. There is the fear of harm experienced during the rape, accompanied by the realization that the victim may contract a venereal disease or the deadly HIV virus. The victim may become pregnant as a result of the rape and have to endure the trauma of deciding to terminate the pregnancy or bear the child. As a complainant in the criminal process, the rape victim suffers further victimisation. Not surprising, in the view of the law, rape constitutes the most serious non-fatal violation of the person and the self that can be perpetuated.¹⁴¹

3.4.2 The incidence of rape in South Africa

3.4.2.1 It is widely accepted that the statistics for reported rape reflect only a small percentage of the actual incidents of rape in South Africa. NICRO¹⁴² estimates that only 1 out of every 20 rapes is reported to the police while the South African Police Service¹⁴³ places the estimate of reported rapes at 1 out of every 35 rapes. Whatever the exact figure, it can be safely argued that there is substantial and significant discrepancy between the number of rapes that are reported to the police, the number of rapes that are revealed as a result of research and the actual number of rapes that occur in South Africa.

3.4.2.2 The reasons for this include the following:

- C The narrowness of the definition of the crime effectively excludes a number of acts that, although they do not fit into the legal definition of rape, are nevertheless still experienced as rape by both women and men;
- C The fear of not being believed;
- C Self-blame;
- C The anticipation of secondary victimisation by state officials and the legal system;
- C The fear of retaliation by the perpetrator; and

141 Milton **South African Criminal Law and Procedure Volume II** (third edition) 439 - 440.

142 National Institute for Crime Prevention and the Rehabilitation of Offenders.

143 **SAPS** Central Information Management Centre Website <http://www.saps.co.za/index.html>

C A lack of access to police and the legal system - especially in rural areas.¹⁴⁴

3.4.2.3 Even if we use only the reported cases of rape as a focal point, the number of rapes that are committed in South Africa is staggering.

3.4.2.4 In 1997, the South African Police Central Information Management Centre (CIMC) reported the following in its *Quarterly Report on Rape and Attempted Rape*:

C Between January and September of 1997, 36 147 rapes, including attempted rapes, were reported to the police nationally. This was a 28.9% increase from the first three quarters of the previous year.

C That the incidence of rape is again on the increase after showing signs of stabilisation during the first 6 months of 1997.

3.4.2.5 Comparing the South African crime ratios with 1994 Interpol ratios reported for 89 member states, the CIMC revealed that South Africa remains in an 'undisputed first place' as far as reported cases of rape are concerned.

3.4.2.6 More recent statistics reported by CIMC for the period of January to June 1998 show that for the first 6 months of 1998, 23 374 rapes were reported nationally. A breakdown of these figures for the Western Cape, where the only Sexual Offences Court was operating at the time,¹⁴⁵ reveals the following:

C	Cases reported to the police	:	2 898
C	Cases that went to court	:	1 690
C	Cases that were prosecuted	:	640
C	Number of accused found guilty	:	334
C	Number of accused found not guilty	:	306
C	Actual number of rapes ⁹	:	57 960

Broken down as percentages, these figures show that:

144 Artz L **Access to Justice for the Rural Women** (1998).

145 A Sexual Offences Court was instituted at Wynberg, Cape Town, on 3 March 1993.

- C Only 5% of incidents of rape are reported;¹⁴⁶
- C Only 56.62% of reported rapes were referred to court;
- C Only 18.67% of reported rapes were prosecuted;
- C Only 10.84% of reported rapes received guilty verdicts.

3.4.2.7 If we were to use the 1998 CIMC 6 month reported rape statistic (23 374) as an annual indicator of rape with the '*1 out of 20 rapes are reported*' estimate, the national figure for rape in South Africa for 1998 would be 934 960. If we use the '*1 out of every 35 rapes are reported*' estimate, the national figure for 1998 would be 1 636 180.

3.4.2.8 Both statistics and research reveal that the investigation and prosecution of rape yields unsatisfactory results. This conclusion is clearly indicated by the extremely low conviction rates referred to above, and also emerges from almost universally expressed views among rape complainants that they find the process of investigation and prosecution almost as traumatic as the rape or attempted rape.

3.4.3 The current common law definition of the crime rape.

3.4.3.1 Although the Commission concluded in its 1985 ***Report on Women and Sexual Offences in South Africa***¹⁴⁷ that there was no basis for redefining the offence of rape, this is no longer the case. As we will see, the definition of the common law crime of rape has, in recent years, been the subject of considerable criticism and debate.¹⁴⁸

146 Based on the estimate that only 1 out of 20 cases of rape are reported to the police.

147 The Commission partly justified this decision on the fact that the investigation was not born of the need to rationalise the criminal law relating to sexual offences in general and the strong objections from especially the legal profession. See par 2.1 and para 2.19 - 2. 21 of the Report.

148 See, for instance, Hall C 'Rape: The politics of definition' 1988 **SALJ** 67; Ross K 'An examination of South African rape law' in **Women, Rape and Violence in South Africa** Community Law Centre (1993) 12 - 15; Reddi M 'A feminist perspective of the substantive law of rape' in Jagwanth S et al (eds) **Women and the Law** (1994) 159.

3.4.3.2 According to our present law, rape consists in a man having unlawful intentional sexual intercourse with a woman without her consent.¹⁴⁹ As was stated in the Issue Paper,¹⁵⁰ 'sexual intercourse' presupposes penetration of the female sexual organ by the male's penis. This precludes intercourse per anum, oral penetration and the insertion of foreign objects into the orifices of the body. The offence is gender specific¹⁵¹ in that it can only be committed by a man and the victim can only be a woman.¹⁵² There is an irrebuttable presumption that a girl under 12 years old is incapable of consenting to sexual intercourse. There is no similar presumption in respect of boys under 12 years of age. The emphasis is based on the absence of valid consent by the woman.

3.4.3.3 The essential elements of the crime of rape are:

- C intention;
- C unlawfulness;
- C sexual intercourse;
- C with a woman;
- C without her consent.

3.4.3.4 The State must prove all these elements beyond a reasonable doubt in order to secure a conviction.

3.4.3.5 The crime of rape overlaps with indecent assault and, in cases where the girl is under 16 years of age, with statutory rape,¹⁵³ an offence created in terms of section 14(1) the Sexual Offences Act 23 of 1957. Attempted rape invariably overlaps with assault with intent to rape. A husband can be convicted of raping his wife.¹⁵⁴

149 Milton **South African Criminal Law and Procedure Volume II** (third edition) 439; Snyman **Criminal Law** 424. See Hall 'Rape: The politics of definition' 1988 (105) **SALJ** 67 for a critical assessment of definitions of rape.

150 Par 4.4.

151 **South African Law Commission** Issue Paper 10, Project 107 at 24 referring to Fryer L 'Law versus Prejudice: Views on Rape through the centuries' 1994 (7) **SACJ** 60.

152 A woman who acts as the accomplice may be convicted of the offence on that basis.

153 The commonly referred to 'statutory rape' is a misnomer as consent is not lacking.

154 Section 5 of the **Prevention of Family Violence Act** 1993.

3.4.4 The essential elements of the offence.

3.4.4.1 Intention

3.4.4.1.1 The man must intend to have sexual intercourse with the woman, knowing, or foreseeing the possibility, that she has not consented to the sexual intercourse. This is what is usually referred to as *mens rea*.

3.4.4.1.2 Intention must extend to each element of the crime. Though it is difficult to envisage sexual intercourse by mistake, such cases are not impossible.¹⁵⁵ The question whether there is the necessary intent in rape cases usually arises in connection with the element of lack of consent.¹⁵⁶ The accused must foresee the possibility that the woman is not a consenting party, yet proceed with intercourse.¹⁵⁷ If the accused genuinely believes that the woman consents, even though his belief is unreasonable, he lacks the necessary intention. Usually such a mistaken belief will be attributed to the woman's conduct, active or passive, but this is not essential. Where there is actual consent but, because the girl is younger than 12 years and therefore incapable in law of consenting, the accused must foresee the possibility that she is under 12.¹⁵⁸ Likewise, where consent is in fact vitiated by intoxication or mental defect, the accused lacks intention unless he foresees this possibility.¹⁵⁹

3.4.4.2 Unlawfulness

3.4.4.2.1 At common law sexual intercourse without consent was not unlawful where it took place between husband and wife. However, this common law rule was repealed in 1993 by the **Prevention of Family Violence Act**, 133 of 1993. In the result, in South African law

155 As **R v H** 1962 1 SA 278 (SR) shows.

156 See also Snyman 'Toestemming in die strafreg - Omskrywingselement of regverdigingsgrond' 1998 **De Jure** 373.

157 **R v K** 1958 3 SA 420 (AD) at 421 - 2, 423; **R v Z** 1960 1 SA 739 (AD) at 743, 745; **S v S** 1971 2 SA 591 (AD) at 597.

158 **R v Z** 1960 1 SA 739 (AD).

159 **R v K** 1958 3 SA 420 (AD).

notwithstanding anything to the contrary contained in any law or the common law, a husband may be convicted of the rape of his wife.¹⁶⁰

3.4.4.2.2 Another quaint rule of South African law - that a boy under the age of 14 years was irrebuttably presumed incapable of sexual intercourse and therefore of rape - was repealed in 1989.¹⁶¹

3.4.4.2.3 Other grounds of justification, such as coercion, are unlikely, but not inconceivable. If there were a tribal custom permitting rape¹⁶² in certain circumstances, our courts would not recognise it as a ground of justification, although the accused's *bona fide* belief in the justification would exclude intent.¹⁶³ In the result, Milton¹⁶⁴ submits, rightly in our view, that there are no circumstances in which intercourse with a woman without her consent may be lawful.

3.4.4.3 **Sexual Intercourse**

3.4.4.3.1 There must be penetration of a woman's vagina by the male penis.¹⁶⁵ The penetration of other orifices by the penis is not rape, nor is the penetration of the vagina with something other than the penis.¹⁶⁶ The slightest penetration is sufficient.¹⁶⁷ Once penetration

160 Section 5 of the **Prevention of Family Violence Act** 133 of 1993.

161 In terms of section 1 of the **Law of Evidence and the Criminal Procedure Amendment Act** 103 of 1987. See also J R L Milton 'Law reform: The demise of the impunity of pre-pubescent rapists' 1988 (1) **SACJ** 123.

162 On the indigenous rape law of South African tribal peoples, see Labuschagne J M T 'Verkragtings in die inheemse reg: Opmerkings oor die oorsprong van vroulike ondergeskiktheid in misdaadoms krywing' 1994 (15) **Obiter** 85.

163 See **S v De Blom** 1977 3 SA 513 (A).

164 **South African Criminal Law and Procedure Volume II** (third edition) 448.

165 For a critical review of this aspect of the crime, see Labuschagne 'Die penetrasievereiste by verkragting heroorweeg' 1991 (108) **SALJ** 148.

166 Anal or oral intercourse with a woman without her consent is punishable as indecent assault: **S v M (2)** 1990 (1) SACR 456 (N).

167 That is entry into the labia (the anterior of the female genital organ) is sufficient. Milton **South African Criminal Law and Procedure Volume II** (third edition) 448 footnote 122.

has occurred the necessary element for liability of the male is established. It is not necessary in the case of a virgin that the hymen should be ruptured,¹⁶⁸ and in any case it is unnecessary that semen should be emitted.¹⁶⁹ But if there is no penetration there is no rape.¹⁷⁰

3.4.4.3.2 The requirement of sexual intercourse excludes the possibility of penetration of other parts of the body, including the anus and the mouth, and similarly excludes the possibility of penetration by means of other instruments, for example sticks and bottles.

Who is to say that the sexual humiliation suffered through forced oral or rectal penetration is a lesser violation of the personal private inner space, a lesser injury to mind, spirit and sense of self?... All acts of sex forced on unwilling victims deserve to be treated as equally grave offences in the eyes of the law, for the avenue of penetration is less significant than the intention to degrade.¹⁷¹

3.4.4.3.3 Sexual intercourse is a continuing act which only ends with withdrawal.¹⁷² Milton¹⁷³ submits that what is consented to by the woman is the complete act of sexual intercourse and not merely the initial penetration, which is the first stage of the act of sexual intercourse.¹⁷⁴ If this is so, it follows that where the woman withdraws her consent after penetration it is rape for the male to continue the act of intercourse.

3.4.4.4 With a Woman

168 **S v K** 1972 2 SA 898 (AD) at 900C.

169 Although the presence of semen in the vagina is the best evidence of penetration. Other evidence may, however, suffice: see **S v F** 1990 (1) SACR 239 (A).

170 The perpetrator may be held liable for attempted rape or indecent assault.

171 **Legal Aspects of Rape** at 30 citing S Brownmiller **Against Our Will** 1976 at 370.

172 Milton **South African Criminal Law and Procedure Volume II** 448 quoting Lord Scarman in **Kaitamaki v R** [1958] AC 147 (HL) at 151H.

173 **South African Criminal Law and Procedure Volume II** 448.

174 Contrast the discussion by Labuschagne 'Verkragting deur 'n Late?' 1995 (112) **SALJ** 217.

3.4.4.4.1 A man cannot be raped, and a woman cannot commit rape.¹⁷⁵ However, a woman who acts as an accomplice of a man who commits rape can be on that basis be convicted of rape.¹⁷⁶

3.4.4.4.2 However, it is important to note that sexual assault of a man in the form of forced anal penetration is also often described as ‘rape’ in common parlance. Although such act would be punishable by criminal law, this would take the form of a charge of indecent assault,¹⁷⁷ or assault with the intent to do grievous bodily harm.

3.4.4.4.3 There are no women in respect of whom rape cannot in law be committed.¹⁷⁸

3.4.4.4.4 The woman must be alive when penetration takes place. Milton¹⁷⁹ points out it may happen that the woman dies because of the force used to overcome her resistance prior to penetration. This issue was raised on appeal in **S v W**¹⁸⁰ where the Court held *obiter* that a conviction of attempted rape was possible. However, it is noted that by characterising the issue as that of an attempt to commit the impossible, the court tacitly accepted that it is not possible in law to commit rape where the woman is dead at the time of penetration.¹⁸¹

3.4.4.4.5 It should also be noted that the present definition does not allow for the rape of a man who has undergone a ‘sex change’ operation (in other words penetration of artificially constructed genitals).¹⁸²

3.4.4.5 Without Consent

175 Milton **South African Criminal Law and Procedure Volume II** 449.

176 **R v M** 1950 4 SA 101 (T).

177 **Legal aspects of Rape in South Africa** 31.

178 Milton **South African Criminal Law and Procedure Volume II** 449.

179 Milton **South African Criminal Law and Procedure Volume II** 449.

180 1976 1 SA 1 (A).

181 Milton **South African Criminal Law and Procedure Volume II** 449.

182 See also **W v W** 1976 2 SA 20 (W).

3.4.4.5.1 Rape is not committed where a woman consents to an act of sexual intercourse with a man; the essence of the crime is thus that the complainant had not consented to the sexual intercourse which took place. Physical resistance on the part of the woman very obviously indicates an absence of consent on her part.¹⁸³ However, the essence of the offence is that sexual intercourse should have occurred without consent, whether the lack of consent was due to 'fear, force or fraud'¹⁸⁴ or incapacity to consent.

3.4.4.5.2 The inclusion of an 'absence of consent' in the definition of rape stands in marked contrast to the common law position relating to assault, where proof of non-consent is not required before the accused can be held criminally liable.¹⁸⁵ While consent is recognised as a ground of justification that excludes unlawfulness, and therefore criminal liability, absence of consent is not one of the essential elements that the prosecution has to prove beyond reasonable doubt.¹⁸⁶

3.4.4.5.3 A similar comparison can be drawn between rape and theft where the common law, while requiring that the 'taking' of an object must be without the consent of the owner, assumes that the taking is non-consensual rather than requiring any particular level of proof of this factor.¹⁸⁷

3.4.4.5.4 Because an absence of consent is included as one of the elements of the offence of rape, the state firstly bears the notoriously difficult burden of proving a negative proposition, that is, that the complainant had not consented to sexual intercourse.¹⁸⁸ The effect of this is to 'shift the enquiry from the behaviour of the accused to that of the victim. Her non-consent, not his compulsion is in issue'.¹⁸⁹ Secondly, the issue of consent invites questions

183 Milton **South African Criminal Law and Procedure Volume II** 450. See also J M T Labuschagne 'Die klagte by seksmisdade' 1978 (11) **De Jure** 18.

184 Per Van den Heever JA in **R v M** 1953 4 SA 393 (AD) at 398.

185 Barga & Fishwick **Sexual Assault Law Reform: A National Perspective** (1995) 59.

186 Burchell & Milton **Principles of Criminal Law** (second edition) 198 - 199.

187 Barga & Fishwick **Sexual Assault Law Reform: A National Perspective** (1995) 59.

188 Reddi 'A feminist perspective of the substantive law of rape' in Jagwanth et al (eds) **Women and the Law** (1994) 159.

189 Hall 'Rape: The politics of definition' 1988 (105) **SALJ** 67 at 74.

about the woman's sexual history or allegations of promiscuity. It is this emphasis on her actions which puts the complainant 'on trial' as well as the accused.¹⁹⁰

3.4.4.5.5 Consent need not be express, and the woman may through her conduct show that she does or does not consent. This often raises difficult problems of fact for it has to be remembered that there is a difference between consent and submission; every consent involves a submission, but it by no means follows that a mere submission involves consent.¹⁹¹ As was said in *R v Swiggelaar*.¹⁹²

[I]f a man so intimidates a woman as to induce her to abandon resistance and submit to intercourse to which she is unwilling, he commits the crime of rape. All the circumstances must be taken into account to determine whether passivity is proof of implied consent or whether it is merely the abandonment of outward resistance which the woman, while persisting in her objection to intercourse, is afraid to display or realises is useless.

3.4.4.5.6 Where, on the other hand, the 'victim's resistance ... is overcome by the prompting of her own passions, to the stimulation of which she consented, there can be no question of rape'.¹⁹³

3.4.4.5.7 In the traditional approach 'consent supposes three things - a physical power, a mental power and a free and serious use of them'.¹⁹⁴ This being so, it follows that a 'consent' from which one or other of these elements is absent is not 'real' consent, and is without legal significance. Factors which may affect the reality of consent are the possession of the requisite

190 Hubbard D 'A critical discussion of the law of rape in Namibia' in Susan Bazili **Putting Women on the Agenda** (1991) 144 - 145.

191 Milton **South African Criminal Law and Procedure Volume II** (second edition) 442 with reference to *R v Day* (1841) 9 C & P 722 at 724.

192 1950 (1) PH H61 (AD) at 110 - 11. See also *S v S* 1971 2 SA 591 (AD).

193 *R v M* 1953 4 SA 393 (AD). In casu the court acquitted the man because it was reasonably possible on the evidence that he and the complainant had made 'a pact to indulge in sexual acts with each other short of natural sexual intercourse' and that 'overcome by the stimuli so experienced' the woman succumbed, permitting full copulation and came to her senses when it was too late. But Van den Heever JA was careful to stress that 'I do not wish to suggest that once the male is sexually aroused by lascivious acts permitted by the woman he may resort to vis and rape her with impunity' (at 398). Labuschagne 'Verkrachttingsfantasieë en toestemming in die strafreg' 1992 (5) **SACJ** 72 distinguishes between 'rational-moral' and 'instinctive-emotional' consent, and argues that consent given on the 'instinctive-emotional' level ought not to be considered as a valid consent.

194 Jowitt's Law Dictionary s v 'consent' as quoted in Milton **South African Criminal Law and Procedure Volume II** 450.

mental power, constraint upon the physical power, and absence of freedom to exercise the mental or physical powers. These factors require attention:

3.4.4.5.7.1 Lack of mental capacity

C Mental defect

3.4.4.5.7.1.1 For a woman to consent she must have sufficient mental capacity to understand what she is consenting to. However, the case law on this point is not very clear. In *R v Ryperd Boesman*¹⁹⁵ (1942) Hoexter J (as he then was) held that the test is whether the woman 'is so devoid of reason that she cannot exercise any judgement at all on the question whether she will consent or dissent from ... intercourse'. In *R v S*¹⁹⁶ (1951) the woman was retarded. Her mental 'age' was 8. However, the court held that because she had not been proved to be either an idiot or an imbecile her consent could not be regarded as having been vitiated. Milton¹⁹⁷ submits that it is a question of fact in every case whether the woman's mental defect was such as to make her incapable of consenting.

C Intoxication

3.4.4.5.7.1.2 Intoxication may vitiate consent. According to Steyn JA (as he then was) in *R v K*,¹⁹⁸ this happens, as a matter of law, either when the woman is reduced to a state of insensibility or when it renders her incapable of understanding what she is doing.¹⁹⁹ The majority of the court²⁰⁰ accepted, however, that it is not only when the woman is insensible that she is incapable of consenting, but considered that the issue of incapacity to consent must 'remain a question of fact'.

195 1942 (1) PH H 63 (SWA). The complainant was found to be 'an idiot, without any human intelligence', and the accused was convicted.

196 1951 3 SA 209 (C).

197 **South African Criminal Law and Procedure Volume II** (third edition) 453.

198 1958 3 SA 420 (AD).

199 Per Steyn JA, for the minority, in *R v K* 1958 3 SA 420 (AD) at 423 - 6.

200 Schreiner JA, with whom Malan JA and Reynolds AJA concurred, in *R v K* 1958 3 SA 420 (AD) at 421 - 2.

C **Girls under 12**

3.4.4.5.7.1.3 An irrefutable presumption that girls under 12 are incapable of consenting to sexual intercourse applies.²⁰¹ This is a legal fiction, for a girl under that age might well in fact understand the nature of the act and have both *intellectus* and *judicium*, but the rule is justified on grounds of public policy. It is the girl's actual age or physical age that is relevant. If she is over twelve, but has a mental age of less than 12 the rule does not apply, unless she is so mentally defective as to render the consent invalid as she is incapable of consenting.

3.4.4.5.7.2 **Lack of opportunity to consent**

C **Sleep**

3.4.4.5.7.2.1 A sleeping woman obviously cannot consent to intercourse and, unless she has previously consented, intercourse with her is rape. Milton²⁰² raises the problem that the intention to rape (the *mens rea*) is possibly lacking when the offender thinks the sleeping woman consented or genuinely believes that she would have consented if she knew what he was up to.

C **Insensibility**

3.4.4.5.7.2.2 A woman who is in a state of insensibility is deprived of the opportunity to consent. This may occur where she is intoxicated, drugged, hypnotized or under general anaesthetics.

201 **R v Z** 1960 1 SA 739 (AD) at 742, 744.

202 Milton **South African Criminal Law and Procedure Volume II** 454.

3.4.4.5.7.3 Absence of physical capacity - duress

3.4.4.5.7.3.1 In most cases the woman's consent is overborne by physical force, but it is also rape where the accused induces her consent by threats,²⁰³ as in **S v Volschenk**,²⁰⁴ where a policeman threatened the complainant, whom he had arrested, with prosecution unless she submitted. In **S v S**²⁰⁵ the policeman made no threat as such to the woman who agreed to his demand for sexual intercourse simply because she believed that the policeman had it within his power to cause her harm. This fear, the court held, was sufficient to vitiate consent, and he was convicted of rape.

3.4.4.5.7.4 Fraud

3.4.4.5.7.4.1 Active or passive fraud may vitiate consent. However, there are only two species of fraud which for the purposes of rape destroy consent: First, where the fraud induces error as regards the person²⁰⁶ in the sense of confusion between two actually existing persons. In most of the cases the accused has induced the woman to believe that he is her husband²⁰⁷ - an identifiable third person - but Milton²⁰⁸ argues that the same should hold true where the woman's fiancée or boy friend is impersonated. Where, however, the man induces consent by fraudulently misrepresenting the state of his affection, age, pedigree, health, bank balance, or willingness to pay for the woman's services, it is improbable that the courts would regard the consent of the woman as vitiated.²⁰⁹

203 The threats do not necessarily have to be directed at the victim, but may include threats to harm the woman's child.

204 1968 (2) PH H 283 (D). See also **S v Botha** 1982 (2) PH H 112 (E).

205 1971 2 SA 591 (A).

206 *Error personae*.

207 **R v C** 1952 4 SA 117 (O).

208 **South African Criminal Law and Procedure Volume II** 456.

209 See also JMT Labuschagne 'Dwaling ten opsigte van die identiteit en beroepstatus van die dader en die vraagstuk van toestemming by gewelds- en geslagsmisdade' 1999 (116) **SALJ** 230.

3.4.4.5.7.4.2 Secondly, where the fraud induces error as to the judicial act,²¹⁰ in that as a result the woman fails to appreciate that what she is consenting to is sexual intercourse and thinks that it is an act of a different nature, such as an operation.²¹¹ But her consent is not vitiated if the woman appreciates that what the man is doing is sexual intercourse but wrongly supposes as a result of his fraud that it will have certain consequences.²¹²

3.4.4.5.7.5 The time of consent - change of mind

3.4.4.5.7.5.1 In *R v Handcock*,²¹³ after sexual intercourse had already commenced, the complainant heard her employer coming and sought to withdraw her consent. The court held that the accused, in refusing to desist, had not committed rape. As Milton²¹⁴ shows, this conclusion is correct if the *actus* of rape is construed as the penetration of the woman's body; it is not if the *actus* is construed as the whole act sexual intercourse. Certainly from the point of view of the man, the act of penetration is sufficient to fix liability, and it is not necessary or essential for the prosecution to prove that there had been a completed act of sexual intercourse. As Milton²¹⁵ submits, this does not preclude the woman from changing her mind concerning the stages of intercourse following penetration. Where a woman does withdraw her consent to the continuation of the intercourse a refusal by the man to desist will therefore constitute rape.

210 *Error in negotio*.

211 As in *R v Williams* [1923] 1 KB 340, [1922] All ER 433, where the woman thought her singing teacher was performing a surgical operation to improve her breathing, and as in *R v Flattery* (1877) 2 QBD 410, where the woman thought that the man, a quack surgeon, was operating on her 'to break nature's string' and cure her fits. See also *R v Mobilio* [1991] VR 339 where a radiographer had fraudulently conducted vaginal examinations using an ultra-sound probe. The Victoria Court of Criminal Appeal held that this was not rape as the complainants understood the nature and character of the physical act to which they had consented.

212 As in *R v Williams* 1931 (1) PH H38 (E), where the complainant, a married woman, knew the accused was having sexual intercourse with her, but thought this would remedy her womb displacement, and as in *R v K* 1966 1 SA 366 (RAD), where the complainant, a married woman, knew the accused, a witch doctor, was having sexual intercourse with her, but believed his story that this would cure her barrenness.

213 1925 OPD 147. The opposite view was taken in *R v Kaitamaki* [1980] NZLR 60.

214 **South African Criminal Law and Procedure Volume II** 457

215 **South African Criminal Law and Procedure Volume II** 458.

3.4.5 Submissions regarding rape

3.4.5.1 Comment was invited in the Issue Paper on the question of whether the common law offence of rape should be retained.²¹⁶ Respondents were asked for suggestions as to how it should be changed should it be necessary. The following additional questions were posed:

- C What constitutes sexual intercourse?
- C Should rape be gender neutral (in other words should non-consensual homosexual intercourse be regarded as rape)?
- C Is there a need for the presumption that a girl under the age of 12 years is incapable of consenting to sexual intercourse?
- C Should the presumption be extended to boys under the age of 12 years ?
- C Should the insertion of objects other than a penis into the vagina of another person be included in the definition of rape?

3.4.5.2 The majority of respondents regard the definition of rape as presently construed as unacceptable, outdated and limited in the sense that it excludes a wide range of perpetrators, complainants and actions from its definition / ambit.²¹⁷ The unanimity surrounding the need for change, however, does not extend to what the content of such an offence should be nor to the reasons for codification.

3.4.5.3 Penetrative versus non-penetrative offence

3.4.5.3.1 In the Issue Paper the question was also posed whether there should be a distinction between penetrative and non-penetrative offences. The reason such a question was posed is because it would be possible to define a single offence to cover all types of sexual assaults, from the merest touching to penetration accompanied by extreme violence.

216 See par 4.4.1 of the Issue Paper.

217 **Department of Public Safety and Security, Gauteng Provincial Government; Department of Welfare and Population Development, Gauteng Provincial Government; Tshwaranang Legal Advocacy Centre; Mpumalanga Provincial Government; FAMSA; South African National Council for Child and Family Welfare (31 responses); Sr Potter, AGAPE C P School; Ms T Madonsela, Department of Justice; Mr K Worrall-Clare; Mr Neil van Dokkum; Association for Persons with Physical Disabilities (Northern Cape); Adv K J C Lekoeneha, Deputy Chief State Law Adviser, Free State Provincial Government; Ms Pillay (social worker).**

3.4.5.3.2 Submissions were made to the effect that there is no logic in distinguishing between penetrative and non-penetrative offences. The ***Tshwaranang Legal Advocacy Centre***, for instance, argues that such a distinction can only lead to a hierarchy of offences, which does not pay attention to the damage caused. ***Tshwaranang*** continues:

Different children are differently affected by sexual abuse, and the fact that a paedophile only fondled as opposed to penetrated a child, should make no difference in terms of a conviction. The degree of damage done to the child, both emotionally and physically should be taken into account at the sentencing stage, and whether the offence involved penetration may be relevant in specific cases, but is not determinative of the extent of the harm caused.

3.4.5.3.3 The seriousness of non-penetrative offences should not be overlooked.²¹⁸ ***Mr LI Carr*** argues that 'by privileging one form of violation over another, while acknowledging the seriousness of the more serious form, one in turn also diminishes the seriousness of the form that one considers less serious'. The opinion is voiced also that one should not focus on whether there was penetration or not, but on the fact that a person's rights have been violated followed by secondary effects suffered by the victim.²¹⁹ Both penetrative and non-penetrative offences violate the person's sexual integrity and should therefore be given the same status and conviction. For this reason the view is held that the only difference should be in the sentence meted out.²²⁰

3.4.5.3.4 In their joint submission, the members from the ***SAPS Child Protection Units in KwaZulu Natal*** are of the opinion that there should be a distinction between penetrative and non-penetrative offences. They argue that the penetration of the penis into the mouth of a child must not be seen as 'rape' as this will diminish the present public and legal opinion on 'rape', which is seen as an act of violence and deserves a higher sentence.²²¹ They further argue that penile penetration into the mouth of a child will automatically bring about a lower sentence for

218 Workshop 28 August '97.

219 **FAMSA; Ms Thuli Madonsela (Department of Justice); Mr LI Carr** (clinical psychologist).

220 Workshop 28 August '97.

221 **Mr Neil van Dokkum** is of a similar view, without reference to penile penetration of the mouth. He says: 'Rape is a serious offence which needs to be abhorred by the public. To include other lesser offences under the general definition of rape might diminish the seriousness of the offence both in the eyes of the courts and the public'.

'rape'. For this reason there should be a distinction between penetrative and non-penetrative offences.

3.4.5.3.5 The advocates²²² of such a distinction argue that penetrative offences tend to cause more trauma to a child,²²³ carry a higher risk of transmitting sexually transmitted diseases and result in all probability in more pain and or injury to a child, all of which are aggravating factors. Because of the aggravating factors acts of penetration should be punished more severely than non-penetrative offences.²²⁴ It was pointed out that the definition of penetration must be defined clearly.²²⁵

3.4.5.3.6 While enacting a single offence to cover all types of sexual assault would dramatically simplify the present law, there are two main arguments against such an approach. First, the issue of penalty is a very important aspect of criminal law. A single, all-embracing offence would reduce legislative guidance for presiding officers in relation to sentencing. Secondly, it would be wrong in principle for the legislature not to distinguish one type of sexual interference from another.

3.4.5.3.7 **Recommendation**

We recommend that the law should continue to distinguish between penetrative and non-penetrative sexual offences.

3.4.5.4 **Retaining the common law offence rape**

222 **Ms W L Clark; Attorney-General: Transvaal; South African National Council for Child and Family Welfare** (23 pro); Workshop 28 August 1997.

223 Contra the submission by the **Johannesburg Child Welfare Society** who argues that there is limited or inconclusive evidence in certain studies involving adult survivors of sexual abuse to suggest that penetrative forms have the most severe impact on victims.

224 **Attorney-General: Transvaal.**

225 **South African National Council for Child and Family Welfare.**

3.4.5.4.1 The ***Association for Persons with Physical Disabilities, Northern Cape*** is of the view that the common law should be retained.²²⁶ The ***Association*** nevertheless states that rape should be a gender neutral offence. To achieve that, statutory intervention would be necessary. This is not to say that retention of the common law offence of rape is incompatible with affecting changes through statutory intervention, but it does highlight the dilemma facing the legislature.

3.4.5.4.2 ***Ms Thuli Madonsela***²²⁷ is very vocal in her condemnation of the common law definition of rape. She says:

The common law definition of rape should fall. Rape should include the use of the penis or any other object into the vagina, mouth or anus of another without consent. The offence of sodomy, indecent assault and rape as we know it would have to merge into one offence.

3.4.5.4.3 The need for codification was strongly motivated in order to avoid the danger of inconsistency and overlapping.²²⁸ The ***Tshwaranang Legal Advocacy Centre*** argues that the entire common law of rape should be amended and codified. ***Tshwaranang*** proposes the introduction of a new offence called 'sexual assault' which should be a codified in a statute entitled 'Sexual Offences against the abuse of women and children'. ***Tshwaranang*** is of the opinion that the distinctions between rape, sodomy, bestiality and others are unhelpful and only create complications in securing convictions.

3.4.5.4.4 ***Rape Crisis (Cape Town), Women & Human Rights Project (Community Law Centre, UWC) and the ANC Parliamentary Women's Caucus*** justify the call for amending the definition of 'rape' due to the limitations of the offence in its present form. The respondents show that the definition excludes a wide range of perpetrators, victims and actions from its ambit, although they concede that this exclusion does not imply that perpetrators will necessarily go unpunished.

226 Others share this view. See the submissions by **Adv K J C Lekoeneha, Deputy Chief State Law Adviser, Free State Provincial Government; Sr Potter, Agape School for Cerebral Palsied.**

227 **Department of Justice, Pretoria.**

228 **FAMSA; Tswaranang Legal Advocacy Centre.**

3.4.5.4.5 In contrast to the aforementioned views of the **Attorney General: Transvaal** is of the opinion that the common law offence of rape should be retained.²²⁹ He states:

Through the centuries the crime of rape has become well-established. One knows exactly what one is talking about. The legal foundation is firm. Rather than re-enacting the definition of rape, a device raising other offences to the same benchmark of seriousness should be considered.

Penetrative offences, i.e. the insertion of any body part or object into another person's vagina or anus, and also the insertion of a body part (penis) into another's mouth, should expressly be made punishable by the same sentence that may be imposed for rape. In this way the gravity of such acts of indecent assault would be highlighted.

Subsequent jurisprudence may indicate the development towards a comprehensive crime covering all penetrative acts. It is clear, however, that the present is not the time for it.

3.4.5.4.6 **Mr A J Van Wyk** also contends that the common law definition of rape should be retained. He argues that sodomy and indecent assault are all well defined crimes. Accordingly if these crimes are called another name it will create confusion.

3.4.5.4.7 **Ms Clark** is of the opinion that there is no reason to codify the common law or adapt the definition of rape, provided sufficiently severe penalties are available in appropriate cases of indecent assault. She says:

This is not to deny that indecent assault should not be treated seriously if the facts justify it. Penetration by certain objects, for example a firearm barrel, could well be as horrifying for the victim as penile penetration, and if the circumstances warrant it, extremely heavy sentences should be able to be passed for indecent assaults. Each individual case would have to be assessed on its own merits.

3.4.5.5 **Sexual intercourse**

3.4.5.5.1 The general consensus is that the definition of what constitutes unlawful sexual intercourse should be widened to include the introduction of the penis into another person's vagina, anus, or mouth. Indeed, some respondents and workshop participants were under the mistaken impression that non-consensual anal intercourse and oral sex do constitute 'rape'. This highlights the disparity between the current definition of rape and what people on the

229 This was also the view of **Ms Clark**, senior public prosecutor, Verulam.

ground regard as rape. Others extend the definition of sexual intercourse to its limits.²³⁰ **Ms Madonsela**²³¹ argues that the prohibition should also include 'gross forms of sexual abuse such as masturbating in front of a child, touching the child or rubbing one's penis between the thighs of a child'.

3.4.5.5.2 Respondents also displayed a misunderstanding of what sexual intercourse and the requirement of penetration mean in legal terms. As stated, most regarded non-consensual anal and oral intercourse as sexual intercourse warranting a charge of rape. The general interpretation given to the penetration requirement is that full penetration is required. As one of the workshop participants said at the workshop in Umtata:²³² 'The girl must bleed, otherwise there is no rape'. The fact that the slightest penetration will do and that 'blood and semen' are not necessary to prove rape was misunderstood even by some experts in the field.

3.4.5.5.3 Another distinction is drawn with regards to the body orifice which is penetrated. One opinion²³³ is that penetration into the mouth of a complainant must not be seen as a penetrative offence in the sense of rape as this would automatically bring about lower sentences for rape.

3.4.5.6 **Section 2A(1) of the Australian Crimes Act**

3.4.5.6.1 The Australian example quoted in the Issue Paper received a very positive response and most respondents are in favour of introducing a similar provision in South African law.²³⁴ The inclusion of a single comparative example was perhaps unfortunate as this limited discussions to the example given. However, respondents were clearly in favour of expanding the offence of rape to include the insertion of objects into another person's vagina or anus.

230 **Sr Potter, Agape School for Cerebral Palsied** defines sexual intercourse as normal male / female interaction and include flirtation.

231 **Department of Justice**, Pretoria.

232 18 August 1997.

233 **SAPS Child Protection Units, KwaZulu Natal**.

234 **RP Clinic, Pretoria; Association for the Physical Disabled, Northern Cape; Department of Education; FAMSA; Adv KJC Lekoeneha; Department of Local Government, Housing and Land Administration, Mpumalanga Provincial Government; Ms E Ngwenya; National Council of Women of South Africa; Johannesburg Child Welfare Society**.

3.4.5.6.2 Certain proponents are of the view that the Australian definition should be widened to include ‘any other object’,²³⁵ whilst others feel that the Australian definition should be used, but ‘other body parts should be excluded’²³⁶ or it should exclude ‘penetration into the mouth’.²³⁷ Some respondents feel that sexual intercourse should be defined as the introduction of the penis or any other object (including other body parts) into the vagina, mouth or anus.²³⁸

3.4.5.7 **Making rape gender neutral**

3.4.5.7.1 Although only a few respondents and workshop participants query the constitutionality of the common law offence of rape because of its gender bias, respondents are almost unanimously of the view that rape should be a gender neutral offence.²³⁹ Indeed, most of the respondents want to include non-consensual homosexual intercourse²⁴⁰ and ‘forced lesbian activity’²⁴¹ in the definition of rape.

3.4.5.8 **The presumption that girls under the age of 12 years are incapable of consenting to sexual intercourse and its possible extension to boys under 12 years**

235 **Ms Thuli Madonsela (Department of Justice); Association for Persons with Physical Disabilities (Northern Cape); Piet Retief, Department of Health and Welfare; South African National Council for Child and Family Welfare (36 submissions); Sr Potter, AGAPE C.P. School.**

236 **Mr K Worrall-Clare.**

237 **South African Council for Child and Family Welfare (4 responses); AGAPE C P School.**

238 **Ms Thuli Madonsela (Department of Justice); Attorney-General: Transvaal (according to him jurisprudence may indicate the development towards a comprehensive crime covering all penetrative acts); agreed on in several workshops; South African National Council for Child and Family Welfare (11 responses).**

239 **FAMSA; Adv K J C Lekoeneha, Deputy Chief State Law Adviser (Free State Provincial Government); Gauteng Department of Public Safety and Security; Ms T Madonsela (Department of Justice); South African National Council for Child and Family Welfare (31 responses); Sr Potter, AGAPE C P School; Associations for Persons with Physical Disabilities (Northern Cape); South African Police Services (Durban); Ms Pillay (social worker); Mr Neil van Dokkum; Mr K Worrall-Clare; Johannesburg Child Welfare Society.**

240 **Department of Local Government, Housing and Land Administration, Mpumalanga Provincial Government; Ms Collet Wagner; FAMSA; Mr P Nel (prosecutor, Port Elizabeth); RP Clinic, Pretoria; National Council for Persons with Physical Disabilities, Northern Cape; SAPS Social Work Services, Head Office, Pretoria.**

241 **Ms T Madonsela, Department of Justice.**

3.4.5.8.1 The universal opinion expressed is that the presumption that girls under the age of 12 years are incapable of consenting to sexual intercourse should be extended to boys under the age of 12.²⁴² Reasons cited are that boys of a tender age, just like their female counterparts, do not know what they are consenting to; and, more importantly, any presumption that presumes something for one sex and leaves the other sex unregulated is discriminatory and contrary to section 9 of the Constitution.²⁴³ Some respondents hold the view that boys are actually slower to mature than girls, therefore requiring more protection.²⁴⁴ Respondents also argue that the age of 12 years is too young and that the age should rather be 14²⁴⁵ or 16 years.²⁴⁶ One of the reasons advanced in support of the contention that the age of consent should be higher is the threat of HIV/AIDS.²⁴⁷

3.4.5.8.2 Certain proponents opine that apart from physical maturation, one should also consider the mental age of a child.²⁴⁸ This would in fact mean that the presumption as such would fall away, leaving room for the exceptions. The law would then have to apply a subjective test to the actual circumstances.²⁴⁹

3.4.5.8.3 Some respondents highlight the difficulty with fixing age limits and peer activities. The **Johannesburg Child Welfare Society**, for instance, poses the following questions:

[D]oes the age of consent apply in the same way to intercourse between adolescents as between an adult or a substantially older or stronger adolescent, and a child under 12 or 16 as the case may be? Where do we draw the lines? Are there situations where legal lines cannot be drawn or are not helpful or impossible to implement (e.g. a

242 **Ms Collet Wagner; FAMSA; Ms Rita Blumrick; Attorney-General: Transvaal; Ms Thuli Madonsela (Department of Justice); Mr A J Van Wyk; SAPS Child Protection Units, KwaZulu Natal; Association for Persons with Physical Disabilities, Northern Cape; the South African National Council for Child and Family Welfare (34 responses); Sr Potter, AGAPE C.P. School; Department of Education; National Council for Persons with Physical Disabilities; Mr P Nel.**

243 **Ms Thuli Madonsela**, Department of Justice.

244 Workshop 28 August 1997.

245 **National Council for Persons with Physical Disabilities in South Africa.**

246 Workshop Atlantis.

247 **National Council for Persons with Physical Disabilities in South Africa.**

248 **Sr Potter, AGAPE C.P. School.**

249 **Mr K Worrall-Clare.**

thirteen-year-old and an eleven-year-old, or two eleven-year-olds, having consensual sex?

3.4.6 Comparative Survey

3.4.6.1 This section of the paper sets out in broad terms the trends in a number of foreign jurisdictions. The progressive development on rape law reform in some of these countries are instructive and informative.²⁵⁰ There is a general trend to broaden the definition of rape and this has taken a number of different forms.

3.4.6.2 The legislative changes to the common law definition of rape in other jurisdictions were generally characterised by:

- C A shift in emphasis away from the perception of rape as an offence against 'public morals' and towards a perception of an offence against the personal dignity and sexual autonomy of the complainant;²⁵¹
- C A shift in focus away from the 'sexual' element of the crime towards the element of 'violence';
- C A shift away from the question of whether or not the complainant had consented to the sexual act towards the question of whether the accuse had used force in order to have sex with the complainant.²⁵²

3.4.6.3 Where the common law definition has been replaced by progressive statutory measures, the definition is consistently framed in gender neutral terms. While a gender-neutral definition of rape on the one hand eliminates the difficulties described above, it also on the other hand poses the risk of obscuring the reality that the overwhelming majority of victims of rape (in the broad sense of the term) are women.

3.4.6.4 Defining rape in a statute

250 'Rape: reform of law and procedure' in **Appendixes to Interim Report No. 42** Law Reform Commission Victoria 1991.

251 C 125 of the **Canadian Criminal law Amendment Act** S.C. 1980-81-82.

252 **Legal aspects of Rape in South Africa** at 29.

3.4.6.4.1 Queensland (Australia)

3.4.6.4.1.1 In Queensland the crime was limited to sexual intercourse with a woman without her consent. However, the recommendation of the Criminal Code Review Committee (Final report) that the offence of rape be re-defined by replacing the word 'female' with 'another person', and thereby removing the gender specificity of the crime, was accepted.

3.4.6.4.1.2 In the current **Queensland Criminal Code**²⁵³ the crime of rape is set out in sections 347 and 348:

347: **Definition of Rape.** Any person who has carnal knowledge of another person without that person's consent or with that person's consent if it is obtained by force, or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false and fraudulent representations as to the nature of the act, or, in the case of a married woman by personating her husband is guilty of a crime, which is called rape.

348: **Punishment of rape.** Any person who commits the crime of rape is liable to imprisonment for life.

3.4.6.4.1.3 Therefore, in Queensland, rape is no longer a gender specific crime.

3.4.6.4.2 Victoria (Australia)

3.4.6.4.2.1 The **Crime Act**, 1958 defines sexual penetration in section 35(1) as:

- (a) the introduction (to any extent) by a person of his penis into the vagina, anus or mouth of another person, whether or not there is emission of semen; or
- (b) the introduction (to any extent) by a person of an object or a part of his/her body (other than the penis) into the vagina or anus of person, other than in the course of a procedure carried out in good faith for medical or hygienic purposes.

3.4.6.4.2.2 Section 36 defines consent as follows:

For the purposes of subdivisions (8A) to (8D) "consent" means free agreement. Circumstances in which a person does not freely agree to an act include the following-

253 For a critical analysis of the position in Queensland, see Ratush Z **Rougher than Usual Handling - Women and the Criminal Justice System** (fully revised and updated 2nd edition) West End: The Women's Legal Service.

- (a) the person submits because of force or the fear of force to that person or someone else;
- (b) the person submits because of the fear of harm of any people to that person or someone else;
- (c) the person submits because she or he is unlawfully detained;
- (d) the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing;
- (e) the person is incapable of understanding the sexual nature of the act;
- (f) the person is mistaken about the sexual nature of the act or the identity of the person;
- (g) the person mistakably believes that the act is for medical or hygienic purposes.

3.4.6.4.2.3 Section 38(2) describes the circumstances under which rape is committed:

- (a) he or she intentionally sexually penetrates another person without that person's consent while being aware that the person is not consenting or might not be consenting;
- (b) after sexual penetration he or she does not withdraw from a person who is not consenting on becoming aware that the person is not consenting or might not be consenting.

3.4.6.4.3 **New Zealand**

3.4.6.4.3.1 Section 128(1) of the **Crimes Act**, 1961 states that rape is the act of a male personal having sexual intercourse with a woman or girl:

- (a) without the complainant's consent, or
- (b) with consent extorted by fear or bodily harm or by threats; or
- (c) with consent extorted by fear, on reasonable grounds, the refusal of consent would result in the death or grievous bodily harm to a third person,
- (d) with consent obtained by personating her husband; or
- (e) with consent obtained by a false and fraudulent representation as to the nature and equality of the act.

