

**SOUTH AFRICAN LAW COMMISSION**

**DISCUSSION PAPER 90**

**PROJECT 101**

**THE APPLICATION OF THE BILL OF RIGHTS TO CRIMINAL PROCEDURE,  
CRIMINAL LAW, THE LAW OF EVIDENCE AND SENTENCING**

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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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The project leader responsible for this project is the Honourable Mr Justice LTC Harms.

The Commission would like to express its appreciation to the GTZ and its project manager, Mr R Pfaff, for the technical and financial assistance rendered in this investigation.

## **PREFACE**

This discussion paper (which reflects information gathered up to the end of December 1999) was prepared for the Commission by Professor Schwikkard to elicit responses and to serve as a basis for the Commission's deliberations, taking into account any responses received. The views, conclusions and recommendations in this paper are accordingly not to be regarded as the Commission's final views. The discussion paper is published in full so as to provide persons and bodies wishing to comment or to make suggestions for the reform of this particular branch of the law with sufficient background information to enable them to place focussed submissions before the Commission.

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

Respondents are requested to submit written comments, representations or requests to the Commission by **31 March 2000** at the address appearing on the previous page. The researcher will endeavour to assist you with particular difficulties you may have. Comment already forwarded to the Commission should not be repeated; in such event respondents should merely indicate that they abide by their previous comment, if this is the position.

The researcher allocated to this project, who may be contacted for further information, is Mr MHL Kganakga. The project leader responsible for the project is The Honourable Mr Justice LTC Harms.

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## ORIGIN OF THE INVESTIGATION AND SOME INTRODUCTORY REMARKS

### BACKGROUND

1.1 During his budget vote speech to the National Assembly and the Senate in 1994, the Minister of Justice touched on a number of issues that should be addressed. He stated, **inter alia**, that he believed that the judicial system is in need of fundamental changes in order to make it more accessible to the public. Legal procedures should be simplified, terminology should be less technical, the judicial system should serve the community and it should also reflect the schools of thought in the community. The Minister also expressed concern for the unprecedented crime wave in South Africa. In this regard he stated that we needed innovating thinking and a new approach to solve the problems. He therefore requested the Commission to give urgent attention to the problems arising from the application of the Bill of Rights to criminal law, criminal procedure and sentencing. A new investigation was consequently included in the Commission's programme (Project 101- The application of the Bill of Rights to the criminal law, criminal procedure and sentencing).

1.2 A Bill of Rights was included in the Interim Constitution which came into operation on 27 April 1994. An amended Bill of Rights forms part of the new Constitution which was approved by the Constitutional Assembly during May 1996 and the certification of the Constitution by the Constitutional Court was subsequently finalised.

1.3 In the light of the Minister's further requests, and because the new Constitution came into operation, the Commission had to redefine the content of its investigation. In order to proceed meaningfully with the investigation the project committee's first priority was to identify specific areas that are in need of reform and to proceed incrementally with investigations in that regard. A new project committee was appointed during September 1996 which was restructured during 1998 and 1999. At present the Committee consists of the following members:

Mr Justice LTC Harms (Judge of Appeal and Project leader)

Madam Justice Y Mokgoro (Judge of the Constitutional Court and Vice-Chairperson of the Commission)

Mr Justice AEB Dhlodhlo (Judge of the High Court)

Mr PAJ Kotze (Retired Regional Court President)

Professor NC Steytler (Law Faculty, University of Cape Town)

Professor B Majola (Director Legal Resources Centre)

1.4 In the first phase of the investigation the Committee invited all role players to submit proposals for amendment as well as relevant motivation to the Committee for consideration. In the second phase the Commission's researcher, Mr MHL Kganakga, with the assistance of Professor Steytler (committee member), worked through the Criminal Procedure Act with the aim to identify provisions which may be constitutional and to make recommendations for amendment. In the third phase the committee obtained the services of Professor PJ Schwikkard of Rhodes University who drafted the discussion paper having due regard to the comments submitted to the Commission by role players and the discussion document prepared by the Commission's researcher.

1.5 It is important to note the Committee's point of departure in the investigation. The Committee resolved that it should focus only on those sections which are clearly unconstitutional and which need urgent consideration. It was argued that the Law Commission or the Project Committee should not usurp the function of the Constitutional Court and decide on the constitutionality of those sections of the Act which are only arguably unconstitutional. In those instances the Constitutional Court should rather develop step by step the case law. While the committee primarily focussed on provisions which it considers to be clearly unconstitutional, it considered the constitutionality of some other provisions and whether or not they should be amended in the scope of the investigation. In these instances the provisions and motivation for amendment are included in the discussion paper for purposes of inviting comment.

1.6 The Commission would like to express its appreciation to the GTZ and its project manager, Mr R Pfaff, for the technical and financial assistance rendered in this investigation.

## **CHAPTER 2**

### **PROBLEMS ARISING FROM THE APPLICATION OF THE BILL OF RIGHTS TO PROVISIONS OF THE CRIMINAL PROCEDURE ACT**

## INTRODUCTION

2.1 The Commission's point of departure in the investigation is to identify those provisions in the Criminal Procedure Act that are *clearly* unconstitutional. Due to the operation of the limitations clause, identifying what is unconstitutional is a hazardous task. The Commission consequently attempted to identify those sections of the Criminal Procedure Act which give rise to sustainable constitutional arguments. The degree to which these arguments establish an infringement of the Constitution varies. **In some instances the Commission recommends amendments while in others the proposal for amendment are submitted for comments without the Commission making a final finding on the proposal.**

## THE PRESUMPTION OF INNOCENCE AND CLUSTER OF ASSOCIATED RIGHTS

**Section 35(3) Every accused person has a right to a fair trial, which includes the right-(h) to be presumed innocent, to remain silent, and not to testify during the proceedings;**

2.2 The following is a summary of conditions that give rise to an infringement of the presumption of innocence with reference to South African and Canadian case law.

### ***The scope of the presumption of innocence***

2.3 It can be argued that the scope of the presumption of innocence as a constitutionally entrenched right in s 35(3)(h) of the Constitution, requiring the prosecution to prove guilt beyond a reasonable doubt at trial, is restricted to proof of those elements of the state's case that must be established in order to justify punishment. The relevance of evidence should also be proved beyond a reasonable doubt in order to ensure the consistent application of the reasonable doubt standard<sup>1</sup>. The blameworthiness of the accused is the underlying justification for punishment. Consequently, facts necessary to establish legal guilt but not pertinent to blameworthiness need

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<sup>1</sup> In **S v Zuma** 1995 (1) SACR 568 (CC) the Constitutional court, albeit in a qualified manner, extended the application of the presumption of innocence beyond the elements of the offence required to be proved by the prosecution. In **Zuma** the court considered the application of the presumption of innocence in allocating and determining the standard of proof with regard to the admissibility of confessions. See generally PJ Schwikkard *The scope, content and normative value of the presumption of innocence in the South African law of criminal procedure and evidence* (1999) LLD thesis (Stellenbosch).

not be proved beyond reasonable doubt in terms of the presumption of innocence, which reflects society's tolerance of erroneous acquittals in an attempt to ensure that only the blameworthy are convicted. However, there may be circumstances where the value given to other rights demands that the reasonable doubt rule be applied independently of the presumption of innocence. The constitutional right to be presumed innocent is specified in relation to the right to a fair trial. It therefore does not apply to proceedings outside the definition of a criminal trial. However, when imprisonment is a possible result of 'other proceedings' the residual content of the s 12(1) right to freedom and security, requiring procedural fairness, may well require the application of the reasonable doubt standard.<sup>2</sup>

### ***Identifying infringements of the presumption of innocence***

#### ***Canada***

2.4 The decisions of the Canadian Supreme Court show that the presumption of innocence will be infringed in relation to "true crimes" wherever there is a possibility of conviction despite the existence of a reasonable doubt.<sup>3</sup> This will occur whenever the accused is required to prove something, relevant to the verdict, on a balance of probabilities. The defence-offence dichotomy is irrelevant<sup>4</sup> except in regard to proof that a person holds a statutorily required licence.<sup>5</sup> A mandatory evidential burden will infringe the presumption of innocence if it relieves the prosecution of its burden of establishing a prima facie case before the accused need respond.<sup>6</sup> A mandatory presumption will also breach the presumption of innocence where the basic fact does not lead inexorably to the presumed fact as such a presumption allows conviction despite the existence of reasonable doubt.<sup>7</sup> Whilst a permissive evidential burden will

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<sup>2</sup> See ***Ferreira v Levin NO & Wryenhoek v Powell NO*** 1996 (1) BCLR 1 (CC) at [79] but cf [185]. Cf ***S v Dlamini***; ***S v Dladla***; ***S v Joubert***; ***S v Schietekat*** 1999 (2) SACR 51 (CC).

<sup>3</sup> ***R v Oakes*** (1986) 50 CR (3d) 1 (SCC).

<sup>4</sup> ***R v Whyte*** 1988 64 CR (3d) 123 (SCC); ***R v Keegstra*** 1990 3 SCR 697 (SCC); ***R v Chaulk*** 1990 3 SCR 1303 (SCC).

<sup>5</sup> ***R v Schwartz*** 1989 66 CR (3d) 251 (SCC). In ***R v Chaulk*** supra, Wilson J distinguished ***Schwartz*** on the basis that it dealt with regulated rather than prohibited conduct. Consequently, it may be argued that the ***Schwartz*** does not apply to truly criminal offences.

<sup>6</sup> ***R v Downey*** 1992 13 CR (4th) 129 (SCC); ***R v Du Bois*** 1986 23 DLR (4th) 503 (SCC); ***R v P(MB)*** 1994 29 CR (4th) 209 (SCC).

<sup>7</sup> ***R v Downey*** supra; ***R v Audet*** 1996 48 CR (4th) 1 (SCC).

generally not infringe the presumption of innocence, it will do so when a negative inference is required to be drawn from the accused's silence.<sup>8</sup> Where an offence is regulatory in nature, the requirement that an accused prove due diligence on a balance of probabilities will not infringe the presumption of innocence.<sup>9</sup>

### **South Africa**

2.5 There is clear authority for the view that the presumption of innocence will be infringed whenever there is the possibility of a conviction despite the existence of a reasonable doubt.<sup>10</sup> The offence-defence dichotomy is irrelevant.<sup>11</sup> The Constitutional Court in **S v Coetzee**<sup>12</sup> has by implication rejected the "greater includes the lesser test".<sup>13</sup> Consequently, a reverse onus provision cannot be saved by the argument that the legislature by creating a special defence in respect of which the accused bears the onus, has ameliorated the hardship the accused would otherwise have suffered if it had chosen to create an absolute liability offence.

2.6 The Constitutional Court, without distinguishing between permissive and mandatory presumptions, has held that an evidential burden does not create the possibility of conviction despite the existence of a reasonable doubt.<sup>14</sup> However, the question remains open as to whether an evidential burden will nevertheless infringe the presumption of innocence by relieving the prosecution of its duty to prove all the elements of the offence charged. It is submitted that the better view is that mandatory presumptions do infringe the presumption of innocence whether it be by permitting convictions despite the existence of a reasonable doubt or by

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<sup>8</sup> **R v Noble** 1997 1 SCR 874 (SCC).

<sup>9</sup> **R v Wholesale Travel Group** 1992 8 CR (4th) 145 (SCC).

<sup>10</sup> **S v Zuma** 1995 1 SACR 568 (CC).

<sup>11</sup> **S v Coetzee** 1997 3 SA 527 (CC).

<sup>12</sup> *Supra*.

<sup>13</sup> This American phraseology is used to reflect an argument that since the legislature in formulating an offence is not obliged to provide any defences, it is free to determine the rules of proof in relation to any defences it gratuitously creates ie the greater power of elimination of the defence is seen as including the lesser power of shifting the burden of proof. See D Dripps "the Constitutional Status of the Reasonable Doubt Rule" (1987) 75 *California Law Review* 1665 at 1678. See also **Ferry v Ramsey** 277 US 88 (1928); Cf **United States v Romano** 382 US 136 (1965); **Morrison v California** 291 US 82 (1934).

<sup>14</sup> **Scagell v Attorney-General of the Western Cape** 1996 11 BCLR 1446 (CC).

relieving the prosecution of its full duty to prove all the elements of the crime.<sup>15</sup> However, the distinction between a mandatory evidential burden and a reverse onus would be an important factor to be taken into consideration in determining whether a breach was justifiable, the former constituting a lesser infringement.

2.7 Whether the drawing of a negative inference from silence infringes the right to remain silent or the presumption of innocence also remains an open question. In so far as the presumption of innocence determines the incidence of the burden of proof, any shift of an evidential burden to the accused prior to the prosecution establishing a prima facie case will constitute an infringement of the presumption of innocence. Consequently, an inference drawn from silence before the prosecution has discharged its duty of establishing a prima facie case will infringe the presumption of innocence.

2.8 The application of the presumption of innocence to regulatory offences has yet to be properly considered by the courts. However, the Constitutional Court has indicated that the regulatory nature of an offence is better considered as a factor in establishing whether a provision constitutes a justifiable limitation of the right to be presumed innocent rather than in establishing breach. This approach is to be preferred in that it allows the court to concentrate on “the values at stake in the particular context”<sup>16</sup> rather than focussing on the unruly distinction between regulatory and criminal offences.

### ***Measuring the cases against the limitations clause***

2.9 The Constitutional Court has been remarkably consistent in refusing to find justification for the infringement of the presumption of innocence. It has held that any justification for

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<sup>15</sup> See also K Dawkins “Statutory presumptions and reverse onus clauses in the Criminal Law: In search of rationality” 1987 (3) *Canterbury Law Review* 215 who outlines the infringement of the presumption of innocence by mandatory evidential burdens as follows:  
“The trier of fact must find that the presumed fact has been established once P has proved the basic fact, even if not satisfied that P could prove the presumed fact if put to its usual burden of persuasion. D therefore loses the benefit of any residual doubt that would otherwise arise from P’s case’.

CF A Skeen “A Bill of Rights and the presumption of innocence” 1993 9 *SAJHR* 525 at 535; U Raifeartaigh “Reversing the burden of proof in a criminal trial: Canadian and Irish Perspectives on the Presumption of Innocence” 1995 5 *Irish Criminal Law Journal* 135.

<sup>16</sup> **S v Coetzee** supra [43].

infringing the presumption of innocence would have to be clear, convincing and compelling.<sup>17</sup> In respect of the proportionality inquiry required by the limitation clause, it is clear that the importance of the objective of the limitation, even if addressing a pressing and substantial concern, will seldom, if ever, on its own justify an infringement of the presumption of innocence.<sup>18</sup> However, if the objective is not sufficiently important it would appear that the constitutional challenge must fail irrespective of the means used to achieve the objective. It is inevitable that a reverse onus in the criminal context will have as its broad objective the effective prosecution of crime; however, to be sufficiently important it must be shown that there is a pressing social need for the effective prosecution of the category of offence to which the presumption applies.<sup>19</sup> The fact that a presumption is required to facilitate adequate sentencing discretion would not on its own be a sufficiently important objective.<sup>20</sup>

2.10 Once it is established that the purpose of the limitation is not discordant with the values underlying an open and democratic society based on human dignity and equality, the validity of an infringement is dependent on a determination of whether the means used in attaining the objective are reasonable and justifiable. In determining the nature and extent of the limitation the courts appear wary of presumptions that are overly broad in their application.<sup>21</sup> Over-breadth must be considered in relation to the range of offences brought within the framework of the presumption as well as the category of offenders. In the case of a reverse onus it would be logical to infer that the effect of the limitation will also be influenced by the accused's ease of access to the information required to discharge the burden. Cameron J in **S v Meaker**<sup>22</sup> expressed the view that a presumption would constitute a lesser infringement of the presumption of innocence where it only came into effect once a person had already been shown to have committed an offence. However, this will clearly not be the case where the offence to which the presumption pertains attracts heavier penalties or greater disapprobation than the offence

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<sup>17</sup> See **S v Mbatha; S v Prinsloo** supra 1996 3 BCLR 293 (CC); **S v Ntsele** supra 1997 11 BCLR 1543 (CC) at [4].

<sup>18</sup> **S v Coetzee** supra.

<sup>19</sup> **Scagell v Attorney-General of the Western Cape** supra.

<sup>20</sup> **S v Bhulwana; S v Gwadiso** 1996 1 SA 388 (CC).

<sup>21</sup> **S v Coetzee** supra.

<sup>22</sup> Supra.

proved.<sup>23</sup> The extent of the limitation will also be partially determined by the nature of the penalties and stigma attached to the offence<sup>24</sup> However, the trivial consequences of conviction on their own will not constitute sufficient justification.<sup>25</sup> Whether the offence to which the presumption applies is truly criminal or regulatory, will also be taken into account.<sup>26</sup> Evidence that a reverse onus is applied with circumspection and is therefore unlikely to impact on the rights of innocent people will not be considered a justifying factor, it being unacceptable for the rights of innocent people to be dependent on the discretion of the police or attorney-general.<sup>27</sup> The extent of the limitation will also be effected by the likelihood of the presumption operating in a manner that increases the possibility of innocent people being brought to trial,<sup>28</sup> for example, where the basic fact from which the inference to be drawn is in itself not suggestive of criminal behaviour.<sup>29</sup>

2.11 The inquiry into the relationship between the limitation and its purpose requires a finding of both external and internal rationality.<sup>30</sup> External rationality requires a rational connection between the presumption and the legislative purpose behind its enactment. Internal rationality requires a rational connection between the basic fact and the presumed fact. The content of the presumption of innocence compels the court to establish internal rationality at both the breach and limitations stages. The degree of internal rationality determines whether conviction is possible despite the existence of a reasonable doubt. At the limitations stage the court needs to assess the parameters of doubt arising in accordance with the level of internal rationality. In

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<sup>23</sup> **S v Bhulwana; S v Gwadiso** supra.

<sup>24</sup> **S v Mbatha; S v Prinsloo** 1996 3 BCLR 293 (CC)..

<sup>25</sup> Cf **S v Meaker** 1998 (2) SACR 73 WLD where Cameron J rejected the contention that the trivial consequences of conviction were relevant to justification.

<sup>26</sup> **S v Coetzee** supra.

<sup>27</sup> **S v Mbatha; S v Prinsloo** supra at [23]; **Scagell v Attorney-General of the Western Cape** supra at [17]-[18]. In the light of such clear and substantial Constitutional Court authority it would appear Cameron J in **S v Meaker** supra at 91g was misguided in his conclusion that the Constitutional Court “did not intend to discountenance all consideration of benign administrative procedures in assessing the practical efficacy and equitable operation of a presumption”.

<sup>28</sup> **S v Mbatha; S v Prinsloo** supra at [24];

<sup>29</sup> See **Scagell v Attorney-General of the Western Cape** supra.

<sup>30</sup> **S v Bhulwana; S v Gwadiso** supra; **S v Julies** 1996 4 SA 313 (CC); **S v Van Nell** 1998 4 BCLR 605 (NC); **S v Mbatha; S v Prinsloo** supra; **S v Ntsele** supra.

the absence of express articulation of this view by the Constitutional Court, the best example of the different application of the rational connection test is to be found in the Witwatersrand Local Divisions decision in **S v Meaker**.<sup>31</sup> In **Meaker** the court applied s 36 of the 1996 Constitution in determining whether the presumption contained in s 130(1) of the Road Traffic Act<sup>32</sup> constituted a justifiable infringement of the presumption of innocence. This section provides that in any prosecution under the common law relating to the driving of a motor vehicle or under the Act, it will be presumed that the vehicle was driven by the owner. In finding that s 130 breached the presumption of innocence, the court found that it was reasonably possible that the owner would not be the driver of the vehicle. However, in applying s 36 the fact that it was not unlikely that the owner was the driver was sufficient to conclude that the provision was sufficiently rational for the purposes of the limitations clause. Whilst it is clear that insufficient rationality will be found to exist for the purposes of breach when the inference to be drawn from the basic fact does not exclude a reasonable doubt as to the existence of the presumed fact, it is less clear what will constitute sufficient rationality at the second stage of the inquiry. The finding of the court in **Meaker** would support the minority view of McLachlin J in **R v Downey**<sup>33</sup> “that at a minimum, proof of the substituted fact must make it *likely* that the presumed fact is true”.<sup>34</sup>

2.12 An inquiry as to whether less restrictive means could be used to achieve the limitations objective, includes the question whether the infringement is required at all.<sup>35</sup> Consequently, it is argued that s 36 does not exclude the necessity test but merely makes it applicable to all constitutionally guaranteed rights. In establishing the necessity of a reverse onus, the state would have to lead evidence that in practice it was impossible or unduly burdensome for the state to discharge its onus.<sup>36</sup> A factor supporting such a contention would be that the presumed fact was peculiarly within the knowledge of the accused.<sup>37</sup> But this on its own will not be

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<sup>31</sup> Supra.

