Should We Consent?
Rape Law Reform in South Africa

For more than a decade, South Africans have been advocating for a reform of the country’s laws on sexual offences. South Africa has one of the highest levels of reported rape in the world, and legislative reform was seen as an essential step towards shifting the understanding of rape and its treatment within the criminal justice system. Since 1996 the activism has focused on the South African Law Reform Commission’s investigation into sexual offences and the parliamentary process, which culminated at the end of 2007 in the Criminal Law (Sexual Offences and Related Matters) Amendment Act.

Many of the authors of Should We Consent? were involved in substantive legal submissions, research and legislative drafting, and promoting changes to the law to provide rape victims with effective redress and protection. Drawing on a body of empirical, social and legal scholarship, this unique text charts the critical social and legal debates and jurisprudential developments that took place during the rape law reform process. This book also provides important insights into the engagement of civil society with law reform and includes thoughtful and contemporary discussions on topics such as defining rape, HIV, sexual offences against children and sentencing of sexual offenders. Should We Consent? examines the successes, challenges and defeats of rape law reform, and will be of interest to academics, professionals, government, and civil society alike.

www.jutalaw.co.za
ACKNOWLEDGEMENTS

We would like to express our profound respect and deepest appreciation to the contributors of *Should We Consent?* Most of these authors have been part of the rape law reform process since the beginning. Their contributions to social advocacy, legal scholarship and law reform have been significant over the past decade. To bring their perspectives and contributions together into a cohesive volume was a great privilege.

We are indebted to the staff of the Gender, Health & Justice Research Unit at the University of Cape Town who assisted the editors in reviewing various chapters in this book. Yoni Hoffman-Wanderer, Steffi Roehrs and Diane Jefthas were exceptionally generous in their contributions to the different stages of the writing and editorial stages of this ambitious project. A special ‘thank you’ to Yoni for breathing life into the book while there was so much uncertainty about the conclusion of the law reform process.

Finally, to Ute Kuhlmann of Juta, whose extreme patience we are deeply grateful for – thank you for believing in the project and for seeing it through despite the general state of flux in the finalisation of what is now known as the ‘Sexual Offences Act’.

Lilian Artz & Dee Smythe
Cape Town
CONTENTS

ACKNOWLEDGEMENTS ................................................................. iii

1 INTRODUCTION: SHOULD WE CONSENT? ................................. 1
Lillian Artz / Dee Smythe
1. Part I: Introduction ......................................................... 1
   1.1 The Law Reform Process ............................................. 4
   1.2 Should We Consent? Charting out the Sexual Offences Act ........ 8
2. Part II: Feminism and Law Reform ....................................... 12
3. Conclusion ........................................................................ 20

2 THE POLITICS OF A DEFINITION .................................................... 22
Nikki Naylor
1. Introduction ...................................................................... 22
2. Elements (and Semantics) of the Crime of Rape ....................... 22
   2.1 Sexual intercourse ..................................................... 23
   2.2 With a woman .......................................................... 25
   2.3 Unlawfully ................................................................. 26
   2.4 With the absence of consent ........................................ 26
4. Comparative Legislative Developments ................................... 31
   4.1 Canada ...................................................................... 31
   4.2 Namibia .................................................................... 33
   4.3 United Kingdom ........................................................ 35
   4.4 The United States ....................................................... 38
5. The South African Law Reform Process: After Eleven Years of Drafting and (re)drafting the Definition of Rape How Far Have We (not) Come? ............................................................... 41
   5.1 Discussion Paper 85 .................................................... 43
   5.2 Discussion Paper 102 ................................................... 44
   5.3 The Final Report ........................................................ 46
   5.4 The Sexual Offences Bill .............................................. 47
6. Concluding Remarks ................................................................ 50

3 RAPE AND HIV/AIDS: WHO’S PROTECTING WHOM? ............ 52
Sarai Chisala
1. Introduction ...................................................................... 52
3. Criminalising Harmful HIV-Related Sexual Conduct ............... 56
5 THE PERSONAL IS THE POLITICAL: DISCLOSURE OF RAPE COMPLAINANTS PERSONAL RECORDS

Bronwyn Pithey

1. Introduction ................................................... 99
2. Effects of Disclosure of Personal Records on Victims, Counsellors and the Criminal Justice System ................................................... 99
3. Legal Rules: The use of Personal Records in Criminal Proceedings ................................................... 101
   3.1 Relevance ................................................... 101
   3.2 Privilege ................................................... 102
4. Comparative Position: Lessons from Canada ................................................... 103
   4.1 The Decisions: O’Connor and A.B. ................................................... 104
   4.2 Implications of O’Connor and A.B. ................................................... 105
   4.3 Credibility ................................................... 107
   4.4 Motives for and Consequences of Using Personal Records ................................................... 108
   4.5 Canadian Legislation: Bill C–4657 ................................................... 109
5. South Africa ................................................... 110
   5.1 Access to Personal Records in South Africa ................................................... 111
   5.2 Privilege ................................................... 111
   5.3 The “Just Excuse” Rule ................................................... 112
   5.4 Attorney-General, Transvaal v Kader ................................................... 112
   5.5 Nel v Le Roux NO and others ................................................... 113
   5.6 Evidence Contrary to Public Interest ................................................... 114
   5.7 Constitutional Arguments ................................................... 115
   5.8 Equality ................................................... 116
   5.9 Privacy ................................................... 116
# 6 THE PSYCHO–SOCIAL IMPACT OF RAPE AND ITS IMPLICATIONS FOR EXPERT EVIDENCE IN RAPE TRIALS

*Anastasia Maw/Gail Womersley/Michelle O’Sullivan*

1. Introduction ................................................... 121

2. The Psychological Impact of Rape ............................... 122
   2.1 The gendered history of the study of psychological trauma . 123
   2.2 The psychological and psychiatric impact of rape ........... 124
   2.3 Variables affecting recovery .............................. 127
   2.4 Critical overview of the research into the psychological impact of rape ........................................ 130

3. Psychological Expert Testimony in Rape Trials .................. 132
   3.1 Legal Admissibility criteria for expert testimony .......... 132
   3.2 The use of psychology in expert testimony in rape trials . 135
   3.3 Problems with PTSD in Court .............................. 137
      3.3.1 Assumption of the complainant’s honesty ............ 137
      3.3.2 Comorbidity ........................................ 138
      3.3.3 Premorbid factors ................................. 138
      3.3.4 PTSD as a prescription ............................. 139
   3.4 Prejudicial impact of a PTSD diagnosis .................... 140
      3.4.1 Violation of rape shield laws ....................... 141
      3.4.2 Pathologising the complainant ..................... 141
      3.4.3 The problem of reasonable doubt ................... 142

4. Recommendations .............................................. 143

# 7 CHILDREN AND SEXUAL OFFENCES ............................ 144

*Jacqui Gallinetti/Daksha Kassan*

1. Introduction ................................................... 144

2. Protective Mechanisms for Child Victims Appearing in Court . 145
   2.1 Vulnerable witnesses ..................................... 147
   2.2 Support persons .......................................... 148
   2.3 Testimony by CCTV ...................................... 150
   2.4 Intermediaries .......................................... 152
   2.5 Identification of child victims .......................... 157
   2.6 In camera proceedings .................................. 160

3. Exclusion of the Vulnerable Witness Provision from the Sexual Offences Act ..................................... 162

4. Child Sex Offending ........................................ 163
4.1 Why intervene with young sex offenders? .......................... 164
4.2 Who are young sex offenders? ................................... 165
5. Background to Child Justice Developments in South Africa ........ 168
  5.1 Tracing the development of the Child Justice Bill ............... 169
  5.2 Changes effected to the Child Justice Bill by Parliament ...... 171
7. Conclusion .................................................................. 173

8 HALF–HEARTED HIV–RELATED SERVICES FOR VICTIMS ......................... 175
Stefanie Roehrs
1. Introduction ......................................................... 175
2. Post-Exposure Prophylaxis ........................................ 176
  2.1 Background on PEP .......................................... 177
  2.2 State response to PEP for victims of sexual offences ......... 178
  2.3 The Law Commission’s recommendations .................... 179
  2.4 The Portfolio Committee’s deliberations ...................... 180
  2.5 Critical analysis and implementation challenges ............. 181
     2.5.1 Access to PEP ........................................... 182
     2.5.2 Adherence to PEP ....................................... 182
     2.5.3 Management of children .............................. 183
     2.5.4 Comprehensive health-care package .................... 185
3. Compulsory HIV Testing of Alleged Sexual Offenders ............. 185
  3.1 Comparative Position .......................................... 185
     3.1.1 Sub-Saharan Africa .................................... 186
     3.1.2 Canada .................................................. 186
     3.1.3 United States of America ............................. 186
     3.1.4 Australia ................................................. 187
  3.2 South Africa’s compulsory HIV testing Bill .................... 187
  3.3 Law Reform ..................................................... 188
     3.3.1 Application by or on behalf of the victim ............. 188
     3.3.2 Application by an investigating officer ............... 190
  3.4 Critical analysis and implementation challenges ............. 191
     3.4.1 Constitutional concerns ................................ 191
     3.4.1.1 Application by the police ......................... 191
     3.4.1.2 Application by or on behalf of a victim ......... 192
     3.4.2 Practical challenges .................................... 193
     3.4.2.1 Criminalisation of rape survivors ................ 193
     3.4.2.2 Endangerment of victims ......................... 194
     3.4.2.3 Implementation by the SAPS ..................... 195
4. Conclusion .......................................................... 197
9 POLICING SEXUAL OFFENCES: POLICIES, PRACTICES AND POTENTIAL PITFALLS ......................................................... 198
Dee Smythe/Samantha Waterhouse
1. Introduction ................................................................. 198
   1.1 Policing Rape: Facts, Figures and Failures ....................... 198
2. The Existing Policy Environment ........................................ 201
   2.1 Policies .................................................................. 201
   2.2 National Instructions ............................................... 203
3. Challenges in Policing Sexual Violence .............................. 204
   3.1 The Problem of Attrition ........................................... 204
   3.2 Explaining Attrition at Police Level .............................. 207
      3.2.1 Human & Material Resources ............................... 207
   3.3 Police Attitudes ...................................................... 209
      3.3.1 Supervision and Leadership ................................. 211
      3.3.2 Perceptions of Police Corruption ......................... 213
      3.3.3 Victim Responses ............................................ 214
      3.3.4 Vicarious Trauma ............................................ 215
4. The South African Law Reform Commission’s Recommendations on the Police ................................................................. 216
5. Evaluation of the Law Commission’s approach ....................... 218
6. The Sexual Offences Act ................................................ 221
7. Conclusion ..................................................................... 223

10 SENTENCING AND MANAGEMENT OF SEXUAL OFFENDERS ......................................................... 224
Yonina Hoffman-Wanderer
1. Introduction ................................................................. 224
2. Part 1: Sentencing Sexual Offenders ................................. 225
   2.1 The Social and Political Context .................................. 226
   2.2 Theories of Punishment ............................................. 227
   2.3 Legislation: Minimum Sentencing for Sexual Offences .... 228
   2.4 Application of the CLAA in cases of rape ..................... 230
      2.4.1 Misunderstanding the nature of rape .................... 231
      2.4.2 Undermining the legislative aim ......................... 232
      2.4.3 The structure of the legislation ......................... 234
      2.4.4 A more coherent approach to ‘substantial and compelling circumstances’ ..................... 236
   2.5 Amendment of the CLAA ........................................... 239
   2.6 The Sentencing Framework Bill ................................... 241
      2.6.1 The Sentencing Framework Bill structure ............... 241
      2.6.2 Departures from Sentencing Guidelines under section 6(4)(a) ................................................................. 242
INTRODUCTION:

SHOULD WE CONSENT?

LILLIAN ARTZ*
DEE SMYTHE**

1. Part I: Introduction

The subject of sexual offences and, more specifically, the reform of rape law and criminal justice practice have sparked lively debate in both public and legal spheres. Over the past ten years, feminists, human rights scholars/activists, as well as civil society organisations have advocated for the creation of new laws, policies and practices in relation to the treatment of rape survivors and the punishment of sexual offenders. According to the South African Law Reform Commission, the intention of the rape law reform process was to codify the substantive law relating to sexual offences in one Act and to develop effective legal provisions for the reporting, management, investigation and prosecution of sexual offenders.1

In an attempt to make the criminal law and the criminal justice process more responsive to the needs and experiences of rape survivors, as well as to introduce more appropriate procedural measures to correct historically discordant approaches to the management of rape cases, an exhaustive process was initiated in 1998 to change the law on sexual offences. This was accompanied by a focus on the implementation of practical, systemic interventions specifically focused on rape survivors.2 However, at various points during the rape law reform process, the objectives and intentions of creating a new law on rape were at odds with each other. For some, reforming laws on rape meant creating a legal environment where victims of sexual offences would be treated with dignity and care, and for others, the reform of the law meant creating a more punitive environment for sexual offenders. Throughout the process, however, the creation of ‘new’ offences — that were more in line with the experiences of victims of sexual offences — was a common objective.

---

* Dr Lillian Artz BA (SFU) BA (Hons) MA (Cape Town) PhD (QUB) is the Director of the Gender, Health and Justice Research Unit in the Faculty of Health Sciences at the University of Cape Town.
** Dee Smythe BA LLB (UCT) JSM (Stanford) is a senior researcher at the Gender, Health and Justice Research Unit in the Faculty of Health Sciences and Acting Director of the Law, Race and Gender Unit in the Faculty of Law at the University of Cape Town.


The emphasis of reforming the laws on sexual offences shifted over time. The initial focus was on improving the treatment of rape survivors in the criminal justice system, expanding the range of persons protected under the law and codifying the substantive laws on rape into one comprehensive statute. Later, issues relating to improving the reporting, prosecution and sentencing of rape cases became the focus of reform. During this time concern began to be expressed about the high levels of attrition in sexual offences cases within the criminal justice system. Studies highlighted the dramatic fall-out of cases from reporting to investigation, from investigation to prosecution and from prosecution to conviction. Of particular concern was the inconsistent treatment of rape survivors and the unchecked discretion used by police and prosecutors in the disposition of cases. This concern resulted in the submission of opinions to the Law Commission to limit discretion of criminal justice personnel, and emphasised the need to enact positive duties on the state in the management of rape cases. With increasing public concern over HIV and its links with sexual violence, debates over the provision of post-exposure prophylaxis for rape victims and the compulsory HIV testing of persons accused of a sexual offence became very important. In particular, the emphasis on compulsory testing, over the comprehensive medico-legal needs of rape survivors, became highly contested terrain.

In the end, the reforms enacted focused more on the creation of new sexual offences, rather than on the improvement of specific procedural mechanisms to reduce secondary victimisation and address the arbitrary application of measures designed to protect victims. It is this latter function that many feminists would maintain was the real purpose behind the law reform process. As the process unfolded, and various iterations of the Bill appeared, the intended goals of this rape law reform process became more diffuse. As with all legislation, the final outcome of the Criminal Law (Sexual and Related Matters) Amendment Act (No 32 of 2007) ['the Sexual Offences Act'] is reflective of a particular and complex interplay between social expectation, the reformist imperatives of rights-building and political inclination. Thus, in some respects, the new Sexual Offences Act is seen by many as a legislative compromise.

The genesis of Should We Consent? was a desire to trace the process and debates of the law reform process in South Africa. Reflecting on 10 years of sexual offences law reform, this book attempts to highlight some of South Africa’s unique experiences with shaping the law on sexual offences as well as the specific discursive challenges faced by reformers in developing a (context-appropriate) legal framework for these offences. It also reflects on the often overlooked engagement of civil society with government in precipitating and sustaining this important law reform initiative. The

---

law reform process has demonstrated how profoundly fragile the relationship between state and civil society organisations can be and how tenuous the well-intentioned government commitment to ‘public consultation’ really is. Although this is a general critique, it is perhaps particularly true of those areas of law making where social — and particularly sexual — identities are being constructed and codified.

The process of law reform attracted submissions from feminists, academicians, non-governmental organisations, public health professionals, legal practitioners and mental health experts. Contributions to rape law reform ranged from substantive legal submissions to public awareness campaigns. The motivation to shift ‘the reality of rape’ and the treatment of rape survivors in the criminal justice system was paralleled by equally strong public pressure to ensure that the South African government made a definitive and persuasive statement showing that it will not tolerate the high rates of rape in South Africa. Thus the legislation was expected to be more than a ‘law on rape’, but also a social statement about sexual violence.4 These social movements highlighted the magnitude and reality of sexual offences, while simultaneously creating public awareness surrounding these issues. Civil society organisations not only challenged the substantive law, but the standards of care provided to rape survivors within both the criminal justice and public health systems. They also highlighted the complexities of ‘managing rape’ within a legal context and the importance of a comprehensive response to sexual offences.

The beginning of the rape law reform process was filled with much optimism about the possibilities of changing the experiences of rape survivors and dismantling archaic legal constructs surrounding women and sexual offences. After the announcement in 1998 that the Minister of Justice had approved the extension of the project, which from 1996 to 1998 had focused on children, to all aspects of sexual offences committed against both adults and children, women’s organisations around the country began the long process of ‘evidence-gathering’ to assist lawmakers in ‘getting the law right’. Right through until the publication of their Report on Sexual Offences in 2002, the Law Commission’s Project Committee on sexual offences embraced submissions, research and legal opinions from civil society organisations, while civil society organisations remained faithful to the prospect of a meaningful, substantive and dialectic law reform process. This took place within an ideological and institutional climate that saw civil society participation as central to law making and was therefore receptive to the contributions of non-state actors in advancing rape law. It was only in 2003 — at the ‘business end’ of the process — when work began in earnest on finalising the legislation, that this seemingly joint effort began to erode. It became apparent that the subject of ‘rape law reform’ (and indeed ‘sexuality’) would engender the inevitable clashes between law, rights, politics and culture. Com-

4 L Artz & D Smythe (2008) ‘Feminism vs. the State?: A Decade of Sexual Offences Law Reform in South Africa’ Agenda 74 (1,3) 6–18.
pounding these byzantine tensions, the efforts by both the state and civil society to reform the laws on rape took place during a decade where ‘sexuality’ and gender — and women’s experiences of the two — had become deeply politicised. AIDS denialism, the embargoring of rape (and other) police statistics, the Zuma rape trial, flourishing research and media reports on child and adult rape, moral panic surrounding HIV and high levels of violence, as well as a faltering criminal justice system, added tension to the already tenuous reform process.

1.1 The Law Reform Process

In its 1996 Annual Report the Commission announced the establishment of Project 107: Sexual Offences By and Against Children. In the Annual Report we are told that the investigation was initiated on the basis of an LLM thesis submitted by J.J. Brits titled *Sexual Offences with Youths — A Critical Analysis*, in which he makes a number of proposals to amend the law relating to sexual offences against children. We are told that the Commission circulated Mr. Brits’ recommendations to interested parties (how these were identified or who they were is not recorded) and that while these parties generally did not support his proposals, they did agree that the problem of sexual offences committed by and against children was a problem worthy of further investigation. Those responding are reported to have been particularly concerned with the need for a gender-neutral definition of specific sexual offences, an inquisitorial approach when dealing with child witnesses, creating a presumption of competency for child witnesses, enacting legislation to prevent the employment of known sex offenders in positions of trust over children, and the investigation of child pornography and prostitution. The Minister of Justice and Constitutional Development approved the inclusion of the investigation in the Commission’s program in April 1996.

5 The original title of the thesis is ‘Seksuele Misdrywe met Jeugdiges — ‘n Kritiese Beskouwing’ (1994). Although any interested party can approach the Law Commission to request that it establish an investigation, for the most part the Commission’s program is generated either by the Commission itself, (eg Project 126: Review of the rules of evidence, proposed by the chair of the Project Committee working on the simplification of criminal procedure); the legislature (eg Project 123: Protected disclosures, referred by Parliament’s Portfolio Committee on Justice and Constitutional Affairs); or the executive (eg Project 124: Privacy and data protection, referred by the Minister of Justice and Constitutional Development). All projects are subject to the approval of the Minister of Justice and Constitutional Development.

6 These included decriminalisation of sexual acts or experimentation between age cohorts and the inclusion of sexual intercourse *per anum* in the offence of rape.

7 Both ‘rape’ and ‘sodomy’ were gender specific offences under the common law as applied in South Africa. See J Burchell & J Milton (1997) *Principles of Criminal Law* for definitions of these crimes.


9 By the time that the Commission’s 1997 Annual Report was published, credit for establishing the investigation had been given to the Minister of Justice, with the Commission reporting that the investigation was a product of the government’s National Plan of Action for Children, launched in 1996, in terms of which the government had committed itself to drafting legislation that would combat the sexual
INTRODUCTION

By May 1997 the Commission had decided to restrict Project 107 to sexual offences against children, as the ongoing investigation into Juvenile Justice was already dealing with juvenile offenders. In May 1998 the Minister of Justice approved the extension of the project to all aspects of sexual offences committed against both adults and children. Recognising that the expertise of the project committee lay predominantly in sexual offences relating to children, the Commission appointed three additional members. In the same year the Deputy Minister of Justice, Manto Tshabalala-Msimang, commissioned a research report on the legal aspects of rape. The report, authored by four of the contributors to this volume and titled the Legal Aspects of Rape was published in September 1998. The purpose of the report was to present an analysis of South Africa’s current legal position on rape and to recommend progressive amendments to the law, based on the Constitution, government commitments to reform as set out in the Gender Policy Statement of the Department of Justice, international legal reform and empirical research on rape and the criminal justice system. In addition to making recommendations about the re-definition of the crime of ‘rape’, the report included substantive and procedural recommendations on the treatment of rape survivors within the criminal justice and public health systems, including: the use of ancillary prosecutors (later re-packaged as ‘legal representation’ in the Law Commission’s report on sexual offences), in camera hearings, protective measures, the cautionary rule, admissibility of previous consistent statements, evidence of previous sexual history, the use of expert witnesses, the production of personal records and the use of PEP after a rape. This report became the basis for the South African Law Reform Commission’s Discussion Paper 85, which dealt with the substantive law and later informed the Commission’s Discussion Paper 102 relating to process and procedure in rape cases. Both discussion papers were accompanied by draft legislation on sexual offences.

exploitation of children. See SALRC (1997) Annual Report. This confusion probably reflects a growing concern at the time, coming from many quarters — not least government — about the issue of sexual offences. More cynical commentators might suggest that it is already at this early stage of the law reform process that the legal history of sexual offences begins to be re-written in official reports.

13 John Milton, Professor of Criminal Law at the University of Natal, and activist-attorneys Lebo Malepe (at the time with Thshwaranang Legal Advocacy Centre) and Bronwyn Pithey (then advocacy coordinator of Rape Crisis Cape Town Trust). What sensitivity the Commission shows to the reality of systemic constraints can be largely credited to activists like these and others on the committee who were working with victims at the coalface of the criminal justice system.
15 The inclusion of measures analogous to ss 153(3) and 153(3A) of the Criminal Procedure Act 51 of 1977 (the CPA).
16 Analogous to the provisions in ss 158(3) and 170A of the CPA.
In 2002 the South African Law Reform Commission released its final report on Sexual Offences, which included a comprehensive Sexual Offences Bill. The report was considered progressive, balanced and inclusive of a wide range of civil society submissions on the legal aspects of rape. It also made some surprisingly bold recommendations. Here the Law Commission envisioned a Bill that was ‘innovative and progressive’. The report specifically stated that the intention [of rape law reform] is —

...to encourage victims of sexual violence to approach the system for assistance and to improve the experiences of those victims who choose to enter the criminal justice system, whilst at the same time giving due regard to the rights accorded to alleged perpetrators of sexual offences.17

In August 2003, the Portfolio Committee on Justice and Constitutional Development (‘the Portfolio Committee’) was briefed by the Law Commission on the proposed Sexual Offences Bill and a Cabinet debate was held on the contents of the Bill. The 2003 version of the Bill18 dramatically departed from what the Law Commission had recommended. A number of provisions had been removed from the Bill on the basis that they would be ‘too costly’ to implement. Parliament demanded a costing framework prior to considering their re-inclusion into the Bill. One of the major exclusions in this regard — and one that is reflective of the general trend of this process away from victims’ rights — related to protective measures for vulnerable witnesses. Despite compelling arguments submitted by civil society organisations about the unequal and discriminatory manner in which certain provisions of the CPA (such as s 158 relating to the use of CCTV and s 170A which relates to the use of the intermediary system) were being implemented, the Portfolio Committee maintained an implacable position that legislating a presumptive category of ‘vulnerable witnesses’ who would ipso facto be entitled to access these and other protective measures was not necessary.

The push to remove ‘consent’ from the definition of rape was another battle lost. It was submitted by activists that the well-considered definition of rape set out in the Law Commission’s 2002 report should be applied. This definition removed the element of consent and replaced it with the concept of ‘coercive circumstances’, where the evidence of ‘coercion’ was effectively synonymous with non-consent. Recognising that consent could still be used as a defence to a charge of rape, this debate simmered, despite concerns that prosecutors would still have to prove non-consent. Other major revisions to the Law Commission’s proposed Bill included the removal of sections dealing with: ‘the medico-legal management of rape survivors’, ‘the appointment of support persons’, ‘evidence of the impact of rape’, ‘prosecutor-led investigations’ and ‘psychological support’ of rape victims. One of

the aims of this book is to revisit some of these key exclusions, to reflect and debate the reasons, and to alert readers to the ongoing need to move our interpretation and application of the new Act towards the kind of victim-centricity envisaged by the Law Commission.

From 2003–2006, law reform efforts by civil society seemed to become less and less persuasive to the powers that be, and particularly to the Portfolio Committee of Justice and Constitutional Development. After the national elections in 2004, rape law reform appeared to all intents and purposes to have fallen off the legislative agenda. A National Working Group on Sexual Offences\(^{19}\) was established during this time by concerned civil society organisations to pressure government into prioritising the process and to lobby for the inclusion of various key provisions. This work was complemented by ongoing pressure from other civil society initiatives, including those of the Western Cape based Consortium on Violence Against Women. However, while ‘allowing’ written submissions during this time, the Portfolio Committee gave the distinct impression that the rape law reform conversation was now ‘closed’.

In mid–2006 a revised draft Bill was submitted to Cabinet. After it was reintroduced into the National Assembly, the Bill was again sent to the Justice Portfolio Committee for deliberation. Again, this was accompanied by a flurry of submissions from civil society, none of which appeared to make much of an impact. Extreme unhappiness was expressed about this apparent closing down of consultation and a number of efforts were made to ‘keep the Act in play’ rather than accepting what many took to be an unacceptably watered down version.\(^{20}\) In the event, the Bill was passed in the National Assembly in May 2007. Further submissions were made to the National Council of Province’s Select Committee on Security and Constitutional Affairs on a number of key issues, including compulsory HIV-testing, legal representation for victims, the need for presumptive protective measures, and the position of disabled victims. None of these found favour with the legislature. The NCOP passed the Bill in September 2007 and it was enacted in December of that year.

During this decade-long process, and in between the various versions of the Act, local jurisprudence on sexual offences, and broader rights relating to freedom from (sexual) violence and the duty of the state to protect was also developing. The South African courts contemplated the cautionary rule in *S v Jackson*\(^{21}\); the extension of the

\(^{19}\) One of the leading activists driving this initiative was Joan van Niekerk of Childline SA, who had also chaired the SALRC Project Committee on Sexual Offences.

\(^{20}\) This included lobbying for the re-tagging of the Bill so that it would be dealt with under s 76 of the Constitution, rather than s 75, on the basis that the Bill also dealt with issues that fell under provincial competency. The purpose of this ultimately failed attempt was solely to force greater public consultation, which would have been required if the Bill had been forced back to the provinces before its enactment.

\(^{21}\) 1998 (1) SACR 470 (SCA).
common law definition of rape to include anal rape in State v Masiya; the production of personal records in rape cases in S v Alex Henry; the definition and ambit of substantial and compelling circumstances in the sentencing of sexual offenders in S v Mahomotsa, S v Abrahams and S v Mvamvu; and delictual cases against the state based on the failure of the state to protect women from violence in K v Ministry of Safety and Security, Carmichele v Minister of Safety and Security and Van Eeden v Minister of Safety & Security. Few of the legal principles set out in these cases were subsequently formalised in the Sexual Offences Act.

Both the rape law reform process and these cases are profound demonstrations of how contested women’s sexuality, their right to be free from coercive sexual circumstances and the role of the state in the prevention of sexual violence is. Some might argue that these contestations are necessary for effective law-making and the development of a greater respect for the rule of law. However, at the centre of these debates, judgements, legal principles and legislative provisions is the position and experiences of rape victims. Whether the law reform process has enabled women to seek safe redress from the system or whether the ‘reductionist approach’ taken by the legislature has disabled the original intention of the legislation, can only be answered by the victim herself.

1.2 Should We Consent? Charting out the Sexual Offences Act

On 16 December 2007, certain sections of the Sexual Offences Act came into effect. These include the definitions and objects of the Act (Chapter 1), the reformulated definitions of rape, compelled rape and other forms of sexual assault (Chapter 2), sexual offences against children (Chapter 3), sexual offences against persons who are mentally disabled (Chapter 4) and parts of the general provisions section (Chapter 7) dealing with issues such as the obligation to report, defences and sentencing, and the national directives, amongst others. At the time of writing the only regulations that had been gazetted were Regulations on Services to Victims of Sexual Offences and Compulsory HIV Testing of Alleged Sex Offenders.

The Sexual Offences Act has been hailed for repealing the common law offences of rape and indecent assault and replacing them with a substantially broader range of statutory offences. It creates a hierarchal structure of sexual offences and defines victims and perpetrators in gender-neutral terms. The term ‘sexual penetration’
replaces the term ‘vaginal penetration’, recognising forced anal penetration as rape and includes penetration with objects (into the vagina or anus). The Act also introduces a number of new crimes, making it an offence, for example, to compel another person to rape or sexually assault a third person. The element of ‘consent’, defined as voluntary and uncoerced agreement, has been retained as an element of the offences of rape, compelled rape, sexual assault, and compelled sexual assault. In Chapter 2, The politics of a definition, Nikki Naylor sheds light on the importance of redefining rape in the South African context. She presents an overview of the historical roots and contemporary consequences of a definition rooted in patriarchal assumptions about violence against women and women’s sexuality. These underpin a discussion of the tensions and challenges experienced during the South African rape law reform process in determining — in law — what constitutes ‘rape’.