3.4.6.4.3.2 Subsection (3) states that a man is excluded from prosecution if he had sex with his wife, unless:

- (a) there was a decree of divorce or nullity and ever since the parties had not lived together as husband and wife with the consent of the wife; or
- (b) there was a judicial separation order.

3.4.6.4.4 **International Tribunal for the former Yugoslavia**

3.4.6.4.4.1 The International Tribunal for the former Yugoslavia recently defined the elements of rape as follows:

The sexual penetration, however slight-

- (a) of the vagina or anus of the victim by the penis of the perpetrator or any object used by the perpetrator; or
 - (b) of the mouth of the victim by the penis of the perpetrator;
- by coercion or threat or force against the victim or a third person.

3.4.6.4.4.2 The Trial Chamber of the Tribunal considered principles of law common to the major legal systems of the world, and concluded that there is at present a trend to broaden the definition of rape. The chief element of the offence is *forced physical penetration*.²⁵⁴

3.4.6.4.5 **Ghana**

3.4.6.4.5.1 Sections 97, 98 and 99 of the **Criminal Code (Amendment Act) 554** of 1998 separates rape of children under 16 years of age²⁵⁵ and rape of women over that age. It defines rape as the carnal knowledge (being penetration to the least extent) of a female of 16 years or older. The Act also makes it an offence for the 'unnatural carnal knowledge of any person of the age of sixteen years or over without his or her consent'.²⁵⁶ 'Unnatural carnal knowledge' is defined as sexual intercourse with a person in an unnatural manner or with an animal.²⁵⁷

3.4.6.5 **The mental element of rape**

254 **Legal Aspects of Rape in South Africa** at 30.

255 Section 101 provides for the defilement of a child under 16 years of age.

256 Section 104.

257 Section 104(2).

3.4.6.5.1 The mental element required for rape is basically the same in New South Wales, South Australia and the ACT as in Victoria. However, a different approach has been taken in the code jurisdictions of Western Australia, Queensland, Tasmania and the Northern Territory.

3.4.6.5.2 In these jurisdictions, the definitions of rape, or of related offences contained in the codes, require the prosecution to prove only that the accused's physical act of penetration of a person was voluntary and intentional and occurred without the consent of that person. However, a general defence of 'honest and reasonable mistake of fact' is available under each of the codes.²⁵⁸ Once this defence is raised, the prosecution must prove beyond reasonable doubt that the belief either did not exist, was not reasonable.²⁵⁹

3.4.6.5.3 It should be emphasised that these code provisions are not recent innovations. Rather, they date from the nineteenth century and reflect the common law as it was at the time

3.4.6.5.4 **New Zealand**

3.4.6.5.4.1 Prior to 1985, the New Zealand law on the mental element of the offence of rape was the same as in Victoria and other common law jurisdiction. The New Zealand sexual assault provisions now use a mix of objective and subjective standards. The offence of 'sexual violation' (see above) requires that the prosecution prove that an accused person acted without the other person's consent and without believing on reasonable grounds that the other person was consenting to that sexual connection. However, a subjective test has been retained for the second offence, including sexual connection by coercion. This offence requires the prosecution to prove that the accused knew that the other person had been induced to consent because of one or a combination of the vitiating factors. It is interesting to note that this offence covers circumstances in which it seems more likely that the belief in consent issue would arise.

3.4.6.5.5 **Canada**

258 The operation of this defence was considered by the Western Australia Supreme Court in *Attorney General's Reference No. 1* (1979) WAR 45. In this decision, that the Court confirmed that an accused could be properly convicted despite his belief that the woman consented if such belief was not based on reasonable grounds. By implication, the same interpretation would apply in Queensland and the Northern Territory, where virtually identical code provisions are in force. In Tasmania, the use of an objective test has been confirmed as law by the Tasmania Court of Appeal (*R v Snow* (1972) Tas SR 250; *Arnol and others v The Queen* unreported decision, No. 34/1981).

259 The onus of the prosecution in this regard has recently been confirmed in Tasmania, see the *Attorney-General's Reference No.1 of 1989 Re R v Brown* (unreported, No. 7/1990)

3.4.6.5.5.1 In Canada, the 1983 reforms of the sexual offence provisions of **Criminal Code** codified mistake of fact. The relevant provision (section 244(4)) now state that:

Where an accused alleges that he believed that the complainant consented to the conduct that is the subject matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all of the evidence to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable ground for that belief.

3.4.6.5.5.2 In practical terms, this approach does not appear significantly to alter the common law position, except that judges in Canada must first be satisfied that there is sufficient evidence of an honest mistake for the issue to be put to a jury.²⁶⁰ Once the defence is raised the onus is placed on the complainant and it must be disproved by the prosecution beyond reasonable doubt.

3.4.6.5.6 **United States**

3.4.6.5.6.1 In contrast to the approach taken in Canada and under the English and Australian common law, American courts have long used an objective, or 'reasonable' test to judge the accused's claim that he thought the woman consented.²⁶¹ However, a number of American feminist writers have been critical of the failure of American courts and legislatures to specify what this standards entails. For example, the American feminist lawyer, Susan Estrich,²⁶² has strongly argued the need to specify not only that belief in consent should be reasonable, but also that the reasonable man is one who understands that 'no means no'. According to this argument, the criminal law has an important role to play in defining how sexual relations should be conducted in our community, not simply in reflecting and perpetuating established, 'male' standards of conduct.

3.4.6.5.6.2 Reflecting these concerns, some writers have argued that legislation should state the circumstances under which it is, or is not, reasonable to presume consent. A more novel

260 Bryant A W 'The Issue Of Consent in the Crime Of Sexual Assault' 1989 (68) **Canadian Bar Review** 143 -150.

261 Weiner R D 'Shifting the Burden of Consent' 145.

262 **Real Rape: How the Legal System Victimises Women Who Say No** Cambridge Mass: Harvard University Press 1987.

strategy has been advocated by Lucinda Vandervort, a Canadian feminist lawyer.²⁶³ She argues that most mistakes as to consent are really mistakes of law, not mistakes of fact, and hence should not provide grounds for escaping punishment. Vandervort's proposal is that the law should clearly spell out that consent must be positively communicated either verbally or by unequivocal non-verbal behaviour. It would then no longer be open to men to claim as a defence that they thought the victim was consenting simply because she did not resist, as such a claim would only show that they were unaware that the law requires them to ascertain consent in advance.²⁶⁴ Under this formulation, the accused could only argue a mistaken belief in consent where there were language differences, or some other genuine mis-communication about what was being discussed and agreed to.

3.4.6.6 **The move from absence of consent to the presence of coercive circumstances**

3.4.6.6.1 Under the present South African law, the prosecution must prove beyond a reasonable doubt that the complainant did not consent to sexual intercourse by the accused. An alternative approach is to require that the prosecution prove that the sexual penetration took place in 'coercive circumstances', rather than without consent. This approach has been adopted in some American jurisdictions, most notably Michigan and Illinois. Aspects of the Michigan approach were also incorporated into the New South Wales Crimes (Sexual Assault) Amendment Act 1981, although this provision has recently been substantially modified. The main features of these models are outlined below.

3.4.6.6.2 **Michigan**

3.4.6.6.2.1 Until comparatively recently, in most American jurisdictions lack of consent normally had to be demonstrated by evidence that the accused had 'overcome the victim' and the victim had reacted with the utmost physical resistance.

263 See Vandervort L 'Mistake of Law and Sexual Assault: Consent and Mens Rea' 1988 (2) **Canadian Journal of Women and the Law** 233-309.

264 Vandervort 1988 (2) **Canadian Journal of Women and the Law** 251. The author concedes that defendants who are genuinely mistaken about what the law requires of them are less morally culpable than those who knowingly rape someone, but she argues that this should be regarded only as a mitigating factor in sentencing, not as relevant to the determination of guilt or innocence.

3.4.6.6.2.2 In 1974, the American state of Michigan adopted a comprehensive rape reform statute which, among other things, has replaced this traditional definition of rape with one that focuses on the circumstances in which the sexual penetration was alleged to have taken place. Under this new approach, the prosecution has to prove only that there was sexual penetration, or some other form of sexual contact, in 'coercive circumstances'. The prosecution does not have to prove that there was also a lack of consent on the part of the complainant, although the defence can still raise consent as a defence.

3.4.6.6.2.3 One justification offered for introducing the Michigan reform was that it would lead to less focus on the consent issue - particularly in cases where a weapon was involved or significant violence used. More generally, this approach was seen as dispelling the legal presumption that even where force may be used or threatened, there may still be consent.

3.4.6.6.2.4 The precise structure of the Michigan scheme is as follows:

1. A single offence category known as 'criminal sexual conduct' has replaced a range of offences, most notably forcible rape, assault with intent to rape and indecent liberties. This offence category is in turn broken down into four degrees.
2. The four degrees of criminal sexual conduct are differentiated as follows:
 - C First degree criminal conduct (CSC1) applies to acts of sexual penetration carried out where:
 - (i) the accused was armed;
 - (ii) the offence occurred under circumstances involving the commission of any other felony;
 - (iii) the penetration was accomplished by force or coercion, or as a result of the victim being mentally or physically incapacitated, *and* resulted in personal injury (defined to include mental anguish); or
 - (iv) the accused was aided and abetted in the commission of the offence. This offence carries a maximum penalty of life imprisonment.
 - C **Second degree criminal sexual conduct (CSC2)** is defined in similar terms to CSC1, except that it applies to non-penetrative sexual assaults. This offence carries a maximum penalty of 15 years imprisonment.

- C **Third degree criminal sexual conduct (CSC3)** basically covers cases where sexual penetration was accomplished by means of coercion, or by virtue of the victim's incapacitation, but did not result in personal injury. This offence also carries a maximum penalty of 15 years imprisonment.
- C **Fourth degree criminal sexual conduct (CSC4)** is defined similar terms to CSC3, except that it applies to non-penetrative sexual assaults. This offence carries a maximum penalty of two years imprisonment or a monetary penalty.
3. Force or coercion is defined as including, but not being limited to, circumstances where a person:
- a. overcomes the victim through application of physical force;
 - b. threatens to use force or violence and the victims believes that the actor has the present ability to execute these threats;
 - c. threatens to retaliate against the victim or another person in the future and the victim believes the actor has the ability to execute this threat ('to retaliate' includes threats of physical punishment, kidnapping or extortion);
 - d. engages in medical treatment in a manner medically recognised as unacceptable; or
 - e. is able to overcome the victim through force or surprise.
4. Although the Michigan legislation makes no mention of consent, it remains open to defence attorneys to use common law consent defences and, in practice, the consent issue has been easily raised. Thus an accused may either present evidence of consent to disprove the prosecution's allegation that force was used, or, more rarely, raise consent as a defence to admittedly forceful conduct (for example, by arguing that although the accused was armed at the time, the complainant was nonetheless consenting). Recent decisions have supported the view that the defence must provide a proper foundation of evidence before a jury direction on consent is required.²⁶⁵ Once this defence is raised, the burden shifts back to the prosecution to prove the victim's lack of consent beyond reasonable doubt.

3.4.6.6.2.5 As the first reform of its kind, the impact of the Michigan legislation has been extensively studied. This research has found that, even though the statute no longer makes reference to consent, in practice this has remained the key issue in many rape trials. Thus the major study of the Michigan reforms has reported that a very large proportion of judges, prosecutors, and defence attorneys consider that, under the new law, it is still absolutely essential for the prosecution to establish the victim's lack of consent.²⁶⁶

3.4.6.6.2.6 More generally, studies of the Michigan reforms have concluded that the reform package did not have a major effect on reporting or arrest rates, and had only a limited impact on prosecution practices and trial outcomes.²⁶⁷ To the extent that there was an impact on prosecution and conviction rates, it is arguable that this was due more to the introduction of sexual history restriction than to the adoption of a revised definition of sexual assault.

3.4.6.6.2.7 It should also be noted that the Michigan approach has been criticised by a number of feminist writers for defining coercive circumstances primarily in terms of physical violence. For example, one critic has argued that the use of the word "overcome" seems to indicate that it is still necessary to prove non-consent by showing that the victim physically resisted.

If 'overcome' does not require non-consent, it is hard to see what it means...the subsequent definitions of force wholly ignore the reality illustrated by the cases - that coercion of a woman need not involve either actual violence or threats of future physical injury.²⁶⁸

3.4.6.6.2.8 Similarly, the Canadian feminist Susan Heald has argued the Michigan's focus on violence ignores the intrinsic harm of other forms of non-consensual penetration. According to Heald, this focus is consistent with widely held beliefs that rape is an aberrant act of deviant

266 Marsh J C, Geist A and Caplan N **Rape and the limits of Law Reform** Boston: Auburn House 1982 50 - 52.

267 Caringella-MacDonald S 'The Comparability in Sexual and Nonsexual Assault Case Treatment: Did Statute Change Meet the Objective?' 1985 (2) **Crime and Delinquency** 206 -222.

268 Estrich S 'Rape' 1986 (95) **The Yale Law Journal** 1155.

violence having no relation to normal sexuality and that non-consensual penetration without force must be pleasurable to women.²⁶⁹

3.4.6.6.2.9 The legislation enacted in Michigan (USA) provided a model for many subsequent enactments in other countries and were hailed as a major advance in the protection of woman's sexual autonomy, in that their purpose was to shift the focus of the trial on the presence of coercive circumstances, with no requirement that the prosecution prove absence of consent. Unfortunately, the prevailing influence of the common law has diluted the intention of the legislature in that consent is still, whether overtly or covertly, the predominant element in rape trials.

3.4.6.6.3 Illinois

3.4.6.6.3.1 In 1984, the American state of Illinois adopted a legislative scheme broadly similar to that employed in Michigan.²⁷⁰ The primary offences created were criminal sexual assault ('an act of sexual penetration by the use of or threat of force') and criminal sexual abuse ('an act of sexual conduct by the use of force or threat of force'). Aggravating circumstances were also defined for each offence.

3.4.6.6.3.2 The main differences between Illinois and Michigan are, firstly, that the Illinois statute explicitly provides that consent is a statutory defence to the crime of criminal sexual assault and, secondly, offers a statutory definition of consent. According to this definition.

'Consent' means a freely given agreement to the act of sexual penetration or sexual conduct in question. Lack of verbal or physical resistance by the victim resulting from the use of force or threat of force by the accused shall not constitute consent.²⁷¹

3.4.6.6.3.3 The Illinois Statute defines 'force or threat of force' to include:

269 Heald S 'Social Change and Legal Ideology: A Critique of the New Sexual Assault Legislation' 1985 (7) **Canadian Criminology Forum** 117-27. See also MacKinnon C 'Rape: On Coercion and Consent' in **Towards a Feminist Theory of the State** Cambridge: Harvard University Press 1989 and Smart C 'Rape Law and the Disqualification of Women's Sexuality' in **Feminism and the Power of Law** London: Routledge 1989.

270 Ill Re Stat ch38, paras 12-12 to 12-18 (1984).

271 Ill Re Stat ch38, paras 12-17 (1984).

- 1 When the accused threatens to use force or violence on the victim or on any person, and the victim under the circumstances reasonably believed that the accused had the ability to execute the threat; or
- 2 When the accused has overcome the victim by use of superior strength or size, physical restraint or physical confinement.²⁷²

3.4.6.6.3.4 In *People v Haywood*²⁷³ the Illinois Appellate Court ruled that there is nothing in the language of the statute, or the legislative record, to indicate that the legislature intended a new definition of “force” that would criminalise conduct that was not criminalised under repealed statutes.

3.4.6.6.4 **New South Wales**

3.4.6.6.4.1 Aspects of the Michigan approach were incorporated into the New South Wales *Crimes (Sexual Assault) Amendment Act* 1981. This Act created a four-part scheme of graded sexual assaults. Under this scheme, the two most serious grades covered situations where violence was inflicted or threatened with intent to achieve sexual penetration. Consent was not an element of these offences. Consent was retained as an element for the remaining two grades - sexual intercourse without consent and indecent assault.

3.4.6.6.4.2 Maximum penalties for each grade of sexual assault where as follows:

- Category 1:* inflicting grievous bodily harm with intent to have sexual intercourse, 20 years imprisonment;
- Category 2:* inflicting actual bodily harm with intent to have sexual intercourse, 12 years imprisonment, or 14 years imprisonment if the offender is in the company of others;
- Category 3:* sexual intercourse without consent, 8 years imprisonment, and 12 years imprisonment if the offender is in the company of others;
- Category 4:* indecent assault and act of indecency, 4 years imprisonment, 6 years imprisonment if the offender is in the company of others.

272 Ill Re Stat ch38, para 12-12 (d) (1984)

273 118 Ill 2d 263, 515 NE2d 45 (1987)

3.4.6.6.4.3 In practice, it was unusual for the first two categories of sexual assault to be charged in isolation. Rather, if an accused effected penetration, he would usually be charged with category 3 sexual assault (sexual intercourse without consent) in addition to either category 1 or 2.²⁷⁴

3.4.6.6.4.4 The New South Wales **Crimes (Amendment) Act** 1989 (proclaimed January 1991) substantially modified this scheme to bring it very close to the offence structure which currently applies in Victoria. The four categories of sexual assault have been replaced by two basic offences - sexual assault (sexual penetration without consent) and indecent assault - and aggravating circumstances defined for each. Maximum penalties for these offences have also been increased significantly. It would appear that this change in the structure of the law arose primarily out of a concern that the 1981 scheme set too low a penalty for rape.²⁷⁵

3.4.6.6.4.5 As a carry-over from the structure of offences adopted in 1981, a new offence has been defined in the **Crimes Act 1900**: 'assault with intent to have sexual intercourse'. Lack of consent is not an element of this offence. This offence, which carries a maximum penalty of 20 years imprisonment, is committed where a person, with intent to have sexual intercourse with another person:

- (a) maliciously inflicts actual body harm on the other person or a third person who is present or nearby; or
- (b) threatens to inflict actual bodily harm on the other person or a third person who is present or nearby by means of an offensive weapon or instrument.²⁷⁶

3.4.6.6.4.6 It would appear that most of the behaviour covered by this offence could be dealt with as an attempted sexual assault with aggravating circumstances - an offence which carries the same maximum penalty. However, in his second reading speech, then New South Wales Attorney-General, Mr John Dowd, argued that it was important that the additional offence be retained.

274 The 1981 legislation provided that where a defendant was convicted of a category 1 or 2 sexual assault and a category 3 sexual assault arising out of the same circumstances, this was to be taken into account in determining sentence. A similar provision has been retained in the recently amended scheme.

275 In its 1988 election campaign, the NSW Liberal Party was very critical of the fact that rape carried a maximum penalty of only 8 years imprisonment. It argued that the maximum penalty should be 20 years imprisonment. Adoption of the distinction between sexual assault with, and without, aggravating circumstances was a means of achieving this objective while retaining a tiered penalty structure.

276 **Crimes Act** (New South Wales) 1900, section 61 K.

The infliction of violence or the making of threats of violence is sufficient to found the offence ... In appropriate cases this new offence can be charged. The victim will then not have to be cross-examined in relation to the issue of consent.

3.4.6.6.4.7 Of some interest also is s65A of the New South Wales **Crimes Act 1900**, which was adopted in 1987.²⁷⁷ This section reads as follows:

65 A (1) In this section:

'non-violent' threat means intimidatory or coercive conduct, or other threat, which does not involve a threat of physical force.

(2) Any person who has sexual intercourse with another person shall, if the other person submits to the sexual intercourse as a result of a non-violent threat and could not in the circumstances be reasonably expected to resist the threat, be liable to penal servitude for 6 years.

(3) A person does not commit an offence under this section unless the person knows that the person concerned submits to the sexual intercourse as a result of the non-violent threat.

3.4.6.6.4.8 It is unclear to what extent, if any, this provision covers actions which do not constitute sexual assaults for the purpose of the New South Wales legislation.²⁷⁸ The New South Wales Bureau of Crime Statistics and Research has indicated that in 1988 and 1989, no person who was proceeded against in the District Court had been charged with this offence.

3.4.6.6.5 **Namibia**

3.4.6.6.5.1 The Law Reform and Development Commission of Namibia are investigating redefining rape through codification and have prepared a number of draft Bills. In all of them the definition of rape has been codified, one of the possible reasons being that by defining it in

277 Inserted by the **Crimes (Personal and Family Violence) Amendment Act 1987**.

278 In introducing the legislation to Parliament, the New South Wales Premier gave the following example of where this offence might be charged: 'an immigrant woman who speaks almost no English, works from home as an out-worker, sewing piece work. This provides her only income and she has dependent children. The man delivering work to her indicates that he will stop bringing work unless she submits to sexual intercourse with him. The woman submits to intercourse because she believes that, if she does not, she will be denied her only access to an earned income. She has been intimidated into submitting to sexual intercourse by a threat that her only source of income will be terminated - a threat that, in the circumstances she could not reasonably be expected to resist. The question of what could not, in the circumstances be reasonably resisted will be a question of fact for the jury'. (**Hansard 29 October 1987, p 15466**)

a statute they are able to rectify a number of shortcomings with the common law position on rape.

3.4.6.6.5.2 Firstly, the latest Namibian draft statute²⁷⁹ has defined rape as the Australians have, but they have gone wider by including the insertion of any part of the body of an animal into the vagina or anus of any other person as well as cunnilingus or any other form of genital stimulation.²⁸⁰ Secondly the said Namibian draft statute removes 'absence of consent' as an element of the offence and replaces it with 'coercive circumstances'.²⁸¹ The reasoning of the Law Reform and Development Commission of Namibia is that to require an 'absence of consent' is 'problematic because it puts the complainant "on trial", in effect, by requiring the prosecution to prove beyond reasonable doubt that the complainant did not consent to the sexual act'.²⁸² The intention of the latest Namibian Bill 'is to put the crime of rape on the same foot as other crimes where the prosecution must prove the conduct of the accused beyond reasonable doubt. This will help to ensure that a judgement is based upon objective circumstances put before the court rather than the court's appraisal of the subjective intention of the complainant'.²⁸³

3.4.6.6.5.3 The clause further defines a sexual act and coercive circumstances in considerable detail. The Namibian Law Reform Commission have dealt with the issue of when a person is unable to give consent by stating that 'coercive circumstances' shall exist *inter alia* where the complainant is affected by-

- C physical disability or helplessness, mental incapacity or other inability (whether permanent or temporary); or
- C intoxicating liquor or any drug or other substance which mentally incapacitates the complainant; or
- C sleep,

279 The **Combatting of Rape Bill** 1999.

280 Ibid at clause 1(a)-(c).

281 This formulation follows the Michigan model.

282 **Combatting of Rape Bill** 1999 p 3.

283 Namibian Law Reform and Development Commission **Report on the Law relating to Rape** July 1997 p 3.

to such an extent that the complainant is rendered incapable of understanding the nature of the sexual act or is deprived of the opportunity to communicate unwillingness to submit to or to commit the sexual act.²⁸⁴

3.4.6.6.5.4 Thirdly, it proposes a gender neutral offence of 'rape' which consists of the intentional performance, with another person, of a sexual act under coercive circumstances.²⁸⁵ Fourthly, it includes in the definition of 'coercive circumstances' circumstances where the perpetrator knows that he or she is infected with the HIV virus, and does not disclose this fact prior to committing the sexual act.²⁸⁶

3.4.6.6.5.5 In the document commissioned by the former Deputy Minister of Justice, Dr M Tshabalala-Msimang entitled *Legal Aspects of Rape in South Africa* the authors, B Pithey, L Artz, H Combrinck and N Naylor, recommend a new statutory definition be enacted and include a draft of the definition. Their recommendations follow the Michigan model of removing 'absence of consent' and inserting the requirement of sexual intercourse in 'coercive circumstance'. This draft definition broadens the ambit of the definition of rape and sexual act by including contact with or insertion of the penis of an animal into the vagina, mouth or anus of the complainant, simulation of oral sex and cunnilingus or fellatio.

3.4.6.6.5.6 The provision on rape in the discussion paper *Legal aspects of Rape in South Africa* reads as follows:

1. A person (hereinafter referred to as the actor) who intentionally performs or continues to perform a sexual act with another person (hereinafter referred to as the complainant) under coercive circumstances or who under coercive circumstances intentionally causes another person to perform a sexual act (whether with the actor or with the complainant himself or herself or with a third person or persons), is guilty of rape.
2. For the purposes of this Act, a sexual act shall mean:
 - a) contact with or the insertion of, to any extent whatsoever, the penis of the actor into the vagina, anus or mouth of the complainant;

284 Clause 2(2)(f) (i)-(iii) of the **Combatting of Rape Bill** 1999.

285 Clause 2 of the **Combatting of Rape Bill** 1999.

286 Clause 2 (2) (i) of the **Combatting of Rape Bill** 1999.

- b) contact with or insertion of, to any extent whatsoever, the penis of an animal into the vagina, anus or mouth of the complainant;
- c) the contact with or insertion of any object or part of the body of the actor or of an animal into the vagina, anus of the complainant: provided that the contact with, or insertion, of any object or part of the body of the actor that constitutes medical treatment that is generally accepted by the medical profession, shall not be a sexual act;
- d) simulation of oral sex with any object or part of the body of the actor or of an animal into the mouth of the complainant;
- e) cunnilingus or fellatio.

3. For the purpose of this section, the term “vagina” shall include the whole or part of the female sexual organ or surgically constructed vagina.

4. For the purpose of subsection (1), coercive circumstances shall include, but shall not be limited to -

- a) the use of physical force, whether explicit or implicit, direct or indirect;
- b) threats (whether verbal or through conduct, direct or indirect) to use physical force (either against the complainant or another person) in the present or in the future;
- c) threats (whether verbal or through conduct) to cause harm other than physical harm (either to the complainant or another person) in the present or in the future;
- d) circumstances where the complainant is unlawfully detained by the actor;
- e) circumstances where the complainant is affected by -
 - (i) sleep or lack of sleep;
 - (ii) drugs, alcohol or other substances; or
 - (iii) mentally, physically or otherwise disabled or incapacitated, whether on a temporary or permanent basis;
 to such an extent that he or she is unable to appreciate the nature of the sexual act concerned, or that he or she is unable to resist against the performance of the sexual act concerned, or that he or she is unable to communicate unwillingness;
- f) circumstances where the complainant believes that the actor or the person in respect of whom the complainant performs the sexual act, is another person;
- g) circumstances where the complainant is mistaken as to whether a sexual act is performed by the actor;

5. No marriage or relationship shall constitute a defence to a charge of rape as defined in this Act.

6. Subject to the provisions of this Act, any reference to “rape” in any law shall be deemed to include a reference to rape as defined in this section.

3.4.6.7 **Definition of consent**

3.4.6.7.1 **New South Wales**

3.4.6.7.1.1 The approach taken in New South Wales has been to provide a partial definition, which sets out only some of the circumstances in which consent is deemed to be lacking.

Specifically, the **Crimes Act** 1900, as amended by the **(Sexual Assault) Amendment Act 1981**, states that:

... without limiting the ground upon which it may be established that consent is vitiated:

- (a) a person who consents to sexual intercourse with another person:
 - (i) under a mistaken belief as to the identity of the other person; or
 - (ii) under a mistaken belief that the other person is married to the person,
 shall be deemed not to consent to the sexual intercourse;

.....

- (d) a person who submits to sexual intercourse with another person as a result of threats or terror, whether the threats are against, or the terror is instilled in, the person who submits to the sexual intercourse or any other person, shall be regarded as not consenting to the sexual intercourse; and
- (e) a person who does not offer actual physical resistance to sexual intercourse shall not, by reason only of that fact, be regarded as consenting to sexual intercourse.²⁸⁷

3.4.6.7.1.2 With the exception of the provision relating to fraud about marital status, the New South Wales formulation does not conflict with the position at common law. If anything, it may adopt a narrower definition of lack of consent than is allowed for under the common law.

3.4.6.7.2 **Western Australia**

3.4.6.7.2.1 In Western Australia, a major reform of sexual offences in 1986 abolished the discrete offence of rape and replaced it with a system of graded sexual assaults. The following general definition of consent was also incorporated into the **Criminal Code**.

- (1) ... 'consent' means a consent freely and voluntarily given and, without in any way affecting or limiting the meaning otherwise attributable to those words, a consent is not freely and voluntarily given if it is obtained by force, threat, intimidation, deception or fraudulent means.²⁸⁸
- (2) A failure to offer physical resistance to a sexual assault does not of itself constitute consent to a sexual assault.

287 **Crimes Act** 1900, s61D(3). The New South Wales **Crimes (Amendment) Act** 1989 does not significantly alter this formulation.

288 **Western Australian Criminal Code** s324G.

3.4.6.7.2.2 In *Ibbs v The Queen*²⁸⁹ the Supreme Court of Western Australia ruled that, in the light of this definition, it was inappropriate for a judge to tell a jury that ‘consent may be hesitant, grudging or tearful’.²⁹⁰ The meaning of key concepts such as ‘threat, deception and fraudulent means’ has not yet been tested by the appellate courts.

3.4.6.7.3 Tasmania

3.4.6.7.3.1 In Tasmania the ***Criminal Code*** of 1924, as amended by the ***Criminal Code Amendment (Sexual Offences) Act*** 1987, defines consent in the following terms:

- 2A(1) In the code, unless the contrary intention appears, a reference to consent means a reference to a consent freely given by a rational and sober person so situated as to be able to form a rational opinion upon the matter to which the consent is given.
- (2) Without limiting the meaning that may otherwise be attributable to the expression ‘freely given’, a consent is freely given where -
- a) it is not procured by force, fraud or threats of any kind.
 - b) it is not procured by reason of the person being overborne by the nature or position of another person; or
 - c) it is not given by a person so affected, or liquor or drugs, or so otherwise affected, as to be incapable of forming a rational opinion upon the matter to which the consent is given.²⁹¹

3.4.6.7.3.2 The Tasmania Supreme Court has had occasion, in an appeal against a conviction for rape, to consider the scope of the phrase ‘being overborne by the nature or position of another person’.²⁹² The complainant in this case was, at the time of the incident in question, 11 years old and in the foster care of the accused, 52 years her senior. Evidence was given that the complainant had felt sorry for the accused when he cried and said to her that he

289 [1988] WAR 91.

290 See also **Review of Sexual Assault Laws: A Report to the Attorney-General of Western Australia** Crown Law Department Western Australia, 1988, 15-19.

291 Section 4, **Criminal Code Amendment (Sexual Offences) Act** 1987. Also note s2A(3) of the **Criminal Code** of 1924, as amended by the **Criminal Code Amendment Act** 1987, which states that grievous bodily harm suffered by a person as a result of, or in connection with [rape] is prima facie evidence of the lack of consent on the part of that person.

292 **Crisp v The Queen** unreported 19 December 1990.

would get aches and pains if she did not have sexual intercourse with him. In finding that the verdict of the trial jury had been unsafe and unsatisfactory, the Supreme Court observed that 'at no stage did the complainant say that she did not give her consent to this act of intercourse at any time while it was occurring'. In the Court's view, other inferences as to why the complainant had submitted to sexual intercourse with the accused were reasonably open to the jury. The Court did, however, note that:

there may be cases where, because of the extreme youth or mental incapacity of the complainant, or because for some satisfactory reason the complainant does not give evidence at all, an inference can be drawn that the apparent consent was procured by her being overborne by the nature or position of the accused.

3.4.6.7.4 Australian Capital Territory

3.4.6.7.4.1 In the Australian context, the **ACT Crimes (Amendment) Ordinance** (No.5) 1985 has provided the most elaborate formulation of the consent element. This formulation bears a close resemblance to the Draft Sexual offences Bill produced by the Women's Electoral Lobby in 1980.²⁹³

3.4.6.7.4.2 The relevant provisions of the ACT ordinance read as follows:

1. For the purpose of [the relevant sections] and without limiting the grounds on which it may be established that consent is negated, the consent of a person to sexual intercourse with another person, or to the committing of an act of indecency by or with another person, is negated if that consent is caused -
 - a) by the infliction of violence or force upon the person, or on a third person who is present or nearby;
 - b) by a threat to inflict violence or force on a person, or on a third person who is present or nearby;
 - c) by a threat to inflict violence or force on , or to use extortion against the person or another person;
 - d) by a threat publicly to humiliate or disgrace, or to physically or mentally harass, the person or another person;
 - e) by the effect of intoxicating liquor, a drug or anaesthetic;

293 See Law Reform Commission of Victoria **Rape and Allied Offences: Substantive Aspects** Discussion Paper No 2 August 1986 at p30.

- f) by mistaken belief as to the identity of that other person;
- g) by the fraudulent misrepresentation of any fact made by that other person, or by a third person to the knowledge of the other person;
- h) by the abuse of the other person of his position of authority over, or professional or other trust in relation to, the person;
- i) by the unlawful detention of the person.

3.4.6.7.4.3 Most of the listed circumstances which negate consent clearly fall within the ambit of the common law, but some are potentially much broader: for example, taken at face value, the phrase ‘fraudulent misrepresentation of any fact’ [our emphasis] would appear to cover cases where a person is ‘tricked’ into having sex by any knowingly false promise, (for example, of marriage or financial reward).²⁹⁴

3.4.6.7.4.4 Although the scope of these provisions may potentially be quite wide, conversations with members of the Canberra Office of the Commonwealth Director of Public Prosecutions indicate that, in practice, the types of rapes prosecuted in the ACT differ little, if at all, from those prosecuted in Victoria. For example, there has not yet been a prosecution of a case which comes under the head of ‘abuse of authority’.

3.4.6.7.5 **New Zealand**

3.4.6.7.6 Amendments to the New Zealand **Crimes Act** 1961, enacted in 1985, substantially modified the legislative definition of consent and created two separate offences, ‘sexual violation’ and ‘including sexual connection by coercion’ in place of the offence rape. Both of these offences carry the same maximum penalty of 14 years imprisonment.

3.4.6.7.7 The offence of ‘sexual violation’²⁹⁵ requires the prosecution to prove that the physical act took place without the consent of the other person and without the accused person believing on reasonable grounds that the other person was consenting to that sexual

294 See Cunliffe I ‘Consent and Sexual Offences Law in New South Wales’ 1984 (8) **Criminal Law Journal** 271.

295 This offence covers rape and unlawful sexual connection. ‘Sexual connection’ includes a range of penetrative acts similar to those defined in the Victorian **Crimes Act**, as amended by the Crimes (Sexual Offences) Act 1991.

connection. In place of the former legislative definition of consent, the legislation now provides.²⁹⁶

- 128 A
- (1) The fact that a person does not protest or offer physical resistance to sexual connection does not by itself constitute consent to sexual connection for the purposes of section 128 of this Act [sexual violation].
 - (2) The following matters do not constitute consent for the purpose of section 128 of this Act:
 - a) The fact that a person submits or acquiesces in sexual connection by reason of -
 - i) the actual or threatened application of force to that person or some other person, or
 - ii) the fear of the application of force to that person or some other person:
 - b) The fact that a person consents to sexual connection by reason of -
 - i) a mistake as to the identity of the other person; or
 - ii) a mistake as to the nature and quality of the act.

3.4.6.7.8 The offence of 'inducing sexual connection by coercion' is committed where a person has sexual connection with another person, knowing that the person has been induced to consent to the sexual connection by reason of any of the following:

- a) an express or implied threat that the person having sexual connection or some other person will commit an offence which is punishable by imprisonment but which does not involve the actual or threatened force to any person; or
- b) an express or implied threat that the person having sexual connection or some other person will make an accusation of disclosure (whether true or false) about misconduct by any person (whether living or dead) that is likely to damage seriously the reputation of the person against or about whom the accusation or disclosure is made; or
- c) an express or implied threat by the person having sexual connection to make improper use, to the detriment of the other person, of any power or authority arising out of any

296 Section 128 formerly read:

- 1. Rape is the act of a male person having sexual intercourse with a woman or girl.
 - a) without her consent; or
 - b) with consent extorted by fear or bodily harm or by threats; or
 - c) with consent extorted by fear, on reasonable grounds, that the refusal of consent would result in the death of grievous bodily injury to a third person; or
 - d) with consent obtained by personating her husband; or
 - e) with consent obtained by a false and fraudulent representation as to the nature and quality of the act.

occupational or vocational position held by the person having sexual connection or any commercial relationship between that person and the other person.²⁹⁷

3.4.6.7.9 It appears that the offence of inducing sexual connection by coercion is seldom charged and there are no reported cases dealing with the operation of this section.

3.4.6.8 **Canada**

3.4.6.8.1 In 1983, there was a radical revamping of Canadian sexual offence laws. Section 244 (3) of the **Canadian Criminal Code** now reads as follows:

For the purpose of this section, no consent is obtained where the complainant submits or does not resist by reason of

- a) the application of force to the complainant or to a person other than the complainant;
- b) threats or fear of the application of force to the complainant or to a person other than the complainant;
- c) fraud; or
- d) the exercise of authority.

3.4.6.8.2 According to one Canadian commentator, section 244 (3) 'is partially a codification of common law principles and partially a reflection of former statutory provisions'.²⁹⁸ It is unclear whether the new definition is meant to be exhaustive. The scope of key terms such as 'fraud' and 'exercise' of authority remains a matter of dispute.²⁹⁹

3.4.6.9 **Wisconsin**

3.4.6.9.1 Prior to 1977, the state of Wisconsin, like most American jurisdictions, had defined rape as sexual intercourse 'by force and against the will'. The current Wisconsin sexual assault statute defines four degrees of sexual assault. For all four degrees, 'lack of consent' is an element of the offence. The first two degrees also require evidence of bodily injury, force, or the threat of force. Third degree sexual assault, which carries a lower penalty, is defined simply as sexual intercourse without consent. Fourth degree sexual assault prohibits sexual

297 Section 129 A.

298 Bryant A W 'The Issue Of Consent in the Crime of Sexual Assault' 1989 (68) **Canadian Bar Review** 103.

299 Bryant A W 1989 (68) **Canadian Bar Review** 117 - 131.

contact (intentional touching of 'intimate parts') with another person without that person's consent.³⁰⁰

3.4.6.9.2 The most distinctive feature of the Wisconsin statute is the definition which it provides of consent. According to this definition, consent means:

words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact.

3.4.6.9.3 There is quite an extensive body of case law relating to the scope of this definition. The leading case is ***State v Lederer***.³⁰¹ This case involved an accused who took the victim to see a residence for rental purposes. After arriving at the property, the accused proceeded to have sexual intercourse with the victim over her verbal protestations. The accused disrobed the victim and told her that it would be worse if she fought. He then fell asleep on the victim. During the night, he also engaged in several other sexual acts with her, including acts of fellatio. When the accused asked the victim to open her mouth prior to the act of fellatio she did not, but instead turned her head away and only complied when the accused took her head in his hands.

3.4.6.9.4 The accused in ***Lederer*** was convicted of third degree sexual assault (sexual intercourse without consent). On appeal, he argued that the definition of consent contained in the legislation was overbroad and unconstitutional. In response, the Court held that in so defining consent the legislature 'has relieved the State of the burden of proving that the victim resisted in order to establish that the act was non-consensual'. The accused also argued that the evidence was insufficient to find that the acts of fellatio were performed without consent. In upholding the conviction the Court stated that:

these actions can hardly be said to be manifestation of consent, particularly when viewed together with the threat of the accused that things would be worse if she did not comply. 'No means no', and precludes any finding that the prosecutrix consented to any of the sexual acts performed.³⁰²

300 Wisc Stat Ann 940.225 (West 1987-88). Section 940.225 was created by the enactment of Ch 173, Laws of 1977.

301 299 NW 2d 457 (Ct Appeal 1980).

302 ***State v Lederer*** 299 NW 2d 457 at 461 (Ct App 1980).

3.4.6.9.5 In *State v Clark*³⁰³ the Supreme Court of Wisconsin held that there was a lack of consent where the victim did not resist but followed the directions of the accused. Several more cases have affirmed that failing to resist, or merely following directions, does not amount to consent. In *State v Simpson*, the Wisconsin Court of Appeal summarised these decisions in the following terms:

The meaning of consent is illustrated by the case law. Passive acquiescence and responding to directions during the sexual act is not consent when the victim tells the accused that she does not want sex. Compliance during continuous objection is not consent. Evidence that the accused had sexual intercourse with a sleeping woman is sufficient to sustain a third degree sexual assault conviction.³⁰⁴

3.4.6.9.6 Taken at face value the Wisconsin approach places more emphasis than does the common law on the need for consent to be communicated in some overt way.³⁰⁵ However, on the facts given, it seems likely that most, if not all, of the cases which have been the subject of reported appellate court decisions in Wisconsin would also fit within the common law definition of 'lack of consent'.

3.4.6.9.7 In contrast to the Michigan reforms, the Wisconsin legislation has attracted little attention from social scientists. Hence, there is no published data available to indicate whether adoption of the revised consent standard in Wisconsin has had significant impact on reporting or charging practices, trial outcomes or underlying social behavior.

3.4.7 Evaluation and recommendations

3.4.7.1 Revision of common law definition of rape

3.4.7.1.1 The Commission agrees with the majority of submissions on the need to revise the current common law definition of rape, and is of the opinion that the following aspects merit attention:

303 87 Wis 2d 804, 275 NW 2d 715 (1979).

304 125 Wis 2d 375, 373 NW 2d 673 (Ct. App. 1985)

305 See Weiner R 'Shifting the Communication Burden: A Meaningful Consent Standard in Rape' 1988 (8) *Harvard Women's Law Journal* 143.

- C Sexual intercourse and sexual penetration
- C Unlawfulness, consent and coercive circumstances
- C Intention: objective or subjective fault element
- C Renaming the offence of rape
- C Certain defences to a charge of rape

3.4.7.2 **Sexual intercourse and sexual penetration**

3.4.7.2.1 The present common law definition of rape relies on the concept 'sexual intercourse'. This is understood to imply conventional heterosexual intercourse, i.e. penile penetration of the female vagina. It is this aspect of the definition which imposes significant limits on the ambit of the offence. The Commission agrees that the definition should be broadened to reflect the reality that not only women experience 'rape', and that rape may include more than vaginal penetration with a penis.

Who is to say that the sexual humiliation suffered through forced oral or rectal penetration is a lesser violation of the personal private inner space, a lesser injury to mind, spirit and sense of self?... All acts of sex forced on unwilling victims deserve to be treated as equally grave offences in the eyes of the law, for the avenue of penetration is less significant than the intention to degrade.³⁰⁶

3.4.7.2.2 In addition to extending the ambit of the offence to include a broader range of acts of penetration, we also believe that it is essential to move away from the term 'sexual intercourse'. This term carries a common understanding of vaginal penetration by the penis. The Commission believes that the definition of the offence should reflect the fact that the *actus reus* consists of the violation of the sexual integrity of the victim by an act of penetration (irrespective of how this penetration is achieved). In addition, it should be noted that the term 'intercourse' carries a connotation of mutual engagement, which is contrary to the nature of the offence of rape.

3.4.7.2.3 *The Commission therefore recommends that the definition of rape should refer to 'sexual penetration' rather than 'sexual intercourse', and that sexual penetration should be defined clearly to encompass the broadest range of acts of sexual penetration.*

3.4.7.3 **Unlawfulness, consent and coercive circumstances**

306 **Legal Aspects of Rape** at 30 citing S Brownmiller **Against Our Will** (1976) at 370.

3.4.7.3.1 Under current South African law, the prosecution must prove, as one of the elements of the offence of rape, that the complainant did not consent to sexual intercourse with the accused in order to obtain a conviction. This requirement has been criticised on the grounds that it leads to an excessive focus on the complainant's behaviour (rather than the alleged conduct of the accused) during the rape trial. It has also been argued that our courts have difficulty interpreting the meaning of consent and consequently often rely on stereotyped notions of consenting sexual behaviour to decide whether the accused is guilty of rape. These stereotyped views are also said to lead police and those involved in the prosecution process to screen out many cases in which consent is a major issue.

3.4.7.3.2 It is suggested that these problems be addressed by considering what role the element of consent plays in terms of the general principles of the criminal law in relation to the offence of rape.

3.4.7.3.3 Generally unlawfulness of an act or omission is one of the elements of an offence. In short unlawfulness implies that a person had no lawful reason to act in the way he or she had acted. The accused may raise as a defence that he or she had an excuse in law for his or her actions thereby justifying what appears to be unlawful. One such excuse, depending on the type of offence with which the accused is charged, may be that the accused had acted with the consent of the victim. The existence of consent is therefore a justification which may be raised by an accused in the course of a trial, which will exclude the apparent unlawfulness of his or her actions.

3.4.7.3.4 When these general principles are considered in relation to a practical example it means the following: On a charge of theft the prosecution must prove all the elements of the offence, including unlawfulness. Since it is *prima facie* unlawful for one person to take the property of another person, the unlawfulness appears from the facts once the prosecution has proven the action and the intent. Consequently the prosecution is not expected to exclude all possible legal excuses which may justify the accused's actions. If the accused wants to base his or her defence on a justification he or she must raise that in answer to the prosecution's case and carries the *onus* to prove the justification.³⁰⁷ The accused in this practical example therefore carries the *onus* to prove that he or she had the consent of the owner to take the property in question. If the accused succeeds in doing so he or she will have shown that the taking of the property was in fact lawful and a conviction of theft cannot follow.

3.4.7.3.5 Broadly speaking, rape at common law consists of two elements namely sexual intercourse and absence of consent. Since sexual intercourse, in itself, is not *prima facie*

307 This is confirmed by section 90 of the Criminal Procedure Act which states that an excuse does not have to be alleged or proven by the prosecution, but may be proved by the accused.

unlawful the prosecution must prove in which circumstances the sexual intercourse took place in order to establish unlawfulness. This has developed into the current requirement to prove that the sexual intercourse took place without the consent of the victim. By establishing an absence of consent on the part of the victim the prosecution, in fact, proves that the accused had no lawful reason to act in the way he had acted. Therefore the sexual intercourse was *prima facie* unlawful.

3.4.7.3.6 In the majority of rape cases the element of an absence of consent is placed in dispute by the accused. In other words the accused alleges that the victim had consented to the sexual intercourse. In these circumstances the accused's allegation of consent on the part of the victim does not amount to a reliance on a legal excuse as a justification for his actions (for which the accused will carry the *onus* of proof). It is merely a dispute of one of the elements of the prosecution's case on a factual basis.

3.4.7.3.7 The accused may, of course, also rely on a legal excuse as a justification for what appears to be rape. He may, for example, allege that his act was not unlawful due to duress of necessity (eg where he was threatened at gunpoint to rape the victim). If he alleges such a legal excuse he carries the *onus* to prove that excuse. It is suggested that a method be devised to treat the consent of the victim in the same manner. This will bring the role of consent in respect of rape in line with the role it plays in respect of other offences.

3.4.7.3.8 In order to solve the problem faced by prosecuting authorities and victims of rape to prove the absence of consent, it is suggested that the element of unlawfulness be approached by considering the circumstances in which the sexual intercourse took place. Once unlawfulness is established by proof that the rape took place in certain circumstances the *onus* must be on the accused to prove his or her defence which may, or may not, be based on consent as a justification for his or her actions. Such an approach will require the prosecution to prove that the sexual intercourse took place in "coercive circumstances", rather than without consent.