<sup>32</sup> 29 of 1989.

<sup>33</sup> Supra.

<sup>34</sup> At [69].

<sup>35</sup> **S v Coetzee** supra.

<sup>36</sup> **S v Mbatha**; **S v Prinsloo** supra; **Scagell v Attorney-General of the Western Cape** supra.

<sup>37</sup> See **S v Zuma** supra . Glanville Williams “The Logic to Exceptions” (1988) 47 *Cambridge Law Journal* 261 at 268 makes the following observations regarding the “peculiar knowledge rule”: “A ‘peculiar knowledge’ rule would be reasonable if it referred only to the evidential burden; but why, because the matter was particularly within the knowledge of the defendant, should he be deprived

sufficient evidence of an unduly burdensome onus.<sup>38</sup> Nor will the mere fact that a presumption makes proof of the offence easier, constitute sufficient justification.<sup>39</sup> Nor would it be sufficient to show that in certain circumstances the absence of the presumption would permit a guilty person to escape conviction, this being an inevitable consequence of the presumption of innocence.<sup>40</sup> The courts will also take into account the approach adopted in foreign jurisdictions regarding the necessity of a presumption in relation to the offence or category of offence under consideration.<sup>41</sup>

2.13 Once it is established that the objective of the provision could not be obtained by using policing or prosecutorial tactics<sup>42</sup> which do not conflict with the provisions of the constitution,<sup>43</sup> the question arises whether the objective could have been obtained by using less intrusive means, for example, by imposing an evidential burden rather than a legal burden.<sup>44</sup> This raises

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of the benefit of the doubt? Indeed, to shift the burden of proof to the defendant not only deprives him of the benefit of a reasonable doubt; it convicts him when it is a toss-up whether he is guilty or not.

...The rule is inconsistent with *Woolmington* and the cases following it. The defendant to a criminal charge is in the best position to know whether he had the mental element required for the crime charged; yet *Woolmington* decided that the burden of proving the mental element rests on the prosecution.”

And at 290:

“That it is easy for the defendant to give evidence on an issue, and relatively difficult for the prosecution, may be an excellent reason for placing an evidential burden upon the defendant. It is a very poor reason for telling the jury, at the end of the day, that the defendant is to be convicted if he has not established his version of the issue.”

See also Glanville Williams *The Proof of Guilt* 3 ed (1963) 184-5.

<sup>38</sup> **S v Coetzee** supra. See D Dripps “The Constitutional Status of the Reasonable Doubt Rule” (1987) 75 *California Law Review* 1665 who argues at 1695 that the drastic consequences arising from conviction provide a strong motive to offer exculpatory testimony:

“Because of this incentive, the trier of fact is likely to discount any exculpatory testimony given by the accused. In a criminal case, the unilateral consequences of conviction therefore undercut the credibility of the defendant’s testimony. The credibility problem explains why access to evidence cannot justify shifting the burden of proof to a criminal defendant.”

<sup>39</sup> **S v Bhulwana; S v Gwadiso** supra at [11].

<sup>40</sup> **S v Mbatha; S v Prinsloo** supra [20].

<sup>41</sup> **S v Coetzee** supra; **S v Meaker** supra.

<sup>42</sup> **Scagell v Attorney-General of the Western Cape** supra; **S v Coetzee** supra.

<sup>43</sup> **S v Coetzee** supra.

<sup>44</sup> **S v Mbatha; S v Prinsloo** supra [26]. The fact that the legislature might have adopted a more drastic measure to achieve its objective, such as creating an absolute liability offence appears to be irrelevant. See **S v Coetzee** supra .

the difficulties experienced by the Canadian Courts in determining the parameters of the minimal impairment test.

2.14 Sachs J in **Coetzee v Government of the Republic of South Africa; Matiso v Commanding Officer of Port Elizabeth Prison**<sup>45</sup> formulated the parameters of necessary review as follows:

“[T]he law would not be permitted to impose restrictions or burdens going beyond what would be strictly required to meet the legitimate interests of judgment creditors and society as a whole. This is not to say that an impossibly high threshold would have to be established which effectively ruled out genuine weighing by Parliament of reasonable alternatives within the broad bracket of what would not be unduly oppressive in the circumstances. The requirement of finding ‘the least onerous solution’ would not therefore have to be seen as imposing on the Court a duty to weigh each and every alternative with a view to determining precisely which imposed the least burden. What would matter is that the means adopted by Parliament fell within the category of options which were clearly not unduly burdensome, overbroad or excessive, considering all the reasonable alternatives.”<sup>46</sup>

2.15 This formulation tends towards a conclusion substantial similar to that reached by the majority in **R v Chaulk**,<sup>47</sup> namely that the minimal impairment test does not require Parliament to have chosen the absolutely least intrusive means of meeting its objective.<sup>48</sup> However, in **Coetzee v Government of the Republic of South Africa** the state was not the sole antagonist as the individual rights of judgment debtors had to be weighed together with the interests of judgment creditors and society as a whole. Where the state is the sole antagonist, which is invariably the case when considering a limitation of the presumption of innocence, there is much to be said in favour of the stance adopted by the Canadian Supreme Court in its later decision in **R v Laba**<sup>49</sup> In terms of this approach it is recognized that where the presumption of innocence is the subject of constitutional scrutiny, the state, acting on behalf of the *whole* community, is in effect a singular antagonist of the individual who seeks to assert a right fundamental to the criminal justice system. And in this context “the courts are in as good a position as the legislature to assess whether the least drastic means of achieving the

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<sup>45</sup> 1995 (4) SA 631 (CC).

<sup>46</sup> At 664E-H SALR.

<sup>47</sup> Supra.

<sup>48</sup> At [68]-[69].

<sup>49</sup> 1995 34 CR (4th) 360 (SCC).

governmental purpose have been chosen".<sup>50</sup>

2.16 *For purposes of this discussion document it should be noted that in accordance with its point of departure outlined in chapter 1, in the discussion that follows, the Commission did not deal with many of the provisions that cast an evidential burden on the accused due to the uncertainty regarding the constitutional implications of such a burden.*

### **SECTION 55(2) & (3)(A) - FAILURE OF ACCUSED TO APPEAR ON SUMMONS (1.1)**

2.17 Section 55(2) & (3)(a) requires the accused to prove on a balance of probabilities that her failure to appear on summons was not due to any fault on her part. If the accused does not satisfy the court regarding absence of fault, the accused may be sentenced to a fine not exceeding R300 or to imprisonment for a period not exceeding three months. No doubt there are a number of persuasive arguments that might be made justifying this infringement of the presumption of innocence. On the other hand, it can be argued that it is relatively easy for the prosecution to establish a prima facie case without the assistance of the presumption.

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### **Recommendation**

**2.18 The Commission recommends that the provision should not be amended as there are substantial arguments in favour of justification in terms of the limitation clause. The alternative would be that the presumption should either be removed or redrafted so as to impose no more than an evidential burden on the accused. See also 1.11 in which the summary nature of proceedings is discussed.**

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### **SSUBSECTIONS 60(11)(A) & (B): BAIL APPLICATION OF ACCUSED IN COURT (1.2)**

2.20 In considering the constitutionality of s 60(11)(a) & (b), which the court found imposed a formal onus on the accused, Kriegler J in **S v Dlamini, S v Dladla, S v Joubert, S v**

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<sup>50</sup> **R v Laba** supra [86].

**Schietekat**<sup>51</sup> explicitly stated that the imposition of an onus on an applicant for bail was not constitutionally objectionable as the question of erroneous conviction did not arise.<sup>52</sup>

### **SUBSECTION 67(2)(A) : FAILURE OF ACCUSED ON BAIL TO APPEAR (1.3)**

2.21 The reverse onus provision in this subsection requires the accused to satisfy the court that her failure under subsection (1) to appear or to remain in attendance was not due to fault on her part.

If she fails to so satisfy the court, the provisional cancellation of bail and the provisional forfeiture of the bail money (in terms of ss 67(1)) shall become final.

2.22 Unlike a bail application, this provision is concerned with the accused's blameworthiness and consequently **S v Dlamini, S v Dladla, S v Joubert, S v Scheitekat** cannot be said to be directly applicable. Nevertheless there is a good chance that if an infringement of the presumption of innocence is found to exist it will be viewed as justifiable given the close and rational connection between this provision and the efficient administration of the bail system.

However, the state would also have to establish that the same objectives could not be reached by imposing an evidential burden on the accused.

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<sup>51</sup> 1999 (2) SACR 51 (CC)

<sup>52</sup> At [78].

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## Recommendation

**2.23** It can be argued that it may be prudent to rephrase s 67(2)(a)&(b) so as to impose an evidential rather than a legal burden, but the Commission is for the reasons set out in this paragraph and in 1.1 not convinced that the provision should be changed. The Commission invites comments on the proposal.

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## SECTION 68: CANCELLATION OF BAIL (1.4)

2.24 Du Toit et al<sup>53</sup> submit that the onus is upon the State to satisfy the court on a balance of probabilities that there are sufficient grounds for cancellation of bail in terms of s 68. Consequently, the accused might have her bail cancelled despite the existence of a reasonable doubt. It is submitted that this section will also survive constitutional scrutiny. The standard is the same as that required at the bail application where the prosecution must establish on a balance of probabilities that it is in the interests of justice to refuse bail (see *S v Dlamini, S v Dladla, S v Joubert, S v Scheitekat* supra at 53).

## SUBSECTION 72(4): ACCUSED MAY BE RELEASED ON WARNING IN LIEU OF BAIL (1.5)

2.25 In terms of this subsection unless the accused satisfies the court that his failure to comply with his warning in terms of subsection (1) was not due to his fault he will be guilty of an offence. And the court may sentence him to a fine not exceeding R300 or to imprisonment for a period not exceeding three months.

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## Recommendation

**2.26** See 1.1 above, the same considerations and recommendations would apply here and the Commission invites comments on the proposal.

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## SUBSECTION 74(7): PARENT OR GUARDIAN UNDER EIGHTEEN YEARS TO ATTEND

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<sup>53</sup> At 9-48.

## **PROCEEDINGS (1.6)**

2.27 In terms of this section unless a parent or guardian satisfies the court that his failure to attend proceedings after been duly warned was not due to fault on his part he will be liable to a fine not exceeding R300 or to imprisonment for a period not exceeding three months.

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### **Recommendation**

**2.28 See 1.1 above, the same considerations and recommendations would apply here and the Commission invites comments on the proposal.**

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## **SECTION 78(1A) & 78(1B) MENTAL ILLNESS OR MENTAL DEFECT AND CRIMINAL RESPONSIBILITY (1.7)**

*After amendment by the Criminal Matter Amendment Act 68 of 1998*

2.29 *This amendment has not yet been put into operation. It reads as follows:*

78(1A) Every accused person is presumed not to suffer from a mental illness or mental defect so as not to be criminally responsible in terms of section 78(1), until the contrary is proved on a balance of probabilities.

78(1B) Whenever the criminal responsibility of an accused with reference to the commission of an act or an omission which constitutes an offence is in issue, the burden of proof with reference to the criminal responsibility of the accused shall be on the party who raises the issue.'

2.30 Professor JR Milton<sup>54</sup> has made the following observations regarding these amendments.:

"The position in South African law is now as follows: the presumption of sanity is codified in s 78(1A) of the Criminal Procedure Act 1977; the burden of proving insanity rests on the party raising the issue; the burden may be discharged on the balance of probabilities. ... [T]he accused who raises the defence of insanity is now in more or less the same position as before the passing of the Criminal Matters Amendment Act 1998: he or she must adduce evidence that establishes, on the balance or probabilities, a state of insanity at the time of the offence.

What is puzzling about all this is why Parliament declined the constitutionally correct

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<sup>54</sup> "Law reform: The Criminal Matters Amendment Act 1998" 1999 (12) SACJ 41 at 47- 81.

opportunity to assert the presumption of innocence and prefer the more dubious option of perpetuating the anomalous reverse onus arising from the presumption of sanity? It might be that Parliament (in the form of the Portfolio Committee) was persuaded by the reasoning of the Canadian Supreme Court in *R v Chaulk* (supra) which found that 'the nearly impossible task of disproving insanity' placed an insupportable burden of proof on the prosecution. The Court thus found the reverse onus justifiable.

If this was indeed the motivation of the Portfolio Committee it is, with respect, neither persuasive nor principled.

Whatever may be the position in Canada, the task of disproving insanity in South African law is not so arduous as may appear. Section 79 of the Criminal Procedure Act 1977 requires that an accused person thought to be mentally ill must be referred to a psychiatric institution for examination by a panel of psychiatric practitioners. The panel is required to prepare a report which must, among other things, include a finding as to whether, at the relevant time, the accused's capacity to distinguish right from wrong was affected by mental illness. Should the panel report that the accused was not insane at the time, it is surely disingenuous to suggest that it is 'virtually impossible' for the state, in these circumstances, to disprove sanity?

2.31 Professor Milton's argument is persuasive and it was submitted that it is highly probably that these subsections will be found to be unconstitutional.<sup>55</sup>

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## Recommendation

**2.32 Subsection 78(1B) is a departure from the common law. At common law the only exception to the presumption of innocence was the defence of insanity. Presumably once section 78(1B) comes into force all defences pertaining to criminal responsibility would have to be proved by the accused on a balance of probabilities. (For example, the defence of non-pathological incapacity). In order to justify this infringement of the presumption of innocence the state would have to establish that convictions could not be obtained using ordinary police and prosecutorial tactics. Presumably this would be very difficult to establish as the prosecution has managed without this presumption in the past. It is also likely that s 78(1B) will be found to be unconstitutional.**

**2.33 It was submitted that these sections should be revised so as to impose no more than a duty to introduce a defence on the accused. At this stage the Commission does not recommend an amendment in this regard and invites comments on the proposal.**

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<sup>55</sup> See also the dissenting judgment of Wilson J in *R v Chaulk* 1990 3 SCR 1303 (SCC); D Stuart *Charter Justice in Canadian Criminal Law* 2 ed (1996) 15; 'Will section 1 now save any Charter violation? The Chaulk Effectiveness Test is improper' (1991) 2 CR (4th) 107; P Healy "R v Chaulk: Some answers and some questions on insanity" (1991) 2 CR (4th) 95.

## **SECTION 90: CHARGE NEED NOT SPECIFY OR NEGATIVE EXCEPTION, EXEMPTION, PROVISIO, EXCUSE OR QUALIFICATION (1.8)**

2.34 Section 90 clearly infringes the presumption of innocence as it permits conviction despite the existence of a reasonable doubt by requiring the accused to prove “any exception, exemption, proviso, excuse or qualification”. This defence-offence dichotomy was rejected by the constitutional court in **S v Coetzee**<sup>56</sup>. Although s 90 is prima facie unconstitutional difficulties arise with regard to the limitations clause. Section 90 could apply to any number of statutory offences and it can be argued that whether it constitutes a justifiable limitation will depend on different considerations depending on the nature of the particular offence. On the other hand it could be found to be unconstitutional because of its over-breadth - ie its indiscriminate application to statutory offences. Given the Constitutional Court’s record in striking down reverse onuses which pertain to blameworthiness - very few , if any, applications of s 90 are likely to pass constitutional muster.<sup>57</sup>

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### **Recommendation**

**2.35 It was argued that in the interests of certainty and consistency this provision should be deleted. An infringement of the presumption of innocence requires rigorous justification and it therefore makes sense to require the legislature to make considered choices in imposing reverse onuses. The Commission’s provisional view is that it is not convinced that the section should be amended because of its over-breadth and invites comments on the proposal for amendment.**

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## **SECTION 101: S 319(3) OF ACT 56 OF 1955 (1.9)**

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<sup>56</sup> Supra.

<sup>57</sup> See A Paizes ‘A closer look at the presumption of innocence in our Constitution: what is an accused presumed to be innocence of’ 1998 (11) SACJ 409.

2.36 Section 319(3) of Act 56 of 1955 reads as follows:

“If a person has made any statement on oath whether orally or in writing, and he thereafter on another oath makes another statement as aforesaid, which is in conflict with such first mentioned statement, he shall be guilty of an offence and may, on a charge alleging that he made the two conflicting statements, and upon proof of those two statements and without proof as to which of the said statements was false, be convicted of such offence and punished with the penalties prescribed by law for the crime of perjury, unless it is proved that when he made such statement he believed it to be true.”

2.37 Section 319(3) has no equivalent in the 1977 Act, but was not repealed so it remains in force.

2.38 Du Toit et al<sup>58</sup> make the following observations about s 319(3).

“In contrast to the case of common-law perjury, the State need not for the purposes of statutory perjury prove which one of the two statements is false; all that need be proved, is that the accused on two different occasions made sworn statements and that they differ. This discrepancy must appear clearly in the charge in the sense that the words, in their context and taking into account surrounding circumstances must not be reconcilable. Moreover the alleged conflict must be specifically indicated so that the accused is put in a position to prepare his defence. Where the conflict is obvious a specific indication of the differences is actually superfluous as the possibility of prejudice falls away.

The onus then falls upon the accused to prove on a balance of probability that he believed in the truth of each statement at the time when he made it. ...”

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<sup>58</sup> *Commentary on the Criminal Procedure Act (1987, as revised bi-annually)* 14-43.

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## Recommendation

**2.39 This section by requiring the accused to establish that he believed the statements to be true when he made them clearly infringes the presumption of innocence. Whether or not this would constitute a justifiable limitation is slightly more open question. Nevertheless it is likely that the objectives of s 319(3) could be met by imposing an evidential burden and it was suggested that the section be amended so as to create no more than an evidential burden. The Commission does not recommend an amendment and invites comments on the proposal.**

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## SECTION 151 ACCUSED MAY ADDRESS COURT AND ADDUCE EVIDENCE (1.10)

2.40 In *Brooks v Tennessee*<sup>59</sup> the Supreme Court was required to consider a Tennessee Statute that rendered an accused an incompetent witness if he did not testify before any other defence testimony was heard by the court. The majority held that this infringed the privilege against self-incrimination and the right to remain silent as it penalised the accused for remaining silent at the close of the state case. Section 151(1)(b) can be distinguished on the basis that the accused is not rendered incompetent, he merely runs the risk of a negative inference being drawn. The fact that the inference is permissive and not mandatory also serves to support the constitutionality of the section. The purpose of the section is to prevent the accused from tailoring his/her evidence and it is likely that should the existence of a constitutional infringement be established it will be found to be a justifiable limitation. It could also be cogently argued that s 151(1)(b) does not impinge on any constitutional rights as it merely requires the accused to

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<sup>59</sup> 406 US (1972) 605.

make a choice and does not compel the accused to do anything.<sup>60</sup> It is submitted that **Brooks v Tennessee** does not provide grounds for redrafting s 151(1)(b).

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## Recommendation

**2.41** As reflected in case law it is essential that the unrepresented accused be fully advised of his rights at the close of the state's case. The instructions should pertain not only to the consequences of not testifying before other defence witnesses, but also to the consequences of not testifying at all. Van der Merwe suggests that 'the undefended accused should be warned that he has the constitutional right to testify or to refuse testify, but that if he remains silent that the court will have to decide the case on the uncontroverted prima facie evidence furnished by the state'. The question arises whether it is prudent to include an express instruction to this effect in section 151. This depends upon whether the Act should perform the function of a bench manual or simply as a statute. The Commission's view is that it is not necessary to amend the Act since the matter will have to be dealt with in terms of the constitutional provisions and there

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is no need for merely repeating the constitutional provisions. No amendment is recommended.