New offences have also been created to protect vulnerable groups such as children and people with mental disabilities. Chapters 3 and 4 of the Act make it an offence to engage in consensual sexual acts with children of either sex under the age of 16 and also criminalise sexual exploitation of children, sexual grooming of children, exposure to pornography, using children for pornography, compelling children to witness sexual offences and the exposure of genital organs to children (defining children in this regard as 18 years and younger). In Chapter 7 Children and Sexual Offences of this book Jacqui Gallinetti and Daksha Kassan explore in detail the issue of children as victims of sexual offences. They not only provide a detailed picture of the protective mechanisms available to children as they pertain to the rape law reform process, but also reflect on developments that emerged through other law reform efforts relating to children. These include the ad hoc general amendments to the Criminal Procedure Act 51 of 1977 (‘the CPA’) and the Child Justice Bill 49 of 2002. They also examine ‘children as sex offenders’, illustrating how appropriate and effective interventions with this category of child offender can lead to a reduction in sexual re-offending.

In terms of rules of evidence and procedure, the Act has finally definitively scrapped the use of the cautionary rule in sexual offence cases, meaning that the evidence of a rape complainant cannot be treated with caution solely because she (or he) is the victim of a sexual offence. Although the Supreme Court of Appeal ruled in 1998 that the use of the cautionary rule in cases of sexual offences was based on obsolete and irrational assumptions, it was undoubtedly still applied in practice, both as a ‘rule’ for evaluating the probative value of the victim’s testimony and as a general ‘approach’ to sexual offences matters. The Act now acknowledges that a complainant in sexual offence cases should not be treated any differently from a complainant in other cases since there is no reason to believe that she (or he) is less credible than a victim of any other crime. Similarly, delayed police reporting of the crime was often interpreted as indicating a false complaint and used to discredit the victim in the criminal proceedings. It is commendable that with the introduction of the Act the courts will no longer be allowed to draw any negative inference from delayed reporting.
Although the Act’s update of the definition of rape and other positive procedural aspects are welcome, it seems to miss out on a number of opportunities to improve the experiences of victims of sexual offences. Unfortunately, the legislature’s commitment to ‘eliminate secondary victimisation’ did not extend to provisions designed to shield the victim from direct physical confrontation with the accused. This and other comprehensive protective measures, such as the right to testify via CCTV, intermediaries, and in camera hearings have all been replaced with a provision authorising the National Directorate of Public Prosecutions to issue directives on these matters to the members of the National Prosecuting Authority. This is disappointing. Our experience with addressing gender-based violence in South Africa has shown that outdated norms are sufficiently entrenched to require legislation, and not merely protocols, if they are going to be shifted. In spite of submissions urging the legislature to recognise the unique vulnerability and needs of many rape victims, no special provision was provided. Likewise, rape victims remain unentitled to legal representation to protect their particular interests during criminal proceedings.

In Chapter 4, Getting somewhere slowly — the revision of a few evidence rules, PJ Schwikkard critically reflects on the legislative decisions made in relation to the law of evidence. The chapter takes an in-depth look at the cautionary rule in sexual offences cases and explores the misogynist nature of this rule. Specific attention is paid to child witnesses and the testimonial competence of children. She not only reviews international and local jurisprudence on competency, but explores other evidentiary concerns such as cross-examination by unrepresented accused, previous consistent statements, delayed reporting, previous sexual history, protective measures, and evidence relating to surrounding circumstances and the impact of sexual offences.

Complementing this chapter is Bronwyn Pithey’s contribution in Chapter 5, The personal is the political: Disclosure of rape complainants’ personal records. Pithey presents a critical discussion on the disclosure of a rape victim’s personal records during trial and the use of these records by the defence in attempts to discredit complainants. She examines the legal options available for both complainants and record holders who wish to resist such disclosure and discusses the rationale of the defence and the courts for admitting information contained in personal records into evidence. Pithey forcefully argues that the ‘flawed reasoning’ of the courts in the admission of personal records as evidence is revealed through an investigation of the myths and stereotypes of women, children and sexual offences. Although canvassed at length by the Law

---

31 For compelling reasons why rape victims should be entitled to some degree of legal representation see D Smythe (2005) ‘Moving beyond 30 years of Anglo-American rape law reforms: Legal representation for victims of sexual offences’ SACJ 18 (2) 167–187.
Commission, a provision providing protection against such disclosure was ultimately not included in the Act.

Another provision dropped by the legislature relates to the introduction of psycho-social evidence in rape trials within the substantive law on sexual offences. This is a complex issue that sits at the intersection of law and psychology. Aptly therefore, in Chapter 6 of this volume, two psychologists, Sia Maw and Gail Womersley, join Advocate Michelle O’Sullivan to examine the psycho-social impact of rape and its implications for utilising expert evidence in criminal trials on the chapter entitled — The psycho social impact of rape and its implications for expert evidence in rape trials. The authors explore the gendered history of the study of trauma in relation to the existing body of research on the psychological and psychiatric impact of rape, and the impact this has on psychological expert testimony in rape trials. Focusing exclusively on female adult rape survivors, their discussion looks closely at the common use of Post Traumatic Stress Disorder (PTSD), highlighting both the potential positive and negative impact for complainants. They conclude by providing recommendations for the use of psychological evidence in criminal rape trials.

An important development within the law is the right granted to rape victims to receive post-exposure prophylaxis (PEP) to prevent the possible transmission of HIV. However, despite extensive research and legal opinions promoting a comprehensive medico-legal response to rape, including psychological services, the Act only makes provision for the administration of PEP as a post-violence health response. It is ironic therefore that the Act goes to great lengths to enforce the compulsory HIV testing of the accused. This provision has been criticised for creating a false sense of security for the victim by suggesting that an HIV-negative test result means there is no risk of HIV transmission. It is also reflective of a conceptual fudging of the functions of criminal law with public health imperatives to protect uninfected people against possible transmission of HIV to the exclusion of all other possible (and, in some instances, more probable) health consequences, such as pregnancy and the transmission of sexually transmitted infections. In Chapter 8, entitled Half-hearted HIV-related services for victims, Stephanie Roehrs focuses on the advantages and disadvantages of these two distinct ‘HIV-related services’. Her conclusion is that these services, though well-intentioned, in fact fail in their efforts to afford victims the envisioned ‘maximum and least traumatising protection that the law can provide’.

Also addressing the subject of HIV and sexual offences is Sarai Chisala, who examines some key issues relating to the criminalisation of harmful HIV-related sexual conduct in Chapter 3. Included in the discussion is a presentation of aspects of the law reform process, with specific reference to the arguments put forth by the Law Commission around the use of criminal law to manage HIV/AIDS. The author considers the international position on criminalising HIV/AIDS transmission and/or exposure and the implementation challenges that such legislation might pose.

Despite the submission of compelling evidence during the law reform process to ‘legislate positive duties’ on the police, these recommendations were not adopted by
the legislature. In Chapter 9, *Policing sexual offences: Policies, practices and potential pitfalls*, Dee Smythe and Samantha Waterhouse examine the challenges of policing sexual offences. They provide a general overview of shifts in policing policies and practices with regard to sexual offences in the South African context and paint a rather grim picture of the ‘facts, figures and failures’ of policing sexual offences. Smythe and Waterhouse are critical of the fact that while the Sexual Offences Act will have some impact on what the police must investigate, it does not address the more critical and pressing issue of how the police should manage rape cases reported to them.

Sentencing has become a politically contested issue, as much as it is a legal one. In Chapter 10, *Sentencing and Management of Sexual Offenders*, Yoni Hoffman-Wanderer provides a critical review of the current and proposed sentencing frameworks for sexual offenders. The overview sheds light on provisions related to the management of sexual offenders as recommended by the Law Commission’s Project Committee on Sexual Offences, focussing in particular on why certain provisions were included in the Sexual Offences Act, while others were not. She further compares the Sexual Offender Registration Scheme established by the Act and the existing National Child Protection Registry, highlighting potential constitutional challenges.

The chapters in this volume share a deep concern about the reorientation of the Sexual Offences Act away from its strong original focus on victims’ rights. It is therefore appropriate that it concludes with a chapter by Helene Combrinck in which she evaluates the extent to which victims’ rights truly feature in the Act. In examining the meaning of the term ‘victims’ rights’, Combrinck highlights the difficulties sexual assault victims are faced with when entering the criminal justice system. Her chapter provides a comprehensive overview of the legislative reforms considered at various stages of the law reform process for improving the position of victims and historical attempts by feminists/activists to introduce systemic reforms into the criminal justice process.

The prognosis for this round of law reform is ambiguous. Sometimes our authors are optimistic (although perhaps guardedly so) and at other times downright despondent. What they share is a clear position that this *process* is not yet over. Aluta continua. This is most apparent in the bent towards recommendations and possible options for addressing what we hold in our hands now. It is a commitment to a continued dialectical engagement with the law and the institutions that apply and enforce it, and at the same time is a spur to think critically about ‘how we do this law reform thing’.

2. **Part II: Feminism and Law Reform**

The law reform process has been an integral part of the feminist movement in South Africa to secure the protection of women from gender-based violence. Despite criticisms of the law and the criminal justice system, few feminists and feminist organisations have relinquished the law and the criminal justice system as a site for

---

32 For a fuller discussion of feminism and law reform see L Artz (2008) *An Attrition in Domestic Violence Cases within the Criminal Justice System in South Africa*. PhD Dissertation: Queen’s University Belfast.
social transformation to emancipate (or at least provide options for) women experiencing sexual violence. We have used the law to challenge the social and legal understanding of women's experiences with sexual violence and have attempted to embody these within law and criminal justice practice. We have also used the law to influence policies and practices in the management of sexual offences within other spheres, such as the public health context. While some feminist scholars in South Africa have questioned the utility of the law as an effective mechanism for addressing gender-based violence, others maintain that the law has been receptive to the overtures of feminist legal principles and theory. Of course, the continuously shifting interrogation of what the law means to women and how the law should be used (if at all) in the protection of women from sexual violence, will remain as diverse as feminism is itself.

Reflecting on this most recent experience with rape law reform, South African feminism is still faced with numerous questions about our engagement with the law. For instance, will reformative shifts such as creating definitions of sexual offences to be more commensurate with women's real experience with rape or change their experience with the law? Was the law ever really designed to provide meaningful justice? Can we simultaneously acknowledge the inherently subjugative disposition of the law and argue for the re-construction of practices within it? Benson, who discusses the impact of rape law reform in the United States, has argued that ‘even if we label [rape] law reform as a symbol, it is a powerful one, as it symbolises and reinforces emerging conceptions concerning the status of women and the right of self-determination in sexual conduct’.33 Schafran, on the other hand, makes the shrewd point that ‘focussing on legislation is seductive because when it passes it produces a “product” that gives an almost tangible sense of accomplishment. Yet laws are no more effective than the judges who interpret, apply, and enforce them’.34 To this commentators like Dee Smythe and Sam Waterhouse, writing in this volume, would equally stress the role of actors in the criminal justice process, like police and prosecutors, whose exercise of discretion determines the outcome of the majority of rape cases before they even come before a judge for consideration.

Within South Africa, those adopting the loosely framed approach of feminist jurisprudence — from either empirical social science approaches or legal theory — have focused their work on women’s experiences with the law and the criminal justice system. These projects have exposed a range of practices within criminal justice practice and process that are inherently discriminatory, structurally inadequate and, in terms of substantive law, limited in scope and application. The response to these problems has been to develop a sustainable and relevant praxis that draws on the experiences of women, and victims of violence more generally, to not only shift the law

to be more responsive to victims of violence, but to shift legal paradigms and approaches.

Accepting that the implementation of seemingly progressive law will be partial, subjective and may have some invidious results, the role of the law in protecting women from violence cannot simply be dismissed as a misguided effort at shifting social relations. Although feminist campaigns for ‘justice’ have had mixed results, they have resulted in the establishment of inalienable rights with respect to the social and political life of women in South Africa. It is easy to forget this and to undervalue the role of law and legal institutions in granting and protecting these rights. On the power of the law to change the social conditions of women, Catherine MacKinnon offers the following:

A form of force, law is also an avenue for demand, a vector of access, an arena for contention other than the physical, a forum for voice, a mechanism for accountability, a vehicle of authority, and a expression of norms . . . Women who work with the law have learned that while legal change may not always make social change, sometimes it helps, and law unchained can make social change impossible.

However, for other feminist scholars, like Robin West, women’s suffering always seems outside of the scope of legal redress:

Thus, women’s distinctive, gender-specific injuries are not or have in the recent past been variously dismissed as trivial (sexual harassment on the street); consensual (sexual harassment on the job); humorous (non-violent marital rape); participatory, subconsciously wanted or self-induced (father/daughter incest); natural or biological, and therefore inevitable (childbirth); sporadic, and conceptually continuous with gender-neutral pain (rape, viewed as a crime of violence); deserving or private (domestic violence); non-existent (pornography); incomprehensible (unpleasant and unwanted consensual sex) or legally predetermined (marital rape, in States with the marital exemption).

Perhaps feminist jurisprudence — as a theoretical framework for changing women’s social realities of violence — can provide a starting point from which the state, the law and society can be viewed as both exercising power which sometimes nullifies women and their experiences with violence as well as serving an instrumental function of protection and one that is intrinsically symbolic. At the very least, our continued participation in the law reform process can expose the state and the criminal justice system as systems which uphold largely masculinist interpretations of justice. It may also have the potential to address some seemingly intractable questions.

35 From legal emancipation — during the first wave of feminism — to more contemporary shifts in marriage, divorce and property rights, education and employment, socio-economic rights, equality legislation, reproductive health rights, women’s representation in political structures and so on.
about women’s engagement with the law. In her examination of the growth and
diversity of feminist jurisprudence, Barnett argues that the law is a regulating force in
society created, practiced and applied by men for the purpose of maintaining
patriarchal dominance. It is therefore ‘the aim of feminist scholars both to explore the
manner in which such discriminations may be identified and eliminated, to explore
and seek to eliminate the inequalities which are created by, or supported by, law’.38
The central premise of feminist approaches to the law should therefore be to use
feminism as a corrective measure to address male bias in law and legal scholarship.
Feminist jurisprudence then,

... signals the shift away from a concentration on law reform and ‘adding women’ into
legal considerations to a concern with fundamental issues like legal logic, legal values,
justice, neutrality and objectivity. Because it appears to offer the combination of theory
and practice, and because it will be grounded in women’s experience, the ideal of a
feminist jurisprudence appears to be a way out of the impasse of liberal feminist theories
of law reform.39

Feminist jurisprudence not only seeks a better understanding of women and law, but
seeks to develop a feminist position that combines theory with practice in a way that
is meaningful to women. The analytical apparatus of feminist jurisprudence is
political, epistemological and methodological.40 Like the feminist theory of
knowledge it is inextricable from the feminist critique of power.41 Although it does
not prescribe, or even suggest, methodological approaches that can (or should) be
used by feminists working with the law, it does raise some interesting, sometimes
conflicting, questions about feminism and the law. It acknowledges that law is not the
answer to patriarchy, but it is a powerful arena in which the experiences of ‘violence’
are articulated and visions of justice are promoted. It also recognises that critical
questions need to be asked about feminism’s role in progressive law reform
movements. Law should be seen as something that cannot bring about women’s full
equality and participation in society, but something that has an important part to play
in shifting, or at least acknowledging, inequalities.42

Carol Smart has argued that as an integrated theoretical framework — a promising
theory with transformative and practical application — feminist jurisprudence implies
a better understanding of law... seeks to tackle philosophical issues, such as the idea of feminist justice and feminist legal method, as well as procedural issues,

---

such as how law should be administered and in which forums’. Smart does, however, express some concern that feminist jurisprudence will replace one abstraction about law with another and that the very terminology of ‘jurisprudence’ may have the result of turning the debates on law and justice into an exclusively legal one. However, the extent of this risk is dependent on how law and justice are defined or understood by the analyst. If it is accepted that law is a particularly authoritative and masculinist discourse and that the objective of feminist jurisprudence is to ensure that feminist praxis (exercising reflexivity in theory, method and practice) is truly integrated, accessible and influences shifts within this discourse, then feminist jurisprudence will not follow Smart’s concern to its conclusion. Instead, the vision of law reform and the strategies within need to be interrogated and reshaped.

Janet Sawicki makes the argument that feminists need to deeply analyse the politics of personal relations, to recognise that there are both victims and agents within systems of domination and to ‘account for our participation in reproducing systems of domination despite our conscious protests against specific forms of it’. For those seeking a (more) feminist jurisprudence, this means engaging in reformist activities that go beyond the strict analysis of the law and legal decisions to include activities such as redefining how women and their experiences with violence are articulated in the law and how these are treated within the criminal justice system more broadly. Within the South African rape law reform movement, the use of empirical and other social science research on women’s actual experiences with sexual violence and the criminal justice process was a core strategy in feminist attempts to shape the law. This evidence-based approach to law reform drew not only on academic research and scholarship, but on the valuable and compelling case studies and stories of women assisted by civil society organisations. At the heart of substantive submissions for re-constructing the law were the ‘real life’ experiences of South African women.

As with most approaches to the law, there are contradictions and tensions within the feminist jurisprudence ‘model’. The area of sexual offences is a good example of the contradictory imperatives of its analysis. For instance, feminist scholarship and activism in South Africa has emphasised the ways in which the law and the criminal justice process sustain inequality and, to some extent, violence against women. However, this indictment is also often coupled with demands from the law to increase criminal sanctions against perpetrators and to strengthen criminal justice responses to victims. The state becomes both a locus of control over women’s sexuality and agency, as well as a site for protection, liberation and justice. We demand that that law sends a clear message about sexual violence, but we are sceptical about the role of law and criminal justice as a remedy or even an appropriate agent of ‘meaningful justice’.

43 Smart (note 38 above).
These tensions are not specific to the South African context. International scholars on the subject have also been at odds on the issue. For instance, in 1989, Smart argued that law reform ‘preserves law’s place in the hierarchy of discourse’, that it encourages ‘turning to the law for solutions’ and that it ‘fetishes law rather than deconstructs it’. She later argued that although power of the law lies in its ability to define authoritatively on the world around it, and that this authoritative nature of the law can easily disqualify opposing discourses (such as feminist discourses), law as a discourse can be a powerful site from which to assess how the legal system constitutes and constructs women’s identities:

Law is then an important site of discursive struggle. It is a terrain on which competing visions of the world are fought out; on which contesting normative visions struggle for the power to define legal and political concepts that give meaning to our world. It is neither the only site of this discursive struggle, nor is it any way the primary site. It is a site, among others, where this discursive struggle occurs. It is a place where to contest over the meaning of equality. Of secularism, of political liberty, are fought out and where dominant meanings come to inform not only judicial approaches, but also come to shape the way we understand the world we live in.

The notion of ‘fetishising’ law through law reform and somehow turning law into the definitive site for solutions to, for example, sexual violence, is a limited interpretation of the scholarly-activist works of feminists internationally, but more particularly of liberation- or democracy-building law reform efforts in developing contexts. Apart from being fatalist about the potential of law reform — particularly in transitional states — to enhance access to justice and to redress institutionally imposed inequalities, the development of a body of women’s jurisprudence is essential for democracy building more generally. Lahey reminds us that:

... women’s struggle for access to the legal process has been many things: It has been a strategy for improving the distribution to social goods between women and men; it has been a goal in its own right; it has been a method of defending women against the worst oppressions of women; it is a way to construct the “public” (in patriarchal terms) for women, and on terms that women can tolerate.

It seems more useful then to see some laws and structures as instrumental in ‘protecting’ (ensuring equality/condemning violence) women as well as in controlling or regulating them. Accepting that law and criminal justice are intrinsically contradictory, it is also an important site of resistance and struggle in shaping and re-defining women’s gendered experiences and the right to be free from violence.

45 Smart (note 38 above) 88–89.
46 Ibid 41–42.
While in some respects the law reinforces subordination and victimisation, it may also empower women in different ways, producing different results in different contexts. Reform processes, however, need to be attentive to the social and economic realities that cause violence in the first place. In her analysis of feminist jurisprudence, Martha Fineman sends a useful message to feminists about working with the law:

Law can reflect social change, even facilitate it, but can seldom if ever initiate it. No matter what the formal legal articulation, implementation of legal rules will track and reflect the dominant conceptualizations and conclusions of the majority culture. Thus, while law can be used to highlight the social and political aspects it reflects, it is more a mirror than a catalyst when it comes to effecting enduring social change.48

She further maintains that:

[The] law is too crude an instrument to be employed for the development of theory that is anchored in an appreciation of differences in the social and symbolic position of women and men in our culture. Law can be and should be the object of feminist inquiry, but to position law and law reform as the objective of such theorizing is to risk having incompletely developed feminist innovations distorted and appropriated by the historically institutionalized and inextractable dictates of the "Law".49

In discussing her work on the body in legal theory and feminist jurisprudence more widely Grbich argues that feminist jurisprudence is ‘a way of articulating the issues that traditional jurisprudence ignores — the positionality of knowers about law, the negotiation of meaning about authority, and the professional academic practices which exclude women’s experience from the development of legal theory’.50 However, Naffine argues that although ‘feminists have convincingly demonstrated law’s failure to make sense of many aspects of women’s lives . . . legal institutions have proven remarkably resistant to feminism and its findings’.51 This is partially correct in the South African context, where constitutional rights, substantive law and institutional assistance to women have improved remarkably since the passing of the Constitution. Although feminism has not been (openly) embraced as a theoretical position or its methods used for legal and institutional reform, there are feminist influences informing specific aspects of the law and procedure. Though admittedly, much of its absorption into law and practice has been as a result of couching (perhaps concealing) feminism behind seemingly more savoury doctrines such as “human rights” and “equality”. However, as Naffine aptly puts it ‘we have not seen a

49 Ibid xv.
fundamental reconceptualisation of the legal subject, from the ground up — from his [sic] lace up shoes to his collar and tie’.52

In post-apartheid South Africa the law and criminal justice has had considerable symbolic importance. The symbolism of the law has also served a useful purpose in the South African feminist movement in that it has forced the movement to find a focus and to mobilise itself around it. Equality-based law reform has been sufficiently malleable to allow critical feminist contributions towards shaping legal perspectives on termination of pregnancy,53 equality law,54 labour law,55 domestic violence,56 sexual assault,57 maintenance,58 customary marriages59 and domestic partnerships60. For those undertaking the analytical approach of feminist jurisprudence, it is the interpretation of these laws that needs to be challenged, not the ‘law reform’ movement itself.

Those engaging in ‘feminist jurisprudence’, with all its focus on deconstructing the law and reformative strategies through theory and practice, have also examined the features of law and society that create and maintain inequality and violence. Some have approached the law with a focus on the core questions of (masculinist) jurisprudence and legal theory while others have been more inclined to interrogate the broader questions of the sociology of law and systems of justice. As our social ideologies have changed, so too have the demands for more realistic laws and criminal justice practices in relation to violence against women. MacKinnon’s analysis of these approaches to law reform resonates: she argues that the law ‘names’ the harm and that changing what could be done by the law changes the status of women from victims to citizens.61 In this way the law reform process may give some women at least a greater sense of entitlement to safety and redress. The resultant demands can provide a powerful force for change.

We must not lose the expectation that progressive legal frameworks can lead to substantive transformation, social policy and improved practices. Within a transitional social context, it would be fatalist to view the law as a vacant collection of juridical rights that cannot be realised without full political and social restructuring. It seems more useful to see the progressive potential of the law as informing and

52 Ibid 73.
53 The Choice on Termination of Pregnancy Act 92 of 1996.
60 SALRC Project 118: Domestic Partnerships.
61 MacKinnon (note 35 above).
reinforcing social restructuring processes; where social change and the institutionalisation of ‘rights’ happen simultaneously, incrementally and relationally. It is not a question of one before the other, but instead of one approach informing the other in a dialectical manner. In South Africa political transformation has been effected on many fronts through legal transformation — the recognition of new constitutional rights and the development of human rights discourses — because historically it was the law and its agencies that kept people unequal and underdeveloped. In relation to sexual offences, there was an unambiguous need to challenge the prevailing definition of rape and to broaden the scope and accessibility of legal interventions as a transformative measure of social justice and equality. These not measures are undoubtedly partial. Referring to the work of Gandhi and Shah, Menon maintains that ‘the law is not enough’ and that:

... no part of the women’s movement is under any illusion that the law is a genuinely transformative instrument. At most, women’s groups see legal campaigns as a broad strategy to achieve legitimacy, to create public awareness on specific issues and to secure some short-term legal redress.

MacKinnon, on the other hand, makes a case for institutional support of rights through the law:

There is a legitimate question, though, about the relation between law and the power that produces it, and the degree to which change in one produces change in the other. Whatever we know about how change is made, we do know that no change in one produces no change in the other.

Engaging in law reform, and in that process, making statements about the reality of women’s lives and their engagement with the law, gives conversations about the law some depth. It creates oppositional positions and even raises ambiguities about the law, which is more than non-engagement with the law and legal systems would do. The feminist project on the law is deeply challenging and imperfect, but the fact that women are negotiating a system — one that was historically exclusionary and systemically discriminating — can be considered an essential tread in our efforts to address sexual violence and the attainment of equality more generally. Supporting legal interventions and law reform does not mean accepting the substance of the law or the actualisation of it wholesale. Nor does it mean being uncritical of its masculinist dimensions.

64 MacKinnon (note 35 above) 42.
3. Conclusion

While sexual violence and the politics of sexuality are experienced universally by women and girls, there is an increasing recognition that the way in which this manifests and how it is managed can differ between different social and cultural contexts. In the South we have often taken our lead in our efforts to reform rape laws from the pioneering work of Northern activists. But increasingly we are seeing disillusionment in those countries that have long preceded ours in the process of rape law reform with the inability of law to address staggeringly high levels of violence against women. At the same time we are seeing a resurgence of interest in rape law reform in developing countries, which face similar development constraints to South Africa.

We believe that South Africa is uniquely positioned to inform rape law reform efforts in both the North and the South. While our criminal law mirrors that of other Anglo-American common law traditions, in our efforts at changing those laws we are constantly reminded that our context is that of a resource-constrained developing country. It is therefore not surprising that we have already fielded enquiries from those involved in nascent rape law reform efforts in Africa and South East Asia, as well as activists in countries such as the United States and England who are attempting to improve on the implementation of earlier reforms. The experiences and lessons of South African rape law reform may therefore be of some interest to the international audience. At the same time we recognise that implementation of the Sexual Offences Act will pose substantial challenges in South Africa. It is therefore important to identify these challenges and to continue to inform the evolving South African jurisprudence on sexual offences. We hope that this volume will go some way towards achieving this challenge.
1. Introduction
Research suggests that for criminal law reform to be effective, it should take account of factors such as the need to protect victims, encouraging the reporting of crime, higher conviction rates and a focus on the conduct of the assailant as opposed to the victim.1 This is also the case with any efforts at rape law reform, which remains a complex issue. In this chapter the importance of redefining rape is discussed by considering the historical roots of the definition and the consequences of a definition rooted in patriarchal assumptions about violence against women and women’s sexuality. The chapter begins with a brief discussion on the historical context of rape within the law and legal systems. It then examines the definition of rape in South Africa and in other comparative international contexts. It concludes with a discussion of the tensions and challenges experienced during the South African rape law reform process in defining ‘rape’.

2. Elements (and Semantics) of the Crime of Rape
Prior to 2007 rape in South African law, as in many jurisdictions, had been defined as ‘intentional, unlawful sexual intercourse with a female without her consent’.2

---

* Nikki Naylor BProc LLB (UWC) LLM (London) has been an attorney at the Women’s Legal Center in Cape Town and Interights in London, where she has litigated a number of groundbreaking cases involving violence against women. She is currently the Program Officer for Human Rights in the Ford Foundation’s Office for Southern Africa and has written this chapter in her private capacity.

---


---

* The word rape originates from the Latin words *raptus*, *rapio*, and *rapina*, meaning ‘tearing off, rending away, carrying off, abduction, rape, plundering, to seize, snatch, to plunder a place, to hurry along a person or thing, robbery, pillage and booty plunder’ (*Simpson Cassell’s New Compact Latin-English English-Latin Dictionary* (1963) 189–190). As such, *raptus* in Roman law was generally understood as an offence consisting of the violent ‘carrying away’ of women and is better translated as ‘abduction’. See *S v Ncanywa* 1992 (2) SA (Ck) at 185E–G citing De Wet and Swanepoel (1975) *Strafreg* 3 ed, 242 and Voet *Commentarius ad Pandectas* 48.6.4, Van der Keessel (1809) *Praelectiones ad Jus Criminale* 46.6.7. Also see Hiemstra and Conin (1986) *Trilingual Legal Dictionary* 2nd ed. Rape has its roots in ancient history and makes its first appearance in early religious texts. In antiquity and until the late Middle Ages, rape was seen in most cultures less as a crime against a particular girl or woman than against the male figure she ‘belonged’ to. Accordingly, the penalty for rape was often a fine, payable to the father or the husband whose ‘goods’ were ‘damaged’. (J Temkin (2002) *Rape and the Legal Process* 2nd ed, 57). In English law rape was originally understood as a crime of ‘deflowering’ a virgin thereby affecting her value as a bride. In ancient societies such as Babylonia and Assyria the severity of the offence depended on the social and sexual status of the woman, with the rape of a virgin seen as worse than rape of a married woman. (Ibid). Ironically, punishment was not directed solely at the aggressor. In some cultures the victim was required to marry her assailant and her father was entitled to rape the aggressor’s wife or sister. (DL Rhode (1991) *Justice and Gender*, 245). Early English law
The intention of gender-based violence is to perpetuate and promote hierarchical gender relations. No matter how the violence is manifested it ultimately serves the same end: the preservation of male control and power. This view of patriarchy and masculinity provides a useful starting point for examining rape within a context of gender roles and the reinforcement of relations of power. Sexual violence is thus seen and contextualised as a form of social control.