3.4.7.3.9 As can be seen from the comparative survey this approach has been adopted in some American jurisdictions, most notably Michigan and Illinois. Aspects of the Michigan approach were also incorporated in the New South Wales Crimes (Sexual Assault) Amendment Act 1981, although this scheme has since then been substantially modified. The Michigan model has also been adopted in the Namibian Combatting of Rape Bill and forms the basis of the proposal put forward in the Discussion Document on the ***Legal Aspects of Rape in South Africa***.

3.4.7.3.10 It has been argued that the 'coercive circumstances' that have to be proved under the Michigan model - such as the use of physical force, weapons, or threats of physical

harm - are in reality no more than indicators of lack of consent. It is said that the sort of evidence which will tend to prove that the accused 'coerced' the victim to engage in intercourse will essentially be the same as the evidence indicating whether or not the victim consented, and that this change therefore simply entails referring to 'absence of consent' as the alternative 'coercive circumstances'. It is argued that court-room tactics, and therefore the experiences of the victim, are unlikely to vary with semantic changes to the law.

3.4.7.3.11 In response to these remarks it has often been pointed out that the primary difference between the act of rape and lawful sexual intercourse *is* the lack of consent. There seems little reason to obscure this fundamental point. Simply abandoning the phrase 'lack of consent' and replacing it with an equally complex concept such as 'coercive circumstances', will not, of itself, lessen any confusion that may exist at present.

3.4.7.3.12 This, with respect, is the problem with the Michigan model. It makes no sense to simply replace the most essential element of rape 'without consent' with a new element 'under coercive circumstances'. In fact, it might actually be counterproductive, because the concept of coercion has strong connotations of violence and physical compulsion.

3.4.7.3.13 *We believe the fact that a person did not consent to sexual intercourse with a particular person or was coerced into it by that person is prima facie unlawful. Lack of consent or the presence of coercive circumstances are indicators of the unlawfulness of the sexual intercourse. There is therefore no need to include as a substantive element of the crime of rape 'lack of consent' or the 'presence of coercive circumstances'.*

3.4.7.3.14 The Commission therefore believes that it is essential to redefine the offence of rape to be reliant on 'coercive circumstances' rather than absence of consent in order to establish *prima facie* unlawfulness. A shift from 'absence of consent' to 'coercion' represents a shift of focus of the utmost importance from the subjective state of mind of the victim to the imbalance of power between the parties on the occasion in question. This perspective also allows one to understand that coercion constitutes more than physical force or threat thereof, but may also include various other forms of exercise of power over another person: emotional, psychological, economical, social or organisational power. One may also add here the exercise of power resulting from age difference between the perpetrator and victim.

3.4.7.3.15 This new requirement will bring the definition more in line with the modern international trend of moving away from 'absence of consent' and the resultant trial of the complainant. It will have the effect of harmonising the general principles of our criminal law as it will place the crime of rape on the same footing as other crimes where the prosecution must

prove the accused's conduct beyond reasonable doubt. 'This will help to ensure that a judgement is based upon objective circumstances put before the court rather than the court's appraisal of the subjective intention of the complainant'.³⁰⁸

3.4.7.3.16 *We therefore recommend the creation of a statutory offence to replace the common law offence of rape. The essence of our proposal reads as follows:*

- (1) *Any person who intentionally and unlawfully commits an act of sexual penetration with another person, or who intentionally and unlawfully causes another person to commit such an act, is guilty of an offence.*
- (2) *For the purposes of this Act, an act of sexual penetration is prima facie unlawful if it takes place in any coercive circumstances.*

3.4.7.4 **Definition of coercive circumstances**

3.4.7.4.1 The Commission is of the opinion that a statutory list of 'coercive circumstances' should be provided. This list should not be exhaustive. In its formulation of what constitutes 'coercive circumstances', the Commission has been led by the Namibian Draft Combatting of Rape Bill and the Discussion Document on Legal Aspects of Rape in South Africa.

3.4.7.4.2 It is important to note that the Namibian Bill includes as a 'coercive circumstance', the situation where the complainant is under the age of thirteen years and the perpetrator is more than three years older than the complainant. We propose to follow this example, but to limit it to children under 12 years. This is in line with the common law presumption that a girl under the age of 12 cannot in law consent to sexual intercourse. It is important that the provision clearly refers to 'children under the age of 12 years' in order to extend the protection that girls under 12 receive to boys under 12 years.

3.4.7.4.3 As far as the second leg of the Namibian provision is concerned, the Commission is of the opinion that this should not be retained. The inclusion of a second leg (which has to be coexistent with the first aspect, as indicated by the use of 'and'), in order to constitute 'coercive circumstances' implies that where, for example, an 11-year old victim purports to give consent to sexual penetration by a 14-year old perpetrator, this will not

308 Namibia Law Reform and Development Commission **Report on the Law Pertaining to Rape** July 1997 at 3.

constitute 'coercive circumstances'. (This problem does not arise where she does not 'consent': the force or coercion applied by the perpetrator will constitute coercive circumstances, with the implication that the perpetrator will be liable for the offence of rape.)

3.4.7.4.4 Another potentially controversial aspect of the Namibian Bill relates to the inclusion, as a 'coercive circumstance', of the situation where the 'perpetrator knowing that he or she is infected with the human immuno-deficiency virus does not, before committing the sexual act, disclose to the complainant that he or she is so infected'. The theory appears to be that the other party would never have consented to a sexual encounter if he or she had known about the HIV. But this would also probably be true in the case of failure to disclose infection with syphilis, or even marital status. We deal with harmful HIV/ AIDS related behaviour in the subsequent Chapter of this document, and conclude here by stating that it is our provisional view that failure to disclose the fact that a person has HIV/ AIDS should not, at this stage, be included as a 'coercive circumstance'.

3.4.7.4.5 *In our proposal, 'coercive circumstances' therefore include:*

circumstances where—

- C there is any application of force, whether explicit or implicit, direct or indirect, physical or psychological against any person or animal;*
- C there is any threat, whether verbal or through conduct, direct or indirect, to cause any form of harm to any person or animal;*
- C the complainant is under the age of twelve years;*
- C there is an abuse of power or authority, whether explicit or implicit, direct or indirect, to the extent that one person is inhibited from communicating his or her resistance to an act of sexual penetration, or his or her unwillingness to participate in such an act;*
- C a person's mental capacity is affected by—*
 - C sleep;*
 - C any drug, intoxicating liquor or other substance;*
 - C mental or physical disability, whether temporary or permanent, or*
 - C any other condition, whether temporary or permanent, to the extent that he or she is unable to appreciate the nature of an act of sexual penetration, or is unable to resist the commission of such an*

act, or is unable to indicate his or her unwillingness to participate in such an act;

C a person is unlawfully detained;

C a person believes that he or she is committing an act of sexual penetration with another person, or

C a person mistakes an act of sexual penetration which is being committed with him or her for something other than an act of sexual penetration.

3.4.7.5 **Intention: objective or subjective fault element**

3.4.7.5.1 Another aspect that will have to be addressed revolves around the test to be applied to determine the reasonableness of the belief of an accused that the victim was consenting to sexual penetration. In terms of the definition proposed by the Commission, the question does not revolve around a mistaken belief regarding consent, but relates to a lack of knowledge of unlawfulness.

3.4.7.5.2 The test to be applied to determine the reasonableness of the belief of an accused that the victim was consenting to sexual intercourse was discussed at some length by the Australian Model Criminal Code Officers Committee. This Committee decided against a requirement that the accused's belief must be based on reasonable grounds.³⁰⁹ The arguments that they put forward for both are worth noting here:

3.4.7.5.3 Arguments in favour of a subjective fault element:

C It accords with fundamental principles of criminal responsibility. 'A person could face conviction for a most serious crime on the basis that his or her honest belief did not fall within what is regarded as reasonable'.³¹⁰

309 The draft Australian **Model Criminal Code** at 64-65.

310 Ibid at 68-73.

- C It would also be extremely ‘difficult to formulate an objective standard of “reasonableness”... whether the accused’s mistaken belief in consent was reasonable for a person of the same social status, ethnic group or mental capacity’.³¹¹ It will sometimes be difficult for the State to refute an allegedly honestly held belief though it may not be at all reasonable.
- C If the test is subjective, then the accused’s belief would be tested on an evidentiary basis, and the court would still consider whether the accused honestly believed that the victim had consented.

3.4.7.5.4 Arguments against a subjective fault element:

- C A chief argument against the subjective test is that it allows men to adhere to old-fashioned views about sexual behaviour and female sexuality. It leaves the way open for an accused to rely on notions such as “no really means yes” or that women enjoy being seduced and ravished.³¹²
- C The adoption of an objective test and a requirement of ‘reasonableness’ would assist in educating the community, particularly men, that proper care should be exercised in sexual relations.³¹³

3.4.7.5.5 If the element of consent is removed from the definition of rape this part of the fault element will have to be approached differently. If one accepts that the absence of consent (or the presence of coercive circumstances) are indicators of the unlawfulness of an act of sexual intercourse then it follows that a belief of the accused that he had acted with the consent of the victim amounts to a lack of knowledge of unlawfulness on his part. Such a lack of knowledge of unlawfulness will exclude intent on the part of the accused. If the accused was unaware of the unlawfulness of his or her actions, he or she will have to allege that fact as a basis for his or her defence against the charges against him or her. In order to succeed with such a defence the accused will have to satisfy the court that there is a reasonable possibility that the alleged lack of knowledge of unlawfulness is true.

311 Ibid.

312 Ibid.

313 Ibid.

3.4.7.5.6 *The Commission has elected not to formulate a specific provision on this aspect at this stage. However, we specifically invite comments on the following question:*

‘Should the accused’s mistaken belief that he or she had acted lawfully be a complete defence to a charge of rape where this mistake, objectively viewed, is unreasonable under the circumstances?’

3.4.7.6 **Renaming the offence of rape**

3.4.7.6.1 What the new statutory offence should be called, opened up a considerable debate. As we have seen, some argue that the term ‘rape’ has ancient origins and has acquired a particular legal meaning through the years. However, in common parlance, ‘rape’ seems to include more than the accepted limited legal definition.

3.4.7.6.2 As more and more jurisdictions redefine and restructure their sexual offence laws, and it is interesting to note that most of the newer statutes have substituted the term ‘rape’ with terms such as ‘sexual assault’, ‘sexual violation’, ‘sexual attack’, and ‘sexual imposition’.³¹⁴ This tendency forms part of an attempt to emphasize the violence associated with rape rather than to focus on the sexual component of the act. The difficulty with these other terms is that they have all been associated in one form or another with a very different kind of wrongdoing (i.e. assault) and could therefore simply confuse the issue.

3.4.7.6.3 The main argument for retention of the word ‘rape’ is that it is synonymous with a particularly heinous form of behaviour and the concern is that the removal of the term would inevitably detract from that image in the public mind, especially over a period of time.³¹⁵ The alternative view is that rape is a highly emotive term and is damaging to the victims and the community. The word ‘rape’, with its emotional connotations, tends to produce excessively emotive responses to sex and violence. One effect is to add trauma and to further stigmatise victims, often regardless to the outcome of the case. Proponents of this view believe we would

314 Law Reform Commission of Victoria Paper 2 **Rape and Allied Offences: Substantive Aspects** at p 52 August 1986.

315 In support of the argument that removal of the label ‘rape’ tends to devalue the crime and the victim see Giacomassi D J and Wilkinson K R ‘Rape and the Devalued Victim’ 1985 (9) **Law and Human Behaviour** pp 367-383. For an expression of the opposite point of view see Schwartz M D and Clear T R ‘Toward A New Law on Rape’ 1980 (26) **Crime and Delinquency** pp 129-151.

have a far more sane and effective approach to dealing with sexual offences if the label was removed.³¹⁶

3.4.7.6.4 Another argument in favour of retaining the word 'rape' is that it is commonly understood and corresponds to a distinctive form of wrong doing. The difficulty with this reasoning is that the elements of the crime have been altered enormously and consequently this evolved crime bears little relation to the ancient crime of rape.³¹⁷

3.4.7.6.5 However, Barga and Fishwick³¹⁸ report that many women consider that the word rape itself is a powerful indicator of the violence (whether overt or covert) and the aggression that accompanies the offence. Consequently, increasing calls are being made for the retention or restoration of the term 'rape' in the definition of the offence. Significantly, the draft Namibian Bill uses the term 'rape'.³¹⁹

3.4.7.6.6 *The Commission recommends that the term 'rape' should be used to describe the proposed statutory offence.*

3.4.7.7 **Certain defences to a charge of rape**

3.4.7.7.1 This section does not purport to deal with all potential defences to a charge of rape, but only addresses two aspects which have emerged from the research and submissions.

3.4.7.7.2 We do not include, as possible defences to a charge of rape, the fact that body orifices are penetrated during *bona fide* medical examinations and operations. Such acts if done lawfully, will obviously not amount to an act of sexual penetration as it is not unlawful. If not done lawfully, then the medical 'examination' can constitute rape, provided the other elements are proven.

316 Law Reform Commission of Victoria Paper 2 **Rape and Allied Offences: Substantive Aspects** at p 52 August 1986.

317 Law Reform Commission of Victoria Paper 2 **Rape and Allied Offences: Substantive Aspects** at p 52 August 1986.

318 **Sexual Assault Law Reform: A National Perspective** (1995) note 6 at 60.

319 **Legal aspects of Rape** at 32.

3.4.7.7.3 *The Commission recommends the inclusion of a provision that 'no marriage or other relationship' shall be a defence against a charge of rape. This provision makes it clear that a husband can rape his wife. We deem it appropriate to have all the legislation relating to rape in a single enactment, and, as a result, propose to repeal section 5 of the Prevention of Family Violence Act, 1993.*

3.4.7.8 **Proposed statutory definition**

3.4.7.8.1 *We therefore recommend the creation of a statutory offence to replace the common law offence of rape. The suggested statutory provision reads as follows:*

Rape

2 (1) *Any person who intentionally and unlawfully commits an act of sexual penetration with another person, or who intentionally and unlawfully causes another person to commit such an act is guilty of an offence.*

(2) *For the purposes of this Act, an act of sexual penetration is prima facie unlawful if it takes place in any coercive circumstances.*

(3) *No marriage or other relationship shall be a defence against a charge under this section.*

(4) *No person shall be charged with or convicted of the common law offence of rape in respect of an act of sexual penetration committed after the commencement of this Act.*

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

We also propose the inclusion of the following definitions of "sexual penetration" and "coercive circumstances".

"sexual penetration" means any act which causes penetration to any extent whatsoever—

- (a) by the penis of one person—*
 - (i) into the anus, ear, mouth, nose or vagina of another person, or*
 - (ii) into any body orifice of an animal;*
- (b) by any object or part of the body of one person—*
 - (i) into the anus or vagina of another person, or*
 - (ii) into any body orifice of another person in a manner which simulates sexual intercourse, or*
- (c) by any part of the body of an animal—*
 - (i) into the anus or vagina of a person, or*
 - (ii) into any body orifice of a person in a manner which simulates sexual intercourse.*

"coercive circumstances" include any circumstances where—

- (a) there is any application of force, whether explicit or implicit, direct or indirect, physical or psychological against any person or animal;*
- (b) there is any threat, whether verbal or through conduct, direct or indirect, to cause any form of harm to any person or animal;*
- (c) the complainant is under the age of twelve years;*
- (d) there is an abuse of power or authority, whether explicit or implicit, direct or indirect, to the extent that one person is inhibited from communicating his or her resistance to an act of sexual penetration, or his or her unwillingness to participate in such an act;*
- (e) a person's mental capacity is affected by—*
 - (i) sleep;*
 - (ii) any drug, intoxicating liquor or other substance;*
 - (iii) mental or physical disability, whether temporary or permanent,*
or

- (iv) *any other condition, whether temporary or permanent, to the extent that he or she is unable to appreciate the nature of an act of sexual penetration, or is unable to resist the commission of such an act, or is unable to communicate his or her unwillingness to participate in such an act;*
- (f) *a person is unlawfully detained;*
- (g) *a person believes that he or she is committing an act of sexual penetration with another person, or*
- (h) *a person mistakes an act of sexual penetration which is being committed upon him or her for something other than an act of sexual penetration.*

3.4.7.9 The following aspects of this definition are important: Firstly, the essential elements of the offence are intent, unlawfulness, an act of sexual penetration committed with another person, and coercive circumstances. Secondly, the unlawfulness of an act of sexual intercourse is indicated by 'coercive circumstances'. Thirdly, the offence is not limited to sexual acts committed by men upon women. It is framed in gender neutral terms. Fourthly, penetration is a requirement. Penetration is not limited to the insertion of a penis into a vagina, but includes anal or oral sexual intercourse and the insertion of other body parts or objects into the penis, vagina or anus of another person. In the sixth place, lack of consent is not an element of the offence.

3.5 SODOMY

3.5.1 Introduction

3.5.1.1 Verschoor³²⁰ defines sodomy as the unlawful and intentional sexual relation *per anum* between two men. This is similar to the way Milton³²¹ defines sodomy. The crime presuppose two parties. The act consisted of the penetration of the penis of the one party into the anus of the other party. Without penetration the crime was no more than attempted sodomy

320 Verschoor T **Misdaad, Verweer en Straf** 166.

321 Milton **South African Criminal Law and Procedure Volume II** (third edition) 248. See also the definition by Snyman **Criminal Law** 341.

or else one of the miscellaneous unnatural offences. The crime of sodomy was particularly directed at and intended to penalise homosexuality between males.³²²

3.5.1.2 The reasons usually advanced for criminalizing sodomy are:

- C it denies the basic purpose of the sexual relationship, viz. procreation;
- C it subverts the institution of the family; and
- C homosexuals corrupt and pervert young people.

3.5.1.3 As Milton³²³ rightly shows, none of these contentions is rationally persuasive.³²⁴

He says:

Homosexuality does not necessarily preclude a heterosexual procreative relationship. In any event, celibacy and contraception also prevent procreation, but they are not criminalized. The argument that homosexuality subverts the institution of the family makes sense only if it is assumed that all humans will enter into exclusively homosexual relationships, which is patently not the case. Further, if concern for the family is the reason for criminalizing sodomy, then adultery ought also to be a crime, which it is not. There is scant evidence that homosexuals as a group are more inclined to corrupt young persons that are non-homosexuals.

The fact is that the criminal prohibition of sodomy is based on nothing more than a moralistic prejudice against a particular form of sexual gratification and, as such, it serves no rational object of the criminal law and is demeaning and discriminatory. The case for decriminalising homosexual relations between consenting adults is overwhelming.

The traditional crime of sodomy discriminates against males - there is no equivalent common law crime regarding females - and against gay persons - it punishes homosexual but not heterosexual intercourse in private between consenting adults - and violates the rights to human dignity and privacy.³²⁵ The contention that the crime of sodomy was an unconstitutional

322 Milton **South African Criminal Law and Procedure** (Volume II) 248.

323 **South African Criminal Law and Procedure** (Volume II) 249.

324 See also Labuschagne 'Dekriminalisasie van Homo- en Soöfilie' 1986 (11) **TRW** 167 at 180 - 185; **S v H** 1993 (2) **SACR** 545 (C); Lötter S 'Homoseksualiteit en die strafreg' 1998 **De Jure** 294.

325 Milton **South African Criminal Law and Procedure Volume II** (third edition) 250. See also E Cameron 'Sexual orientation and the Constitution: A test case for human rights' 1993 (110) **SALJ** 450 at 452; D A J Richards 'Unnatural acts and the constitutional right to privacy: A moral theory' 1977 (45) **Fordham LR** 1281.

violation of entrenched rights³²⁶ by Milton³²⁷ seems to have been well founded as the Constitutional Court did declare sodomy unconstitutional in 1998.³²⁸

3.5.2 Submissions received

3.5.2.1 Although it is perhaps irrelevant to consider the submissions in the light of the Constitutional Court judgment in the *National Coalition* case,³²⁹ we in fairness to the respondents nevertheless include a brief analysis of the submissions received. It should be further remembered that the Issue Paper had a particular child focus and it is therefore not surprising to see strong views being expressed about the lack of protection for boys in particular.

3.5.2.2 In their combined submission, the members of the *SAPS Child Protection Units, KwaZulu Natal* state that non-consensual anal penetration by a man of a boy (male child) should be rape.³³⁰ This is also the view of the *RP Clinic* which states that the impact on the boy being sodomised and the girl being raped is emotionally exactly the same. The general response is that children need to be protected from all forms of molestation and abuse by adults and older siblings.³³¹

326 In particular the rights to freedom from discrimination on the basis of gender or sexual orientation and the right to privacy entrenched in the Constitution.

327 **South African Criminal Law and Procedure Volume II** (third edition) 250. Milton, however, limited the unconstitutionality of sodomy to consenting adult homosexual intercourse in private. He argues that non-consensual anal intercourse and sexual intercourse with males under the age of the consent are 'sexual conduct which are considered reprehensible in an open and democratic society based upon freedom and justice' and should therefore be prosecuted as sodomy.

328 **National Coalition for Gay and Lesbian Equality v Minister of Justice and others** 1999 (1) SA 6 (CC). For a discussion of the case, see par 3.5.3 below.

329 1999 (1) SA 6 (CC).

330 See the submissions on rape above.

331 Highlighted at all the workshops. See also the submissions by the **SA National Council for Child and Family Welfare** (30 submissions); **the Association for Persons with Physical Disabilities, Northern Cape**; **Professor C J Davel**; **the Department of Education**; **Ms T Madonsela, Department of Justice**; **FAMSA**; **Adv Lekoeneha, Deputy Chief State Law Adviser, Free State Provincial Government**; **Department of Welfare and Population Development, Gauteng Provincial Government**; **Johannesburg Child Welfare Society**; **Department of Local Government, Housing and Land Administration, Mpumalanga Provincial Government**; **Mr K Worrall-Clare**.

3.5.2.3 **Ms Clark**³³² states that current thought³³³ is that sodomy is all but extinct in our law as it is unconstitutional provided it is committed between consenting adults in private.³³⁴ She is, however, of the opinion that the offence should be retained where one of the parties is below the age of consent (though a willing participant) and also where the act takes place in a public area. Where there is lack of consent a better charge would be indecent assault, regardless of the sex of the passive party. **Ms Clark** concedes that non-consensual anal intercourse is a severe type of indecent assault comparable to rape and deserving of severe penalties. She goes further to say that if the passive party was female and consented it would in her view be unconstitutional to criminalise the act. If the woman was unwilling, then indecent assault is available as a charge, and it could also be the charge in cases where the female party was a willing (or indeed unwilling) participant below the age of consent. **Ms Clark** therefore submits that she sees no reason to interfere with the law as it presently stands.

3.5.2.4 As to same sex relationships between minors, **Ms Clark** feels that these should be governed by the best interests of each individual child. She submits that the criminal courts may perhaps not be the most appropriate forum to deal with this complex issue and suggests that it would be better in appropriate circumstances to hold a children's court enquiry or subject the child to counselling. The **Tshwaranang Legal Advocacy Centre**, however, is of the opinion that same sex relationships between minors where there is consent and an absence of force should not be regulated by the law at all.

3.5.2.5 **Attorney General: Transvaal** is of the view that, as among minors (same-sex or not), children should be protected from sexual abuse in whatever form. He says 'if committed upon a "consenting child" by adults and also by unequal minors, prosecution is warranted'. This has always been dealt with by way of prosecutorial discretion - if it appears that the minors are not equal, the institution of criminal proceedings is seriously considered.

332 **Senior Public Prosecutor:** Verulam.

333 Her submission is dated 26 September 1997.

334 This is also the view of **Attorney General: Transvaal**, assisted by **Adv H M Meintjies; Professors Snyman and Swanepoel**, Unisa.

3.5.2.6 On the other hand **Professors Snyman** and **Swanepoel**³³⁵ seem to favour restricting the common law offence to males. They say that if a male has non-consensual anal intercourse with a woman, such conduct is punishable in our law as indecent assault. They further submit that same-sex relationships between children (not necessarily minors) should not be regulated by criminal law and that only the abuse of children by adults should be made punishable.

3.5.3 **The *National Coalition for Gay and Lesbian Equality* case**

3.5.3.1 In the ***National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others***³³⁶ the Constitutional Court recently confirmed an order of the Witwatersrand High Court declaring the common-law offence of sodomy and the common-law offence of commission of an unnatural sexual act to the extent that it criminalises acts committed by a man or between men which, if committed by a woman or between women or between a man and a woman would not constitute an offence unconstitutional and invalid.³³⁷ Therefore, consensual homosexual acts are no longer a crime.

3.5.3.2 The Constitutional Court found that the criminalisation of sodomy impaired homosexuals fundamental right to equality, as it was discriminatory due to differentiation on the grounds of sex and sexual orientation. It further found this offence also impaired homosexuals fundamental right to dignity in that the common-law prohibition on sodomy criminalised all sexual intercourse *per anum* between men: regardless of the relationship of the couple who engaged therein, of the age of such couple, of the place where it occurred, or indeed of any other circumstances whatsoever. In so doing it punished a form of sexual conduct which was identified by the broader society with homosexuals. As a result of the criminal offence, homosexual men were at risk of arrest, prosecution and conviction of the offence of sodomy simply because they sought to engage in such acts. The offence additionally infringes the fundamental right to privacy as it criminalised the expression of consensual and non-harmful

335 Unisa: Faculty of law.

336 1999 (1) SA 6 (CC); See also Pantazis A 'How to decriminalise gay sex: **National Coalition for Gay and Lesbian Equality v Minister of Justice**' 1999 (15) **SAJHR** 188; Richard Cameron Blake 'The Frequent irrelevance of US Judicial decisions in South Africa: **National Coalition for Gay and Lesbian Equality v Minister of Justice**' 1999 (15) **SAJHR** 192.

337 The judgment also dealt with the constitutionality of section 20A of the **Sexual Offences Act** and certain ancillary matters.

sexuality. The criminalisation of sodomy in private between consenting males was therefore found to be a severe limitation of a homosexual's right to equality, privacy, dignity and freedom.

3.5.3.3 *In casu* the Constitutional Court expressed the opinion that acts of male 'rape' still constitute crimes at common law, whether in the form of indecent assault or assault with intent to do grievous bodily harm. These were the criminal forms by means of which anal intercourse with a woman, without her consent, is punished. The competent punishments which can be imposed for such offences have not been restricted by statute and the severity of such punishments can be tailored to the severity of the offences committed. The Court specifically refrained from any comment, one way or the other, on the constitutional validity of the age limits or differential age limits prescribed in section 14 of the Sexual Offences Act 1957, but points out that its provisions do protect persons below a certain age against both heterosexual and homosexual acts of a prescribed nature being performed with them. In the words of Judge Ackermann, for the Court, 'declaring the offence [of sodomy] to be invalid in its entirety would leave no hiatus in the criminal law'.³³⁸

3.5.3.4 Judge Ackermann held³³⁹ that he was not aware of any jurisdiction which, when decriminalising private consensual sex between adult males, had not retained or simultaneously created an offence which continued to criminalise sexual relations *per anum* even when they occur in private, where such occur without consent or when one partner is under the age of consent. The Legislature usually fixes a minimum age for the parties to enjoy the benefit of the decriminalisation. The need for retaining some control, even over consensual acts of sodomy committed in private, is recognised.

3.5.3.5 With regards to the retrospective effect of the order declaring the offence of sodomy to be constitutionally invalid, the Court found that it had to be limited to cases of consensual sodomy.³⁴⁰ In other words the offence of consensual sodomy is invalid as of the 27th April 1994, the date the Interim Constitution came into force. In respect of all other cases of sodomy, the order is limited to one which took effect from date of the judgment, being the 9th

338 Paragraph [71] at 42 H-I and 43 A-B.

339 Paragraph [66].

340 Paragraph [98].

October 1998. This was essential to prevent persons convicted of sodomy which amounted to male rape from having their previous convictions set aside.

3.5.3.6 This judgment therefore brought an end to the common law crime of sodomy.

3.5.4 Comparative analysis

3.5.4.1 The British **Sexual Offences Act** 1967 provides that 'a homosexual act in private shall not be an offence provided that the parties consent thereto and have attained the age of twenty-one years'. However, buggery (as sodomy is referred to in English law) and indecent acts between males in public or without consent, or buggery or indecent acts committed with someone who is not an adult are still crimes in terms of the common law.

3.5.4.2 Anal sexual intercourse between consenting adult males in private was decriminalised in Wales in 1967 and in Scotland in 1980.

3.5.4.3 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.

3.5.4.4 New Zealand have codified the offence of sodomy in section 128 of the **Crimes Act** of 1961, which defines 'sexual violation' as the act of a male who rapes a female or the act of a person having unlawful sexual connection with another person. This section constitutes a gender neutral definition addressing non-consensual vaginal and anal intercourse. Consensual sexual relations between adult males have been decriminalised. The Human Rights Act 82 of 1993 includes sexual orientation as a prohibited ground of discrimination.

3.5.4.5 Homosexual acts in the Federal Republic of Germany were decriminalised in 1994³⁴¹ and all men and women under the age of 16 now receive the same protection under section 182 of the **German Penal Code** in respect of sexual acts whether they are

341 Section 175 of the **German Penal Code (Strafgesetzbuch)**.

heterosexual, gay or lesbian.³⁴² The purpose of this legislative provision is for the protection of young people.³⁴³

3.5.4.6 In Canada, consensual anal sexual intercourse (referred to as ‘buggery’) and so-called ‘gross indecency’ were decriminalised by statute in 1969 in respect of such acts committed in private between persons 21 years and older.

3.5.4.7 The ***Criminal Code of Ghana (Act 29)*** has addressed the issues of consent and same-sex and opposite sex relationships between minors by providing for the offence of ‘defilement of a child under 16 years of age’. Section 101 of the Act reads as follows:

- (1) For purposes of this Act defilement is the natural or unnatural carnal knowledge of any child under sixteen years of age.
- (2) Whoever naturally or unnaturally carnally knows any child under sixteen years of age, whether with or without his or her consent commits an offence and shall be liable on summary conviction to imprisonment for a term of not less than seven years and not more than twenty-five years.

3.5.4.8 As indicated above, most countries have dealt with ‘male rape’ by way of new statutory provisions.

3.5.5 Analysis and recommendation

3.5.5.1 Cameron³⁴⁴ proposes that anal intercourse be prohibited on the same grounds as heterosexual intercourse. Unlike heterosexual sexual intercourse, no common-law age of consent in relation to sodomy exists. Section 14(1)(a) of the ***Sexual Offences Act 23*** of 1957 makes it an offence for any male person to have ‘unlawful carnal intercourse’ with a girl under 16 years or commit or attempts to commit an immoral or indecent act with a girl or boy under the age of 19 years.

342 **National Coalition for Gay and Lesbian Equality**, *supra* at 33 par 44.

343 Mishke C ‘Big law - little wrong: discrimination on the basis of sexual orientation and the new South African constitutional order’ 1995 **Codicillus** (Vol XXXVI No 1) 33 at 38.

344 Cameron E ‘Sexual Orientation and the Constitution: A Test Case for Human Rights’ 1993 (110) **SALJ** 450.

3.5.5.2 In view of the **National Coalition**-case referred to above, and the fact that the **Sexual Offences Act** 23 of 1957 does not make it an offence for a male to have non-consensual anal intercourse with another male above the age of 19 years, it can, at present, only constitute indecent assault or assault with intent to commit grievous bodily harm. As we have seen, non-consensual anal intercourse is not rape. If the complainant is under the age of 19 years old, the act could be prosecuted under section 14(1)(b) of the Sexual Offences Act 23 of 1957 as ‘an immoral or indecent act’.

3.5.5.3 In order to prevent the common law offence rape from suffering the same constitutional fate as sodomy, and in the light of the submissions received, we have decided to create a statutory gender neutral offence we prefer to call rape.³⁴⁵ We have therefore already decided to proscribe unlawful sexual acts in a new statutory offence. This does not preclude bringing charges for non-consensual anal intercourse of a man (or a woman) under the common law offence indecent assault.³⁴⁶

3.5.5.4 We also propose to extend the common law presumption that girls under 12 are irrebuttably presumed to be unable to consent to sexual intercourse to boys under 12 years of age. This aspect has also been canvassed in our discussion on rape above.³⁴⁷

3.6 INCEST

3.6.1 Introduction and background

3.6.1.1 As is stated in the Issue Paper, the common law offence of incest consists in unlawful and intentional sexual intercourse between two persons who on account of consanguinity (blood relationship), affinity (relationship by marriage) or an adoptive relationship may not marry one another.³⁴⁸ Incest is similarly defined in the **Choice on Termination of**

345 See section 3.4 above.

346 We recommend that the common law offence of indecent assault be retained. See paragraph 3.11.5.1. below.

347 See par 3.5.5.7.1. and 3.4.6.2. above.

348 As defined by Milton **South African Criminal Law and Procedure** (Volume II) 234 based on the finding in **S v M** 1968 (2) SA 617 (T) where sexual intercourse between an adoptive parent and child was held to be incestuous.

Pregnancy Act, 1996 as sexual intercourse between two persons who are related to each other in a degree which precludes a lawful marriage between them. Absence or lack of consent is not an element of the crime.³⁴⁹ It is not necessary for the parties to be related within the prohibited degrees for them to commit incest. What is required is conventional vaginal intercourse. Any other form of intercourse will be punishable as indecent assault and not as incest.

3.6.1.2 Unlike the common law approach, the incest sanction has a strong ritual and religious connotation in customary law, and does not conform to the common law definition of incest.³⁵⁰ Customary law rules in respect of prohibited sexual intercourse and prohibited marriage also do not necessarily coincide³⁵¹ and different rules apply to members of certain royal families. Labuschagne,³⁵² for example, mentions the Kolanga of Java who believes that sexual relations between mothers and sons will ensure prosperity.

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

3.6.1.2.2 Presently the following prohibited categories exist:

- C Consanguinity: The following blood relations may not intermarry or have sexual intercourse:
 - C ascendants and descendants in the direct line *ad infinitum*, for example father and daughter; grandfather and granddaughter;
 - C collaterals, if either of them is related to their common ancestor in the first degree of descent, for example brother and sister.

349 Where non-consensual sexual intercourse takes place between family members or persons within the prohibited degrees this constitutes rape or indecent assault.

350 Labuschagne 'Teoretiese verklaring van die bloedskandeverbod' 1990 (3) **TSAR** 415.

351 Some customs allow a man to have sexual intercourse with a relative with the aim of producing children although he may not marry that person, and may only have relations with her after her husband has died.

352 The existence of this unique approach to the crime of incest will be dealt with under the chapter on customary law.

C Affinity: The only prohibition on intermarriage between relations by marriage applies to those in the ascending and descending line *ad infinitum*. This indicates a fairly substantial statutory relaxation of the common-law position according to which a man could not marry the blood relatives of his deceased or divorced wife whom he could not have married had he or she been a man.³⁵³ The same applies to the woman. Affinity does not terminate by death or divorce.³⁵⁴

C Adoptive relationship: Section 20(4) of the **Child Care Act** 74 of 1983 embodies an absolute prohibition against marriage or sexual intercourse between adoptive parents and adopted children. An adopted child may legally marry or have intercourse with the relatives of the adoptive parent.

3.6.1.2.3 Additionally, section 238(1) of the **Criminal Procedure Act** 51 of 1977 creates a statutory presumption in incest cases. It provides that it will be sufficient at criminal proceedings at which the accused is charged with incest, to prove that the woman or girl on whom and by whom the offence is alleged to have been committed is reputed to be the linear ascendant or descendant or the sister, stepmother or stepdaughter of the other party to the incest.

3.6.1.2.4 As no presumption exists with regards to age, any boy capable of sexual intercourse may be convicted of incest. On the other hand a girl under 12 cannot in law consent to sexual intercourse and therefore cannot be convicted of incest as an accomplice.

3.6.1.2.5 With regard to the moral abhorrence of sexual relations between close relatives, the question arises as to whether a criminal sanction should be used to enforce public morality, as the degrees of relationship that fall within the prohibition are subject to the mores of the day. The point is readily taken that what adults and adult family members do in the privacy of their bedrooms is their business and their business only. The criminal role has no role to play there. The picture changes as soon as children get involved.

353 Section 28 of the **Marriage Act** 25 of 1961.

354 **R v Mulder** 1954 1 SA 228 (E) at 229.

3.6.1.2.6 The criminalizing of incest is often justified on the ground that it prevents a particular and abhorrent form of sexual abuse of children. As incest is only committed by the performance of vaginal sexual intercourse, the crime cannot be used to penalize homosexual abuse of children or indecent assaults upon children or the performance of unnatural sexual acts with a child; nor does it punish a female relative abusing a female child. The only act this common law crime does provide for is already punishable as rape in the event of vaginal intercourse with a girl under 12, or 'statutory' rape when it involves a girl under 16.

3.6.1.2.7 The most commonly used reason for the prohibition is that it prevents persons who share the same genetic makeup from procreating and thereby avoiding possible genetic, mental or physical defects. Whether this rationale is justified remains to be seen as this reason does not apply where persons are related by affinity or adoption. There is no similar provision seeking to prevent procreation between unrelated partners with inherent genetic deficiencies.³⁵⁵

3.6.1.2.8 In *R v Giles*³⁵⁶ it was found that partial penetration is sufficient to constitute the crime of incest. Labuschagne³⁵⁷ deduces that, as the transmission of semen is therefore not a prerequisite, incest may be committed by a sterile person. He concludes that the prohibition against incest is against sexual intercourse and not against procreation. If this is so, the anomalous situation arises where, due to modern technology, a woman may be artificially inseminated by her brother, albeit with her knowledge and consent, and it will not constitute incest as penetration is a prerequisite. On the other hand studies have shown that inbreeding directly impacts on infant mortality, congenital malformations and intelligence level.³⁵⁸ A prohibition based solely on genetic grounds would not be apposite, yet it may serve as an additional reason for justifying the criminalising of incest.

3.6.1.2.9 As adultery is no longer a crime and there are no genetic reasons why intercourse between *affines* should be prohibited, the question arises as to whether incest should be restricted to *consanguines*. Where the sexual intercourse is 'consensual and voluntary' it could be argued that there are no elements of exploitation or corruption which could justify the imposition of criminal sanctions. The assumption may be made that the crime exists

355 See also Labuschagne 'Dekriminalisasie van bloedskande' 1985 **THRHR** 443.

356 1926 WLD 211 at 212-213.

357 Labuschagne 'Dekriminalisasie van bloedskande' 1985 **THRHR** 443.

358 Temkin J 'Do we need the crime of incest' (1998) **Current Legal Problems** 185 at 190.

only as a reflection of a moralistic disapproval of the choice of a sexual partner. In the same vein utilitarians argue that the criminal law should only be used to prevent harm and, as incest is not necessarily harmful and often occurs by mutual consent, it is a victimless crime and therefore should not be criminalised. As is mentioned above consent is no justification. Where both parties have consented, both are guilty of committing the offence.

3.6.1.2.10 Temkin³⁵⁹ has found, through comparative research, that incest in all its forms is frequently harmful or extremely harmful to victims and that the notion of consent is problematic. The Scottish Law Commission have found that not only is incest harmful to the victim but to other members of the family as well.

3.6.1.2.11 It is also argued that incest, when committed between consenting adults in private, should no longer be regarded as an offence since it is not the duty of the law to interfere with private, sexual activity between consenting adults. Research, however, indicates that incest frequently commences with pre-pubertal children. It may also start later, but in both cases it is not uncommon for it to extend into adulthood. Even though the victim may reach the age of 'consent' or be classified as adult, the abuse does not cease to be abuse once the victim has reached the prescribed age. Due to the peculiarities of familial relationships, the victim may find it impossible to extricate himself or herself from the relationship.

3.6.2 Submissions received

3.6.2.1 Although lack or absence of consent is not an element of the crime of incest and therefor need not be proved in order to obtain a conviction, it can be raised as a defence: where both parties have consented, both are guilty of committing the offence. Respondents were unanimous in their opinion that the child in an incestuous relationship is not a criminal and should not be branded as one.³⁶⁰ In practice, however, children are rarely prosecuted for committing this offence.³⁶¹

359 Temkin 'Do we need the crime of incest' (1998) **Current Legal Problems** 185 at 186.

360 **Association for Persons with Physical Disabilities: Northern Cape; Sr Potter, Agape C.P. School; Vryheid Child and Family Welfare Society; Professors Snyman and Swanepoel, Unisa; Ms S Pillay, Dreyer, Coertze & Swart of SA National Council for Child and Family Welfare; Child and Family Welfare: Bloemfontein; Tshwaranang Legal Advocacy Centre.**

361 **Attorney General: Transvaal; Ms Clark, Senior Public Prosecutor: Verulam.**

3.6.2.2 Given the power imbalances which generally prevail in such situations, the **Johannesburg Child Welfare Society** feels that it is totally unacceptable to criminalise a child victim of incest even where he or she is over 16 years, regardless of his or her consenting to the deed. The **Society** feels, however, that where both parties are below a certain age and the activities are consensual, use of the criminal law would generally be inappropriate as a means of intervention. The opinion is also held that it would be better to deal with children who have consented to this behaviour in a children's court enquiry or in a diversion programme as the crime presupposes strong evidence of a dysfunctional family. The **Society** proposes the age of 18 years to be the cut-off age for the institution of a children's court enquiry or a diversion programme.

3.6.2.3 Others feel that consent should be a defence, but should be restricted by establishing an age of consent. Different ages were suggested, such as 18;³⁶² below the age of 12, although the age could be set higher, eg. 16 - which is the 'age of consent' for the purposes of section 14 of the **Sexual Offences Act**,³⁶³ 16, 15 or 14.³⁶⁴ An argument against consent and/or using age as a criterion for consent was made out by the **South African National Council For Child and Family Welfare** which comments that, as it is difficult to determine the maturity of children, psychological assessment will be necessary. Mental impairment is a factor which will influence the maturity of a child and it is argued that age alone should therefore not be the deciding factor.

3.6.2.4 In response to the question posed in the Issue Paper as to whether the offence called incest should be limited to intra-familial sexual abuse of children in the nucleus family, or whether the category of persons between whom incest is possible should include **in loco parentis** parenting figures who are not the biological parents of the child, the majority of submissions received strongly recommended that persons **in loco parentis** be included in the category of persons between whom incest is possible.³⁶⁵ In other words, it was felt that

362 Association for Persons with Physical Disabilities: Northern Cape; Sr Potter, Agape C.P. School; S Pillay: SA National Council for Child and Family Welfare.

363 Professors Snyman and Swanepoel, Unisa.

364 South African National Council for Child and Family Welfare; Tshwaranang Legal Advocacy Centre proposes the age of 14.

365 Attorney General: Transvaal; Chief Social Worker: Department of Welfare and Population Development; Mpumalanga Provincial Government; Sr Potter, Agape C.P. School; National Council of Women of South Africa; Vryheid Child and Family Welfare Society; S Pillay, Dreyer, Coertze &

parenting figures other than the biological parents or blood relatives³⁶⁶ such as, for example custodians, care givers, child minders, guardians, foster and adoptive parents should also be included in the prohibition.³⁶⁷ According to **Mr Neil van Dokkum**, enlarging the ambit of the definition of incest to include custodians or those *in loco parentis* seems sensible as the frequency and variation of extra-marital relationships is increasing, and to determine the offence of incest by reference to marriage or blood ties is inadequate and does not prevent the mischief, namely the practice of sexual relations within a family unit. In contrast the opinion was held that the offence should not be widened to include *in loco parentis* figures, as the fact that the perpetrator was *in loco parentis* could be used to justify a heavier sentence, as it would be seen to be an aggravating factor.³⁶⁸ The opinion is also mooted that although legislation should prohibit inter-marriage between adopted siblings, it should not extend to persons 'who assume the liability for providing for a minor in a manner or way a parent would'.³⁶⁹

3.6.2.5 The **Tshwaranang Legal Advocacy Centre** proposes that the law should perhaps focus on the age differences between the parties, and where one party exercises power over the other (either as a parent or older brother), this should be criminalised. Where a parent has intercourse with a child, there should be an irrebuttable presumption that the child did not consent. A contrary opinion was expressed by **Mr Johan Brits** who asserts that sexual activity of children amongst themselves is criminally irrelevant and that for this reason only sexual exploitation of children by adults should be regulated.

3.6.2.6 Although some persons³⁷⁰ feel that the offence should be retained as it currently stands, others contend that the offence should be retained only in instances where marriage

Swart of SA National Council for Child and Family Welfare; Child and Family Welfare Society: Bloemfontein; Tshwaranang Legal Advocacy Centre.

366 Johannesburg Child Welfare Society.

367 South African National Council for Child and Family Welfare.

368 South African Police Services: Serious Violent Crime Component; Professors Snyman and Swanepoel, Unisa; Ms Clark, Senior Public Prosecutor: Verulam.

369 Mr Kurt Worrall-Clare.

370 Association for Persons with Physical Disabilities: Northern Cape; Vryheid Child and Family Welfare Society; South African Police Services: Serious Violent Crime Component; Ms Clark, Senior Public Prosecutor: Verulam; Ms S Pillay: S A National Council for Child and Family Welfare.

is prohibited.³⁷¹ The ***Tshwaranang Legal Advocacy Centre*** is of the opinion that it would be problematic to criminalise incest as the state may be criminalising a consensual act, the ideal situation being to criminalise incest only where one party exploits the sexuality of the other. Another view is that the offence should be retained as a mechanism to help protect children even though it will seldom be used in practice as most cases would be primarily classifiable as some other offence such as rape or indecent assault.³⁷² ***Professors Snyman and Swanepoel*** are of the opinion that the retention of the crime of incest is in the interest of morality and more particularly healthy relations within the family. Others are of the opinion that the definition of incest should be reformulated and broadened.³⁷³ Some proponents were of the opinion that the common law offence of incest should not be retained.³⁷⁴

3.6.2.7 Despite the divergent opinions in the previous paragraph, three schools of proponents advocating the abolition of the common law crime of incest have emerged. The first group proposes relying on the existing sexual offences such as rape and those offences which proscribe sexual relations with persons under age. The second group proposes decriminalisation of sibling incest, even where the girl (or boy) is under the age of consent in some or all circumstances. The third group wishes to see the introduction of a new offence of sexual abuse of authority.

3.6.3 Relying upon the existing offences:

3.6.3.1 This option has its flaws in that it does not account for the fact that the breach of trust, the destruction of boundaries, the deprivation of childhood which incest victims describe, the repetitiveness of the offence as well as the genetic risks will generally have little application to non-incestuous cases of under-age sex. It also does not take into account that victims' whole lives may change once the perpetrator is removed from the child's environment and *vice versa*.

371 **Attorney General: Transvaal.**

372 **Ms WL Clark, Senior Public Prosecutor:** Verulam.

373 **Johannesburg Child Welfare Society.**

374 **Dreyer, Coertze & Swart of SA National Council for Child and Family Welfare; Child and family Welfare Society:** Bloemfontein.

3.6.4 Decriminalisation of sibling incest

3.6.4.1 The reasoning underpinning this proposal is that much or most sibling incest is simply children experimenting with sex in a manner that is relatively harmless. A flaw in this argument is that an older sibling may fulfill an authoritarian position in the family and may use a younger sibling as a sexual guinea pig. Studies have shown that even where siblings are fairly close in age, force and coercion may be involved.³⁷⁵ If this option were implemented, a brother, irrespective of his age, would for instance be free to exploit his sister with impunity unless a rape charge could be brought. In addition to this the genetic argument is also valid here.