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## SECTION 170 FAILURE OF ACCUSED TO APPEAR AFTER ADJOURNMENT (1.11)

**2.42** The constitutional issue raised by s 170(2) is whether summary proceedings in this context infringe the right to a fair trial? In particular the right to be informed of the charge with sufficient detail to answer it (s 35(3)(a)) and the right to presumed innocent and to remain silent (s 35(3)(h)). Section 170 proceedings are analogous to contempt of court proceedings. The constitutionality of summary contempt of proceedings have been considered in a number of provincial division cases.<sup>61</sup>

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<sup>60</sup> See **S v Dlamini; S v Dladla; S v Joubert; S v Schietekat** 1997 (7) BCLR 771 (CC).

<sup>61</sup> See for example, **S v Lavhengwa** 1996 (2) SACR 453 (W) and **Uncedo Taxi Services Association v Maninjwa** 1998 (2) SACR 166 (ECD) (The former dealing with contempt *in facie curiae* and the latter with contempt *ex facie curiae*).

2.43 The conclusion to be drawn from these cases is that summary proceedings for contempt do not infringe the right to a fair trial (and if they do, the infringement would be justifiable). Pickering J in *Uncedo*<sup>62</sup>, held that it was irrelevant whether contempt of court proceedings were instituted by means of civil or criminal proceedings, in either instance proof beyond reasonable doubt was necessary as it would be “clearly unconstitutional to deprive a person of his liberty upon proof merely on a balance of probabilities”. However, Pickering J also approved the holding of Claasen J in *Lavhengwa*<sup>63</sup> that the requirement that the offender in contempt proceedings was required ‘to show cause why he should not be committed for contempt’ did not infringe the presumption of innocence as it merely created an evidential burden. In both cases the court referred to *R v Cohn*,<sup>64</sup> in which the Ontario Court of Appeal held: “Summary proceedings for contempt in the face of the court do not infringe the right to be presumed innocent. The burden on the accused is an evidential one only and if at the end of the proceedings there exists a reasonable doubt as to guilt, he is entitled to be acquitted.”<sup>65</sup>

2.44 Section 170(2) needs to be distinguished from the common law of contempt in that it contains an express reverse onus which places a burden on the accused to prove on a balance of probabilities that his absence was not due to his fault.<sup>66</sup>

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## Recommendation

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**2.45 It was argued that there is strong possibility that this reverse onus which infringes the presumption of innocence will fail the limitations test primarily under the inquiry as to whether less restrictive means could be used to achieve the limitations objective. Again the possibility of imposing an evidential burden should be considered. The Commission’s view is that the that the section should be retained unchanged. See also ss 184, 188 where s 170(2) is made applicable.**

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<sup>62</sup> Supra 174g.

<sup>63</sup> Supra.

<sup>64</sup> (1985) 10 CRR 142.

<sup>65</sup> At 158. However, it is clear from the *Cohn* judgment that the evidential burden in question was constitutional because of its permissive nature.

<sup>66</sup> See *S v Du Plessis* 1970 (2) SA 562 (E) and *S v Bkenlele* 1983 (1) SA 515 (O).

## SECTION 174 ACCUSED MAY BE DISCHARGED AT CLOSE OF CASE FOR PROSECUTION (1.12)

2.46 It was argued that section 174 constitutes an unjustifiable infringement of presumption of innocence in that it gives the court a discretion to refuse discharge in the absence of a prima facie case. The argument is set out below.

2.47 The discretion conferred by the word “may” has enabled the courts to invoke the following test in applying s 174:

“At the close of the State case, when discharge is considered, the first question is:  
(i) is there evidence on which a reasonable man might convict; if not  
(ii) is there a reasonable possibility that the defence evidence might supplement the State case?  
If the answer to either question is yes, there should be no discharge and the accused should be placed on his defence.”<sup>67</sup>

2.48 In *R v Kritzinger*<sup>68</sup> the court held that it had an absolute discretion to refuse discharge even where there was no evidence against the accused.<sup>69</sup> This approach which allows the court to refuse discharge if there is a reasonable possibility that the accused might supplement the state’s case, has been criticized in numerous divisions of the Supreme Court.<sup>70</sup> These decisions were rendered prior to the new constitutional dispensation, *S v Mathebula*<sup>71</sup> being the first case to consider s 174 in light of the interim Constitution. In this case Claasen J noted that ss 11(1),

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<sup>67</sup> *S v Shuping* 1983 (2) SA 119 (BSC) at 120. See also *S v Zimmerie* 1989 (3) SA 484 (C); *S v Campbell* 1991 (1) SACR 435 (Nm); *S v Rittmann* 1992 (2) SACR 110 (Nm).

<sup>68</sup> 1952 (2) SA 402 (W) at 402.

<sup>69</sup> See also *R v Heholdt*(3) 1956 (2) SA 722 (W); *S v Ostilly* 1977 (2) SA 104 (D); *S v Mpetha* 1983 (4) SA 262 (C).

<sup>70</sup> See *S v Phuravhatha* 1992 (2) SACR 544 (V) at 551-2; *S v Qozo* 1994 (1) BCLR 10 (Ck); *S v Beckett* 1987 (4) SA 8 (C); *S v Amerika* 1990 (2) SACR 480 (C); *S v Heller*(2) 1964 (1) SA 524 (W). In a number of earlier cases the court held that a presiding officer has a duty to acquit the accused where there is no evidence that he committed the offence. See *R v Louw* 1918 AD 344; *R v Thielke* 1918 AD 373; *R v Machinini*(2) 1944 WLD 91.

<sup>71</sup> 1997 (1) BCLR 123 (W). See also *S v Ndlangamandla* 1999 (1) SACR 391 (W).

25(3)(c)&(d) of the interim Constitution, curtailed the discretion conferred by s 174 “possibly even to the extent of it being non-existent”.<sup>72</sup> He reasoned as follows:

“The duty to prove an accused’s guilt rests fairly and squarely on the shoulders of the State. As I said previously the accused need not assist the State in any way in discharging this onus. If the State cannot prove any evidence against the accused at the end of the state’s case, why should the accused be detained any longer and not be afforded his constitutional rights of being regarded innocent and thus be acquitted and accorded his freedom? Can it be said that he was given a fair trial if, at the close of the State’s case wherein no evidence was tendered to implicate him in the alleged crimes, the trial is then continued due to the exercise of a discretion in the hope that some evidence implicating him might be forthcoming from the accused himself or his co-accused? To my mind such a discretionary power to continue the trial would fly in the face of the accused’s right to freedom, his right to be presumed innocent and remain silent, not to testify and not to be a compellable witness. To my mind it would constitute a gross unfairness to take into consideration possible future evidence which may or may not be tendered against the accused either by himself or his co-accused or by other co-accused and for that reason decide not to set him free after the State had failed to prove any evidence against him.”<sup>73</sup>

2.49 However, Claasen J attached the caveat that his judgment only pertained to cases where there was no evidence tendered against the accused and did not lay down a general rule “when there is scant evidence against the accused”.<sup>74</sup> He concluded that where there was no evidence against the accused it would render the trial unfair not to grant discharge, and a discretion to refuse discharge could not be said to constitute a justifiable limitation on the basis that it would “be grossly unreasonable that an accused, vested with all the higher order rights, should be put on his defence when no incriminating evidence came from the mouth of the State”.<sup>75</sup> Further, it would negate the accused’s rights to freedom, to be presumed innocent and not to be a compellable witness.<sup>76</sup>

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<sup>72</sup> At 146j.

<sup>73</sup> At 146I-147D.

<sup>74</sup> At 147D.

<sup>75</sup> At 147I.

<sup>76</sup> At 148C. See also **S v Jama** 1998 (2) SACR 237 (N), in which Nicholson J, Niles-Duner J concurring, approved and applied the approach taken by Claasen J in **S v Mathebula** supra.

2.50 In support of his conclusion he drew on the reasoning of the Canadian Supreme Court in **Du Bois v R**.<sup>77</sup> In this case, Lamer J held that the standard required to avoid discharge, ie the “case to meet” was an essential component of the presumption of innocence. He stated that the presumption of innocence required the prosecution to prove “the accused’s guilt beyond a reasonable doubt as well as that of making out the case against the accused before he or she need respond, either by testifying or by calling other evidence”.<sup>78</sup> He referred with approval to the following observation by Ratushny:

“The accused need only respond once. The Crown must present its evidence at an open trial. The accused is entitled to test and to attack it. If it does not reach a certain standard, the accused is entitled to an acquittal. If it does reach that standard, then and only then is the accused required to respond or to stand convicted.”<sup>79</sup>

2.51 However, this component of the presumption of innocence appears to have carried little weight in **S v Makofane**.<sup>80</sup> Mynhardt J was prepared to follow **Mathebula**,<sup>81</sup> only in so far as it applied to a single accused against whom no evidence had been adduced. To not discharge an accused in such circumstances he held, would be unfair as any subsequent conviction would inevitably be a consequence of self-incrimination. However, he found that the court retained a discretion to refuse discharge where some evidence had been adduced against the single accused although not sufficient to constitute a prima facie case. And where there were more than one accused, even if no evidence had been adduced against one or more of them, the court could exercise its discretion to refuse discharge if there was a reasonable possibility that such an accused would be implicated by his co-accused.

2.52 Mynhardt J (Swart J concurring) rejected the reasoning of Claasen J on the basis that the only change brought about by the interim Constitution in relation to s 174 is that the court must now, in exercising its discretion, ask whether the accused has been accorded a fair trial.

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<sup>77</sup> (1986) 23 DLR (4th) 503.

<sup>78</sup> At 521-522.

<sup>79</sup> E Ratushny *Self-incrimination in the Canadian Criminal Process* (1979) 180. See also E Ratushny (WS Tarnopolsky & GA Beaudoin eds) “The Role of the Accused in the Criminal Process” in *The Canadian Charter of Rights and Freedoms* (1982) 335, 359.

<sup>80</sup> 1998 (1) SACR 603 (T). See also **S v Shongwe** 1998 (2) SACR 321 (T); **S v Hudson** 1998 (2) SACR 345 (W).

<sup>81</sup> Supra

Referring to **Key v Attorney General, Cape Provincial Division**<sup>82</sup> and **Khan v S**<sup>83</sup> as authority for the proposition that the decision as to what constitutes a fair trial is discretionary, Mynhardt J appears to take the approach that the specific rights guaranteed in relation to the right to a fair trial are also subject to the court's discretion and does not deal with the contention that the broad discretion exercised under s 174 infringes the right to remain silent and the right to be presumed innocent. The argument against the approach of Mynhardt J are the following. The passages referred to in **Key** and **Khan** clearly apply to the discretion to exclude or include unconstitutionally obtained evidence in accordance with the right to a fair trial. Both cases were decided in terms of the interim Constitution which, unlike the 1996 Constitution, had no explicit provision regarding the admissibility of unconstitutionally obtained evidence. Whilst both cases are consistent with the finding of the court in **S v Zuma**<sup>84</sup> that the right to a fair trial is broader than the specific rights guaranteed in s 25(3) of the interim constitution, they cannot be read as conferring a discretion on the court to disregard those rights in determining whether the requirements for the right to a fair trial have been met.

2.53 It is clear from **R v P (MB)**<sup>85</sup> and **R v Noble**<sup>86</sup> that in the Canadian context, the prosecution must establish a prima facie case in order to avoid discharge. A prima facie case is "one in which the prosecution case is complete on all inculpatory elements of the offence and sufficient in the sense that a reasonable trier of fact could find that the evidence comes up to proof beyond reasonable doubt".<sup>87</sup> McLachlin J<sup>88</sup> explained the distinction between the application of the presumption of innocence at the close of the state case and at the end of the trial, as follows: At the close of the state case the question to be asked, is whether the evidence, *if believed*, establishes proof beyond a reasonable doubt.<sup>89</sup> At the end of the trial the presiding

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<sup>82</sup> 1996 (4) SA 187 (CC).

<sup>83</sup> 1997] 4 All SA 435 (A).

<sup>84</sup> 1995 (1) SACR 568 (CC).

<sup>85</sup> 1994] SCR 555

<sup>86</sup> [1997] 1 SCR 874 at [29], [118]-[120].

<sup>87</sup> P Healy 'Risk, obligation and the consequences of silence at trial (1997) 2 Canadian Criminal Law Review 385 at 398.

<sup>88</sup> In **R v Noble** supra at [119].

<sup>89</sup> This accords with Lord Devlin's statement referring to the evidence required to avoid discharge in **Jayasena v The Queen** [1970] AC 618 at 624: "How much evidence has to be adduced depends

officer must then consider whether he believes the prosecution evidence. This approach, it was submitted, would be consistent with the presumption of innocence as a constitutional right determining the allocation and standard of proof; a logical consequence of which is that an evidential burden cannot shift to the accused until the prosecution has established a prima facie case.<sup>90</sup>

2.54 Skeen<sup>91</sup> points out that the Canadian Supreme Court in **R v Oakes**<sup>92</sup> held that “the presumption of innocence has at least three components: (i) an accused must be proved guilty beyond a reasonable doubt, (ii) the prosecution must bear the onus of proof and (iii) criminal prosecutions must be carried out in accordance with lawful procedures and principles of fairness”.<sup>93</sup> He states that the discretion to refuse discharge on the basis that the defence evidence might supplement the state’s case “offends against the notion of fairness”.<sup>94</sup> On this basis he asserts that the presumption of innocence is infringed.<sup>95</sup> Whilst agreeing with Skeen that such an approach infringes the right to a fair trial and the presumption of innocence, it is submitted that the presumption of innocence is infringed because to refuse discharge in the absence of a prima facie cases absolves the prosecution from overcoming the first hurdle in proving guilt beyond a reasonable doubt. The premature shifting of the evidential burden infringes that part of the presumption of innocence that places the incidence of the burden of proof on the state.

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upon the nature of the requirement. It may be such evidence, as if believed and if left uncontradicted and unexplained, could be accepted by the jury as proof.” In **Haw Tua Tua v Public Prosecutor** [1981] 3 All ER 14 the Privy Council held that proof beyond reasonable doubt is the test to be applied on a no case submission. See also H Glass “The Insufficiency of Evidence to Raise a Case to Answer” (1981) 55 *Australian Law Journal* 842 at 847 who notes: “No reason appears why the test of sufficiency on a no case submission should be different from the test appropriate when the evidence is concluded. Considerations of principle seem to dictate an identical criterion.”

<sup>90</sup> It also accords with test set out in **S v Qozo** supra at 137J, namely: “Is there evidence upon which a reasonable man could convict the accused or is there evidence upon which a reasonable man, if he believed it, might convict or evidence upon which a reasonable man acting carefully might convict?”

<sup>91</sup> A Skeen “A Bill of Rights and the Presumption of Innocence” (1993) 9 *SAJHR* 525, 535.

<sup>92</sup> (1986) 26 DLR (4th) 200 (SCC) at 214.

<sup>93</sup> Skeen op cit 535.

<sup>94</sup> Op cit 535. See also E Du Toit, FJ de Jager, A Paizes, A St Q Skeen, SE van der Merwe *Commentary of the Criminal Procedure Act* (1987, as revised) 22-32F.

<sup>95</sup> Op cit 534.

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## **Recommendation**

**2.55 It was suggested that the unconstitutionality of s 174 can be cured by redrafting the section so as to require the court to grant discharge in the absence of a prima facie case. However, the Commission's view is that the case law on the application of section 174 is well developed and in accordance with the constitutional provisions. There are complicating factors which should also be considered such as the cases where two or more accused persons are on trial. Although the constitutional principles will have to be followed the Commission is not convinced that merely changing the "may" to "must" will necessarily remove the problem. The Commission is of the view that the provisions of section 174 should not be amended at this stage and invites comments on the proposal for amendment.**

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## **SECTION 212 PROOF OF CERTAIN FACTS BY AFFIDAVIT OR CERTIFICATE (1.13)**

2.56 Section 212 contains a host of provisions that effectively impose an evidential burden on the accused, because these are evidential burdens it is unlikely that they will be found to infringe the presumption of innocence. And in any event they would in all likelihood meet the requirements of the limitations clause. However, subsection 10(a) contains a presumption that imposes a legal burden on the accused: "the measuring instrument in question shall, for the purpose of proving the fact which it purports to prove, be accepted at criminal proceedings as

proving the fact recorded by it, *unless the contrary is proved.*”

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### **Recommendation**

**2.57** The Commission recommends that the section be remedied by rewording the presumption so as to merely impose a evidential burden. For example: ‘the measuring instrument .....shall ... be accepted at criminal proceedings as prima facie proof of the fact recorded by it.’

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### **SECTION 217 ADMISSIBILITY OF CONFESSION BY ACCUSED (1.14)**

2.58 The Constitutional Court in **S v Zuma** 1995 (4) BCLR 401 (SA) held the provisions contained in s 217(1)(b)(ii) to be unconstitutional. (The reverse onus provisions infringing the presumption of innocence).

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### **Recommendation**

**2.59** The Commission recommends that sections 217(1)(b) and (2) be deleted.

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### **SECTION 219A ADMISSIBILITY OF ADMISSION BY ACCUSED (1.15)**

2.60 The proviso to s 219A mirrors that in s 217(1)(b)(ii), it has essentially the same reverse onus infringing the presumption of innocence.

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## Recommendation

**2.61 The Commission recommends that the proviso, ss (1)(a)(b) and (2) should be deleted.**

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### GENERAL COMMENT REGARDING ADMISSIONS AND CONFESSIONS (1.16)

2.62 An argument can be made that if the constitutional privilege against self-incrimination is to be upheld, a distinction should not be drawn between the requirements of admissibility for confessions and admissions, and that both admissions and confessions should be required to be made freely and voluntarily in sound and sober senses and without undue influence.<sup>96</sup> The courts have taken an overly technical approach in distinguishing between admissions and confessions and the reluctance to classify statements as confessions appears to have its origins in judicial disapproval of the requirement that a confession made to a peace officer be reduced to writing.<sup>97</sup> This requirement, prior to *Zuma*, was coupled with proviso that once a confession was reduced to writing in the presence of a magistrate and certain requirements were met it would be presumed to have been made freely and voluntarily, in sound and sober senses and without undue influence. This proviso has been found to be unconstitutional and has been held to be an infringement of the presumption of innocence. The requirement of writing and confirmation in the case of certain peace officers has not provided the intended protection to accused persons as it “has the effect of dropping a veil between the treatment of the accused by his custodians and his resulting confession”.<sup>98</sup> There would therefore appear to be little

reason to retain it. The scrapping of this requirement (s 217(1)(a)) should also reduce resistance to the notion of making both admissions and confessions subject to the same requirements of admissibility. Once the distinction between confessions and admissions is removed the necessity of retaining the restrictive and technical common-law interpretation of voluntariness is removed, there being little sense in retaining it when it can be subsumed under the broader umbrella of undue influence. **This issue will, however, be addressed by the Commission**

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<sup>96</sup> See Schwikkard et al *Principles of Evidence* (1997) 195- 199.

<sup>97</sup> Ibid 203-227

<sup>98</sup> See AV Lansdown & J Campbell *South African Criminal Law and Procedure* vol V *Criminal Procedure and Evidence* (1982) 874.

in a separate investigation.

### **SECTION 237 EVIDENCE ON CHARGE OF BIGAMY (1.17)**

2.63 Subsections (1) and (2) contain reverse onus provisions imposing a legal burden on the accused to disprove the fact presumed on a balance of probabilities. (They consequently infringe the presumption of innocence.)

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#### **Recommendation**

**SEC**

**2.64 The Commission recommends that the objectives could be obtained by imposing an evidential burden on the accused. Subsection (3) contains such an evidential burden.**

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### **SECTION 238 EVIDENCE OF A RELATIONSHIP ON CHARGE OF INCEST (1.18)**

2.65 The justification for the reverse onus contained in ss (1)(b) is presumably that this is something peculiarly within the knowledge of the accused. The Constitutional Court has held that this on its own is not sufficient justification for imposing a reverse onus. It also does not appear that it would be impossible to obtain a conviction in the absence of such presumption.