Accordingly, before one embarks on a process of redrafting the definition of rape it is crucial to understand what the problems with the current definition have been. There are five elements to the crime of rape. Culpability for rape requires proof beyond a reasonable doubt of the unlawfulness of the act, that it was done with the requisite intention, that sexual intercourse took place with a woman and that there was an absence of consent on the part of the woman. In this section we highlight the critique surrounding the current definition and attempt to highlight progressive decisions within comparative jurisdictions dealing with these problematic aspects of the definition. Thereafter we provide more detail as to legislative developments around redefining rape.

2.1 Sexual intercourse
Prior to the Constitutional Court ruling in *S v Masiya* vaginal penetration by the penis alone constituted rape and no other forms of sexual activity (such as anal penetration) qualified. This limitation has been recognised as problematic since it excludes the possibility of the use of other body parts (anus, mouth or fingers) and similarly ignores the reality that penetration in rape often takes place with the use of objects such as sticks or bottles. Hall and Brownmiller for example, correctly argued that the avenue and instrument of penetration are irrelevant for an act of rape also graded offences not by brutality of the crime but by the status of the victim, for example, rape of a nobleman’s serving maid cost 12 shillings, whilst rape of a commoner’s maid only five. Similarly, in Roman law, the crime of rape was not defined by the lack of consent of the woman, but by her removal from her family and the tainting of her honour (RN Stacey (2003) *Sir William Blackstone and the Common Law: Blackstone’s Legacy to America*). In English law, by 1285 the second Statute of Westminster defined the crime as ravishment of any female ‘where she did not consent’ and ‘with force’. (J Burchell & J Milton (1991) *Principles of Criminal Law* 438). By 1841, the crime of rape was extended by redefining the offence as intercourse with a woman without her consent and no reference was made to the virginity of the woman concerned. (Ibid). However, Temkin points out that even as late as the Century courts were still discussing whether the hymen of a raped woman had been intact at the time. (Temkin *supra* 58). South African courts, in turn, accepted the English definition, as did most Anglo-American jurisdictions. In the early 1970s, however, the demands of feminist activists in many countries led to a call for reforms to outmoded rape laws. Today the need for rape law reform has been well-documented within the context of the feminist critique of the definition of rape.

*5 Case No. CCT 54/06, Constitutional Court Judgment of 10 May 2007.*
and that the sexual humiliation suffered through forced oral or rectal penetration is as much a violation of the dignity and personal private space of the woman concerned and evidences the same intention to degrade, as vaginal penetration by a penis during rape. A further problem relates to the fact that the crime of rape is ‘sexualised’ by this definition since it focuses on the act of sexual penetration rather than the violence associated with the attack. Rape is not a deviant sexual act — it is an act of violence perpetrated predominantly against women.\(^7\)

The international community endorsed this argument in the case of *Furundziji* where the International Criminal Tribunal for Yugoslavia (ICTY) held that:

> [F]orced penetration of the mouth by the male sexual organ constitutes a most humiliating and degrading attack upon human dignity. The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender . . . It is consonant with this principle that such an extremely serious sexual outrage as forced oral penetration should be classified as rape.\(^8\)

Furthermore, the International Criminal Tribunal for Rwanda (ICTR) has acknowledged that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. In the case of *Akayesu*,\(^9\) the Tribunal acknowledged that sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact, such as the case in point where a woman had been forced to undress and do gymnastics naked in a public courtyard in front of a crowd\(^10\) and a piece of wood was thrust into the vagina of a dying woman.\(^11\)

During the process of rape law reform in England in 2000 the Law Reform Commission noted that:

> Penetration comes in many forms. Men put their penis into the vagina, anus and mouth. Other parts of the body (most notably finger and tongues) are inserted into the genitalia and the anus. Objects are inserted into the vagina and anus of the victims. Both men and women may perform such penetration. These are all extremely serious violations of victims, which can leave them physically and psychologically damaged for many years.\(^12\)

In South Africa the constitutionality of the common law definition of rape, which excludes nonconsensual anal penetration, was decided in the case of *Masiya*.\(^13\) Mr Masiya was charged with having anal intercourse with a nine year old girl without

---

\(7\) Ibid 163.


\(10\) Ibid para 688.

\(11\) Ibid para 686.

\(12\) United Kingdom Home Office Report (2000) *Setting the Boundaries* vol i, para 2.8.2.

\(13\) Note 5 above.
her consent. Under the common law he had to be charged with the lesser offence of indecent assault which carried a lesser sentence than rape. The Regional Court decided that the common law definition should be modified so as to include nonconsensual anal penetration and convicted Mr Masiya of rape. The High Court confirmed this and the constitutionality of the definition was referred to the Constitutional Court.

The Constitutional Court held that the case involved a number of rights under the Constitution, most notably, dignity, equality and freedom and security of the person. It found that historically the definition of rape was based on protecting the interests of society in avoiding unchaste behavior, rather than protecting the interests of rape victims, with patriarchal societies criminalising rape to protect property rights of men over women. The Court found that under the Constitution, however, rape should be viewed within the context of the right of all women to dignity, autonomy, bodily integrity and security of the person. Accordingly, it held that the definition of rape should be extended. It was emphasised that the humiliation, degradation and physical harm associated with both anal penetration and vaginal penetration were the same and that the inclusion of anal rape in the definition would harmonise the common law with the spirit, purpose and objectives of the Bill of Rights. The Court would not, however, go further and extend this definition to include nonconsensual anal penetration of men. The decision is thus limited to anal penetration of women and girls and not all forms of penetration, such as penetration with objects other than the penis, are covered.

Most other countries have reformed their legislation so as to allow for all forms of penetration as opposed to only penile penetration of the vagina. These are discussed further below.

### 2.2 With a woman

Under the South African common law the definition of rape was couched in terms making it legally impossible to rape a man. Forced anal penetration of men was charged as a form of indecent assault. The reason seems to be historical in that rape laws originated in terms of the regulation of the chastity and virginity of women as property of men and hence evolved as a crime committed only in respect of women. We would argue that this gender-specificity tends to stereotype women as the passive victims with men as the aggressors, not recognising that women can commit acts of rape and that men can rape men. On the other hand, there has been an

---

16 Ibid paras 39–40
17 Australia, Canada, Namibia and the United States, for example.
18 In the United States, for example, it has been recognized that there is no reason in principle why a woman cannot commit rape. *People v Liberta* (1984) 64 NY 2d 152
argument that by bringing men into the category of rape victims, rape would cease to ‘emphasise the reality that sexual violence is predominantly committed by men against women and rape would no longer underline the protection of the sexual autonomy of women’.19

2.3 Unlawfully
Traditionally the notion of unlawfulness meant that the violation had occurred outside of a marriage, with rape within marriage not deemed to be an offence. Again, this aspect of the definition can be traced back to the 17th century writings of Sir Matthew Hale, based on the notion that rape law was exclusively concerned with the protection of the virginity of women. It was held that upon marriage, by mutual matrimonial consent, the wife gave herself up to her husband and thus the notion of ‘irrevocable consent’ applied.

The marital rape exemption was abolished within South African law in 1993 under the Prevention of Family Violence Act.20 It is safe to conclude that the issue of unlawfulness insofar as it relates to marital rape is no longer an issue in South African law and that the principle established in the Prevention of Family Violence Act will remain intact.21

2.4 With the absence of consent
As highlighted above, absence of consent together with penetration of the vagina have been vital ingredients of the \textit{actus reus} of the offence. Before the middle of the 19th Century, judges in England would direct juries that rape was sexual intercourse against a woman’s will by force, fear or fraud.22 Today, resistance and force requirements have been largely modified or abolished in most jurisdictions. However, these are often still used when interpreting whether or not the sexual intercourse was consensual, as courts tend to revert to standards of physical force and/or resistance. The most common arguments used to counter an allegation of rape have been consent or the honest and reasonable, albeit mistaken, belief that consent had been given. Here notions of when ‘no’ means ‘no’ and when ‘no’ means ‘yes’ come into play and it is often argued that in intimate emotional human relationships...

---

19 Reddi (note 6 above) 69.
21 Similar trends have occurred within England and Wales with the marital rape exemption being abolished there in 1991. Germany abolished the rule in 1997. In the 1980s most Australian states abolished the immunity given to husbands, as did Canada and New Zealand. The Republic of Ireland abolished the rule in 1990. In the United States seventeen states have abolished the exemption in its entirety with other states only providing for partial exemption.
relationships it is not always easy for men to understand that a woman is not consenting.\textsuperscript{23}

Temkin\textsuperscript{24} points out that the unequal status which women still possess in society results in a situation in which what they have to say is, for many purposes, discounted or reinterpreted for them. This also happens within the context of sex, where women who expressly state that they do not consent to intercourse are nevertheless deemed to have consented.

Feminists have critiqued this standard of consent on the basis that it re-enforces inequality between men and women in sex. MacKinnon, for example, argues that when the law of rape looks to establish consent to sex, it does not look to see if the parties were social equals in any sense, nor does it require mutuality or positive choice in sex.\textsuperscript{25} The doctrine of consent in the law of rape envisions instead unilateral initiation (the stereotyped acted and acted-upon model of male dominant sex) followed by accession by persons tacitly presumed equal. Consent is then proved if the person being acted upon does not say no. It can, however, even include saying no. A lot of ‘not-yes saying’ manages to pass for consent to sex by this standard, such as the resigned, silent, passive dissociated acquiescence where a woman may fear for her life or safety.\textsuperscript{26} It has furthermore been argued that legal reform through consent alone (whilst an improvement) will still fall short, unless the concept of rape is fundamentally recast in terms of inequality.\textsuperscript{27} MacKinnon succinctly summarises the position when she states that:

\begin{quote}
No means ‘no’ is a big improvement over ‘no’ meaning ‘yes,’ but until equality exists not even ‘yes’ can reliably mean ‘yes.’ ‘Yes’ can be coerced. It can be the outcome of forced choices, precluded options, constrained alternatives, as well as adaptive preferences conditioned by inequalities.\textsuperscript{28}
\end{quote}

Ultimately, it needs to be acknowledged that sex under conditions of inequality can look consensual and this is the inherent danger of relying on a consent approach.

In the final analysis, the requirement of consent has been criticised and various jurisdictions have attempted to deal with the issue. Canada, Michigan in the United States, the United Kingdom and New South Wales in Australia have all attempted to deal with the problems in proving this element of the offence and the dangers of resorting to stereotypical notions in relation to how women should and should not behave in sexual relations. It may well be that the problem of consent is unlikely to vanish, whatever terminology is adopted to deal with rape. Realistically, it is likely to

\textsuperscript{23} Temkin (note 2 above) 121.
\textsuperscript{24} Ibid 122.
\textsuperscript{26} Ibid.
\textsuperscript{27} Ibid 246.
\textsuperscript{28} Ibid.
remain an issue in the majority of sexual violence cases. However, there may be strategies worth considering such as utilising the notion of coercion, as opposed to consent, or shifting the burden of establishing consent onto the shoulders of the defence. Alternatively, legislation could codify the law by providing that the prosecution need not adduce evidence of resistance or words or conduct indicating absence of consent in order to establish lack of consent. Moreover, in those cases where the evidential burden of establishing consent is on the defence, evidence of lack of resistance or absence of words or conduct should not suffice. Finally, there is the possibility of statutorily defining consent or coercion coupled with a well-defined non-exhaustive list of situations in which consent or coercion will be negated. Legislative amendments dealing with consent and/or coercion in the above manner are dealt with below. However, before turning to the legislative developments in other jurisdictions it is appropriate to consider the jurisprudence as it has evolved within international tribunals.

3. Consent and Coercion: Lessons from International Tribunals

In 1998, the ICTR for the first time expressly defined rape under international law in the case of Akayesu. Mr Akayesu was found criminally liable for crimes against humanity for ordering, instigating, aiding and abetting sexual violence that took place as part of a widespread and systematic attack on civilians in Rwanda. The Chamber held that rape is ‘a physical invasion of a sexual nature, committed on a person under circumstances which are coercive’. Crucially, it added that ‘coercive circumstances need not be evidenced by a show of physical force [but] may be inherent in certain circumstances’ such as armed conflict or the military presence of threatening forces on an ethnic basis. Akayesu was subsequently endorsed by the Musema and Niyitegeka trial chamber decisions in the ICTR.

Unfortunately, the progressive stance of the Akayesu court and the ICTR was diluted somewhat by the ICTY in the case of Furundzija, where the Court revisited and surveyed national laws and how they defined rape and came to the conclusion that the underlying principle common to all was sexual penetration without consent. All jurisdictions surveyed required an element of force, coercion, threat or acting without consent of the victim. In Furundzija it was held that one needed to show

---

29 Temkin (note 2 above) 176.
30 Ibid 177.
31 Akayesu (note 9 above).
32 Ibid at 688.
33 Ibid.
34 Prosecutor v Musema, Case No. ICTR 96–13–T; Judgment 27 January 2000 at 220.
36 Furundzija (note 8 above).
37 Ibid at 180.
vaginal or anal penetration (however slight) by a penis or object or oral penetration by a penis without the consent of the victim.  

In the Kunarac, Kovac and Vukovic case the Trial Chamber found that the basic underlying principle common to the legal systems surveyed in Furundzija was that sexual penetration will not constitute rape if it is truly voluntary or consensual and that the true common denominator which unifies various systems may be wider in terms of the principle of penalising violations of sexual autonomy. The Appeals Chamber surveyed the decision in Kunarac, critically observing that any assertion that only continuous resistance provides adequate notice to the perpetrator that his attentions are unwanted is ‘wrong on the law and absurd on the facts.’ Secondly, it was held that the Trial Chamber had departed from the prior definitions of rape in ‘focus[ing] on the absence of consent as a conditio sine qua non of rape.’ The Appeals Chamber preferred to presume non-consent in view of the fact that the women were in de facto custody at the time of the rapes and were thus the legitimate sexual prey of their captors. It concluded that the circumstances were coercive enough to negate any possibility of consent. This evidences support for a coercion-based definition as per the Akayesu decision.

The more recent 2005 ICTR decision in Muhimana has provided an accurate synthesis of prior rulings on the definition of rape and has confirmed that coercion is an element that may obviate the relevance of consent as an evidentiary factor in the crime of rape, since most international crimes will be universally coercive, thus vitiating true consent.

The significance of the ICTR jurisprudence is that Akayesu built into its rape definition the context of violent inequality and shifted the focus of proof from individual interactions to collective realities, from proof of the defendant’s subjective psychological state to proof of objective facts, thereby discarding presumptive consent. Therefore, the Akayesu definition may be well-suited to addressing rape, not only within the context of crimes against humanity, but also to situations of

---

38 Ibid at 185.
40 Ibid at 440.
42 Ibid at 128.
43 Ibid at 129.
44 Ibid at 132.
45 Ibid.
48 Ibid at 546.
49 MacKinnon (note 46 above) 955.
inequality outside of recognisable conflicts. The definition and focus on coercion has already been incorporated into the Rome Statute of the International Criminal Court and in legislation in the states of California and Illinois in the United States, for example.50

Developments around the definition of rape have not been limited to the ICTY and ICTR. The European Court of Human Rights (ECHR) has also had to grapple with the notion of consent and coercion in the case of M.C v Bulgaria.51 This case concerned the rape of the applicant when she was 14 years old in 1995. Two men, whom the applicant had met at a nightclub, allegedly raped her. Following investigations that continued for three years, the District Prosecutor issued a decree terminating the criminal proceedings on the basis that there was insufficient evidence that the applicant had been compelled to have sex against her will.52 In particular, it was argued that it had not been established beyond reasonable doubt that there had been the use of force or threats or that sexual intercourse had taken place without the applicant’s consent and despite her resistance.53

Under Bulgarian law54 the offence of rape requires proof of sexual intercourse through the use of force or threats. The applicant complained, invoking the European Convention, that Bulgarian law and practice did not provide effective protection against rape and sexual abuse, as only cases where the victim had resisted actively were prosecuted. She also argued that the authorities had not investigated the events of 1995 effectively and that this amounted to a violation of the State’s positive obligations to protect an individual’s physical integrity and private life and to provide effective remedies in this respect.55

In finding a violation the Court observed that historically proof of physical force and physical resistance were required under domestic law and practice in a number of jurisdictions. However, over the last decade the Court observed that there had been a clear and steady trend in Europe and some other parts of the world toward abandoning formalistic definitions and narrow interpretations of the law in the area of rape, with most countries accepting that there is no requirement of physical resistance.56 It was accepted by the Court that the development of law and practice in the area reflected the evolution of societies toward effective equality and respect for each other’s sexual autonomy.57 The Court criticised the Bulgarian authorities finding that it was significant that a large number of the reported judgments from the

50 Ibid 986.
52 Ibid at 10.
53 Ibid at 61–65.
54 Article 152 s 1 of the Bulgarian Criminal Code.
55 Bulgaria (note 51 above) at 109 and 111.
56 Ibid at 156.
57 Ibid at 165.
Supreme Court of Bulgaria that dealt with rape involved the use of significant violence. This seemed to indicate that where no physical force or resistance was established then those cases were not prosecuted, thus supporting the allegation made by M.C.58 It was therefore held that the prosecutors should have taken into account the age, vulnerability of the victim and the surrounding circumstances of the rape, which evidenced coercion on the part of the accused. The Court held that the prosecution had erred by placing undue emphasis on direct proof of resistance.

The case is significant because the Court found that where States are relying on outdated notions of what constitutes ‘lack of consent’ it may mean that they are not fulfilling their positive obligation to protect women from violence. In the final analysis, having regard to the ICTY, ICTR and ECHR’s approach to the issue of defining rape, the focus appears to have moved from mechanical definitions to a contextual understanding that rape constitutes a violation of the sexual autonomy and dignity of women. I turn now to consider the definition of rape as it has evolved in various jurisdictions.

4. Comparative Legislative Developments

4.1 Canada

The crime of ‘rape’ was abolished by Canadian Law in 1983 and replaced by three levels of assault: (1) sexual assault; (2) sexual assault with a weapon and (3) aggravated sexual assault. This gradation system was introduced on the grounds that since consent was difficult to prove, women could obtain justice only if the crime of rape was defined as assault rather than as a sexual crime.59 It also aimed to focus on the violence associated with rape. A useful exposition of Parliament’s rationale for reconsidering the common law crime of rape was set out by L’Heureux-Dube J in the case of R v Cuerrier60 where the learned Judge held as follows:

The substantial overhaul that Parliament undertook with the 1983 amendments implies that it was dissatisfied with the traditional approach to sexual offences. This approach had been informed by the common law, as well as previous statutory codifications. In this context of discontent with the law’s historical treatment of victims of sexual offences . . . it is clear that Parliament intended to move away from the traditional approach as it relates to consent in sexual assault offences.61

The three offences remained gender-neutral and covered homosexual and heterosexual conduct. Canadian legislation drew no distinction between penetration and other sexual acts since the view that rape is less a crime of sex and more a crime of violence had been pursued with fervour and had been accepted by the Canadian Law

58 Ibid at 173, 174.
61 Ibid.
Reform Commission. This was also reinforced by the Canadian Supreme Court in the case of *R v Seaboyer, R v Gayme*. However, the sections in the Criminal Code were critiqued for their failure to define sexual assault, as this resulted in one having to revert to the definition of assault contained elsewhere in the Criminal Code. The issue of consent therefore remained an issue to grapple with. In 1992 the Canadian government announced further reform measures. In addition to new sexual history provisions, a concerted effort was made to tackle both the issue of consent as well as the plea of honest belief in consent. Consent was defined and a list of situations where consent would be regarded as absent was elaborated upon. This then established a statutory list of non-consent situations which would be non-exhaustive. Section 273.1 now provides that consent means ‘the voluntary agreement of the complainant to engage in the sexual activity in question’. Section 273.2 provides that no consent is present where:

(a) the agreement is expressed by the words or conduct of a person other than the complainant;
(b) the complainant is incapable of consenting to the activity;
(c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
(d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
(e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.’

The new law thus includes abuse of a position of trust or power and aims to limit unmeritorious claims of belief in consent. It was hoped that by defining consent to

---

62 Temkin (note 2 above) 160.

63 [1991] 2 SCR 572. The Court held that at 648–9 that: Sexual assault is not like any other crime. In the vast majority of cases the target is a woman and the perpetrator is a man. . . Unlike other crimes of a violent nature, it is for the most part unreported. Yet, by all accounts, women are victimized at an alarming rate and there is some evidence that an already frighteningly high rate of sexual assault is on the increase. . .

64 Section 265(1)(a) of the Criminal Code which provided that ‘a person commits an assault when, without the consent of another person he applied force intentionally to that other person’.

65 Temkin (note 2 above) 174.

66 The Canadian Supreme Court was given a further opportunity to grapple with the notion of mistaken belief in consent in the case of *R v Ewanchuck* [1999] 1 SCR 330. The Court emphasised that in making an assessment the judiciary needs to be responsive to women’s realities rather than utilise the law as a vehicle for the perpetuation of historic repression and disadvantage. In this case the complainant was a 17-year-old girl who had been interviewed for a job in the back of a van by the accused. The accused closed the van door and made her believe that he had locked it; he then proceeded to touch her and indecently assault her notwithstanding that she had said ‘no’ on three occasions. At the point when the complainant stopped saying no and submitted to the advances, evidence was led to the effect that she had done so out of extreme fear. The trial judge acquitted the accused by relying on the notion of implied consent. On appeal,
mean voluntary agreement, this would underline that consent requires active, hence verifiable (not projected) conduct freely chosen (not coerced or presumed) and that it would focus on the specific sexual interaction in dispute, not on past history or myths.67 Initially the Canadian process was criticised for its grading of offences, as well as the failure to ensure sufficient detail and specificity in the law. Significantly, research conducted into the effect of the 1992 reforms three years after coming into operation was unable to find any evidence that the definition of consent had had any impact at all on the practice of the Courts.68

4.2 Namibia
Namibia followed the English law and South African approach for many years. However, it embarked on a process of re-evaluating and examining the effectiveness of its rape laws post-independence and as a result passed the Combating of Rape Act 8 of 2000. The Act starts off by defining a sexual act and then goes on to define the crime of rape. A sexual act is defined to cover penetration by the penis of a man into the vagina, anus or mouth of another person, as well as the insertion of objects or animals into the vagina, anus or mouth of another person with the exception of objects inserted as part of sound medical practice.69

In terms of Section 2 rape is defined as follows:

Any person (in this Act referred to as perpetrator) who intentionally under coercive circumstances —

commits or continues to commit a sexual act with another person; or

causes another person to commit a sexual act with the perpetrator or with a third person,

shall be guilty of the offence of rape.

At the outset it is significant that Namibia has moved away from the notion of consent and defines rape using the concept of coercive circumstances, similar to the

L’Heureux-Dube J pointed out that the case was not about consent, implied or otherwise, but rather about myths and stereotypes. In setting out some of these myths the learned judge held as follows at para 82:

Myths of rape include the view that women fantasise about being rape victims; that women mean ‘yes’ even when they say ‘no’; that any woman could successfully resist a rapist if she really wished to; that the sexually experienced do not suffer harms when raped (or at least suffer lesser harms than the sexually ‘innocent’); that women often deserve to be raped on account of their conduct, dress, and demeanour; that rape by a stranger is worse than one by an acquaintance. Stereotypes of sexuality include the view of women as passive, disposed submissively to surrender to the sexual advances of active men, the view that sexual love consists in the ‘possession’ by a man of a woman, and that heterosexual sexual activity is paradigmatically penetrative coitus.

It was further held that the issue of implied consent should never have arisen and that the trial court had made a fundamental error by basing its finding on a belief that women are in a state of ‘constant consent to sexual activity’ as opposed to the right of all women to sexual autonomy, para 87.

67 Ibid at 175.
68 Ibid.
69 Combating of Rape Act 8 of 2000, s 1.
ICTR in Akayesu. Recognising that coercion was a new concept, within the context of rape, the Act goes on to explicitly set out (in a non-exhaustive list) what constitutes coercive circumstances. It provides that coercive circumstances include:

- the application of physical force to the complainant or to a person other than the complainant;
- threats (verbal or otherwise) of the application of physical force to the complainant or to a person other than the complainant;
- threats (verbal or otherwise) to cause harm (other than bodily harm) to the complainant or to a person other than the complainant under circumstances where it is not reasonable for the complainant to disregard the threats;
- circumstances where the complainant is under the age of 14 and the perpetrator is more than three years older than the complainant;
- circumstances where the complainant is unlawfully detained;
- circumstances where the complainant is affected by-
  - physical disability, helplessness, mental incapacity or other inability whether permanent or temporary; or
  - intoxicating liquor or any drug or other substance which mentally incapacitates the complainant; or
  - sleep,
    to such an extent that the complainant is rendered incapable of understanding the nature of the sexual act or is deprived of the opportunity to communicate unwillingness to submit to or to commit the sexual act;
- circumstances where the complainant submits to or commits the sexual act by reason of having been induced (verbally or through conduct) by the perpetrator or by some other person to the knowledge of the perpetrator, to believe that the perpetrator or the person with whom the sexual act is being committed is some other person;
- circumstances where as a result of the fraudulent misrepresentation of some fact by, or any fraudulent conduct on the part of, the perpetrator, or by or on the part of some other person to the knowledge or the perpetrator, the complainant is unaware that a sexual act is being committed with him or her;
- circumstances where the presence of more than one person is used to intimidate the complainant.70

The definition is very similar to the Canadian definition in relation to what constitutes consent. The onus remains on the state to show the coercive circumstance existed and this may be rebutted by the defendant proving consent. Similar to the position in Canada, at this stage it has been hard to assess whether the new Act has made any significant inroads into reporting and conviction rates in relation to rape. In fact, in October 2005, it was reported that violence against

---

70 Section 2(2).
women and girls had increased dramatically and had reached ‘crisis point’ with women’s groups highlighting that the progressive law was not enough to address what actually happened within courtrooms and the lives of women.71

Nonetheless, the new definition has positively broadened the ambit of rape and allowed a wider range of complainants to come forward to report rape. The process of defining legislatively what constitutes and what does not constitute rape has thus proved useful in Canada and Namibia. A similar approach has been followed in the United Kingdom where the notion of consent has remained, but has been extensively defined with evidential and conclusive presumptions created.

4.3 United Kingdom

In the United Kingdom the law of rape underwent significant changes during the 1990s, even before the Sexual Offences Act of 2003. Amendments attempted particularly to widen the definition. Before 1994, the definition of rape contained five constituent elements. There had to be (1) sexual intercourse (2) with a woman which was (3) unlawful and which took place (4) without consent (5) knowingly or recklessly. Vaginal penetration by the penis alone constituted sexual intercourse, whilst forced acts of oral sex and penetration with objects or other parts of the body remained collectively subsumed under the heading ‘indecent assault.’ Furthermore, until 1994 only a man could be the perpetrator, and a woman the victim, of rape. The Criminal Justice and Public Order Act of 1994 re-defined the offence by bringing anal intercourse within its scope and removed the word ‘unlawful’ from the definition so as to cater for marital rape.

In considering the issue of consent, the leading case in the United Kingdom prior to the passing of the new Act was the case of Olugboja.73 In this case two teenage girls had been given a lift home by the accused and his friend who then raped the girls. The complainant had taken off her trousers when told to do so out of fear. When pushed onto the sofa she did not cry out or struggle. In convicting the accused of rape Dunn LJ held that:

... consent, or the absence of it, is to be given its ordinary meaning and if need be, by way of example, that there is a difference between consent and submission; every consent involves a submission, but it by no means follows that a mere submission involves consent. ... [The jury] should be directed to concentrate on the state of mind of the victim immediately before the act of sexual intercourse, having regard to all relevant circumstances, and in particular the events leading up to the act, and her reaction to them showing their impact on her mind.

72 Temkin (note 2 above) 55.
This statement supports a subjective element in the enquiry into whether or not consensual sexual intercourse took place, similar to the Canadian law. Despite the Olugboja case, problems were still encountered and in reality the prosecution would very rarely proceed with a case where a woman submitted in circumstances of psychological duress or fear. The sexual offences review process prior to the passing of the 2003 Act highlighted the problem in relation to the legal meaning of consent, which was not clearly understood. Criminal law commentators, such as Smith and Hogan, pointed to the fact that it was doubtful whether the bounds of the crime of rape could satisfactorily be drawn by a distinction between consent and submission since these concepts were so vague that both judges and juries often had very different ideas of their meaning and application.74 On 20 November 2003 the new Sexual Offences Act came into effect, redefining rape and expanding on the notion of consent substantially.

The new Act defines rape as follows:

(1) A person (A) commits an offence if —
   (a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,
   (b) B does not consent to the penetration, and
   (c) A does not reasonably believe that B consents.

(2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.75

The Act goes on to define assault by penetration as well as sexual assault and sets out evidential and conclusive presumptions relating to consent.76 It provides that a person consents if they agree by choice and have the freedom and capacity to make that choice.77 This serves to underline the fact that a complainant who simply freezes but utters no protest and offers no physical resistance may nevertheless not be consenting. It therefore covers situations of consent by duress as well.78

Section 75 creates evidential presumptions regarding consent and reasonable belief in consent. It lists examples of circumstances where consent is not present. The prosecution thus has to prove that sexual activity took place in one of the circumstances on the list. If proved, it is for the defendant to show that the

---

75 Section 1.
76 In ss 74, 75 and 76.
77 Section 74.
78 Rook and Ward (note 22 above) 1.83. However, the parameters of freedom are not clear. To have freedom to make a choice a person must be free from physical pressure but the definition does not address the issue as to whether absence of economic, cultural or even religious freedom will be sufficient to vitiate consent. The boundaries of free agreement have therefore yet again been left to juries and judges to determine.
complainant did indeed give her consent. Section 75(2) provides for the following circumstances to invoke the evidential presumption:

- where violence is used against the complainant or the complainant fears that immediate violence would be used against the complainant or another person;
- the complainant was unlawfully detained at the time;
- the complainant was asleep or otherwise unconscious;
- because of the complainant’s physical disability, he/she was unable at the time of the relevant act to communicate consent;
- any person had administered to or caused to be taken by the complainant, without the complainant’s consent, a substance capable of causing the complainant to be stupefied or overpowered at the time of the relevant act.