3.6.5 A new offence of sexual abuse of authority

3.6.5.1 This would be committed where a parent, adoptive parent, step-parent, foster parent or long-term cohabitee of a parent has sexual relations with a child. This could be extended even further by including teachers, probation or childcare officers, games coaches and indeed anyone in control of children. An objection to this proposal is that very different relationships will be treated the same. The psychological relationship between parent and child is unique and the fracture of the sexual taboo between them is particularly damaging. Abuse by others is generally not in the same league. An alternative would be to introduce a new offence in addition to and not as a substitute for the offence of incest.³⁷⁶

3.6.6 Comparative analysis

3.6.6.1 In order to determine whether the common law offence of incest should be regulated by way of statute, it would be valuable to compare the existing offence with foreign legislation and to determine whether the incidences or actions for which the existing offence does not provide are of such importance that they should be or need to be included. New Zealand, Australia and Ghana have codified the offence of incest and their applicable legislation is briefly referred to in the following paragraphs.

375 Temkin 'Do we need the crime of incest' (1998) **Current Legal Problems** 185 at 196.

376 Temkin 'Do we need the crime of incest' (1998) **Current Legal Problems** 185 at 199.

3.6.6.2 Section 130 of the New Zealand **Crimes Act** of 1961 states that incest occurs where there is sexual intercourse between parents and children, brothers and sisters (of 'whole or half-blood') or grandparents and grandchildren. The proviso to prosecution is that the person charged knows of the relationship between the parties. Where the parties involved are over the age of 16, they are liable to a maximum sentence of 10 years imprisonment. Section 131 of the same Act regulates sexual intercourse with a girl under care or protection. This section provides for a broad interpretation of *in loco parentis* relationships. It is important to note that no similar provision exists for boys under care or protection or for such an offence being committed by a female person. The section reads as follows:

- (1) Every one is liable to imprisonment for a term not exceeding 7 years who has or attempts to have sexual intercourse with any girl, not being his wife, who is under the age of 20³⁷⁷ years and who –
 - (a) Being his step-daughter, foster daughter, or ward, is at the time of the intercourse or attempted intercourse living with him as a member of his family; or
 - (b) Not being his step-daughter, foster daughter, or ward, and not being a person living with him as his wife, is at the time of the intercourse or attempted intercourse living with him as a member of his family and is under his care or protection.
- (2) It is no defence to a charge under this section that the girl consented.

3.6.6.3 In Australia offences for engaging in sexual intercourse with a person who is a linear descendant, sister, half-sister, brother, half-brother or step-child are contained in section 92L of the **Crimes Act** of 1900. Where a person is over sixteen years this includes a linear ancestor. 'Step-child' in this section includes relationships where the perpetrator is *in loco parentis*. Consent of the other party to the sexual intercourse is not a defence to charges under this section. The maximum penalties are determined depending on the ages of the persons concerned.

3.6.6.4 The **Criminal Code of Ghana (Act 29)** was amended in 1998 to increase the age of criminal and sexual responsibility. Incest is a statutory crime with a prescribed punishment. It does not however provide for same sex incest, for example between a father and his son. Section 105 of the aforementioned Act provides as follows:

377 The age of 21 was substituted for 20 by the **Age of Majority Act** 1970.

- (1) A male of sixteen years or over who has carnal knowledge of a female whom he knows to be his grand-daughter, daughter, sister, mother or grandmother commits an offence and shall be liable on summary conviction to imprisonment for a term of not less than three years and not more than twenty-five years.
- (2) A female of sixteen years or over who has carnal knowledge of a male whom she knows to be her grandson, son, brother, father or grandfather commits an offence and shall be liable on conviction to imprisonment for a term of not less than three years and not more than twenty-five years.
- (3) A male of the age of sixteen years or over who permits a female whom he knows to be his grandmother, mother, sister or daughter to have carnal knowledge of him with his consent commits an offence and shall be liable on conviction to imprisonment for a term of not less than three years and not more than twenty-five years.
- (4) A female of the age of sixteen years or over who permits a male whom she knows to be her grandfather, father, brother, or son to have carnal knowledge of her with her consent shall be liable on conviction to imprisonment for a term of not less than three years and not more than twenty-five years.
- (5) In this section "sister" includes half-sister, and "brother" includes half-brother, and for the purposes of this section any expression importing a relationship between two people shall be taken to apply notwithstanding that the relationship is not traced through lawful wedlock.

3.6.7 Evaluation and recommendation

3.6.7.1 Amidst calls to either retain or abolish the common law crime of incest and the proposition of a host of alternatives in which incest can be dealt with by way of statute, the following observations and recommendations are made.

3.6.7.2 It is clearly vital to the actual security and the sense of security of all members of the family unit that certain boundaries are set and preserved within such family. Of these boundaries the sexual one is the most fundamental. If criminal law has indeed a role to play in regulating incestuous behaviour, it must seek both to protect the family and the individual within the family from the family. In a changing society with confused and often exploitative attitudes towards sexuality and sexual relationships, it could be argued that the prohibition of the practice of sexual relations within the family unit more than ever needs the force of law behind it.

3.6.7.3 According to Spies³⁷⁸ there are three factors which determine the degree of seriousness or impact of 'sexual molestation' on a child. One of these factors is the relationship with the child. A child who is related to an offender often endures the situation for much longer

378 Spies G M 'Seksuele Genesing' **SALUS** Vol 17 No 13 at 16.

than once off abuse and the abuse, in addition, is usually repetitive and extensive. Of immense concern is that despite the fact that incest usually is repetitive and extensive, the perpetrator is usually given the benefit of being sentenced as a first time offender.

3.6.7.4 The emotional bond which exists between family members leaves conflicting feelings with the child, for example, love versus hate. To add to this burden, the child may feel guilty about the possible disintegration of the family unit. It is the general feeling that far more attention needs to be paid to abuse in the home both as primary cause of commercial sexual exploitation and as a far more serious problem in itself.³⁷⁹ E and W Schurink take the argument a step further by stating that frequent sexual abuse of a child by a perpetrator known to and trusted by the child often causes the child to leave home. Because such children often wind up on the street, they are likely to be further abused and sexually exploited. The sexual exploitation of children by a familiar and trusted person could therefore be directly linked to children's commercial sexual exploitation. Distrust in the family institution causes severe emotional and psychological damage to children, which makes rehabilitation of such children extremely difficult.³⁸⁰

3.6.7.5 The common law offence as it presently stands only makes provision for conventional vaginal sexual intercourse, whereas, for example, the law of Victoria, Australia, includes the introduction of the penis into the vagina, anus or mouth of another person and the introduction of an object into the vagina or anus. The need to expand the ambit of sexual intercourse is essential as males as well as females are subject to sexual abuse within the family. In Victoria, Australia, homosexual as well as heterosexual acts are included within the ambit of incest.³⁸¹ The common law offence is clearly too restrictive and does not adequately recognise or proscribe actions which by their very nature are incestuous and criminal. A way of overcoming this *lacuna* would be to make the proposed statutory definition of 'act of sexual intercourse' applicable to the common law offence of incest, thereby making the act gender neutral and expanding the ambit of sexual intercourse. Where the actions complained of do not amount to a penetrative offence, the fact that a relationship exists on grounds of consanguinity, affinity or adoption will be seen to be an aggravating factor.

379 Proceedings of the Eastern and the Southern African Regional Consultation on the Commercial Sexual Exploitation of Children, as published in (1996) **In Focus Forum on Child Abuse**.

380 Schurink E and W 'Sexual Exploitation of Children' (1996) **In Focus Forum on Child Abuse** 25.

381 **Crimes Act** 1958, Section 2A(2).

3.6.7.6 Incest by its very nature is a hidden crime. It is usually also not a 'once-off' affair. We believe that the law should take cognisance of the pervasive and repetitive nature of incest. Where a person is convicted of committing incest it is extremely unlikely that the particular incident he or she is charged with and found guilty of is his or her first offence of this nature. We deal with the process and procedural issues in the subsequent discussion paper, but do provide in this paper for an offence called 'persistent sexual abuse of a child'.³⁸²

3.6.7.7 Although it is technically possible to prosecute a child for incest, the discretion to prosecute and whom to prosecute rests with the prosecuting authorities. As we have seen, an older child can just as easily abuse his or her younger siblings. We are of the opinion that where a significant power imbalance (i.e. age and physical difference) exists between siblings, and the younger or weaker children are sexually abused by the older sibling, then this amounts to rape. It is for this reason that we have included as a coercive circumstance the abuse of power relationship in our newly defined offence rape. On the other hand, we do not see a role for the criminal law to regulate what is quaintly called 'sexual experimentation' by siblings. Prosecutorial discretion will therefore continue to play a critical role.

3.6.7.8 It has been suggested that the boundaries of incest should be set at consanguinity and adoptive relationships, but it is undeniably the case that other family and quasi-family relationships may leave children and young persons vulnerable to abuse, hence the call for the inclusion of a person who is *in loco parentis*. As we have seen, children are also at risk from step-parents, foster parents, cohabitees and caretakers in residential institutions.

3.6.7.9 However, incest does not prohibit a teacher (even a very old one) from marrying an ex-pupil and therefore sexual intercourse is also not forbidden. By including persons acting *in loco parentis* one would be expanding the category of persons who may not marry and may therefore not have sexual intercourse with one another. It is suggested that this is not the appropriate route to follow to prohibit sexual intercourse between a child and a person who is in a position of control or authority over the child. The existence of such a relationship between the victim and offender might constitute a 'coercive circumstance' and therefore qualify the conduct as rape or as child molestation.

382 See paragraph 4.2.3. below.

3.6.7.10 *In summary it is recommended that the crime of incest in principle be left in the common law. However, in order to make the crime gender neutral and to expand the ambit of common law offence, it is recommended that the proposed statutory definition of 'sexual penetration' be made applicable to the common law offence of incest.*

3.7 COMMERCIAL SEXUAL EXPLOITATION

3.7.1 Introduction

3.7.1.1 The concept 'commercial sexual exploitation' of children can be sub-categorised into three compartments, which are not mutually exclusive, namely, child prostitution, child pornography and the trafficking of children for sexual exploitation.

3.7.1.2 The crime of trafficking in children for commercial sex has become the third most serious illegal trade, after drugs and arms.³⁸³ Possible causal factors of commercial sexual exploitation include poverty, parental debt³⁸⁴ or greed, children attempting to escape from abuse within their family homes and fleeing from conflict to neighbouring or foreign countries as illegal immigrants or refugees. These factors are exacerbated by unprecedented international travel and increasing markets for 'sex tourism'. Commercial sexual exploitation has become a lucrative and organized business which brings multi-million dollar profits to traffickers.

3.7.1.3 Child sexual exploitation is expressly prohibited in Article 34 of the United Nation's Convention on the Rights of the Child.³⁸⁵ It 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 multi-cultural measures to prevent:

383 WEDO 1999, as quoted by Dr September in her paper 'Commercial Sexual Exploitation of Children'.

384 Gangs operating on the Cape Flats are calling in their loans to parents by demanding their children in exchange for debt owing. This debt is being incurred because of high rates of poverty where the provision of basic food and accommodation comes from gangs. These children are sold from brothels, or more and more openly on the street corners day and night. **Asijiki** March 1999 Vol 1 No 8.

385 An international treaty to which, by 1997, all countries except two, were full members.

- (a) the inducement of 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 material.

3.7.1.4 The term 'child' is defined in the Convention on the Rights of the Child as a person under 18 years of age unless, under the law applicable to the child, majority is attained earlier.

3.7.1.5 It is also apposite to refer to the International Labour Organisation (ILO) Convention No 29, 1930 concerning Forced or Compulsory Labour, which has as its aim the suppression of the use of forced labour in all its forms. It states that the illegal exaction of forced or compulsory labour shall be a punishable offence. 'Forced or compulsory labour' is defined as all work or service which is exacted from any person under the menace of penalty and of which the said person has not offered himself or herself voluntarily. This Convention was later reinforced in 1957 by the Abolition of Forced Labour Convention (No. 105). States Parties to these Conventions undertake to counter forced labour which is defined as 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'.

3.7.1.6 The ILO is currently drafting a new convention on the abolition of the most exploitative and dangerous forms of child labour. This will probably be adopted by the ILO and will be open for signature in 1999.³⁸⁶ Presently the ILO Convention concerning Minimum Age for Admission to Employment sets the minimum age for any type of work which is likely to jeopardise health, safety or morals of young people at 18 years.

3.7.1.7 The Commission is of the opinion that any form of commercial sexual exploitation jeopardises the health, safety and morals of any child subjected thereto or participating therein.

3.7.1.8 The First World Congress against the Commercial Sexual Exploitation of children held in 1996 was a breakthrough in the battle against sexual exploitation of children. The Congress established that based on the ethical and legal framework of the Convention on the Rights of the Child, commercial sexual exploitation constitutes a fundamental human rights violation. In view of the fact that the Convention on the Rights of the Child has not defined

386 Skelton A **Children and the Law** Lawyers for Human Rights 1998, at 101.

‘commercial sexual exploitation’, the World Congress accepted the definition of ‘commercial sexual exploitation of children’ as comprising, in relation to a child, ‘sexual abuse by the adult and remuneration in cash or kind to the child or a third person or persons’. 120 countries, including South Africa, adopted a Declaration and Agenda of Action against the phenomenon of commercial sexual exploitation of children, and highlighted the need for more effective preventive action, as well as protection measures, coupled with reintegration of the victims and child participation. One of the measures advocated under the heading of ‘protection’ was the need for more effective laws and law enforcement, including extraterritorial criminal laws.

3.7.1.9 Specific recommendations were made with regards to judicial and legislative intervention, international cooperation and the securing of children’s rights. The recommendation on judicial and legislative intervention emphasised that the following steps needed to be taken:

- C Full implementation of the UN Convention on the Rights of the Child.
- C Introduce laws of extraterritoriality (by which countries can try their nationals under domestic laws for crimes committed abroad) and institute harsh penalties for brokers such as sex tour operators. Related to this is the need to combat illegal migration which is linked to transnational organized crime.
- C Amend (full ratification) the 1949 Convention on Suppression of Trafficking to include monitoring mechanisms to strengthen compliance.

3.7.1.10 As commercial sexual exploitation occurs in two localities, namely, nationally (within the borders of South Africa) and internationally, different approaches need to be followed in order to fulfill the obligations placed upon South Africa by international instruments and the Declaration and Agenda for Action. On the one hand the prevalence of a ‘home’ market of local customers and intermediaries who sexually abuse and profiteer from children needs to be addressed by effective national legislation against commercial sexual exploitation. This legislation will be ineffective if it is not supplemented by national policies, for example, regulating preventive measures such as poverty alleviation and combatting illegal immigration. On the other hand, the prevalence of nationals who tour to foreign destinations in order to sexually abuse or profiteer from children also needs to be curbed. The appropriate vehicle being extra-territorial legislation. These two issues will be dealt with separately below.

3.7.2 The ‘home’ market (Current national approach)

3.7.2.1 In 1995 South Africa ratified the United Nations' Convention on the Rights of the Child. The South African Government is therefore, in terms of this Convention, bound to take measures to protect children from sexual exploitation and to ensure that every child is protected from economic exploitation and from any work that is likely to be hazardous (dangerous) or to interfere with the child's education or work that is harmful to the child's health or physical, mental, spiritual, moral or social development.

3.7.2.2 In accordance with this international instrument, sections 28(1)(e) and (f) of the Constitution afford children protection against exploitation by enshrining certain fundamental rights. The relevant sections read as follows:

Every child under 18 years has the right-

...

- (e) to be protected from exploitative labour practices; and
- (f) not to be required or permitted to perform work or provide services that:
 - (i) are inappropriate for someone of that age
 - (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development,

3.7.2.3 The **Basic Conditions of Employment Act**, 1997³⁸⁷ concretises the abovementioned constitutional protection afforded to children by expressly prohibiting the employment of children where such employment is inappropriate or places at risk a child's³⁸⁸ well-being, education, physical or mental health, or spiritual, moral or social development. Any person who employs a child in contravention of this provision commits an offence.³⁸⁹

3.7.2.4 This provision puts paid to a person who employs a child in order to commercially sexually exploit such a child, for example a hotel owner. However, self-employment is neither regulated nor criminalised. The children engaging in commercial sex themselves are therefore not committing an offence. As independent contracting does not fall within the scope of the **Basic Conditions of Employment Act** the customers cannot be seen to be employing the child even though 'services' are sought or delivered. Customers therefore escape liability in terms of this Act.

387 Section 43.

388 In terms of this Act 'child' means a person who is under 18 years of age.

389 Section 43(3).

3.7.2.5 The Commission is of the opinion that the attempt by the **Basic Conditions of Employment Act** to curb commercial sexual exploitation, thereby criminalising the employers and not the children encapsulates the need for protection of such children and gives them recourse to the law without fear that they too will be prosecuted, and seen in this light is effective. As the 'relationship' between the customer and the child without intervention of a third party such as a pimp does not constitute a labour relationship the Act can arguably regulate such relationship, but it is not recommended that this be done.

3.7.3 Child Prostitution

3.7.3.1 'Child Prostitution' refers to the sexual exploitation of a child for remuneration in cash or in kind, usually, but not always organised by an intermediary (pimp, parent, family member, procurer, teacher, etc.).³⁹⁰

3.7.3.2 The ILO (Lin Lean Lim, International Labour Office, Geneva, 1998) stresses that whereas adults may choose sex work as an occupation, children are invariably victims of prostitution. Child prostitution differs from - and should be considered a much more serious problem than - adult prostitution. Children, in contrast to adults, are clearly much more vulnerable and helpless against the established structures and vested interests in the sex industry, and much more likely to be victims of debt bondage, trafficking, physical violence and torture.

3.7.3.3 Child prostitution risks growing as poverty and unemployment strain family income. Parents and other persons (including children) rent out their own or other children and or siblings to supplement family income or simply to earn a living. In the intra-familial situation charges are often withdrawn for the reason that the offender (the exploiter of the child) is the breadwinner in the family. Undue pressure may be placed upon the victim to withdraw the charges as the whole family will suffer should the offender be convicted and imprisoned.

390 <http://www.jubileecampaign>. at page 16.

3.7.3.4 With the ever increasing number of street children on the streets of Cape Town, children are freely available to be sexually exploited. Police estimates in 1997 were that at least a quarter of Cape Town's 2000 street children were selling themselves.³⁹¹ According to the co-ordinator for the child advocacy organisation Children in Violence, thousands of children in Johannesburg have been used as sex slaves by wealthy businessmen and drug dealers. Prostitution rings in Johannesburg are said to 'recruit' schoolgirls from the townships and offer them money to work in the city. Some girls and boys - some as young as eight years old- offer sex for as little as R10.³⁹² Many of these children are found in hotels which are frequented by tourists.

3.7.4 Parent or guardian procuring the defilement of a child or a ward

3.7.4.1 In terms of section 9 of the **Sexual Offences Act**, 1957, it is an offence for any parent or guardian of any child under the age of 18 years to permit, procure or attempt to procure a child to have unlawful carnal intercourse or to commit any immoral or indecent act with any other person than the procurer. It is also an offence for any parent or guardian of any child under 18 years to permit such child to reside in or to frequent a brothel. 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. Furthermore, it requires a parent or guardian who knows that their child is associating with persons who are prostitutes or have an immoral character to take positive steps to prevent that association, failing which, and if the child is 'defiled, seduced or has become a prostitute', they are deemed to have assisted in bringing about that defilement, seduction or prostitution.

3.7.4.2 The term 'guardian' is defined as including any person who has in law or in fact the custody or control of the child.³⁹³ As many children are, for a variety of reasons, in the care of persons other than parents or legal guardians, this broader interpretation offers such children the same protection they would have had, had they been living with their biological or legal guardians. The person who actually makes use of the services of the child, for lack of a better word, the 'customer' is not guilty of an offence in terms of section 9.

391 **Mail & Guardian** March 21 1997 'It's better than begging, says street child'.

392 **Mail & Guardian** March 21 1997 'It's better than begging, says street child'.

393 Section 9(2).

3.7.4.3 The offence criminalises the procuring for defilement of a child, and does not require that the parent, guardian or child be compensated for such, although it is an offence to do so.

3.7.4.4 The **South African National Council for Child and Family Welfare** and the **Attorney-General: Transvaal** both state in their submissions that an adult can, and often does, manipulate a child and force the child into prostitution. Both feel that the adult must be held responsible and accountable for his or her actions. Forcing a child into prostitution is certainly not in the best interest and well-being of the child and should therefore be a very serious criminal offence. **Mr Kurt Worrall-Clare** suggests the creation of a specific offence in relation to adults who use children in prostitution and suggests this information should be added in a national register of sex offenders. He also says that legislation should specifically allow the immediate rescue of children suspected of being involved in prostitution.

3.7.4.5 The Commission are of the opinion that a separate offence of this nature criminalising the actions of parents or guardians is warranted, due to the unique relationship which exists between parents or guardians and children and the inherent duty on the parent or guardian to protect such a child. It is furthermore the opinion of the Commission that persons who make themselves guilty of this offence should be meted out a severe punishment. It is recommended that the offence created by section 9 of the **Sexual Offence Act** with regards to the parents or guardians procuring defilement of a child or ward should be retained.

3.7.5 **Persons living on the earnings of prostitution or committing or assisting in the commission of indecent acts**

3.7.5.1 The **Sexual Offence Act** also provides that persons living on the earnings of prostitution or committing or assisting in the commission of indecent acts are guilty of an offence. Section 20 of the Act provides as follows:

- (1) Any person who-
 - (a) knowingly lives wholly or in part on the earnings of prostitution; or
 - (aA) has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward; or
 - (b) in public commits any act of indecency with another person; or

- (c) in public or in private in any way assists in bringing about, or receives any consideration for, the commission by any person of any act of indecency with another person, shall be guilty of an offence.
- (2) If it is made to appear to a magistrate by information on oath that there is reason to suspect that any house is used for purposes of prostitution and that any person residing in or frequenting the house is living wholly or in part on the earnings of prostitution, the magistrate may issue a warrant authorizing any police officer not below the rank of sergeant to enter and search the house and to arrest that person.

3.7.5.2 Section 20(1)(a) is directed at persons (male and female) who parasitically live on the earnings of prostitution, that is on the earnings of the prostitute and is not directed at the prostitute herself or himself.³⁹⁴ The notion of 'living on' is construed widely so as to include not only that which maintains the life of the recipient but also other purposes. It is thus sufficient that the person lives in a relationship with the prostitute which is of a parasitic nature insofar as it enables the person to obtain cash or kind by which he or she was able to clothe, house, feed, entertain and maintain himself or herself. This section does not differentiate between children and adults when it criminalises knowingly living on the earnings of prostitution. In reality a younger sibling of any age, knowing that he or she is being supported on the earnings of his or her sister's trade as a prostitute is guilty of the same offence as the owner of the brothel in which the prostitute plies his or her trade. Arguably, this is not the intention of the legislature.

3.7.5.3 In terms of the **Aliens Control Act**, 1991, any person who enters or has entered the Republic and who lives or has lived on the earnings of prostitution or receives or has received any part of such earnings or procures or has procured persons for immoral purposes is designated a 'prohibited person'.³⁹⁵ If such a person is found in the Republic he or she is committing an offence. Whereas section 20(1)(a) of the **Sexual Offence Act** may be interpreted to be directed at persons who are citizens or residents in South Africa, the **Aliens Control Act** is directed at foreign citizens.

3.7.5.4 Persons who are not South African citizens, who have lived or are living on the earnings of prostitution or receive any part of such earnings or procure persons for immoral

394 **S v H** 1988 3 SA 545 (A) at 552. See also C F Klopper 'In camera met 'n prostituut' 1978 (11) **De Jure** 155.

395 Section 39(2).

purposes, constitute one of the categories of persons who are designated 'prohibited persons' in terms of the ***Aliens Control Act***. This is the appropriate mechanism to regulate access to the Republic and therefore it is not necessary to include a provision of this nature in the ***Sexual Offence Act***.

3.7.5.5 Section 20(1)(aA) provides that a prostitute who is plying his or her trade is guilty of an offence. Once again no distinction is made with regards to age or the volition of the action which constitutes this offence or for that matter to whom the reward is paid. A child of 7 held in debt bondage by her parents creditors, forced to perform an act of indecency or to have sexual intercourse for reward (even though the reward does not go to the child) can technically be charged with this offence.

3.7.5.6 A popular interpretation of this section is that the 'customers's' actions are neither criminalised nor regulated in any manner. Milton³⁹⁶ states³⁹⁷ that 'although the section does not specifically mention prostitutes, its gist and intent is, it is submitted, that persons who are prostitutes commit the offence. The import of this is that the other partner in the sexual act - the customer - does not commit the offence'. Milton argues further that the subject is the person who has sexual relations for reward 'with any other person'. He says it is thus the person who receives the reward who commits the offence and not the persons who gives the reward.

3.7.5.7 In the event of this interpretation being the correct interpretation of this section, the Commission draws attention to the hypocrisy of a society which condemns and penalizes the actions of child prostitutes, while their customers, who are ultimately responsible for the prevalence of this phenomenon, have neither slur, nor stigma, nor prosecution to fear.

3.7.5.8 In contrast the opinion³⁹⁸ is held that customers of prostitutes can also be prosecuted in terms of this section as the phrase 'for reward' has been construed (in another context) as 'a return or recompense made to or received by a person for some service'.³⁹⁹

396 **South African Criminal Law and Procedure** (Volume III) 2nd edition Cape Town: Juta 1998.

397 At E3-83.

398 Hollamby G: South African Law Commission.

399 **Silberman v Pearl Insurance Co Ltd** 1962 3 SA 841 (W).

Following this interpretation the phrase 'for reward' includes both the receiving **and giving** of a reward. Furthermore, the legislature could easily have addressed any possible misunderstandings surrounding the use of the phrase simply by stating 'any person who accepts a reward for unlawful carnal intercourse, or commits an act of indecency, with any other person, shall be guilty of an offence' or words to that effect.

3.7.5.9 In **S v C**⁴⁰⁰ Van Dijkhorst J says:

The wording of s 20(1)(aA) does not limit its offenders to the category of professional prostitutes. It clearly includes all who for reward have unlawful carnal intercourse or commit acts of indecency,

3.7.5.10 Section 20(1)(aA) was inserted in the **Sexual Offences Act** in 1988 following a judgment by the Appellate Division in **S v H**⁴⁰¹ where our highest court held that the conduct of a prostitute in plying her trade does not constitute the offence of knowingly living on the earnings of prostitution.

3.7.5.11 In practice today, however, very few people are prosecuted for either being a prostitute, plying the trade of a prostitute, or being the client of a prostitute, as enquiries made at local magistrates' courts confirm.

3.7.5.12 It is recommended that section 20 of the **Sexual Offences Act** be repealed and that provision should be made for the outright prohibition of child prostitution and that the actions of any person who allows, invites, persuades, induces, offers or engages a child to commit a sexual act for financial or other reward, favour or compensation to the child or the aforementioned or another person should be an offence. The actions of the child will then fall outside of such an offence.

3.7.6 Submissions

400 1992 (1) SACR 174 (W) at 176.

401 1988 3 SA 545 (AD).

3.7.6.1 There was general consensus⁴⁰² among the respondents that it is unfair to brand a child prostitute a criminal. **Sr MD Potter** of the Agape School for the Cerebral Palsied argues that child prostitutes are already punished by what they do and that they should be protected and counselled. In its submission, the **Johannesburg Child Welfare Society** states that the child prostitute is the victim and the older person who exploits him or her is the offender. The law should be framed accordingly. The Society mentions that it is necessary to bear in mind that child prostitutes working from inner city hotels are normally doing so as a means of survival. Actions to stop them being exploited will need to incorporate the provision of other options, otherwise these children will just be driven deeper into different and possibly even more dangerous ways of selling sexual services.

3.7.6.2 The **Tshwaranang Legal Advocacy Centre** makes the point that children do not 'decide' to become prostitutes. The social conditions that make children into prostitutes therefore needs to be addressed. The Centre is of the opinion that a child prostitute needs **more**⁴⁰³ protection of the law, not less. The Centre makes the following recommendations:

Where a child is a prostitute, sex with the child should be regarded as sexual assault, irrespective of whether the child 'consented' or not. People who pimp children should also be convicted of sexual assault.

3.7.6.3 This view is shared by **Ms WL Clark**, a senior public prosecutor from Verulam, who says children should certainly not be branded as criminals if they are prostitutes, although she feels that this is unlikely that this would happen. She says most young prostitutes are under the control of a pimp or some other unscrupulous adult and this is the person who should be stigmatized or punished.

3.7.6.4 The Commission share the sentiments of those who have made submissions in this regard and categorically state that a complete ban should be placed on child prostitution and that anyone involved in sexually exploiting a child whether as a pimp or customer should be severely punished for doing so. In order to portray uniformity with the abovementioned

402 See, for instance, the submissions by the **Vryheid Child and Family Welfare Society; SAPS (Child Protection Units KwaZulu Natal); the Council for Child and Family Welfare, KwaZulu Natal; the South African National Council for Child and Family Welfare (28/39 responses); the Department of Welfare and Population Development, Gauteng; Attorney-General, Transvaal.**

403 Emphasis in the original.

international instruments it is suggested that a child with regards to commercial sexual exploitation be seen to be anyone under the age of 18 years.

3.7.7 Revoking of trade licenses, confiscation of property, fines, etc. where children are being accommodated on premises for the purpose of prostitution.

3.7.7.1 Section 20(2) of the ***Sexual Offences Act*** makes provision for the arrest of any person who resides in or frequents a house used for the purposes of prostitution if he or she is living wholly or in part on the earnings of prostitution. The Act itself, however, does not provide for the confiscation of such a house or related property.

3.7.7.2 The Issue Paper posed the question as to whether more stringent measures should be adopted in the form of e.g. revoking trade licenses, confiscation of property, fines, etc. where children are being accommodated on premises for the purpose of prostitution. The answer to this question was a resounding yes, for a variety of reasons.⁴⁰⁴

3.7.7.3 ***Ms S Snyman***, a Commissioner of Child Welfare from Pretoria, argues that accommodation for a child should be seen against the background of the ***Child Care Act***. Before a decision can be made to remove a child from the care of the parent several factors must be taken into consideration. Simply because a child lives on premises which are used for the purpose of prostitution is not enough reason to remove a child in terms of the Child Care Act: it must be too detrimental to the child to live on such premises. Because a child is living in a place with a bad reputation does not mean that the child is or will become a prostitute. What is important is that the child must not be part of the activities or even be exposed to them.

3.7.7.4 The Commission is of the opinion that as the ***Prevention of Organised Crime Act*** of 1998 makes provision for the civil forfeiture of criminal assets that have been used to commit an offence or assets that are the proceeds of unlawful activity, it is unnecessary to include similar or identical provisions in legislation dealing specifically with sexual offences. At

404 **Johannesburg Child Welfare Society; Vryheid Child and Family Welfare Society; SAPS (Child Protection Units KwaZulu Natal); the Association for Persons with Physical Disabilities, Northern Cape; the South African National Council for Child and Family Welfare (41 responses); the Department of Welfare and Population Development, Gauteng; the Department of Safety and Security, Gauteng; Ms Clark.**

this point in time adult and child prostitution is illegal and forfeiture would be possible in both cases.

3.7.8 The Child Care Amendment Bill, 1999

3.7.8.1 The Child Care Amendment Bill, 1999,⁴⁰⁵ provides for the prohibition of commercial sexual exploitation of children in a similar but much more comprehensive fashion to sections 9 and 20 of the **Sexual Offences Act**. In terms of section 1 of the Amendment Bill 'commercial sexual exploitation' means the procurement of a child to perform a sexual act for a financial reward payable to the child, the parents or guardian of the child, the procurer or any other person. This definition is in keeping with the definition agreed upon at the Stockholm World Congress referred to above. The reach of this provision is much wider than parents and guardians.

3.7.8.2 The offence of commercial sexual exploitation is to be regulated by a new section 50A of the amended **Child Care Act**, 1983. This section reads as follows:

- (1) Any person who participates or is involved in the commercial sexual exploitation of a child shall be guilty of an offence.
- (2) Any person who is an owner, lessor, manager, tenant or occupier of property on which the commercial sexual exploitation of a child occurs and who, within a reasonable time of gaining information of such occurrence, fails to report such occurrence at a police station, shall be guilty of an offence.
- (3) Any person who is convicted of an offence in terms of this section, shall be liable to a fine, or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment.

3.7.8.3 Two components of the proposed new section 50A of the **Child Care Act** are intended to strengthen protections for children who are subject to commercial sexual exploitation. First, by the creation of an offence to criminalise participation in the commercial sexual exploitation of a child. This makes the client's actions subject to criminal sanctions, in sharp contrast to the present situation. Secondly, the proposed subsection (2) targets the 'owner, lessor, manager or occupier of property' on which child prostitution is taking place who, whilst being aware of such occurrences, fail to report this to the police.

3.7.8.4 The definition of 'commercial sexual exploitation' is obviously critical. Earlier versions of the gazetted definition initially read:

'Commercial sexual exploitation' means, with regard to a child,⁴⁰⁶engaging or offering to any person, the services of a child to perform sexual acts for a financial or other reward, favour or compensation to the child, his or her parents or to any other person.

3.7.8.5 The most recent version of this definition provided that commercial sexual exploitation would mean 'the procurement of a child to perform a sexual act for a financial or other reward payable to the child, the parent or guardians of the child, the procurer, or any other person'.

3.7.8.6 The later definition refers to the notion of procurement of a child, a concept which does not appear elsewhere in the **Child Care Act**, but one which echoes the terminology of section 9 of the **Sexual Offences Act**. The dictionary definition of procurement is the acquisition or obtainment or getting of something (in this instance a child's sexual services). It would appear that the meaning of procurement in the context of this provision of the **Sexual Offences Act** has not been the subject of judicial consideration before now. This may be problematic in interpreting the new definition and offences created by the 1999 Bill, as the meaning of procurement may be unclear.

3.7.8.7 It seems that the prohibition in the **Sexual Offences Act** targets the parents or guardian who permits or 'gets' his or her child to enter into one or more of the forbidden activities. The word 'procure', as it is used in the **Sexual Offences Act**, therefore relates to the provision of the child's sexual services, rather than the receipt thereof; this interpretation is strengthened by the last phrase, which confirms that the procurer is not the so-called 'client', but is the offending parent or guardian. According to Sloth-Nielsen and Loubser⁴⁰⁷ this is possibly not congruent with the dictionary meaning of the word 'procure', and the word therefore has a meaning specific to the context of the prohibition against parents or guardians who allow or offer their child for unlawful carnal intercourse or other immoral or indecent acts. They further submit that the usage of the word 'procure' in the Act is probably incorrect, given the ordinary meaning of the word.

406 Defined in the **Child Care Act** as a person under the age of eighteen years.

407 Supra.

3.7.8.8 It is also important to point out that the definition of 'commercial sexual exploitation' omits any reference to attempted procurement, which is included in comparable provisions of the ***Sexual Offences Act***, as well as the reference to parents or guardians permitting a child to be procured.

3.7.8.9 The fact that the definition in the 1999 Bill refers only to (completed) procurement therefore seems more limited than the equivalent provision in the ***Sexual Offences Act***. In addition, the focus of the definition, given the dictionary definition of 'procure' (i.e. acquire, obtain or get) seems to be (in the view of Sloth-Nielsen and Loubser) directed at the procurer ('client'), rather than the individual offering a particular child for commercial sexual exploitation (be it a parent or a pimp). There is therefore a shift in emphasis, and it is submitted that the meaning of procurement in the 1999 Child Care Amendment Bill is consequently different from the usage of 'procure' in the ***Sexual Offences Act***.

3.7.8.10 Sloth-Nielsen and Loubser⁴⁰⁸ state that it is questionable whether a parent or sibling who offers a child for commercial sexual purposes at a traffic light, or outside a nightclub would be committing an offence in terms of the new provision. The act in question is not necessarily covered by the proposed new definition which refers to commercial sexual exploitation as being constituted by the procurement (which signifies a completed transaction on the part of the 'client'). If this is so, the question must then be posed whether the actions of an 'offeror' are nevertheless covered by the criminal prohibition created by section 50A. This would depend on whether the actions of the person offering the child for commercial sexual exploitation purposes can be regarded as 'participating in' or being 'involved in' commercial sexual exploitation of a child. The offeror can probably be held liable if a transaction is actually concluded with a procurer, but convictions may be more difficult to obtain if the offer has taken place, but no client has been found, the offer refused, or the transaction interrupted. In other words, the parent or sibling who is merely offering a child's sexual services would probably not be liable unless a client had been found. At most, the actions described above would be an attempt. This possible lacuna would have been addressed had the previous wording been

408 Supra.

retained, making it explicit that both the offering⁴⁰⁹ and obtaining of a child's sexual services constituted commercial sexual exploitation.⁴¹⁰

3.7.8.11 Even under the proposed new definition, though, other actors who play a role in facilitating commercial sexual exploitation - brothel owners and escort agency managers or other go-betweens who allow children to operate as 'independents' under the aegis of their business - would be hard pressed to escape criminal liability. In the view of Sloth-Nielsen and Loubser,⁴¹¹ putting children on the agency books as it were, is tantamount to procurement itself, or at the very least participating in commercial sexual exploitation of children, and these activities would fall squarely within the ambit of the new provisions. This is strengthened by the fact that the definition refers to rewards payable to the child, which removes the possible defence that the child is engaging independently in sexual transactions, and that the brothel keeper or escort agency owner is merely a silent partner.

3.7.8.12 Sloth-Nielsen and Loubser⁴¹² indicate that the new provisions do bring about significant improvements. For the first time, the emphasis now falls on commercial sexual exploitation rather than proscribing prostitution, with its connotations of immoral yet often semi-voluntary conduct, and the centuries of history of penalising the prostitute rather than the client. A second beneficial aspect is the reference in the definition to the involvement of children in any 'sexual act', which is admittedly broad, but replaces previously outdated and narrow definitions in comparable legislation. For example, section 9 of the **Sexual Offences Act** referred to above, applies the offence to 'acts of unlawful carnal intercourse or any immoral or indecent act' where children have been procured. The broader and simpler reference to 'sexual act' opens the door to the consideration of a broad variety of exploitive activities concerning children: involving children in self-masturbation or as third party voyeurs would now fall within the definition, whereas this is arguably not the case under the comparable definitions of the Act. Another positive point is the extension of liability to owners, tenants, managers and occupiers of property who conduce to the trade in child sex on their premises. Situations have arisen in

409 Even in a very general way, e.g. by placing advertisements in the newspaper.

410 In addition, a criminal prohibition proscribing the giving of tacit or express permission by a parent or guardian to a child to engage in commercial sexual exploitation (which is proscribed in the aforementioned section of the Act) could have strengthened the amendment that has now been drafted.

411 Supra.

412 Supra.

recent times where the state has been powerless to act against this set of profiteers in the commercial sexual exploitation industry. The new obligation to report, tied to hefty criminal sanctions, will undoubtedly encourage increased self-regulation amongst owners and occupiers of premises being used as so called budget hotels.

3.7.8.13 In conclusion Sloth-Nielsen and Loubser⁴¹³ suggest that the fact that the word procure and procurement have uncertain meanings depending on the context, may lead to legal uncertainty and ultimately a reluctance on the part of officials to arrest and prosecute where convictions may be uncertain. There is therefore a strong argument for the use of easily understood and clear language, especially given the rules that where criminal law provisions lack clarity, they must be narrowly interpreted in favour of the accused. The words offering, permitting or engaging a child for the purposes of commercial sexual exploitation are, for this reason, preferable.

3.7.8.14 Another matter which needs to be considered is the fact that the financial reward is a key element to the above definition of commercial sexual exploitation. A narrow interpretation of this requirement may limit the reward to money or something which has an ascertainable monetary value. This in turn may cause children or adults who have not received such a reward in relation to a child to fall outside of the ambit of this provision. However, there may also be circumstances where there is no remuneration, whether financial or in kind between the adult and child or between the adult and another adult with respect to the child.

3.7.8.15 According to the Memorandum on the Objects of the Child Care Amendment Bill 1999, the intention was to effect only urgent interim amendments, pending the comprehensive legislative review to be undertaken by the Law Commissions project committees on the **Child Care Act** and Sexual Offences. Thus a complete revisiting of the protections in civil and criminal law for children involved in commercial sexual exploitation was not envisaged, and the challenge lay in grafting limited, yet meaningful, changes onto the existing (flawed) legislative framework.⁴¹⁴

3.7.9 Comparative examples

413 Supra.

414 Sloth-Nielsen J and Loubser T paper on **Sexual Exploitation of Children: Challenges for Law Reform** delivered at the Cape Town Conference on Commercial Sexual Exploitation of Children 17 -18 March 1999.

3.7.9.1 An example of a broader interpretation of commercial sexual exploitation is found in the **1995 Sri Lanka Penal Code (Amendment) Act No 22** which lists six types of sexual exploitation. It reads as follows:

Whoever

- a) knowingly permits any child to remain in any premises, for the purposes of causing such child to be sexually abused or to participate in any form of sexual activity or in any obscene or indecent exhibition or show;
 - b) acts as a procurer of a child for the purpose of sexual intercourse or for any form of sexual abuse;
 - c) induces a person to be a client of a child for sexual intercourse or by any form of sexual abuse, by means of print or other media, oral adverts or other similar means;
 - d) takes advantage, of his influence over, or his relationship to, a child, to procure such child for sexual intercourse or any form of sexual abuse;
 - e) threatens or uses violence towards a child to procure such child for sexual intercourse or any form of sex abuse;
 - f) gives monetary consideration, goods or other benefit to a child or his parents with intent to procure such child for sexual intercourse or any form of sexual abuse,
- shall be guilty of an offence.

3.7.9.2 Canada has opted for the notion of sexual abuse connected to remuneration. Section 2(1) of the 1997 Act to Amend the **Criminal Code** (Child Prostitution, Child Sex Tourism, Criminal Harassment and Female Genital Mutilation) reads as follows:⁴¹⁵

Every person who lives wholly or in part on the avails of prostitution of another person under the age of 18 years and who

- a) for the purposes of profit, aids, abets, counsels or compels the person under that age to engage in or carry on prostitution with any person or generally, and
 - b) uses, threatens to use or attempts to use violence, intimidation or coercion in relation to the person under that age,
- shall be guilty of an offence.

3.7.10 Conclusion and recommendation

3.7.10.1 The Commission is of the opinion that commercial sexual exploitation implies sexual abuse of children based upon remuneration in cash (financially) or in kind. In kind

415 As quoted by Muntarbhorn V **Extraterritorial Criminal Laws against Child Sexual Exploitation** United Nations Children's Fund 1998 at 14.

remuneration should be interpreted broadly to cover a variety of situations where there is some value, profit, benefit or consideration interlinking or exchanging between the child and the adult or between the adult and another adult in regard to the child. The Commission is further of the opinion that as commercial sexual exploitation has sexual conduct with a child at its core, that a provision criminalising such actions should be included in like-minded legislation regulating sexual offences and should not be regulated in terms of the **Child Care Act**.

3.7.10.2 *In summary the Commission recommends that:*

- C The offence created by section 9 of the Sexual Offence Act with regards to the parents or guardians procuring or defiling a child or ward should be retained.*
- C Those persons who are not South African citizens, who have lived or are living on the earnings of prostitution or receive any part of such earnings or procure persons for immoral purposes constitute only one of the categories of persons who are designated 'prohibited persons' in terms of the Aliens Control Act. The appropriate place to regulate access to the Republic is through the Aliens Control Act and not the Sexual Offences Act.*
- C A complete ban should be placed on child prostitution and anyone involved in sexually exploiting a child whether as a pimp or customer should be severely punished for doing so.*
- C The child prostitute be regarded as a victim who should be protected and rescued and not be branded a criminal.*
- C The acts of customers, pimps, procurers and parents and guardians who wilfully cause children to participate in child prostitution or related activities must be criminalised and severely punished.*
- C The proceeds and fines for contraventions of these provisions should be used for the treatment of sexually abused children.*
- C The phenomenon of commercial sexual exploitation of children must be regulated in terms of the Sexual Offences Act and not the Child Care Act. For the reasons stated above it is also recommended that the definition and offence relating to commercial sexual exploitation as found*

in the Child Care Amendment Bill not merely be transposed as it presently reads.

3.7.11 Trafficking in children

3.7.11.1 Trafficking in persons is an ill-defined concept at best but may be considered the brokered movement of persons across state lines or borders. However, most of the documents and studies that consider the problem of 'sexual trafficking in children' define this very broadly to encompass the transportation of children from one place to another. This means that very diverse examples are bundled together under one label obscuring fundamentally different legal concerns. Instances where children are abducted to 'work' in canteens and bars and provide sexual services for local labourers raise different legal, health and human rights concerns than the cases of children who are sold by their parents to work in brothels abroad.

3.7.11.2 South African children are 'exported' to other countries and when found abroad, generally appear not to have been reported missing within our own country, indicating that they are children who lived on the streets, run-away children. There is also evidence that children are being trafficked within the country.⁴¹⁶ Children who have been trafficked across provinces find themselves in a very precarious situation, often not knowing where they are and removed from any support structure that they might have had. However, a child who has been trafficked from a foreign or neighbouring country is much more vulnerable since, he or she may not even know the language or where or how to ask for help. Added to this is the fact that a foreign child who has been smuggled into the country will almost never have any travel or identification documents. Such a child will be classified an illegal alien by the authorities and may be arrested without a warrant and may be detained pending removal.

3.7.11.3 A major route for prostitution, including under-age girls, is from South East Asia to Japan. There have been many stories told of women tricked into travelling to Japan with the promise of good employment in a shop or restaurant, only to find that this means working in some aspect of the sex-industry. Since the women (girls) generally travel with false documentation and are kept in situations of near slavery, it is extremely difficult for them to find

a way to escape.⁴¹⁷ Young girls from Thailand have been found trafficked for prostitution to Japan, Hong Kong, Taiwan, Australia, America and several countries in Europe. They are escorted through airports, sometimes by cooperative airline staff. With stricter controls at border crossings, many of these movements could be ended.

3.7.11.4 In the United States of America each state and the federal government criminalise some aspect of child prostitution. The **'Mann Act'** is a federal law that prohibits the transportation of individuals younger than the age of 18 in interstate or foreign commerce with the intent that the individual engage in prostitution or any sexual activity. The coercion, enticing, persuading or inducing any person to travel across a state boundary for prostitution or for any sexual activity for which any person may be charged with a crime it prohibited.⁴¹⁸ Transporting of a minor across state lines for prostitution or any sexual purpose for which any person may be charged with a crime or travel with the intent to engage in a sexual act with a juvenile is also prohibited.⁴¹⁹

3.7.11.5 As is stated above, foreign children found in the country, irrespective of whether they have been trafficked into the country or have willingly crossed the borders, are committing offences in terms of the **Aliens Control Act**.⁴²⁰ Once arrested such children will be detained pending repatriation. This matter is receiving the attention of the Project Committee on the Review of the Child Care Act and for this reason will not be dealt with here.

3.7.11.6 *In summary it is recommended that the trafficking or transporting of a child from the place where he or she is usually resident to another destination, whether within the country or abroad, for the purposes of commercial sexual exploitation be included as part of the definition of commercial sexual exploitation, as discussed above.*

3.7.12 Child pornography

417 R O'Grady **The Rape of the Innocent** Thailand: ECPAT 1994 at 29.

418 18 USC 2422 as quoted in <http://www.missingkids.com/html>.