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#### **Recommendation**

**2.66 Given the Constitutional Courts reluctance to uphold reverse onus's of this nature the Commission recommends that subsection (1)(b) be deleted or alternatively rephrased so as to impose an evidential burden.**

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## **SECTION 240 EVIDENCE ON A CHARGE OF RECEIVING STOLEN PROPERTY (1.19)**

2.67 Again the primary justification for the reverse onus in s 240 would be that the fact to be proved is something peculiarly within the knowledge of the accused. And again, the Constitutional Courts approach to reverse onus's does not auger well for this provision. (See also Du Toit 24-116 where it is noted '[w]hether this presumption will survive constitutional attack must be open to serious doubt'. It could also be argued that the imposing of an evidential burden could also fulfil the purpose sought to be achieved by this provision. (Overcoming the difficulties of proving the offence of receiving stolen property) . For example, ss (3) could be replaced by the following: 'Where an accused is proved to have received the property which is the subject of the charge, from a person under the age of eighteen years, at a time when the accused was over the age of twenty-one, this will constitute prima facie proof that the accused knew at the time when he received such property that it was stolen property.'

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### **Recommendation**

**2.68 The Commission recommends that the section be deleted.**

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## **SECTION 243 EVIDENCE OF RECEIPT OF MONEY OR PROPERTY AND GENERAL DEFICIENCY ON CHARGE OF THEFT (1.20)**

2.69 Du Toit et al note: "The effect of subsec (1) and in particular the meaning of the words 'shall be proof' is not entirely clear. It could be argued that the entry in the book of account merely constitutes prima facie proof of receipt or that the subsection creates a presumption of

receipt which casts on to the accused the onus of proving the contrary on preponderance of probability. Hiemstra submits (at 511) that the latter interpretation was intended."<sup>99</sup>

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<sup>99</sup> At 24-119.

2.70 It can be argued that to ensure constitutional consistency the interpretation that imposes an evidential burden should be favoured. Alternatively the ambiguity can be cleared up by inserting the words 'prima facie' before proof ie the section would then read 'shall be prima facie proof'.

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**Recommendation**

**2.71 The Commission is of the view that in view of the different interpretations of the section it should not be amended at this stage. The Commission invites comments on the proposal.**

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**SECTION 245 EVIDENCE ON CHARGE OF WHICH FALSE REPRESENTATION IS ELEMENT (1.21)**

2.72 Declared unconstitutional in **S v Coetzee** 1997 (4) BCLR 437 (CC).

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**Recommendation**

**2.73 The Commission recommends that the section be deleted.**

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**SECTION 249 PRESUMPTION OF FAILURE TO PAY TAX OR TO FURNISH INFORMATION RELATING TO TAX (1.22)**

2.74 Another reverse onus which the state would have to justify. It is argued that it would probably be prudent to rephrase so as to create an evidential burden.

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**Recommendation**

**2.75 The Commission recommends that the section should not be amended at this stage and invites comments on the proposal.**

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**SECTION 250 PRESUMPTION OF LACK OF AUTHORITY (1.23)**

2.76 The reverse onus provision contained in this subsection pertains to offences which fall to be classified as ‘regulatory’. The regulatory nature of an offence will be a factor taken into account in determining whether a reverse onus constitutes a justifiable limitation. The Canadian Courts have been reluctant to strike down reverse onus clauses pertaining to regulatory offences. Consequently it must be concluded that the unconstitutionality of this provision is far from clear. In *S v Fransman*<sup>100</sup> the court held that s 250(1) did not offend the accused’s constitutional rights or the presumption of innocence.

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**Recommendation**

**2.77 The Commission does not recommend any amendment.**

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**SECTION 274 EVIDENCE ON SENTENCE (1.24)**

2.78 The ultimate decision as to what constitutes an appropriate sentence is discretionary and not subject to a specified standard of proof. Prior to the amendment of s 277 of the Criminal

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<sup>100</sup> 1999 (9) BCLR 981 (W).

Procedure Act,<sup>101</sup> there was no onus on either party at the sentencing phase, with the exception of the onus on the accused to prove extenuating circumstances following a murder conviction.<sup>102</sup> Following the amendment of s 277 the Appellate Division held in **S v Nkwanyana**<sup>103</sup> that when the sentence of death was a competent verdict, s 277(2) required the state to prove extenuating factors and negative the existence of mitigating factors beyond a reasonable doubt. Section 277 has subsequently been struck down on the basis that the death penalty is unconstitutional.<sup>104</sup> In *Du Toit et al* it is argued that there is no reason why the standard of proof stipulated in **Nkwanyana** should not be applied at the sentencing phase in respect of other offences.<sup>105</sup>

2.79 There are two possible constitutional grounds that can be used in support of the *Du Toit et al* argument. The right to be presumed innocent and the right to freedom and security of person. Lamer CJC, in **R v Pearson**,<sup>106</sup> noted obiter that the presumption of innocence as a rule requiring proof of guilt beyond a reasonable doubt did not apply at the sentencing phase; however, it did apply as a component of fundamental justice. Logically the presumption of innocence cannot be applied as a rule requiring proof of guilt beyond reasonable doubt at the sentencing phase as guilt has already been proved. It is equally difficult to see how the presumption of innocence can be applied as a principle of fundamental justice as there is no justification for continuing to assume innocence.

2.80 As Schwartz<sup>107</sup> notes there is a distinction between procedures applied in proving criminal liability and the less formal procedures in determining sentence. This, he says, is because “conviction is the basic determination that the defendant has forfeited his freedom and subjected himself to dispositions society makes for its own protection. Sentencing is an

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<sup>101</sup> See s 4 of the Criminal Law Amendment Act 107 of 1990, subsequently repealed by s 35 of Act 105 of 1997).

<sup>102</sup> *Du Toit* 28-4. See also **S v Siebert** 1998 (1) SACR 554 (A).

<sup>103</sup> 1990 (4) SA 735 (A). See also **S v Khumalo** 1991 (4) 310 (A).

<sup>104</sup> **S v Makwanyane** 1995 (2) SACR 1 (CC).

<sup>105</sup> *Du Toit et al* 28-4A; see also **S v Shepard** 1967 (4) 170 (W).

<sup>106</sup> (1992) 3 SCR 665 (SCC) at [36]-[37].

<sup>107</sup> Schwartz ‘Innocence - a Dialogue with Professor Sundby’ (1989) 41 *Hastings Law Journal* 153 at 159.

altogether different matter”.<sup>108</sup>

2.81 However, whilst the presumption of innocence may not apply at the sentencing phase, this does not mean that other societal interests do not require the prosecution to prove disputed facts beyond a reasonable doubt. Colman J in **S v Shepard**,<sup>109</sup> referring to the application of the reasonable doubt rule at the sentencing phase, stated:

“To an accused person the sentence is at least as important as the conviction, and it might seem, in a sense, anomalous to give him the benefit of all reasonable doubts before finding him guilty, and then, when dealing with a question which may make a vast difference to his sentence, to place an onus on him so that the Court, if it finds the probabilities equally balanced in relation to some mitigating factor, will punish him as if that fact did not exist.”<sup>110</sup>

2.82 The Canadian Supreme Court in **R v Gardiner**,<sup>111</sup> in holding that disputed facts relevant to sentencing should be proved beyond a reasonable doubt by the prosecution, quoted the following passage with approval: “[B]ecause the sentencing process poses the ultimate jeopardy to an individual ... in the criminal process, it is just and reasonable that he be granted the protection of the reasonable doubt rule at this vital juncture of the process.”<sup>112</sup>

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<sup>108</sup> At 159. Cf Sundby op cit who argues that the presumption of innocence does apply at the sentencing stage. However, his argument is based on those exceptions in American criminal law which permit the onus to be placed on the accused in respect of certain defences or exceptions. In contrast D Dripps “The Constitutional Status of the Reasonable Doubt Rule” (1987) 75 *California Law Review* 1665 at 1703 notes that the decisions of the United States Supreme Court, whilst inconsistent, reflect a less rigorous application of due process safeguards at the sentencing phase (see, for example, **Williams v New York** 337 US 241 (1949)) and argues that consistency would be best achieved by requiring all issues of fact at the sentencing stage to be proved beyond a reasonable doubt.

<sup>109</sup> Supra .

<sup>110</sup> At 180G. However, the following comments of Colman J in *S v Shepard* supra at 180H also deserve noting: “But on the other hand, it could hardly be sound policy, or conducive to the proper administration of justice, to place an onus on the state to negative, beyond all reasonable doubt, all mitigating circumstances. A prosecutor is not always able to foresee all the mitigating factors which might be urged in favour of an accused person; and when such a factor is put forward, either in argument or in evidence given by or on behalf of the accused, he is not always equipped to test its factual validity, or to counter the assertion if it is false. And that may be true of matters closely related to the gravity of the offence, as well as matters personal to the accused. See also S Sundby “The Virtues of a Procedural View of Innocence - a Response to Professor Schwartz” (1989) 41 *Hastings Law Journal* 171.

<sup>111</sup> [1982] 2 SCR 368 (SCC) at 415.

<sup>112</sup> From JA Olah “Sentencing: The Last Frontier of the Criminal Law” (1980) 16 CR (3d) 97 at 121.

2.83 Consequently, it is possible to argue that the right to freedom and security of person requires that that an onus be placed on the state at the sentencing phase at least in respect of establishing the presence of aggravating factors and the absence of mitigating factors. Another approach may be to consider the sentencing stage a stage of the trial where the ordinary rules of evidence and argument do not necessarily apply. The function of the judicial officer would then be to conduct an investigation into the matter in which case it will no longer be party driven.

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### **Recommendation**

**2.84 This cannot be classified as a section that is clearly unconstitutional. However, any potential conflict with the constitution could easily be reduced by amending s 274(2) to make provision for the prosecution to address the court first on the matter of sentence. The Commission recommends that the provision should be retained as it is.**

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### **SSECTION 332 PROSECUTION OF CORPORATION AND MEMBERS OF ASSOCIATION (1.25)**

2.85 **Subsection 332(5)** was declared invalid by the constitutional court in **S v Coetzee**<sup>113</sup> as an unjustifiable infringement of the presumption of innocence. A number of other subsections in s 332 need to be reconsidered in the light of **S v Coetzee** and the Constitution.

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<sup>113</sup> 1997 1 SACR 379 (CC).

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**Recommendation**

**2.86 Subsection 2 (d) should be deleted unless (5) is redrafted so as to pass constitutional muster.**

**2.87 Subsection (4) in terms of the reverse onus contained in this subsection ‘any record made or kept by a director, servant or agent of a corporate body or any document which was at any time in his custody or under his control, shall be presumed to have been made or kept or to have been in his custody or under his control within the scope of his activities as such director, servant or agent, unless the contrary is proved.’ This reverse onus only operates for the purposes of ss (3) which provides that such a record will be admissible in evidence against the accused in criminal proceeding against a corporate body.**

**2.88 The constitutionality of this presumption will come into question when proof of custody or the control of a document is relevant to a conviction. For when it is so relevant placing the onus on the accused to disprove that the record was kept made or kept in custody or under control within the scope of his activities as director, servant or agent will permit conviction despite the existence of a reasonable doubt.’ It is submitted that the state may have difficulty establishing that the convictions would be thwarted without this presumption. It is submitted that the presumption should either be deleted or re-phrased so as to impose no more than an evidential burden.**

**2.89 Subsection 6(b) constitutes an exception to the hearsay rule and would appear to impose a legal burden on the accused to prove on a balance of probabilities that he had no knowledge of the said document, memorandum, book or record and was in no way party to the drawing up of such document or memorandum or the making or any relevant entries in such book or record. This subsection appears unduly broad and to lack internal rationality. Furthermore it is likely that its purpose could be achieved by applying the ordinary rules applicable to documentary hearsay.**

**It is recommended that this subsection should be deleted.**

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**2.90** Subsection (7) has essential the same format as ss (5) and consequently it must be concluded that this section would also be declared invalid if it were to come before the Constitutional Court.

**2.91** Subsection(8) not unconstitutional - but ss (7) would have to be redrafted so as to comply with the constitution - if subsections 8 & 9 are going to make any sense.

**2.92** Subsection (9) see comments under ss (4) & (8)

**2.93** The Commission recommends that the section be amended as reflected in the draft Bill in Annexure A.

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## **SECTION 337 ESTIMATING AGE OR PERSON (1.26)**

**2.94** This section cannot be used where age is an essential element of the offence charged. But it can be used at sentencing stage. At sentencing stage once the presiding officer has made an estimation of age, the accused must prove on a balance of probabilities that the estimated age is incorrect. Although s 35(3) doesn't apply at the sentencing phase (see discussion under s 274 above at **1.24**), it may be argued that the right to freedom and security of person requires

that such an essential fact be proved beyond reasonable doubt.

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**Recommendation**

**2.95 The Commission recommends that the section be rephrased as reflected in the draft Bill in Annexure A so that it only imposes an evidential burden.**

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**SECTION 338 (1.27)**

2.96 The reverse onus provision in this section requires the accused to establish on a balance of probabilities that the failure to produce a specified document was not due to her fault. If the accused fails to establish this on a balance of probabilities they will be guilty of an offence and be fined (up to R300) or imprisoned (up to 3 months).

2.97 It is argued that this reverse onus is unconstitutional for the same reasons set out under the discussion of s 170.

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**Recommendation**

**2.98 See 1.11 above where it is suggested that an evidential burden replace the reverse onus provision. The Commission recommends that the provision should not be amended.**

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## **CHAPTER 3**

### **EQUALITY AND ACCESS TO COURTS**

#### **EQUALITY**

**9 (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.**

**(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.**

**(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age disability, religion, conscience, belief, culture, language and birth.**

**(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection(3).**

**National legislation must be enacted to prevent or prohibit unfair discrimination.**

**(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.**

3.1 The Constitutional Court in *Harksen v Lane NO*<sup>114</sup> set out the stages of an enquiry into a violation of the equality clause as follows:

(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of s 8(1) [now s 9(1)]. Even if it does bear a rational connection, it might nevertheless amount to discrimination.

(b) Does the differentiation amount to 'discrimination'. This requires a two stage analysis:  
(b)(i) Firstly, does the differentiation amount to 'discrimination'. If it is on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human being or to affect them adversely in a comparably serious manner.

(b)(ii) If the differentiation amount to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and other in his or her situation.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of s 8(2) [now s 9(3) and (4)].

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause.

3.2 As noted by De Waal et al<sup>115</sup> '[a] purposive approach to constitutional interpretation means that s 9 must be read as grounded on a substantive conception of equality'. In *President of the Republic of South Africa v Hugo*<sup>116</sup> the court held:

'We need ... to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context.'

## ACCESS TO COURTS

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<sup>114</sup> 1998 (1) SA 300 (CC) at [53].

<sup>115</sup> J De Waal, I Currie & G Erasmus *The Bill of Rights Handbook* 2 ed (1999) 191.

<sup>116</sup> 1997 (4) SA 1 (CC) at [41].

**34 Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or where appropriate, another independent and impartial tribunal or forum.**

**SECTION 7: PRIVATE PROSECUTION ON CERTIFICATE NOLLE PROSEQUI & SECTION 9: SECURITY BY PRIVATE PROSECUTOR (2.1)**

3.3 One of the comments received by the Commission raised the possible difficulties that may arise by requiring a private prosecutor to provide security for costs. In principle there can be no objection to this requirement as it protects against abuse of process and protects the accused from the whims of a vexatious litigant. Also it is not clearly discriminatory as it treats all potential private prosecutors the same. However, its effect is to deny the indigent complainant access to court where the state declines to prosecute and in this way deprives the complainant of equal benefit to the law.

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**Recommendation**

**3.4 The Commission recommends that this section be amended as in the draft Bill in Annexure A so to allow waiver or reduction of security in the case of the indigent complainant. Subsections 7(1)(b) &(c) require amendment in that they contain different locus standi provisions for men and women and consequently discriminate on the basis of gender. It is suggested that ss (1)(b) be amended so as to confer equal standing to spouses. In the event of such an amendment it would be unnecessary to refer to ‘the wife’ in ss (1)(c).**

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**SECTION 29 SEARCH TO BE CONDUCTED IN DECENT AND ORDERLY MANNER (2.2)**

3.5 A comment was also submitted to the Commission in respect of this section. The section makes provision for women to be searched by women but is silent as regards men. It is submitted that there can be little disadvantage in requiring men to be searched by men. This may well be necessary to ensure that this provision complies with the equality and dignity provisions. It may also assist in establishing that a search is a justifiable infringement of the right to privacy.

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## Recommendation

**3.6 The Commission recommends that the section be amended as in the draft Bill in Annexure A.**

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### **SECTION 190 IMPEACHMENT OR SUPPORT OF CREDIBILITY OF WITNESS (2.3)**

3.7 The difficulty with this section lies in the contents of some aspects of the English law (as understood and applied in South African on the 30 May 1961) made applicable by ss (1). (Subsection (2) is a departure from the English law.)

3.8 We have inherited from the English law the contentious sexual offence exception to the rule that previous consistent statements are irrelevant. In terms of this exception evidence that the complainant in a sexual offence case made a complaint soon after the alleged evidence is admissible. It has been argued that the admission of such evidence favours the complainant unfairly in that the accused is prohibited from leading similar evidence. Conversely it is criticised on the basis that it enables the defence to exploit the complainant's failure to complain timeously in order to cast doubt upon her credibility. The negative inference that may be drawn from the complainant's failure to complain timeously reflects attitudes formulated in a time when there was little understanding of the psychology of the rape survivor. There are many psychological and social factors which may inhibit a rape survivor from making a complaint, consequently the absence of a complaint can never be a reliable criteria in assessing credibility.<sup>117</sup> Two recent High Court cases illustrate the contradictions and inequality in treatment arising from this exception. In **S v M**<sup>118</sup> Donen AJ did not draw a negative inference from the complainant's failure

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<sup>117</sup> See generally Schwikkard in Jagwanth et al *Women and the Law* (1994) 198 -202.

<sup>118</sup> 1999 (1) SACR 664 (C ) at 669f-l.

to report the rape at the first available opportunity on the basis that the failure to report was consistent with the trauma experienced by a person who had been raped. On the other hand Cille J in **S v De Villiers**<sup>119</sup> found that the failure to report the rape at the first reasonable opportunity was a factor undermining the complainant's credibility.

3.9 It was submitted that this exception has no rational basis and results in a category of complainants not being afforded equal protection and benefit of the law. As the exception has no rational basis it cannot meet the requirements of the limitations clause. It was submitted that a further subsection be added to s 190 prohibiting the use of previous consistent statements by complainants in sexual offence cases except where it is suggested that a witness's story is a recent fabrication.

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## **Recommendation**

### **3.10 The Commission recommends no amendment.**

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## **SECTION 191 PAYMENT OF EXPENSES OF WITNESS (2.4)**

(See also discussion of s 179 at 5.1 below.)

3.11 Steytler<sup>120</sup> asserts that this section is discriminatory. "While a state witness is entitled to witness fees (over and above travelling and transport costs) unless the court directs otherwise, a witness for the defence will receive travelling and transport expenses only if the court makes such an order."

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<sup>119</sup> 1999 (1) SACR 297 (O) at 306a-c.

<sup>120</sup> N Steytler *Constitutional Criminal Procedure* (1998) at 355 fn96.

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## Recommendation

3.12 The Commission recommends the amendment of the section as reflected in the draft Bill in Annexure A. The discriminatory effects of s 191 could be removed by deleting ss (2) and inserting the following words in ss (1) Any person who attends criminal proceedings as a witness for the State or defence shall be entitled...

3.13 It is submitted that the proviso to ss (1) is sufficient to prevent abuse of this procedure. Steytler also notes:

“Where an indigent accused who is not in custody, is arraigned at a place far from home, it may be difficult for him or her to be and remain present due to the attendant travel and subsistence costs. At present there is no statutory duty on the state to provide for such cost; the duty applicable to state and defence witnesses excludes an accused. In *S v Maki*(2) the Court found that this was grossly unfair for an accused on bail and recommended that the matter should receive legislative attention. It may also be argued that the effective exercise of

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the right to be present at trial imposes a positive constitutional duty on the state in these circumstances to provide such accused with an adequate subsistence and travel allowance.”