Section 75 is designed to make absolutely clear the circumstances in which consent is unlikely to have been present. Once any one of these presumptions is triggered the evidential burden rests on the defendant to rebut the presumption. Three matters have to be proved before the presumption arises:

- that the defendant performed the relevant act;\(^{79}\)
- that any one of the Section 75(2) circumstances existed;
- that the defendant knew those circumstances existed.\(^{80}\)

In contrast to the rebuttable presumptions of s 75, s 76 creates conclusive presumptions by essentially replicating the common law. It provides as follows:

1. If in proceedings . . . it is proved that the defendant did the relevant act and that any of the circumstances specified in subsection (2) existed, it is to be conclusively presumed—
   (a) that the complainant did not consent to the relevant act, and
   (b) that the defendant did not believe that the complainant consented to the relevant act.
2. The circumstances are that—
   (a) the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act;

\(^{79}\) As defined in Section 77. Namely rape, assault by penetration, sexual assault or engaging in sexual activity without consent.

\(^{80}\) It is of concern that the defendant’s state of mind becomes relevant here. How can the defendant’s knowledge shed light on the complainant’s state of mind? This point was made in the Ewanchuck case in Canada in relation to absence of consent being purely subjectively determined by the complainant’s subjective internal state of mind, with the accused’s perception being irrelevant. Furthermore, for the defendant to rebut the presumption he has to adduce sufficient evidence, which is not defined. Rook and Ward suggest that the Canadian ‘air of reality’ test may prove useful in determining what constitutes sufficient evidence, namely that when a defendant merely asserts that he believed that the defendant was consenting, he must satisfy the evidential burden by giving the defence an air of reality. See Rook and Ward (note 22 above) 1.117.
(b) the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant.

Where the prosecution is able to prove that the defendant did the relevant act (rape, intentional penile penetration of the complainant’s vagina, anus or mouth) and that either of the circumstances set out in Section 76(2) existed, then it is conclusively presumed that the complainant did not consent to the relevant act and the jury can be directed to convict.

Some problems in relation to the new definitions of consent and the presumptions may nevertheless still arise as the Act does not provide sufficient guidance in relation to consent.81 In 2006 there were calls for further law reform in order to amend and clarify the law relating to drunkenness and consent. Concern has been raised that the conviction rate in rape cases has continued to drop from a 33% conviction rate in 1977 to 5.4% in 2005 to a slight increase to 5.7% in 2006.82

4.4 The United States

In 1962, the United States Model Penal Code (MPC) updated the definition of rape. The MPC set out that ‘a man who has sexual intercourse with a female, not his wife, is guilty of rape if . . . he compels her to submit by force or threat of force or threat of imminent death, serious bodily injury, extreme pain, or kidnapping.’83 In addition to

81 Rook and Ward point out that whilst an evidential presumption arises in respect of a complainant intoxicated to a level of unconsciousness, or where drugs or alcohol have been administered surreptitiously without the complainant’s knowledge, the Act provides no guidance in respect of those cases where a complainant may have been heavily but voluntarily intoxicated, nor are there any presumptions in respect of lesser levels of intoxication. How affected by drugs and alcohol must a complainant be to be unable to give her ‘free agreement’ by choice? How impaired does a complainant’s judgment need to be for there to be an absence of free agreement? To what extent does the jury take into account that the alcohol was consumed by choice? Furthermore, what degree of coercion and/or abuse of position, power or authority has to be exercised upon a person’s mind before he or she is not agreeing by choice? These matters remain matters of fact for the jury to resolve and yet again mean that issues relating to perceptions and inherent bias by jury members may be allowed to creep into the equation. Ibid 1.84-1.85.

82 The main areas of reform currently under review relate to:

• The power for expert witnesses to give general evidence, not about a specific case, but about how rape victims generally behave to dispel myths that affect the jury’s reaction.
• An automatic right to use the victim’s videotaped interview with the police in place of her main evidence at the trial.
• The jury being allowed to be told and to consider any occasions when the woman confided in someone else about the rape before telling the police.

The Council of Circuit Judges, which represents judges who deal with rape cases and other serious criminal cases in Crown court, has objected to the calls for law reform, warning that this will lengthen the rape trial and that the use of expert evidence may prove to be complicated and would greatly increase the costs of the trial and result in a miscarriage of justice. See C Dyer Ministers defy Judges on Rape Law Reforms The Guardian, June 18 2007. Available at http://politics.guardian.co.uk/print/0,,330041728–110247,00.html.

limiting the definition of rape to a crime against a woman, this definition was deemed to be narrow because:

- it did not acknowledge rape within marriage or co-habiting couples;
- it focused on the victim’s consent rather than the perpetrator’s forcible conduct;
- it established a grading system for rape and similar offences (for example, it stated that rape by a voluntary social companion was a less serious offence than rape by a stranger); and
- it treated the rape of men as a lesser felony than the rape of women.84

In the 1970s and 1980s, extensive rape reform legislation was enacted throughout the country. Michigan’s Criminal Sexual Conduct Statute, enacted in 1975, became the national model for an expanded definition of rape. The Michigan gradation scheme is comprehensive, distinguishing between penetration and other forms of sexual assault.85 Where sexual penetration is present together with a full range of aggravating factors, criminal sexual conduct in the first degree is committed. Aggravating factors include where the defendant is armed with a weapon or where he causes injury to his victim and threatens her with future physical punishment, extortion or kidnapping. Where sexual penetration takes place without the specified aggravating factors but in circumstances which include force or coercion, criminal sexual conduct in the third degree is committed. The statute provides a non-exhaustive list of the situations in which force or coercion will be deemed to have been used. Force or coercion is then defined to include (but is not limited to):

- when the actor overcomes the victim through the actual application of physical force or physical violence;
- when the actor coerces the victim to submit by threatening to use force or violence on the victim and the victim believes that the actor has the present ability to execute these threats;
- when the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute this threat to retaliate includes threats of physical punishment, kidnapping or extortion;
- when the actor engages in the medical treatment or examination of the victim in a manner or for purposes which are medically recognised as unethical or unacceptable; and
- when the actor, through concealment or by the element of surprise, is able to overcome the victim.86

84 Ibid.
85 MCL 750.520a. Sexual penetration is defined by the statute as sexual intercourse, cunnilingus, fellatio, anal intercourse or any other intrusion, however slight, of any part of a person’s body or any object into the genital or anal openings of another person’s body.
86 MCL 750.520b (1)(f).
Where there is no sexual penetration but some other form of sexual conduct, there is a similar two-tier structure of the offences. It specifies precisely and in detail what forms of conduct are included in each degree of the offence and it thereby reduces the discretion of police officers, prosecutors and judges. One of the main aims of the Michigan legislation was to lessen the prosecution’s burden of proof. Once evidence of force has been adduced, for example, it is not necessary for the prosecution to show that the victim had not consented; the legislation provides that the victim need not have resisted the actor in this regard.\(^{87}\) Whilst consent does not appear in the legislation at all, it is well established that the defendant will be able to raise the issue of consent as a defence in some forms of sexual assault. However, in other forms of sexual conduct, consent is ruled out altogether. Where the defendant engages in sexual penetration with another and is armed with a weapon or engages in sexual penetration under circumstances involving the commission of another felony, then the victim’s consent is immaterial. Temkin, however, argues that research into the operation of the Michigan law suggests that as far as judges, prosecutors and defence counsel are concerned, consent remains an important issue.\(^{88}\) The state of Illinois adopted a legislative scheme broadly similar to the Michigan model in 1984. The main difference between the two models was that Illinois explicitly provided that consent was a statutory defence to the crime of criminal sexual assault and offered a statutory definition of consent. It provides that consent means:

A freely given agreement to the act of sexual penetration or sexual conduct in question. Lack of verbal or physical resistance by the victim resulting from the use of force or threat of force by the accused shall not constitute consent.\(^{89}\)

The Illinois Statute defines ‘force or threat of force’ to include instances where the accused threatened to use force or violence on the victim or on any person, and the victim reasonably believed that the accused had the ability to execute the threat. It may also mean instances where the accused has overcome the victim by use of superior strength or size, physical restraint or physical confinement.\(^{90}\) Following a decision by the California Supreme Court in January 2003\(^{91}\) relating to consent and whether a woman who had initially consented to sexual intercourse could change her mind, the law has since been amended. In the case of John Z, a 17-year-old had been raped by two men and evidence showed that whilst she may initially have consented to intercourse, she subsequently, during the act, withdrew her consent. Previous decisions in California had consistently held that where a victim consents to intercourse at the time of penetration and thereafter withdraws her consent, any use

\(^{87}\) MCL 750.520(6).

\(^{88}\) Temkin (note 2 above) 173 and 179.


\(^{90}\) Ibid at s12–12(d) (1984).

of force by her assailant past that point is not rape. The Court in John Z overturned the earlier authority for this proposition and found that the offence of forcible rape occurs when, during apparently consensual intercourse, the victim expresses an objection and attempts to stop the act and the defendant forcibly continues despite the objection. Following the judgment in July 2003 the law in Illinois was also amended. The amended law now reads as follows:

A person who initially consents to sexual penetration or sexual conduct is not deemed to have consented to any sexual penetration or sexual conduct that occurs after he or she withdraws consent during the course of that sexual penetration or sexual conduct.

A similar provision exists in Canadian law. More recently, in 2004, the States of Illinois and California have amended their civil laws to bring them in line with the Akayesu decision by the ICTR. The amendments define gender violence for civil purposes to include ‘a physical intrusion or physical invasion of a sexual nature under coercive conditions’. It is clear that reform measures in the United States have been focussed primarily on moving toward a better understanding of what constitutes consent and what will be deemed to be rape. Whilst the coercion model has been adopted in full in relation to civil claims, the limitations of a consent or absence of consent approach have been acknowledged and have been addressed in a way that hopes to give clarity of meaning to a notion with which courts around the world have grappled.

Having considered the legislative reform and various options adopted by other countries, it now remains to track the options adopted by South Africa at various stages of the law reform process.

5. The South African Law Reform Process: After 11 Years of Drafting and (re)drafting the Definition of Rape How Far Have We (not) Come?

In 1985 the South African Law Commission (SALRC) came to the conclusion that there was no basis for redefining the offence of rape. Following wide-spread criticism relating to escalating rape statistics and a failure on the part of the criminal justice system to effectively deal with rape, the matter was reconsidered soon after the advent of democracy in 1994. The enactment of a progressive Constitution and Bill of Rights also made it easier to place the matter on the Law Commission’s agenda as one of extreme public importance going to the core of the equality and dignity guarantee in the Constitution. Strong reliance was also placed on Section 12 of the Constitution, which protects the right to freedom and security of the person,
including freedom from violence whether from public or private sources. Cumulatively these rights make an important contribution toward the rights of women within the context of rape and gender-based violence. This was evidenced in the early judgment in the case of *Chapman*\(^6\) where the Supreme Court of Appeal (SCA) dealt for the first time with the crime of rape within the confines of the Constitution and the right of the rape survivor to be free from all forms of violence. Previously the impact of rape on the survivor would only have been considered during sentencing. However, here the Court correctly contextualised rape as:

\[
\text{... a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilization. Women in this country are entitled to the protection of these rights.}\(^7\)
\]

The court clearly envisages a situation whereby the Constitution not only imposes certain duties on the state but also forms the foundation for analysing violent crimes, such as rape.

In 1996 the SALRC was requested to investigate sexual offences by and against children. It became clear during the course of the investigation and at workshops held that any proposed changes to the law relating to sexual offences against children would have a far-reaching effect on the position of adults as well. The Commission was then requested to consider the position of adults affected by sexual violence and was given an expanded mandate encompassing a complete overhaul of the criminal justice system in relation to sexual offences.\(^8\) From the start of the consolidated process in 1999 the Law Commission spent considerable time researching the substantive definition of rape and considering alternatives to the emphasis on consent. The Law Commission thoroughly researched what other countries had done in order to amend their sexual offences laws, focussing to a large extent on the countries analysed above.\(^9\) Taking a comparative perspective, the Law Commission came to the following conclusion:

The Commission therefore believes that it is essential to redefine the offence of rape to be reliant on ‘coercive circumstances’ rather than absence of consent in order to establish *prima facie* unlawfulness. A shift from ‘absence of consent’ to ‘coercion’ represents a shift of focus of the utmost importance from the subjective state of mind of the victim to the imbalance of power between the parties on the occasion in question. This perspective also allows one to understand that coercion constitutes more than physical force or

---

\(^6\) *S v Chapman* 1997 (3) SA 341 (SCA).

\(^7\) Ibid at 344J–345B.


threat thereof, but may also include various other forms of exercise of power over another person: emotional, psychological, economical, social or organisational power.100

5.1 Discussion Paper 85

Discussion Paper 85 proposed a definition of rape along the following lines:

Any person who intentionally and unlawfully commits an act of sexual penetration with another person, or who intentionally and unlawfully causes another person to commit such an act, is guilty of an offence. For the purposes of this Act, an act of sexual penetration is prima facie unlawful if it takes place in any coercive circumstances.101

This proposal then went on to define coercive circumstances, relying heavily on the Namibian Combating of Rape Draft Bill.102 The Law Commission recommended that coercive circumstances be defined in a non-exhaustive manner and include (but not be limited to) circumstances where—

• there is any application of force, whether explicit or implicit, direct or indirect, physical or psychological against any person or animal;
• there is any threat, whether verbal or through conduct, direct or indirect, to cause any form of harm to any person or animal;
• the complainant is under the age of 12 years;
• there is an abuse of power or authority, whether explicit or implicit, direct or indirect, to the extent that one person is inhibited from communicating his or her resistance to an act of sexual penetration, or his or her unwillingness to participate in such an act;
• a person is unlawfully detained;
• a person believes that he or she is committing an act of sexual penetration with another person;
• a person mistakes an act of sexual penetration which is being committed with him or her for something other than an act of sexual penetration; or
• a person’s mental capacity is affected by—
  • sleep;
  • any drug, intoxicating liquor or other substance;
  • mental or physical disability, whether temporary or permanent, or
  • any other condition, whether temporary or permanent,
  to the extent that he or she is unable to appreciate the nature of an act of sexual penetration, or is unable to resist the commission of such an act.103

100 Ibid 114.
101 Ibid 115.
102 In 1999 the legislation had not yet been enacted.
103 Ibid 116–117.
The itemised factors all appeared to constitute coercive circumstances, whereas closer scrutiny would reveal three separate categories of circumstances, including those that deal with threats, force and the abuse of authority, and mistake on the part of the victim or mental incapacity and the incapacity to appreciate the nature of an act of sexual penetration.

5.2 Discussion Paper 102

Two years later, in 2001, after further deliberation and having received comments on the Draft Bill contained in Discussion Paper 85, Discussion Paper 102 on Practice and Procedure was released. This Discussion paper contained an amended Draft Bill. It defined rape in gender-neutral terms and was based on three categories of circumstances in which an act of sexual penetration would be considered prima facie unlawful. These were coercive circumstances, circumstances where the act of sexual penetration was committed under false pretences or by fraudulent means, and circumstances where a person was incapable in law to appreciate the nature of the act of sexual penetration. Each of these three categories was in turn expanded upon. This evidenced a shift from the approach taken in Discussion Paper 85, which had grouped all these instances under the rubric of coercive circumstances.

Coercive circumstances were now defined to include any circumstances where:

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

In addition, the circumstances under which an act of sexual penetration could take place under false pretences or by fraudulent means was extended to incorporate instances where there may be a mistaken belief on the part of the victim that sexual penetration would be beneficial to his or her physical, psychological or spiritual health. Furthermore, a person would be deemed to be incapable in law to
appreciate the nature of the act where such person was mentally impaired, asleep, unconscious or under the influence of any medicine, drug, alcohol or other substance to the extent that the person’s consciousness or judgment was adversely affected.\(^{109}\)

After the release of Discussion Paper 102 and during workshops around the country most participants and respondents who commented on the Discussion Paper expressed agreement with the inclusion of ‘coercive circumstances’, though some did suggest that the wording be simplified.\(^{110}\) In terms of Discussion Paper 102, sexual penetration was defined as any act which causes penetration to any extent whatsoever by—

the genital organs of one person into the anus, mouth or genital organs of another person; or
any object, including any part of the body of an animal, or part of the body of one person into the anus or genital organs of another person in a manner which simulates sexual intercourse but does not include an act which is consistent with sound medical practices which is carried out for proper medical purposes.\(^{111}\)

Concerns were raised during workshops that the definition of sexual penetration was too wide and that a scenario would be possible in terms of which a perpetrator who performed slight digital penetration of a victim’s genital organs would be labelled as a rapist on par with a perpetrator who, for instance, hammered a bottle into the genital organs of another victim.\(^{112}\) As a result, in its 2002 Final Report the Commission decided to differentiate between certain degrees of sexual penetration (grading essentially) and recommended that unlawful and intentional penetration to any extent by the genital organs of one person into the anus or genital organs of another person would amount to rape, and that the penetration of an object or any part of the body of an animal into the anus or genital organs of another person would amount to an offence named sexual violation. In addition, the offence of oral genital sexual violation would occur when the genital organs of one person or an animal was inserted into the mouth of another person.\(^{113}\)

Some commentators\(^{114}\) have correctly pointed out that distinguishing penile penetration from object or digital penetration only serves to minimise some sexual violations and creates a scale of what one deemed ‘real’ rapes and other lesser violations. It also creates an opportunity for the reduction of charges in matters where the state may feel that it has a difficult rape case to prove. For the complainant in such

---

\(^{109}\) Section 3(5).
\(^{110}\) SALRC (note 98 above) 33.
\(^{111}\) Draft Bill (note 105 above) s 1(v).
\(^{112}\) SALRC (note 98 above) 23.
\(^{113}\) Ibid 25.
a case her own experience and what she classifies as rape is thereby reduced to a lesser offence. Ultimately, if one aims to protect the sexual autonomy of complainants then one would expect less focus on penile and vaginal penetration, and rather on the violence of the act and the impairment of the dignity and sexual autonomy of the complainant concerned. Within this context many women’s groups argued that instead of relying on three separate offences the proposed definition of rape should be extended to include the acts contained in the proposed definitions of sexual violation and oral genital sexual violation.\textsuperscript{115}

In addition, the Discussion Paper included ‘\textit{prima facie} unlawfulness’ of sexual penetration when committed under coercive circumstances. The Law Commission pointed out that this would amount to no more than an evidential burden on the perpetrator. However, in view of concerns that if the common law relating to rape were repealed, all defences at common law would also be repealed, a new provision was inserted to make it clear that no common law defences available to perpetrators were influenced by the codification of the offence of rape.

\textbf{5.3 The Final Report}

In its Final Report the Law Commission recommended that rape be defined as follows:

\begin{quote}
Any person who unlawfully and intentionally commits any act which causes penetration to any extent whatsoever by the genital organs of that person into or beyond the anus or genital organs of another person, or any act which causes penetration to any extent whatsoever by the genital organs of another person into or beyond the anus or genital organs of the person committing the act, is guilty of the offence of rape.
\end{quote}

An act which causes penetration is \textit{prima facie} unlawful if it is committed—

(a) in any coercive circumstance;

(b) under false pretences or by fraudulent means; or

(c) in respect of a person who is incapable in law of appreciating the nature of an act which causes penetration.

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

there is any use of force against the complainant or another person, or against the property of the complainant or that of any other person;

there is any threat of harm against the complainant or another person, or against the property of the complainant or that of any other person;

there is an abuse of power or authority to the extent that the person in respect of whom an act which causes penetration is committed is inhibited from indicating his or her resistance to such an act, or his or her unwillingness to participate in such an act.

\textsuperscript{115} Ibid.
In addition, the offence of oral genital sexual violation together with sexual violation was created.\textsuperscript{116}

\section*{5.4 The Sexual Offences Bill}

The Criminal Law (Sexual Offences) Amendment Bill\textsuperscript{117} was introduced in the National Assembly of Parliament for discussion in January 2003. In the Bill the definition of rape and sexual violations highlighted above had to a large extent been included, save for some minor semantic changes.\textsuperscript{118} The framework of rape, sexual violation and oral genital sexual violation remained. Compelled and induced indecent acts were also included.\textsuperscript{119}

The Bill was referred for further review to the Portfolio Committee on Justice and Constitutional Development (‘the Portfolio Committee’). Written and oral submissions were invited during August and September, with public hearings being scheduled at the end of September 2003. Extensive debate ensued within the Portfolio Committee in terms of the necessity to move from ‘consent’ to ‘coercive circumstances.’ Civil society had assumed that the issue of ‘consent’ versus ‘coercive circumstances’ had been sufficiently canvassed with the Law Commission and that consensus had been reached after the years of research and workshops across the country. It is perhaps this assumption that led to very few written or oral submissions being made in relation to the problems with the ‘consent’ approach. Therefore, when the Chairperson of the Portfolio Committee raised the issue and expressed the view that he did not believe that there was any need to move from consent to coercion, this had not been anticipated by civil society.

In April 2004 a working document was circulated, recommending changes to the introduced Bill and the Chairperson of the Portfolio Committee was mandated to work with the Department of Justice and Constitutional Development to redraft the Bill for further deliberation.\textsuperscript{120} A redrafted Bill\textsuperscript{121}, dated 16 June 2006, was

\begin{itemize}
\item \textsuperscript{116} Section 4 of the Draft Bill contained in the Final Report read as follows: ‘Any person who unlawfully and intentionally commits any act which causes penetration to any extent whatsoever by any object, including any part of the body of an animal, or part of the body of that person, other than the genital organs, into or beyond the anus or genital organs of another person, is guilty of the offence of sexual violation.’
\item \textsuperscript{117} Criminal Law (Sexual Offences) Amendment Bill B50–2003 Gov. Gazette No. 25282 of 30 July 2003.
\item \textsuperscript{118} Ibid s 2, 3 and 4.
\item \textsuperscript{119} An indecent act was defined to mean any act (that does not cause penetration) which causes:
\begin{itemize}
\item (a) direct or indirect contact between the anus or genital organs of one person or, in the case of a female, her breasts and any part of the body of another person or any object, including any part of the body of an animal;
\item (b) exposure or display of the genital organs of one person to another person; or
\item (c) exposure or display of any pornographic material to any person against his or her will or to a child.
\end{itemize}
\item \textsuperscript{120} Minutes of Briefing Meeting with Portfolio Committee on Justice and Constitutional Development, 19 June 2006. Available at www.pmg.org.za/docs/2006/060619briefing1.htm.
\item \textsuperscript{121} Redrafted Criminal Law (Sexual Offences) Amendment Bill B50–2003, June 2006.
\end{itemize}
subsequently released. Insofar as the definition of rape is concerned, the 2006 Bill acknowledges that the three separate offences of rape, sexual violation and oral genital violation draws an artificial distinction between acts that constitute sexual penetration.\textsuperscript{122} Furthermore, the Committee concluded that attempts to move away from ‘lack of consent’ could not be supported and thus consent has been re-inserted and re-defined.\textsuperscript{123} Notwithstanding the majority of expert submissions setting out the problems with the common law definition of rape, the legislature seems to have adopted a view that the common law approach is the one most suited to South Africa’s needs, simply requiring some elaboration.

In essence, the current definition contained in the Criminal Law (Sexual Offences and Related Matters) Amendment Act\textsuperscript{124} takes us back to the familiar definition of unlawful sexual intercourse without consent. It has now simply become gender-neutral and sexual penetration is defined more widely. Save for this, it has taken almost 11 years for us to come right back to the following definition:

Any person (‘A’) who unlawfully and intentionally commits an act of sexual penetration with a complainant (‘B’), without the consent of B, is guilty of the offence of rape.\textsuperscript{125}

In this regard the legislature has chosen to copy the definition of rape verbatim as contained in the UK Sexual Offences Act of 2003. However, the Act has failed to transplant the detailed provision’s evidential and conclusive presumptions regarding consent as it appears in the UK provision. Instead, the Act defines consent as ‘voluntary or uncoerced agreement’.\textsuperscript{126} Section 1(3) then goes on to set out the circumstances (not a closed list) where a person does not consent to an act of sexual penetration or sexual violation. It covers those situations which, under common law, would vitiate consent, including where:

- an accused uses force or intimidation;
- there is a threat of harm to the complainant or a third person;
- there is an abuse of power or authority to the effect that the complainant is inhibited from indicating his or her unwillingness or resistance to the sexual act;
- the sexual act is committed under false pretences or by fraudulent means; or
- the complainant is incapable of appreciating the nature of the act (ie asleep, intoxicated or mentally disabled.

These are similar to the provisions contained in the previous drafts. Consent is also vitiated where the sexual act is performed with a child below the age of 12 years.

Since sexual penetration is part of the element of the crime, its definition has become crucial. The redrafted definition of sexual penetration attempts to collapse

\textsuperscript{122} Ibid.
\textsuperscript{123} Ibid.
\textsuperscript{124} Act 32 of 2007.
\textsuperscript{125} Section 3.
\textsuperscript{126} Section 1(2).
the previous notion of oral genital violation within sexual penetration, instead of creating a break-down of penile versus other penetration. Sexual penetration is now defined to include any act which causes penetration to any extent whatsoever by—

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

(b) any other part of the body of one person or, any object, including any part of the body of an animal or any object resembling the genital organs of a person or an animal, into or beyond the genital organs or anus of another person; or

(c) the genital organs of an animal, into or beyond the mouth of another person.

The Chairperson of the Committee has noted that a further important definition introduced in the 2006 Bill relates to sexual violation since it covers ‘every other conceivable sexual act that one person could do to another, which does not involve penetration.’ Chapter 1 thus defines ‘sexual violation’ to include any act which causes—

(a) direct or indirect contact between the—

(i) genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or an animal, or any object, including any object resembling the genital organs or anus of a person or an animal;

(ii) mouth of one person and—

(aa) the genital organs or anus of another person or, in the case of a female, her breasts;

(bb) the mouth of another person;

(cc) any other part of the body of another person, other than the genital organs or anus of that person or, in the case of a female, her breasts, which could—

(aaa) be used in an act of sexual penetration;

(bbb) cause sexual arousal or stimulation; or

(ccc) be sexually aroused or stimulated thereby; or

(dd) any object resembling the genital organs or anus of a person, and in the case of a female, her breasts, or an animal; or

(iii) the mouth of the complainant and the genital organs or anus of an animal;

(b) the masturbation of one person by another person; or

(c) the insertion of any object resembling the genital organs of a person or animal, into or beyond the mouth of another person, but does not include an act of sexual penetration.128

127 Minutes of Briefing Meeting with Portfolio Committee on Justice and Constitutional Development, 7 August 2006.

128 My emphasis.
The provision is clearly trying to delineate cases of sexual penetration from sexual violations, but in terms of oral violations it appears that there is substantial overlap in relation to what is referred to as ‘direct or indirect contact’ between the mouth of one person and the genitals of another, as opposed to the ‘slightest penetration’ of the genital organ of one person into the mouth of another. It seems that an almost impossibly artificial fine line has been created which in no way takes into account the reality for the complainant in each of these cases and the need to have her experience classified and punished as a violation of dignity and sexual autonomy amounting to rape.

The new provision relating to sexual assault is really a codification of the common law indecent assault provisions. Sexual assault is defined as:

A person ('A') who unlawfully and intentionally sexually violates a complainant ('B'), without the consent of B, is guilty of the offence of sexual assault. A person ('A') who unlawfully and intentionally inspires the belief in a complainant ('B') that B will be sexually violated, is guilty of the offence of sexual assault.129

In May 2007 the Criminal Law (Sexual Offences and Related Matters) Amendment Bill was presented before the National Assembly and unanimously supported. The new legislation remains significant for its move toward a gender-neutral definition and the fact that there is no longer a division between the different forms of penetrative assault. Whether or not the retention of consent as opposed to coercion will prove useful or not remains to be seen. It is important to recognise in this regard that that whilst removing ‘absence of consent’ from the definition of the offence may have symbolic importance, evidence of what constitutes coercion may still have the same effect of focusing on the conduct of the victim.130

6. Concluding Remarks

The issue of rape has been the subject of extensive analysis within legal and feminist circles, with feminist responses being focused on the need to acknowledge rape as a form of sexual violence and a violation of the dignity and autonomy of women. The feminist struggle to shift or alter criminal justice responses to gender-based violence has predominantly been undertaken at the level of legal reform, the very site that has historically treated sexual assault victims with indifference, suspicion and, at times, hostility.131 The criminal justice process is by its very nature responsive rather than preventative — and thus law reform processes along with increased penalties and conviction rates do not automatically mean that incidents of rape will decrease or that women will be more protected in a society.132

129 Section 5.
130 Artz and Combrinck (note 114 above) 88.
132 Ibid.
It is important for feminist litigators to recognise the tension that exists in this regard. Whilst necessarily engaging with the law from a critical perspective one is also working inside the realm of the law. The struggle must therefore take place within the law and outside it, both through it and beyond it. Legal change is an inevitable part of the process and possibly a tool for change, though not the definitive solution. Experience has shown that if legal initiatives are (re)constructed from women’s real experiences of violation then the law can make a difference. As Mackinnon aptly phrases it:

[Law is not everything, but it is not nothing either. Perhaps the most important lesson is that the mountain can be moved. . . [and] women’s experiences can be written into the law, even though clearly tensions will remain.\textsuperscript{133}]

The passing of the Sexual Offences Act is by no means an indication that rape cases will henceforth be dealt with in a manner that is conducive to a complainant’s dignity and equality as a citizen. It will require significant investment in terms of resources, infrastructure and training to ensure effective implementation. Without the necessary training and investment into making the Act a reality, the 11 years spent on drafting and redrafting the Act will come to naught.