419 18 USC 2423 as quoted in <http://www.missingkids.com/html>.

420 See also the report of the South African Human Rights Commission on Treatment of Persons arrested and detained under the **Aliens Control Act** at www.sahrc.org.za ; 1999 (15) **SAJHR** 131.

3.7.12.1 Child pornography depicts the participation of children in sexual activities with adults or other children. This type of activity is universally condemned as inappropriate to the psychological and physical well-being of children and, as such, it has been suggested,⁴²¹ does not deserve to be protected by the constitutional guarantee of freedom of expression.

3.7.12.2 The **Films and Publications Act**, 1996 *inter alia* regulates child pornography. The system of classification introduced by this Act seeks to protect children by placing age restrictions on the exposure of persons to the film or publication concerned. The Act also prohibits the distribution of publications or films on five specified grounds: child pornography; extreme forms of sexual violence; misogynistic pornography; bestiality and extreme violence.⁴²²

3.7.12.3 In terms of section 27(1)(a) of the **Films and Publication Act** it is an offence for any person knowingly to produce, import or be in possession of a publication which contains a visual presentation⁴²³ of child pornography. It is also an offence to exhibit in public or to distribute any film or to broadcast any film which has been classified as XX (which includes child pornography). Anyone found guilty of contravening the prohibition against child pornography may be sentenced to a fine or to imprisonment for a period not exceeding five years, or where the court convicting such person finds that aggravating factors are present, both such fine and such imprisonment.⁴²⁴

3.7.12.4 A related problem is the exposure of children to the depiction of sexually explicit material, a matter made especially troubling by the easy availability of such matter on the Internet.⁴²⁵ However, child pornography is due to be addressed in legislative amendments to the **Films and Publications Act**. No Bill has, at the time of writing been tabled for

421 **Case v Minister of Safety and Security; Curtis v Minister of Safety and Security** 1996 3 SA 617 (CC); 1996 (5) BCLR 609 (CC) as quoted by Milton **South African Criminal Law and Procedure** Vol II Cape Town: Juta 1998 at E7-6.

422 See also Van Rooyen K 'Pitfalls in drafting a new Films and Publications Bill for South Africa' 1996 **De Jure** 291; 'Should a new Films and Publications Act include a security paragraph?' 1996 **De Jure** 345.

423 In terms of section 1 'visual presentation' means a drawing, picture, illustration, painting or photograph, or a drawing, picture, illustration, painting or photograph produced through or by means of computer software on a screen or a computer print-out.

424 Section 30(1).

425 Cohen T 'Cyber-censorship: No tickets for speeding on the information superhighway' 1998 (115) **SALJ** 710.

consideration, however, and it would be speculative to comment on the likely content of any new prohibitions pertaining to child pornography.

3.7.12.5 *We believe child pornography should be addressed comprehensively in specific legislation such as the Films and Publications Act, 1996 and not in the new sexual offences act. We therefore do not recommend any legislative enactments, pending the amendment of the Films and Publication Act, 1996.*

3.7.13 Child Sex Tourism

3.7.13.1 Sex tourism involves the systematic and deliberate exploitation of children and adults who are forced by circumstances into prostitution or the sex industry. The greater ease of travel between countries and the development of organised tourism has expanded tourism in South Africa and elsewhere. This has led in turn to the phenomenon of sex tourism which has been described as an industry balancing the supply of, and demand for sexual services and involving a segment of the local sex industry which is directly linked with the international tourist market.

3.7.13.2 The United Nations Working Group on Contemporary Forms of Slavery has recognised that child prostitution is largely connected with mass tourism.⁴²⁶ A working group sponsored by the Ecumenical Coalition on Third World Tourism investigated tourism and child prostitution in the Philippines, Sri Lanka, and Thailand and concluded that tourism is now very closely linked with the acceleration (and, in some cases, is the cause) of child prostitution.⁴²⁷ In some countries, including Sri Lanka, public officials claim that child prostitution was introduced by tourism, while in others it would appear that tourism has merely aggravated an existing problem in so far as child prostitution has provided an additional attraction to tourists. The Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography has also identified a direct link between sex tourism and a greater number of local boy prostitutes and visiting paedophiles.⁴²⁸

426 Working Group Report as quoted in <http://online.anu.edu.au/law/pub/journals/mulr/Vol19No3Douglas>.

427 Ibid page 5.

428 <http://online.anu.edu.au/law/pub/journals/mulr/Vol19No3Douglas>.

3.7.13.3 In South Africa tourism is a large industry and is one of the top earners of foreign exchange and a critical source of employment. Sadly though, Cape Town is apparently fast becoming a child sex tourist destination, with rumours of organised sex tours much in the same fashion as a wine-route tour.

3.7.13.4 Besides the existing offences in terms of the **Sexual Offences Act** and the proposed amendment to the **Child Care Act** relating to commercial sexual exploitation there are no other measures in place to protect children from sex tourism.

3.7.13.5 To stop child-sex tourism, effective laws and their enforcement is vital. Countries where sex tourists originate must be encouraged to create and enforce extra-territorial legislation making it possible to prosecute sex-tourists and sexual offenders for crimes committed abroad, thereby making child-sex tourism illegal. The governments of countries being visited by sex tourists also need to take responsibility for curbing the sex industries within their own countries. All such countries should be persuaded to develop strict laws prohibiting tourists from engaging in child prostitution. The law enforcement agencies in these countries need to strictly enforce their country's current legislation on child prostitution. The countries that are the destination for these tours, need to create legislation that will no longer punish the children, but punish the exploiters instead. Governments of countries that are hosting sex tourists need to provide educational and alternative economic opportunities to child prostitutes in their countries.

3.7.13.6 Although world-wide the majority of legislation concerning sex tourism is centered at the national level, there are transitional and international governing bodies that help combat the commercial sexual exploitation of children. In recent years, several international conferences involving governments as well as non-governmental organizations have been held to deal with child-sex tourism on an international level.

3.7.13.7 ECPAT believes that tourism is a major contributory factor in the growth of the sexual exploitation of children. Poorer countries have become the target for tourists, businessmen and paedophiles from Europe, Australasia, Japan and North America.

3.7.13.8 The tourism industry as a whole can play a tremendous role in preventing sex tourism. Tourism employers can take a pro-active role by conducting training sessions to educate their employees of the problem and its scope. In addition to making the tourism

industry aware of child-sex tourism, the governments of both the countries from whence the tourists originate and the countries receiving such tourists need to increase their role in preventing child-sex tourism.

3.7.13.9 *The Commission is of the opinion that child sex tourism will only be given an effective death blow once effective national legislation relating to commercial sexual exploitation is enacted coupled with extra-territorial application. It is therefore recommended that in order to combat sex tourism, effective national legislation relating to commercial sexual exploitation be enacted coupled with extra-territorial application.*

3.7.14 Extra-territorial Legislation

3.7.14.1 When offences are committed abroad, the country where the offender is arrested may be requested to send the offender back (extradite) to the country in which the offence was committed. Some countries will extradite on the basis of a treaty, and some will do so on mere request.

3.7.14.2 Extra-territorial jurisdiction can be operated on the basis of a number of principles:

- C the **personality** principle, whereby the state exercises jurisdiction either in the interests of victims who are its nationals (passive personality), or because the wrongdoer is one of its nationals or residents (active personality);
- C the **protective** principle whereby the state seeks to protect its own fundamental interests, whether against nationals or non-nationals;
- C the **universality** principle, whereby a state accepts to prosecute certain offences because these offences are crimes for which the international community has undertaken responsibility to punish wrongdoers.

3.7.14.3 The ability to prosecute extra-territorially is often dependant on the presence or absence of certain conditions. Conditions generally applicable are:

- C **double criminality:** this means that extra-territorial jurisdiction can only apply if the acts committed abroad constitute an offence in both countries.⁴²⁹
- C **double jeopardy:** it is a principle of law in most countries that a person may not be re-tried for the same offence. However, it should be noted that the Committee on Human Rights issued a recommendation⁴³⁰ to the effect that this principle has no international application and only applies to a second trial in the same country.
- C **a prior complaint by the victim,** or a request for prosecution by the foreign state.⁴³¹

3.7.14.4 In general, the principle of double criminality will apply, namely that the offence for which the offender is wanted must be analogous to an offence in his or her own country. However, some countries have an objection to extraditing their own nationals. For this reason, they will prosecute their nationals at home for offences committed abroad, rather than send them back to the country where the offence took place.

3.7.14.5 Three types of modern extra-territorial jurisdiction have been identified.⁴³² They can be categorised as follows:

- C Those countries that apply extra-territorial jurisdiction to offences committed by their nationals abroad as a general principle. Such countries include Japan, the Netherlands, Norway, Sweden and Switzerland. The jurisdiction can be applied without limitation for certain very serious offences, including those connected with the security of the state, and also, generally with the requirement of double criminality, for a large number of other offences, which are more than simple misdemeanors. In Japan, however, double criminality is not required for any of the offences specified in the Penal Code as being capable of being prosecuted extra-territorially. In such countries, there are no special provisions to deal with crimes connected with child sex tourism. A general category of

429 In Sweden, Belgium, the Netherlands and Switzerland this is a requirement. In Japan, Germany and Australia it is not.

430 2nd November 1987.

431 Although an investigation may be started because of pornographic material being discovered and reported or as a result of a degree of entrapment promoted by an NGO.

432 ECPAT Europe Law Enforcement Programme Extraterritorial Legislation Project, Case Studies: Conclusions and Recommendations, Draft Version March 7th 1999.

serious crimes exist in these countries which enables them to prosecute nationals in their country of origin even though the offence was committed abroad.

- C Those countries that as a general principle will also apply extra-territorial jurisdiction for serious offences committed by their nationals abroad, but which, in the case of some offences committed against children, have legislated to facilitate prosecutions for such offences. Such countries include Belgium, France and Germany.
- C Those countries that introduced specific legislation which establishes jurisdiction with regards to offences against minors committed abroad. Such countries include Australia, Ireland and the United Kingdom. The law is restrictive in its scope and designed to cover a specific issue. In such countries, double criminality may or may not be required. (It is not required in Australia, but it is required in Ireland and the UK).⁴³³

3.7.14.6 Extra-territoriality normally applies to nationals. However, some countries have extended the scope of extra-territorial jurisdiction from nationals to offenders who are resident in the territory of the state (France and Belgium) or even to persons who are passing through their territory (Belgium and Sweden).⁴³⁴ Australia includes any legal entity incorporated in the country in the scope of liability.

3.7.14.7 In Sweden, the Netherlands, Germany, France, Belgium and Switzerland, extra-territoriality applies to all serious offences committed abroad. In all of these countries the following sexual offences, or their equivalent, are considered as serious and capable of being prosecuted extra-territorially:

- C pimping/inducing minors into prostitution;
- C sexual assault on minors, with or without violence, threat or coercion (including rape, battery, attacks on modesty etc.);
- C corruption of minors.

3.7.14.8 In mid-1993 the German Parliament extended the application of its **Penal Code** to certain criminal acts committed abroad by German nationals including carrying out sexual

433 Ibid pages 6 and 7.

434 Ibid page 8.

practices with a child under the age of 14 years.⁴³⁵ The legislation is expressed to be independent of the law of the country where the criminal act was committed. This means that a German national who commits an act which constitutes an offence in Germany, in another country, even if it is not a crime in that other country, may be prosecuted for the crime in Germany. The victim need not be a German national. Sweden also has legislation pursuant to which Swedish nationals who sexually exploit children in other countries can be prosecuted in Sweden.

3.7.14.9 Travel restrictions to limit the demand for child prostitution may be imposed. In the Philippines, foreigners convicted of sex offences against children will be deported but only after having served any custodial sentence and will thereafter be banned from re-entering the country.⁴³⁶ Australia empowers the Minister to cancel an Australian passport in terms of the **Passports Act** 1938 if it is likely that the passport holder will engage in conduct that might endanger the health or physical safety of other persons, whether in Australia or in a foreign country.

3.7.14.10 A study commissioned by UNICEF⁴³⁷ concluded with three key findings concerning extra-territorial criminal laws, namely those laws which reach beyond the territories of the legislating states to penalize the sexual crimes of their nationals or residents when perpetrated against children in other countries. Firstly, it was found that extra-territorial criminal laws on the part of the countries of origin of the sex exploiters should not be seen as a substitute for effective laws, policies, and law / policy enforcement in the destination countries of such exploiters. Rather extra-territorial criminal laws are a complement to the laws, policies and law/policy enforcement of the destination countries.

3.7.14.11 Secondly, there are often divergences between the countries that have extra-territorial criminal laws; there is no uniformity of these laws in regard to their content or substance, related procedures and related personnel. A key concern is that the age of protection for the child varies between countries, and in regard to all the countries that have extra-territorial laws, few use 18 as the age for child protection, even though this is increasingly

435 **German Penal Code** Sections 5 and 176.

436 Republic Act No 7610 (1991) (Phillippines) section 31.

437 Muntarhorn V **Extraterritorial Criminal Laws Against Child Sexual Exploitation** UNICEF 1998.

the preferred international criterion for child protection. Thirdly, the presence of extra-territorial criminal laws is inadequate unless there is close cooperation between the countries of origin and the destination countries of the sex exploiters.

3.7.14.12 *The Commission endorses the following recommendations regarding extra-territorial operation of legislation:*

- C That the South African Government exercise jurisdiction because the wrongdoer is one of its citizens or permanently resident in South Africa.*
- C That legal entities incorporated or doing business in South Africa be included in the scope of persons who can be prosecuted under this type of provision.*
- C That the principle be accepted whereby sexual offences are prosecuted because these offences are crimes for which the international community has undertaken responsibility to punish wrongdoers in terms of inter alia the Convention on the Rights of the Child.*
- C That to enable South Africa to exercise jurisdiction of this nature provision for extra-territorial application be made in specific legislation dealing with sexual offences.*
- C That in keeping with the German example, that extra-territorial provisions should be expressed to be independent of the law of the country where the criminal act was committed, meaning that a South African national or permanent resident⁴³⁸ committing an act which is criminal in South Africa, in another country, even if it is not a crime in the other country, may be prosecuted for the crime in South Africa.*
- C That any foreign national convicted of a sexual offence within South Africa be deported after serving his or her sentence and be prohibited from entering the country again.*

438 The inclusion of permanent residents is based on the Constitutional Court judgement **Larbi-Odam and others v Member of the Executive Council for Education (North-West Province) and another** 1998 1 SA 745 (CC); 1997 (12) BCLR 1655 (CC) where it was found that non-citizens issued with permanent residence permits should be treated on the same footing as South African citizens for employment purposes. Surely they too should be obliged to comply with South African legislation whilst abroad, as they are for almost all other purposes treated as South African citizens.

- C Cancelling and retracting the passport of any South African citizen convicted of a sexual offence abroad.*
- C Making provision for the retraction of operating licences of any travel agent or bureau found to have organised or planned to organise sex tours within the borders of South Africa or abroad.*
- C That 18 be used as the age of protection of children from sexual exploitation, irrespective of the issue of the child's consent and the need to prove that the sexual misdeed is a crime in both the country of origin and the destination country of the sex exploiter (the double criminality principle) be discarded.*

3.7.15 Summary of Recommendations

3.7.15.1 *For the benefit of our readers we summarise our recommendations on commercial sexual exploitation. These are:*

- C The offence created by section 9 of the Sexual Offence Act with regards to the parents or guardians procuring or defiling a child or ward should be retained.*
- C Those persons who are not South African citizens, who have lived or are living on the earnings of prostitution or receive any part of such earnings or procure persons for immoral purposes constitute only one of the categories of persons who are designated 'prohibited persons' in terms of the Aliens Control Act. The appropriate place to regulate access to the Republic is through the Aliens Control Act and not the Sexual Offences Act.*
- C A complete ban should be placed on child prostitution and anyone involved in sexually exploiting a child whether as a pimp or customer should be severely punished for doing so.*
- C The child prostitute be regarded as a victim who should be protected and rescued and not be branded a criminal.*
- C The acts of customers, pimps, procurers and parents and guardians who wilfully cause children to participate in child prostitution or related activities must be criminalised and severely punished.*

- C The proceeds of fines for contraventions of these provisions should be used for the treatment of sexually abused children.*
- C The phenomenon of commercial sexual exploitation of children must be regulated in terms of the Sexual Offences Act and not the Child Care Act. For the reasons stated above it is also recommended that the definition and offence relating to commercial sexual exploitation as found in the Child Care Amendment Bill not be transposed as it presently reads.*
- C That the South African Government exercise jurisdiction because the wrongdoer is one of its citizens or permanently resident in South Africa.*
- C That legal entities incorporated or doing business in South Africa be included in the scope of persons who can be prosecuted under this type of provision.*
- C That the principle be accepted whereby sexual offences are prosecuted because these offences are crimes for which the international community has undertaken responsibility to punish wrongdoers in terms of inter alia the Convention on the Rights of the Child.*
- C That to enable South Africa to exercise jurisdiction of this nature provision for extra-territorial application be made in specific legislation dealing with sexual offences.*
- C That in keeping with the German example, that extra-territorial provisions should be expressed to be independent of the law of the country where the criminal act was committed, meaning that a South African national or permanent resident committing an act which is criminal in South Africa, in another country, even if it is not a crime in the other country, may be prosecuted for the crime in South Africa.*
- C That any foreign national convicted of a sexual offence within South Africa be deported after serving his or her sentence and be prohibited from entering the country again.*
- C Cancelling and retracting the passport of any South African citizen convicted of a sexual offence abroad.*
- C Making provision for the retraction of operating licences of any travel agent or bureau found to have organised or planned to organise sex tours within the borders of South Africa or abroad.*

c That 18 be used as the age of protection of children from sexual exploitation, irrespective of the issue of the child's consent and the need to prove that the sexual misdeed is a crime in both the country of origin and the destination country of the sex exploiter (the double criminality principle) be discarded.

3.7.15.2 To give effect to these recommendations, we propose the following provisions:

Child prostitution

- 10.** (1) *Any person who intentionally commits a sexual act with a child for financial or other reward, favour or compensation to the child or to any other person, is guilty of an offence.*
- (2) *Any person who intentionally invites, persuades or induces a child to allow him or her or any other person to commit a sexual act with that child for financial or other reward, favour or compensation to the child or to any other person, is guilty of an offence.*
- (3) *Any person who intentionally participates in, or is involved in, the commercial sexual exploitation of a child, is guilty of an offence.*

Offering, engaging a child for commercial sexual exploitation

- 12.** *Any person who intentionally offers or engages a child for purposes of the commercial sexual exploitation of that child is guilty of an offence.*

Facilitating or allowing commercial sexual exploitation

- 13.** (1) *Any person who intentionally facilitates, in any way, the commercial sexual exploitation of a child is guilty of an offence.*

- (2) *Any parent, guardian or caregiver of a child who intentionally allows the commercial sexual exploitation of such child is guilty of an offence.*

Receiving consideration from commercial sexual exploitation

- 14.** (1) *Any person who intentionally receives any financial or other reward, favour or compensation from the commercial sexual exploitation of a child, is guilty of an offence.*
- (2) *Any person who intentionally lives wholly or in part on rewards, favours or compensation from the commercial sexual exploitation of a child is guilty of an offence.*

For the purpose of the above the following terms are defined:

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

“child” means any person under the age of 18.

3.7.15.3 The whole new sexual offences act is given extra-territorial operation in the following manner:

Extra-territorial jurisdiction

- 16.** *Any person who, while being a citizen or permanent resident of the Republic, commits any action outside the Republic which would have*

constituted an offence under this Act, had it been committed inside the Republic, is guilty of an offence which would have been so constituted.

3.8 UNNATURAL SEXUAL OFFENCES

3.8.1 Introduction

3.8.1.1 South African practice at an early stage subdivided the ‘unnatural’ sexual 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’.

3.8.1.2 The category of unnatural offences generally has undoubtedly narrowed⁴³⁹ since Roman-Dutch times,⁴⁴⁰ although it remains impossible to define the limits of ‘unnatural’ sexual offences. 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 consenting female’s thighs or against some other part of her body or by insertion into her mouth or anus is not a crime.⁴⁴¹ Similarly it now seems clear that self-masturbation is not criminal.⁴⁴² As we have seen in the Issue paper,⁴⁴³ there are no reported cases dealing with unnatural acts between consenting females.

439 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 an unnatural act.

440 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.

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

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

443 See par 4.8.5 of the Issue Paper.

3.8.1.3 The ***Tshwaranang Legal Advocacy Centre*** finds the term ‘unnatural’ problematic as it denotes that certain types of sexual behaviour are natural while others are not. ***Tshwaranang*** is therefore of the opinion that anal sex should not be a crime between consenting adults. In the absence of consent, this should constitute sexual assault. ***Tshwaranang*** is further of the opinion that same sex relations between consenting minors in the absence of force should not be regulated by the (criminal)⁴⁴⁴ law.⁴⁴⁵

3.8.1.4 We have already discussed sodomy above⁴⁴⁶ and focus in this section on bestiality and the residual category of other ‘unnatural’ sexual offences.

3.8.2 Bestiality

3.8.2.1 Bestiality consists of unlawful and intentional sexual intercourse by a person with an animal. The essential elements of the crime are intent, unlawfulness, sexual relations *per anum* or *per vaginum*, by a person with an animal.⁴⁴⁷ Penetration is required. If no penetration is effected, the perpetrator may be found guilty of attempted bestiality provided intention to penetrate is proved, otherwise he or she may be convicted of a miscellaneous unnatural offence.⁴⁴⁸ The offence is gender neutral and the person and the animal may be male or female.

3.8.2.2 Because of the penetration requirement, bestiality does not cover the situation where a person performs oral sex on an animal or induces the animal to perform oral sex on that person or some other person. Further, as is stated in the Issue Paper,⁴⁴⁹ it is not inconceivable that an adult may force a child to submit to sexual intercourse with an animal.⁴⁵⁰ Plainly, coercion will deprive the conduct of the child of unlawfulness, and bestiality is not

444 Our assumption.

445 This is also the view of the members from the SAPS Child Protection Units in KwaZulu Natal.

446 See par 3.5 above.

447 Milton **South African Criminal Law and Procedure Volume II** (third edition) Cape Town: Juta 1996 at 230.

448 Milton **South African Criminal Law and Procedure Volume II** (third edition) 230.

449 See par 4.8.4 of the Issue Paper.

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

committed by the child. The adult person can, however, in such circumstances be convicted of bestiality as an accomplice.

3.8.2.3 It is clear that two major issues need to be addressed. The first relates to the need to create a statutory offence to cover forced or manipulated sexual activity between children and animals, while the second issue relates to the penetration requirement for the existing common law crime of bestiality. We will deal with these two issues separately, although most respondents did not.

3.8.2.4 **Forced or manipulated sexual activity between children and animals**

3.8.2.4.1 The majority of respondents⁴⁵¹ are in favour of the enactment of legislation to cover forced or manipulated sexual activity between children and animals in response to a question posed in the Issue Paper.⁴⁵²

3.8.2.4.2 The **Johannesburg Child Welfare Society** points out in its submission that where children engage in sexual acts with animals without adult involvement, the need is normally for treatment rather than law enforcement. The **Society**, however, is of the opinion that where such sexual acts are being engineered or facilitated by an adult, this should amount to a statutory offence by the adult. Penetration should not be a requirement for such an offence. This is also the view of the **Department of Justice**.

3.8.2.4.3 **Ms W L Clark**⁴⁵³ is of the view that there is no need to create a statutory offence as she is of the view that an adult who forces a child to perform a sexual act with an animal can be found guilty of bestiality as an accomplice. She says that adult coercing the child into a sexual act with an animal could be charged with indecent assault in those instances where there is no penetration. **Ms Clark** is also of the opinion that conviction of the adult will attract a heavy

451 **Ms R Blumrick; Sr Potter, Agape School for Cerebral Palsied; Department of Welfare and Population Development, Gauteng Provincial Government; Department of Justice; Mr Kurt Worrall-Clare; Association for Persons with Physical Disabilities, Northern Cape; South African Police Service: Serious Violent Crime Component; SAPS Child Protection Units, KwaZulu Natal; FAMSA; Tshwaranang Legal Advocacy Centre; S A National Council for Child and Family Welfare (39 submissions). Contra Professors Snyman and Swanepoel, Faculty of Law, UNISA.**

452 See par 4.8.4 of the Issue Paper.

453 **Senior Public Prosecutor, Verulam.**

penalty 'as such conduct would be extremely abhorrent to right-thinking members of society'. She has, however, never personally encountered such a case in her career as prosecutor.

3.8.2.4.4 The **Attorney-General, Transvaal** is also of the view that forced or manipulated sexual activity between children and animals will always constitute the crime of indecent assault. The argument is simply that the animal is used as an instrument to inflict the assault on the child. The **Attorney-General, Transvaal** is therefore of the opinion that there is no need to introduce a statutory offence to cater for these instances.

3.8.2.5 The penetration requirement for bestiality

3.8.2.5.1 The **Department of Justice** says bestiality should be broadened to include non-penetrative acts much as rape should be broadened. This is in line with the majority view that penetration as an element of the crime should be irrelevant to a charge of bestiality,⁴⁵⁴ and that any sexual activity involving animals, including masturbation, should be punishable.⁴⁵⁵ It was also opined that any indecent conduct should suffice. The need for the requirement of penetration was also proposed but without substantiation.⁴⁵⁶

3.8.2.6 Comparative analysis and research

3.8.2.6.1 The New Zealand **Crimes Act** 1961 has codified the offence of bestiality. Penetration is a requirement for the offence. Of particular interest is the fact that coerced acts are specifically penalised in terms of section 142A of the Act. The relevant sections read as follows:

454 Mr K Worrall-Clare; the Association for Persons with Physical Disabilities, Northern Cape; Johannesburg Child Welfare Society; South African Police Services: Serious Violent Crime Component; FAMSA; Ms Clark; 34 submissions to the SA National Council for Child and Family Welfare.

455 Tshwaranang Legal Advocacy Centre.

456 4 submissions to the SA National Council for Child and Family Welfare.

S142A. Compelling indecent act with animal

Every one is liable to imprisonment for a term not exceeding 14 years who compels any other person, by the actual or threatened application of force to that other person, to perform, or to submit to or acquiesce in, any act of indecency with an animal, whether or not involving penetration.

S143. Bestiality

- (1) Every one is liable to imprisonment for a term not exceeding 7 years who commits bestiality.
- (2) This offence is complete upon penetration.

S144. Indecency with animal

Every one is liable to imprisonment for a term not exceeding 3 years who commits any act of indecency with an animal.

3.8.2.6.1.1 The ***Criminal Code of Ghana (Act 29)*** has codified the offence of bestiality. However, the offence forms part of the statutory offence “unnatural carnal knowledge”.

3.8.2.6.1.2 The Australian Model Criminal Code⁴⁵⁷ includes a provision to cover the situation where a person forces another person to engage in sexual conduct with a third person, to penetrate the person, or to commit a penetrative act upon his or her own person. It reads as follows:

33.4 Compelling sexual acts

- (1) A person who compels another person:
 - (a) to sexually penetrate the person, or
 - (b) to sexually penetrate, or be sexually penetrated by, a third person, or
 - (c) to sexually penetrate the other person’s own genitalia or anus,

is guilty of an offence.

Maximum penalty: Imprisonment for 15 years.

- (2) A person who compels another person to engage in a sexual act with an animal is guilty of an offence.

Maximum penalty: Imprisonment for 15 years.

457 See the Discussion Paper on the ***Model Criminal Code*** Chapter 5: Sexual Offences against the Person by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, November 1996.

- (3) A person who compels another person to touch the person, or a third person, indecently is guilty of an offence.

Maximum penalty: Imprisonment for 5 years.

Similar provisions operate in New South Wales,⁴⁵⁸ Western Australia⁴⁵⁹ and the Northern Territory.⁴⁶⁰

3.8.2.7 Evaluation and recommendation

3.8.2.7.1 We have seen that the criminal law does not serve to protect every societal interest and that it is not, according to the prevailing view, the device through which standards of morality can or should be endorsed.⁴⁶¹ Some respondents, as we have seen, find the mere idea of sexual intercourse with an animal revolting. For others, ‘anything goes’ provided it is done in the confines of the home and with somebody capable of consent.⁴⁶² We cannot legislate standards of morality and we are therefore reluctant to express an opinion on whether the common law offence bestiality should be repealed. We believe it is best to leave that question to our courts who are in the best position to judge societal interests. This flexible approach also makes it unnecessary to consider whether penetration should remain a requirement of the common law offence bestiality as the present legal position allows for a conviction of attempted bestiality.

3.8.2.7.1.1 One consequence of such a step would be that children (and adults) could be charged with the common law offence bestiality if they, of their own volition and possessing the necessary intention and criminal capacity, engage in sexual intercourse with an animal.

458 Section 80A of the New South Wales **Crimes Act**.

459 Sections 327 and 328 of the Western Australia **Criminal Code**.

460 Section 192B of the Northern Territory **Criminal Code**.

461 See par 3.2 above.

462 See the submission by **Mr Neil van Dokkum** and the judgment of Didcott J in **Case v Minister of Safety and Security** 1996 3 SA 617 (CC).

Whether the criminal law is the appropriate mechanism to be used **for children** in such circumstances is an open question.⁴⁶³

3.8.2.7.1.2 In bestiality the animal is used as an instrument to obtain sexual gratification. Depending on what is done with the animal, it is obviously possible to prosecute an offender in terms of legislation preventing the abuse of animals. Although sections 2(1)(a) or (b) the **Animal Protection Act** 71 of 1962 do not specifically deal with sexual intercourse or other sexual acts with animals, it could be argued that bestiality involves acts that torture, maim, terrifies or cause suffering to animals. However, the abovementioned sections of the **Animal Protection Act** are intended to prevent animals from being held in cruel conditions and it is not clear whether an offender would have the necessary intention to 'maim' or 'torture'.⁴⁶⁴

3.8.2.7.1.3 *We are adamant, however, that we do need to include a statutory provision in a new sexual offences act to cover forced or manipulated sexual activity between persons (children and adults alike) and animals despite the assurance by the Attorney-General, Transvaal and Ms W L Clark that acts such as these will always constitute indecent assault. We think it appropriate to adopt the example of the Australian Model Criminal Code and recommend the inclusion of such a section in the draft bill.*

3.8.3 Other unnatural sexual offences

3.8.3.1 According to Milton⁴⁶⁵ an unnatural offence consists in the unlawful and intentional commission of an unnatural sexual act by one person with another person or animal. Lack of consent to the sexual act is not an element of the crime.

463 The **Johannesburg Child Welfare Society** seems to suggest that proceedings in terms of the **Child Care Act** might be more appropriate. Diversion options should also be considered where children are involved in bestiality.

464 See **S v Gerwe** 1977 3 SA 1078 (T).

465 **South African Criminal Law and Procedure Volume II** (second edition) 276.

3.8.3.2 The problems surrounding the content of this residual category and the question of whether it still constitutes a crime are borne out by the submissions. **Professors Snyman** and **Swanepoel** are doubtful whether this category of offences still exists and doubt whether the Constitutional Court would recognise the existence of such an unduly vaguely defined crime.⁴⁶⁶ In any event, it is not clear whether a term such as ‘unnatural sexual act’ serves much purpose these days. The **Johannesburg Child Welfare Society** feels the need is rather to categorise different forms of sexual activity with children in the light of abuse of power relationships by adults or stronger juveniles, and to apply the age of consent uniformly.

3.8.3.3 The **Attorney-General, Transvaal** is of the opinion that these deeds (unnatural sexual acts) will always constitute the crime of indecent assault. He is therefore of the view that there is no need for the retention of this common law crime.

3.8.3.4 The **Association for Persons with Physical Disabilities, Northern Cape**, on the other hand, believes this common law offence still exists and should not be repealed. The **Department of Justice** finds it difficult to conclude that this offence no longer exists because there are few precedents or reported cases. The **Department** submits that it should remain an offence to serve as a safety net to cover all other acts that tend to abuse others and especially children.⁴⁶⁷

3.8.3.5 Recommendation

3.8.3.5.1 *We are not in a position to say whether the common law offence of ‘unnatural’ sexual offence exists at all, and if it does, to predict what actions constitute ‘unnatural’ sexual offences if at all. It is conceivable, however, that certain sexual acts involving children and adults, for instance, might fall in this category. We therefore believe it best not to express any opinion on whether this common law crime still exists and what sexual conduct it prohibits. Our*

466 This is also the view of the **SAPS Area Commissioner, Legal Services, East Rand**.

467 This approach is supported by the **SAPS Child Protection Units, KwaZulu Natal**.

*courts are in the best position to make these decisions and may well in future find it necessary to express societies condemnation (or approval) of sexual acts considered unnatural.*⁴⁶⁸

3.9 **CRIMEN INIURIA**

3.9.1 **Introduction**

3.9.1.1 *Crimen iniuria* is an offence against the dignity and consists in unlawfully, intentionally and seriously impairing the *dignitas* of another person.⁴⁶⁹ It is distinguishable from defamation in that publication is not required.

3.9.1.2 As stated in the Issue Paper,⁴⁷⁰ 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 iniuria*.⁴⁷¹ An intentional impairment of the *dignitas* of another person does not constitute *crimen iniuria* unless it is serious.⁴⁷² A non-serious impairment of *dignitas* is not unlawful in criminal law, whether or not it constitutes an actionable *iniuria* in civil law,⁴⁷³ and whether or not it is technically an *iniuria* at all.⁴⁷⁴ If every *iniuria* were treated as criminal, the criminal courts would be cluttered up with trivialities. Moreover, 'in the ordinary hurly-burly of everyday life man must be expected to endure minor or trivial insults to his dignity'.⁴⁷⁵

468 Courts may find in future, for instance, that 'cybersex' or 'virtual sex' with children involving robots and computers is an 'unnatural' sexual offence meriting punishment.

469 Milton **South African Criminal Law and Procedure Volume II** (third edition) 492. See also Snyman **Strafreg** (third edition) 465; John van den Berg 'The criminal act of violation of dignitas' 1988 (3) **SACJ** 351 at 355 et seq.

470 See par 4.9.2 of the Issue Paper.

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

472 **R v Chipo** 1953 4 SA 573 (AD).

473 Every insult to dignity which is serious enough to found a civil action will not necessarily be serious enough to warrant a criminal prosecution or conviction: **R v Walton** 1958 3 SA 693 (SR) at 695.

474 **R v Terblanche** 1933 OPD 65 at 69.

475 Per Beadle J (as he then was) in **R v Walton** 1958 3 SA 693 (SR) at 695.

3.9.1.3 The crime of *crimen iniuria* in principle protects the interests of human dignity. Dignity is that aspect of human personality that is not embraced by the concepts of *corpus*⁴⁷⁶ and *fama*.⁴⁷⁷ In South African law this trinity of interests of human personality is protected both through civil actions for damages and by way of criminal sanction. At criminal law violation of the interest in *corpus* is prosecuted as assault, and violation of the interest in *fama* is prosecuted as defamation. Violations of dignity are prosecuted as *crimen iniuria*, for example verbal comments.

3.9.1.4 *Crimen iniuria* and assault therefore overlap,⁴⁷⁸ for assaults accompanied by a sexual element may be seriously injurious of the *dignitas*.⁴⁷⁹ Indecent assault will invariably also constitute *crimen iniuria*, but of course the converse does not hold true.

3.9.1.5 The exact content of this interest of human dignity is by no means clear and the prevailing view⁴⁸⁰ is that dignity is a composite concept embracing the human claim to respect for the individual's sense of self-respect, mental tranquillity and privacy.

3.9.1.6 The basis for judging the gravity of the insult varies from one place and time to another. The concept both of what is an *iniuria* and of what is a serious *iniuria* 'depends to a great extent upon the modes of thought prevalent amongst any particular community or at any period of time, or upon those of different classes or grades of society, and the question must to a great extent therefore be left to the discretion of the court'.⁴⁸¹ The basis for judging gravity is therefore largely the court's conception of the contemporary *boni mores*. This does not mean that contemporary social attitudes inevitably prevail as the courts rightly only give effect to *mores* which they consider *boni*.

476 The physical integrity of the person.

477 The reputation of a person.

478 As does *crimen iniuria* and defamation. See also Milton **South African Criminal Law and Procedure Volume II** (third edition) 495.

479 Van den Berg J 'The criminal act of violation of *digitas*' 1988 (3) **SACJ** 351 at 360.

480 See Neethling J 'Grondslag vir die Erkenning van 'n Selfstandige Persoonlikheidsreg op Privaatheid in die Suid-Afrikaanse Reg' 1976 (39) **THRHR** 120 at 126; Snyman **Criminal Law** 429; Labuschagne J M T 'Dignitas en die bestraffing van voyeurisme' 1989 (4) **SACJ** 339.

481 Melius de Villiers 83 - 4, approved in **R v Terblanche** 1933 OPD 65 at 69, approved in turn in **R v Chipso** 1953 4 SA 573 (AD) at 576.

3.9.1.7 De Villiers JP said in *R v Van Meer*.⁴⁸²

It is very difficult, of course, 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 inuiriæ*; and I do not think it is advisable for the Court to attempt to lay down such a definition. The criminal or innocent character of the acts would depend upon many circumstances. It would depend upon the place where the acts are committed, and upon the time of the commission. It would depend upon the relation between the parties; upon the sex of the two parties concerned. It would also depend very largely upon the degree to which the conduct is persisted in after it has been shown to be distasteful, or to be objected to by the other party.

3.9.1.8 Conduct which impairs *dignitas* and which contains an element of 'sexual impropriety' is usually seriously regarded.⁴⁸³ It is not suggested, of course, 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.⁴⁸⁴

3.9.1.9 Roman⁴⁸⁵ and Roman-Dutch⁴⁸⁶ law accepted that the *dignitas* of both children and lunatics can be impaired even though they may be incapable of understanding the nature of what occurs. Our case law appears to have accepted this proposition.⁴⁸⁷ The explanation seems to be that although the self-respect and mental tranquillity of the child (or lunatic) have not been disturbed, his / her rights to privacy and freedom from contemptuous treatment have been. The child is incapable in law of consenting to the disturbance or of disregarding it.⁴⁸⁸

482 1923 OPD 77 at 81.

483 Milton **South African Criminal Law and Procedure Volume II** (third edition) 505.

484 See Milton **South African Criminal Law and Procedure Volume II** (third edition) 511 - 512.

485 D 47.10.3.1.

486 Voet 47.10.4; Huber *HR* 6.8.3.

487 **R v M** 1915 CPD 334 at 342; **R v Holliday** 1927 CPD 395 at 401.

488 **R v Makeke**; **R v Makona** 1942 SR 47 at 48.

3.9.1.10 It must also be remembered that the law of delict provides financial damages to be paid where *iniuria* is suffered as a result of a sexual offence.⁴⁸⁹

3.9.2 Analysis of the submissions received

3.9.2.1 The overwhelming response from the workshops and the majority of submissions favour the creation of a special statutory form of *crimen iniuria* which contains an element of sexual impropriety.⁴⁹⁰

3.9.2.2 On the other hand, submissions and responses from the legal field indicate no need or advantage to regulate this crime by way of statute.⁴⁹¹ **Professors Snyman and Swanepoel** elaborate this point of view by stating that codification would amount to an unjustified fragmentation of the criminal law. The **Tshwaranang Legal Advocacy Centre** is of the view that certain types of conduct⁴⁹² that infringe the dignity of the person should rather be prosecuted as non-physical sexual assault. **Mr Neil van Dokkum** is also of the view that there is no need to extend the crime of *crimen iniuria* to include a sexual element. He says if the perpetrator acted in such a way that the victim was sure he or she was going to perform an unlawful sexual act on that person, then that would be indecent assault. If the person was simply foul-mouthed but never made the victim fear that the verbal utterances would be converted into practice, then that is *crimen iniuria* according to **Mr Van Dokkum**.

3.9.2.3 In their joint submission, the **SAPS members of the Child Protection Units, KwaZulu Natal** say that it is very difficult to establish whether a young child has a dignity. They propose the creation of a separate offence called gross indecency to protect children. As we have seen above, Roman and Roman-Dutch law accepted that the *dignitas* of young children

489 See **N v T** 1994 1 SA 862 (C) where the mother of a child who was raped successfully claimed damages in her personal capacity for the emotional shock and trauma she has suffered as a result of the rape of her eight year old daughter. The daughter (the rape victim) also succeeded in her claim for damages for shock, pain and suffering and *contumelia*.

490 **Association for Persons with Physical Disabilities, Northern Cape; Gauteng Provincial Government Department of Welfare and Population Development; Sr M D Potter; Tshwaranang Legal Advocacy Centre; South African Council for Child and Family Welfare** (30 submissions).

491 **SAPS Area Commissioner, Legal Services, East Rand; Ms W L Clark; Attorney-General: Transvaal; South African Council for Child and Family Welfare** (8 submissions).

492 Such as obscene telephone calls, threats and sexual harassment.

and lunatics can be impaired even though they may be incapable of understanding the nature of what occurs. Milton⁴⁹³ shows that this appears to be accepted in our case law.

3.9.3 Evaluation and Recommendation

3.9.3.1 *We are convinced that there is no need to create a special form of statutory crimen iniuria which contains an element of sexual impropriety. As we have seen, the common law offence of crimen iniuria already adequately provides for attacks on the dignitas of persons and that conduct which contains elements of 'sexual impropriety' is usually regarded in a very serious light. We therefore do not see any need or advantage to regulate this common law offence or any aspect thereof by way of statute.*

3.10 INDECENT ASSAULT

3.10.1 Introduction

3.10.1.1 Milton⁴⁹⁴ defines indecent assault as an unlawful and intentional assault which is or is intended to be indecent. Snyman,⁴⁹⁵ on the other hand, defines indecent assault as the unlawful and intentional assault of another with the intent to commit an indecent act.⁴⁹⁶ What appears from these two definitions is that indecent assault is one of the three species of assault with intent.

3.10.2 Problem analysis

493 **South African Criminal Law and Procedure Volume II** (second edition) 537 - 538.

494 **South African Criminal Law and Procedure** (Volume 11) 467.

495 Snyman **Strafreg** Durban: Butterworths (third edition) 458.

496 Snyman 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'.

3.10.2.1 Indecent assault is a generic term describing most forms of unlawful sexual encounters other than rape, for example, from anal rape or the non-consensual insertion of an object other than the penis into the vagina or anus, to touching or fondling of persons in an indecent manner and consensual sexual acts which are *contra bonos mores*.⁴⁹⁷ Ordinarily, an indecent assault is an assault which involves the touching of the erogenous parts of the body ie. touching of genitals.⁴⁹⁸ Non-consensual acts of anal or oral⁴⁹⁹ intercourse, whether with a male or female, are regarded as an indecent assault. The purpose of the offence of indecent assault is primarily to protect the sexual autonomy, bodily integrity, and *dignitas* of a person, whether male or female.

3.10.2.2 This crime is gender neutral, in other words it may be committed by persons of the same or different sex. Depending on the circumstances, such perpetrators may be prosecuted for rape, incest, offences under the **Sexual Offences Act**, indecent exposure or indecent assault. This overlap results in the crime of indecent assault being used as a catch-net where it is not possible to bring a prosecution under one of the other offences. In contrast to the other common-law crimes, this crime may take the form of the inspiring, by threats or conduct, of apprehension that force is immediately to be applied. Force does not presume the infliction of actual violence, a mere touching suffices.⁵⁰⁰ This follows from the fact that indecent assault is a species of the genus assault with assault as an element.

3.10.2.3 The nature of the assault and the element of indecency are aspects on which there seems to be some divergent views. In the case of **R v Abrahams**⁵⁰¹ the court made the following remarks:

When, therefore, assault is qualified by the term 'indecent', it seems to me that it is the act of violence that is qualified; there must be an act of indecent physical violence. I do not think that the qualification refers to the motive or purpose of the offender. ... Nor, leaving aside the question of purpose, do I consider that indecent language or even indecent acts applied to the accused himself and not to the complainant, can make an

497 Sado-masochistic behaviour is one such act as it was found to be injurious to the participants and unpredictably dangerous **R v Brown** 1993 2 All ER 75 (HL).

498 **S v A** 1993 1 SACR 600 (A) at 607h-j.

499 **S v M** 1990 2 SACR 456 (N).

500 **R v M** 1961 2 SA 60 (O) at 61-3.

501 1918 CPD 590.

assault indecent. If, for instance, a man were to expose his person, though this might be indicative of an intent to rape, I do not think it would make a catching hold of a girl by the arm an indecent assault. It might, of course, justify a conviction for public indecency, if committed in a public place, or for injuria. But for an indecent assault, the violence constituting the assault must in itself be indecent; there must be some indecent handling of the complainant.'

3.10.2.4 This case was followed in numerous other decisions. However in the case of **S v Fen 'n Ander**⁵⁰² the Transvaal Provincial Division comes to a different conclusion. The court makes the following remarks in this regard:

Ek is gevolglik van mening dat daar wel gekyk kan en moet word na die uitgesproke bedoeling van 'n beskuldigde soos oorgedra aan die klaer (hetsy deur woorde, gedrag of by implikasie) om vas te stel of 'n aanranding 'n onsedelike aanranding daarstel.

Na my mening kan die betrokke liggaamsdeel van die klaer waarteen die aanranding gerig of gemik is, nie deurslaggewend wees vir die bepaling van die 'onsedelike' van die aanranding nie. Klaarblyklik waar dit gerig is op die 'slagoffer se geslagsorgane of ander 'erotiese' dele van die liggaam' sal die aanranding onsedelik wees. (Sien De Wet en Swanepoel (op cit te 227).) Die teenoorgestelde sal nie noodwendig altyd waar wees nie, nl dat die aanranding nie onsedelik sal wees bloot omdat die aanranding nie gerig is op sodanige dele nie. R v Barden was juis so 'n geval waar die beskuldigde gepoog het om die klaer se hand in aanraking met die beskuldigde se geslagsorgaan te bring. Na my mening sou dit kennelik 'n onsedelike aanranding wees waar 'n beskuldigde (met die nodige skuld natuurlik) sy geslagsorgaan in aanraking bring, of dreig om dit in aanraking te bring, met enige gedeelte van die klaer se liggaam. Na my mening sou dit die uitgesproke seksuele motief van so 'n handeling wees wat dit onderskei van die geval waar, in die loop van 'n gewone aanranding, dit terloops sou gebeur. Na my mening sou so 'n benadering ook die probleme oplos wat moontlik so kon opduik indien dit nie duidelik is of die bepaalde liggaamsdeel wel 'n 'erotiese' een is al dan nie. Indien, bv, 'n beskuldigde seksuele bevrediging kry of seksueel geprikkel word deur 'n gedeelte van die klaer se liggaam te betas wat nie normaalweg as 'n 'erotiese' deel beskou word nie en by sodanige betasting dit aan die klaer laat blyk dat hy sodanige bevrediging kry of prikkeling geniet en dat dit die oogmerk van die betasting is, dan sou sodanige betasting na my mening neerkom op onsedelike aanranding.