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## SECTION 269 - SODOMY (2.5)

3.14 This section needs to be deleted in light of the constitutional invalidation of the crime of sodomy in *National Coalition for Gay & Lesbian Equality v Minister of Justice*.<sup>121</sup>

3.15 In *National Coalition for Gay & Lesbian Equality v Minister of Justice*<sup>122</sup> the court

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<sup>121</sup> 1998 (2) SACR 102 (W).

<sup>122</sup> Supra.

held that because of the conclusion that criminalizing sodomy is unconstitutional it necessarily follows the inclusion of sodomy in the Schedule is inconsistent with the Constitution.

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## **Recommendation**

**3.16 The Commission recommends that the section be deleted.**

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## **CHAPTER 4 THE RIGHT TO A FAIR TRIAL**

**35(3) Every accused has a right to a fair trial, which includes the right  
(o) of appeal to, or review by, a higher court.**

4.1 The purpose and content of this right is set out by Steytler<sup>123</sup> as follows:

“‘To err is human; thus protection against error is necessary.’ Judicial officers are fallible with regard to the finding of fact or law. Moreover, they may reasonably differ in their conclusions. A court once removed from the heat of a trial may also be better able to judge the rationality of factual conclusions, the correct finding of the law and the fairness of the proceedings. Through appeal and review proceeding consistency and uniformity in the application of the law may be achieved in furtherance of equality before the law.

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<sup>123</sup> Op cit 393-4.

The right to appeal or review, although seldom protected in constitutions, recognises these realities and values. It is an essential component of a deliberate and rational decision-making process, a core characteristic of a judicial system which gives expression to the foundational value of the rule of law.

...

The content of the right of appeal to or review by a higher court is not immediately apparent. Section 35(3)(o) does not constitutionalise the current rules and procedures of appeal and review, but from them the core elements of appeal and review could be extracted and accorded constitutional status. Those include (a) reconsideration of a court decision (or a review of proceeding) by a higher court, (b) a reconsideration of the merits of decisions on law or fact (or fairness of the proceedings) on the basis of the full record of the proceedings (and such additional information as need be), (c) the hearing of the appeal or review only after the completion of the case, and (d) the exercise of the right within reasonable time limits. In addition, the constitutional right should be limited to a one-level appeal or review process and an undefended accused should be duly informed about the right.

4.2 There can be little doubt that informing an unrepresented accused, who is frequently indigent and ignorant of the law (and who may also have been refused legal aid) is going to do little to further the substantive right of appeal or review. To date the existence of procedures for automatic review have significantly contributed to creating a substantive right to review.

#### **SECTION 302 SENTENCES SUBJECT TO REVIEW IN THE ORDINARY COURSE AND SECTION 303 TRANSMISSION OF THE RECORD (3.1)**

4.3 These two sections would appear to be constitutionally consistent but unfortunately they are likely to be repealed by virtue of s 2 Criminal Procedure Amendment Bill B7-99.

4.4 This Amendment Bill does away with automatic review “where an unrepresented accused person is sentenced by a magistrate with less than seven years experience, to a fine exceeding R2 500 or to imprisonment exceeding three months and by a magistrate with more than seven year’s experience, to a fine exceeding R5 000 or to imprisonment exceeding six months”.

4.5 The effect of this is to deny many indigent accused the right to review and thus denying such accused the equal benefit of the law. The abolition of automatic review will also undermine the normative effects of s 302 on magistrates’ conduct.

## CHAPTER 5

### THE RIGHT TO A PUBLIC TRIAL

**35(3)(c) Every accused person has the right to a fair trial, which includes the right to a public trial before an ordinary court**

5.1 Steytler<sup>124</sup> 251 describes the content of the right to a public trial as follows:

“A trial is public when members of the public, including the media, have access to the courtroom and may report on the proceedings. A prerequisite for a public hearing is that the public knows when the proceedings are scheduled...”

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<sup>124</sup> Op cit 251.

## **SECTION 153 CIRCUMSTANCES IN WHICH CRIMINAL PROCEEDINGS SHALL NOT TAKE PLACE IN OPEN COURT (4.1)**

5.2 Section 153 constitutes a prima facie infringement of s 35(3)(c) of the Constitution - the right to a public trial before an ordinary court. However, the grounds enumerated in s 153 for holding criminal proceedings in camera coincide with interests internationally recognised as overriding the right to a public trial.<sup>125</sup> Consequently, it is likely that s 153(1) &(2) will pass constitutional muster. However, s 153(3) may be considered over-broad. It would appear to be directed at protecting the privacy of victims. The offences of indecency and extortion (and related statutory offences) may arise out of facts which do not always demand that the privacy of the victim and/or witnesses trump the right to a public trial. Section 153(3) confers a discretion on judicial officers whether to order that the hearing be heard in camera. However, the scope of the discretion is defined by the nature of the offence alone. It is suggested that the potential over-breadth of s 153(3) could be remedied by specifying criteria to be considered in the exercise of the courts discretion.

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### **Recommendation**

**5.3 The Commission recommends that the provision should be retained unchanged.**

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## **SECTION 154 PROHIBITION OF PUBLICATION OF CERTAIN INFORMATION RELATING TO CRIMINAL PROCEEDINGS (4.2)**

5.4 Section 154 is in potential conflict with s 16(1)(a) - freedom of the press and other media, as well as the right to a public trial, in so far as media access constitutes a component of a public trial. However, the same considerations which apply to s 153 will no doubt assist s 154 in passing constitutional muster (but subject to the same doubts expressed in relation to s 153(3)). The proviso in s 154(1) permitting publication of the name of the accused, the charge, plea, verdict and sentence together with the proviso's contained in ss 154(2)(a) and (3)

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<sup>125</sup> Generally see Steytler op cit 247-249.

conferring a discretion on judicial officers to allow publication where it would be just and equitable, lend weight to the view that s 154 constitutes a reasonable limitation of the abovementioned rights. However, s 154(2)(b) has no such proviso and would consequently be more vulnerable under a proportionality inquiry.

5.5 Steytler<sup>126</sup> makes the following comments in relation to s 154(2)(b):

“This blanket prohibition is constitutionally questionable. While the objective of protecting the victim is legitimate, the sweep of the prohibition is over broad. The offences subject to the prohibition cover a wide array of conduct and not all of which may need to be shielded from the public view. It is not apparent why the ban must apply up to the pleading stage (which could take a considerable time after the first court appearance). It is also unclear why all information should be banned. While the identity of the victim should be protected the public may have a legitimate interest in knowing about the incident and the identity of the accused. Finally, the broad sweep of the prohibition is compounded by the fact that the court has no discretion to decide on the publicity of the proceedings until the accused pleads to the charge.”

5.6 It is submitted that purpose of the provision is to prevent publication prior to a court ruling in terms of s 153(3) and presumable the reason for extending the blanket prohibition to the plea stage is to protect the accused from the stigmatization that might arise from a spurious complaint and to give the court an opportunity to make a ruling in terms of s 153(3). After the plea the public will have full access if there is no s 153(3) ruling, and where there is a s 153(3) ruling the court has a discretion in terms of s 154 (2)(a) to authorize the publication of such information which he/she considers just and equitable. If it is accepted that the interests protected by s 154(2)(b) are legitimate it is likely that this section will meet the requirements of the limitations clause.

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## **Recommendation**

**5.7 The Commission is of the view that there is no immediate necessity to consider redrafting section 154 and recommends no amendment. (See also s 335A)**

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<sup>126</sup> Op cit 255.

**CHAPTER 6**  
**THE RIGHT TO ADDUCE AND CHALLENGE EVIDENCE AND ADEQUATE FACILITIES**  
**TO PREPARE A DEFENCE**

**Section 35(3) Every accused person has the right to a fair trial which includes the right-**  
**(b) to have adequate time and facilities to prepare a defence;**

...

**(i) to adduce and challenge evidence**

6.1 Steytler<sup>127</sup> describes the content and purpose of the right to have adequate facilities to prepare a defence as follows:

“Equality of arms, as one of the underlying principles of the fair trial, becomes illusory where there is a vast disparity of resources between the prosecution and an accused. The former has all the state’s resources of investigation at its disposal, while the latter

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<sup>127</sup> Op cit 235-6.

has only that which he or she can afford. The disparity in arms is most acute where the accused is indigent and in custody. The contest between the state and an accused becomes more even when evidence in the possession of the prosecution, which may assist he accused in the preparation of a defence, is placed at the latter's disposal. Similarly access to other state facilities may, ameliorate the position of the indigent accused.

...

The words 'facilities' means, the Namibian High Court noted in *S v Nassar*<sup>128</sup> 'facilitating or making easier the performance of an action'. The right to 'have ... facilities' implies a claim against someone or somebody to facilitate or make easier the preparation of a defence. In the context of the Bill of Rights the claims are certainly against the state, imposing a positive a duty on it to assist. As the word 'facilities' is not self-limiting, it holds the potential of being expansively interpreted to place an accused in a position similar to that of the prosecution, with state-appointed investigators, access to laboratory expertise, expert witnesses, etc. The state's obligations are, however limited in three ways.

First, as the right arises only when an accused does not have access to a particular facility, an accused must show a particular need. This requirement will be met most readily by indigent and imprisoned accused who cannot afford a particular facility. Second, the need must relate to the preparation of a defence. The onus will be on the accused to show why a particular facility is required. Third, the state's obligation is confined to the provision of facilities that are 'adequate'. The adequacy of the offered facility falls to be determined by the court and is not dictated by the accused."

## 6.2 Steytler<sup>129</sup> sets out the contents of the right to adduce and challenge evidence:

"The right to adduce and challenge evidence lies at the heart of the criminal trial, namely establishing the truth about the guilt or innocence of an accused. The right also applies to all aspects of court proceedings where the court makes a factual finding. In view of the importance of the right, few limitations are readily accepted. This right is reinforced by the right to have access to statements of state witnesses in order for an accused to exercise the right to adduce and challenge evidence in an effective way.

The right to challenge and adduce evidence is a composite right which is given content in a number of rules. Cross-examination, for example, entails both eliciting favourable evidence from witnesses (adducing evidence) and undermining the value or incriminating evidence (challenging evidence). By the same token, calling a defence witness both challenges the state evidence and adduces evidence in reply. The right is discussed in terms of these two active defence rights.

...

The primary interest of the confrontation clause in the Sixth Amendment, the US Supreme Court held in *Douglas v Alabama*<sup>130</sup> is the right of cross-examination. The same is true in South Africa; the right to challenge evidence includes the right to cross-examine. A prerequisite for cross-examination is that all evidence is produced in court and witnesses testify *viva voce*. Where an accused has been deprived of the opportunity to cross-examine a witness due, for example, to the latter's death, the use of such untested evidence will result in the infringement of this constitutional right.

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<sup>128</sup> 1995 1 SACR 212 (Nm) 239b.

<sup>129</sup> Op cit 346-347, 354.

<sup>130</sup> 380 US 415 1965.

An accused has the right to cross-examine state witnesses and any witness called by a co-accused or the court. Presiding officers must inform undefended accused about the right and how to exercise it. The right should be conveyed to accused persons before the first state witness testifies to allow them to listen to the evidence with cross-examination in mind. The information given must appear from the record to enable a court on review to assess its correctness and adequacy.

Both at common and statutory law, an accused does not have an absolutely free hand to cross-examine at will. Under the Bill of Rights these restrictions are either inherent to the right itself or require justification in terms of the limitation clause.

...  
The right to call witnesses is one of the core principles of a fair trial. In the words of Justice Stevens in the decision of *Taylor v Illinois*<sup>131</sup>:

Few rights are more fundamental than that of an accused to present witnesses in his own defense. Indeed, this right is an essential attribute of the adversary system itself.

This right, codified in the CPA, provides that an accused may testify and/or call any witness for the defence, and when undefended, must be informed by the court of this right. The court must also afford an accused the opportunity to exercise this right. An accused is also a witness at his or her own calling he or she should also be informed of this right. Where undefended accused have made a plea explanation in terms of section 115 CPA, the court must inform them, in order to ensure an intelligent exercise of the right to adduce evidence, that such a statement did not constitute evidence, and if they want to testify, they must do so under oath.

In *S v Gwala*<sup>132</sup> Didcott J held that the 'accused had an absolute right to call the witness', a right which was not dependent on permission from the magistrate 'nor qualified in any other way'. Whether or not this dictum accurately reflects the common law, the question must nevertheless be asked whether there are inherent qualification of the constitutional right to call a witness."

## SECTION 166 CROSS-EXAMINATION AND RE-EXAMINATION OF WITNESSES (5.1)

6.3 If s 166(3)(a) infringes the right to challenge evidence it is clearly a justifiable limitation.<sup>133</sup>

6.4 However, it may be worth considering including an instruction to presiding officers regarding advice to the unrepresented accused. The Appellate Division held in *S v Tyebela*<sup>134</sup> that the accused's rights of cross-examination should be explained to them and some indication given as to how cross-examination should be conducted.<sup>135</sup>

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<sup>131</sup> 484 US 400 (1988) 408.

<sup>132</sup> 1989 4 SA 937 (N) 938G.

<sup>133</sup> See van der Merwe 1997 *Stellenbosch Law Review* 348.

<sup>134</sup> 1989 (2) SA 22 (A).

<sup>135</sup> See Du Toit 22-21; Steytler 347 and cases cite therein.

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## Recommendation

**6.5 The Commission recommends that the provision should be retained unchanged and invites comments on the proposal.**

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### SECTION 179 PROCESS FOR SECURING ATTENDANCE OF WITNESS (5.2)

6.6 Steytler<sup>136</sup> comments as follows with regard to s 179:

“The right to a fair trial may also have horizontal application; information in the possession of third parties could be necessary for the adequate preparation of a defence. While the state has the power to search for and seize any documentary evidence wherever located, an accused is limited to the subpoenaing of witnesses to give evidence or ‘to produce any book, paper or document’ at the trial. Documents in possession of a reluctant witness are thus produced only during the trial, rather than before trial in preparation of a defence.

The principle of equality of arms should also apply during preparation for trial, and should entail the compulsory process of obtaining documentary evidence from third parties. However, an accused’s claim to a fair trial will conflict with a third party’s right to privacy. The manner in which the Supreme Court of Canada has sought to balance these rights,<sup>137</sup> is instructive and not inconsistent with the general principles of South African law. First, applying the rules pertaining to the granting of a *subpoena duces tecum* an accused must approach the trial court to obtain a court order by convincing the court that (a) there are reasonable grounds to believe that a specified document is in the possession of a third party, and (b) that it is ‘likely to be relevant’ for the preparation of the defence. The latter tests holds that the court must be satisfied that ‘there is a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify’.<sup>138</sup> An issue at trial refers to the content of the evidence as well as the credibility of a witness and the reliability of other evidence. Second, on the order being granted, the evidence is produced to the court and examined by the presiding officer to determine whether, and to what extent, it should be disclosed to the accused. The court’s discretion should be guided by weighing ‘the salutary and deleterious effects of a production order’ in determining whether a non-production order would constitute a reasonable limit on the ability of the accused to make full answer and defence.”

And at 355,

“An accused’s right to call witnesses would be of limited value if it were confined to those who would attend court voluntarily. The right to compel witness for the defence is thus widely regarded as an integral part of the right to adduce evidence. The ICCPR and the ECHR add the important rider that an accused’s right to compulsory process should be

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<sup>136</sup> Op cit 243.

<sup>137</sup> See *R v O’Connor* (1995) 103 CCC (3d) 1 (SCC).

<sup>138</sup> *O’Connor* supra at [22].

under the same conditions that apply to state witnesses.

The right to compel the attendance of witnesses, as provided for in the CPA<sup>139</sup> now has constitutional status. However, the rules giving effect to the accused's right to subpoena a witness are inferior to those applicable to the state. First, where an accused is unable to pay the necessary costs and fees of a subpoena, the court may subpoena a witness whom it deems 'necessary and material'.<sup>140</sup> The requirement of 'material' is not only higher than the usual threshold for the right to call a witness, but no such condition applies to state witnesses. Second, there is as yet no clear requirement that the court must inform undefended accused of the right to compulsory process. In *S v Hlongwane*<sup>141</sup> the Court held that where the presiding officer is aware that an accused encounters difficulties in getting a witness to court, the accused should be informed of the compulsory process and the court must, if necessary assist in securing the attendance of the witness in view of the constitutional nature of this right, undefended accused should be informed about it as a matter of course."

6.7 It is argued that the deletion of the word material from s 179(3)(a)(ii) may solve Steytler's problem as the threshold for requirements for state and defence will be on a par.

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## Recommendation

**6.8 The Commission recommends the amendment of the section as set out in the draft Bill in Annexure A.**

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## SECTION 182 WITNESS FROM PRISON (5.3)

6.9 See comments made under s 179 above.

6.10 Steytler<sup>142</sup> notes:

"Section 182 CPA falls foul of this principle. Where an accused subpoenas a prisoner as a defence witness, prior authority of the trial court is required; this is granted only if the court is satisfied that the evidence of such witness is 'necessary and material for the defence' and that the 'public safety or order will not be endangered by the calling of the witness.' A suggested ratio for this section is that it 'prevents possible abuse of court

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<sup>139</sup> Section 179(1).

<sup>140</sup> Section 179(3).

<sup>141</sup> 1982 4 SA 321 (N).

<sup>142</sup> Op cit 355.

process by awaiting trial prisoners calling co-accused merely to afford such persons time away from the place of detention'. More compelling arguments would have to be advanced to justify the high standard for relevancy (the evidence must be both 'necessary and material') and the additional requirement of public safety order."

6.11 It is submitted that a rational justification can conceivably be raised in respect of the requirement of public safety and order. However the requirement of materiality should be deleted in order that the provision be constitutionally consistent.

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## **Recommendation**

**6.12 The Commission recommends that section 182 be amended as reflected in the draft Bill in Annexure A.**

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## **SECTION 190 IMPEACHMENT OR SUPPORT OF CREDIBILITY OF WITNESS (5.4)**

6.13 The difficulty with this section lies in the contents of some aspects of the English law (as understood and applied in South African on the 30 May 1961) made applicable by ss (1). (Subsection (2) is a departure from the English law.)

6.14 A party who call a witness who then gives evidence which is unfavourable to her may not cross-examine that witness unless the witness has been declared hostile.

6.15 Van der Merwe<sup>143</sup> argues that this rule constitutes an infringement of the right to challenge evidence. And argues that in applying this rule 'the constitutional right to a fair trial should be the ultimate test and not the question of whether the accused has proved the defence witness 'hostile' in the technical sense of the word'. The US Supreme Court in **Chambers v**

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<sup>143</sup> In Schwikkard et al *Principles of Evidence* at 315-6.

*Mississippi*<sup>144</sup> considered the constitutionality of the rule prohibiting a party from impeaching her own witness and declined to declare the rule itself unconstitutional but found that the manner in which it had been applied to the facts of the case violated the constitutional rights of the accused. This would indicate that this particular rule does not constitute a sufficiently clear infringement of the right to challenge evidence to justify amending s 190 in this respect.

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## **Recommendation**

**6.16 The Commission recommends no amendment.**

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## **CHAPTER 7**

### **THE RIGHT TO FREEDOM AND SECURITY OF PERSON AND**

**Section 12 (1) Everybody has the right to freedom and security of the person which includes the right -**

**(a) not to be deprived for freedom arbitrarily or without just cause;**

**(b) not to be detained without trial;**

...

**(d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful be released;**

**(e) not to be treated or punished in a cruel, inhuman or degrading way.**

**s 35(2) Everyone who is detained, including every sentenced prisoner, has the right -**

...

**(b) to choose, and to consult with , a legal practitioner, and to be informed of this right promptly;**

...

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<sup>144</sup> 410 US 284 (1973).

**(f) to communicate with, and be visited by, that person's -**

**(i) spouse or partner;**

**(ii) next of kin;**

**(iii) chosen religious counsellor; and**

**(iv) chosen medical practitioner.**

## **SECTION 185 DETENTION OF WITNESS (6.1)**

7.1 Section 185 is a prima facie infringement of the right to be detained without trial and its over-breadth makes it highly unlikely that it will meet the requirements of the limitations clause

7.2 Steytler<sup>145</sup> notes:

“The arrest and detention of material witnesses whose presence cannot be secured by a subpoena are for a “just cause”, as they further the truth finding function of trial courts. There can thus be no constitutional objection to section 184(1) CPA which provides that a judicial officer, before whom a not too serious charge is pending, may issue a warrant for the arrest of a material witness where such a person is about to abscond or is evading the service of a subpoena. Once arrested the court may release the witness on warning with suitable conditions.