\textsuperscript{133} C MacKinnon (1987) \textit{Feminism Unmodified: Discourses on Life and Law} 116.
RAPE AND HIV/AIDS: WHO’S PROTECTING WHOM?

SARAI CHISALA*

1. Introduction

South Africa is battling with one of the highest HIV infection rates in the world. According to estimates, over five million people are infected with the disease.1 At the same time, South Africa suffers from an unrivalled sexual violence pandemic.2 Perhaps it is therefore unsurprising that the Criminal Law (Sexual Offences and Related Matters) Amendment Bill (the ‘Sexual Offences Bill’) attempted to criminalise wrongful HIV transmission or exposure by defining it as rape.

Fortunately, Parliament narrowly escaped making a legislative blunder that may well have detrimentally impacted on public health efforts to curb the spread of HIV/AIDS. Criminalisation of harmful HIV-related behaviour may still arise, however, as a law reform issue. Indeed, the initially envisioned ‘HIV/AIDS rape provision’, which will be discussed in this chapter, may be reintroduced to the legislature at a later stage. Given public concern about the issue there is also a need for a discussion on how best to manage harmful HIV-related conduct. At the same time Parliament has ostensibly addressed concerns regarding the link between HIV/AIDS and sexual violence by including in the Act a ‘right’ to post-exposure prophylaxis (PEP) for HIV following rape and the possibility of having alleged sexual offenders tested for HIV. The latter is particularly controversial.3

This chapter traces the development and eventual removal of the ‘HIV/AIDS rape’ provision in the Sexual Offences Bill.4 The discussion is contextualised with a brief look at the HIV/AIDS pandemic in South Africa. Thereafter I examine a number of aspects of the law reform process, including the South African Law Reform Commission’s (the ‘Law Commission’) arguments around the use of criminal law to manage HIV/AIDS, the debates of the Portfolio Committee on

* Sarai Chisala LLB (Malawi) LLM (Pretoria) is a lecturer in the College of Law at the University of Malawi. At the time that this chapter was written she was a researcher at the Gender, Health and Justice Research Unit in the Faculty of Health Sciences at the University of Cape Town. The author would like to acknowledge the substantial contribution to this chapter of Stefanie Roehrs.


3 See S Roehrs, Chapter 8 of this Volume.

4 Criminal Law Sexual Offences Amendment Bill [50–2003].
Justice and Constitutional Development (‘the Portfolio Committee’), and local media commentary. I also consider the international position on criminalising HIV/AIDS transmission/exposure and the implementation challenges that such legislation might pose.

2. The Social Context of HIV/AIDS in South Africa

The HIV/AIDS pandemic in South Africa must be understood within the context of South Africa’s unique history and recent political reactions to the pandemic. South Africa was not spared the horror that surrounded the discovery of HIV in the early 1980s. Cameron and Swanson describe how, in 1988, the official health spokesperson for the liberal parliamentary opposition argued for the isolation and quarantine of ‘Aids carriers’, while in 1991 a Member of Parliament for the Conservative Party urged that all HIV infected persons should be visibly branded with a tattoo.5 These reactions occurred prior to 1994 and came at a time when apartheid was sapping both human and economic resources. South Africa’s turbulent history is relevant to the explosive spread of HIV in the country. As Fassin points out, ‘[i]f the epidemiological crisis in South Africa has no precedent, one should realise that, rather than being an exception, it is the most extreme illustration of the tragic link observed all over the world between the structures of societies and the dynamics of diseases.’6

The first significant government response to AIDS was when Nelson Mandela addressed the newly-established National AIDS Convention of South Africa (NACOSA) in 1992, but there was little further action from the government in the following few years.7 In 2000, President Thabo Mbeki made a speech that avoided reference to HIV and instead focused on the problem of poverty, fuelling suspicions that he saw poverty, rather than HIV, as the main cause of AIDS.8 According to Fassin,

[p]olemics have developed around: [. . .] the discovery of a local treatment quickly disqualified as an ineffective industrial solvent in 1997; government concern since 1998 about the dangers of antiretroviral drugs; statements of President Mbeki on the cause of the disease being poverty and not simply a virus; as well as the formation of a Presidential Panel in 2000, which includes the most famous AIDS dissidents from all over the world. These events have led to global attention to what has been interpreted as a denial of the

---


8 Ibid.
problems as well as of its solutions. Here again, the history of the first two decades of the epidemic does not reveal such a controversial climate in any other country. Both epidemiological and political facts thus plead in favour of the uniqueness of the South African context of AIDS.9

As recently as 2006, at the 16th International AIDS Conference held in Toronto, the Health Minister, Dr Manto Tshabalala-Msimang, drew criticism for promoting a natural recipe of lemons, garlic and beetroot for treating HIV.10 Despite the fact that the government managed to spearhead a number of initiatives aimed at increasing AIDS awareness and disseminating basic facts about transmission, disconcerting judgement calls, maladministration and a lack of political will to address the impact of the epidemic head-on have set back South Africa’s response to HIV/AIDS. This has resulted in confusion about the epidemic that has compounded prejudice, discrimination and resulted in the loss of countless lives.11

Researchers estimate that 10.8% of all South Africans over the age of two years were living with HIV in 2005.12 The Human Sciences Research Council’s (HSRC) survey showed that HIV is generalised in the South African population, leaving no race, sex, age, and province or locality unaffected.13 Although conflicting data exists concerning HIV prevalence in South Africa, the bleak reality remains that the pandemic has reached epic proportions.14 Rehle and Shisana project that by the year 2010 an estimated 4.96 million people will have died.15 As Marais warns, ‘[a]n epidemic that threatens to prematurely bring to an end the lives of one fifth or more of a country’s population will change that society.’16

Although knowledge among young people of how to protect themselves from infection is said to be high, such information may not always be usable in their daily lives, which are often characterised by economic and social disadvantage.17

According to Crewe, South Africans are a largely AIDS-aware population, but one

---

9 Fassin (note 6 above) 64.
15 Rehle and Shisana (note 13 above) 4.
16 Marais (note 14 above) 90.
that has not seen the necessity to turn this awareness into personal behaviour change.\textsuperscript{18} As pointed out in a Panos report on HIV/AIDS: ‘[t]here is an assumption that decisions about HIV/AIDS prevention are based on rational, volitional thinking with no regard for more true-to-life emotional responses to engaging in sexual behaviour.’\textsuperscript{19} It is this ‘rationality assumption’ that is the deepest and deadliest pitfall for legislators when criminalising harmful HIV-related behaviour.

An important factor in the analysis of the HIV/AIDS epidemic in South Africa is the high prevalence of the disease among women. HIV/AIDS is a gendered epidemic. The latest statistics on the demography of HIV/AIDS show that women and girls bear the brunt of the pandemic:

- 21% of women aged 15 — 49 are infected with HIV/AIDS in comparison to 15.4% of men in that age group.
- 17% of female youth aged 15 — 24 are infected with HIV/AIDS in comparison to 4% of male youth in that age group.
- 40% of women in antenatal clinics in KwaZulu Natal are infected with HIV/AIDS.\textsuperscript{20}

The heightened vulnerability of women can partly be explained by biological factors. Women have a greater risk of contracting HIV due to the physiology of the vagina, with its large mucosal area; the high viral load of semen; and the prevalence of other sexually transmitted infections that often go unnoticed.\textsuperscript{21} However, there are many and varied ways in which women’s vulnerability intersects. Besides biological factors there are socio-economic factors that increase women’s vulnerability, such as poverty and unemployment, as well as high levels of violence against women. Gender inequalities also play a major role. Since many women do not have the power to say no to sex, they are not in a position to ask their partners to wear condoms.

Unfortunately, many interventions are based on the myth that women have the ability to deny sexual access to men and that their power to refuse consent is equal to, or even greater than, men’s power to initiate sex. This assumption ignores all of the social rules which constrain women’s ability to withhold consent. Most importantly, placing emphasis on concepts such as ‘choice’ ignores the violence that is the reality of many women’s lives. Such women are not in a position to refuse their partners sex.

\textsuperscript{20} UNAIDS (note 1 above) 28. Percentages have been rounded.
Indeed, compared with the certainty of violence, van Vliet argues that the 1% transmission rate for HIV may even seem, for some women, like a reasonable risk.22

3. Criminalising Harmful HIV-Related Sexual Conduct

In this section I discuss the debates and decisions that took place during the course of the law reform process with respect to harmful HIV-related behaviour, in the form of either exposure to HIV or actual transmission of the virus.

3.1 The South African Law Reform Commission Investigations

During the 1990s, two HIV-related investigations took place concurrently at the Law Commission. These were Project 85, investigating aspects of the law relating to AIDS, and Project 107, the investigation of sexual offences. Both Project Committees ran into the issue of harmful HIV-related behaviour and it is interesting to follow the disparate arguments and conclusions reached by each. In the end, the Sexual Offences Project Committee’s findings went before the Portfolio Committee on Justice and Constitutional Development as draft legislation.

3.2 The HIV/AIDS Project Committee

Led by Justice Edwin Cameron, the investigation around HIV/AIDS and the law dates back to 1993. In April 2001, the Project Committee released its Fifth Interim Report on “The Need for a Statutory Offence Aimed at Harmful HIV–Related Behaviour.” The report dealt with harmful sexual behaviour by People Living with HIV/AIDS (PLHA) who could transmit or expose others to HIV, current measures available to address such behaviour, and whether there was a need for statutory intervention.

The Project Committee pointed out that its recommendations related only to consensual sexual activity and not to HIV exposure that occurred through non-consensual sexual acts. The report set out three options for dealing with harmful HIV-related behaviour: codification of common law crimes; criminalisation of behaviour not hitherto criminal; and, finally, maintaining the present position, which means that PLHA who transmit HIV to others may be prosecuted under the existing common law under certain circumstances.24

The second option, of creating new statutory offences, stemmed from the observation that the common law lacks certain alternatives. There are no crimes of negligent injury or endangerment, nor any crime of deliberately exposing another to danger, short of assault. In this regard, new statutory offences could either penalise

24 Ibid at viii–ix.
the non-disclosure of HIV status before engaging in certain sexual activities, or the negligent transmission of and/or exposure to HIV.\textsuperscript{25} Although the Project Committee conceded that prosecution under existing common law would be difficult (especially with regard to proof of causation, fault and consent) it concluded that statutory intervention was neither necessary nor desirable.\textsuperscript{26} The major arguments advanced by the Project Committee against the creation of an HIV-specific statutory offence were:

- There is no evidence that offences are occurring in numbers for which statutory intervention is necessary.
- There is limited or no practical utility of an HIV-specific statutory offence.
- An HIV-specific statutory offence would not necessarily minimise the difficulties with regard to burden of proof and constitutional issues.
- It is unclear whether complainants would utilise such offence.
- Codification would promote ‘exceptionalism’ in dealing with HIV/AIDS.
- There is no justification for the entailed social costs.
- As the majority of South Africans are unaware of their HIV status and there are insufficient resources to undertake HIV testing, negligent behaviour should not be penalised.
- Such an offence would counteract public health efforts to curb the spread of the disease, would increase discrimination against HIV positive people, and would drain away resources from more effective HIV prevention programmes.
- Such an offence would infringe the right to privacy of both the accused and his or her sexual partners.

Accordingly, the Project Committee duly recommended maintaining the present legal position, allowing for harmful HIV-related conduct to be prosecuted under various common law provisions.

3.3 The Sexual Offences Project Committee

The Law Commission’s investigation into sexual offences was an entirely separate process from the investigation into various aspects of HIV. This Project Committee released its final Report on Sexual Offences in December 2002. Between its inception in 1996 and 2002 the Project Committee released two discussion papers for public comment.\textsuperscript{27} In relation to rape, the committee made an effort to shift the traditional emphasis placed on consent in rape cases by introducing categories of coercive and fraudulent circumstances in which an act of sexual penetration would

\textsuperscript{25} Ibid at ix.

\textsuperscript{26} Ibid.

be *prima facie* unlawful. Originally, non-disclosure of HIV status was not included under these special circumstances. However, when comments were received on Discussion Papers 85 and 102, it purportedly became evident that some respondents wanted the specific inclusion of intentional non-disclosure of HIV status as an offence that amounts to rape.

The Project Committee noted that Judge Cameron had cited the Canadian case of *R v Cuerrier* as representing a precedent that would likely be followed in South Africa. In *R v Cuerrier*, the Canadian Supreme Court held that a person’s consent to engage in unprotected sexual intercourse is vitiated by fraud where their partner knows that he or she is HIV positive and either fails to disclose or deliberately deceives the other person. While differing over how broadly ‘fraud’ should be defined in the law of assault, all seven of the judges agreed that Cuerrier’s non-disclosure of his HIV positive status was a fraud that could vitiate his sexual partners’ consent to sex. The Project Committee went on to describe how that particular case ‘decided that a person infected with HIV who engages in unprotected sex is guilty of rape.’ This is a misleading interpretation of the case, which may have contributed to the later inclusion of the harmful HIV-related behaviour provision under the definition of rape. The Cuerrier case is an assault case that was based on a charge of aggravated assault, not sexual assault or aggravated sexual assault.

While acknowledging that ‘non-consensual intentional or negligent exposure or transmission could be prosecuted under one of the common law crimes of murder, culpable homicide, rape, assault and attempts to commit these crimes’, the Project Committee argued that these crimes ‘did not seem to provide effective redress in the case of harmful HIV-related behaviour.’ It therefore recommended that ‘criminal activity compounded by deliberate or reckless exposure to HIV/AIDS should be subject to criminal sanction.’ It is hard to understand the precise intention of the Project Committee on the basis of this reasoning, especially since the behaviour they attempt to distinguish is in fact covered in the range of behaviours that they rightfully point out can be managed under the common law. In any event, the committee presented then Justice Minister Penuell Maduna with a report containing its final recommendations on the law relating to sexual offences, as well as a draft Bill. The issue of harmful HIV-related behaviour was dealt with by adopting the (misquoted)

---

28 See further in this volume Chapter 3, Nikki Naylor’s contribution on the definition of rape.
31 SALRC (note 27 above) 35. For a useful discussion of the approach taken to the criminalisation of harmful HIV-related conduct in other jurisdictions see D Smythe *et al* (2007) *Sexual Offences and HIV: Challenges Facing Magistrates*, University of Cape Town.
32 SALRC (note 27 above) 35.
33 This comment was made specifically in reference to the work of the HIV/AIDS project committee.
34 SALRC (note 27 above) 91–92.
Canadian courts’ approach in the Cuerrier case. When the Sexual Offences Bill went before the Portfolio Committee in 2003, the rape provision in the draft Bill appeared as follows:

**Rape**

2. (1) A person who unlawfully and intentionally commits an act which causes penetration to any extent whatsoever by the genital organs of that person into or beyond the anus or genital organs of another person, or any act which causes penetration to any extent whatsoever by the genital organs of another person into or beyond the anus or genital organs of the person committing the act, is guilty of the offence of rape.

(2) An act which causes penetration is prima facie unlawful if it is committed—

(a) in any coercive circumstance;

(b) under false pretences or by fraudulent means; or

(c) in respect of a person who is incapable in law of appreciating the nature of an act which causes penetration.

(3) . . .

(4) False pretences or fraudulent means, referred to in subsection (2)(b), are circumstances where a person—

(a) . . .

(b) . . .

(c) intentionally fails to disclose to the person in respect of whom an act which causes penetration is being committed, that he or she is infected by a life-threatening sexually transmissible infection in circumstances in which there is a significant risk of transmission of such infection to that person.35

### 3.4 Parliamentary Deliberations

When the Portfolio Committee began deliberations on the Sexual Offences Bill in 2003 it was chaired by Advocate J H de Lange. The Bill was heralded in the media as introducing a radically redefined crime of rape.36 This new rape provision occupied most of the Portfolio Committee’s energies during their initial meetings on the Bill.

The Portfolio Committee was briefed on specific clauses of the Bill, including the ‘HIV rape clause’. The Chair expressed the view that it should be a crime if someone knowingly infected other people with HIV/AIDS and that specific offences should be created relating to AIDS.37 Essentially, the Chair recommended that transmission be a crime in its own right and was cited in the media as saying that ‘everyone has a responsibility to be tested, so not being aware of one’s status could not be used as a

---

37 Parliamentary Monitoring Group (PMG), Minutes of 6 August 2003. All minutes of the Parliamentary Monitoring Group for the deliberations of the Portfolio Committee on Justice and Constitutional Development can be accessed on their website at www.pmg.org.za.
defence’ and that ‘he cannot understand why infected people are not expected to take responsibility for their actions.’

The Portfolio Committee heard public submissions on various aspects of the Bill. Africa Christian Action (ACA) argued that people who choose a promiscuous lifestyle do so at their own risk and suggested that if the Committee wanted to criminalise this, it should not do so under the rubric of ‘rape’, but instead as a new HIV offence. Calling it ‘rape’ would confuse the public understanding of this offence. Unfortunately, this argument was largely overshadowed by the presenter’s outrageous request that marital rape be decriminalised. The assertion that it is inappropriate to subsume harmful HIV-related behaviour under the offence of rape was correct. Rape commonly refers to non-consensual sexual activity and therefore should not be applied to specific forms of consensual sexual conduct. What the provision aimed to punish was not the sexual act itself but the intentional or reckless exposure of another to a life threatening illness, whether through sex or any other means. This was rightly emphasised by the Saartjie Baartman Legal Advice and Training Project which agreed that criminalisation of harmful HIV-related behaviour is not the proper route and argued that if the Portfolio Committee felt it necessary to criminalise the intentional or reckless exposure to HIV then this should be done in separate legislation.

The National Association of Democratic Lawyers’ (NADEL) Human Rights and Advocacy Project also submitted that rape should not be equated with intentional non-disclosure of HIV. Rape relates to a non-consensual act while the latter relates to a consensual act. They did not object to criminalisation of non-disclosure, but proposed that it should be made a separate offence. Despite the relative consensus from civil society groups on the inappropriateness of this provision, in the minuted discussions of the Portfolio Committee following these submissions, no mention is made of concerns about applying the definition of rape to consensual sexual activity.

The Women’s Legal Centre (WLC) pointed out that there were less restrictive means to achieve the purposes of the Bill without stigmatising People living with HIV/AIDS [PLHA]. The WLC highlighted the close relationship between HIV/AIDS and gender, arguing that women are more likely to know their status and therefore they would be most at risk in terms of prosecution. The Commission on Gender Equality (CGE) concurred that women are more likely to know their status since they are the ones predominantly tested for HIV through antenatal programmes. The proposed ‘HIV rape provision’ would therefore, they argued, affect women disproportionately. Again these submissions passed without comment.

39 Ibid.
40 Ibid.
When the Portfolio Committee reconvened to deliberate upon the Bill in 2004, the rape clause was still under discussion and remained unchanged from the previous year. The Chair expressed his support for a proposal that a clear distinction be made between HIV and other sexually transmitted infections (STIs). In response to the specific concern that the transmission clause would result in women being disproportionately prosecuted, the Chair proposed that only the National Director of Public Prosecutions (NDPP) be entitled to decide whether or not to prosecute. He further proposed that the legislation should explicitly state that these powers may not be delegated by the NDPP and that, where the prosecutor decides to prosecute, he or she should take into account the circumstances of the person to be prosecuted and his or her vulnerability. The Portfolio Committee rejected all proposals that the ‘HIV rape provision’ be deleted from the Bill.

In similar vein to its previous submissions, the ACA submitted that referring to the failure to disclose an STI to a willing partner as rape trivialises the crime of rape and that failure to disclose an STI should be a crime separate from rape, especially since the use of a condom may excuse a person from disclosing his or her HIV status. This is a correct reading of the ‘HIV rape provision’ as it appeared then because the provision required a ‘significant risk.’ In response, the Chair said that while the use of a condom may be a defence in other countries ‘that is not the real issue.’ \(^{42}\) In February 2004 the Bill was amended to reflect the deliberations up to that point. Significantly, the ‘HIV rape provision’ had been deleted. The criminalisation of harmful HIV-related behaviour was still an issue however and in the following months, the Portfolio Committee deliberated on two different ways of addressing such conduct: the criminalisation of ‘exposure’ and the criminalisation of ‘non-disclosure’.

3.4.1 The HIV/AIDS exposure clause
Initially, the Portfolio Committee envisioned sanctioning the exposure of HIV by one person to another. The new clause entitled ‘Criminal Exposure to HIV,’ presented two possible versions. The first option read as follows:

**Criminal exposure of another to HIV**\(^{43}\)

5.(1) A person (‘A’) who unlawfully and intentionally fails to disclose to another person (‘B’), in respect of whom an act contemplated in paragraph (a) of the definition of sexual penetration is being committed, that he or she has HIV or AIDS under circumstances

---

\(^{42}\) PMG, Minutes of 26 January 2004. The Chair elaborated that ‘the issue is not about the precaution taken by one party, but whether the other party had exercised his or her free will after being informed of the status of the other party.’ This stance raises interesting questions relating to interpretation since, according to the provision as it stood then, only a significant risk of transmission would result in conviction.

where there is a significant risk of transmission of HIV to B, is guilty of an offence of criminal exposure of another to HIV.

(2) It is a defence to a charge under subsection (1), if B who was exposed to HIV knew that A was infected with HIV or AIDS and gave advance consent to the act with that knowledge.

(3)(a) The institution of a prosecution for an offence referred to in subsection (1) must be authorised in writing by the National Director of Public Prosecutions and may only be instituted if such prosecution will be in the public interest/interests of justice with due regard to the circumstances surrounding the commission of the alleged offence and the personal circumstances of A and B.

(b) The National Director of Public Prosecutions may not delegate his or her power to decide whether a prosecution in terms of this section should be instituted or not.

It is unclear whether the defence spelt out under subsection 2 of the clause was the only contemplated defence to the charge of criminal exposure — especially in light of the Chair’s earlier negative response to the question of condom use as a defence.

In respect of subsection (3), the drafters outlined the types of personal circumstances that should be taken into consideration by the NDPP when deciding whether to prosecute a case. These included:

• the nature and duration of the relationship between A and B;
• whether B has in the past committed any acts of domestic violence as defined in the Domestic Violence Act 116 of 1998 towards A;
• whether A is financially dependent on B;
• the likelihood of retaliation, whether emotional, financial, physical or otherwise against A or his or her family by B and/or his or her family if A discloses HIV/AIDS status;
• the attitude prevailing in the community in which A and B reside towards persons living with HIV/AIDS, with specific reference to previous incidents of violence towards or discrimination against such persons; and
• the likelihood of loss of employment or accommodation resulting from disclosure of A’s status.

The drafters then presented the second version of the HIV/AIDS exposure clause. The main difference between the two versions was the substitution of the act of ‘sexual penetration’ with that of ‘intimate contact’. The second version defined ‘intimate contact’ as ‘contact of a sexual nature that exposes the body of one person to the bodily fluid of another person in a manner that presents a significant risk of HIV transmission.’ Of interest in both of these formulations is that ‘knowledge’ of the perpetrator of his or her HIV status was neither discussed nor defined. Hence it is unclear what would suffice as knowledge of status, thereby inviting criminal sanction.
3.4.2 The criminal non-disclosure of HIV or AIDS clause

In the end, the Portfolio Committee decided against the exposure clauses discussed above, but submitted the following version of the HIV clause to Cabinet for approval:

**Criminal non-disclosure of HIV or AIDS**

5.(1) A person (‘A’) who engages in intimate contact with another person (‘B’) and who intentionally does not disclose to B that he or she has HIV or AIDS is guilty of an offence of criminal non-disclosure of HIV or AIDS.

(2) ‘Intimate contact’ means contact of a sexual nature that exposes the body of one person to a bodily fluid of another person.

(3) It is a defence to a charge under subsection (1), if B was aware that A was infected with HIV or AIDS and consented to intimate contact with that knowledge.

(4) (a) The institution of a prosecution for an offence referred to in subsection (1) must be authorised in writing by the National Director of Public Prosecutions and may only be instituted if such prosecution is in the interests of justice with due regard to the following—

(i) the nature and duration of the relationship between A and B;
(ii) whether A is financially dependent on B;
(iii) the likelihood of retaliation, whether emotional, financial, physical or otherwise against A or his or her family by B or his or her family if A disclosed that he or she has HIV or AIDS;
(iv) the attitude prevailing in the community in which A and B reside towards persons who have HIV or AIDS, with specific reference to previous incidents of violence towards or discrimination against such persons; and
(v) the likelihood of loss of employment or accommodation resulting from disclosure of the fact that A has HIV or AIDS.

(b) The National Director of Public Prosecutions may not delegate his or her power to decide whether a prosecution in terms of this section should be instituted or not.

The Portfolio Committee also introduced a similar clause criminalising the non-disclosure of sexually transmissible infections other than HIV.

The Sexual Offences Bill was not dealt with by the Portfolio Committee in 2005, but went before Cabinet during that period. When the reconstituted Portfolio Committee, chaired by Fatima Chohan-Kota, convened to discuss the Bill in 2006, the document had undergone significant changes. Cabinet had removed the clauses criminalising non-disclosure of HIV/AIDS and STIs on the basis that the deliberate transmission of HIV was already covered by common law crimes such as murder, attempted murder and culpable homicide.\(^{44}\) The Bill was ultimately passed into law without any provisions directly targeting HIV-related sexual conduct.

\(^{44}\) PMG, Minutes of 16 June 2006.
Although excluded from the Bill, it could be argued that non-disclosure of HIV vitiates consent and that the sexual conduct concerned would therefore still fall within the definition of ‘rape’. This is because the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (Sexual Offences Act) defines consent as voluntary or uncoerced agreement, providing that ‘where the sexual act is committed under false pretences or by fraudulent means’ that consent is nullified. This is especially so in circumstances where X knows that he or she is HIV positive and proceeds to engage in conduct that bears a significant risk of infecting Y with HIV, without informing Y of that risk. In that case it could be argued that Y’s consent to sex was gained fraudulently, since Y consented to have unsafe sex but did not consent to have unsafe sex with a person who was HIV positive. This is the line of thinking that the court followed in the Canadian assault case of R v Cuerrier and upon which the original formulation of HIV transmission/exposure as rape was loosely based.

4. Critical Analysis and Implementation Challenges
Having set out the legislative process that has taken place thus far, the following section examines the wisdom of the different proposals made during the process and highlights a number of specific difficulties that they raise. This criticism occurs at two levels. The first assumes that harmful HIV-related behaviour should be criminalised and focuses on particular aspects of the proposed provisions. For a number of reasons, however, it is highly questionable whether harmful HIV-related behaviour ought to be criminalised at all. Thus, in the second part of this section criticism is levelled at this underlying assumption, raising a number of arguments in support of non-criminalisation.

4.1 The proposed provisions
HIV transmission/exposure laws must be clearly drawn and narrowly tailored to cover only behaviours that have been epidemiologically demonstrated to transmit HIV. According to Tierney, if such a precaution is followed, the criminal law can be an effective method of punishing those who engage in risky behaviour, without becoming a vehicle for public hysteria and misinformation regarding HIV/AIDS.

---

45 Now contained in s 1(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
46 Section 1(3)(c).
47 R v Cuerrier [1998] 2 S.C.R. 371. See also SALRC (note 27 above) 35; J Burchell (2005) Principles of criminal law, 340; D Smythe et al (note 31 ) 43–44. Smythe suggests that ‘sexual intercourse always carries certain risks, including the risk of contracting any one of a number of sexually transmitted infections,. . . the expectation is that people engaging in such activities will take personal responsibility for mitigating those risks through, for example, condom use.’
It is doubtful whether any of the various HIV provisions discussed above meet these requirements.

4.1.1 The 2003 rape provision
Whilst the envisioned ‘HIV rape provision’ did not sit comfortably under the definition of rape, the provision itself was cleverly crafted. The statute encompassed two distinct elements. In the first place the non-disclosure had to be intentional (implying actual knowledge of status). The act of penetration also had to bear a significant risk of transmission. However, the provision would have criminalised conduct that was already considered criminal based on the existing common law crimes. It would also not have been easy to secure an HIV -rape conviction, as there would have to be proof that the non-disclosure of the accused’s HIV status lead to sexual activity that entailed a significant risk of transmission to the person whose consent was obtained by means of the dishonesty. The prosecution would have had to prove that the act of penetration bore a significant risk of HIV transmission. This raises important questions around attempts to mitigate the transmissibility of the virus, such as condom use, coitus interruptus and the accused’s use of anti retroviral therapy to reduce viral load.49

The prosecution would also have had to prove knowledge of HIV status (which admittedly will be an obstacle for any HIV-related prosecution). Besides the obvious evidentiary problems, it is difficult to actually define what constitutes ‘knowledge of HIV status.’ Narrowly construed, I would argue that only an HIV positive test result suffices. However, HIV testing services are difficult to access for people who live far from clinics. Concerns in this regard might include the quality of counselling provided when a person tests positive for HIV and the psychological denial that may accompany such a test result.

4.1.2 The 2004 exposure to HIV provision
It is noteworthy that the Portfolio Committee’s early 2004 draft provisions no longer subsumed harmful HIV-related behaviour under rape, but instead introduced (two versions of) the separate offence of criminal exposure to HIV. Despite the more appropriate placement, however, the provisions were imprecise and broadly tailored and would ultimately have failed as an effective criminal intervention.

As with the original ‘HIV rape provision’, both versions of this new offence required proof of the offender’s knowledge of their HIV status. In contrast, a partner’s consent was explicitly drafted as a defence. In the absence of a cure, however, HIV/AIDS remains a fatal disease and it is contentious whether a person can validly consent to the potentially life threatening act of HIV transmission. Further, the phrasing suggests that consent was the only defence available to an alleged offender. However, given that female and male condoms are a highly

49 These issues are discussed at length in D Smythe et al (note 31 ).
effective means of preventing HIV transmission, it is unclear why condom use was not included as a defence.