3.10.2.5 Consequently the court comes to the conclusion that the intention of the accused must be taken into account when deciding whether an assault is indecent or not. The part of the victim's body which is the target for the assault should not be the deciding factor to establish whether an assault is indecent or not. This decision was followed in the case of **S v**

Muvhaki⁵⁰³ however in the case of **S v M**⁵⁰⁴ the Transvaal Provincial Division followed the *Abrahams*-decision without referring to the decision of **S v Fen 'n Ander**.

3.10.2.6 As far as could be established the Supreme Court of Appeal has not had an opportunity to consider this question.

3.10.3 Submissions regarding indecent assault

3.10.3.1 Although the majority⁵⁰⁵ of submissions argue in favour of retaining the common law offence of indecent assault, some respondents feel the offence should be codified and be regulated by statute.⁵⁰⁶ The opinion was also held that as indecent assault at common law covers a wide variety of acts and is furthermore a competent verdict on a number of other offences, codification may lead to loopholes or problems with interpretation.⁵⁰⁷ The necessity was voiced that consent should not be a defence to this crime.⁵⁰⁸ According to **Ms WL Clark**⁵⁰⁹ while there is apparent disparity in the definitions given by Milton and Snyman, in practice the courts will convict of indecent assault where there is an indecent element in the assault, which seems to cover both Milton and Snyman's definitions. The 'intent to commit an indecent act' mentioned by Snyman is given a fairly loose interpretation. In her opinion there are not many reported cases on the subject which is indicative of the fact that the courts are not experiencing problems with the definition.

503 1985 4 SA 317 (ZH).

504 1984 4 SA 111 (T).

505 **Attorney-General: Transvaal; Mpumalanga Provincial Government; Association for Persons with Physical Disabilities: Northern Cape; Vryheid Child and Family Welfare; South African Police Service: Serious Violent Crime Component; Professors Snyman and Swanepoel, Unisa Faculty of Law; S Pillay: SA National Council for Child and Family Welfare; 31 submissions from the SA National Council for Child and Family Welfare; Neil van Dokkum.**

506 **Dreyer, Coertze & Swart of SA National Council for Child and Family Welfare; Child and Family Welfare: Bloemfontein; 3 submissions from the SA National Council for Child and Family Welfare.**

507 **Ms WL Clark**, Senior Public Prosecutor: Verulam.

508 **South African Police Service: Serious Violent Crime Component.**

509 **Ms WL Clark.**

3.10.3.2 In the Issue Paper the question is posed as to when an assault becomes 'indecent'. Views differ markedly. One view was that it is impossible to classify all kinds of acts that might be indecent. Depending on the circumstances, any act which is so viewed by a complainant can presently be reported, investigated and prosecuted as an indecent assault. The interpretation given to what indecent assault is that it is an assault which significantly invades the person or privacy of the individual.⁵¹⁰ Another interpretation is that an assault is 'indecent' when there is direct physical sexual contact on the body of a person by another person with or by means of any other object than a penis.⁵¹¹ According to yet another interpretation an assault is 'indecent' when it affects the person emotionally and physically.⁵¹² According to Snyman this crime should not be confined to cases where the act itself, regarded objectively, is indecent, but should also cover cases where, although the act regarded objectively is not indecent, the accused's intention was to commit an indecent assault.⁵¹³

3.10.3.3 In response to the same question, **Professor Milton** states in his submission that at common law acts such as fellatio, cunnilingus, masturbation, insertion of objects into the vagina or anus, touching of genitals, buttocks and breasts can constitute indecent assault. As a general principle the consent of the parties engaged in such activity is likely to render it not unlawful. The consent of a girl under the age of 12 years is not a defence. There is no certainty as to whether there is an age of consent for males. Indecent assault can be committed by males or females. Professor Milton adds that presently the **Sexual Offences Act** 1957 punishes the performance of the acts mentioned with children under the age of consent.⁵¹⁴

3.10.4 Comparative analysis and research

3.10.4.1 New Zealand⁵¹⁵ have codified the crime of indecent assault under the following headings, namely:

510 **Johannesburg Child Welfare Society.**

511 **South African Police Service: Serious Violent Crime Component.**

512 **S Pillay: SA National Council for Child and Family Welfare.**

513 **Unisa: Faculty of Law.**

514 Section 14 of the **Sexual Offences Act.**

515 **Crimes Act, 1961.**

- C Indecency with a girl under 12;
- C Sexual intercourse or indecency with a girl between 12 and 16;
- C Indecent assault on a woman or a girl;
- C Indecent act between woman and girl;
- C Indecency with boy under 12;
- C Indecency between man and boy;
- C Indecency with boy between the ages of 12 and 16;
- C Indecent assault on man or boy; and
- C Indecency between males.

3.10.4.2 The punishment for each crime is clearly stipulated under each section as well as whether any defence or proviso with regards to the offence exists.

3.10.4.3 In Australia the **Crimes Act** 1900 provides in section 92K that it is an offence for a person to commit an act of indecency upon a young person or in the presence of a young person. As with the sexual intercourse offences concerning children, acts of indecency offences involving children are viewed more seriously if the child is under 10 years of age.

3.10.4.4 Section 146 of the Hong Kong **Crimes Ordinance** states that any person who commits or incites an act of gross indecency with or towards a child (of either sex) under the age of 16 is guilty of an offence.

3.10.4.5 Section 103 of the **Criminal Code** of Ghana (Act 29) provides as follows:

- (1) Whoever indecently assaults any person shall be guilty of a misdemeanour and shall be liable on conviction to a term of imprisonment of not less than six months.
- (2) A person commits the offence of indecent assault if, without the consent of the other person he--
 - (a) forcibly makes any sexual bodily contact with that other person, or
 - (b) sexually violates the body of that other person in any manner not amounting to carnal knowledge or unnatural carnal knowledge.

3.10.5 Recommendations

3.10.5.1 *We believe the common law offence indecent assault is a flexible and dynamic concept adequately suited to the changing needs of society. It covers a wide variety of acts, is a competent verdict on a number of offences and is gender neutral, providing that the offence may be committed by persons of the same or different sex. Although the proposed definition of rape provides for the insertion of objects other than the penis, numerous non-penetrative acts may still constitute indecent assault. The Commission therefore recommends that the common law offence of indecent assault not be codified.*

3.11 THE CHILD CARE ACT, 1983

3.11.1 For the sake of completeness it is necessary to refer to particular sections of the **Child Care Act**, 1983 which have a bearing on the present investigation. Some of the new proposals introduced by the Child Care Amendment Act have been discussed in the context of commercial sexual exploitation above.⁵¹⁶

3.11.2 Section 14(4)(aB)(iii) of the **Child Care Act**, 1983 provides that the court shall determine whether a child who appears before the court is in need of care in that the child ‘... lives in circumstances likely to cause or conduce to his or her seduction, abduction or sexual exploitation’.

3.11.3 Section 50 of the **Child Care Act** reads as follows:

- (1) Any parent or guardian of a child or any person having the custody of a child who -
 - (a) ill-treats that child or allows it to be ill-treated
 - (b) abandons that child, or any other person who ill treats a child, shall be guilty of an offence.
- (2) Any person legally liable to maintain a child who, while able to do so, fails to provide that child with adequate food, clothing, lodging and medical aid, shall be guilty of an offence.

3.11.4 Clearly the effect of section 50 is that parents, guardians or persons having custody of a child can, in terms of this section, be convicted of the offences of:

516 See par 3.7 above.

- (a) ill-treating a child
- (b) allowing a child to be ill-treated, and
- (c) abandoning a child.

3.11.5 'Any person having custody' of a child includes schoolteachers, foster parents, care givers and day mothers. However 'any other person'⁵¹⁷ (someone who does fall into the category of a 'parent or guardian of a child or any person having the custody of a child') can be convicted only of the offence of ill-treating a child. Therefore if owners and operators of establishments where children are victims of commercial sexual exploitation can show that they did not in fact ill-treat the child, they would escape conviction under this section in its present form, even though they might have allowed the child to be ill-treated.⁵¹⁸

3.11.6 *This lacuna can easily be addressed by amending section 50(1)(b) of the Child Care Act, 1983, by inserting the words 'or allows it to be ill-treated' before the words 'shall be guilty of an offence'. We do not recommend, however, that this provision be incorporated in the new sexual offences act. This aspect falls within the mandate of the Project Committee on the Review of the Child Care Act. We also refrain from expressing any opinion on the viability or appropriateness of the sanction contained in this particular section of the Child Care Act and leave the matter there.*

3.12 THE DOMESTIC VIOLENCE ACT, 1998

3.12.1 The **Domestic Violence Act** 1998⁵¹⁹ partially repeals the **Prevention of Family Violence Act**, 1993. All that remained of the **Prevention of Family Violence Act** was sections 4 and 5. Section 4 places an obligation on various persons to report ill-treatment of children and section 5 provides that a husband may be convicted of raping his wife.

517 See section 50(1)(b) of the **Child Care Act**, 1983.

518 Sloth-Nielsen & Loubser **Sexual Exploitation of Children: challenges for law reform** (unpublished paper) 1999.

519 Although the **Domestic Violence Act**, 1998 was assented to on 20 November 1998, it has still to come into operation; See also Clark, Meintjes-Van der Walt 'The New Domestic Violence Bill: Rhetoric or reality?' 1998 (115) **SALJ** 760.

3.12.2 As we propose a new statutory definition of rape which provides for the fact that a husband may rape his wife,⁵²⁰ it is recommended that section 5 of the Prevention of Family Violence Act be repealed. The aspect of obligatory reporting of ill-treatment of children will be addressed in the discussion paper on process and procedural law.

3.13 THE SEXUAL OFFENCES ACT, 1957

3.13.1 Introduction

3.13.1.1 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'. The **Sexual Offences Act**, 23 of 1957, ("the Sexual Offences Act") has been part of our criminal law since 1957, but many of its provisions have their origins in colonial times.⁵²¹ This Act has undergone a number of amendments since it became law, the last being in 1993. It was previously known as the **Immorality Act**, 23 of 1957, but its name was changed by the **Immorality Amendment Act**, 2 of 1988.

3.13.1.2 The amendments made in 1988 were the result of a report by an *ad hoc* committee of the then President's Council on the effectiveness and comprehensiveness of the Immorality Act. These amendments were thus far the most substantive amendments to the **Sexual Offences Act** since its enactment. The most prominent effect of these changes was to remove gender-specific descriptions of offenders and victims from the **Sexual Offences Act**. However, as will be seen from this discussion, certain gender-specific offences still exist in this Act. The 1988 amendments also marked a change in the legislature's approach to prostitution by introducing a prohibition against any person having unlawful carnal intercourse with any other person for reward.⁵²²

520 See also Le Roux J 'Maritale verkragting: Van huweliksdaad na misdaad' 1996 **De Jure** 261.

521 J Milton 'The Sexual Offences Act' 1988 (1) **SACJ** 269.

522 Section 20(1)(aA) of the **Sexual Offences Act**.

3.13.1.3 The **Sexual Offences Act** deals with a wide range of issues concerning sexual activity.⁵²³ The main purpose of this Act was to enforce a certain view of what constitutes moral and immoral behaviour. It is safe to say that the views on morality of the society in which the **Sexual Offences Act** functions now do not correspond with those of the society into which the Act was initially introduced. If these views have changed to the extent that the society today no longer accepts the morality which underpinned the **Sexual Offences Act**, then the Act does no longer serve the purpose for which it was placed on the statute book. This calls into question the role of the **Sexual Offences Act** and its continued existence.⁵²⁴

3.13.2 Submissions received

3.13.2.1 **Professor Milton** is of the opinion that section 14 is presently flawed and ought to be replaced. He states that this section, it will be seen, in essence seeks to do two things:

- C prohibit sexual intercourse with a person under the age of 16 years;
- C prohibit any form of sexual activity ('an immoral or indecent act') with a person under the prescribed age. The wording makes it clear that the prohibition contemplates both heterosexual and homosexual acts (with a higher age of consent in the latter case).

3.13.2.2 He further states that these provisions must be understood in the context of the common law crimes of rape, sodomy and indecent assault.

3.13.2.3 At common law, sexual intercourse with a girl without her consent is a crime, i.e. rape, whatever the age of the female. It is also rape at common law to have intercourse with a girl under the age of 12 years with her 'consent'. Section 14(1)(a) supplements this provision of the common law by rendering consensual sexual intercourse with a girl between 12 and 16 years a criminal offence. (It is not rape because the girl is a consenting party. Obviously if she has not consented then the act is common law rape).

523 These range from prostitution and activities related thereto to certain extra-marital sexual activities, sexual offences with youths and mentally disabled persons and homosexual activity.

524 J Milton 'Unfair discrimination on the grounds of 'gender, sex, ... [or] sexual orientation'. How the Sexual Offences Act 1957 does it all' 1997 (10) **SACJ** 297 at 302.

3.13.2.4 Common law rape is only committed by a male upon a female: a female cannot rape a male. This being so there is no common law pertaining to the situation where a female has sexual intercourse with a male under the age of 12 years (although it might be arguable that the female has committed an indecent assault). Section 14(3)(a) purports to fill this gap by penalizing a female who has sexual intercourse with a male under the age of 16 years. In the physiological nature of things it will be so that in these cases the male is a voluntary participant and presumably consents to the act.

3.13.2.5 Section 14(1)(b) renders punishable other sexual acts than anal penetration between males, but in this regard, establishes an age of consent (which is higher than that established for heterosexual partners).

3.13.2.6 The common law does not (it seems) punish homosexual acts between females. Section 14(3)(b) supplements the common law by creating an offence which would penalize homosexual sexual activities between females (providing an age of consent limitation upon the offence).

3.13.2.7 At common law acts such as fellatio, cunnilingus, masturbation, insertion of objects into the vagina or anus, touching of genitals, buttocks and breasts can constitute indecent assault, if the acts are not consented to. As a general principle the consent of the parties engaged in such activity is likely to render it not unlawful. The consent of a girl under the age of 12 years is not a defence. There is no certainty as to whether there is an age of consent for males. Indecent assault can be committed by either males or females. Section 14(2)(b) and (3)(b) avoids some of the technicality of the common law by punishing the performance of the acts mentioned above with children under the age of consent.

3.13.2.8 Technically section 14 of the **Sexual Offences Act** 1957 can be characterized as a species of age of consent legislation. In other words, as indicated above, the consent of a person to participate in a sexual act deprives that act of any taint of unlawfulness. This means that at common law the consent of a girl or boy to have sexual intercourse or to engage in a 'immoral or indecent act' renders that sexual intercourse or act not unlawful. Societal concern at the capacity of children to be able to give an informed consent has led to the notion that society should regulate the age at which the consent of a child should render erotic activity not unlawful. The establishment of a so-called age of consent - a chronological age which is a bright line separating valid and invalid consent - has been the result. Section 14 not only

establishes the age of consent but also enforces the concept by punishing those who engage in sexual activity with a person who is under the age of consent.

3.13.2.9 Milton states that the present version of section 14 seems deficient for following reasons: First, it does not sufficiently identify the offender. The difficulty is that sexual child abuse is usually understood as involving an adult offender and a child victim. In other words, the offence postulates a certain age differential between offender and victim. The section, however, refers baldly to the offender as 'any male', 'any female' person. This means that the offender for the purposes of the section could be a person of the same age (or younger) than the victim.

3.13.2.10 Second it provides for different ages of consent for homosexual and heterosexual relationships. In this regard the question arises whether this involves a form of unconstitutional discrimination against gay persons. Clearly the law is discriminatory: in effect it says that persons engaging in heterosexual sexual relations may do so with a person over the age of 16 years with impunity but that persons who engage in homosexual sexual relations may not do so with a partner who is over the age of 16 years but under the age of 19 years.

3.13.2.11 Milton submits that what is required is a reformulation of section 14 in terms which will explicitly identify it as a provision for the punishment of sexual child abuse and that only. The notion of sexual child abuse should have two forms: (1) physical contact with the child which is physically or psychologically harmful to the child and (2) the misuse of a position or status of authority to induce, directly or indirectly, the child to participate in sexual activity.

3.13.2.12 The formulation of an offence which would incorporate these principles would involve:

- C identification of an age at which the child is not physiologically equipped to participate in sexual activity;
- C identification of an age at which the child is not psychologically equipped to participate in sexual activity;
- C identification of relationships between the child and the offender which may be abused to obtain sexual relations with the child;
- C identification of an age differential between the offender and the victim which would indicate that the sexual activity is exploitive rather than between peers;

c explicitly identify the sorts of sexual activities which are prohibited.

3.13.2.13 Milton suggests that implementation of these proposals might result in a version of section 14 of the **Sexual Offences Act** which would read as follows:

14. Sexual offences with youths

Any person who intentionally has or attempts to have sexual intercourse with a child shall be guilty of an offence if:

- (a) the child is less than [*] years old and the person is at least [*] years older than the other person; or
- (b) the child is less than [*] years old and the person is the guardian or otherwise responsible for general supervision of his welfare; or
- (c) the child is in custody of law or detained in a hospital or other institution and the other person has supervisory or disciplinary authority over such child.

Any person intentionally

- (a) commits or attempts to commit with a child under the age of [*] years a sexual act shall be guilty of an offence if
 - (i) the child is less than [*] years old and the person is at least [*] years older than the other person; or
 - (ii) the child is less than [*] years old and the person is the guardian or otherwise responsible for general supervision of his welfare; or
 - (iii) the child is in custody of law or detained in a hospital or other institution and the person has supervisory or disciplinary authority over such child.

For these purposes 'a sexual act' is

- (a) any physical act which penetrates or causes the penetration of the anus or vagina of a child by any means;
- (b) any physical act which penetrates or causes the penetration of the mouth of a child by the penis of such person;
- (c) any physical act which causes the genital organs of a child to contact or penetrate the mouth, anus or genital organs of another person, including such person; or
- (d) any physical act which causes the anus of a child to contact the mouth, anus, or genital organ of another person, including such person; or
- (e) any invitation, persuasion, inducement or otherwise or other word or act which causes a child to touch the anus, or genital organs of another person, including such person; or
- (f) exposing or displaying genital organs to the view of any child.

3.13.2.14 Issue Paper 10 posed the question as to what the age of consent should be. In response to this question the opinion was held that 18 is an appropriate age of consent. Sexual intercourse and any type of sexual intercourse is essentially an adult activity and an informed, mature decision must be made by an individual in respect thereof. If voting and obtaining a car licence require a minimum age of 18, participating in a sexual relationship should at least have

the same age limit, bearing in mind the enormous scope.⁵²⁵ **Ms W L Clark** is also of the opinion that 'carnal intercourse' should be limited to penetration of the vagina by the penis because firstly, this is to give them their commonly understood meaning, and secondly, they establish that there is a difference in this type of act and its implications for the child and other types of sexual conduct which are also punishable but are usually a little less harmful to the child.

3.13.2.15 In response to the question as to whether the scope of the offences created by section 14(1)(b) and 14(3)(b) of the **Sexual Offences Act**, 1957 should be broadened to include intentional exposure of a child to an immoral or indecent act, it was felt that as intentional exposure might fall short of those already catered for, such deed should be included.⁵²⁶

3.13.2.16 The opinion was also held that there is no 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). It was felt that the age of consent for all acts should be the same and be in the region of 18 years for both boys and girls.⁵²⁷

3.13.2.17 On the one hand it was stated that the defences created by section 14 should be retained.⁵²⁸ They are not seen to be excluding other defences and a bona fide belief regarding age has always been held to be a good defence. To the knowledge of the **Attorney General: Transvaal** it has never happened, although it is a possible scenario, for a boy of twelve to be prosecuted for having had intercourse with a girl nearly sixteen. Hard and fast rules are not always possible and allowance must therefore be made for prosecutorial discretion.

3.13.2.18 On the other hand, **Ms W L Clark** opines that the fact that the parties were married should not be retained as it is still possible that in some cultures a very young girl could be forced to marry. Such girls should be given as much protection as possible under the law. In the case of an older girl who is willing to marry, it is doubtful that many complaints would be laid anyway.

525 **Ms W L Clark**, Senior Public Prosecutor, Verulam Magistrate's Office.

526 **Attorney General: Transvaal; Ms W L Clark**.

527 **Attorney General: Transvaal; Ms W L Clark**.

528 **Attorney General: Transvaal**.

3.13.2.19 The fact that the accused was deceived as to the victim's age poses many problems. It can be used as an easy defence in certain cases. In others it may be quite an acceptable defence, especially if the 'victim' is mature in appearance and was a willing participant in the acts complained of. This is a case where there may well be allegations of unconstitutionality should the accused have to bear the onus of proving his belief was justified, as clearly the Constitution gives everybody the right to be presumed innocent.⁵²⁹

3.13.2.20 The fact that the 'victim' was a prostitute should not be a defence. The need to protect children from exploitation is overwhelming and child prostitution is an enormous social evil.⁵³⁰

3.13.2.21 The fact that the accused was under 21 should not be a defence. Statistics of child abuse cases show a significant percentage of acts are committed by youthful offenders who harm and exploit younger children, in some cases both brutally and ruthlessly. Youth may, however, be a very important mitigating factor when it comes to sentencing.⁵³¹

3.13.2.22 The fact that it was the first occasion on which the accused has been charged is also no defence. Anyone who wants to interfere with children sexually should know that it is wrong and if children are to be adequately protected this defence cannot possibly be retained.

3.13.2.23 In response to the question posed, as to whether there is any merit in the criticisms offered by Snyman on the formulation of the offences created by section 14(1) and the defences set out in section 14(2), **Ms Clark** states that Snyman's criticisms have merit but in theory only. She says that in practice it is highly doubtful that a boy of twelve or thirteen would be prosecuted for having consenting intercourse with a girl of almost sixteen. **Ms Clark** is also of the opinion that most magistrates take a robust, common-sense approach and would accept error as to the girl's age as being a defence.

529 **Ms W L Clark.**

530 **Ms W L Clark.**

531 **Ms W L Clark.**

3.13.2.24 **Ms Clark** says that very few women are charged with sexual offences against minors. However it does seem absurd that a young victim should be charged as an accused and therefore in practice such a person would inevitably be the main state witness and not a co-accused.

3.13.2.25 Where both females are under 19 and both were willing participants then it is doubtful that anyone would be charged. If one coerced the other or used force then clearly that one alone is guilty of an offence.⁵³²

3.13.3 Analysis of the Sexual Offences Act

3.13.3.1 There can be no question that there is a need to review the **Sexual Offences Act**. It is suggested that such a review should be undertaken with the objective to establish a statute which offers protection, through the medium of the criminal law, against sexual exploitation of persons who are at risk. Such a review should also take account of the review of certain common law offences such as rape for instance.⁵³³ The introduction of new statutory offences to replace certain common law offences will necessarily have some effect on the current provisions of the **Sexual Offences Act**. With this in mind the provisions of the **Sexual Offences Act** will now be considered.

3.13.3.2 Conspiracy to defile

3.13.3.2.1 Section 11 of the **Sexual Offences Act** prohibits any conspiracy to defile a female. This section reads as follows:

Conspiracy to defile

Any person who conspires with any other person to induce any female by any false pretence or other fraudulent means to allow any male to have unlawful carnal intercourse with her, shall be guilty of an offence.

532 **Ms W L Clark.**

533 See paragraphs 3.4 to 3.10 of this Chapter above.

3.13.3.2.2 For this offence to be committed there must be a conspiracy and the conspiracy must involve the inducement of a woman to allow a man to have unlawful, ie extra-marital, carnal intercourse with her.

3.13.3.2.3 The most obvious objection to this provision is that it is not completely gender-equal. Although the offender can be either male or female the offence is committed only if a woman is so induced and not when a man is the object of the offence ie. when the aim of the conspiracy is to induce a man to have unlawful carnal intercourse.

3.13.3.2.4 The phrase 'by any false pretence or other fraudulent means to allow' seems to relate to the nature of the woman's consent to the unlawful intercourse. In other words the fact that the woman's consent was obtained by false pretence or by fraudulent means is one of the elements of the offence. The aim of this seems to be to protect the woman against exploitation by persons making use of devious and fraudulent devices.

3.13.3.2.5 The question immediately arises as to what the relationship is between this offence and the common law offence of rape. Where a woman's consent to sexual intercourse is induced by fraud, that fraud may vitiate the consent thereby constituting rape.⁵³⁴ Where a third person has assisted in obtaining a woman's consent by false pretence such a person should be accountable as an accomplice to rape in circumstances where the fraud is taken to have destroyed the consent. Our law, however, recognises only a limited number of circumstances where fraud vitiates a woman's consent to sexual intercourse, in other words where rape is committed in spite of a woman's apparent consent to intercourse.⁵³⁵

3.13.3.2.6 Actual intercourse is not a requirement for the offence of section 11 to be committed, as long as it can be proven from the circumstances of a specific case that the objective of the conspiracy was to induce the woman to consent to intercourse. The protection which this provision of the **Sexual Offences Act** can afford women is therefore potentially wider than the common law offence of rape.

534 See Milton **South African Criminal Law and Procedure Volume II** (third edition) 456 on the species of fraud that is accepted to destroy consent in rape cases.

535 Ibid.

3.13.3.2.7 *It is suggested a provision of this nature should be retained but not in its present form. There may well be a need for a provision which protects persons from being misled into consenting to sexual intercourse in circumstances where they would not have consented thereto had it not been for the fraudulent means or false pretences of another. Such a provision should, however, afford equal protection for both sexes. It should furthermore not be dependent on whether a conspiracy to cause the inducement can be proven. In devising such a provision due regard should also be had to the potential overlap which it may have with the common law offence of rape.*

3.13.3.3 **Sexual offences with children**

3.13.3.3.1 Section 14 of the Sexual Offences Act criminalises certain actions involving persons below certain age limits and also provides certain defences to accused persons. This section reads as follows:

Sexual offences with youths

(1) 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 a 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.

(2) It shall be a sufficient defence to any charge under subsection (1) if it shall be made to appear to the court-

- (a) that the girl at the time of the commission of the offence was a prostitute, that the person so charged was at the said time under the age of 21 years and that it is the first occasion on which he is so charged; or
- (b) and (bA)
- (c) that the girl or person in whose charge she was, deceived the person so charged into believing that she was over the age of 16 years at the said time.

(3) Any female who-

- (a) has or attempts to have unlawful carnal intercourse with a boy under the age of sixteen years; or
- (b) commits or attempts to commit with such a boy or with a girl under the age of 19 years an immoral or indecent act; or

(c) solicits or entices such a boy or girl to the commission of an immoral or indecent act, shall be guilty of an offence.

(4) It shall be a sufficient defence to any charge under subsection (3) if it shall be made to appear to the court-

(a) that the boy at the time of the commission of the offence was a prostitute, that the person so charged was at the said time under the age of 21 years and that it is the first occasion on which she is so charged; or

(b) that the boy or person in whose charge he was, deceived the person so charged into believing that he was over the age of 16 years at the said time.

3.13.3.3.2 It is suggested that the reason for the existence of an offence concerning sexual behaviour with young persons should be to punish sexual abuse of children. The objective of such a provision should be to use the criminal law as a means to provide protection to young persons against sexual exploitation.

3.13.3.3.3 Elsewhere in this Chapter it is suggested that the common law definition of rape be replaced with a statutory definition.⁵³⁶ The suggested definition includes the ages of the parties as one of the 'coercive circumstances' which will render the act of sexual intercourse unlawful. If this suggestion is accepted the offences created in section 14 of the **Sexual Offences Act**, in so far as they involve sexual intercourse, will be taken up into the newly defined offence of rape.

3.13.3.3.4 The offences of section 14 of the **Sexual Offences Act** not only involves sexual intercourse but also the 'commission of any immoral or indecent act'. This may include much more than sexual intercourse.

3.13.3.3.5 The problem can be dealt with in one of two ways. The definition of rape can be extended to include all forms of indecent acts which may fall under the current section 14, or a separate offence for sexual behaviour with persons under a certain age may be retained. It is suggested that the latter option be pursued for the reasons that follow.

3.13.3.3.6 The offence of rape at common law as well as in the suggested statutory offence mentioned earlier only relates to sexual penetration. If this is to be extended to include a wide

536 See paragraph 3.4.7.8.1 above.

range of actions which fall outside the scope of sexual intercourse it may detract from the seriousness with which this offence should be approached.

3.13.3.3.7 The offence of rape, whether at common law or in a redefined statutory offence as the one suggested, revolves around the issue of consent, since it is the existence or absence of consent which draws the distinction between sexual intercourse which is lawful and sexual intercourse which is unlawful. The circumstances in which the sexual intercourse takes place provides an indication of the existence or absence of consent. In the recommendation concerning the definition of rape it is suggested that these circumstances should be referred to as 'coercive circumstances' and should be used to establish the unlawfulness of the sexual intercourse.⁵³⁷

3.13.3.3.8 *It is suggested that sexual relations with young persons should constitute a separate offence where the existence or absence of consent is not an element of the offence and therefore not an issue to be placed in dispute.*

3.13.3.3.9 By criminalising sexual behaviour with young persons in separately defined offences prominence can be given to the seriousness of such offences and the particular protection which should be afforded to young persons at risk of sexual exploitation.⁵³⁸ By incorporating such behaviour with a general sexual offence such as rape where a wide spectrum of victims can be identified (especially in the light of the recommendations in this paper) these issues may be lost.

3.13.3.3.10 *In order to accomplish a new statutory offence to replace the current section 14 of the Sexual Offences Act is suggested.*

Child molestation

7. (1) *Any person who intentionally commits a sexual act with a child, at least two years younger than him or her, shall be guilty of an offence.*

537 See paragraphs 3.6.3.1. to 3.6.3.14. above.

538 It also affords magistrates the opportunity to impose suitable sentences. See, for instance, **S v Abels en Wyngaardt** (Wynberg case SH G 239/97, unreported) for one such innovative approach.

(2) *Any person who commits any act with the intent to invite or persuade a child, at least two years younger than him or her, to allow any person to commit a sexual act with that child shall be guilty of an offence.*

(3) *Consent by a child to any sexual act shall not be a defence to a charge under this section.*

3.13.3.4 **Sexual offences against mentally impaired persons**

3.13.3.4.1 **Introduction**

3.13.3.4.1.1 The general offences of rape, indecent assault and incest apply to all persons including victims with impaired mental functioning. The question arises whether there is anything about their personal circumstances that requires further legislative enactments to ensure that they are adequately protected. What is of concern is their particular vulnerability due to the fact that they often do not understand what has happened to them, are unable to communicate their experiences and do not have access to persons outside their home or residential facility where the abuse takes place.

3.13.3.4.2 **Current law**

3.13.3.4.2.1 Section 15 of the ***Sexual Offences Act, 1957*** places an absolute prohibition on any sexual relations with persons who suffer from a certain degree of mental disability. The section reads as follows:

Sexual offences with idiots or imbeciles

Any person who-

(a) has or attempts to have unlawful carnal intercourse with any male or female idiot or imbecile in circumstances which do not amount to rape; or

(b) commits or attempts to commit with such a male or female any immoral or indecent act; or

(c) solicits or entices such a male or female to the commission of any immoral or indecent act,

shall, if it be proved that such person knew that such male or female was an idiot or imbecile, be guilty of an offence.

3.13.3.4.2.2 The penalty is imprisonment not exceeding 6 years with or without a fine of R12 000,00. It must be noted that the section is not applicable in circumstances which would amount to rape. In other words where the facts are clear that the mentally impaired victim did not consent to sexual intercourse the offence of section 15 is not committed and a conviction of rape should follow.

3.13.3.4.2.3 This gives rise to the question as to when a charge under this section will be apposite in cases where sexual intercourse has taken place with a mentally impaired person. This question should be considered against the background of the interpretation which our courts have given to the terminology used in this section. In **S v N**⁵³⁹ it was decided that the words 'idiot' and 'imbecile' must be given their usual meaning in the technical language. This means that these words refer to special classes of mentally deficient persons and not to mentally disabled persons generally. It appears from the judgment that an 'idiot' is generally accepted to be a person with an IQ below 25 and an 'imbecile' to be a person with an IQ between 25 and 50. However the court notes that there are various tests that can be applied to determine what a person's IQ is which means that there is no uniform method of determining whether a person is either an 'idiot' or an 'imbecile'.⁵⁴⁰

3.13.3.4.2.4 In **S v N** the court acknowledges that the layman would not have the ability nor the facilities to establish whether a person falls into the category of either an 'idiot' or an 'imbecile'.⁵⁴¹ However, the court comes to the conclusion that persons who can be categorised as 'idiots' or 'imbeciles' are so plainly deficient that even a layperson will realise that they do not have the ability to make decisions concerning their sex life.⁵⁴²

3.13.3.4.2.5 In reaching these conclusions the court acknowledges that section 15 of the **Sexual Offences Act** interferes with a mentally impaired person's ability to conduct his or her

539 1979 4 SA 632 (O).

540 **S v N** 1979 4 SA 632 (O) at 638; see also **R v K** 1951 4 SA 49 (O) where the same classification is used although the court acknowledges that these margins are ill defined.

541 **S v N** 1979 4 SA 632 (O) at 638.

542 At 639 of the judgment.

private life. The court finds justification for this interference in the fact that the majority of mentally impaired adults have normal sexual desires but lacks the mental control to express these desires with responsibility.⁵⁴³

3.13.3.4.2.6 In *R v K*⁵⁴⁴ the following remarks were made concerning a mentally impaired complainant:

The complainant in the present case, according to Dr. Barker, could have consented to sexual intercourse, and she was quite possibly aware that in so consenting she was agreeing to something which she regarded as a pleasurable experience. She could even invite a person to indulge with her in the act of intercourse. Moreover, such a person was 'notoriously suggestible', very easily bribed and prone to succumb to threats.

3.13.3.4.2.7 If the discussion above accurately reflects the justification for the offence in section 15(a) it seems that this offence is actually based on an absence of consent on the part of the mentally disabled person. The legislature apparently assumes that a person who is mentally impaired to the extent where he or she may be termed an 'idiot' or an 'imbecile' does not possess the mental faculties to form a considered consent to sexual intercourse to which any value can be attached in law. It is submitted that this scenario can be accommodated in a properly worded statutory definition of rape.⁵⁴⁵ We appreciate that outdated terms such as 'idiot' and 'imbecile' do connote a certain technical meaning and that its use may be offensive to people.

3.13.3.4.2.8 What remains to be considered are the offences of section 15 of the **Sexual Offences Act** concerning the commission of immoral or indecent acts with idiots or imbeciles and the solicitation or enticement of such persons to commit immoral or indecent acts.⁵⁴⁶ The phrase 'immoral or indecent act' is not defined in the **Sexual Offences Act**. It can be accepted that actions which would constitute an indecent assault will amount to immoral or indecent acts. An 'immoral or indecent act' may therefore be equated with actions that are objectively

543 Ibid.

544 1951 4 SA 49 (O).

545 See paragraph 3.4.6 above.

546 Section 15 (a) and (b) of the **Sexual Offences Act**.

indecent. However, in *R v H*⁵⁴⁷ it was decided that the circumstances of each case should determine whether an act was immoral or indecent. The court further makes the following *obiter* remarks:

[A]s a matter of ordinary language, it is, I think, indisputable that it would be 'immoral or indecent' within the meaning of secs. 14 and 15 of Act 23 of 1957 for a man deliberately - in the absence of some just cause such as, for example, medical necessity - to witness the stripping of a young girl or female idiot who is a stranger to him. A fortiori if the man in question actively participates in, or instigates, the removal of the clothing of the female concerned.⁵⁴⁸

3.13.3.4.2.9 This seems to indicate that the words of section 15 of the ***Sexual Offences Act*** may cover more than the actions which would amount to indecent assault.

3.13.3.4.2.10 The solicitation or incitement of a mentally impaired person to commit an immoral or indecent act will not amount to indecent assault since there is no action involved which can be described as an 'assault'.⁵⁴⁹ In certain cases this would amount to *crimen iniuria*. However, the State would have to prove in each case that the *dignitas* of the victim has been impaired. The *dignitas* can include self-respect, mental tranquillity, privacy and freedom from contemptuous treatment.⁵⁵⁰ Milton,⁵⁵¹ with reference to the case law, shows that our law accepts that the *dignitas* of mentally impaired persons can be impaired even though they may be incapable of understanding the nature of what occurs. The explanation seems to be that though the self-respect and mental tranquillity of the mentally impaired person may not have been disturbed, his or her rights to privacy and freedom from contemptuous treatment have been. Milton⁵⁵² submits that the mentally impaired person is incapable in law of consenting to the disturbance or (short of consent) of disregarding it. The mentally impaired person 'is incapable of not being aggrieved'.⁵⁵³

547 1959 4 SA 427 (A).

548 At 432 of the judgment.

549 An assault must at least include physical contact between two persons.

550 Milton **South African Criminal Law and Procedure Volume II** (third edition) 506.

551 Ibid 507.

552 Ibid.

553 Ibid.

3.13.3.4.2.11 It is suggested that persons who are mentally impaired should be afforded protection from sexual exploitation. This protection should place the ability of a mentally impaired person to make decisions concerning expression of his or her sexual desire on par with his or her ability to conduct the rest of his or her private life.⁵⁵⁴ In order to accomplish this a new statutory offence to replace the current section 15 of the **Sexual Offences Act** is suggested.

3.13.3.4.2.12 A question in this regard on which specific comment is invited is how the reference to a mentally impaired person should be defined in a statute. The terminology of section 15 of the **Sexual Offences Act** have specific technical meanings. However, the margins between the various categories into which mentally impaired persons may be classified are not clearly defined and even among experts there may be a difference of opinion on the classification of a person's level of mental impairment. This will hamper the State's case to prove that the victim falls below a specific level of mental impairment and to prove that the accused was aware of this fact, and not merely that the victim was suffering from some sort of mental deficiency.

3.13.3.4.3 Comparative analysis

3.13.3.4.3.1 Many jurisdictions have specific statutory provisions dealing with sexual acts committed by and against mentally impaired persons. For example, all the Australian states have, in addition to the general sexual offences, offences specifically aimed at protecting persons with mental impairment.⁵⁵⁵

3.13.3.4.3.2 In the Australian state of New South Wales there are two offences: One prohibits sexual intercourse where a person has authority in connection with a facility or programme providing services to persons who have intellectual disabilities. The other generally prohibits sexual intercourse between any person and a person with an intellectual disability if

554 Such as the entering into agreements or choosing a domicile.

555 Victoria **Crimes Act** ss50-52; New South Wales **Crimes Act** s 66F; ACT **Crimes Act** s 92P(1)(i); Southern Australia **Criminal Law and Consolidation Act** s 49(6); Western Australia **Criminal Code** s 330; Tasmania **Criminal Code** s 126; Northern Territories **Criminal Code** ss 130(1) and 130(3). See also Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General **Discussion Paper: Model Criminal Code: Chapter 5: Sexual Offences Against the Person** (November 1996)143-145.

perpetrated with the 'intention of taking advantage of the other person's vulnerability to sexual exploitation.

3.13.3.4.3.3 The Law Reform Commission of Victoria⁵⁵⁶ shows that the law must balance between two competing interests - protecting people with impaired mental functioning from sexual exploitation, and giving maximum recognition to their sexual rights. The difficulty for the legal system in striking a balance between these interests is compounded by the considerable diversity of people with mental impairment in terms of the extent of impairment, living circumstances, and sexual interest and knowledge.

3.13.3.4.3.4 The main issues are the scope of an offence and the available defences. The Queensland legislation places a blanket prohibition on unlawful sexual/indecent acts with a person with impaired mental functioning, but it is a defence where the accused did not know of this fact or the act was not sexual exploitation. In Western Australia, a blanket provision applies, but it is a defence where the accused is married to the complainant. The same applies in the Northern Territory, but includes a *de facto* spouse of a mentally ill or handicapped person.⁵⁵⁷

3.13.3.4.4 **Submissions received**

3.13.3.4.4.1 The Commission received submissions from a number of organisations on behalf of disabled persons. The ***Association for Persons with Disabilities (Northern Cape)***, the ***Disabled Children's Action Group (DICAG)***, and the ***Deaf Community of Cape Town*** took the Commission to task that Issue Paper 10 did not make provision for debate on the specific requirements of disabled persons. No submissions were received from organisations acting on behalf of mentally impaired persons. The majority of submissions received focussed on the difficulties experienced by a disabled person to report abuse either due to poverty, institutional problems, their particular vulnerability and the fact that court procedures are particularly hostile to a disabled witness.

556 **Report no.15: Sexual offences Against People with Impaired Mental Functioning** (1988) 24 - 29.

557 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General **Discussion Paper: Model Criminal Code: Chapter 5: Sexual Offences Against the Person** (November 1996)143-145.

3.13.3.4.4.2 **DICAG** has drawn the attention of the Commission to the fact that the majority of people with disabilities in South Africa have been excluded from the mainstream of society and have thus been prevented from accessing fundamental social, political, legal and economic rights.

3.13.3.4.4.3 The exclusion experienced by people with disabilities and their families is a result of a range of factors, for example:

- C the political and economic inequalities of the apartheid system;
- C social attitudes which have perpetuated stereotypes of disabled people as dependent and in need of care; and
- C a discriminatory and weak legislative framework which has sanctioned and reinforced exclusionary barriers.

3.13.3.4.4.4 According to **DICAG** the factors that put children with disabilities more at risk from abuse may be that they are:

- C Less able to defend themselves physically
- C Unable to differentiate between appropriate and inappropriate physical contact, whether it be violent or sexual
- C More dependent on others for assistance or care and, therefore, more trusting, since dependency and trust often translate into compliancy and passivity
- C Reluctance to report instances of abuse for fear of losing vital linkage to major care providers
- C Considered less credible than the non-disabled child, when and if they report abuse.

3.13.3.4.4.5 The **Association for Persons with Physical Disabilities (Northern Cape)** expresses the view that, in relation, to the substantive law, sections 14(1)(b) and 14 (3) (b) of the **Sexual Offences Act** should be broadened to include intentional exposure of a child to an immoral or indecent act.

3.13.3.4.4.6 The **Deaf Community of Cape Town** raises concerns over the deaf child's inability to communicate easily, the fact that they may not have gone to school and find it difficult to communicate. They point out that in most cases children who cannot communicate

effectively are abused because they will not be able to tell anyone and who will believe what they tell.

3.13.3.4.4.7 The Commission recognises the vulnerability of disabled and mentally impaired persons. As indicated above many of their concerns relate to improving procedural matters to make it easier to report sexual abuse particularly when they are in residential care and to give evidence to police officers and in court. The Commission will prepare a second paper dealing with sexual offences which will cover all the procedural issues on which legislation will be recommended and will include court procedures. Special consideration will be given to determine what procedures need to be put in place to assist disabled complainants. This focus will be carried through to the third and general paper containing the non-legislative recommendations to the various agencies involved in handling allegations of sexual assault.

3.13.3.4.4.8 The new definition of rape, recommended in this paper, read with the definition of coercive circumstances will provide for the situation where there is an imbalance in the power relations to the extent that one person is inhibited from communicating his or her resistance to an act of sexual intercourse, or his or her unwillingness to participate in such an act and that will be sufficient to constitute a charge of rape. This will protect persons who are reliant on a caregiver, are influenced by that fact and agree to sexual intercourse. Furthermore, disabled children will be protected, like all children, by provisions which will amend section 14 of the **Sexual Offences Act, 1957** and will provide comprehensive protection for any sexual act with a child under 16 years of age. This section read together with the new suggested definition of 'sexual act' covers the exposure of a child to an immoral or indecent act.⁵⁵⁸

3.13.3.4.5 Recommendation

3.13.3.4.5.1 *The Commission:*

C Proposes the enactment of a separate statutory offence covering exploitative relationships with mentally impaired persons and situations where the mental impairment of the complainant excludes free and informed consent to acts of sexual penetration. There are cogent policy reasons for regulating sexual activity within these particular relationships:

558 This should satisfy the concern raised by the **Association for Persons with Physical Disabilities (Northern Cape)**.

a person who is mentally impaired may not want a sexual relationship, but may find it difficult to refuse; other concerns include the psychological harm which may result from such a relationship as well as the breach of trust by a caregiver.⁵⁵⁹

C The view is held that the continued use the words 'idiot' and 'imbecile' are derogatory and it is proposed that the term 'mentally impaired' be used in place thereof. Another reason for using the term 'mentally impaired' instead of the terms 'idiot' and 'imbecile' is that as they are technical terms it is extremely difficult for the prosecution firstly to prove that the victim indeed falls into one of these categories and secondly that the accused knew that the victim resorted under one of these categories.

C That it is important for the law not to over regulate and to recognise that mentally impaired persons have sexual rights in terms of section 12(2) of the Constitution to make decisions concerning reproduction and to security and control over their bodies. A general blanket prohibition does not recognise the sexual rights of mentally impaired persons.

3.13.3.4.5.2 **Scope of the offence.**

- C It is suggested that the scope of the offence be the following:*
- (a) Firstly, for a person to consent he or she must have sufficient mental capacity to understand what they are consenting to.*
 - (b) Secondly, it must not be an exploitative sexual relationship.*
 - (c) Thirdly, the offender must know that the complainant was mentally impaired, and must intend to commit a sexual act with that person.*

559 Law Reform Commission of Victoria Report **Sexual Offences against People with impaired Mental Functioning**, at n 235 pp 24-29 June 1988 cited by the Model Criminal Code Officers Standing Committee Discussion Paper **Sexual Offences Against the Person** at p 145.

3.13.3.4.5.3 *The Commission recommends the enactment of the following clause to provide for the specific protection of mentally impaired persons.*

Sexual offences with mentally impaired persons

(1) *Any person who intentionally commits a sexual act with, or in the presence of, a mentally impaired person shall be guilty of an offence.*

(2) *Any person who commits any act with the intent to invite or persuade a mentally disabled person to allow any person to commit a sexual act with that mentally disabled person shall be guilty of an offence.*

Definition of 'mentally impaired person'

'Mentally impaired person' means a person affected by any mental disability irrespective of its cause, whether temporary or permanent, to the extent that he or she is unable to appreciate the nature of the sexual act, or is unable to resist the commission of such an act, or is unable to communicate his or her unwillingness to participate in such an act.

3.13.3.5 Use of drugs, etc, for purposes of defilement of females

3.13.3.5.1 Section 18 of the ***Sexual Offences Act*** prohibits any person from giving a woman any substance with intent to overpower her so as to have unlawful carnal intercourse with her. This section reads as follows:

Use of drugs, etc, for purposes of defilement of females

Any person who applies, administers to or causes to be taken by any female any drug, intoxicating liquor, matter or thing with intent to stupefy or overpower her so as thereby to enable him to have unlawful carnal intercourse with her, shall be guilty of an offence.

3.13.3.5.2 This provision is aimed at protecting a woman from being sexually exploited by administering drugs, alcohol etc. to exclude her rejection of the unlawful carnal intercourse. The phrase 'intent to stupify or overpower' indicates that the legislature intended to require an

intent to induce a high level of intoxication to the extent where it would be physically impossible for the woman to refuse intercourse.

3.13.3.5.3 The wording of the provision limits its application to cases where the person administering the substance to the victim is also the person intending to have intercourse with her.⁵⁶⁰ However, it is also an offence for any person to apply, administer to or cause to be taken by any female any drug, intoxicating liquor, matter or thing with intent to stupefy or overpower her so as thereby to enable any person other than the procurer to have sexual intercourse with that woman.⁵⁶¹ Both these statutory offences can only be committed in respect of females.⁵⁶²

3.13.3.5.4 The relationship between the offence created by section 18 of the **Sexual Offences Act** and the common law offence of rape must be considered. Proof of any action which would act to exclude a woman's ability to refuse sexual intercourse would obviously rebut a man's claim that the woman consented to the intercourse.⁵⁶³ Therefore there seems to be an overlap between section 18 of the **Sexual Offences Act** and the common law offence of rape.