The same cannot be said of section 185 CPA ...

Apart from the constitutional shortcoming with regard to procedural aspects of section 185, the justness of detention under this provision is also open to doubt. First, persons subjected to this power need not be *material* witnesses. Second, after discounting the legitimate concerns of a threat to personal safety to the ‘witness’, or that he or she may abscond, be tampered with or intimidated, it is difficult to conceive what possible legitimate content can be given to the sweeping phrase that detention ‘would be in the interests of the person concerned or of the administration of justice’. With no identifiable content, the justness of the cause cannot properly be assessed. Third, the power to detain a person until the completion of the proceedings may result in the detention of a person after his or her testimony has been given, thus serving no legitimate purpose.”

7.3 The procedural shortcomings of the section include the following:

C Section 185(1)(b) allows the Attorney-General (DPP) to detain a potential witness for up to 72 hours before obtaining a court order for the detention (if the delay in obtaining the order would defeat the purpose of obtaining the order). The 72 hours period seems unduly long, given that person arrested for allegedly committing an offence must be brought before a court no later than 48 hours after the arrest.

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<sup>145</sup>

Op cit 53.

C Section 185(2)(b) provides that a judge's order for the issue of warrant of detention is final. This is capable of an interpretation that denies the detainee access to appeal. And consequently infringes the right of access to court (s 34) and s 35(2)(d) - to challenge the lawfulness of the detention in prison before a court and, if the detention is unlawful to be released.

7.4 Section 185(5) infringes the accused's rights conferred by s 35(2)(b) & (e). It is difficult to ascertain the justification for denying such a detainee access to a lawyer or care givers specified in s 35(2)(e).<sup>146</sup>

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### **Recommendation**

**7.5 It is recommended that the following amendments be effected to remedy the constitutional short falls in section 185:**

**Deletion of ss (1)(a)(ii) & 2(a)(ii).**

**Deletion of 'seventy-two hours' in ss (1)(b) - to be replaced with 48 hours.**

**Insertion of the following words in ss (2)(b) The decision of a judge to refuse an application under paragraph (a) shall be final.**

**Deletion of ss (5)**

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## **CRUEL, INHUMAN OR DEGRADING PUNISHMENT- SECTIONS 286A DECLARATION OF CERTAIN PERSONS AS DANGEROUS CRIMINALS AND SECTION 286B IMPRISONMENT FOR INDEFINITE PERIOD (6.2)**

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<sup>146</sup> See Steytler op cit 163 & 201; *S v Mhlongo* unreported decision DCLD of Didcott J, case no CC176/88, quoted in (1989) 2 SACJ 402-404.

7.6 Steytler at 422 makes the following observations in respect of s 286A & s 286B

“In view of its severity this sentencing option is constitutionally suspect on a number of fronts.

First, the sentence of indefinite imprisonment could easily be grossly disproportionate to the offence for which an accused has been convicted as there is no statutory requirement that the offence must be of any particular nature or severity. The offence before the court should at least by itself necessitate the enquiry about an accused’s dangerousness.

Second, the definition of dangerousness may not meet the constitutional standard of legality. An offence must pose a danger to “the physical or emotional well-being of other persons” and, in addition, “the community should be protected against” the offender. The term “well-being” when qualified by “emotional”, is vague in the extreme. If a threat of violence is not required, what other type of conduct is feared and when does a danger to the emotional well-being of persons also pose a danger to the community? Is the emotional well-being of the community also to be protected? Vague criteria which are offensive to the principle of legality, could easily result in grossly disproportionate punishment.

The effectiveness of the procedural safeguards attached to the inquiry into dangerousness is also undercut by the very vagueness of this concept. Before deciding on the dangerousness of an offender, the court must direct that an inquiry be conducted at a psychiatric hospital. The offender must be appraised of the inquiry and has the right to contest any of its findings. These procedural safeguards, however important, are of limited value if there is no adequate standard in terms of which the inquiry is conducted or against which an offender can contest the finding.

Third the release procedures may not adequately safeguard against a grossly disproportionate punishment in individual cases. The court, when imposing the sentence of indefinite imprisonment, must reconsider the sentence after a period fixed by it. This period may not exceed the court’s jurisdiction which in the case of a regional court is 10 years and for a High Court wholly within its discretion. Unless the fixed period bears a relationship to the offence committed the sentence may ab initio be grossly disproportionate.”

7.7 It is to be noted that the Act refers to ‘mental’ and not ‘emotional’ well being. Nevertheless, Steytler’s point that the vagueness as to what constitutes a ‘dangerous criminal’ compromises the constitutionality of the provision is valid and the section needs to be reconsidered and a more precise definition of dangerous criminal inserted.

7.8 His other points do not indicate that the section is per se unconstitutional - but that its application may become unconstitutional depending of the particular circumstances of the case.

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**Recommendation**

**7.9 The Commission recommends that the provision should be retained as it is and invites comments on the proposal.**

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**CHAPTER 8**

**THE RIGHT TO BE BROUGHT BEFORE A COURT AFTER ARREST**

**Section 35(1) Everyone who is arrested for allegedly committing an offence has the right-**

**(d) to be brought before a court as soon as reasonably possible but not later than-**

**(i) 48 hours after arrest; or**

**(ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day.**

**8.1 Steytler at 126 notes:**

“The right of an arrested accused to be placed promptly under the authority of a court, with 48 hours being the outer limit, determines the lawful duration of detention in the hands of the police. After the expiry of this period the detention becomes unconstitutional. A positive obligation is thus imposed on the detaining authority to bring an arrestee before a court within that period. The right to be brought to court is circumscribed, first, by a general standard that it must be done ‘as soon as reasonably possible’ and, second, by an outer limit of 48 hours.

...

The right need not be realised immediately on arrest, but within a reasonable period thereafter, with 48 hours being the outer limit. To put it differently; before the expiry of the 48 hours a detention may become unconstitutional if it was reasonably possible for the police to have brought an accused to court but failed to do so.

What is reasonably possible must relate both to the legitimate concerns and capacities of the police as well as the interests of an accused. Where the police have not completed identification procedures or collected evidence for the bail inquiry, it would be unreasonable to require that an accused be taken to court. At the same time it is clearly in the interests of an accused to be brought before a court as soon as possible in order to determine the necessity of his or her detention. Reasonableness will depend on the circumstances of each case giving due consideration to the interests of both parties.”

## **SECTION 50 - ARREST (7.1)**

8.2 **Section 50(6)(b)** reads: An arrested person contemplated in paragraph (a)(i) is not entitled to be brought to court outside ordinary hours.

8.3 Section 50(1)(c) & (d)(i) contain essentially the same provisions as s 35(1)(d). Prior to the insertion of s 50(6)(b) - it was recognised that accused persons were entitled to bring bail applications outside of court hours and before the expiration of the 48 hours period.<sup>147</sup>

8.4 The Constitutional right to be brought before a court as soon as reasonably possible - means precisely that - the 48 hour (during court days) limitation simply reinforces the right to freedom and security of person. And even if it is not reasonably possible to bring the accused before the court within 48 hours the accused must be released on the expiration of the 48 hour period. Consequently, it can be argued that the meaning of ‘reasonably possible’ will depend on the circumstances of each case. For example, when an arrested person is found to suffer from some chronic medical ailment - it is reasonable to demand that public officials make a greater effort to bring that person to the court before the expiration of the 48 hour period - than would be

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<sup>147</sup> See *Twayie v Minister van Justisie* 1986 (2) SA 101 (O); *Garces v Fouche* 1998 (2) SACR 451 NmHC.

the case with accused unencumbered by 'peculiar personal' circumstances.<sup>148</sup>

8.5 It was argued that the blanket prohibition on bail outside of court hours contravenes both s 12 and s 35(1)(d) and should either be deleted or qualified so as to permit bail outside of normal working hours where grounds for urgency exist.

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### **Recommendation**

**8.6 The Commission recommends that the provision should be retained unchanged in view of the fact that s 35(1)(d) presupposes that the time limits are to be calculated with reference to 'ordinary court hours' and invites comments on the proposal.**

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## **CHAPTER 9**

### **THE RIGHT TO A FAIR TRIAL - INCLUDING THE RIGHT TO BE INFORMED OF DETAIL OF CHARGE**

**Section 35(3) Every accused person has a right to a fair trial, which includes the right -  
(a) to be informed of the charge with sufficient detail to answer it;**

9.1 Steytler<sup>149</sup> notes;

“The right to adequate notification of the charge, recognised in foreign constitutions and South African law, is an essential component of the right to a fair trial for it allows for the effective preparation of a defence. It enables an accused, first, to consider whether to

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<sup>148</sup> Hannah J in *Garces* supra at 457e noted: ‘to my mind justice dictates that in the appropriate case a person should have a right to apply for bail outside normal hours.’ However, at 457j he stated: “I must emphasise, however, that real grounds for urgency must exist before a court will hear a bail application outside normal hours. This is a matter which must be decided by magistrates on a case by case basis.”

<sup>149</sup> Op cit 226-7.

contest the charge, and second, if a plea of not guilty is entered, what evidence to gather and how to challenge the incriminating evidence and prepare a line of defence. Once furnished, the prosecution cannot deviate from the charge during the trial for it sets the framework of the trial. This distinguishes the right to adequate notification from the right of access to information held by the prosecution. While such information may be useful for the preparation of a defence, a detailed charge binds the prosecution to a specified offence and particularised factual allegation. The information to be obtained is thus of a more limited nature and does not include the disclosure of evidence.

In *S v Lavhengwa*<sup>150</sup> the Court extended the application of the right to the definition of the offence itself: 'The charge itself must be clear and unambiguous.' In *casu* the Court asked whether the 'nature' of the statutory offence of contempt *in facie curiae*, was sufficiently clear and unambiguous to comply with the constitutional right to be sufficiently informed of the charge?. The prohibition against a vaguely formulated offence is certainly an integral part of the foundational value of the rule of law and can be brought home under a number of rights including the right to freedom and the right against retrospective offences. With the emphasis on 'sufficient details', suggesting factual *allegations*, section 35(3)(a) is not the best suited provision for this purpose."

9.2 And he further notes:<sup>151</sup>

"A vaguely-defined offence raises the same concerns that underlie the prohibition against retroactive offences. If the definition of an offence is so vague that it cannot give sufficient notification to citizens of the proscribed field of activity, it not only permits the unfair prosecution of an unwitting person, but also allows the state a wide spread prosecuting discretion which it may abuse.

The doctrine of vagueness may be invoked under a number of provisions in the Bill of Rights. The doctrine has been included under the *nullum crimen sine lege principle* of article 7 of the European convention. In *S v Lavhengwa* the Court examined whether the nature of the statutory offence of contempt of court was sufficiently clear and unambiguous to comply with the constitutional right to be informed with sufficient particularity of the charge. The dicta in *S v Coetzee*<sup>152</sup> which suggest that an offence could be reviewed for 'overbreadth' in terms of the right to freedom, applies *a fortiori* to vagueness. Vagueness is also pertinent to the limitations clause; a law of general application must meet the criterion of foreseeability. While the doctrine on vagueness is connected to a number of specific provisions in the Bill of Rights it flows directly from the overarching value of the rule of law. Whatever its source provision, its rationale is the same: fair notification to those subjected to the law and adequate guidance for law enforcement agencies."

## **SECTIONS 95(12) & 262 HOUSEBREAKING WITH INTENT TO COMMIT AN OFFENCE (8.1)**

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<sup>150</sup> 1996 2 SACR 453 (W) 482-484.

<sup>151</sup> Op cit 374.

<sup>152</sup> Supra.

9.3 Burchell & Milton<sup>153</sup> note: “By statute the State may charge that X had the intent to commit ‘an offence to the prosecutor unknown’. At common law such a charge was not permitted, but the Criminal Procedure Act sanctions it.” In **S v Woodrow**<sup>154</sup> the court noted that the validity of a charge of housebreaking with intent to commit a crime to the prosecutor unknown “has long been the subject of criticism by our courts and academic writers”.<sup>155</sup>

9.4 Such a charge may not contain sufficient detail to enable the accused to properly prepare a defence. The accused for example, will not know, whether he is being charged with housebreaking with the intention of rape, murder or trespass. It was submitted that the section should be amended so as to reflect the common law position.<sup>156</sup>

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## Recommendation

**9.5 The Commission recommends that the provision be retained since it relates to problems peculiar to the definition of the crime and invites comment on the proposal.**

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<sup>153</sup> *Principles of Criminal Law* (1997) at 605.

<sup>154</sup> 1999 (2) SACR 109 (E) 111.

<sup>155</sup> See De Wet and Swanepoel *Strafreg* 4th ed 369.

<sup>156</sup> The ***Lavhengwa*** approach is preferred because of the particular content of the offence under consideration. The primary component of the offence is clear and consequently the proscribed field of activity is clear. However the accused will clearly be hampered in his defence if he is unaware of the second component of the charge.

## CHAPTER 10

### UNCONSTITUTIONALLY OBTAINED EVIDENCE

**Section 35(5) Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice**

10.1 In *Principles of Evidence*<sup>157</sup> the following observations are made in respect of s 35(5):  
Section 35(3) lists certain basic requirements for the existence of a fair trial. If s 35(5) is read together with s 35(3), it is certainly open to the interpretation that if any of the rights

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<sup>157</sup> Op cit 150.

falling under the umbrella of s 35(3) are violated, the evidence must be excluded, that is, the courts do not have a discretion to include it. However, it must be borne in mind that the limitations clause must be applied before the constitutional exclusionary rule comes into play. Consequently, a person arguing for the exclusion of evidence, on the basis that it was obtained in contravention of the accused's right to a fair trial, would not succeed if the prosecution persuaded the court that the violation was reasonable and justifiable in terms of the limitations clause.

It is also clear that once it is established that the admission of evidence would "be detrimental to the administration of justice" the courts do not have a discretion to admit it. What remains to be determined is the test to be applied in establishing when the admission of evidence would be detrimental to the administration of justice..."

## SECTION 225 EVIDENCE OF PRINTS OR BODILY APPEARANCE OF ACCUSED (9.1)

### 10.2 Section 225(2) reads:

"Such evidence shall not be inadmissible by reason only thereof that the finger-print, palm-print, or foot-print in question was not taken or that the mark, characteristic, feature condition or appearance in question was not ascertained in accordance with the provisions of section 37, or that it was taken or ascertained against the wish or the will of the accused."

10.3 In **S v Huma**(2)<sup>158</sup> the court found that taking the accused's fingerprints against the accused's will did not infringe the accused's constitutional right to dignity or the privilege against self incrimination. Claassen J held that the taking of fingerprints did not constitute testimonial evidence by the accused and was therefore not in conflict with the privilege against self-incrimination. The court clearly found the majority decision in **Schmerber v California**<sup>159</sup> clearly persuasive. We must therefore conclude that in this respect there is no clear constitutional breach. However more contentious is the directive that "evidence shall not be inadmissible by reason only thereof that the finger-print,... was not ascertained in accordance with the provisions of s 37". On the face of it this would allow improperly obtained evidence to be admitted into evidence - however the words "by reason only thereof" make it clear that evidence can be excluded on grounds other than non-compliance with s 37, consequently, s 35(5) of the Constitution will apply in case where evidence is obtained in breach of the Bill of Rights. Therefore it would appear that no amendment is required.<sup>160</sup>

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<sup>158</sup> 1995 (2) SACR 411 (W).

<sup>159</sup> 384 US 757 (1966).

<sup>160</sup> Cf Schwikkard et al *Principles of Evidence* at 118.

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## Recommendation

### 10.4 The Commission recommends no amendment.

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## SECTION 252A - AUTHORITY TO MAKE USE OF TRAPS AND UNDERCOVER OPERATIONS AND ADMISSIBILITY OF EVIDENCE SO OBTAINED (9.2)

### 10.5 In *Du Toit et al*<sup>161</sup> the following constitutional objections are made:

“Subsection (1) provides that evidence obtained as a result of a trap ‘*shall* be admissible’ (emphasis added) if the conduct of the trap ‘does not go beyond providing an opportunity to commit an offence’. Whatever the last phrase may mean... it is not difficult to envisage the existence of traps of this kind which do, nevertheless, entail the violation of one or other constitutional right to a greater or lesser extent - say, for example, the right to dignity or privacy. In such a case [the] provisions of s 35(5) of the Constitution come into play. This subsection provides that ‘[e]vidence obtained in a manner that violates any right in the Bill of Rights *must be excluded* if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice’ (emphasis added). Thus subsection (1), in so far as it provides for the mandatory admission of a class of evidence which ... [may fall into] ... a class for which the Constitution provides for mandatory exclusion in certain circumstances - circumstances which s 252A(1) does not even allow a court to consider - would seem to be clearly unconstitutional.

A similar objection arises in respect of subsection (3)(a), which provides that where the conduct of the trap does go beyond providing an opportunity to commit an offence, the court ‘*may* refuse to allow such evidence to be tendered or *may* refuse to allow such evidence already tendered, to stand, if the evidence was obtained in an improper or unfair manner and [sic] that the admission of such evidence would render the trial unfair or would otherwise be detrimental to the administration of justice’. Where the procurement of such evidence violates a constitutional right, however, (and it seems that this would arise more often than not), s 35(5) of the Constitution again becomes applicable. And, as has been pointed out, this section provides that such evidence ‘*must*’ be excluded if the condition set out in it - conditions which are the same as those in s 252A(3)(a) - are met. To the extent that subsection (3)(a) gives a court a discretionary power to determine whether those conditions are met, it is clearly unobjectionable. But to the extent that it gives a court a discretionary power to exclude *or not to exclude* such evidence once it has found those conditions to have been met, it is clearly in conflict with s 35(5) of the Constitution.”

### 10.6 It was argued that a possible solution would be to substitute the word ‘shall’ in ss (1) with ‘may’. And substitute the word ‘may’ in (3)(a) with ‘must’.

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<sup>161</sup> Op cit 24-133.

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**Recommendation**

**10.7 The Commission does not agree with the proposal and recommends that the provision should be retained unchanged and invites comments on the proposal.**

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**CHAPTER 11**

**THE RIGHT TO A FAIR TRIAL**

**SECTION 213 - PROOF OF WRITTEN STATEMENT BY CONSENT (10.1)**

11.1 This is another exception to the rule that evidence should be given viva voce. The fact that such a statement can only be admitted by consent should in principle save it from constitutional challenge. It is argued that this section may severely compromise the unrepresented accused's right to a fair trial. If no objection is received at least two days before commencement of proceedings (2)(c) & (e) the written statement may be admitted into evidence. An unrepresented accused may not be literate and may not understand the import of not objecting consequently the failure to object may not be a true reflection of consent.

11.2 It was submitted that this section should either be made to apply only to those who have legal representation or include a proviso imposing a duty on presiding officers to ascertain from the accused at proceedings whether he understands the import and consequences of consenting to the admission of such statements and whether the failure to object is indeed consent.

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**Recommendation**

**11.3 The Commission recommends that the provision should be retained unchanged and invites comments on the proposal.**

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**THE UNREPRESENTED ACCUSED (10.2)**

11.4 Clearly the unrepresented accused must be advised fully of his rights and how to best exercise those rights at each step in the criminal process. The question arises whether it is in the interests of the unrepresented accused to instruct presiding officers when and how they should do this by codifying these instructions in the Criminal Procedure Act. In the short term

codification has its advantages in that the instructions are more likely to be noticed by presiding officers. The disadvantage is the rigidity of codification and the risk of attention being paid to form rather than substance. If codification is preferred a full investigation should be made as to the contents of the instructions to be given at each stage in the criminal process. (See also the provisions of sections 105, 119, 126 and 213).