An additional criticism relates to the Portfolio Committee’s failure to define the term ‘bodily fluid’, in spite of it being a crucial aspect of the offence. A kiss from a person living with HIV or AIDS would thus be enough to invite potential prosecution. This, despite the clear medical knowledge that there is practically no transmission risk involved in kissing, since the viral load in saliva is very low. As such, without a more limited definition, both versions of the exposure provision would have created the deplorable situation where mere knowledge of HIV status would practically be linked with criminal liability.

One positive aspect of the 2004 provision was the suggestion that personal circumstances of the accused and the victim should be taken into consideration when deciding whether or not to prosecute the case. This left room for contextualised prosecution of the offence, taking into account the social background of HIV/AIDS in South Africa. However, the types of personal circumstances that should be taken into consideration by the prosecutor had not been incorporated into the first option of the exposure provision, but were only part of the second option. Hence, the first option might have led to inconsistencies in the prosecution of HIV exposure offences.

4.1.3 The 2004 criminal non-disclosure of HIV provision

The clause that went to Cabinet had undergone significant changes compared to its predecessors. Commendably, the provision included an obligation upon the NDPP to consider specific types of personal circumstances surrounding the commission of the alleged offence when deciding whether to prosecute a case.

This provision, however, retained consent as a defence, and a ‘significant risk’ was not required. In this manner, the offence of criminal non-disclosure was made so broad as to capture any action between the parties that involved bodily fluid, regardless of the presence of risk.

It is also unclear what degree of intent the non-disclosure clause envisioned. The common law does not punish negligent harm, injury or endangerment, since these are generally not regarded as blameworthy. Hence, it can be assumed that the proposed non-disclosure clause required intention in the form of dolus: knowledge and will to proceed. As with the earlier definitions, the question of what constitutes knowledge remained unclear. Additionally, proving that the offender acted with the required intention would have been difficult for the prosecution.

4.2 Criminalising HIV Transmission

The Portfolio Committee’s move towards criminalisation of HIV exposure is neither novel nor unique to South Africa. A number of other jurisdictions have grappled

---

50 In a later version of the Sexual Offences Bill, published in 2006, body fluid was defined as being any body substance which may contain HIV or any other sexually transmissible infection, but not saliva, tears or perspiration.
with the question of criminalisation at one point or another. In this chapter, the authors advance three main arguments to counter the proposal that HIV-specific criminalisation is necessary or desirable: firstly, that criminal law is not the appropriate tool to deal with the HIV/AIDS pandemic; secondly, the current legal framework is sufficient to deal with criminal instances of harmful HIV-related behaviour; and thirdly, the negative social implications of criminalisation far outweigh any justifications in favour of criminalisation.

4.3 Harmful HIV-related behaviour and principles of criminal law

Criminal law was designed to enforce compliance with social norms by spelling out the behaviours that society considers harmful enough to warrant punishment.\textsuperscript{51} Criminalisation of specific behaviours may serve several purposes: to appease the wronged individual and society generally; to denounce the conduct in question; to prevent crime and incapacitate the offender; to reform the offender; to deter people from committing the sanctioned behaviours; and to punish the offender.\textsuperscript{52} In the case of harmful HIV-related behaviour, two questions must be considered: which of these purposes best justifies the use of criminal measures; and can that purpose be served while also achieving the overarching goal of preventing or controlling the spread of HIV/AIDS?\textsuperscript{53}

Using the criminal law to \textit{appease} the individual or community after a victim has been exposed to or been infected with HIV and to \textit{punish} the offender is surely ‘punishment for punishment’s sake’ alone.\textsuperscript{54} It also seems to be out of touch with the reality of the HIV/AIDS crisis since it lacks any proven impact on the larger public health goal of stopping the spread of the disease. Furthermore, it has repeatedly been pointed out by the Law Commission that, where necessary and appropriate, retribution may be achieved under existing common law offences thus obliterating the need for a specific offence relating to HIV transmission or exposure.

\textit{Denunciation} of harmful HIV-related behaviour is theoretically important but of questionable efficacy in preventing risky behaviours. Preventing the spread of HIV by incarcerating infected individuals seems akin to emptying the ocean a teaspoonful of water at a time. In any event, imprisonment does not stop a person from spreading the disease within the confines of prison.\textsuperscript{55} Deterrence of risky behaviours and reforming the offender are clearly motivated by public health concerns but it is unlikely that

\begin{itemize}
\item \textsuperscript{53} Wolf and Vezina (n 51 above).
\item \textsuperscript{55} Ibid.
\end{itemize}
criminal measures will significantly influence sexual practices.56 There is no evidence from any jurisdiction that criminalising HIV transmission resulted in reducing HIV prevalence, or that coercive criminal measures alter individuals’ risky HIV-related behaviour.57

On the contrary, HIV-specific legislation may lead to adverse public health implications, such as suggesting that HIV/AIDS is mainly transmitted through deliberate infection by people who know that they are HIV positive, an assertion that is contradicted by the facts. This misrepresentation may create a false sense of security amongst people who are HIV-negative.58 People might think that unless a person discloses their HIV status or insists on safer sex practices, they cannot be infected with HIV since it would be against the law to engage in unprotected sexual activity. Silence or passivity might be interpreted as HIV-negative status.59 Hence, a number of individuals might actually refrain from protecting themselves by not using condoms or other safer sex measures.

Last but not least, HIV-specific criminal laws could deter people from getting tested and encourage the thinking that ‘I cannot communicate what I don’t know.’ This is a real danger in a country like South Africa, where some hold the view that they are negative until they get tested.60 Voluntary counselling and testing (VCT) initiatives could be undermined and the pervading stigma around HIV/AIDS reinforced.61 VCT is an important and effective public health measure. Without people getting tested and knowing their HIV status, the chain of transmission cannot be disrupted. Thus, discouraging people from utilising VCT services can never be in the interest of public health.

4.4 Using the Current Legal Framework to Manage Harmful HIV-related Conduct

The current absence of HIV-specific legislation62 does not mean that harmful HIV-related behaviour must go unsanctioned under the current legal framework. A
number of existing common law crimes can be used to prosecute HIV transmission/exposure, including murder, culpable homicide, assault, and **crimen iniuria**.

While the use of common law crimes to prosecute harmful HIV-related behaviour is advocated, this admittedly poses prosecution problems (even where actual infection took place) due to the complexities of HIV/AIDS. The two main obstacles are proving causation and intention and the ability to overcome these will depend upon the crime with which the defendant is charged. For instance in murder, assault or culpable homicide cases, to prove causation the state must show that the victim acquired the infection from the perpetrator. That is problematic due to the window period between the time of infection and the appearance of detectable antibodies to the virus.  

It is, therefore, difficult to conclusively link the act of alleged transmission with the virus, as another means of transmission may, arguably, have occurred during this period. Furthermore, it might be challenging to provide definitive proof that the victim was not already HIV positive. Although certain DNA tests can show whether one person was infected by a particular person, it is highly unlikely that these tests will be used on a large scale in a resource-poor setting like South Africa.

A charge for an attempted crime (murder or assault) does not require the causal link. What is at issue is the relevant intention on the part of the alleged perpetrator. To establish intention, the state would have to prove that the alleged perpetrator knew that he or she was HIV positive and understood that his or her actions would lead to transmission of or exposure to the virus. As noted earlier, providing evidence on knowledge and intent is also very difficult.

Perhaps negligence may be easier to establish in an HIV transmission case. In a culpable homicide case it would have to be shown that (1) a reasonable person would have foreseen the possibility of HIV transmission taking place; (2) would have taken steps to guard against such a possibility; and (3) that the conduct of the alleged perpetrator differed from that of such a reasonable person.  

Despite the main obstacle that the complainant must have died as a result of the conduct, the offence opens the door for contextual adjudication because of the test of the reasonable person. What is considered to be a ‘reasonable person’ is very dependant on societal views concerning HIV/AIDS. It is interesting to consider the standard of such person in a climate where the President entertains dissident notions about HIV/AIDS, the

---

63 During the window period, within three to six weeks of infection, the virus cannot be detected with antibody testing. This means that a victim would not test positive until three to six weeks (and possibly, some argue, three months) after transmission.

64 These tests are very expensive and require special skills and laboratories for analysis.

65 Furthermore, the common law crime of culpable homicide requires the victim to have died of the criminal conduct which might actually lead to further prosecution problems; CR Snyman (2007) *Criminal Law*, 426.
Health Minister advocates the healing powers of the African potato, and the former Deputy President describes taking a shower to ward off HIV infection.

5. Conclusion

The foregoing analysis shows that prosecuting harmful HIV-related behaviour under the current legal framework meets numerous legal and evidentiary obstacles. It needs to be acknowledged though, that the proposed provisions considered by the Law Commission and Portfolio Committee during the process of deliberating the Sexual Offences Bill would not have solved any of these prosecutorial problems, but would, in fact, have added further difficulties for the prosecution. It therefore needs to be accepted that the criminal law — notwithstanding whether a specific provision is crafted or the existing common law is used — can only play a very limited role in addressing harmful HIV-related behaviour and public health problems.

Criminalising harmful HIV-related behaviour has a number of adverse social implications, including increased stigma around the disease, and a disproportionate affect on marginalised groups, particularly women. In South Africa, infected individuals have been shunned, abandoned, isolated, expelled and even killed by horrified neighbours and kin. PLHA live with this prospect of emotional and social exclusion, including physical expulsion from their family, kinship structures and other familiar forms of support, should they disclose their status. Fear may result in denial of status to the point of continuing risky sexual and other practices for fear of alerting a partner or family members to their condition. Infected persons may believe that they are ‘protecting’ family members from the trauma of being faced with the possibility that they too may be HIV positive.

Despite being several decades into the HIV pandemic, these concerns are still extremely relevant. In South Africa, one survey referred to in a UNAIDS Report found that only one-third of respondents who revealed their HIV positive status received a supportive response in their communities. One in 10 said they had met with outright hostility and rejection. Dodds et al argue that criminal HIV/AIDS prosecutions contribute to the further demonisation of all PLHA, without regard for their actual behaviours or personal circumstances.

66 Although this may be perceived as a weakness of the criminal law, it could also be considered a benefit. If it is difficult to convict someone, the use of the criminal law will be the exception and not the rule. As a consequence, the prosecution will be limited to cases where the conduct in question was truly blameworthy and harmful to society; it is what the criminal law aims for.


69 Dodds et al (note 35) at 12. Also see Z Lazzarini and R Klitzman ‘HIV and the Law: Integrating Law, Policy, and Social Epidemiology’ (2002) 30 The Journal of Law, Medicine and Ethics 537 who argue that ‘[a]lthough we know that a substantial minority of the general public holds at least some stigmatizing
There is also a very real risk that HIV-specific criminal laws would be disproportionately directed at those who are socially and economically marginalised, particularly women, since they are more vulnerable to infection and more likely to know their status.70 Furthermore, forcing women to disclose their HIV status to their partners would place them at risk for violence and abuse. Research has shown that women who disclose their status risk losing economic support and suffering blame, abandonment, physical and emotional abuse, discrimination and disruption of family relationships.71 In South Africa, this is a serious problem because women often depend upon their partners for basic needs such as food, shelter, clothing and medication.

In conclusion, it is unclear whether the criminal law can have any discernible impact on the spread of HIV/AIDS. To the extent necessary for punishment, the common law does provide tools (albeit limited ones) to deal with intentional transmission. The provisions suggested by the Law Commission and later by the Project Committee, allowing for the specific criminalisation of harmful HIV-related conduct, were a simplistic reaction to the link between HIV and non-disclosure in the context of intimate sexual relations. It is obvious that more nuanced and contextualised public health interventions are required to deal with sexual activity that falls short of an obvious intention to infect another with HIV, and it is fortunate that Cabinet recognised the futility of these provisions.

70 See above B.; C.I.3.a.
GETTING SOMEWHERE SLOWLY — THE REVISION OF A FEW EVIDENCE RULES

PJ SCHWIKKARD*

1. Introduction

The historical embodiment of misogyny in the South African rules of evidence applicable to complainants in sexual offence cases has been recognised for many decades but until recently has evoked little response from the courts and legislature. But things have improved (despite the internalisation of discriminatory beliefs). For example, in 1985 the South African Law Reform Commission (Law Reform Commission) found that there was no need to abolish the cautionary rule or re-consider the exception to the previous consistent statement rule, whereas in 2002 the Law Reform Commission adopted an entirely different approach. It was a different Law Reform Commission, not in bureaucratic form, but in context and composition that operated in a public sphere which had been radically re-shaped by the advent of the democratic South African state in 1994. And it was a democratic legislature that chose to draw on recommendations of the Law Reform Commission.

The South African Law Reform Commission’s Sexual Offences Report¹ made numerous recommendations in respect of the law of evidence, not all of which made their way into the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Sexual Offences Act). This chapter takes a critical look at the legislative choices made in relation to these evidence provisions.²

Taking a somewhat sceptical view of the benefits of the adversarial process, the Law Reform Commission recommended that the existing rules of evidence pertaining to sexual offences be amended and in some instances abolished. These recommendations were made in relation to the following: the competency of children to testify,³ previous consistent statements,⁴ evidence of surrounding

---

* Professor PJ Schwikkard BA (Wits) LLB LLM (Natal) LLD (Stell) teaches in Criminal Procedure, Criminal Law and Evidence in the Department of Public Law, in the University of Cape Town’s Faculty of Law, where she is also deputy dean and dean designate.


² It is not intended here to review the abundance of literature that has been written in the last 20 years and largely ignored by lawmakers; it is well referenced in the Law Reform Commission’s Project 107 Report on Sexual Offences (2002) and Discussion Paper 102 (2001).

³ Article 5 & 8 of the Schedule to the SALRC Bill (Annexure A of the Report on Sexual Offences (2002)).

⁴ Ibid s 18.
circumstances and impact of sexual offences, the cautionary rules and rules of corroboration, cross-examination, character evidence and evidence by means of closed circuit television or other electronic devices.

The legislature did, however, not embrace all the Law Reform Commission’s evidentiary recommendations. To some degree the difference in approach between the Law Reform Commission and the legislature can be explained in terms of differing approaches to legislative drafting: the Law Reform Commission favouring a normative approach in terms of which legislation also serves an educational and training function, in contrast to the legislature which appears to have taken a reductionist approach. A reductionist approach works on the assumption that presiding officers are competent to apply legislative principles to changing factual scenarios. In terms of this approach, legislation should not be overly detailed which makes it cumbersome and inflexible. A reductionist approach has many advantages provided there is also a commitment to judicial training in tandem with legislative changes which reflect contextual shifts.

2. Evidentiary Provisions in the Law Reform Process

2.1 The cautionary rule in sexual offence cases

The fate of the cautionary rule applicable to complainants in sexual offence cases illustrates this tension. There are a number of cautionary rules to be found in the law of evidence in terms of which the courts are instructed to exercise caution when dealing with the evidence of certain witnesses. One such category of witness was the complainant in a sexual offence case.

Cautionary rules are not inflexible. There is no fixed criterion that has to be met before a court will be convinced of a witness’s trustworthiness. Corroboration is not essential, although the cautionary rule will most often be overcome if there is some corroborative evidence. If the requirements of a cautionary rule are met it does not necessarily mean that proof beyond reasonable doubt has been established. Despite the flexibility of the cautionary rules there is no doubt that the application of the cautionary rule to the testimony of complainants in sexual offence cases was taken

---

5 Ibid s 19.
6 Ibid s 20.
7 Ibid Article 6.
8 Ibid Article 10.
9 A minor point worth noting is that the Sexual Offences Act whilst amending s 238 of the Criminal Procedure Act 51 of 1977 dealing with incest, did not take the opportunity to ameliorate the reverse onus provision in s 238(1)(b). It may well have been prudent to rephrase it so as to simply impose an evidentiary burden, given the Constitutional Courts record of striking down reverse onus clauses.
10 S v Artman 1968 (3) SA 339 (A); S v Snyman 1968 (2) SA 582 (A); R v J 1966 (1) SA 88 (RA).
11 S v Hlapezula 1965 (4) SA 439 (A); Boners v Estate Naidoo 1955 (3) SA 78 (A).
seriously. In *S v S*12 the Appellate Division held that mere reference to the cautionary rule applicable in sexual offence cases would not suffice. Eksteen JA held that it was not sufficient that the presiding officer be satisfied that the cautionary rule applicable to single witnesses had been overcome, and even the presence of corroborative evidence would not suffice if the court did not clearly show that it was conscious of the inherent dangers of such evidence in sexual offence cases.

2.1.1 The misogynist nature of the cautionary rule

The problem with this cautionary rule was that it appeared to have no rational basis, demeaned women and contributed to secondary victimisation and the non-reporting of cases.13 Traditional arguments in support of this cautionary rule assert that it must be applied to the complainant in sexual offence cases because sexual offences frequently occur in private and leave no outward traces, making it very difficult to refute an assertion that there was no consent. The accused’s difficulties are allegedly compounded by the danger that a sexual offence complainant may have some improper motive for laying the charge.

The counter-argument is simple: there is a cautionary rule, applicable to single witnesses, that is invoked for all categories of offences. In addition, presiding officers ‘will have available the usual criteria of demeanour and coherence of the witness under cross-examination and the evidence of surrounding circumstances’ to assist them in assessing mendacity.14 The absence of outward traces is not an obstacle for the accused but an additional hurdle that the prosecution has to overcome in proving guilt beyond a reasonable doubt. The accused does not have to prove anything and merely has to raise a reasonable doubt in the event of the prosecution establishing a *prima facie* case. There is no empirical data showing that more false charges are laid in respect of sexual offences than in any other category of crime. Research indicates that

---

12 1990 (1) SACR 5 (A).


14 Dennis (note 13 above) 328.
sexual offences are greatly underreported. All arguments supporting the cautionary rule other than those pertaining to the dangers of a single witness’s testimony are based on a discriminatory misogynist assumption that women are sexually duplicitous and deceitful.

The counter-argument was that the rule could not be discriminatory as it applied to both men and women.15 This denial overlooks the fact that the overwhelming number of total complaints of a sexual nature are laid by women and the historical framing of the rule in terms of female psychology. The traditional rationale is clearly expressed by Wigmore in the following passage:

Modern psychiatrists have amply studied the behaviour of errant young girls and women coming before the court in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defect, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offenses by men. The unchaste [. . .] mentality finds incidental but direct expression in the narrations of imaginary sex incidents of which the narrator is the heroine or the victim. On the surface the narration is straightforward and convincing. The real victim however, too often in such cases is the innocent man; for the respect and sympathy naturally felt by any tribunal for a wronged female helps to give easy credit to such a plausible tale.16

Williams found justification for the cautionary rule on the following grounds:

Sexual cases are peculiarly subject to the danger of deliberately laying false charges, resulting from sexual neurosis, phantasy, jealousy, spite or simply a girl’s refusal to admit that she consented to an act of which she is now ashamed.17

Schriener JA in *R v Rautenbach* 1949 (1) SA 135 (A) at 14318 contributed the following:

It is not only the risk of conscious fabrication that must be guarded against. There is also the danger that a frightened woman, especially if inclined to hysteria, may imagine that things have happened which did not happen at all.

15 See *S v D* 1992 (1) SACR 143 (Nm) in which the argument was raised and dismissed.

16 Wigmore (1970) *Evidence* revised by JH Chadbourn para 924A at 736. This passage has often been quoted with approval by the South African courts, see for example *S v Balhuber* 1987 (1) PH H22 (A) at 40, *S v F* 1989 (3) SA 847 (A) at 854. LB Bienen (note 13 above) scrutinises the authorities upon which Wigmore relied for his assertions about the mendacity of young girls and concludes that ‘Wigmore writes as a man convinced, apparently so convinced that he actually suppressed factual evidence contradicting his assertions’.


18 1949 (1) SA 135 (A) at 143.
2.1.2 Changes in South African case law

These views could easily be dismissed if they were not so harmful and if we could truly be confident that they no longer had a place in South African law. The first change in the judicial tide occurred in 1997, in the case of *S v M.*\(^{19}\) The court, assuming that it had no option but to apply the cautionary rule, held that ‘it is highly problematic to assume automatically that women lie about rape when approaching a court’\(^{20}\) and held that the cautionary rule had to be applied in a way that did not undermine the unequivocal constitutional commitment to gender equality.\(^{21}\) Shortly after the decision in *S v M*, the Supreme Court of Appeal, in *S v Jackson,\(^{22}\) held that:

> the cautionary rule in sexual assault cases is based on irrational and outdated perceptions. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable.

Consequently, an evidence student might have been somewhat surprised when the South African Law Reform Commission recommended that the Sexual Offences Act should expressly abolish this cautionary rule.\(^{23}\)

The court in *Jackson* had expressly held that the cautionary rule had no place in our law.\(^{24}\) It made it clear that the only instance in which the testimony of a complainant or any witness could be treated with caution was when there was an evidentiary basis for doing so.\(^{25}\) It was this qualification that led the Law Reform Commission to conclude that *Jackson* was capable of being interpreted so as to retain the cautionary rule in respect of some sexual offence cases ‘because of the nature of the case’\(^{26}\) so that the effect of *Jackson* was that ‘in certain circumstances victims of sexual offences will be treated with caution in the same way as accomplices to the crime itself are’.\(^{27}\) At the time that the report was published this might have been perceived as a somewhat stretched and over-anxious interpretation of *Jackson*. However, subsequent applications of *Jackson* by the High Courts appear to have proved the Law Reform Commission right.

---

19 1997 (2) SACR 682 (C).
20 At 685d.
21 At 685e-f.
22 1998 (1) SACR 470 (SCA) at 476c-e.
23 SALRC Report on Sexual Offences (note 1 above) 473 para 31.2.4.10.
24 Supra 476c-f.
25 In *S v M* 2006 (1) SACR 135 (SCA) Cameron JA, dissenting, held that the constitutional right to dignity requires that any allegation of malicious motive for laying a complaint in a sexual offence case needs to be canvassed in the complainant’s evidence (at para [271]). As noted by Cameron JA, complainants in other criminal cases are not subject to such speculation (at para [273]) and there is no rational reason for exposing a complainant to the indignity of such speculation.
26 SALRC Report on Sexual Offences (note 1 above) 472 at para 31.2.4.7. Cf *S v Zuma* 2006 (2) SACR 191 (W), 2006 (7) BCLR 790 (W) at 856.
27 Ibid para 31.2.4.8.
Commission right. For example, in *S v Van der Ross*,²⁸ Thring J clearly found that the sexual nature of the offence was something in addition to the single witness status of the complainant, requiring the court to take a doubly cautious approach.²⁹

### 2.1.3 Implications of *S v Jackson* for the law reform process

If the *Van der Ross* interpretation of *Jackson* is correct then the legislature could be expected to abolish the rule. The inequities of this rule have been well documented and it has been abolished in those democracies, including Namibia,³⁰ who, as a consequence of history, have inherited Anglo-American evidentiary processes.³¹ However, the first legislative drafts of the Bill remained silent on this cautionary rule. A possible explanation is that this was not because the legislature thought that the approach of the court in *Van der Ross* was right, but rather that it was preferable that errors in interpretation be corrected through the hierarchy of courts and that legislation is an inappropriate mechanism for judicial education. In other words, the legislature initially chose a reductionist approach.

The lawmakers were perhaps swayed by the submissions of civil society and the frustration and inevitable slowness of judicial self-correction was avoided.³² Section 60 of the Sexual Offences Act, therefore, expressly abolishes the cautionary rule applicable to sexual offences. It reads:

> Notwithstanding any other law, a court may not treat the evidence of a complainant in criminal proceedings involving the alleged commission of a sexual offence pending before that court, with caution, on account of the nature of the offence.

Consequently, it is now absolutely clear that the sexual nature of the offence can no longer be a basis on which to treat the complainant’s evidence with caution.³³

---

²⁸ 2002 (2) SACR 362 (C).
²⁹ See judgment at 365i where the court held (my translation): ‘In my view this case cries out for a double cautious approach to the complainant’s evidence: not only because she is a single witness, but also because of the nature of the complaint’. Cf *S v Cornick* 2007 (2) SACR 115 (SCA) and *S v Mpondi* 2007 (2) SACR 245 (C).
³⁰ See s 5 of the Combating of Rape Act 8 of 2000. See also *S v D* 1992 (1) SACR 143 (Nm).
³¹ See references cited in SALRC Discussion Paper 102 (note 2 above) paras 31.2.4.5 — 31.2.4.10 and the authorities cited in *S v Jackson* supra.
³² In August 2006, during a meeting with the Portfolio Committee on Justice and Constitutional Development, the Deputy Minister of Justice highlighted that the cautionary rule clearly had no place in the South African legal system. He pointed out that although the Supreme Court of Appeal had dealt with the matter in *Jackson*, courts were still applying the cautionary rule. He urged that the matter had to be addressed quickly and that it was essential to find the correct wording. Parliamentary Monitoring Group (PMG), Minutes of 6 August 2006. Available at http://www.pmg.org.za.
³³ A related recommendation by the Law Reform Commission was the abolition of any rule of corroboration in relation to sexual offences. The difficulty here is that in South Africa the cautionary rules do not require corroboration and if they did then a case would need to be made for treating sexual offences differently to other offences. Clearly, the Commission’s concern was not with the content of the law but...
2.2 The cautionary rule regarding child complainants

The potential tension that arises from conflicting views as to the optimal style of drafting does not explain the legislature’s ‘hands off approach’ to recommendations made by the Law Reform Commission in respect of the cautionary rule applicable to children. In its 2002 report, the Commission highlighted the paucity of evidence establishing that children are more unreliable than adults and recommended the clear abolition of the cautionary rule regarding children.34

2.2.1 The content and rationale of the cautionary rule applicable to children

The cautionary rule applicable to the evidence of children provides that a presiding officer must be aware of the inherent dangers in assessing a child’s evidence. Their evidence must be considered in the same light as the evidence of accomplices.35 As a consequence, the court will seek corroboration in order to assist in determining whether the witness is credible. However, corroboration is not essential for the requirements of the cautionary rule to be met.36 The cases are not altogether enlightening as to precisely what the inherent dangers are in children’s evidence. In *R v Manda*37 Schreiner JA states that ‘[t]he imaginativeness and suggestibility of children are only two of a number of elements that require their evidence to be scrutinised with care amounting, perhaps to suspicion’, but unfortunately he did not elaborate on the other ‘numerous elements’.

More guidance is to be found in the dictum of Diemont JA in *Woji v Santam Insurance Co Ltd*38:

The question which the trial court must ask itself is whether the young witness’ evidence is trustworthy. Trustworthiness . . . depends on factors such as the child’s power of observation, his power of recollection, and his power of narration on the specific matter to be testified. In each instance the capacity of particular child is to be investigated. His capacity of observation will depend on whether he appears ‘intelligent enough to observe’. Whether he has the capacity of recollection will depend again on whether he has sufficient years of discretion ‘to remember what occurs’ while the capacity of narration or communication raises the question whether the child has the ‘capacity to understand the questions put, and to frame and express intelligent answers.’ . . . There are other factors . . . Does he appear honest . . . is there a consciousness of the duty to speak the truth . . . At the same time the danger of believing a child where evidence stands alone must not be underestimated.
Although Woji must be applauded in that it recognises the individuality of children, it is clearly still based on the premise that children are inherently more unreliable than adults as witnesses. According to Spencer and Flin this belief accords with societal and ‘expert’ views that were prevalent up until the 1960s.39 However, subsequent research in cognitive psychology and child development has resulted in a reappraisal of earlier beliefs and a realisation that children’s ability to give reliable evidence has been greatly underestimated.40 This conclusion has been strengthened by research on the reliability of adult testimony, which has shown that adults’ memories may be poor and susceptible to suggestion and misinformation.41 The result has been awareness amongst social scientists that ‘the presumed gulf between the eyewitness abilities of children and adults has been seriously exaggerated’.42

It is not at all clear that the cautionary rule applicable to the evidence of children can withstand the test of social science evidence. The legal system’s distrust of children’s evidence has a discriminatory effect on an extremely vulnerable group. In the absence of a clear rationale it becomes difficult to justify this cautionary rule’s inconsistency with South Africa’s constitutional commitment to equality. It would seem to make much more sense to get rid of this cautionary rule and require, as articulated in Jackson,43 that any cautionary approach to a witness must have an evidential basis, with a very clear proviso that the age or gender of the witness cannot provide the requisite evidential base.

2.2.2 An unresponsive law reform process

It is indeed unfortunate that the legislature did not take the opportunity to rid our system of this archaic rule and in doing so make it a little easier for these vulnerable members of our society to have access to justice.44

Getting rid of the cautionary rule applicable to children is by no means a novel idea. In England the cautionary rule applicable to children’s evidence was abrogated by s 34(2) of the Criminal Justice Act 1988. In Canada the Supreme Court rejected the cautionary rule, together with the notion that children’s testimony is inherently unreliable and consequently needs to be treated with special care, well over a decade ago.45 Nevertheless, the Canadian courts have recognised that children are not

40 Ibid.
41 Ibid.
43 Supra.
44 It would not necessarily make sense to abolish the cautionary rule only in respect of children testifying in sexual offence cases. However, this anomaly could be avoided by providing for appropriate amendments to be made to the Criminal Procedure Act 51 of 1977 and the Civil Proceedings Evidence Act 25 of 1965.
45 R v W (R) (1992) 74 CCC (3d) 134. See also S v B (G) (1990) 56 CCC (3d) 200.
miniature adults and this should be appreciated on a case by case basis when assessing the credibility of children. This approach, which is not based on the notion that children are inherently unreliable, impliedly calls for judicial awareness of children’s cognitive development. There are two ways of attaining this: (a) judicial training; and (b) providing expert assistance in the court room. The Law Reform Commission proposed that s 145 of the Criminal Procedure Act be amended to provide the court with assessors who have experience in the areas of child development; the impact of sexual offences; and knowledge of the circumstances that may contribute to the vulnerability of victims of sexual offences. Since courts, unless they are specialised courts, often lack experience in these areas, the amendment would have facilitated assistance to judicial officers by appropriately qualified assessors. Unfortunately, the Law Reform Commission’s proposal was not incorporated into the Sexual Offences Act.