3.13.3.5.5 Actual intercourse is not a requirement for the offence of section 18 to be committed. What must be proven from the circumstances of the case, is that the perpetrator had the intent to have intercourse with the victim. In many cases the facts from which the intent is to be inferred may be sufficient to prove attempted rape. However, the elements of the offence do not require that the perpetrator's actions should have progressed to the point where it would substantiate a charge of rape or attempted rape.

3.13.3.5.6 There are more possibilities of overlap between this offence of the **Sexual Offences Act** and other offences. The offence of administering poison or other noxious substance has been recognised as a substantive offence in our criminal law since before the

560 Milton, assisted by Fuller **South African Criminal Law and Procedure Volume III: Statutory Offences** Cape Town: Juta 1971 359.

561 Section 10(e) of the **Sexual Offences Act**, 1957.

562 Milton and Cowling **South African Criminal Law and Procedure Volume III: Statutory Offences** (second edition) Cape Town: Juta 1988 E3-133.

563 See **R v K** 1951 4 SA 49 (O) on the relation between intoxication on the ability to consent to sexual intercourse in rape cases.

turn of the century.⁵⁶⁴ The administering of a substance that will cause the victim bodily harm can also lead to a conviction of assault.⁵⁶⁵ In both these cases the intent must be for the administering of the substance itself to cause harm in the form of physical discomfort or pain or some other interference with the victim's bodily functions such as inducing unconsciousness for example. In certain instances where the administering of a substance is done in such a way that it invades a person's privacy or that it impairs his or her dignity it may lead to a conviction of *crimen iniuria*.

3.13.3.5.7 The facts that will have to be proven in all these cases may be similar to the facts that will support a charge under section 18 of the **Sexual Offences Act**. However, the intent with which the administering of the substance is coupled will be different.

3.13.3.5.8 *Section 18 of the Sexual Offences Act can offer protection against exploitation in circumstances where the actions of the perpetrator would not amount to rape or attempted rape, nor to one of the other offences discussed above. This indicates a need for a provision of this nature. It is suggested that such a provision should provide equal protection to both sexes. In devising such a provision due regard should also be had to the potential overlap which it may have with the common law offence of rape. We therefore propose the following:*

Administering substance for purposes of committing sexual act

5. *Any person who administers or applies to, or causes to be taken by another person any substance with the intent—*

- (a) to overpower that other person in order to commit a sexual act with that person, or*
- (b) to induce that other person to allow him or her to commit a sexual act with that person,*

is guilty of an offence.

564 See the discussion in Milton **South African Criminal Law and Procedure Volume II: Common Law Crimes** Cape Town: Juta 1996 478 to 483.

565 **S v Marx** 1962 1 SA 848 (N); Milton **South African Criminal Law and Procedure Volume II: Common Law Crimes** 421.

3.13.3.6 **Manufacture, sale or supply of article which is intended to be used to perform an unnatural sexual act**

3.13.3.6.1 Section 18A of the **Sexual Offences Act** prohibits the manufacture, sale or supply of any article which is intended for use in an ‘unnatural sexual act’.

3.13.3.6.2 Very little has been written about this provision by commentators on the criminal law. Likewise our case law contains very little information from which to infer what the law should regard as an ‘unnatural sexual act’.⁵⁶⁶ It also does not include bestiality and sodomy which are substantive offences at common law.⁵⁶⁷

3.13.3.6.3 This provision was placed onto the statute book by the Immorality Amendment Act, 57 of 1969. No similar offence existed before at common law or in any statute. Since it has come into being no reported case reflects a prosecution in terms thereof. As is pointed out by at least one commentator on this provision its purpose is ‘somewhat obscure’.

3.13.3.6.4 *It is suggested that a similar provision should not be incorporated in a revised statute on sexual offences.*

3.14 **CUSTOMARY LAW**

3.14.1 **Introduction**

3.14.1.1 In the Issue Paper⁵⁶⁸ the point was made that child abuse must be examined in its cultural context. Reference was made to the fact that the practices of scarification and male and female circumcision are accepted in many cultures, but would be considered abuse in many others. In contrast, the practices of forcing a child to undergo extensive, often painful

566 See **National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others** 1999 1 SA 6 (CC); **S v M** 1979 2 SA 406 (RA); **R v M** 1969 1 SA 328 (R); **Cunningham v Cunningham** 1952 1 SA 167 (C). None of these cases dealt with section 18A of the **Sexual Offences Act** or with a similar provision. In none of these cases was there an attempt to define what the law should regard as unnatural sexual acts.

567 See Milton **South African Criminal Law and Procedure Volume II: Common law crimes** (third edition) 227 to 229.

568 Issue Paper 10, par 4.14.1.

orthodontic treatment might be considered abusive by some cultures, but is again extensively practised and condoned in other cultures. The question was then posed as to whether harmful social or customary practices must be prohibited by law in our country.

3.14.1.2 The Issue Paper cited, as an example of such a prohibition, section 8 of the Uganda *Children Statute*, 1996. This section reads as follows:

It shall be unlawful to subject a child to social or customary practices that are harmful to the child's health.

3.14.2 Other comparative examples

3.14.2.1 The manner in which the UN Convention on the Rights of the Child and the African Charter deal with the question of harmful traditional or cultural practices are quite contrasting. The UN Convention deals with this subject within the context of health rights and provides that:⁵⁶⁹

States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

3.14.2.2 On the other hand, the African Charter on the Rights and Welfare of the Child, 1990, which has been described as the 'Africanised version' of the Convention, seeks to do more than that. It provides that:⁵⁷⁰

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:
 - a. those customs and practices prejudicial to the health and life of the child;
 - b. those customs and practices discriminating to the child on grounds of sex or other status.
2. Child marriage and 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.

569 Article 24(3).

570 Article 21.

3.14.2.3 A view of the full text of the African Charter on this subject is important for one to appreciate that the framers did see the question of traditional practices as an African (cultural) problem and hence the elaborate provision.

3.14.2.4 The Ghana National Commission on Children also prohibits harmful initiation practices in its proposals for a Children's Code.⁵⁷¹ Section 20 of the Proposals reads as follows:

A child shall not be subjected to initiation or other social and customary practices which are harmful to his welfare and not in his best interests.

3.14.2.5 The revised draft of the Kenyan Children Bill, 1998⁵⁷² also has a detailed provision on customary practices in section 13. This section reads as follows:

No person shall subject a child to cultural rites, customs or traditional practices that are likely to affect the child's life, health, social welfare, dignity or physical or psychological development.

3.14.2.6 From the few comparative examples mentioned above, it is clear that harmful cultural (and for that matter harmful religious practices) are prohibited by the child care statutes of the countries involved. It is not dealt with as a sexual offence *per se* in any of the legislative provisions of the countries investigated and for good reason: the exercise of cultural (and religious) practices does not in itself involve the commitment of a sexual offence

3.14.3 Submissions

3.14.3.1 Respondents were unanimous in their condemnation of harmful cultural practices and the vast majority proposed the adoption of legislation to outlaw social and cultural practices

571 **Reforming the Law for Children in Ghana**, p. 22.

572 The bill dated November 1998 was prepared by the Task Force on Laws Relating to Children for submission to the Attorney-General.

harmful to the child.⁵⁷³ Most of those respondents who commented on this issue expressed themselves in favour of the Ugandan example.

3.14.3.2 Some respondents⁵⁷⁴ weighed cultural rights against the rights of children and their best interests. Often the rights of children and their best interests were said to be more important than cultural rights.⁵⁷⁵ The **Tshwaranang Legal Advocacy Center** said that the values enshrined in the Constitution should be used as a benchmark for balancing cultural rights with the rights of the child and the right to bodily integrity.

3.14.3.3 **Ms W L Clark** acknowledges that the cultural context must be examined as well. She says some societies do claim, as their constitutional right, the right to follow certain cultural practices.⁵⁷⁶ She submits, however, that constitutional rights such as these should be a matter for a mature, informed choice and should not be imposed on children, especially if pain and suffering are to result. **Ms Clark** continues by saying that it is the right of an individual to follow the religion or culture of his or her choice, but that such a person cannot force his or her religious or cultural beliefs upon another. She then makes the following interesting statement:

Matters such as scarification, circumcision, earpiercing and orthodontic treatments should be left to the child to decide upon once he or she is an adult and can make an informed choice about these matters.

3.14.3.4 This might be the ideal, but is not wholly workable. It is conceivable that parents could be accused of neglect should they fail to provide adequate dental and or medical treatment for their children. In practical terms, it might simply be too late to wait until the child reaches adulthood before certain medical and dental treatment is administered.

573 **Dr d'Oliveira Attorney-General: Transvaal; the Association for Persons with Physical Disabilities, Northern Cape; the Department of Welfare and Population Development, Gauteng; Tshwaranang Legal Advocacy Centre; South African Police Service (Social Work Services), Head Office, Pretoria; the Department of Justice; South African Police Services Area Commissioner, Legal Services, East Rand.**

574 **South African Police Service (Social Work Services), Head Office, Pretoria; Ms Clark, senior public prosecutor, Verulam; South African National Council for Child and Family Welfare.**

575 In its submission the **South African Police Service (Social Work Services), Head Office, Pretoria** said that '[c]ustomary laws must be in line with the Child's Rights. The Child's Rights should be universal'.

576 See section 31 of the Constitution, 1996.

3.14.3.5 In their combined submission, the members of the **SAPS Child Protection Units in KwaZulu Natal** state that one of the problems around customary law is that there is nothing in writing, which makes uniform application of customary law very difficult. Every ethnic group lives according to its own particular customs. Custom is not static, but constantly changing. This makes the 'inclusion of "customary laws" a very difficult concept to manage as "customary law" will have to be reviewed on a regular basis to keep in trend with the "new customary laws".'

3.14.3.6 The **Johannesburg Child Welfare Society** recommends that we should strive to do away, through appropriate combination of legislation and or education, with customary practices which are harmful to children. It is, however, conceded by the Society that reaching an agreement as to exactly which practices fall into this category will not be an easy matter.

3.14.3.7 In its submission, the **South African National Council for Child and Family Welfare**⁵⁷⁷ states that it would be impossible to outlaw harmful social or customary practices in terms of the Constitution. Because the child's rights are paramount, should be protected, social and customary practices should be regulated by law to protect the children. Practices such as marriages of child brides should be treated as child abuse and people responsible should be prosecuted for such. The Council states that deaths from circumcision should not influence one, when for instance, the same practice is part of the Jewish faith. There should be legislation for practitioners.

3.14.3.8 The **Department of Local Government and Traditional Affairs (Northern Province)** dedicated its submission to the exposition of customary law in the Issue Paper. It is of the opinion that customary practices must be aligned with the Constitution and that Government must introduce legislation to ensure that harmony exists between customary law practices and the Bill of Rights. The Department states that the Northern Province has enacted legislation⁵⁷⁸ to provide for the control of the holding of circumcision schools and to regulate the running of such schools.

3.14.4 Problem analysis

577 With 35 respondents in favour of and 7 against South Africa following the Uganda example and outlawing social or customary practices harmful to children.

578 The **Northern Province Circumcision Schools Act** 6 of 1996.

3.14.4.1 Interestingly enough, it is not clear whether and if so which harmful cultural practices are being followed in South Africa. In the state of art review in ***A Situational Analysis of the Girl Child***⁵⁷⁹ it is mentioned that initiation and circumcision practices are still common in some rural communities. Little is known of the extent of girls involvement in the practice, although it has been reported⁵⁸⁰ that the MaPulana community in the Northern Province mutilate genitals of young girls as part of being initiated into womanhood. It is very difficult to obtain information on harmful traditional practices because it is a traditional taboo to discuss the issue openly or with someone who has not been through the ritual.

3.14.4.2 The ***South African National Council for Child and Family Welfare*** seems to limit harmful cultural practices to male circumcision in customary settings and says that female circumcision does not appear to be practised in South Africa. The ***South African Police Service Area Commissioner, Legal Services, East Rand*** cites, as an example of a harmful cultural practice, the surrendering of a child⁵⁸¹ in lieu of a civil debt. The ***Department of Justice*** states that female circumcision⁵⁸² needs urgent attention and says that its occurrence amongst the Mapulaneng, Nguni and Sotho tribes needs to be investigated and outlawed. In a similar vein, the Department also mentions child betrothal and suggests that the marriageable age be raised to 18 years. According to Swazi custom a woman is brought up to pretend to repel men's advances even though she actually is interested in a relationship with him. This practice leads men to assume that women consent to sexual intercourse with them even though they do not.⁵⁸³ Apparently there are also instances in Swazi custom where women are married against their will according to the 'kwendzeselwa' tradition.⁵⁸⁴

579 A **Research Report for NIPILAR** - South Africa, February 1998 by Linda Vilakazi-Tselane.

580 **True Love**, April 1997.

581 Usually a female child.

582 The **Department of Justice** also suggests that the traditional 'unhygienic circumstances under which male circumcision is conducted' need to be investigated '*and improved if possible*' (our emphasis). It would therefore appear as if the Department does not consider it necessary to outlaw male circumcision as a harmful cultural practice.

583 Armstrong A K 'A note on several aspects of rape in Swaziland' 1986 (19) **CILSA** 474.

584 Ibid at 475.

3.14.4.3 Our courts have held that consent to a highly dangerous cultural practice superstitiously designed to secure the exorcism of an evil spirit is not a defence.⁵⁸⁵ It is expected that the courts would adopt a similar approach in respect of harmful cultural practices affecting children.

3.14.4.4 The courts in Canada follow the same approach. In *Thomas v Norris*⁵⁸⁶ the plaintiff was abducted and put under house arrest for a number of days. During that period he was forced to participate in an initiation ceremony and spirit dancing, apparently a cultural practice in that community. The plaintiff sued on the ground that his individual right to physical integrity was infringed. The court was faced with a duty to strike a balance between two conflicting sets of rights, i.e, the plaintiff's individual rights and group right to pursue culture.

3.14.4.5 The court held that the group's right to pursue its culture is not absolute. Their act was in conflict with criminal law and impeded the building of a peaceful society. The court found that it is the protection of the rights of **all** that matters. (Our emphasis)

3.14.4.6 If it is accepted that there are harmful customary practices in South Africa, then conflict between the constitutional rights to practice one's own culture and religion and the constitutional rights of children and the principle of the 'best interest of the child' seems imminent. We submit that as much as the Constitution recognises cultural diversity, customary law will always have to be interpreted in line with all the other principles enshrined in the Constitution. Specific provisions in the Constitution make customary/cultural practices subject to the Constitution.

3.14.4.7 The concept of child is also culturally defined. In terms of the South African Constitution, the African Charter on the Rights of the Child and the United Nations Convention on the Rights of the Child, a child is a person under the age of eighteen years. According to the African tradition, the fact that a person has reached a certain age is irrelevant as the attainment of adulthood is determined by other factors.⁵⁸⁷

585 **S v Sikunyana and others** 1961 3 SA 549 (ECD). In casu the four appellants, described as herbalists or witch-doctors, were found guilty of assault with the intent to do grievous bodily harm after burning the complainant with live coals in order to drive out an evil spirit. Contra **R v Njicelana** 1925 EDL 204.

586 (1992) 2 CNLR 139 (BCSC).

587 Such as marriage, initiation, physical and mental maturity, etc.

3.14.4.8 Also according to the African culture, the rearing of a child is not solely the responsibility of the biological mother or father. It is the responsibility of the community at large. That is why a child cannot be exclusively 'my child' but only 'our child'.⁵⁸⁸

3.14.5 Evaluation

3.14.5.1 From the submissions received it is clear that it is necessary to outlaw harmful cultural practices. It is also clear from the review of the comparative law that the place for such a prohibition is not in legislation dealing with sexual offences, but rather within the scope of comprehensive child care legislation. From the comparative review it is also clear that the prohibition against harmful cultural or religious practices has a very specific child protection focus. It is not, and cannot be, addressed to adults who can consent to cultural or religious practices as they are fully entitled to in terms of their constitutional rights to practice an own culture, religion, etc.

3.14.5.2 Cultural and religious practices, even harmful ones, do not necessarily constitute a sexual offence, even though it may involve sexual organs. In any event, harmful cultural (and religious) practices such as exorcism of spirits, circumcision and female genital mutilation do constitute serious offences⁵⁸⁹ at present. Consent therefore seems to be key.

3.14.6 Recommendation

3.14.6.1 It is recommended that harmful cultural and religious practices be prohibited in the new comprehensive children's statute.⁵⁹⁰ It is therefore not necessary to address this issue in the present investigation and we leave the matter there.

588 Mbiti J S **African Religions and Philosophy** 110.

589 A person can be convicted of assault, assault with the intent to do grievous bodily harm, or even attempted murder.

590 As part of Project 110: Review of the Child Care Act.

CHAPTER 4

4. ISSUES CONCERNING THE SUBSTANTIVE LAW NOT COVERED IN THE ISSUE PAPER

4.1 INTRODUCTION

4.1.1 In the course of the investigation several issues concerning the or relating to the substantive law were identified.⁵⁹¹ These issues were not raised in the Issue Paper and we now take the opportunity to do so. The basic questions in each instance are whether we should provide for statutory intervention in the form of a statutory offence and, if so, whether the proper place for such a prohibition is within the ambit of a new sexual offences act.

4.1.2 The following aspects will be addressed:

- C Persistent sexual abuse of a child
- C Female genital mutilation
- C Harmful HIV related behaviour and compulsory testing of persons arrested for having committed sexual offences
- C Stalking
- C Sexual harassment
- C Compelled sexual acts

4.2 PERSISTENT SEXUAL ABUSE OF A CHILD

4.2.1 Introduction

4.2.1.1 One of the most serious problems facing law enforcement officers, prosecution services and organisations attempting to assist children who have been sexually abused over a period of time is the requirement, in our law, that every charge must be specified with

591 **Ms Rita Blumrick** of the Office of the Attorney-General, Pietermaritzburg is one of the respondents who identified instances not presently covered by the common law. She accordingly recommends that a new sexual offences act should make provision for stalking, loitering in or near school grounds, kidnapping of your own biological child, possessing or producing child pornography, showing pornography to a child, invitation to sexual touching, committing bestiality in the presence of a child, etc.

sufficient particularity. This is to enable an accused to know what he or she is charged with.⁵⁹² It is said no to be sufficient merely to name the offence; all the elements of the offence should be spelled out as well.⁵⁹³ The difficulties encountered by the prosecution when the offences involve the persistent sexual abuse of children are: the young age of the complainant, competency to give evidence, highly technical rules of evidence that may exclude relevant evidence being led, the abuse may occur over a long period of time, no clear distinction can be easily made between the separate attacks and frequently no complaint or report was made for some time. Some of these problems can be attributed to the fact that the majority of sexual offences against children are perpetrated by persons known to and trusted by the victim.⁵⁹⁴

4.2.1.2 To overcome this problem, the South African prosecuting authority typically relies on section 94 of the **Criminal Procedure Act** 51 of 1977. This section provides that:

Where it is alleged that an accused on diverse occasions during any period committed an offence in respect of any particular person, the accused may be charged in one charge with the commission of that offence on diverse occasions during a stated period.

However, if the defence requests further particulars, as it is entitled to do, and the prosecution is unable to provide those particulars, the court may dismiss the case against the accused.

4.2.1.3 As a result, this often translates into a child having to give details as to date, time, surrounding circumstances, sequence of events, etc. Children do not remember in this way and the younger the child the more unrealistic the expectation that they can behave in what is essentially an adult manner. All these factors are compounded by the trauma a sexually abused child suffers as a result of the abuse.

4.2.2 Comparative survey

592 See section 84(1) of the **Criminal Procedure Act** 51 of 1977.

593 N Steytler **Constitutional Criminal Procedure** Durban: Butterworths 1998 227.

594 Model Criminal Code Officers Committee Discussion Paper: **Sexual Offences Against the Person** at 115.

4.2.2.1 This was eloquently articulated by the Full Court of the Supreme Court of Western Australia in *Podirsky v The Queen*.⁵⁹⁵ 'This means...that there is a possibility that the more acts of intercourse or other acts of sexual abuse and the greater the length of time over which they occur, the more difficult it may be to establish that any one of a series of multiple offences has been committed. Some reform would seem desirable to cover cases where there is evidence of such a course of conduct'.

4.2.2.2 Statutory provisions were introduced in response to the decision of the New South Wales High Court in *S v The Queen*.⁵⁹⁶ In this case the offender was charged with three counts of sexual assault. Each count alleged one act of carnal knowledge on an unknown date, but within a specified twelve month period. The complainant gave evidence of a number of acts of incest by the accused over a three year period, but could not identify when any one act occurred.

4.2.2.3 The High Court overturned the convictions finding that there was a lack of particulars and the trial court had not required the prosecution to specify which of the numerous acts of intercourse were relied on as the offences charged. Briefly, the court was of the opinion that the accused was reduced to pleading a general denial, and could not raise more effective defences such as an alibi.

4.2.2.4 Most of the Australian jurisdictions have introduced offences of 'persistent sexual abuse of a child'.⁵⁹⁷ These provisions generally permit the prosecution to present an indictment which charges the accused with the offence of having a 'sexual relationship' with a child over a period of time. There must be a number of separate occasions (usually three) on which particular sexual acts occurred. What is important is that it is not necessary to specify the times, dates or circumstances of the acts.⁵⁹⁸ In order to deal with the difficulties that have resulted from *S v The Queen* the prosecution has generally relied upon the first and/or last

595 (1990) 3 WAR 128 at 136.

596 (1989) 89 ALR 321.

597 Victoria **Crimes Act** s47A; Southern Australia **Criminal Law and Consolidation Act** s 74; ACT **Crimes Act** s92EA; Western Australia **Criminal Code** s321A; Northern Territories **Criminal Code** s131A; Queensland **Criminal Code** s229B; Tasmania **Criminal Code** s125A.

598 **Model Criminal Code** Officers Committee Discussion Paper: **Sexual Offences Against the Person** at 113.

instance of an offence and to charge those within specified date ranges. At sentence, further evidence of persistent sexual abuse is admitted to negative that it was an isolated incident.⁵⁹⁹

4.2.2.5 The constitutionality of such a formulation involves weighing up the accused's right to be informed of when and in what circumstances he or she is alleged to have committed the offences with the rights of a child to, *inter alia*, be protected from 'maltreatment, abuse or degradation'. 'The situation carries with it a potential for injustice for the accused. It also carries with it an injustice to the complainant and generally because one effect of the decision in **S v The Queen**⁶⁰⁰ is that notwithstanding clear and cogent evidence of a course of conduct involving repeated acts of sexual intercourse in the relevant period ... the Crown found it impossible to identify any particular act with sufficient precision to enable an offence to be charged'.⁶⁰¹

4.2.2.6 Where there is 'clear and cogent' evidence of repeated sexual abuse of a child it is not appropriate that the accused should be able to hide behind the argument that he or she did not sexually abuse the complainant on that *particular* occasion. It is a pattern of sexually abusive conduct that the justice system needs to be able to protect a child from and to take steps when a person offends in this way. The justice system needs to take in account the reality of an abused child's experience and that the prosecution is faced with an almost impossible task of securing convictions in cases of multiple sexual abuse of children.

4.2.3 Recommendation

4.2.3.1 The Commission is mindful of the possible difficulties that may face an accused of an offence that is not specific in relation to when the offence is alleged to have taken place. Furthermore, it is recognised that the accused person has constitutionally protected rights that

599 Model Criminal Code Officers Committee Discussion Paper **Sexual Offences Against the Person** 117.

600 (1989) 89 ALR 321.

601 (1990) 3 WAR 128 at 136 cited in **Model Criminal Code** Officers Committee Discussion Paper: **Sexual Offences Against the Person** at 115.

guarantee procedural fairness.⁶⁰² On a balance it is of greater importance to protect children from persistent sexual abuse and **it is recommended that an offence be created that deals with the 'persistent sexual abuse of a child'.**

4.2.3.2 In some Australian jurisdictions this crime is described as 'maintaining a sexual relationship with a child'. It is a concern to the Commission that the word 'relationship' may be experienced by the child complainant as implying that they have consented or agreed to a relationship, albeit of a sexual nature, with the accused. Accordingly, the phrase 'persistent sexual abuse of a child' will be used in the suggested draft section below.

4.2.3.3 The Commission also considered limiting the 'persistent sexual abuse' of a child to a specific time period (say 12 months). Obviously the fact that the sexual abuse occurs more than twice within a defined period makes it persistent, but it is not to say that it is persistent if it occurs twice over a ten year period. **We therefore propose to limit the persistent sexual abuse to a twelfth month period.**

4.2.3.4 *We propose to create the following statutory offence.*⁶⁰³

Persistent Sexual Abuse of A Child

- 8.** (1) *Any person who persistently sexually abuses a child is guilty of an offence.*
2. *For the purposes of this section, a person shall be taken to have persistently sexually abused a child if that person has engaged in a sexual act with the child on two or more occasions during a specified 12 month period.*

4.2.3.5 Aspects related to the evidential and procedural issues on persistent sexual abuse will be addressed in the discussion paper on process and procedure.

4.3 FEMALE GENITAL MUTILATION

4.3.1 Introduction

602 These rights can be limited. See section 35 of the Constitution, 1996 and **S v Makwanyane** 1995 3 SA 391 (CC).

603 This section is largely based on s 131A of the Northern Territory **Criminal Code Act** and s 92EA of the ACT **Crimes Act 1900**.

4.3.1.1 The issue of female genital mutilation was not raised in the Issue Paper and no comments were invited on this topic. The Commission nevertheless feels obliged to at least raise this issue now in order to inform us on the best way to proceed.

4.3.2 Background

4.3.2.1 The World Health Organisation estimates that 130 million women and girls - the bulk of them in 28 African countries - have been subjected to female genital mutilation. 'More than two million, ranging in age from infants a few days old to mature women, are genitally mutilated every year. Egypt, Kenya, Nigeria, Somalia and the Sudan account for 75 per cent of all cases. In Djibouti and Somalia, 98 per cent of girls are mutilated'.⁶⁰⁴

4.3.2.2 Female genital mutilation is a particular brutal form of female circumcision. It is '... a collective name given to several different traditional practices that involve the cutting of female genitals'.⁶⁰⁵

4.3.2.3 In order to reveal its cruel and inhuman nature, it is necessary to discuss the three types of female genital mutilation. These are:

- C clitoridectomy,⁶⁰⁶
- C excision,⁶⁰⁷ and
- C infibulation.⁶⁰⁸

604 As per the UNICEF Executive Director Carol Bellamy on 14 January 1999.

605 Nahid Toubia **Female Genital Mutilation : A Call for Global Action** 9.

606 Clitoridectomy is whereby 'a part or whole of the clitoris is amputated and the bleeding is stopped with pressure or a stich'.

607 Excision is when "(b)oth the clitoris and the inner lips are amputated".

608 Infibulation is when "... the clitoris is removed, some or all of the labia minora are cut off and incisions are made in the labia majora to create raw surfaces".

4.3.2.4 Female genital mutilation has devastating effects and there are many hazards involved. Some of these are:⁶⁰⁹

- C severe haemorrhage,
- C infections,
- C dermoid cyst and vulvar abscesses,
- C post-puberty complications, which may include difficulties with menstruation,
- C penile intromission may be impossible due to small size of the vagina, and
- C psychological disturbances as a result of psychological trauma.

4.3.2.5 Some of the accounts by mothers are heart-breaking:⁶¹⁰

The memory of their screams calling for mercy, gasping for breath, pleading that those parts of their bodies that it pleases God to give them be spared. I remember the fearful look in their eyes when I led them to the toilet, 'I want to, but I can't. Why mum? Why did you let them do this to me?' Those words continue to haunt me. My blood runs cold whenever the memory come back. Its now four years after the operation and my children still suffer from its effects. How long must I live with the pain that society imposed on me and my children.

4.3.2.6 Current beliefs of the role and function of female genital mutilation are highly diverse, and include the prevention of prostitution, promotion of easier childbirth, and the prevention of the growth of male-like genital organs. In some areas it is believed that an infant will die if the head touches the clitoris, hence the need for excision. In others it is seen as essential to ensure female purity. In almost every group in which it is practised it is a necessary prerequisite in order for the woman to be truly female. The psychological importance of this should not be underestimated.⁶¹¹

609 Ballal A I **Psychological Effects of Female Circumcision** New York: Vantage press 1992 4 - 6. See also Anne J Davis 'Female genital mutilation: Some ethical questions' 1998 (17) **Medicine and the Law** 143.

610 Singhateh S K **Female Circumcision : Strategies to Bring About Change, The Somalia Women's Democratic Organisation**

611 Webb E and Hartley B 'Female genital mutilation: a dilemma in child protection' 1994 (70) **Archives of Disease in Childhood** 441.

4.3.2.7 The problem is that in the context of the cultures in which it is traditionally practised it is perceived as a responsible act by parents ensuring their daughters a place in society. Any suggestion that the practice is harmful or abusive is seen as highly offensive.⁶¹²

4.3.3 Comparative law

4.3.3.1 The problem of female genital mutilation is being addressed at a universal level, and that is why there has been a call for global action.⁶¹³ It is not simply an African problem.

4.3.3.2 Senegal is the last in a long list of African countries to outlaw female genital mutilation.⁶¹⁴ Formal legislation forbidding infibulation exists in the Sudan. A law first enacted in 1946 allows for a term of imprisonment up to five years and or a fine. However, it is not an offence under article 284 of the *Sudan Penal Code* of 1974 'merely to remove the free and projecting part of the clitoris'.⁶¹⁵

4.3.3.3 The *Ghanian Criminal Code* reads as follows:

(w)hoever excises, infibulates or otherwise mutilates the whole or any part of the labia minora, labia majora and the clitoris of another person ... shall be guilty of a second degree felony and liable on conviction to imprisonment of not less than three years.

The Ghanian Constitution also protects women from harmful customary practices.

4.3.3.4 Article 35 of the *Ethiopian Constitution* of 1994 reads as follows:

612 See also Labuschagne & De Villiers A 'Circumcision and female genital mutilation: A human rights and anthropo-legal evaluation' 1998 (13) *SAPL* 277.

613 Angry words have been written asserting that a 'conspiracy of silence' has surrounded this subject until very recently. For actions on the international front, see, for instance, the proceedings of the seminar on **Traditional Practices Affecting the Health of Women and Children**, organised by the WHO Regional Office for the Eastern Mediterranean in Khartoum, Egypt, February 1979; the proceedings of the African Symposium on the **World of Work and the protection of the Child** organised by the International Institute for Labour Studies in Yaounde, December 1979; the proceedings of the Second Regional Conference (Lusaka, 3 - 7 December 1979) on **The Integration of Women in Development**; the proceedings of a seminar on **Traditional Practices affecting the Health of Women and Children** held in Dakar, Senegal from 6 - 10 February 1984; Resolution 47.10 of the WHO adopted in 1994, etc.

614 Interestingly enough, female genital mutilation has been outlawed in some of the counties, such as Djibouti, where the highest incidences occur. Other African countries to outlaw female genital mutilation are Burkina Faso, the Central African Republic, Ghana, Guinea-Conakry and Togo. See also Kimi Mamtora and Zephaniah Musendo 'Tanzania: Abolish genital mutilation' at <http://womensnet.org.za/news/tanzmut.htm>

615 See also McLean S and Graham S E (eds) **Female Circumcision, Excision and Infibulation: The Facts and Proposals for Change** (undated publication) 6.

(w)omen have the right to protection by the state from harmful customs. Laws, customs and practices that oppress women or cause bodily or mental harm to them are prohibited.

4.3.3.5 The ***Kenyan Penal Code*** provides for both criminal and or civil sanctions should a person conduct female circumcision. In Zimbabwe, it may also give rise to a criminal action, and be prosecuted as assault with intent to do grievous bodily harm.⁶¹⁶

4.3.3.6 In Britain, the ***Prohibition of Female Circumcision Act*** 1985 makes it a criminal offence to:

- (a) to excise, infibulate or otherwise mutilate the whole or any part of the labia majora or labia minora or clitoris of another person; or
- (b) to aid, abet, counsel or procure the performance by another person of any of those acts on that other person's own body.

4.3.3.7 Any person found guilty can face up to a maximum of five years' imprisonment. No prosecutions have been brought in the United Kingdom, although a medical practitioner was struck off the roll for performing multiple female circumcisions, knowing the operation to be against the law.

4.3.3.8 The Northern Territory of Australia ***Criminal Code Act***⁶¹⁷ prohibits female genital mutilation. Section 186B of the Act provides as follows:

186B. Female Genital Mutilation

- (1) A person who performs female genital mutilation on another person is guilty of a crime and is liable to imprisonment for 14 years.
- (2) An offence is committed [in terms of] this section even if one or more of the acts constituting the offence occurred outside the Territory if the person mutilated by or because of the acts is ordinarily resident in the Territory.

616 Women in Law and Development in Africa, Reproductive Health Rights in Zimbabwe 1 (1996) (unpublished paper on file at the Centre for Reproductive Law and Policy) at 8.

617 As in force at 18 June 1999.

- (3) It is not an offence [in terms of] this section to perform a surgical operation if the operation -
- (a) has a genuine therapeutic purpose and is performed by a medical practitioner or authorised professional; or
 - (b) is a gender reassignment procedure and is performed by a medical practitioner.
- (4) A surgical operation does not have a genuine therapeutic purpose by virtue of the fact that it is performed as, or as part of, a cultural, religious or other social custom.

4.3.3.9 'Female genital mutilation' is defined in the Act as the 'excision, infibulation or any other mutilation of the whole or any part of the labia majora or labia minora or clitoris'.⁶¹⁸

4.3.3.10 The Northern Territory of Australia ***Criminal Code Act*** further provides that it is crime for any person to take, or arrange to take, a child from the Territory with the intention of having female genital mutilation performed on the child.⁶¹⁹ It is also not a defence to a charge in terms of this Act that the person mutilated by or because of the acts alleged to have been committed consented to the acts, or consented to being taken away from the Territory, or that a parent or guardian of the child so consented.⁶²⁰

4.3.4 Evaluation

4.3.4.1 We have seen that the Northern Province has enacted legislation to regulate male and female circumcision.⁶²¹ The ***Northern Province Circumcision Schools Act*** 6 of 1996 provides for the control of the holding of circumcision schools in the Northern Province. In terms of this Act, circumcision schools⁶²² may not be held without a valid permit.⁶²³ The Premier may also impose such conditions as he or she may deem desirable in connection with

618 Section 186A of the Northern Territory ***Criminal Code Act***.

619 Section 186C of the Northern Territory ***Criminal Code Act***.

620 Section 186D of the Northern Territory ***Criminal Code Act***.

621 See paragraph 3.14 above.

622 Includes circumcision schools for either male or female initiates: section 1.

623 Section 3.

the conduct of the circumcision school and the treatment of the initiates.⁶²⁴ The South African Police Service is also given the power to rescue, 'in an orderly manner', persons abducted or being abducted or forcefully taken to a circumcision school.⁶²⁵

4.3.4.2 The introduction of this Act would suggest that male and female circumcisions are taking place in the Northern Province,⁶²⁶ therefor the need to regulate the practice. We could not, however, determine the extent and scope of the practice in the Northern Province.⁶²⁷ Nor could we determine whether female circumcision is being practised by other traditional communities in other parts of South Africa.⁶²⁸

4.3.5 Conclusion and recommendation

4.3.5.1 Whether legislation is effective or not, and whether it is to be recommended or simply drives the practice underground, thereby inflicting worse pain and risk, are amongst the issues still being discussed by experts and lay people alike. The Project Committee likewise failed to reach agreement on the role of the law. Some members of the Project Committee see female genital mutilation as a sexual offence which deserve special recognition in a new sexual offences act as it is seen as the most severe form of female suppression. Others are not convinced that this investigation is the proper place to deal with the issue and argue that although female (or male) circumcision involves a sexual organ, it still is not a sexual act. However, the Project Committee and the Commission stand united in its condemnation of the practice of female genital mutilation.

4.3.5.2 *We are therefor not in a position at this stage to recommend the introduction of legislation to prohibit female genital mutilation. We request our readers to assist us in answering the following questions:*

624 Section 4.

625 Section 5.

626 Incidents of male circumcision are more widespread and one often reads about initiates dying after attending circumcision schools. See, for instance, '7 circumcision boys die' **Pretoria News**, 22 July 1999, p. 4 about male circumcisions gone wrong in the Eastern Cape.

627 Save to deny its existence, the issues of harmful cultural practices and female genital mutilation were hardly ever raised at any of the workshops.

628 Despite personal enquiries by members of the Project Committee.

Is female genital mutilation or female circumcision practised in South Africa? If so, how should it be regulated - in a new sexual offences act or in a specific law? How should male circumcision be dealt with? Should male circumcision be dealt with differently to female circumcision?

4.4 HARMFUL HIV RELATED BEHAVIOUR AND COMPULSORY HIV TESTING OF PERSONS ARRESTED FOR HAVING COMMITTED SEXUAL OFFENCES

4.4.1 Introduction

4.4.1.1 There has been mounting public concern and pressure on the authorities to take appropriate action with regard to the deliberate transmission of HIV infection. This has come about largely in response to a number of widely publicised incidents of deliberate transmission of HIV, accompanied by the very real concern that it is in most part women and young girls who are being exposed to HIV infection in this manner.

4.4.1.2 The Project Committee on Sexual Offences did not specifically address issues related to harmful HIV / AIDS related behaviour or the compulsory HIV testing of persons arrested for having committed sexual offences in the Issue Paper. This difficult task was left to a specialist Project Committee of the Law Commission on HIV/AIDS.⁶²⁹ The Project Committee on HIV/AIDS has adopted an incremental approach and has prepared two discussion papers on the topics in question. In the section that follows, we will trace the background of these two discussion papers and highlight some of the recommendations and preliminary conclusions reached by the Project Committee on HIV/AIDS. We obviously do not plan to reinvent the wheel and thank the Project Committee on HIV/AIDS for sharing their valuable work.

4.4.2 Background

629 The Chairperson of the Project Committee on HIV/AIDS is the Honourable Mr Justice Edwin Cameron. The other members of the Committee are Mr Z Achmat, Dr P J Haasbroek, Ms M Makhalemele, Dr M J Matjila, Dr N Simela, Professors R T Nhlapo and C W van Wyk, Ms L Seftel and Ms A E Strode.

4.4.2.1 At the beginning of 1998, the Justice Portfolio Committee requested the Department of Justice to investigate the creation of a statutory offence aimed at harmful HIV-related behaviour and the compulsory testing of sexual offenders for HIV/AIDS. Since these issues fall within the ambit of work of the Project Committee on HIV/AIDS, this Committee was tasked with the investigation. Under the direction of this Project Committee, two Discussion Papers have been prepared.

4.4.2.2 Discussion Paper 80 deals with the issue of harmful behaviour by persons with HIV/AIDS, the administrative and criminal law measures available to address such behaviour and possible statutory intervention. The closing date for comment on this particular discussion paper was 31 March 1999. Extensive comments were received and a draft report is currently being prepared by the HIV/AIDS Committee for submission to the Minister of Justice. Although the closing date for comment on this discussion paper has passed, the paper is still available for public information and interested readers are invited to obtain copies from the Commission.

4.4.2.3 Discussion Paper 84 deals with the question of compulsory HIV testing of persons arrested on a charge, or on suspicion of having committed a sexual offence and the right of alleged victims of such offences to be informed of the test results. This paper will be distributed for comment and interested parties will be invited to obtain copies and to make submissions. The closing date for comment is 30 September 1999.

4.4.2.4 For the benefit of our readers, brief information on the options for reform as canvassed in each of the above discussion papers is given below. We would like to emphasise, however, that both papers deal with complex issues and that it is dangerous to evaluate the options for reform in isolation or without due regard to the motivation underlying each option. The options posed should be evaluated against the background of various other complementary issues and should preferably be done with the complete papers at hand.

4.4.3 The Need for A Statutory Offence Aimed At Harmful HIV-related Behaviour (Discussion Paper 80)

4.4.3.1 Discussion Paper 80, after having examined the possible role of the criminal law in the prevention of the spread of HIV, on a preliminary basis confirms the Commission's 1995 premise that the criminal law is not pre-eminently the means by which to combat the spread of HIV. It stated that the AIDS epidemic is first and foremost a public health issue and that it is

internationally accepted that non-coercive measures are the most successful means through which public health authorities can reduce the spread of the disease.⁶³⁰ However, it is accepted in Discussion Paper 80, and the Paper bears evidence to the effect, that there are individuals who through their irresponsible and unacceptable behaviour deliberately place others at risk of HIV infection. Against this background the Paper examines three possible measures to deal with harmful HIV-related behaviour:

- C Existing public health measures;
- C existing common law criminal measures; and
- C the creation of a statutory offence to deal with such behaviour.

4.4.3.2 The paper finds existing public health measures in themselves insufficient as a means to deal with harmful HIV-related behaviour.⁶³¹ These measures (including isolation and quarantine) are currently provided for in terms of both the 1987 Regulations and the draft 1993 Regulations Relating to Communicable Diseases and the Notification of Notifiable Medical Conditions. The Project Committee on HIV/AIDS argues that such measures will have a limited impact upon achieving the objectives of public health - that is, curbing the spread of the epidemic - since deliberate transmission is arguably not the major factor causing the spread of HIV.⁶³² It is further argued that the costs, infringement of individual rights, and the creation of a climate of fear and denial which would be the result of the use of coercive public health measures would not be justified by the limited advantages to such an approach.

4.4.3.3 The paper points out that the common law crimes of murder, culpable homicide, rape and assault can be used to deal with harmful HIV-related behaviour.⁶³³ If effective, this would obviate the need for further statutory intervention. Since there has to date been no prosecution under the common law of harmful HIV related behaviour in South Africa, it is

630 Discussion Paper 80: The Need for a Statutory Offence Aimed at Harmful HIV-Related Behaviour, par 7.1.

631 Discussion Paper 80, par 7.2; 4. 9 - 4.15.

632 Discussion Paper 80, par 7.2; 4. 9 - 4.15.

633 Discussion Paper 80, par 7.4.

concluded that there is no legal clarity on the appropriateness of these common law crimes to deal with such behaviour.⁶³⁴

4.4.3.4 The Project Committee on HIV/AIDS specifically points out that HIV-related offences are not easily prosecuted under the existing common law crimes.⁶³⁵ It may be difficult, for instance, to prove elements such as fault (*whether the accused acted negligently, or with the intention of transmitting HIV*) and causation (*whether the act of the accused caused, or was likely to cause, the transmission of HIV infection to the other person*) in order for the State to secure a conviction for murder or attempted murder where a person transmits or exposes another to HIV/AIDS.

4.4.3.5 Finally, the possibility of creating an HIV-specific statute is examined. Although the Project Committee on HIV/AIDS makes it clear that it is not yet in a position to recommend that statutory intervention is indeed necessary,⁶³⁶ it nevertheless presents four broad options, based on legislative intervention in other legal systems, for consideration. The four options presented are:

- C Criminalising the intentional infection of another with HIV.
- C Criminalising the intentional exposure of another to any sexually transmitted disease (including HIV infection).
- C Prohibiting sexual intercourse by a person with HIV with any other person, unless certain conditions exist (such as consent by the other person who knows of the accused's HIV status).
- C Requiring a person with HIV to take all reasonable measures to prevent transmission of the disease.

634 A man who is alleged to have had sexual intercourse with two women, knowing that he had HIV and failing to inform them about it, has in September 1998 been charged with attempted murder in the Newcastle Magistrate's Court. The case has since been transferred to the High Court but has not been finalised at the stage of compilation of this Paper.

635 Discussion Paper 80, para 5.21 - 5.23.

636 Discussion Paper 80, par 7.6.

4.4.3.6 Another option not canvassed in Discussion Paper 80 is to follow the very recent example of Namibia.⁶³⁷ According to a draft bill⁶³⁸ recently introduced by the Namibian Minister of Justice into Parliament, it will constitute rape where a person knowing that he or she is infected by HIV does not, before engaging in a sexual act, disclose to the other party that he or she is infected with HIV.⁶³⁹ The theory appears to be that the other party would never have consented to a sexual encounter if he or she had known about the HIV.

4.4.4 **Compulsory HIV Testing of Persons Arrested for Having Committed Sexual Offences (Discussion Paper 84)**

4.4.4.1 Victims of rape and other acts of sexual assault frequently demand to know the HIV status of alleged or convicted sexual offenders.

4.4.4.2 This Discussion Paper examines the suitability of currently available public health and criminal procedural measures which may provide for compulsory testing of **arrested** persons and disclosure of the test results to victims of crime. The paper concludes that neither of these measures are suitable. In its analysis the Project Committee on HIV/AIDS do not address the possibility of compulsory HIV testing of persons **convicted** of a sexual offence. As the Project Committee points out, in most cases the 'utility of testing would have disappeared by the time of a conviction. Unless the victim herself underwent testing shortly after the attack, seropositivity in the accused at conviction stage would tell nothing concerning transmission of HIV. And if the victim had become infected because of the accused, her own seropositivity is likely to show up on tests by the time of conviction'.⁶⁴⁰

637 Discussion Paper 80 does, however, draw attention to a recent decision of the Canadian Supreme Court which held that consent to sexual intercourse which carries the risk of serious bodily harm (in casu the risk of becoming infected with HIV) was vitiated by fraud because of the non-disclosure of the HIV status of the accused who had unprotected sexual intercourse with two women. The Project Committee on HIV/AIDS noted that if such an approach is applied to South African law, it would imply that a person with HIV who fails to inform his or her sex partner of his or her infection may be guilty of rape: Discussion Paper 80, para 5.24 - 5.24.2.2 and 5.29.1.

638 The Combating of Rape Bill.

639 See clause 2(2)(i) of the draft bill. The bill also makes the knowing spread of HIV an aggravating factor in the sentencing of rapist.

640 Discussion Paper 84: Compulsory HIV Testing of the Accused in Sexual Offence Cases, par. 8.5.

4.4.4.3 The Project Committee on HIV/AIDS argues that compulsory medical examinations (which would include HIV testing) currently provided for in the 1987 Regulations and the draft 1993 Regulations Relating to Communicable Diseases and the Notification of Notifiable Medical Conditions conceivably provide for HIV testing but not for disclosure of the test results to third parties other than the health authorities.

4.4.4.4 The Project Committee on HIV/AIDS also shows that section 37 of the Criminal Procedure Act, 1977 provides for taking blood samples of an arrested person to ascertain bodily features (which could arguably include HIV status). This is, however, allowed for evidentiary purposes only. Moreover, there is no provision which allows for the disclosure outside of criminal proceedings of the information gained.

4.4.4.5 The paper consequently debates the need for legislative intervention against the background of the current legal position regarding consent for medical treatment (i.e. HIV testing) and confidentiality of medical information. The debate concentrates on the following conclusive issues:

- C The high prevalence of HIV coupled with the high prevalence of rape and other sexual offences.
- C The utility and limitations of HIV testing.
- C Women's international and constitutional rights.
- C The arrested person's constitutional rights.