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**Recommendation**

**11.5 The Commission's view is that codification of explanation of rights to undefended accused persons should not be recommended and invites comments on the proposal.**

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**ANNEXURE A**

**Proposed amendments to the Criminal Procedure Act resulting from the application of the Bill of Rights to the Act**

**Note:**

**Although the Commission does not recommend amendments to all**

the sections referred to in this draft Bill, the sections in respect of which the Commission received proposals for amendment but did not recommend a change are included in the Bill and quoted in full. These sections are quoted as “Section .... of the Principal Act is submitted for comment”

The relevant parts to which the proposals relate are quoted in italics. The discussion on the proposals is in the narrative text. The relevant sections are quoted in full in order to provide respondents with sufficient information to submit comments and to open the debate for discussion.

The sections in respect of which the Commission recommended amendments are quoted as “ Section .... of the Principal Act is hereby amended”

## AMENDMENT BILL

### CRIMINAL PROCEDURE ACT AMENDMENT BILL, 1999

#### BILL

To amend the Criminal Procedure Act, 1977, so as to bring the provisions of the Act into line with the Constitution; and to provide for matters connected therewith.

[        ]        Words in bold type in square brackets indicate omissions from existing enactments (in respect of those sections where the Commission recommended

amendments).

\_\_\_\_\_ Words underlined with a solid line indicate insertions in existing enactments (in respect of those sections where the Commission recommended amendments)

xxxxxxx Words in italics indicate the relevant parts of those sections which were considered for amendment but in respect of which no recommendation for amendment have been made (in respect of those sections submitted for comment).

**BE IT ENACTED** by the Parliament of the Republic of South Africa, as follows:-

**3. Section 7 of the Criminal Procedure Act, 1977 (hereinafter referred to as the Principal Act) is hereby amended by the substitution for the section of the following section:**

**“7 Private prosecution on certificate nolle prosequi**

(1) In any case in which an attorney-general declines to prosecute for an alleged offence-

(a) any private person who proves some substantial and peculiar interest in the issue of the trial **[arising out of some injury which he individually suffered]** in consequence of the commission of the said offence[;

**(b) a husband, if the said offence was committed in respect of his wife;**

**(c) the wife or child or, if there is no wife or child, any of the next of kin of any deceased person, if the death of such person is alleged to have been caused by the said offence; or**

**(d) the legal guardian or curator of a minor or lunatic, if the said offence was committed against his ward],**

may, subject to the provisions of section 9, either in person or by a legal representative, institute and conduct a prosecution in respect of such offence in any court competent to try that offence.”

**2. Section 9 of the Principal Act is hereby amended by the substitution for the section of the following section:**

**“9 Security by private prosecutor**

(1) No private prosecutor referred to in section 7 shall take out or issue any

process commencing the private prosecution unless he deposits with the magistrate's court in whose area of jurisdiction the offence was committed-

- (e) **[the amount the Minister may from time to time determine by notice in the Gazette as security that he will prosecute the charge against the accused to a conclusion without undue delay; and]**
- (f) the amount, **if any**, such court, **after having heard the accused**, may determine as security for the costs which may be incurred in respect of the accused's defence to the charge.

(2) The accused may, **at any time thereafter [when he is called upon to plead to the charge]**, apply to the court hearing the charge to review the amount determined under subsection (1) (b), whereupon the court may, before the **prosecution proceeds [accused pleads]** -

- (a) require the private prosecutor to deposit such additional amount as the court may determine with the magistrate's court in which the said amount was deposited; or
- (b) direct that the private prosecutor enter into a recognizance, with or without sureties, in such additional amount as the court may determine.

(3) **[Where a private prosecutor fails to prosecute a charge against an accused to a conclusion without undue delay or where a charge is dismissed under section 11, the amount referred to in subsection (1) (a) shall be forfeited to the State.]**"

3. **Section 15 of the Principal Act is hereby amended by the substitution for the section of the following section:**

**"15 Costs of private prosecution**

(1) The costs and expenses of a private prosecutor shall, subject to the provisions of subsection (2), be paid by the private prosecutor.

(2) **[The court may order a person convicted upon a private prosecution to pay the costs and expenses of the prosecution, including the costs of any appeal against such conviction or any sentence: Provided that the provisions of this subsection shall not apply with reference to any prosecution instituted and conducted under section 8: Provided further that] Where a private prosecution is instituted after the grant of a certificate by an attorney-general that he declines to prosecute and the accused is convicted, the court may order the costs and expenses of the private prosecution, including the costs of an appeal arising from such prosecution, to be paid by the State."**

4. **Section 29 of the Principal Act is hereby amended by the substitution for**

**subsection (1) of the following subsection:**

**“29 Search to be conducted in decent and orderly manner**

**(1)** A search of any person or premises shall be conducted with strict regard to **the protection and respect of dignity and to** decency and order and **[a] the person of [woman] someone** shall be searched by **[a woman] a person of the same sex** only, and if no **[female] such** police official is available, the search shall be made by **[any woman] someone** designated for the purpose by a police official.”

**5. Section 36 of the Principal Act is hereby amended by the substitution for subsection (1) of the following subsection:**

**“36 Disposal of article concerned in an offence committed outside Republic**

(1) Where an article is seized in connection with which-

- (a) an offence was committed or is on reasonable grounds suspected to have been committed in a country outside the Republic;
- (b) there are reasonable grounds for believing that it will afford evidence as to the commission in a country outside the Republic of any offence or that it was used for the purpose of or in connection with such commission of any offence,

the magistrate within whose area of jurisdiction the article was seized may, on application and if satisfied that such offence is punishable in such country **[by death or]** by imprisonment for a period of twelve months or more or by a fine of five hundred rand or more, order such article to be delivered to a member of a police force established in such country who may thereupon remove it from the Republic.

(2) n/a”

**6. Section 37 (1) (c) of the Principal Act is hereby amended by the substitution for the paragraph (c) of the following subparagraph:**

**“37 Powers in respect of prints and bodily appearance of accused**

(1) Any police official may-

- (c) take such steps as he may deem necessary in order to ascertain whether the body of any person referred to in paragraph (a) (i) or (ii) has any mark, characteristic or distinguishing feature or shows any condition or appearance; Provided that no police official shall take any blood sample of the person concerned nor shall a police official **who is not of the same sex as the person concerned** make any examination of the body of the person concerned **[where that person is a female and the police official concerned is not a female]**.

**7. Section 39 of the Principal Act is hereby amended by the substitution for subsection (2) of the following subsection:**

**“39 Manner and effect of arrest**

(2) The person effecting an arrest shall, at the time of effecting the arrest or immediately after effecting the arrest, inform the arrested person of the cause of the arrest **and [or]**, in the case of an arrest effected by virtue of a warrant, upon demand of the person arrested hand him a copy of the warrant.”

**8. Section 47 of the Principal Act is hereby amended by the substitution for subsection (1) of the following subsection:**

**“47 Private persons to assist in arrest when called upon**

(1) Every **[male]** inhabitant of the Republic of an age not below sixteen and not exceeding sixty years shall, when called upon by any police official to do so, assist such police official-

- (a) in arresting any person;
- (b) in detaining any person so arrested.”

**9. Section 50(6)(b) of the Principal Act is submitted for comment-**

**“50 Procedure after arrest**

(1) (a) Any person who is arrested with or without warrant for allegedly committing an offence, or for any other reason, shall as soon as possible be brought to a police station or, in the case of an arrest by warrant, to any other place which is expressly mentioned in the warrant.

(2) For purposes of this section-

- (a) 'a court day' means a day on which the court in question normally sits as a court and 'ordinary court day' has a corresponding meaning; and
- (b) 'ordinary court hours' means the hours from 9:00 until 16:00 on a court day.

...

- (6) (a) At his or her first appearance in court a person contemplated in subsection (1) (a) who-

- (i) was arrested for allegedly committing an offence shall, subject to this subsection and section 60-

- (aa) be informed by the court of the reason for his or her further detention; or

- (bb) be charged and be entitled to apply to be released on bail,

and if the accused is not so charged or informed of the reason for his or her further detention, he or she shall be released; or

- (ii) was not arrested in respect of an offence, shall be entitled to adjudication upon the cause for his or her arrest.

**(b) *An arrested person contemplated in paragraph (a) (i) is not entitled to be brought to court outside ordinary court hours.***

**10. Section 55(2) of the Principal Act is submitted for comment-**

**“55 Failure of accused to appear on summons**

(1) An accused who is summoned under section 54 to appear at criminal proceedings and who fails to appear at the place and on the date and at the time specified in the summons or who fails to remain in attendance at such proceedings, shall be guilty of an offence and liable to the punishment prescribed under subsection (2).

(2) The court may, if satisfied from the return of service referred to in paragraph (b) of section 54 (2) that the summons was served on the accused in terms of paragraph (a) of that section and that the accused has failed to appear at the place and on the date and at the time specified in the summons, or if satisfied that the accused has failed to remain in attendance at the proceedings in question, issue a warrant for his arrest and, when he is brought before the court, in a summary manner enquire into his failure so to appear or so to remain in attendance ***and unless the accused satisfies the court that his failure was not due to any fault on his part***, convict him of the offence referred to in subsection (1) and sentence him to a fine not exceeding R300 or to imprisonment for a period not exceeding three months: Provided that . . .”

**11. Section 67(2)(a) and (b) of the Principal Act is submitted for comment-**

**“67 Failure of accused on bail to appear**

(2) (a) If the accused appears before court within fourteen days of the issue under subsection (1) of the warrant of arrest, the court shall confirm the provisional cancellation of the bail and the provisional forfeiture of the bail money, ***unless the accused satisfies the court that his failure under subsection (1) to appear or to remain in attendance was not due to fault on his part.***

(b) ***If the accused satisfies the court that his failure was not due to fault on his part,*** the provisional cancellation of the bail and the provisional forfeiture of the bail money shall lapse.

**12. Section 72(4) of the Principal Act is submitted for comment-**

**“72 Accused may be released on warning in lieu of bail**

(4) The court may, if satisfied that an accused referred to in subsection (2) (a) or a person referred to in subsection (2) (b), was duly warned in terms of paragraph (a) or, as the case may be, paragraph (b) of subsection (1), and that such accused or such person has failed to comply with such warning or to comply with a condition imposed, issue a warrant for his arrest, and may, when he is brought before the court, in a summary manner enquire into his failure and, ***unless such accused or such person satisfies the court that his failure was not due to fault on his part,*** sentence him to a fine not exceeding R300 or to imprisonment for a period not exceeding three months.”

**13. Section 74(7) of the Principal Act is submitted for comment-**

**“74 Parent or guardian of accused under eighteen years to attend proceedings**

(7) The court, if satisfied from evidence placed before it that a parent or guardian has been warned to attend the proceedings in question and that such parent or guardian has failed to attend such proceedings, or that a parent or guardian has failed to remain in attendance at such proceedings, may issue a warrant for the arrest of such parent or guardian and, when he is brought before the court, in a summary manner enquire into his failure to attend or to remain in attendance, and, ***unless such parent or guardian satisfies the court that his failure was not due to fault on his part,*** sentence him to a fine not exceeding R300 or to imprisonment for a period not exceeding three months.”

**14. Section 78(1A) and (1B) of the Principal Act is submitted for comment-**

**“78 Mental illness or mental defect and criminal responsibility**

(not yet in operation)

(1A) ***Every person is presumed not to suffer from a mental illness or mental defect so as not to be criminally responsible in terms of section 78 (1), until the contrary is proved on a balance of probabilities.***

(1B) Whenever the criminal responsibility of an accused with reference to the commission of an act or an omission which constitutes an offence is in issue, ***the burden of proof with reference to the criminal responsibility of the accused shall be on the party who raises the issue.***

15. Section 85 of the Principal Act is hereby amended by the substitution for paragraph (d) of subsection (1) of the following paragraph:

**“85 Objection to charge**

(1) An accused may, before pleading to the charge under section 106, object to the charge on the ground-

(d) that the charge does not contain sufficient particulars of any matter alleged in the charge[: **Provided that such an objection may not be raised to a charge when he is required in terms of section 119 or 122A to plead thereto in the magistrate's court;**”

16. Section 90 of the Principal Act is submitted for comment-

**“90 Charge need not specify or negative exception, exemption, proviso, excuse or qualification**

***In criminal proceedings any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany in the same section the description of the offence in the law creating the offence, may be proved by the accused but need not be specified or negated in the charge and, if so specified or negated, need not be proved by the prosecution.***”

17. Section 95(12) of the Principal Act is submitted for comment-

**“95 Rules applicable to particular charges**

***(12) A charge relating to housebreaking or the entering of any house or premises with intent to commit an offence, whether the charge is brought under the common law or any statute, may state either that the accused intended to commit a specified offence or that the accused intended to commit an offence to the prosecutor unknown.***”

18. The following proposed amendment of section 105 of the Principal Act is submitted for comment-

**“105 Accused to plead to charge**

**(a)** The charge shall be put to the accused by the prosecutor before the trial of the accused is commenced.

**(b) The presiding officer or the judge shall thereupon explain to the accused of the rights enshrined by section 35(3)(f) to (k) of the Constitution and thereafter** the accused shall, subject to the provisions of sections 77 and 85, be required by the court forthwith to plead **to the charge [thereto]** in accordance with section 106.”

19. Section 107 of the Principal Act is submitted for comment-

**“107 Truth and publication for public benefit of defamatory matter to be specially pleaded**

*A person charged with the unlawful publication of defamatory matter, who sets up as a defence that the defamatory matter is true and that it was for the public benefit that the matter should be published, shall plead such defence specially, and may plead it with any other plea except the plea of guilty.”*

20. The following proposed amendment of section 119 of the Principal Act is submitted for comment-

**“119 Accused to plead in magistrate's court on instructions of attorney-general**

**(a)** When an accused appears in a magistrate's court and the alleged offence may be tried by a superior court only or is of such a nature or magnitude that it merits punishment in excess of the jurisdiction of a magistrate's court, the prosecutor may, notwithstanding the provisions of section 75, on the instructions of the attorney-general, whether in general or in any particular case, put the charge, as well as any other charge which shall, in terms of section 82, be disposed of in a superior court, to the accused in the magistrate's court.

**(b) The presiding officer shall thereupon explain to the accused of the rights enshrined by section 35(3)(f) to (k) of the Constitution and thereafter** the accused shall and the accused shall, subject to the provisions of sections 77 and 85, be required by the magistrate to plead thereto forthwith.”

21. The following proposed amendment of section 126 of the Principal Act is

submitted for comment-

**“126 Procedure to be followed by magistrate at preparatory examination**

Where an attorney-general instructs that a preparatory examination be held against an accused, the magistrate or regional magistrate shall, after advice of the decision of the attorney-general, advise the accused of the decision of the attorney-general, **explain to the accused of the rights enshrined by section 35(3)(f) to (k) of the Constitution** and **thereafter** proceed in the manner hereinafter described to enquire into the charge against the accused.”

**22. Section 148 of the Principal Act is hereby deleted-**

**“148 [State President may constitute special superior court]”**

**Repeal in toto**

**23. Section 153(3) of the Principal Act is submitted for comment-**

**“153 Circumstances in which criminal proceedings shall not take place in open court**

...

(3) In criminal proceedings relating to a charge that the accused committed or attempted to commit-

- (a) any indecent act towards or in connection with any other person;
- (b) any act for the purpose of procuring or furthering the commission of an indecent act towards or in connection with any other person; or
- (c) extortion or any statutory offence of demanding from any other person some advantage which was not due and, by inspiring fear in the mind of such other person, compelling him to render such advantage,

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

24. **Section 170(2) of the Principal Act is submitted for comment-**

**“170 Failure of accused to appear after adjournment or to remain in attendance**

(2) The court may, if satisfied that an accused referred to in subsection (1) has failed to appear at the place and on the date and at the time to which the proceedings in question were adjourned or has failed to remain in attendance at such proceedings as so adjourned, issue a warrant for his arrest and, when he is brought before the court, in a summary manner enquire into his failure so to appear or so to remain in attendance and, ***unless the accused satisfies the court that his failure was not due to fault on his part***, convict him of the offence referred to in subsection (1) and sentence him to a fine not exceeding R300 or to imprisonment for a period not exceeding three months.”

25 **Section 174 of the Principal Act is submitted for comment-**

**“174 Accused may be discharged at close of case for prosecution**

If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it ***may*** return a verdict of not guilty.”

26. **Section 179 of the Principal Act is hereby amended by the substitution for subsections (2) and (3) of the following subsections:**

**“179 Process for securing attendance of witness**

(2) Where an accused desires to have any witness subpoenaed, a sum of money sufficient to cover the costs of serving the subpoena shall be deposited with the prescribed officer of the court **and such officer shall subpoena such witness.**

(3) (a) Where an accused desires to have any witness subpoenaed and he satisfies the prescribed officer of the court-

- (i) that he is unable to pay the necessary costs and fees; and
- (ii) that **the evidence of** such witness is **reasonably** necessary and material for his defence,

such officer shall subpoena such witness **at the cost of the State.**

- (b) In any case where the prescribed officer of the court is not so satisfied, he shall, upon the request of the accused, refer the relevant application to the judge or judicial officer presiding over the court, who may grant or refuse the application or defer his decision until he has heard other evidence in the case.”

**27. Section 182 of the Principal Act is hereby amended-**

**“182 Witness from prison**

A prisoner who is in a prison shall be subpoenaed as a witness on behalf of the defence or a private prosecutor only if the court before which the prisoner is to appear as a witness authorizes that the prisoner be subpoenaed as a witness, and the court shall give such authority only if it is satisfied that the evidence in question is **reasonably** necessary and material for the defence or the private prosecutor, as the case may be [**, and that the public safety or order will not be endangered by the calling of the witness].”**

**28. Section 185 of the Principal Act is hereby submitted for comment-**

**“185 Detention of witness**

(1) (a) Whenever any person is with reference to any offence referred to in Part III of Schedule 2 in the opinion of the attorney-general likely to give evidence on behalf of the State at criminal proceedings in any court, and the attorney-general, from information placed before him-

- (i) is of the opinion that the personal safety of such person is in danger or that he may abscond or that he may be tampered with or that he may be intimidated; or
- (ii) deems it to be in the interests of such person or of the administration of justice that he be detained in custody,

the attorney-general may by way of affidavit place such information before a judge in chambers and apply to such judge for an order that the person concerned be detained pending the relevant proceedings.

***(b) The Attorney-general may in any case in which he is of the opinion that the object of obtaining an order under paragraph (a) may be defeated if the person concerned is not detained without delay, order that such person be detained forthwith but such order shall not endure for longer than seventy-two hours unless the attorney-general within that time by way of affidavit places before a judge in chambers the information on which he ordered the detention of the person concerned and such further***

**information as might become available to him, and applies to such judge for an order that the person concerned be detained pending the relevant proceedings.**

**(c) The attorney-general shall, as soon as he applies to a judge under paragraph (b) for an order of detention, in writing advise the person in charge of the place where the person concerned is being detained, that he has so applied for an order, and shall, where a judge under subsection (2) (a) refuses to issue a warrant for the detention of the person concerned, forthwith advise the person so in charge of such refusal, whereupon the person so in charge shall without delay release the person detained.**

(2) (a) The judge hearing the application under subsection (1) may, if it appears to him from the information placed before him by the attorney-general-

- (i) that there is a danger that the personal safety of the person concerned may be threatened or that he may abscond or that he may be tampered with or that he may be intimidated; or
- (ii) that it would be in the interests of the person concerned or of the administration of justice that he be detained in custody,**

issue a warrant for the detention of such person.

**(b) The decision of a judge under paragraph (a) shall be final:** Provided that where a judge refuses an application and further information becomes available to the attorney-general concerning the person in respect of whom the application was refused, the attorney-general may again apply under subsection (1) (a) for the detention of that person.

(3) A person in respect of whom a warrant is issued under subsection (2), shall be taken to the place mentioned in the warrant and, in accordance with regulations which the Minister is hereby authorized to make, be detained there or at any other place determined by any judge from time to time, **or, where the person concerned is detained in terms of an order by the attorney-general under subsection (1) (b), such person shall, pending the decision of the judge under subsection (2) (a), be taken to a place determined by the attorney-general and detained there in accordance with the said regulations.**

**(4) Any person detained under a warrant in terms of subsection (2) shall be detained for the period terminating on the day on which the criminal proceedings concerned are concluded, unless-**

- (a) the attorney-general orders that he be released earlier; or**
- (b) such proceedings have not commenced within six months from the date on which he is so detained, in which case he shall be released after the expiration of such period.**

**(5) No person, other than an officer in the service of the State acting in the performance of his official duties, shall have access to a person detained**

*under subsection (2), except with the consent of and subject to the conditions determined by the attorney-general or an officer in the service of the State delegated by him.*

...