The financial cost and availability (or not) of experts to assist the court, as well as potential administrative difficulties that might contribute to increased backlogs in the court may have influenced the legislature’s rejection of this proposal. However, judicial training is not so easy to dismiss. It can be argued that the transformation of any judicial system requires social context training. The legal system is imbued with internalised beliefs drilled in text books, law school training and tradition; these internalised beliefs are not easily dislodged. Without social context training the formal jettisoning of the cautionary rules on their own is unlikely to improve the quality of fact finding. It is more likely that the prejudices represented by these rules will become an unarticulated factor influencing judicial assessment of credibility. It is because internalised beliefs are so difficult to dislodge that a normative style of legislative drafting on its own is unlikely to change judicial mindsets.

2.3 Testimonial competence of children

Another aspect relating to child witnesses that was discussed by the Law Reform Commission was the testimonial competence of children.

2.3.1 Competency rules under South African law

In South African law, age is not the determining factor in deciding whether a child is competent to testify. Children will be competent to testify if ‘in the opinion of the court, they can understand what it means to tell the truth’. Children need not give sworn evidence if the court believes that they do not ‘understand the nature and

46 See N Perry & L Wrightsman (1991) The Child Witness at 56 who argue that ‘a working knowledge of the stages and issues of child development is essential to any person who interacts with children in the legal system.’

47 See article 2 of the Schedule to the SALRC 2003 version of the Bill.

import of the oath or affirmation.\textsuperscript{49} The fact that a child’s evidence is unsworn does not necessarily mean that it will be accorded less weight.\textsuperscript{50} Hoffmann and Zeffertt summarise the ‘competency test’ as follows:

In each case the judge or magistrate must satisfy himself that the child understands what it means to speak the truth. If the child does not have the intelligence to distinguish between what is true and false, and to recognise the danger and wickedness of lying, he cannot be admonished to tell the truth — he is an incompetent witness.\textsuperscript{51}

In other words, a presumption of incompetency applies to children as they are required to pass a test before their evidence will be admitted.\textsuperscript{52} No similar presumption applies to convicted perjurers or to other persons convicted of crimes involving an element of dishonesty. The effect of the ‘competency test’ is that there is the possibility that reliable testimony may be excluded and this may inhibit the effective prosecution of offences. Truth and the duty to tell the truth are abstract notions, which a young child may not be able to understand or explain; but this does not mean that they cannot give a reliable account of relevant events.\textsuperscript{53}

Adults are generally presumed to be competent witnesses.\textsuperscript{54} However, if their competence is placed in issue there will be two inquiries: (i) the witness’s ability to understand the nature of the oath;\textsuperscript{55} and (ii) the witness’s ability to communicate.\textsuperscript{56} Where adults do not understand the nature of the oath, they may give unsworn evidence after being admonished to tell the truth.\textsuperscript{57} The purpose of administering the oath or admonishing a witness to tell the truth is primarily to encourage the witness to tell the truth.\textsuperscript{58} However, in assessing credibility, the court will place little weight, if any, on the fact that a witness took the oath or was admonished to tell the truth.\textsuperscript{59} Instead it will look to such factors as coherence under cross-examination, evidence of surrounding circumstances and demeanour.

---

\textsuperscript{49} Section 164 of the Criminal Procedure Act 51 of 1977. See also s 41 of the Civil Proceedings Evidence Act 25 of 1964.

\textsuperscript{50} \textit{R v Manda} 1951 (3) SA 158 (A).

\textsuperscript{51} Hoffmann & Zeffertt (note 48 above) 376. See also \textit{S v T} 1973 (3) SA 794 (A).


\textsuperscript{53} Spencer & Flin (note 39 above) 58.

\textsuperscript{54} See s 192 of the Criminal Procedure Act 51 of 1977 and s 42 of the Civil Proceedings Evidence Act 25 of 1964. A person who alleges that an adult is an incompetent witness bears the onus of proof.

\textsuperscript{55} Hoffmann & Zeffertt (note 48 above) 372.

\textsuperscript{56} \textit{R v Ranikolo} 1954 (3) SA 255 (O).

\textsuperscript{57} Section 41 of the Civil Proceedings Evidence Act 25 of 1964 and s 164 of the Criminal Procedure Act 51 of 1977.

\textsuperscript{58} \textit{S v Munn} 1973 (3) SA 734 (W) at 734.

\textsuperscript{59} This is due to the fact that the ability to reason morally does not mean that a person will behave morally. See Perry Wrightsman (note 46 above) 129, Spencer & Flin (note 39 above) 334; K Bussey et al (1993) ‘Lies and secrets: Implications for children’s reporting of sexual abuse’ in G Goodman & B Bottoms (eds) \textit{Child Victims, Child Witnesses} 147, 153.
The fact that a child cannot understand or articulate its understanding of the duty to tell the truth does not necessarily hinder a court in its assessment of credibility.\textsuperscript{60} The second leg of the competence inquiry — the ability to communicate — is far more important. Clearly, a child who cannot communicate and who is unable to give an understandable account of the relevant events will be of little assistance to the court. On the other hand, a child who does not understand the duty to speak the truth but who is able to give an account of relevant events will be of great assistance. But does the court need to test a child’s ability to communicate prior to the child testifying? Wigmore, recognising the difficulties and futility of assessing a child’s credibility prior to the child giving evidence, wrote ‘it must be concluded that the sensible way is to put the child upon the stand and let it tell its story for what it may seem worth’.\textsuperscript{61}

2.3.2 Law reform on competency rules in England

In England, the Pigot Committee gave the following reasons for abandoning the competency requirements applicable to children:

In principle it seems wrong to us that our courts should refuse to consider any relevant understandable evidence. If a child’s account is available it should be heard [. . .] Once this evidence is admitted juries will obviously weigh matters such as the demeanour of the witness, his or her maturity and understanding and the coherence and consistency of the testimony, in deciding how much reliance to place upon it [. . .] [T]he present approach [. . .] appears to be founded upon the archaic belief that children below a certain age or level of understanding are either too senseless or too morally delinquent to be worth listening to at all. It follows that we believe that the competence requirement which is applied to potential child witnesses should be dispensed with and it should not be replaced.\textsuperscript{62}

In accordance with the recommendations of the Committee, s 33A was inserted in the Criminal Justice Act 1991.\textsuperscript{63} In terms of this section, the English courts were no longer required to inquire into the competency of children as a class although they retained the power to declare a child incompetent.\textsuperscript{64} This has subsequently been replaced by sections 53 and 54 of the Youth Justice and Criminal Evidence Act 1999. In terms of s 53, all witnesses whatever their age will be presumed to be competent provided they can understand the questions that are put to them and are able to give

\textsuperscript{60} See G Melton (1981) ‘Children’s competency to testify’ \textit{5 Law and Human Behaviour} 73 at 79, where he persuasively argues that ‘[a]sking a child to tell the meaning of “truth”, “oath” or “God” probably tells more about his or her intellectual development than about the child’s propensity to tell the truth’.

\textsuperscript{61} Wigmore (note 16 above) 509, 601.


\textsuperscript{63} Inserted by virtue of s 52(1) of the Criminal Justice Act 1991.

\textsuperscript{64} According to D Birch (1992) ‘Children’s evidence’ \textit{Criminal Law Review} 262, 268. The correct interpretation of s 33A is that a child will only be declared incompetent when he or she cannot communicate effectively.
answers which can be understood. Section 53 is subject to s 54 which provides, inter alia, that when competency of a witness is put in issue the party calling the witness must satisfy the court that, on a balance of probabilities, the witness is competent to give evidence in the proceedings.65

2.3.3 Law reform on competency rules in South Africa

The Law Reform Commission suggested an amendment to s 164 of the Criminal Procedure Act and the inclusion therein of the following section:

192A (1) All persons below the age of 18 years shall be presumed to be competent to testify in criminal proceedings and no such person shall be precluded from giving evidence unless he or she is found, at any stage of the proceedings, not to have the ability or the mental capacity, verbal or otherwise, to respond to questions in a way that is understandable to the court.66

This recommendation in effect made the ability to communicate with the court the sole criteria for competency in respect of children.67 This would have brought the approach of the South African courts in line with English law.68 The Commission’s proposal did not require an inquiry into the child’s ability to understand the nature and import of the oath and affirmation and simply required the presiding officer to admonish the child to speak the truth.

The Sexual Offences Act does follow the Law Reform Commission’s proposal insofar as it simplifies the wording of s 164 of the Criminal Procedure Act by removing unnecessary verbiage but makes no substantive change to its contents.69 The court must still inquire into the child’s capacity to understand the nature and import of the oath and affirmation. The amendments do not reflect the recommendation by the Law Reform Commission that emphasises the child’s ability to communicate with the court, presumably on the basis that there is no necessity to codify this common law requirement. It is unfortunate that the legislature (for reasons unknown) did not see fit to relieve presiding officers from the impossible task of determining whether a


66 Section 192A of the Criminal Procedure Act furthermore holds that—
(2) The evidence given by a person referred to in subsection (1) shall be admissible in criminal proceedings contemplated in that subsection, and the court shall attach such weight to such evidence as it deems fit.
(3) The court shall note the reasons for a finding in terms of subsection (1) on the record of the proceedings.

67 Article 5 & 8 of the Schedule to the SALRC Bill, Annexure A of the Report on Sexual Offences (note 3 above).

68 Developments in English law are of particular significance in that the South African approach to child witnesses reflects the English law prior to amendment.

69 Article 8 of Schedule 1 of the Sexual Offences Act. See also Articles 5 & 8 of the SALRC Bill (note 3 above).
child who is unable to understand the oath or affirmation is nevertheless capable of understanding what it means to tell the truth.

The requirement that a judge be satisfied that a child understands the duty to speak the truth before that child is considered a competent witness ‘singles out some of society’s most vulnerable members for treatment that effectively deprives them of the protection and vindication of the criminal justice system’.

Provided an accused is afforded the opportunity of challenging the evidence of a child witness, it is difficult to see how the abandonment of the competence inquiry could in any way diminish the accused’s right to a fair trial.

Birch comments that ‘child abuse occurs in part because of the inequalities between child and adult in size, knowledge and power’ and that these inequalities ‘have been institutionalised by one-sided rules of evidence’.

It would appear that there are strong grounds for arguing that the abandonment of the ‘competency test’ is necessary for effective equality (s 9 of the Constitution). It will also increase the potential for successful prosecutions and will act as a buttress for a child’s constitutional right to security and freedom from abuse (s 12 of the Constitution).

Indeed, it is so utterly trite that the best way to establish a child’s competency is to let him or her testify that it is difficult to understand why, in the absence of a jury, a child should not simply be allowed to tell their story without a futile inquiry into their understanding of such a complex concept as truth — something, that is clearly beyond the comprehension of a host of testimonially competent adults.

2.3.4 Evidence of surrounding circumstances and impact of sexual offences

Besides equipping the courts with expert assessors, the Law Reform Commission sought to overcome the courts’ lack of experience in the area of sexual offences by introducing a new evidentiary rule that allowed for the use of evidence on the psycho-social effects and impact of sexual offences. The Law Reform Commission deemed such evidence important because it had the potential to explain late disclosures and the context of child sexual abuse.

The Law Reform Commissions’ proposed provisions on the admissibility of ‘evidence of surrounding circumstances and the impact of sexual offences’ specified inter alia that—

---

71 Birch (note 64 above) 269.
72 For a detailed discussion on the psycho-social impact of rape see Chapter 6 in this volume.
73 SALRC Report on Sexual Offences (note 1 above) 199.
74 Section 19 of the SALRC Bill (note 3 above) continued:
(2) A court, in criminal proceedings referred to in subsection (1), may, subject to subsections (3) and (4), order that the complainant be assessed by a suitably qualified person in order to establish the impact of the offence being tried upon such complainant.
(3) A court may not order that the complainant be assessed as referred to in subsection (2) unless such complainant, or if he or she is mentally impaired or a child, his or her parent or guardian, consents to the assessment.
19(1) Evidence of the surrounding circumstances and impact of any sexual offence upon a complainant may be adduced at criminal proceedings where such offence is tried in order to prove—

whether a sexual offence is likely to have been committed—
towards or in connection with the person concerned;
under coercive circumstances as referred to in section 3(3);
purposes of imposing an appropriate sentence, the extent of the harm suffered by the person concerned.

The recommendations were, however, ignored by the legislature. Common law principles clearly permit the admission of such evidence in the circumstances set out by the Commission. In practice, however, some presiding officers are overly cautious when it comes to applying this common law rule and would clearly benefit from social context training on the benefits that such testimony can provide.

2.4 Cross examination by the unrepresented accused

In Discussion Paper No. 102, the Law Reform Commission had initially suggested far-reaching amendments to the Criminal Procedure Act to address the problem of excessive and inappropriate questioning of witnesses, particularly during cross-examination. Recounting the humiliation of a sexual offence in front of judicial officers and the accused (as well as in an open court) is in itself a very difficult and often highly traumatic experience for complainants. Obviously, the trauma of such testimony is further increased by aggressive and inappropriate questioning during cross-examination.

Despite these concerns, the Law Reform Commission withdrew a number of its initial recommendations in 2002, on the basis that the common law together with professional rules of conduct already adequately protect witnesses from inappropriate conduct such as scandalous or insulting questioning. Instead, the Commission suggested that s 166 of the Criminal Procedure Act be amended by the addition of the following subsection:

(4) An accused in criminal proceedings involving the alleged commission of a sexual offence who has no legal representation shall put any questions to a vulnerable witness as

75 Similar provisions are contained in s 8 of the Namibian Combating of Rape Act 8 of 2000.
76 See for example Holtzhausen v Roodt 1997 (4) SA 766 (W).
77 SALRC Report on Sexual Offences (note 1 above) 33.5.
78 SALRC Discussion Paper 102 (note 2 above) at 160 proposed to introduce legislation that: (1) prohibited scandalous, insulting and vilifying questions and afforded a witness, the accused, and the State the right to object to such questions; (2) prohibit accused persons without legal representation from directly questioning the complainant; (3) prohibit the unduly repetitive, intimidating and offensive questioning of witnesses.
79 SALRC Report on Sexual Offences (note 1 above) 169.
contemplated by section 16 of the Sexual Offences Act [ . . ] by stating the question to the court, which shall repeat the question accurately to the witness.80

It is no doubt the reluctance of some presiding officers81 to exercise both their statutory and common law powers to curtail unnecessary and inappropriate cross-examination which motivated the Law Reform Commission to recommend that the unrepresented accused only be permitted to cross-examine a vulnerable witness through the court.

It is presumed that it is the potential infringements of the accused’s right to equality before the law and the right to a fair trial82 (in so far as the provision curtailed the right to challenge evidence) contained in the Law Reform Commission’s proposal that frightened the legislature off.

This is another area where it is hoped that government will seek to remedy inappropriate practices of presiding officers through intensive judicial training on the secondary traumatisation of witnesses through inappropriate cross-examination.

2.5 Previous consistent statements and delay in reporting

There is a general rule of evidence which provides that if a witness has previously made a statement out of court which confirms his or her testimony, evidence of such a statement is inadmissible.83 The primary reason for the exclusion of such statements is their lack of relevance. Repetition does little to enhance an assessment of veracity and obviously if such evidence was admissible it would be very easy to manufacture.84 However, there are a number of exceptions to this rule which include the admission of evidence that the complainant in a sexual offence case made a complaint soon after the alleged offence.

2.5.1 Previous consistent statements in sexual offence cases

Although the content of the complaint that has been made after a sexual offence is admissible, its probative value is restricted to showing consistency of conduct and

80 Article 6 of the Schedule to the SALRC Bill (note 3 above).

81 This lack of enforcement of existing provisions was also highlighted by civil society organisations responding to the Law Reform Commission’s Discussion Paper. (SALRC Report on Sexual Offences (note 1 above, 162). According to the Western Cape joint submission, another concern was that the scope of protection under current laws was too limited. The right to testify in camera or in a separate room, for instance, still required the witness to hear and answer the unrepresented accused’s voice which in itself may be traumatising for a complainant. (This submission was made by the Children’s Rights Project, Community Law Centre, University of the Western Cape; the Department of Forensics and Toxicology, University of Cape Town; Gender Project, Community Law Centre, University of the Western Cape; and the Women’s Legal Centre, see SALRC Report on Sexual Offences (note 1 above) 163 and 167).

82 Section 35 (3) of the Constitution.

83 Jones v South Eastern & Chatham Railway Co’s managing Committee (1918) 118 LT 802; R v Manyana 1931 AD 386.

84 R v Roberts [1942] 1 All ER 187 (CCA).
absence of consent. It will never be considered as corroborative evidence as this would clearly infringe the rule against self-corroboration.85

Before a prior complaint is admitted into evidence a number of requirements have to be met. The complaint must have been voluntary.86 This does not exclude complaints elicited as a result of questioning. What amounts to an acceptable degree of prompting will depend on all the surrounding circumstances.87 It is also important that the complaint be made at the first reasonable opportunity.88 This does not necessarily mean that a complainant must blurt out her woes to the first person she encounters. What constitutes a reasonable opportunity in the circumstances of the case will be determined by the exercise of judicial discretion.89

The complainant herself is also required to testify before such a prior statement will be admitted; consequently, the admission of such evidence cannot be viewed as an exception to the hearsay rule.

The English law influence on the South African law of evidence is clearly reflected in this exception to the rule prohibiting the use of previous consistent statements. The existence of the previous consistent statement rule has its roots in the old English law of ‘hue and cry’. Its application to rape cases was recorded in the thirteenth century by Bracton.90 It required the victim to—

go at once and while the deed is newly done, with hue and cry, to the neighbouring townships and there show the injury done to her to men of good repute, the blood and clothing stained with blood, and her torn garments.91

2.5.2 Underlying rationale of the exception to the rule on previous consistent statements

Until the 2002 Law Reform Commission report, the prevailing rationale for retaining this antiquated evidentiary practice was rooted in the belief that it was a product of centuries of judicial experience, which had shown that the evidence of a complainant in a sexual offence case must be treated with suspicion. In order to overcome this suspicion, the courts were permitted to take previous consistent statements into account.92 The basis of the suspicion that pervaded the approach taken by the courts in dealing with sexual offences is critically discussed under the

85 R v M 1959 (1) SA 352 (A).
86 S v T 1963 (1) SA 484 (A).
87 R v C 1955 (4) SA 40 (N).
88 R v Osborne [1905] 1 KB 551.
89 R v C supra.
91 Ibid 415.
92 This justification appears to have been received uncritically by the South African Law Reform Commission in Project 45 The Report on Women and Sexual Offences (1985) 53. See also R v P 1967 (2) SA 497 (R).
heading of the cautionary rule above. There are, however, a number of other criticisms directed at the practice of admitting previous consistent statements in cases of a sexual nature.

It has been argued that the admission of such evidence favours the complainant unfairly in that the accused is prohibited from leading similar evidence.93 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’.94 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 such as fear for retaliation by the offender, self-blame and the fear of having to testify to name but a few. Consequently, the absence of a complaint can never be a reliable criterion in assessing credibility.95

However, these arguments and the body of literature supporting them were dismissed by the South African Law Reform Commission in 1985 which found that there was no necessity to alter the status quo.

2.5.3 Law reform developments

Fortunately, in 2002, the Law Reform Commission operated in an entirely different political context. In their Report on Sexual Offences, the following provision was suggested:

A court, in criminal proceedings involving the alleged commission of a sexual offence, may not draw any inference only from—
(a) the fact that no previous consistent statements have been made;
(b) the length of any delay between the alleged commission of such offence and the reporting thereof.96

Although the recommendations in relation to previous consistent statements and delays in reporting were incorporated into the Act, the legislature, for reasons that are not entirely clear, preferred the formulation as it appeared in Discussion Paper No. 102 rather than the more concise version appearing in the Law Reform Commission’s report. The relevant sections as they appear in the Sexual Offences Act read as follows:

94 See R v M 1959 (1) SA 352 (A) which clearly established that a negative inference can be drawn from the accused’s failure to complain timeously.
96 Section 18 of the SALRC Bill (note 3 above).
58. Evidence relating to previous consistent statements by a complainant shall be admissible in criminal proceedings involving the alleged commission of a sexual offence. Provided that the court may not draw any inference only from the absence of such previous statements.

59. In criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof.\(^{97}\)

In recent years some judgments have expressly acknowledged that there is no necessary correlation between late reporting and unreliability.\(^{98}\) However, the approach has not been uniform\(^{99}\) and legislative recognition of the strong body of social science evidence that indicates that victims of sexual offences may postpone reporting the offence for a considerable period is to be welcomed. Yet, the prohibition of drawing an inference from the absence of a previous consistent statement is a non-sequitur — in that for the matter to have come before the court there would always have been a previous consistent statement. A previous consistent statement refers to a statement made out of court that is essentially similar to the statement made by the witness in court. For the matter to have come to court the complainant must have told somebody about the incident. The issue in each instance is not whether a previous consistent statement was made — but when it was made. This is where s 59 of the Sexual Offences Act may well have an impact on judicial approaches in that to date the High Courts have been inconsistent in their evaluation of delays in reporting.\(^{100}\)

It is possible that the same effect may have been achieved by abolishing the exception to the previous consistent statement rule applicable to complainants in sexual offence cases and simply retaining the general exception that applies to all types of cases and allows previous consistent statements to be admitted when there is an allegation of recent fabrication. This is the approach adopted by the Canadian legislature.\(^{101}\) Indeed, it can be argued that if previous consistent statements are irrelevant in relation to other categories of offence it is difficult to see why they should be relevant in sexual offence cases. Conversely, another way of ameliorating the different and discriminatory application of the rules of evidence to complainants in sexual offence cases, is to narrow the common law restriction on the admission of previous consistent statements in all cases.

---

\(^{97}\) Similar provisions are contained in ss 6 & 7 of the Namibian Combating of Rape Act 8 of 2000.

\(^{98}\) *Holtzhauzen v Roodt* 1997 (4) SA 766 (W); *S v Cornick* 2007 (2) SACR 115 (SCA).

\(^{99}\) See for example, *S v Van der Ross* 2002 (2) SACR 362 (C).

\(^{100}\) Compare for example the approach taken in *Holtzhauzen v Roodt* 1997 (4) SA 766 (W) and *S v M* 1999 (1) SACR 664 (C) to *S v De Villiers* 1999 (1) SACR 297 (O) and *S v Van der Ross* 2002 (2) SACR 362 (C).

\(^{101}\) Section 275 of the Canadian Criminal Code.
Singh\textsuperscript{102} argues that the Law Reform Commission did not go far enough in this regard and would have done better to follow the approach adopted in the United Kingdom. Section 120(7) of the United Kingdom’s Criminal Justice Act 2003 permits all first reports provided they are made ‘as soon as could reasonably be expected’ to be admitted into evidence, not only to show consistency but also as evidence of their content. The difficulty is this: if we allow all previous consistent statements there is a high risk of the courts being subjected to a great deal of irrelevant evidence. On the other hand, as soon as the admissibility of first reports is restricted to those made ‘as soon as reasonably expected’ complainants in sexual offence cases are prejudiced as social science evidence indicates that there can be no ‘reasonable expectation’ in respect of the time of reporting a sexual offence.

In this respect, the Law Reform Commission proposals as reflected in the Sexual Offences Act are to be preferred. However, Singh’s argument extends to the use of previous consistent statements; he favours the recent change in English law which allows a previous consistent statement to be admitted as evidence of its contents. And this is really the nub of the issue. If the sole purpose of admitting the previous consistent statement was to show consistency, then the common law recent fabrication rule would be sufficient and have the advantage of circumventing the requirements that the statement be made ‘as soon as reasonably expected’. The English approach has merit if it is accepted that an immediate report makes it more likely that the complainant’s allegations are true. The difficulty is this: presiding officers who have previously drawn negative inferences from the failure to report, must make a mind shift that says although an early report makes the allegation truer the late reporting in sexual offences does not make the allegations less likely. Given the limited probative value of a previous consistent statement it may indeed be prudent to interpret s 58 of the Sexual Offences Act as going no further than permitting previous consistent statements to be admitted to establish consistency.

2.6 Proceedings in the presence of the accused

2.6.1 Evidence by means of closed circuit television\textsuperscript{103}

Differences in approaches to drafting also do not explain the legislature’s rejection of the Law Reform Commission’s proposed amendments to s 158 of the Criminal Procedure Act. Section 158 (1) of the Criminal Procedure Act codifies the general rule that proceedings should take place in the presence of the accused. Subsection (2), which makes provision for evidence to be given by closed circuit television or similar electronic media, has caused some difficulties in its application in that it has not been clear whether the factors the court is required to consider in applying this subsection


\textsuperscript{103} For a further discussion on this topic see in this volume J Gallinetti and D Kassan’s discussion in Chapter 7.
apply disjunctively. It remained thus unclear whether s 158 of the Criminal Procedure Act could truly be used to alleviate the hardships experienced by witnesses in sexual offence cases.

The Law Reform Commission sought to remedy this by amending s 158(3) of the Criminal Procedure Act so as to clarify the disjunctive nature of the pre-requisites for the application of s 158(2). In their Discussion Paper No. 102, the Law Reform Commission had furthermore suggested to insert two new subsections (3A) and (3B) which read:

(3A) If in criminal proceedings involving the alleged commission of a sexual offence the court is of opinion that it is imperative that a witness or an accused should give evidence by means of closed-circuit television or similar electronic media and such facilities are not readily available or obtainable, the court may order that the criminal proceedings should be transferred to another court which has such facilities after the approval of such other court has been obtained.

(3B) When considering whether a transfer as referred to in subsection (3A) should be effected, the court shall take into account—
(a) the need to protect the person who is to give evidence by means of closed-circuit television or similar electronic media from traumatisation.
(b) the wishes of the person referred to in paragraph (a);
(c) the wishes of other persons who are to give evidence in the proceedings;
(d) the costs of having the proceedings transferred;

104 Section 158 of the Criminal Procedure Act reads as follows:
(1) Except as otherwise expressly provided by this Act or any other law, all criminal proceedings in any court shall take place in the presence of the accused.
(2)(a) A court may, subject to section 153, on its own initiative or on application by the public prosecutor, order that a witness or an accused, if the witness or accused consents thereto, may give evidence by means of closed circuit television or similar electronic media.
(b) A court may make a similar order on the application of an accused or a witness.
(3) A court may make an order contemplated in subsection (2) only if facilities therefore are readily available or obtainable and if it appears to the court that to do so would—
(a) prevent unreasonable delay;
(b) save costs;
(c) be convenient;
(d) be in the interest of the security of the State or of public safety or in the interests of justice or the public; or
(e) prevent the likelihood that prejudice or harm might result to any person if he or she testifies or is present at such proceedings.
(4) The court may, in order to ensure a fair and just trial, make the giving of evidence in terms of subsection (2) subject to such conditions as it may deem necessary: Provided that the prosecutor and the accused have the right, by means of that procedure, to question a witness and to observe the reaction of that witness. For the use of the provision see S v F 1999 (1) SACR 571 (C); S v Staggie 2003 (1) SACR 232 (C); S v Domingo 2005 (1) SACR 571 (C).

105 Article 4 of the Schedule to the SALRC Bill (note 3 above).
These subsections made it clear that the provisions could be applied in sexual offence cases and that where such facilities were not readily available a court was required (after taking a number of specified factors into account) to transfer the case to an appropriately equipped court. However, the additional subsections were not included in the Law Reform Commission’s proposed draft Bill and the amendment of subsection (3) of s 158 of the Criminal Procedure Act appears to have been ignored by the legislature.

It is not clear why the additional subsections were withdrawn by the Law Reform Commission because the manner in which the subsections were drafted in the Discussion Paper No. 102 were sufficiently flexible for a presiding officer to take any cost implications into account on a case by case basis (as well as any prejudice to the parties and witnesses). It is furthermore unfortunate that uncertainty remains as to whether the factors listed in s 158(3) must co-exist before an order can be made to allow a witness who might otherwise suffer harm or prejudice if they testify at the proceedings to testify by closed circuit television. It should be noted that in England such protection is afforded to both child and adult witnesses and is considered to be consistent with the right to a fair trial protected by article 6 of the European Convention of Human Rights.

2.6.2 Evidence through an intermediary

Fortunately, the recommendations pertaining to s 170A of the Criminal Procedure Act, which applies to witnesses under the age of 18, fared somewhat better under legislative scrutiny. Section 170A permits a child witness who would otherwise be exposed to undue mental stress or suffering to give his or her evidence through an intermediary. The legislature amended s 170A so as to make it applicable to any witness under both the biological and mental age of 18. In line with the Law Reform Commission’s recommendations, it also made statutory provisions for a

---

106 SALRC Report on Sexual Offences (note 2 above) 141.
107 The Sexual Offences Act now merely foresees a limited amendment to s 158 of the Criminal Procedure Act by introducing a new sub-s (5) which requires the court to provide reasons for refusing the application of a child complainant younger than 14 years to give evidence via closed circuit television. This subsection will be discussed further below.
108 See R (D) v Camberwell Green Youth Court [2003] 2 Cr App R 257, DC para 48. See also L Hoyano (2001) ‘Striking a balance between the right of defendants and vulnerable witnesses: Will special measures directions contravene guarantees of a fair trial?’ Crim. L. R 948. Initially, the SALRC also proposed to make protective measures such as evidence by means of closed circuit television available for adult complainants. However, the relevant provisions were omitted from the Bill by the Portfolio Committee on Justice and Constitutional Development. See the discussion in Chapter 8 of this volume.
109 Section 170A (1). See article 9 of the Schedule to the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (‘the Sexual Offences Act’).
court to summons an intermediary and respond appropriately where an intermediary does not have good reason for not responding to the summons.\textsuperscript{110} One can only presume that the Commission’s recommendations pertaining to the general conduct of the intermediary\textsuperscript{111} (such as requesting a recess and informing the court of the witness’ fatigue) were disregarded as superfluous as there is nothing in the existing law that prevents the intermediary from conveying such information to the prosecutor or presiding officer.\textsuperscript{112}

However, what remains disturbing is that the protections afforded to witnesses under the age of 18 remain dependent on a court finding that such a witness would suffer undue stress, which unfortunately has been interpreted in some High Court cases as requiring something more than the ‘ordinary stress’ of a young victim in a sexual offence case.\textsuperscript{113} It would seem to make far more sense to make such relief automatically available to young witnesses. Similar legislative provisions have passed constitutional muster in Canada,\textsuperscript{114} and the English provisions have been found to be in compliance with the European Convention on Human Rights.\textsuperscript{115} It is to be hoped that most South African High Courts will prefer the view that ‘undue’ stress does not require something in addition to that which would ordinarily be suffered by victims of trauma inducing offences on the basis that those courts which found otherwise were mistaken in finding the constitutional right to a fair trial dictated a higher threshold requirement.