4.4.4.6 The preliminary conclusion arrived at by the Project Committee on HIV/AIDS is that there is a need for statutory intervention. The Project Committee on HIV/AIDS comes to this preliminary point of view in the light of especially women (and children's) undoubted vulnerability to widespread sexual violence in South Africa today amidst the increasing prevalence of a nationwide epidemic of HIV and in the absence of adequate institutional or other victim support measures. In these circumstances there is a compelling argument for curtailing an arrested suspect's rights of privacy and bodily integrity to a limited extent to enable his/her accuser to know whether he/she has HIV or any other life threatening sexually transmissible disease. The benefit to the victim of the knowledge are not only immediately practical in that it enables her/him to make life decisions and choices for herself/himself and the people around her/him; it is also profoundly beneficial to her/his psychological state to have even a limited degree of certainty regarding her/his exposure to a life threatening disease. That

the arrested person's rights are infringed, is accepted and must be reflected in safeguards built into the process created.

4.4.4.7 The Commission consequently recommends the adoption of specific amendments to section 37 of the Criminal Procedure Act 55 of 1977 in order to provide for the compulsory HIV testing of an arrested person in sexual offence cases with a view to disclose information on the HIV status of the arrested person to victims of sexual offences. A draft Bill, reflecting these sentiments, is attached to the Discussion Paper on Compulsory HIV Testing of Persons Arrested for having committed Sexual Offences for public comment.

4.4.5 **The provision of HIV post-exposure prophylactic treatment to victims of sexual violence**

4.4.5.1 The Commission recognises the strong public demand for the provision of HIV post-exposure prophylactic treatment, at State expense, to victims of sexual violence. This particular issue relates to the treatment of victims of sexual violence and their rights and will be dealt with in the subsequent discussion paper on process and procedural issues to be published later this year. We are mindful, however, of the urgency of this particular issue for victims and their families and merely take the opportunity to flag the issue at this stage.

4.4.6 **Recommendation**

4.4.6.1 *In the light of the research already undertaken by the Project Committee on HIV/AIDS and the specialised nature of their work, it is only fair to afford that Project Committee the opportunity to fulfil its mandate. The Project Committee on Sexual Offences therefore decided to hold over any decision considering the criminalising of harmful HIV related behaviour and the HIV testing of persons arrested for having committed sexual offences. This Committee will monitor closely the outcome of the two discussion papers concerned. For the record, however, we would like to state that we are particularly concerned with:*

C The failure to disclose HIV status to sexual partners.

C Harmful exposure to HIV/AIDS through non-consensual sexual acts.

C The testing of sexual offenders and alleged offenders for HIV/AIDS and disclosure of that status to victims of sexual violence.

<i>C</i>	<i>The provision of post-exposure prophylaxis to victims of sexual violence.</i>
<i>C</i>	<i>The sentencing of persons found guilty in cases where, as a result of a crime, the victim is infected with HIV.</i>

Comments are invited.

4.5 STALKING

4.5.1 Introduction

4.5.1.1 Stalking refers to any type of harassing and intimidating conduct that causes a person to fear for his or her safety. The methods employed by stalkers to harass a victim can involve a series of actions which are in themselves unlawful, such as making obscene telephone calls, using threatening language and committing acts of violence. On the other hand, stalkers frequently exhibit behaviour which is perfectly legal and socially acceptable in isolation. This apparently harmless conduct, such as following someone or sending gifts, can be intimidating if done persistently and against the will of another person. Taken together, and in the context of the relationship between the stalker and the victim, seemingly innocuous behaviour becomes wrongful and dangerous.⁶⁴¹ Typically, stalking commences with conduct that appears more annoying and irritating than dangerous. Then, the frequency and magnitude of the conduct escalates, which causes increasing fear, emotional distress and disruption to the victim's life. Ultimately, stalking may intensify to physical violence and homicide.

4.5.1.2 There is no monolithic concept of stalking and a single prototype of a stalker does not exist. Stalkers range from cold-blooded killers to lovesick teens and may exhibit a variety of psychological syndromes such as erotomania, schizophrenia, paranoia, manic depression, and obsessive-compulsive disorder.⁶⁴² A stalker may be trying to re-establish a prior relationship, be trying to establish a new relationship with someone whom he or she thinks is already in love with him or her or would be in love with him or her if the victim would give him or her a chance or is a serial murderer or rapist who has compiled certain criteria for an 'ideal victim' and is seeking him or her out.

641 Manitoba Law Reform Commission **Report on stalking** 1997.

642 Ligg R A 'Stopping Stalkers: A Critical Examination of Anti-Stalking Statutes' 1993 (67) **St. John's Law Review** 347 at 351, n. 25 as quoted in **Report on stalking**.

4.5.2 Comparative law

4.5.2.1 A series of stalking homicides galvanized public opinion in Australia in the early 1990s when it was recognized that the criminal law had no offence which targeted stalking behaviour. Most Australian jurisdictions have now introduced legislation creating the criminal offence of stalking. This legislation only addresses stalking and is commonly known as 'anti-stalking' legislation. In New South Wales stalking is defined as the following of a person about, watching, frequenting of the vicinity of, or an approach to, a person's place of residence, business or work or any place that a person frequents for the purpose of any social or leisure activity.⁶⁴³ Stalking in the Northern Territory includes the following of; loitering outside where the other person is; interfering with property of the other person; keeping the other person under surveillance or acting in any way that could reasonably be expected to arouse the other person's apprehension or fear.⁶⁴⁴ The South Australian provision is similar to that of the Northern Territory, but it also includes giving or leaving offensive material.⁶⁴⁵ In Queensland stalking includes following, loitering near, watching or approaching another person or their place of work, residence or where they visit, telephoning, interfering with property, giving or leaving offensive material, harassing, intimidating, or threatening another person.⁶⁴⁶

4.5.2.2 The United States of America initially promoted legislation of this nature following a spate of celebrities being stalked by crazed fans. Currently 49 states and the District of Columbia have enacted stalking laws, and several have amended their statutes.⁶⁴⁷ Canada and the United Kingdom have enacted similar legislation aimed at combatting stalking and harassment.

4.5.3 The South African position

643 Riordan J A (Editor in Chief) **The Laws of Australia (Title 17 Family Law)** Sydney: the Law Book Company 1995.

644 **The Laws of Australia** paragraph [46].

645 **The Laws of Australia** paragraph [46].

646 **The Laws of Australia** paragraph [72].

647 Clark & Meintjes-Van der Walt 'Stalking: Do we need a Statute?' 1998 (115) **SALJ** 729 at 733.

4.5.3.1 Although stalking is often associated with domestic violence, it is a problem which is much broader than the domestic sphere.⁶⁴⁸ In South Africa the **Domestic Violence Act**, 1998⁶⁴⁹ provides that a person may acquire a protection order in order to prevent further incidences of domestic violence against a person with whom the complainant has been in a domestic relationship.⁶⁵⁰ The term 'domestic violence' is widely defined and includes stalking and harassment.

4.5.3.2 Stalking is defined in the **Domestic Violence Act** as 'repeatedly following, pursuing, or accosting the complainant',⁶⁵¹ whereas harassment is defined as 'engaging in a pattern of conduct that induces the fear of harm to a complainant including -

- (a) repeatedly watching, or loitering outside of or near the building or place where the complainant resides, works, carries on business, studies or happens to be;
- (b) repeatedly making telephone calls or inducing another person to make telephone calls to the complainant, whether or not conversation ensues;
- (c) repeatedly sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant'.⁶⁵²

648 Research paper on domestic violence: South African Law Commission April 1999.

649 The **Domestic Violence Act**, 116 of 1998 was assented to on the 20 November 1998 and has been promulgated, but has not yet been put into operation.

650 'Domestic relationship' means a relationship between a complainant and a respondent in any of the following ways:

- 1.1 they are or were married to each other, including marriage according to any law, custom or religion;
- 1.2 they (whether they are of the same or of the opposite sex) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other;
- 1.3 they are the parents of a child or are persons who have or had parental responsibility for that child (whether or not at the same time);
- 1.4 they are family members related by consanguinity, affinity or adoption;
- 1.5 they are or were in an engagement, dating or customary relationship, including an actual or perceived romantic, intimate or sexual relationship of any duration; or
- 1.6 they share or recently shared the same residence"

651 Section 1(xxiii) of the **Domestic Violence Act**.

652 Section 1(xii) of the **Domestic Violence Act**.

4.5.3.3 Although the **Domestic Violence Act** follows a progressive and innovative approach, peace officers may only arrest a person at the scene of an incident of domestic violence, without a warrant, if he or she reasonably suspects the person of having committed an offence containing an element of violence against a complainant.⁶⁵³ Stalking and harassment usually precede violence, and for this reason a stalker or harasser would not be liable for arrest for stalking or harassment where there is no violence. The victim bears the burden of proof when seeking a protection order and, if granted, the stalkers' or harassers' action will constitute an offence only once the protection order has been contravened.⁶⁵⁴ Of concern is the fact that as is mentioned above, a protection order can only be acquired if the stalker or harasser and the complainant are in a domestic relationship. Persons falling outside of this definition, for example strangers or work colleagues, do not have recourse to the protection offered under the **Domestic Violence Act**.

4.5.3.4 Traditional criminal remedies are also inadequate, since stalkers typically engage in behaviour which is threatening to the victim but which may not constitute a crime. Prosecuting a stalker for trespassing will also not necessarily provide a remedy unless the stalker enters private property.⁶⁵⁵ In South Africa, little can be done to deter or punish a stalker until he or she actually causes direct harm to an individual or an individual's property.⁶⁵⁶

4.5.4 Recommendation

4.5.4.1 *No legal intervention will prevent all forms of stalking, but it is essential that the legal system does provide the greatest protection and remedies possible. It is the opinion of the Commission that including stalking and, or harassment in legislation specifically aimed at criminalising specific sexual conduct will not afford all victims of stalking or harassment the necessary protection which they deserve. In so doing, those instances where the motive of the stalker or harasser is not sexual, it will leave victims vulnerable. The motive of a person is often impossible to establish until real harm has already been done. There is a clear need for specific legislation criminalising stalking or harassment. Although the Domestic Violence Act will give*

653 Section 3 of the **Domestic Violence Act** follows on the amendment of section 40(1) of the **Criminal Procedure Act**, 1977, by the addition of paragraph (q).

654 The offence being contravention of the protection order and not stalking or harassment per se.

655 Discussion Paper 70 Project 100 Domestic Violence (1997).

656 Clark & Meintjes-Van der Walt 1998 (115) **SALJ** 731.

recourse to those who fall within the definition of a domestic relationship, once the Act is put into operation, obtaining a protection order may not give victims the protection they need. It is proposed that a separate investigation be conducted to ascertain the need to enact comprehensive legislation prohibiting stalking.

4.6 SEXUAL HARASSMENT

4.6.1 Introduction

4.6.1.1 Sexual harassment constitutes different things to different people. Definitions vary from verbal harassment by way of sexist, crude or suggestive remarks, to casual touching or open advances, to the extremes of coercion or blackmail where a harasser has the power to threaten a person's job or refuse a customer a sale if he or she doesn't 'play along', or attempted or actual rape. It is difficult to pinpoint the problem clearly: sometimes the more 'innocent' forms of harassment, a stare making a person feel uncomfortable, the too-personal comment, or 'friendly' touching may mean the harasser is testing his or her reaction and will move further if not firmly repelled.⁶⁵⁷ In all cases it is the consequences, and not the intentions that count. The severity of the harassment is to a large extent determined by the impact it has on the victim.

4.6.2 The South African position

4.6.2.1 As sexual harassment is an assertion of power by those with authority over those without it, it is by its very nature endemic to the workplace.⁶⁵⁸ Employer/employee relations are regulated by labour legislation and more specifically the **Labour Relations Act**, 1995. Section 203 of the **Labour Relations Act** provides that the National Economic Development and Labour Council may develop and issue Codes of Good Practice, which must be taken into consideration whilst interpreting or applying the **Labour Relations Act**. The National Economic Development and Labour Council have issued a Code of Good Practice on the handling of

657 Prekel & Wilkinson 'Harassment : Prevention is better than redress' undated paper delivered at UNISA.

658 Joubert D J 'Seksuele teistering in diensverband: Die teorie' 1996 **De Jure** 50; 1996 **De Jure** 197.

sexual harassment cases within the workplace.⁶⁵⁹ The Code casts its net widely over those who may be considered to be victims or perpetrators of sexual harassment.⁶⁶⁰

4.6.2.2 The Code of Good Practice defines sexual harassment as

(1) ... unwanted conduct of a sexual nature. The unwanted nature of sexual harassment distinguishes it from behaviour that is welcome and mutual.

(2) Sexual attention becomes harassment if

the behaviour is persisted in, although a single incident of harassment can constitute sexual harassment; and/or
the recipient has made it clear that the behaviour is considered offensive; and/or
the perpetrator should have known that the behaviour is regarded as unacceptable.⁶⁶¹

4.6.2.3 The following forms of sexual harassment are listed in the Code:

- C Sexual harassment may include unwelcome physical, verbal or non-verbal conduct, but is not limited to the following examples:
- C Physical conduct of a sexual nature includes all unwanted physical contact, ranging from touching to sexual assault and rape, and includes a strip search by or in the presence of the opposite sex.
- C Verbal forms of sexual harassment include unwelcome innuendos, suggestions and hints, sexual advances, comments with sexual overtones, sex-related jokes or insults or unwelcome graphic comments about a person's body made in their presence or to them, unwelcome and inappropriate enquiries about a person's sex life, and unwelcome whistling at a person or group of persons.
- C Non-verbal forms of sexual harassment include unwelcome gestures, indecent exposure, and the unwelcome display of sexually explicit pictures and objects.
- C Quid pro quo harassment occurs where an owner, employer, supervisor, member of management or employee undertakes or attempts to influence or influences the process

659 Government Gazette, 17 July 1998, no 19049.

660 Owners, employers, managers, supervisors, employees, job applicants, clients, suppliers, contractors and others having dealings with the business.

661 Section 3.

of employment, promotion, training, discipline, dismissal, salary increments or other benefits of an employee or job applicant in exchange for sexual favours.⁶⁶²

4.6.2.4 The Code of Good Practice regulating Dismissal contained in Schedule 8 to the **Labour Relations Act** provides that an employee may be dismissed for serious misconduct or repeated offences. Serious incidents of sexual harassment or continued harassment after warnings are dismissible offences. Where the conduct which constitutes sexual harassment is also a criminal offence or sufficiently serious the victim has the right to press separate criminal and, or civil charges against the harasser.⁶⁶³

4.6.2.5 Where internal procedures within the workplace have not satisfactorily resolved the matter, either party may within 30 days of the dispute having arisen refer the matter to the Commission on Conciliation, Mediation and Arbitration and if the dispute remains unresolved it may be referred to the Labour Court within 30 days of the receipt of the certificate issued by the commissioner in terms of section 135(5) of the **Labour Relations Act**.

4.6.2.6 The Industrial Court⁶⁶⁴ has ruled that employers can be held responsible for sexual harassment, even if they were not personally involved. They can be held vicariously liable for the acts of employees. Action can be taken against employers who knew - or ought to have known - of the harassment and who did nothing to prevent it. In cases where channels of complaint were inadequate, the employers can also be held liable - even if they had no knowledge of the act of sexual harassment taking place.⁶⁶⁵

4.6.3 Recommendation

4.6.3.1 As a Code of Good Practice on the handling of sexual harassment cases has been issued in terms of the **Labour Relations Act**, all employers and employees bound by the aforementioned Act are bound by the Code of Good Practice. It is the opinion of the Commission that adequate legal remedies therefore do exist by which sexual harassment can

662 Section 4 of the Code.

663 Pressing civil charges is usually very expensive and may not prove to be effective as it is difficult to quantify the damages suffered where cases are not clear cut, for example losing a promotion.

664 Predecessor to the Labour Court.

665 Levy 'The potency of power: Sexual Harassment in the workplace' **Cosmopolitan** July 1994 at 12.

be addressed within the workplace. The victims of sexual harassment may take recourse to either the civil or criminal courts as the term sexual harassment includes criminal as well as non-criminal activities. Due to the very nature of the power relationship within the working environment, which underlies sexual harassment, one would be hardpressed to find circumstances outside of the workplace where the prosecution of a stranger on a street corner, for sexual harassment *per se* would be warranted.

4.6.3.2 The actions included in the definition of sexual harassment may constitute criminal charges, for example, indecent assault, assault, *crimen iniuria* or even rape. Individuals outside of the workplace could be prosecuted for any one of these crimes.

4.6.3.3 <i>For the reasons noted above, the Commission is of the opinion that there are insufficient grounds to warrant creating a sexual offence of sexual harassment.</i>

4.7 COMPELLED SEXUAL ACTS

4.7.1 Current Law

4.7.1.1 It is an offence to aid, abet or further the commission of any offence. This general principle applies to sexual offences. Although section 9(1)(b) of the **Sexual Offences Act** 1957 makes it an offence for any parent or guardian of a child or ward under the age of 18 years to order, permit, or in any way assist in bringing about, or to receive any consideration for, the defilement, seduction, or prostitution of such child and while section 10 of the same Act makes it an offence for any person to procure or attempt to procure any female to have unlawful sexual intercourse with any person other than the procurer, no specific provisions exist to cover the situation where a person forces another person to engage in sexual acts with that person, a third person, or to commit sexual acts upon his or her own person. There are also no specific provisions to cover compelled sexual acts with an animal.

4.7.1.2 In assessing whether there is a need to enact a statutory offence aimed at curbing sexual acts committed under compulsion, it is necessary to consider what criminal

sanctions already exist. When X compels Y to commit a sexual offence against Z, X could be charged as an accomplice. However, the role of an accomplice appears to be of a secondary nature and does not take into account the reality that a person may compel another person to commit a sexual offence. The person who does the deed is then a mere instrument and lacks the necessary *mens rea* (intention) to commit a crime.

4.7.1.3 Similarly, a person who compels another to self-masturbate or to commit an indecent assault cannot be convicted of indecent assault on the basis of 'common purpose' as the compelled person lacks the intention to commit the offence. There is therefore no common purpose. The essence of common purpose liability is based on association with the commission of the crime by the other participants. Further, there could not be a charge of conspiracy as the agreement between the parties constitutes the unlawful element of conspiracy⁶⁶⁶ and there is no agreement as one of the parties is being compelled.

4.7.2 Evaluation and Recommendation

4.7.2.1 The Commission is convinced that it is necessary to include a provision to cover the situation where a person forces another person to engage in sexual acts with that person, a third person, or to commit sexual acts upon his or her own person. There should also be a specific offence to cover compelled sexual acts with an animal. Similar provisions operate in New South Wales, Western Australia and the Australian Northern Territory.⁶⁶⁷ The Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General also propose the inclusion of a similar provision to cover compelled sexual acts.⁶⁶⁸

4.7.2.2 Our new proposed definition of rape (section 2 of the draft Bill attached to this discussion paper) deals with the situation when one person causes another person to rape a

666 Burchell J M **Burchell and Hunt's South African Criminal Law and Procedure Volume I: General Principles of Criminal Law** (3rd edition) Cape Town: Juta 1997 367.

667 New South Wales **Crimes Act** s 80A; Western Australia **Criminal Code** ss 327, 328; Northern Territory **Criminal Code** s 192 B.

668 **Discussion Paper: Model Criminal Code: Chapter 5: Sexual offences against the person** 94.

third person. In terms of our definition, the person who causes another to rape a third person could be found guilty of rape even though he or she never sexually penetrated the victim.⁶⁶⁹

4.7.2.3 *Therefore the Commission recommends the creation of the following statutory offence:*

Compelled sexual acts

- 3.** (1) *Any person who intentionally compels another person—*
- (a) *to engage in a sexual act with that person; or*
 - (b) *to engage in a sexual act with a third person; or*
 - (c) *to engage in a sexual act with himself or herself,*
- is guilty of an offence.*
- (2) *Any person who intentionally causes another person to engage in a sexual act with an animal is guilty of an offence.*

4.8 SUMMARY OF RECOMMENDATIONS

4.8.1 *In this Chapter, our main recommendations and findings are:*

C We recommend the introduction of a specific section in the new sexual offences act to make the persistent sexual abuse of a child an offence. We regard it as persistent sexual abuse when any person engages in a sexual act as defined in the draft bill with a child on 2 or more occasions within a specified 12 month period.

C We are not in a position to recommend the introduction of legislation to prohibit female genital mutilation and we invite comments on whether female genital mutilation or female circumcision is practised in South Africa. If so, we would like to know how female and male circumcision should be regulated.

669 Section2(1) of the draft Bill provides that 'Any person who intentionally and unlawfully commits an act of sexual intercourse with another person, or who intentionally causes another person to commit such an act is guilty of an offence'.

- C In the light of the research undertaken by the Project Committee on HIV/AIDS on harmful HIV-related behaviour and the compulsory HIV testing of persons arrested for having committed sexual offences, the Commission holds over any decision concerning the criminalising of harmful HIV-related behaviour and the HIV testing of persons arrested for committing sexual offences. We also invite comment on these issues.*
- C We recognise the strong public demand for the provision of HIV post-exposure prophylactic treatment to victims of sexual violence and will deal with this particular aspect in a subsequent discussion paper on process and procedural issues.*
- C We recognise the clear need for specific legislation criminalising stalking (or harassment) and recommend that a specific investigation be conducted in this regard. We are not convinced that it will afford all victims of stalking (or harassment) the protection they deserve if provisions on stalking (or harassment) are included in a new sexual offences act.*
- C We are of the opinion that adequate legal remedies do exist by which sexual harassment in the workplace can be addressed. Other criminal sanctions (such as indecent assault and crimen iniuria) already exist to cover those instances where sexual harassment takes place outside the workplace. It is therefore not necessary to provide for sexual harassment in a new sexual offences act.*
- C We recommend that a new statutory offence be introduced to criminalise compelled sexual acts.*

ANNEXURE A: PROPOSED SEXUAL OFFENCES BILL

B I L L

To consolidate and amend the laws relating to sexual offences and to provide for matters connected therewith.

PREAMBLE

WHEREAS the Bill of Rights in the Constitution of South Africa, 1996 (Act No. 108 of 1996), enshrines the rights of all people in the Republic including the right to equality and the right to freedom and security of the person which incorporates the right to be free from all forms of violence from either public or private sources;

AND WHEREAS several international legal instruments including the United Nations Convention on the Elimination of all Forms of Discrimination Against Women, 1979, and the United Nations Convention on the Rights of the Child, 1989, place obligations on the Republic towards the eradication of violence against women and children;

AND WHEREAS there is a high incidence of sexual offences in the Republic which have a particularly disadvantageous impact on the equal participation of the victims of such offences in society;

AND WHEREAS children are particularly vulnerable to sexual offences including commercial sexual exploitation;

AND WHEREAS the South African common law and statutory law fail to deal effectively and in a non-discriminatory manner with activities associated with sexual offences, thereby failing to provide adequate protection against sexual exploitation to the victims of such activities;

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:—

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CHAPTER 1**DEFINITIONS AND INTERPRETATION****Definitions and interpretation of Act**

- 1.** (1) In this Act, unless the context indicates otherwise—
- (i) "brothel" means any movable or immovable property where the commercial sexual exploitation of a child occurs;
 - (ii) "child" means—
 - (a) for the purposes of Chapter 3, a person under the age of 16 years, and
 - (b) for the purposes of Chapter 5, a person under the age of 18 years.
 - (iii) "coercive circumstances" include any circumstances where—
 - (a) there is any application of force, whether explicit or implicit, direct or indirect, physical or psychological against any person or animal;
 - (b) there is any threat, whether verbal or through conduct, direct or indirect, to cause any form of harm to any person or animal;
 - (c) the complainant is under the age of twelve years;
 - (d) there is an abuse of power or authority, whether explicit or implicit, direct or indirect, to the extent that one person is inhibited from indicating his or her resistance to an act of sexual penetration, or his or her unwillingness to participate in such an act;
 - (e) a person's mental capacity is affected by—
 - (i) sleep;
 - (ii) any drug, intoxicating liquor or other substance;
 - (iii) mental or physical disability, whether temporary or permanent, or
 - (iv) any other condition, whether temporary or permanent,

to the extent that he or she is unable to appreciate the nature of an act of sexual penetration, or is unable to resist the commission of such an act, or is unable to indicate his or her unwillingness to participate in such an act;

- (f) a person is unlawfully detained;
 - (g) a person believes that he or she is committing an act of sexual penetration with another person, or
 - (h) a person mistakes an act of sexual penetration which is being committed upon him or her for something other than an act of sexual penetration;
- (iv) "commercial sexual exploitation" in respect of a child means engaging the services of a child, or offering such services to any person, to perform a sexual act for financial or other reward, favour or compensation to the child or to any other person;
- (v) "mentally impaired person" means a person affected by any mental disability irrespective of its cause, whether temporary or permanent, to the extent that he or she is unable to appreciate the nature of a sexual act, or is unable to resist the commission of such an act, or is unable to communicate his or her unwillingness to participate in such an act;
- (vi) "sexual act" means any indecent act, and includes an act which causes—
- (a) direct or indirect contact between the anus, breasts, penis or vagina of one person and any part of the body of another person, or
 - (b) exposure or display of the genital organs of one person to another person, and further includes an act of sexual penetration;
- (vii) "sexual penetration" means any act which causes penetration to any extent whatsoever—
- (a) by the penis of one person—
 - (i) into the anus, ear, mouth, nose or vagina of another person, or
 - (ii) into any body orifice of an animal;
 - (b) by any object or part of the body of one person—
 - (i) into the anus or vagina of another person, or
 - (ii) into any body orifice of another person in a manner which simulates sexual intercourse, or
 - (c) by any part of the body of an animal—
 - (i) into the anus or vagina of a person, or
 - (ii) into any body orifice of a person in a manner which simulates sexual intercourse;

(viii) "vagina" means the whole of the female sexual organ and includes a surgically constructed vagina.

(2) For the purposes of this Act a person has knowledge of the fact that a child is below a certain age if—

- (a) the person has actual knowledge of that fact; or
- (b) the court is satisfied that—
 - (i) the person believed that there is a reasonable possibility that the child may be below that age; and
 - (ii) he or she failed to obtain information to confirm whether the child is below that age.

CHAPTER 2 GENERAL SEXUAL OFFENCES

Rape

2. (1) Any person who intentionally and unlawfully commits an act of sexual penetration with another person, or who intentionally and unlawfully causes another person to commit such an act is guilty of an offence.

(2) For the purposes of this Act, an act of sexual penetration is *prima facie* unlawful if it takes place in any coercive circumstances.

(3) No marriage or other relationship shall be a defence against a charge under this section.

(4) No person shall be charged with or convicted of the common law offence of rape in respect of an act of sexual penetration committed after the commencement of this Act.

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

Compelled sexual acts

3. (1) Any person who intentionally compels another person—
- (a) to engage in a sexual act with that person; or
 - (b) to engage in a sexual act with a third person; or

(c) to engage in a sexual act with himself or herself,
is guilty of an offence.

(2) Any person who intentionally causes another person to engage in a sexual act with an animal is guilty of an offence.

Inducement to allow sexual act

4. Any person who intentionally induces another person by false pretence or fraudulent means to allow him or her to commit a sexual act with that other person is guilty of an offence.

Administering substance for purposes of committing sexual act

5. Any person who administers or applies to, or causes to be taken by another person any substance with the intent—

- (a) to overpower that other person in order to commit a sexual act with that person,
or
- (b) to induce that other person to allow him or her to commit a sexual act with that person,

is guilty of an offence.

Incest

6. From the date of promulgation of this Act the definition of sexual penetration contained in this Act shall be applied *mutatis mutandis* for the purposes of the common law offence of incest.

Child molestation

7. (1) Any person who intentionally commits a sexual act with a child, at least two years younger than him or her, shall be guilty of an offence.

(2) Any person who commits any act with the intent to invite or persuade a child, at least two years younger than him or her, to allow any person to commit a sexual act with that child shall be guilty of an offence.

(3) Consent by a child to any sexual act shall not be a defence to a charge under this section.

Persistent sexual abuse of a child

8. (1) Any person who persistently abuses a child is guilty of an offence.

(2) For the purposes of this section, a person shall be taken to have persistently sexually abused a child if that person has engaged in a sexual act or an act of sexual penetration in relation to the child on two or more occasions during a specified twelve month period.

CHAPTER 4

SEXUAL OFFENCES AGAINST MENTALLY IMPAIRED PERSONS

Sexual offences against mentally impaired persons

9. (1) Any person who intentionally commits a sexual act with, or in the presence of, a mentally impaired person shall be guilty of an offence.

(2) Any person who commits any act with the intent to invite or persuade a mentally impaired person to allow any person to commit a sexual act with that mentally impaired person shall be guilty of an offence.

CHAPTER 5

COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN

Child prostitution

10. (1) Any person who intentionally commits a sexual act with a child for financial or other reward, favour or compensation to the child or to any other person, is guilty of an offence.

(2) Any person who intentionally invites, persuades or induces a child to allow him or her or any other person to commit a sexual act with that child for financial or other reward, favour or compensation to the child or to any other person, is guilty of an offence.

(3) Any person who intentionally participates in, or is involved in, the commercial sexual exploitation of a child is guilty of an offence.

Keeping a brothel for child prostitution

11. (1) Any person who intentionally keeps a brothel is guilty of an offence.

(2) For the purposes of this section keeping a brothel includes owning, leasing, renting, managing, occupying or having control of a brothel.

Offering or engaging a child for commercial sexual exploitation

12. Any person who intentionally offers or engages a child for purposes of the commercial sexual exploitation of that child is guilty of an offence.

Facilitating or allowing commercial sexual exploitation

13. (1) Any person who intentionally facilitates, in any way, the commercial sexual exploitation of a child is guilty of an offence.

(2) Any parent, guardian or caregiver of a child who intentionally allows the commercial sexual exploitation of that child is guilty of an offence.

Receiving consideration from commercial sexual exploitation

14. (1) Any person who intentionally receives any financial or other reward, favour or compensation from the commercial sexual exploitation of a child is guilty of an offence.

(2) Any person who intentionally lives wholly or in part on rewards, favours or compensation for the commercial sexual exploitation of a child is guilty of an offence.

CHAPTER 6 MISCELLANEOUS

Conspiracy or incitement to commit sexual offence

15. Any person who conspires with another, or incites another to commit any offence under this Act shall be guilty of an offence.

Extra-territorial jurisdiction

16. Any person who, while being a citizen or permanent resident of the Republic, commits any action outside the Republic which would have constituted an offence under this Act had it been committed inside the Republic, is guilty of the offence which would have been so constituted.

Penalties

17. (1) Any person who is convicted of an offence under sections xxx of this Act shall be liable to a fine or imprisonment for a period not exceeding 999 years.

(2) Any person who is convicted of an offence under sections xxx of this Act shall be liable to a fine or imprisonment for a period not exceeding 999 years.

Amendment and repeal of laws

18. (1) Section 5 of the Prevention of Family Violence Act, 1993 (Act 133 of 1993), is hereby repealed.

(2) The Child Care Act, 1983 (Act 74 of 1983), is hereby amended—

(a) by the deletion from section 1 of the definition of "commercial sexual exploitation"; and

(b) the repeal of section 50A.

(3) The Sexual Offences Act, 1957 (Act No. 28 of 1957), is hereby repealed.

Short title and commencement

19. This Act shall be called the Sexual Offences Act, ... and shall come into operation on a date fixed by the President in the *Gazette*.

EXPLANATORY MEMORANDUM ON THE SEXUAL OFFENCES BILL

BACKGROUND

The South African Law Commission was requested to investigate sexual offences by and against children and to make recommendations to the Minister of Justice for the reform of this particular branch of the law. A Project Committee was appointed and an issue paper on sexual offences against children was published for general information and comment in May 1997. The Commission received numerous written and oral responses to the issue paper and 14 workshops were held throughout the country.

The Project Committee prepared a draft discussion paper and draft legislation on the substantive law relating to sexual offences, taking into account the written and oral submissions. This discussion paper and draft Bill were approved by the Working Committee of the Commission on 12 August 1999. The discussion paper is the first of a three-part series as the Commission also plans to release further discussion papers on the process and procedural law relating to the management of sexual offences and on adult commercial sex work and adult pornography later this year.

The discussion paper and draft Bill do not reflect the final views of the Commission and comments and submissions are invited.

It became clear during the course of the investigation that any proposed changes to the law relating to sexual offences will have a far-reaching effect on the position not only of children but adults as well. As a result of this realisation and because of various requests the Commission decided to expand the scope of the investigation to include sexual offences against adults. The investigation was subsequently renamed 'sexual offences'.

AIMS AND OBJECTIVES OF THE SEXUAL OFFENCES BILL

The Bill aims to consolidate and amend the substantive law relating to sexual offences. Matters of process and procedure will be addressed in a subsequent discussion paper. The Bill addresses the following chief concerns:

- (a) the unacceptably high incidence of rape and other acts of sexual violence in South Africa;
- (b) the growing problem of child sexual abuse and the commercial sexual exploitation of children;
and
- (c) sexual offences against mentally impaired persons.

The aim of the Bill is to present one comprehensive act in respect of all sexual offences. However, this does not entail a complete codification of the common law offences relating to sexual offences.

CONTENT OF THE BILL

The Bill is divided into the following six chapters:

Chapter 1:	Definitions and interpretation
Chapter 2:	General sexual offences
Chapter 3:	Sexual offences against children
Chapter 4:	Sexual offences against mentally impaired persons
Chapter 5:	Commercial sexual exploitation of children
Chapter 6:	Miscellaneous

Chapter 1: Definitions and interpretation

Chapter 1 defines certain key concepts. Important to note is the definitions of 'child', 'coercive circumstances', 'commercial sexual exploitation', 'sexual act' and 'sexual penetration'. For the purposes of chapter 3 (sexual offences against children) a child is defined as a person under 16 years of age; for the purposes of chapter 5 (commercial sexual exploitation of children) a child is defined as a person under 18 years of age.

The definitions of 'coercive circumstances' and 'sexual penetration' are crucial elements of the proposed new statutory offence of rape. In the Bill, the presence of 'coercive circumstances' clouds an act of sexual penetration with unlawfulness and makes an act of sexual penetration rape. 'Sexual penetration' is also given a much broader meaning than 'carnal intercourse' in common law, which restricted intercourse to the penetration by the penis of the vagina. 'Sexual penetration' is defined very broadly in the Bill to include the penetration 'to any extent whatsoever' by a penis, any object or part of the body of one person, or any part of the body of an animal into the vagina, anus, or mouth of another person. Simulated sexual intercourse is also included under the definition of 'sexual penetration'.

A 'sexual act' is defined in the Bill as 'any indecent act'. It includes physical contact and the exposure or display of genital organs.

Section 1(2) of the Bill ascribes knowledge of the fact that a child is below a certain age to a person and places a positive duty on that person to determine the child's age should that person believe that there is a reasonable possibility that the child may be below a certain age.

Chapter 2: General sexual offences

Chapter 2 deals with two specific offences: rape and compelling sexual acts.

- **Rape**

In terms of our common law, rape is defined as the unlawful sexual intercourse of a man and a woman without the consent of the woman involved. Non-consensual anal or oral penetration does not constitute rape in common law, although it can constitute indecent assault. Sexual intercourse is restricted to the penetration of the vagina by the penis. Section 3 repeals the common law offence of rape and replaces it with a new gender neutral statutory offence. The new rape provision is built around the concept of 'unlawful sexual penetration' and does not require the State to prove absence of consent on the part of the victim. Section 2(2) states that for the purposes of this Bill, an act of sexual penetration is *prima facie* unlawful when it takes place under coercive circumstances. Coercive circumstances is defined in section 1 and include the application of force, threats, the abuse of power or authority and the use of drugs. In the crime definition, the presence of coercive circumstances does not equate to an absence of consent, but makes an act of sexual penetration *prima facie* unlawful. This is in contrast to the position in Michigan and Namibia where the move was from absence of consent to the presence of coercive circumstances.

In terms of the common law definition of rape, the State must proof beyond a reasonable doubt the fact that the woman did not consent to sexual intercourse. In the public perception, this creates the impression that the victims of rape are put on trial to prove their absence of consent to the sexual intercourse. As stated, absence of consent to sexual intercourse will no longer be an element of the offence. The accused can obviously still raise consent to sexual intercourse as justification for his or her unlawful conduct, but will carry the burden of proof in this regard.

In terms of the extensive definition of an act of sexual penetration oral, anal or vaginal penetration or even simulated sexual intercourse under coercive circumstances can constitute rape. This means that both men and women can be rape victims and perpetrators.

To provide better protection for young children, the definition of coercive circumstances results therein that the sexual penetration of any child below the age of 12 years will constitute rape.

Section 2(3) provides that no marriage or other relationship shall be a defence against a charge of rape. This makes it clear that a husband can be convicted of raping his wife.

- **Compelled sexual acts**

Section 3 is included in the Bill to cover the situation where a person forces another person to engage in sexual acts with that person, a third person, or to commit sexual acts upon his or her own person. Such activity should be the subject of a specific offence. There should also be a specific offence to cover compelled sexual acts with an animal.

Section 3 is based on section 33.4 of the Australian Model Criminal Code: Chapter 5: Sexual Offences against the Person.

° ***Inducement to allow sexual act***

Section 4 makes it an offence for any person to induce another person by false pretence or fraudulent means to allow that person to commit sexual acts with the person being defrauded. The provision is premised on the need to protect persons from being misled into consenting to sexual intercourse in circumstances where they would not have consented had it not been for the fraudulent means or false pretences of another.

This section is a reformulation of the present section 11 of the Sexual Offences Act, 1957.

° ***Administering substance for purposes of committing sexual act***

Section 5 is devised to penalise the methods some persons employ in order to overcome resistance to their sexual advances. It provides that any person who administers or applies any substance (such as drugs or liquor) to another person with the intent to overpower or induce that other person in order to commit a sexual act with that person is guilty of an offence.

This section is a reformulation of the present section 18 of the Sexual Offences Act, 1957.

° ***Incest***

In the common law, conventional vaginal sexual intercourse is an element of the offence of incest. Because of this rather narrow concept of sexual intercourse and the gender specific nature of the offence, section 6 of the Bill applies the definition of sexual penetration to the common law offence of incest. The element of sexual intercourse in the common law offence is replaced by the broadly statutory defined act of sexual penetration. As a consequence, the ambit of incest will be much wider and will cover the father / son and mother / daughter relationship.

Chapter 3 deals with sexual offences against children. It provides for two offences: child molestation, which is modelled on section 14 of the Sexual Offences Act, 1957 and a new provision on the persistent sexual abuse of children. It is important to note that a child is defined for the purposes of this chapter as a person under the age of 16 years.

◦ ***Child molestation***

Section 7 is headed child molestation. It is a reformulation of the statutory rape provision contained in section 14 of the Sexual Offences Act, 1957 and aims to prohibit sexual acts with children below 16 years of age. At the same time it does recognise that peer group sexual experimentation is a reality and the provision specifically provides for a two year age difference. Consensual sexual acts between two 15-year old children will therefore not constitute an offence in terms of this section. The position is markedly different when one of the parties is 30 years old and the other 15 years old. In this instance, consent by the child under 16 years of age to any sexual act is not a defence to a charge of the older person under this new provision.

◦ ***Persistent sexual abuse of a child***

As most cases of intra-familial sexual abuse take place repeatedly and over long periods of time, child victims often have difficulty recalling precise details of the time and place when and where the alleged offences are said to have occurred. As a consequence, state prosecutors sometimes accept a guilty plea to a single incident of sexual abuse well-knowing that the incident was not an isolated one. It is for this reason that the Commission recommends the enactment of a statutory provision in the new sexual offences act to make the persistent sexual abuse of a child a separate offence.

This section is based on section 34.6 of the Australian Model Criminal Code: Chapter 5: Sexual Offences against the Person.

Chapter 4: Sexual offences against mentally impaired persons

Chapter 4 addresses sexual offences against mentally impaired persons. A 'mentally impaired person' is defined in section 1 of the Bill as a person affected by any mental disability irrespective of its cause, whether temporary or permanent, to the extent that such person is unable to appreciate the nature of the sexual act, or is unable to resist the commission of such an act, or is unable to communicate his or her unwillingness to participate in such act. While recognising the fact that mentally impaired persons do have sexual rights, the Commission nevertheless recommends the enactment of two specific provisions in section 9 to deal with sexual offences against mentally impaired persons.

Section 9 in the Bill is a reformulation of the present section 15 of the Sexual Offences Act, 1957.

Chapter 5: Commercial sexual exploitation of children

The Commission recommends a complete prohibition on the commercial sexual exploitation of children in the Bill. Commercial sexual exploitation is defined in section 1 of the Bill and includes child prostitution, child pornography and trafficking in children. The Commission is convinced that the commercially sexually exploited child is a victim in need of care and protection and not a criminal. The following provisions in the Bill give effect to this recommendation:

- ***Child prostitution***

Section 10 of the Bill makes it an offence for any person to commit a sexual act with a child for financial or other reward, favour or compensation; to invite, persuade or induce a child to allow any person to commit a sexual act with a child for financial or other reward, favour or compensation; and to participate in, or be involved in, the commercial sexual exploitation of a child.

This section is a reformulation of the present section 9 of the Sexual Offences Act, 1957, taking into account section 50A(1) of the Child Care Amendment Bill, 1999.

- ***Keeping a brothel for child prostitution***

Section 11 of the Bill makes it an offence for any person to keep a brothel. A brothel is defined as the property where the commercial sexual exploitation of a child occurs.

This section is a reformulation of the present section 2 of the Sexual Offences Act, 1957, taking into account section 50A(2) of the Child Care Amendment Bill, 1999.

- ***Offering or engaging a child for commercial sexual exploitation***

Section 12 of the Bill makes it an offence for any person to offer or engage a child for the purposes of the commercial exploitation of that child.

This section is a reformulation of the present sections 9 and 10 of the Sexual Offences Act, 1957, taking into account section 50A(1) of the Child Care Amendment Bill, 1999.

- ***Facilitating or allowing the commercial sexual exploitation of a child***

Section 13 follows on section 12 and makes it an offence for any person to facilitate or engage a child for commercial sexual exploitation.

This section is a reformulation of the present sections 9 and 10 of the Sexual Offences Act, 1957, taking into account section 50A(1) of the Child Care Amendment Bill, 1999.

- ***Receiving consideration from the commercial sexual exploitation of a child***

Section 14 seeks to address the conduct of pimps and other persons who sexually exploit children for commercial gain.

This section is a reformulation of the present section 20 of the Sexual Offences Act, 1957.

Chapter 6: Miscellaneous

This Chapter provides for matters such as extra-territorial jurisdiction, penalties, and the amendment and repeal of laws.

- ***Conspiracy or incitement to commit a sexual offence***

Section 15 makes it an offence for any person to conspire with another, or to incite another, to commit any offence under this Act.

This section is a reformulation of the present section 11 of the Sexual Offences Act, 1957.

- ***Extra-territorial jurisdiction***

In order to combat sexual offences, sex tourism, child sexual abuse and the commercial sexual exploitation of children, the Commission believes that it is necessary to provide for effective national legislation which has extra-territorial application. Section 16 of the Bill therefore proposes to give extra-territorial jurisdiction to the new sexual offences act on the basis that the wrongdoer is a citizen or permanent resident of the Republic.

- ***Penalties***

Section 17 provides the usual penalty clause. It makes it possible to prescribe different penalties for the contravention of specific sections of the Bill.

- ***Amendment and repeal of laws***

This section provides for the amendment and repeal of particular provisions in various enactments. This gives effect to the recommendation of the Commission that all sexual offences should be contained in one comprehensive new sexual offences act.

- ***Short title and commencement***

This is the standard provision.

CONSULTATION

Extensive consultation took place with stake-holders and interested persons. Workshops were conducted in all nine provinces. Several individuals and organisations made written and oral submissions to the Commission. Comments received have where necessary been incorporated into the Bill.

ANNEXURE B: LIST OF RESPONDENTS WHO COMMENTED ON ISSUE PAPER 10

Abrahams, Mr SG

Association for Persons with Physical Disabilities - Northern Cape

Association for the Physically Disabled, Eastern Cape - Port Elizabeth Region (Social Work Department)

Blumrick, Ms Rita, office of the Attorney-General, Pietermaritzburg

Brits, Mr Johan

Carr, Mr LI

Child and Family Welfare Society, Vryheid

Child Protection Units, Kwazulu-Natal, South African Police Service

Child and Family Welfare Society, Bloemfontein

Child Protection Unit, East Rand, South African Police Service

Clark, Ms WL, Senior Prosecutor

D' Oliveria, Dr JA van S SC assisted by Adv. HM Meintjies, office of the Attorney - General, Transvaal

Davel, Professor CJ Faculty of Law, University of Pretoria

De Lange, Mr BJ Magistrate, Paarl

De Rooster, Ms Linda, Forest Town School for Cerebral Palsied Children

De Broglio Mr Michael

Department of Health and Welfare, Mpumalanga Provincial Government

Department of Local Government, Housing and Land Administration, Mpuumalanga Provincial Government

Department of Education (input prepared by Adv E Boshoff)

Disabled Children's Action Group (DICAG), Ms Washielah Sait

FAMSA

Fedler, Ms Joanne, Ms Shireen Motara and Ms Mona Monadjem)

Forensic Social Workers South-African Police Service, Pretoria

Gauteng Provincial Commissioner, South African Police Service

Gauteng Ministry of Safety and Security

Grabe, Dr S and Dr K Du Plessis of the RP Clinic Medical Forensic Unit

Johannesburg Child Welfare Society, Dr JM Loffell

Lekoeneha, Adv KJC, Deputy Chief State Law Advisor, Free State Provincial Government

Madonsela, Ms Thuli, Department of Justice

Milton, Prof JRL School of Law, University of Natal

Muller, Dr FS

National Council of Women of South-Africa

National Council for Persons with Physical Disabilities in South Africa

Nederduitse Gereformeerde Kerk in Afrika - Oranje Vrystaat

Nel, Mr P Prosecutor, Port Elizabeth

Newhoudt-Druchen, Ms Wilma The deaf Community of Cape Town

Northern Province Local Government and Traditional Authorities, Khosi TJ Ramovha

Potter, Sr MI Agape School for Cerebral Palsied

Rape Crisis (Cape Town), Women & Human Rights Project (Community Law Centre, UWC) and ANC Parliamentary Women's Caucus (input compiled by Ms Bronwyn Pithey, Ms Helene Combrinck and Ms Pamela Shifman)

RP Clinic, Pretoria

Snyman, Miss SS, Magistrate, Pretoria

Snyman, Proff CR and JP Swanepoel, Department of Criminal and Procedural Law, UNISA

Songoa, Adv R Department of Private Law, University of the North

South African National Council For Child and Family Welfare

Tshwaranang Legal Advocacy Centre to end violence against women (input compiled by Ms

Van Dokkum, Mr Neil

Van Wyk, Mr AJ

Wagner, Ms Collet, Chief Social Worker, Department of Welfare and Population Development, Gauteng Provincial Government

Wes Kaapse Forum vir Straatkinders

Willemse, Mrs R, Regional Court Magistrate, Benoni

Worrall-Clare, Mr K