*(9) (a) In this section the expression 'judge in chambers' means a judge sitting behind closed doors when hearing the relevant application.*

*(b) No information relating to the proceedings under subsection (1) or (2) shall be published or be made public in any manner whatever."*

**29. Section 189(1) of the Principal Act is submitted for comment-**

**"189 Powers of court with regard to recalcitrant witness**

(1) If any person present at criminal proceedings is required to give evidence at such proceedings and refuses to be sworn or to make an affirmation as a witness, or, having been sworn or having made an affirmation as a witness, refuses to answer any question put to him or refuses or fails to produce any book, paper or document required to be produced by him, ***the court may in a summary manner enquire into such refusal or failure*** and, unless the person so refusing or failing has a just excuse for his refusal or failure, sentence him to imprisonment for a period not exceeding two years or, where the criminal proceedings in question relate to an offence referred to in Part III of Schedule 2, to imprisonment for a period not exceeding five years."

**30. Section 191 of the Principal Act is hereby amended by the substitution for the section of the following section:**

**"191 Payment of expenses of witness**

(1) Any person who attends criminal proceedings as a witness for the State shall be entitled to such allowance as may be prescribed under subsection (3): Provided that the judicial officer or the judge presiding at such proceedings may, if he thinks fit, direct that no such allowance or that only a part of such allowance shall be paid to any such witness.

**(2) [Subject to any regulation made under subsection (3), the judicial officer or the judge presiding at criminal proceedings may, if he thinks fit, direct that any person who has attended such proceedings as a witness for the accused, shall be paid such allowance as may be prescribed by such regulation, or such lesser allowance as such judicial officer or such judge may determine.]**

(3) The Minister may, in consultation with the Minister of Finance, by regulation prescribe a tariff of allowances which may be paid out of public moneys to witnesses in criminal proceedings, and **[may by regulation prescribe different tariffs for witnesses according to their several callings, occupations or stations in life, and]** according **[also]** to the distances to be travelled by such

witnesses to reach the place where the proceedings in question are to take place, and may by regulation further prescribe the circumstances in which such allowances may be paid to any witness for an accused.”

31. **Section 198 of the Principal Act is hereby amended by the substitution for the section of the following section:**

**“198 Privilege arising out of marital state**

(1) A husband shall not at criminal proceedings be compelled to disclose any communication which his wife made to him during the marriage, and a wife shall not at criminal proceedings be compelled to disclose any communication which her husband made to her during the marriage.

(2) Subsection (1) shall also apply to a communication made during the subsistence of a marriage or a putative marriage which has been dissolved or annulled by a competent court, as well as **a customary marriage or customary union concluded under the indigenous law and custom of any of the indigenous peoples of the Republic of South Africa or any marriage concluded under any system of religious law.**”

32. **Section 212 of the Principal Act is hereby amended by the substitution for subsection (10)(a) of the following subsection:**

**“212 Proof of certain facts by affidavit or certificate**

(10) (a) The Minister may in respect of any measuring instrument as defined in section 1 of the Trade Metrology Act, 1973 (Act 77 of 1973), by notice in the Gazette prescribe the conditions and requirements which shall be complied with before any reading by such measuring instrument may be accepted in criminal proceedings as proof of the fact which it purports to prove, and if the Minister has so prescribed such conditions and requirements and upon proof that such conditions and requirements have been complied with in respect of any particular measuring instrument, the measuring instrument in question shall, for the purposes of proving the fact which it purports to prove, be accepted at criminal proceedings **as prima facie proof of [proving] the fact recorded by it[, unless the contrary is proved].**”

33. **Section 213 [subsections (2)(c)(e) and (f) and (4)] of the Principal Act is submitted for comment-**

**“213 Proof of written statement by consent**

(c) A copy of the statement, together with a copy of any document referred to in

the statement as an exhibit, or with such information as may be necessary in order to enable the party on whom it is served to inspect such document or a copy thereof, shall, before the date on which the document is to be tendered in evidence, be served on each of the other parties to the proceedings, and **any such party may, at least two days before the commencement of the proceedings, object to the statement being tendered in evidence under this section.**

(e) If a party does not object under paragraph (c) or if the parties agree before or during the proceedings in question that the statement may be so tendered, the statement **may, upon the mere production thereof at such proceedings, be admitted as evidence in the proceedings.**

(f) When the documents referred to in paragraph (c) are served on an accused, the documents shall be accompanied by a written notification in which the accused is informed that the statement in question will be tendered in evidence at his trial in lieu of the State calling as a witness the person who made the statement but that such statement shall not without the consent of the accused be so tendered in evidence if he notifies the prosecutor concerned, at least two days before the commencement of the proceedings, that he objects to the statement so being tendered in evidence.

(4) Notwithstanding that a written statement made by any person may be admissible as evidence under this section-

(a) a party by whom or on whose behalf a copy of the statement was served, may call such person to give oral evidence;

(b) **the court may, of its own motion, and shall, upon the application of any party to the proceedings in question, cause such person to be subpoenaed to give oral evidence before the court or the court may,** where the person concerned is resident outside the Republic, issue a commission in respect of such person in terms of section 171.”

34. **Section 217 of the Principal Act is hereby amended by the substitution for the section of the following section:**

**“217 Admissibility of confession by accused**

(1) Evidence of any confession made by any person in relation to the commission of any offence shall, **if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto,** be admissible in evidence against such person at criminal proceedings relating to such offence: Provided-

(a) . . .

(b) [that where the confession is made to a magistrate and reduced to writing by him, or is confirmed and reduced to writing in the presence of a magistrate, the confession shall, upon the mere production thereof at the proceedings in question-

(i) . . .

(ii) be presumed, *unless the contrary is proved*, to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, if it appears from the document in which the confession is contained that the confession was made freely and voluntarily by such person in his sound and sober senses and without having been unduly influenced thereto.]

(2) [The prosecution may lead evidence in rebuttal of evidence adduced by an accused in rebuttal of the presumption under proviso (b) to subsection (1).]”

35. Section 219A of the Principal Act is hereby amended by the substitution for the section of the following section:

**“219A Admissibility of admission by accused**

(1) Evidence of any admission made extra-judicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence and is proved to have been voluntarily made by that person, be admissible in evidence against him at criminal proceedings relating to that offence [ : **Provided that where the admission is made to a magistrate and reduced to writing by him or is confirmed and reduced to writing in the presence of a magistrate, the admission shall, upon the mere production at the proceedings in question of the document in which the admission is contained-**

(a) .....

(b) be presumed, *unless the contrary is proved*, to have been *voluntarily* made by such person if it appears from the document in which the admission is contained that the admission was made voluntarily by such person.]

(2) [The prosecution may lead evidence in rebuttal of evidence adduced by an accused in rebuttal of the presumption under subsection (1).]”

36. Section 237 of the Principal Act is hereby amended by the substitution for the section of the following section:

**“237 Evidence on charge of bigamy**

(1) At criminal proceedings at which an accused is charged with bigamy, it shall, as soon as it is proved that a marriage ceremony, other than the ceremony relating to the alleged bigamous marriage, took place within the Republic between the accused and another person, be **prima facie proof [presumed, unless the contrary is proved,]** that the marriage was on the date of the solemnization thereof lawful and binding.

(2) At criminal proceedings at which an accused is charged with bigamy, ***it shall be prima facie proof [presumed, unless the contrary is proved,]*** that at the time of the solemnization of the alleged bigamous marriage there subsisted between the accused and another person a lawful and binding marriage-

(a) if there is produced at such proceedings, in any case in which the marriage is alleged to have been solemnized within the Republic, an extract from the marriage register . . . “

**37. Section 238 of the Principal Act is hereby amended by the substitution for subsection (1) of the following subsection:**

**“238 Evidence of relationship on charge of incest**

(1) At criminal proceedings at which an accused is charged with incest-

(a) it shall be sufficient to prove that the **[woman or girl] person** on whom or by whom the offence is alleged to have been committed, is reputed to be the lineal ascendant or descendant or the sister, stepmother or stepdaughter of the other party to the incest;

(b) the accused shall **prima facie** be **[presumed, unless the contrary is proved,] deemed** to have had knowledge, at the time of the alleged offence, of the relationship existing between him and the other party to the incest.”

**38. Section 240 of the Principal Act is hereby deleted-**

**“240 Evidence on charge of receiving stolen property**

**To be repealed**

**[(3) Where the accused is proved to have received the property which is the subject of the charge, from a person under the age of eighteen years, he shall be presumed to have known at the time when he received such property that it was stolen property, unless it is proved-**

**(a) that the accused was at that time under the age of twenty-one years; or**

**(b) that the accused had good cause, other than the mere statement of the person from whom he received such property, to believe, and that**

he did believe, that such person had the right to dispose of such property.]”

39. Section 243(1) of the Principal Act is submitted for comment-

**“243 Evidence of receipt of money or property and general deficiency on charge of theft**

(1) At criminal proceedings at which an accused is charged with theft-

. . . . .

an entry in any book of account kept by the accused or kept under or subject to his charge or supervision, and which purports to be an entry of the receipt of money or of property, **shall be proof that** such money or such property was received by the accused.”

40. Section 245 of the Principal Act is hereby deleted-

**“245 [Evidence on charge of which false representation is element**

**If at criminal proceedings at which an accused is charged with an offence of which a false representation is an element, it is proved that the false representation was made by the accused, he shall be deemed, unless the contrary is proved, to have made such representation knowing it to be false.]”**

41. Section 249 of the Principal Act is submitted for comment-

**“249 Presumption of failure to pay tax or to furnish information relating to tax**

When an accused is at criminal proceedings charged with any offence of which the failure to pay any tax or impost to the State, or of which the failure to furnish to any officer of the State any information relating to any tax or impost which is or may be due to the State is an element, the accused **shall be deemed to have failed** to pay such tax or impost or to furnish such information, **unless the contrary is proved.**”

42. Section 250(1) of the Principal Act is submitted for comment-

**“250 Presumption of lack of authority**

(1) If a person would commit an offence if he-

(a) carried on any occupation or business;

- (b) performed any act;
- (c) owned or had in his possession or custody or used any article; or
- (d) was present at or entered any place,

without being the holder of a licence, permit, permission or other authority or qualification (in this section referred to as the 'necessary authority'), an accused shall, at criminal proceedings upon a charge that he committed such an offence, **be deemed not to have been the holder** of the necessary authority, **unless the contrary is proved.**"

**43. Section 252A of the Principal Act is submitted for comment-**

**"252A Authority to make use of traps and undercover operations and admissibility of evidence so obtained**

(1) Any law enforcement officer, official of the State or any other person authorised thereto for such purpose (hereinafter referred to in this section as an official or his or her agent) may make use of a trap or engage in an undercover operation in order to detect, investigate or uncover the commission of an offence, or to prevent the commission of any offence, and the evidence so obtained shall be admissible if that conduct does not go beyond providing an opportunity to commit an offence: **Provided that where the conduct goes beyond providing an opportunity to commit an offence a court may admit evidence so obtained subject to subsection (3).**

(2) In considering the question whether the conduct goes beyond providing an opportunity to commit an offence, the court shall have regard to the following factors: . . .

(3) (a) If a court in any criminal proceedings finds that in the setting of a trap or the engaging in an undercover operation the conduct goes beyond providing an opportunity to commit an offence, the court may refuse to allow such evidence to be tendered or may refuse to allow such evidence already tendered, to stand, if the evidence was obtained in an improper or unfair manner and that the admission of such evidence would render the **trial unfair** or would otherwise be detrimental to the administration of justice.

(b) When considering the admissibility of the evidence the court shall weigh up the public interest against the personal interest of the accused, having regard to the following factors, if applicable:

.....

(cc) the prejudice to the accused resulting from any improper or unfair conduct;

(iii) the nature and seriousness of any infringement of any fundamental right contained in the Constitution; “

**44. Section 262 of the Principal Act is submitted for comment-**

**“262 Housebreaking with intent to commit an offence**

(1) If the evidence on a charge of housebreaking with intent to commit an offence specified in the charge, whether the charge is brought under a statute or the common law, does not prove the offence of housebreaking with intent to commit the offence so specified but the offence of housebreaking with intent to commit an offence other than the offence so specified **or the offence of housebreaking with intent to commit an offence unknown** or the offence of malicious injury to property, the accused may be found guilty of the offence so proved.”

**45. Section 263 of the Principal Act is submitted for comment-**

**“263 Statutory offence of breaking and entering or of entering premises**

(1) If the evidence on a charge for the statutory offence in any province of breaking and entering or of the entering of any premises with intent to commit an offence specified in the charge, does not prove the offence of breaking and entering or of entering the premises with intent to commit the offence so specified but the offence of breaking and entering or of entering the premises with intent to commit an offence other than the offence so specified **or of breaking and entering the premises with intent to commit an offence unknown**, the accused may be found guilty- ...”

**46. Section 269 of the Principal Act is hereby repealed-**

**“269 [Sodomy**

**If the evidence on a charge of sodomy or attempted sodomy does not prove the offence of sodomy or, as the case may be, attempted sodomy, but the offence of indecent assault or common assault, the accused may be found guilty of the offence so proved.]”**

**47. Section 274 of the Principal Act is submitted for comment-**

**“274 Evidence on sentence**

(1) A court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.

(2) ***The accused may address the court on any evidence received under***

***subsection (1), as well as on the matter of the sentence, and thereafter the prosecution may likewise address the court.”***

**48. Section 286A of the Principal Act is submitted for comment-**

**“286A Declaration of certain persons as dangerous criminals**

(1) Subject to the provisions of subsections (2), (3) and (4), a superior court or a regional court which convicts a person of one or more offences, may, if it is satisfied that the said person represents ***a danger to the physical or mental well-being of other persons and that the community should be protected against him***, declare him a dangerous criminal.

(d) The report shall-

(i) . . . .

(ii) include a finding as to the question whether the accused represents a ***danger to the physical or mental well-being of other persons.***”

**49. Section 332 of the Principal Act is hereby submitted for comment-**

**“332 Prosecution of corporations and members of associations**

(1) For the purpose of imposing upon a corporate body criminal liability for any offence, whether under any law or at common law-

(a) any act performed, with or without a particular intent, by or on instructions or with permission, express or implied, given by a director or servant of that corporate body; and

(b) the omission, with or without a particular intent, of any act which ought to have been but was not performed by or on instructions given by a director or servant of that corporate body,

in the exercise of his powers or in the performance of his duties as such director or servant or in furthering or endeavouring to further the interests of that corporate body, ***shall be deemed to have been performed*** (and with the same intent, if any) by that corporate body or, as the case may be, to have been an omission (and with the same intent, if any) on the part of that corporate body.

(2) In any prosecution against a corporate body, a director or servant of that corporate body shall be cited, as representative of that corporate body, as the offender, and thereupon the person so cited may, as such representative, be dealt with as if he were the person accused of having committed the offence in question: Provided that-

(a) if the said person pleads guilty, other than by way of admitting

guilt under section 57, the plea shall not be valid unless the corporate body authorized him to plead guilty;

(b) if at any stage of the proceedings the said person ceases to be a director or servant of that corporate body or absconds or is unable to attend, the court in question may, at the request of the prosecutor, from time to time substitute for the said person any other person who is a director or servant of the said corporate body at the time of the said substitution, and thereupon the proceedings shall continue as if no substitution had taken place;

(c) if the said person, as representing the corporate body, is convicted, the court convicting him shall not impose upon him in his representative capacity any punishment, whether direct or as an alternative, other than a fine, even if the relevant law makes no provision for the imposition of a fine in respect of the offence in question, and such fine shall be payable by the corporate body and may be recovered by attachment and sale of property of the corporate body in terms of section 288;

(d) the citation of a director or servant of a corporate body as aforesaid, to represent that corporate body in any prosecution instituted against it, shall not exempt that director or servant from prosecution for that offence in terms of subsection (5).

(3) In criminal proceedings against a corporate body, any record which was made or kept by a director, servant or agent of the corporate body within the scope of his activities as such director, servant or agent, or any document which was at any time in the custody or under the control of any such director, servant or agent within the scope of his activities as such director, servant or agent, shall be admissible in evidence against the accused.

(4) For the purposes of subsection (3) any record made or kept by a director, servant or agent of a corporate body or any document which was at any time in his custody or under his control, **shall be presumed** to have been made or kept by him or to have been in his custody or under his control within the scope of his activities as such director, servant or agent, **unless the contrary is proved.**

(5) When an offence has been committed, whether by the performance of any act or by the failure to perform any act, for which any corporate body is or was liable to prosecution, any person who was, at the time of the commission of the offence, a director or servant of the corporate body **shall be deemed to be guilty of the said offence, unless it is proved that he did not take part in the commission of the offence and that he could not have prevented it**, and shall be liable to prosecution therefor, either jointly with the corporate body or apart therefrom, and shall on conviction be personally liable to punishment therefor.

(6) In criminal proceedings against a director or servant of a corporate body in respect of an offence-

(a) any evidence which would be or was admissible against that

corporate body in a prosecution for that offence, shall be admissible against the accused;

(b) whether or not such corporate body is or was liable to prosecution for the said offence, any document, memorandum, book or record which was drawn up, entered up or kept in the ordinary course of business of that corporate body or which was at any time in the custody or under the control of any director, servant or agent of such corporate body, in his capacity as director, servant or agent, shall be prima facie proof of its contents and admissible in evidence against the accused, unless he is able to prove that at all material times he had no knowledge of the said document, memorandum, book or record, in so far as its contents are relevant to the offence charged, and was in no way partly to the drawing up of such document or memorandum or the making of any relevant entries in such book or record.

(7) When a member of an association of persons, other than a corporate body, has, in carrying on the business or affairs of that association or in furthering or in endeavouring to further its interests, committed an offence, whether by the performance of any act or by the failure to perform any act, any person who was, at the time of the commission of the offence, ***a member of that association, shall be deemed to be guilty of the said offence, unless it is proved that he did not take part in the commission of the offence and that he could not have prevented it.*** Provided that if the business or affairs of the association are governed or controlled by a committee or other similar governing body, the provisions of this subsection shall not apply to any person who was not at the time of the commission of the offence a member of that committee or other body.

(8) In any proceedings against a member of an association of persons in respect of an offence mentioned in subsection (7) any record which was made or kept by any member or servant or agent of the association within the scope of his activities as such member, servant or agent, or any document which was at any time in the custody or under the control of any such member, servant or agent within the scope of his activities as such member, servant or agent, shall be admissible in evidence against the accused.

(9) For the purposes of subsection (8) any record made or kept by a member or servant or agent of an association, or any document which was at any time in his custody or under his control, ***shall be presumed to have been made or kept by him*** or to have been in his custody or under his control within the scope of his activities as such member or servant or agent, ***unless the contrary is proved.***

**50. Section 337 of the Principal Act is hereby amended by the substitution for the section of the following section:**

**“337 Estimating age of person**

If in any criminal proceedings the age of any person is a relevant fact of which no or insufficient evidence is available at the proceedings, the presiding judge or judicial officer may estimate the age of such person by his appearance or from any information which may be available, and the age so estimated shall be **prima**

**facie proof of the [deemed to be the correct] age of such person, unless-**

- (a) **[it is subsequently proved that the said estimate was incorrect; and]**
- (b) the accused at such proceedings could not lawfully have been convicted of the offence with which he was charged if the correct age had been proved.

**51. Section 338 of the Principal Act is submitted for comment-**

**“338 Production of document by accused in criminal proceedings**

Where any law requires any person to produce any document at any criminal proceedings at which such person is an accused, and such person fails to produce such document at such proceedings, such person shall be guilty of an offence, and the court may in a summary manner enquire into his failure to produce the document and, ***unless such person satisfies the court that his failure was not due to any fault on his part***, sentence him to any punishment provided for in such law, or, if no punishment is so provided, to a fine not exceeding R300 or to imprisonment for a period not exceeding three months.”