The Sexual Offences Act to some extent compensates for the legislature’s preferred reductionist approach by again requiring that judicial officers must give reasons for interlocutory decisions. Subsection (5) is added to s 158 of the Criminal Procedure Act and provides:

\begin{quote}
The court shall provide reasons for refusing any application by the public prosecutor for the giving of evidence by a child complainant below the age of 14 years by means of closed circuit television or similar electronic media, immediately upon refusal and such reasons shall be entered into the record of the proceedings.
\end{quote}

Similarly, subsection (7) is added to s 170A of the Criminal Procedure Act which requires a court refusing the appointment of an intermediary in respect of a complainant below the age of 14 to give reasons immediately upon refusal.\textsuperscript{116} An anomaly that arises here is that whilst children under the age of 18 may be afforded

\begin{footnotesize}
\begin{enumerate}
\item Subsections 170A (8) & (9). See article 9 of the Schedule to the Sexual Offences Act.
\item Article 7 of the Schedule to the SALRC Bill (note 3 above).
\item See J Simon (2006) ‘Pre-recorded videotaped evidence of child witnesses’ (19) SACJ 56, who argues that the Law Reform Commission was premature in rejecting the proposal that provision be made for the admissibility of videotaped testimony of child abuse victims.
\item S v Stefaans 1999 (1) SACR 182 (C); S v F 1999 (1) SACR 571 (C).
\item See R v L (D.O.) (1993) 85 CCC (3d) 289; R v F (C) 120 CCC (3d) 225.
\item See note 108 above.
\item See also the amendments to s 227 discussed below.
\end{enumerate}
\end{footnotesize}
the other protections provided by s 170A, it is only children under the age of 14 who are entitled to reasons when such protections are refused. One can only assume that this was a drafting glitch that will require an appropriate amendment in due course.\textsuperscript{117}

2.7 Previous sexual history

In all criminal cases where the complainant testifies he or she may be cross-examined and the cross-examiner may ask questions that are pertinent to exposing the witness’s credibility or lack thereof. However, the general rule is that the character or disposition of the complainant is not relevant to credibility. Consequently, evidence which is solely directed at establishing that the complainant is of bad character is prohibited as is evidence of good character. But once again there is an exception to the general rule, and in a case involving a charge of rape or indecent assault, the defendant could (until the enactment of the Act) adduce evidence as to the complainant’s bad reputation for lack of chastity.

2.7.1 Evidence of previous sexual history under South African law

Prior to the Criminal Law and Criminal Procedure Amendment Act 39 of 1989, s 227 of the Criminal Procedure Act provided that, in sexual offence cases, the admissibility of evidence as to ‘the character of any female’ would be determined by the application of the common law. This enabled the defence to question the complainant as to her previous sexual relations with the accused.\textsuperscript{118} The accused was prohibited from leading evidence of the complainant’s sexual relations with other men.\textsuperscript{119} However, she could be questioned on this aspect of her private life in cross-examination as it was viewed as being relevant to credibility. Evidence to contradict any denials could only be led if such evidence was relevant to consent.\textsuperscript{120}

In practice the application of s 227 of the Criminal Procedure Act resulted in little (if any) restrictions being placed on the admissibility of sexual history evidence. In accordance with the recommendation of the Law Commission in 1985, s 227 was amended.\textsuperscript{121} The original provisions were retained and three new subsections added. In terms of these additions, evidence of previous sexual history would only be allowed where leave of the court to lead such evidence was sought. The court would only grant leave to lead such evidence if relevance was established. However, the complainant’s prior sexual history with the accused that formed the basis of the offence charged could be led.\textsuperscript{122} This simply allows evidence of the charge before the court to be led.

\textsuperscript{117} See also Chapter 7 in this volume.

\textsuperscript{118} \textit{R v Riley} (1887) 15 QBD 481.

\textsuperscript{119} \textit{R v Adamstein} 1937 CPD 331.

\textsuperscript{120} \textit{R v Cockcroft} (1870) 11 Cox CC 410; \textit{R v Cargill} [1913] 2 KB 271.

\textsuperscript{121} See Act 39 of 1989.

\textsuperscript{122} Section 227(2). In terms of s 227(3) an application to lead evidence must be made in camera. Section 227(4) makes the provisions of s 227 gender-neutral.
2.7.2 Origin of the rule on evidence of previous sexual history

Evidential rules permitting the admission of evidence of prior sexual history appear to have been adopted by the English courts in the nineteenth century,\textsuperscript{123} the underlying assumption behind these rules being that no decent women engaged in sexual intercourse outside of marriage.\textsuperscript{124} These rules were received into the South African law and applied with little modification until the amendments brought about by the 1989 Act.

One of the strongest criticisms of the rule permitting evidence of prior sexual history is that while cross-examination concerning prior sexual history traumatises and humiliates the victim, the evidence it elicits is irrelevant. At most this evidence may establish a general propensity to have sexual intercourse. Evidence of this nature is held to be inadmissible in other cases and there are no grounds for admitting it where the case is of a sexual nature. The admissibility of this evidence deters victims from reporting the offence.\textsuperscript{125}

Most of the arguments against reform were based on the assertion that cross-examination is an essential component of the adversary system, and all relevant information must be put before the court and the rights of the accused must be protected. These arguments ignore the fact that in other cases such evidence of general propensity is inadmissible and that such evidence is irrelevant to proving guilt or innocence.

2.7.3 Law reform in 1989 and 2007

Did the 1989 amendments address existing criticisms? The problem with the 1989 amendments was that although they went some way to redressing the problems identified above, the very purpose for which they were enacted was undermined by the very wide discretion conferred on judicial officers. The same judicial officers who in the past failed to exclude irrelevant previous sexual history evidence were then required to exercise the very same discretion albeit to be proceeded by an application held in camera. Because of this difficulty the Law Reform Commission in 2002 felt that further amendments were required. Given the overt support given to these specific proposals by the Supreme Court of Appeal in \textit{S v M}\textsuperscript{126} it is not surprising that they found legislative approval in principle.

Section 227(1) of the Criminal Procedure Act is now overtly gender neutral and in terms of s 227(2) prior sexual history evidence ‘other than evidence relating to sexual experience or conduct in respect of the offence which is being tried’ may not be led or raised in cross-examination except with the leave of the court or unless prior

\textsuperscript{123} Temkin (note 13 above) 119.
\textsuperscript{125} Ibid 49–50; Temkin (note 13 above) 120.
\textsuperscript{126} 2003 (1) SA 341 (SCA). See also \textit{S v Zuma} 2006 (2) SACR 191 (W), 2006 (7) BCLR 790 (W).
sexual history evidence has been introduced by the prosecution. The exception that is created by the introduction of prior sexual history by the prosecution is a new addition to s 227(2) and did not appear in the Law Reform Commission’s draft Bill. It is consistent with the approach taken by the court in S v Zuma and if unrestricted, once again opens the door to the admission of irrelevant but damaging evidence. Given the unfortunate application of s 227 in the past it may well have been prudent for the legislature to specify that this exception only applied to prior sexual history adduced by the accused in so far as it was relevant to contradicting the evidence introduced by the prosecution.

The most radical change brought about by the amendments to s 227 through the Sexual Offences Act are to be found in subsection (5) which specifies the factors that the court must take into account when deciding whether to grant leave to lead evidence of prior sexual history. In terms of subsection (4), leave to lead prior sexual history will only be granted if the court is satisfied that such evidence is relevant. Section (5) reads as follows:

In determining whether evidence or questioning as contemplated in this section is relevant to the proceedings pending before the court, the court shall take into account whether such evidence or questioning . . .

(a) is in the interests of justice, with due regard to the accused’s right to a fair trial;
(b) is in the interests of society in encouraging the reporting of sexual offences;
(c) relates to a specific instance of sexual activity relevant to a fact in issue;
(d) is likely to rebut evidence previously adduced by the prosecution;
(e) is fundamental to the accused’s defence;
(f) is not substantially outweighed by its potential prejudice to the complainant’s personal dignity and right to privacy; or
(g) is likely to explain the presence of semen or the source of pregnancy or disease or any injury to the complainant, where it is relevant to a fact in issue.

The Sexual Offences Act also adds a new subsection (6) which provides that an application to lead prior sexual history will not be granted if,

in its opinion, such evidence or questioning is sought to be adduced to support an inference that by reason of the sexual nature of the complainant’s experience or conduct, the complainant —

(a) is more likely to have consented to the offence being tried; or
(b) is less worthy of belief.

Finally, subsection (7) requires a court to provide reasons for refusing or allowing an application to lead prior sexual history.

127 Article 11 of Schedule 1 of the Act.
128 2006 (2) SACR 191 (W), 2006 (7) BCLR 790 (W).
129 Here the departure from the Law Reform Commission’s draft seems to be one of efficiency in that it seems to do no more in substance than remove a tautology.
The amended section leaves the court with a significant degree of discretion in determining relative prejudice and whether or not the evidence ‘is fundamental to the accused’s defence’. This is no doubt in deference to the constitutional right to a fair trial and the Canadian experience which saw legislation that placed significant constraints on the court’s discretion being struck down as it allowed the possibility of evidence that was relevant to the accused’s defence being excluded.130

However, this means that there is the danger of old practices continuing. The old s 227 of the Criminal Procedure Act had been amended in 1989131 so as to protect complainants from the admission of irrelevant character evidence. Yet, in 2002 the Supreme Court of Appeal132 was unaware of any instance in which s 227 had been invoked so as to protect the complainant from the admission of such irrelevant evidence. This is a clear example of the limited effect of legislation on legal practice if it is not coupled with extensive judicial training. However, in the absence of judicial training, subsections (6) and (7) provide an extremely important safety net in specifying a prohibited line of reasoning and requiring judicial officers to give reasons for allowing such reasons.

3. Conclusion

The changes to the law of evidence introduced by the Sexual Offences Act are to be welcomed. The influence of the Law Reform Commission permeates throughout the Sexual Offences Act. Although there is in some instances a clear divergence between the Commission and the legislature, both share a commitment to the constitutional values of equality and dignity as well as the right to a fair trial. The differences in approach lie partially in the belief as to how to most effectively promote these values which is to some extent reflected in preferred drafting styles. Perhaps, it is because legislation appears to be such a poor training instrument that a reductionist approach to drafting seems to be preferred by the legislature. However, whatever approach to drafting is preferred, the normative effect of legislation is going to be severely limited if it is not coupled with appropriate social context training. In some instances, the legislature’s reductionist approach is possibly explained on the basis of a legislative reluctance to introduce reforms that go beyond sexual offences and impact on the general laws of evidence (for example, the cautionary rule applicable to children). However, reform of the entire body of the law of evidence

130 R v Seaboyer [1991] 2 SCR 577. Section 276 of the Canadian Code was consequently amended and confers a more flexible discretion. English law also contains legislation restricting the admission of character evidence of complainants and other witnesses but this too confers a relatively wide discretion on presiding officers (s 100 of the Criminal Justice Act 2003). Similar provisions are contained in s 258 of the Namibian Criminal Procedure Act 25 of 2004, which is not yet in force, but the relevant provisions are presently in force as s 227A of the Namibian Criminal Procedure Act 1977.

131 Section 2 of Act 39 of 1989.

132 S v M 2002 (2) SACR 411 (SCA).
remains on the Law Reform Commission’s agenda and it may well be that the arguments rejected in the Sexual Offences arena will be reconsidered at some later stage.
1. Introduction
The issue of personal records was first raised by the South African Law Commission in the 2001 Discussion Paper on Sexual Offences\(^1\) and reconsidered in detail in the 2002 Report on Sexual Offences\(^2\). In both instances, the Commission contemplated both the relevance of personal records evidence and the potentially prejudicial and deleterious effects of the production of personal records in rape cases. Whilst concluding that it was satisfied the adequate protections were in place to safeguard the rights of the complainant as well as an accused’s right to a fair trial, they also recommended that a more ‘formalised’ approach to accessing personal records should be considered. This recommendation, however, was not carried forward into the new Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

This chapter explores the disclosure of personal records of the complainant in sexual offences trials as one of the means of the defence in attempting to admit evidence to discredit the complainant. It will also explore legal options available for complainants and record holders to resist the disclosure of this information as well as the rationale of the defence and the courts in admitting this information into evidence as relevant. The chapter will attempt to reveal the flawed reasoning of the defence and the courts in justifying the use of personal records of complainants by investigating the myths and stereotypes about women, children and sexual offences that inform this reasoning. In doing so, recommendations about how the state can intervene to combat this phenomenon will be submitted.

2. Effects of Disclosure of Personal Records on Victims, Counselors and the Criminal Justice System
The devastating effects of sexual offences have been well documented. While the individual reactions may vary, it is not uncommon for rape survivors to experience

\(^*\) Bronwyn Pithey BA LLB LLM (Cape Town) is an admitted Advocate in the High Court of South Africa, and a Deputy Director of Public Prosecutions in the Sexual Offences and Community Affairs Unit of the National Prosecuting Authority of South Africa. She was instrumental in the setting up of the Manenberg Thuthuzela Care Centre, a multidisciplinary centre based at Jooste Hospital in Manenberg, Cape Town, for the management and treatment of victims of sexual offences. She also served on the South African Law Reform Commission Project Committee on Sexual Offences, which drafted new legislation on the substantive and procedural law relating to all sexual offences.

fear, loneliness, self-blame, and hopelessness, as well as a variety of physiological effects that emanate as a result of a sexual offence. It is therefore not surprising that victims of sexual offences seek out support and advice from a wide range of services and individuals to assist them through the difficult period following the assault. These services may include those of rape crisis centres, social workers, psychologists and youth centres, amongst others. For the purposes of this chapter, these groups will be referred to as counsellors or record holders, and the information that is disclosed by the victim to the counsellor as confidential communications.

It is a generally accepted practice within rape crisis centres (and within other rape intervention support systems) to support the victim in making her own decisions, and explaining the range of health and criminal justice remedies available to her. In light of the sensitive and intimate nature of the discussions that take place between a victim and a counsellor, the relationship between them is based foremost on trust and confidentiality. In order for the counselling process to be effective, open and honest communication is required, and disclosure by the counsellor to outside parties is considered unethical.

Apart from ethical issues, there are serious dangers associated with the disclosure and unrestricted use of information that is communicated by a sexual offence victim to her counsellor. For instance, the infringement of privacy and confidentiality, threats to her process of recovery, fears of retribution from the accused, and facing the conflict of having to decide between counselling and reporting or proceeding with a criminal case against the accused. The effect of victims knowing that their confidential communications may be disclosed to the defence makes full recovery difficult, and in some cases, impossible. A potential breach of privacy and trust by the counsellor (forced to do so by law) means that victims may censor themselves during the counselling process, or not attend counselling at all. By allowing the victim’s records to be disclosed to the defence, feelings of revictimisation are experienced, reinforcing the experience of powerlessness and invasion felt at the time of the sexual offence. Similarly, victims’ willingness to report may erode.

For counsellors whose records are being sought, there is a conflict between the legal obligation to disclose and the ethical obligation to retain confidentiality. In addition to this, there may be adverse effects of disclosure on the counselling relationship and a general reduction of reporting of sexual offences to sexual assault service providers. The methods of record keeping by counsellors may also be affected.


5 Ibid.

6 Ibid at 230.
by disclosure practices. Counsellors who are unwilling to disclose victims’ records may even face the consequence of imprisonment for not complying with a court order.

Many of the above effects may impinge on the proper administration of justice. The broad effects on the administration of justice include the reinforcement of a de facto presumption of guilt on complainants, the infringement of the public interest of protecting victims of crime, and the prevention of reporting of sexual offences.

3. Legal Rules: The use of Personal Records in Criminal Proceedings

3.1 Relevance

The basic tenet of the argument in favour of admitting personal records of a sexual offence complainant is that the records may contain evidence that is relevant to the truth-finding process. Most jurisdictions contain the rule that irrelevant evidence is inadmissible, with the South African version contained in section 210 of the Criminal Procedure Act 51 of 1977 (CPA). Some relevant evidence however may also be deemed inadmissible as a result of a rule of evidence that excludes it.

Broadly, evidence is then either excluded or inadmissible on the basis of being irrelevant, or being subject to another rule of evidence such as privilege. Relevance has been defined in a number of different ways. Evidence that is ‘logically probative or disprobativ’ is considered to be relevant. It is founded on the notion of common sense. Arguably, victims’ personal records could be considered relevant based on the premise that they may reveal evidence that the accused did not commit the sexual offence. This evidence may come in the form of a statement to that effect to a third party and may reveal that she consented, or that she has motive against the accused to lie, or that it was due to influence from the third party that the victim believes that she has been a victim of a sexual offence (commonly referred to as ‘false memory syndrome’). This reasoning can only be sustained by the myths and stereotypes surrounding sexual offences that women are prone to lying about sexual offences and make false claims to protect their reputations or out of malice against the accused.

---

7 Ibid at 227.
9 Ibid at 46-47.
10 *DPP v Kilbourne* 1973 AC 729 756 in Schwikkard & Van der Merwe (note 8 above) 47.
12 Cossins & Pikinton (note 4 above) 246.
If relevance is based on common sense, it raises the question of whose common sense is being used. It is naïve to think that, in the decision making process, a court (judicial officer) does not decide what is relevant based upon what he or she believes to be common sense, and in the context of disclosure, common sense is informed by the judicial officer’s views of women and children. If those views include that women are unreliable, dishonest and morally unworthy, it would be a logical step to regard personal records of the complainant as relevant to determining the lack of credibility of the complainant. Any relevancy decision would be dependent on the court’s experience, common sense and logic. The conscious or unconscious beliefs that women are inherently less credible and more untrustworthy will lead to decisions ruling that this evidence is admissible.

3.2 Privilege

Broadly, privilege is a legal rule that allows for the exclusion of otherwise relevant, or possibly relevant, evidence. In order to justify this practice, the public interest that is protected by the privilege must outweigh the public interest in having the evidence admitted. The question in relation to the production of personal records is whether the public interest in protecting the confidentiality of the counsellor-victim relationship is sufficient to outweigh the public’s interest in the accused’s right to adduce all available evidence.

In South Africa, requests for the disclosure of confidential communications by the defence in sexual offences trials does occur, but not as frequently as it does in other jurisdictions. When it does occur, the requests are generally not opposed to by the prosecution, which is a critical cause for concern. In jurisdictions where the practice of requesting disclosure of records takes place more frequently, legislative intervention to regulate this access has been necessary. Regulation of access is achieved in essentially two ways: deeming that the evidence is irrelevant and therefore inadmissible, unless the accused can show how and why the evidence is relevant; or secondly, by creating a protection of privilege for the evidence, again with the limitation that the evidence may be adduced by the accused in certain circumstances where he can show relevance.

---

13 Ibid.
14 An excellent example of these beliefs is found in the Canadian case of R v Oslin where Cory J of the Canadian Supreme Court stated: ‘[I]t is the duty of the trial judge to ensure that the accused’s rights with regard to cross-examination, which are so essential to the defence, are protected. [. . .] It would have been appropriate to permit cross-examination with regard to the [counselling notes], particularly to determine if it would throw any light either upon a possible motive of the complainant to allege that she was the victim of a sexual assault or with regard to her conduct which might have led the appellant to believe that she was consenting to sexual advances’. See R v Oslin (1994) 109 DLR (4th) 478, 522. This judge reveals the influence of the myth that women are prone to make false allegations of sexual offences in his assessment of the relevance of the counselling notes of the complainant.
15 Schwikkard & Van der Merwe (note 8 above) 115.
16 Cossins & Pikinton (note 4 above) 249.
4. Comparative Position: Lessons from Canada

The history of disclosure of records in Canada is one that is long and complex and not without its defeats and victories. Koshan\textsuperscript{17} has stated that while women in Canada have long sought the protection of the law in response to sexual violence, the criminal justice system revictimises victims of this violence by placing little value on the place of the victim in a system that is characterised by discriminatory practices, attitudes and laws. In an attempt to challenge and limit this discrimination, the Canadian legislature engaged in a rape law reform process that limited the mechanisms available to defence counsel for making the case a trial of the complainant’s credibility.\textsuperscript{18} This was followed by a repeal of the doctrine of recent complaint, the prohibition of the collaboration rule, and restrictions on the use of previous sexual history.

It is in this progressive rape law reform context that new defence tactics flourished.\textsuperscript{19} Increasingly, access to complainants’ personal records in sexual offence matters were being sought. These records were used to discredit complainants’ accounts of the assault and provided scope for corroboration requirements (and indeed rape myths) to be reintroduced under the guise of introducing material relevant to the complainant’s ability to testify.\textsuperscript{20} The types of records sought by the defence were not limited to counselling, therapy, and psychiatric records. Over the years the net has been cast extraordinarily wide, with cases including requests for records from abortion and birth control clinics to military records.\textsuperscript{21}

In most of these cases the accused and victim knew each other, therefore the accused not only knew that the record existed but also knew that it contained sensitive information about the complainant.\textsuperscript{22} Busby’s research has shown that although personal records could be sought in any criminal case, records are sought mainly in sexual offences cases.\textsuperscript{23} The intention behind obtaining the records was to

\textsuperscript{18} L Kelly ‘“You must be crazy if you think you were raped?”: reflections on the use of complainants’ personal and therapy records in sexual assault trials’ (1997) 9 Canadian Journal of Women and the Law 178 at 180.
\textsuperscript{19} Particularly in the provinces of British Columbia and Ontario.
\textsuperscript{20} Kelly (note 18 above) 179.
\textsuperscript{21} Other types of records requested have included child welfare agencies; adoption agencies; residential and public schools; drug and alcohol abuse rehabilitation centres; doctors; employers; and psychiatric hospitals. Records pertaining to previous charges laid by the complainant unrelated to the current charge; previous charges against the complainant; previous criminal history; juvenile offending; attendance at victim/witness assistance programmes; criminal injuries compensation; social welfare; and immigration were also sought. Even personal diaries have been requested.
\textsuperscript{23} Ibid. This was a phenomenon recognised in the minority judgement from both \textit{R v O’Connor} [1995] 4 S.C.R. 411 and \textit{A.B. v L.L.A.} [1995] 4 S.C.R. 536. A particularly vulnerable group were those adult victims of childhood abuse who attended counselling as adults.
seek evidence that would question the complainant’s credibility, motive and character.24

Following will be a discussion of relevant Canadian judgments, the legislative response to these cases contained in Bill C–46.25 It is important to discuss the Canadian developments in detail from a South African perspective, as there is currently no law or law reform proposals governing this particular phenomenon. Given the similarity of the human rights framework of these two countries, an understanding of the Canadian process may give some insight and prediction as to how our courts, and in particular the Constitutional Court, may ultimately rule on this issue, and why Parliament should have considered a regulating provision on disclosure of records within sexual offences legislation.

4.1 The Decisions: O’Connor and A.B.

Prior to O’Connor the Canadian lower courts were inconsistent with cases where records were sought by the defence. This issue finally came before the Supreme Court in O’Connor where the accused had sought the records of the complainants including medical, counselling, school and employment records.26 There were several interveners27 as well as a coalition28 who made submissions to the Supreme Court. The coalition stated that personal records were irrelevant, or very rarely relevant, and that the argument supporting relevancy were based on myths and stereotypes about women, children and sexual offences, including the ‘original myth’ that ‘women are prone to lie about rape and to fabricate rape charges that place innocent men at risk’.29 The coalition went on to argue that the effect of disclosure would deter women from reporting sexual offences to the police, and would have a disproportionate effect on particular groups who are vulnerable to sexual offences and having records made about them: Aboriginal women, those who are poor, disabled, and racialised.30 The Supreme Court heard the case of A.B.31 at the same time as O’Connor.

A two-step procedure was developed by the Supreme Court to dispose of applications for third party records. First, the defence has to satisfy the judge that the

---

24 Busby (note 22 above) 151.
26 Koshan (note 17 above) 658.
27 Included the Canadian Mental Health Association, and the Attorneys General of Ontario and Canada.
28 Comprised of the Aboriginal Women’s Council, DAWN Canada, the Canadian Association of Sexual Assault Centres, and LEAF, see Koshan (note 17 above) 659.
29 Ibid.
30 Ibid.
31 A.B. involved an allegation of sexual offences of a six year old that had taken place some ten years prior to the matter being reported. The accused was a family friend, who wanted access to the counselling records of the complainant, see Busby (note 22 above) 153.
third party records were ‘likely relevant’ or had a ‘reasonable possibility of being logically probative to an issue at trial or the competence of a witness to testify’. If this was achieved, the records were to be produced to the judge. The second part of the application procedure required the judge to review the records and evaluate several factors to determine whether the evidentiary value of the records outweighed their negative effects, in which case the records were to be produced to the accused. The factors to be evaluated included:

- the extent to which the accused needed the records to make a full answer and defence;
- the probative value of the records;
- the reasonable expectation of privacy that the complainant may have in relation to the records;
- whether the request for production and the actual production was premised upon discriminatory beliefs; and
- the potential prejudice that the production of the record may have on the dignity, privacy and security of the person of the complainant.32

The majority then gave examples of situations where records would meet the test of ‘likely relevant’ — where the records concerned the credibility of the complainant, an account of the alleged sexual offence, or the use of therapy or counselling which may have influenced the memory of the complainant.33 The effect of this ruling is that counselling records that may touch on the assault or any other abuse must be disclosed to the judge.34 The minority disagreed with the majority, holding that disclosure should not be ordered based on assertions of credibility generally, recent complaint, prior inconsistent statements, character, sexual abuse by other people, or simply having seen a counsellor.35 The minority, although in agreement with the two-stage procedure that should be followed to determine disclosure, disagreed on the factors that should be considered, recognising that the equality rights of both the complainant and the accused must play a central role.36

4.2 Implications of O’Connor and A.B.

Commentators felt that these cases were ‘disastrous for women and children who have been sexually assaulted’.37 Busby first analysed the majority’s examples of where records would be considered ‘likely relevant’. According to the majority ‘if there is a reasonably close connection between the creation of the records and the date of the

32 Koshan (note 17 above) 660.
33 Ibid at 177.
34 Busby (note 22 above) 157.
35 O’Connor (note 23 above) 217.
36 Ibid.
37 Busby (note 22 above) 176.
alleged commission of the offence’, or where ‘they may contain information concerning the unfolding of events underlying the criminal complaint’38, records may be relevant. The rationale behind this is that there may be an inconsistency between what is contained in the notes of the counsellor (based on what the complainant has told the counsellor) and the statement made to the police, or testimony in court.

Busby severely criticises this rationale, reasoning that the fundamental purpose of counselling is for support and to deal with the trauma experienced by most victims of sexual offences. Notes taken by a counsellor are likely to be incomplete and inaccurate (as the complainant may not give the details of the assault) and would not have been adopted or ratified by the complainant.39 The above ruling of the majority is thus arguably flawed in a number of ways. It is not the norm in a therapeutic relationship for the counsellor to require the victim to recount the sexual offence in any detail. The content of the communication between the victim and the counsellor is largely dictated by the victim, who chooses what to tell, and when to tell it. Busby has pointed out correctly that the potential result of this situation is that records kept by a counsellor, in relation to the details of the actual assault, may be sketchy, inaccurate and without any real detail. It is also interesting to note that should the counsellor’s records corroborate the version of the victim, the state would be prevented from leading this evidence according to the rules of evidence.40

Several years later, Busby examined a range of cases heard subsequent to O’Connor and identified a pattern in the defence applications for personal records.41 In most applications it was common for the defence to simply reiterate the grounds set out in O’Connor: asserting that the record may contain information about the events comprising the complaint of the assault; reveal the use of therapy which may have influenced the memory of the complainant; or that the record has information that may bear on the credibility of the complainant.42 After the case of Carosella43 the defence included that the records may contain a previous statement that may be inconsistent, may assist in cross-examination, or may disclose other witnesses.44

38 O’Connor (note 23 above) 176.
39 Busby (note 22 above) 158.
40 Ibid at 159.
42 Ibid.
44 In the case of J.C.B [1997] P.I.E.J. No.26 (S.C.) the judge went to great lengths to develop the reasons why records may be disclosed, listing amongst others: the mental condition of the complainant on the night of the assault; her expressed hatred toward men following the assault; her anger, whether it existed before the incident, whether it affected or affects her reliability or testimonial ability; whether something similar had happened before; whether she has had sexual relations with a man; whether she had consumed alcohol on the night of the assault. According to Busby, the judge then goes on to say that these inquiries are not
4.3 Credibility

The majority’s decision that records must be disclosed if they contain information that bears on the complainant’s credibility, including testimonial factors such as the quality of the complainant’s perception of the events of the assault, and their memory since is problematic on a number of levels. The effect of the majority position is that complainants that have histories of mental illness, and have taken medication for said illness, have their credibility challenged on the basis that the medication could affect memory. For those complainants with histories of drug abuse, or criminal records, this could be construed as having disrespect for the law, and having a history of discreditable conduct. Women who have been systematically disadvantaged, for example those who have been subject to child welfare systems as children, have become child prostitutes, or have been institutionalised — all events which are disproportionately documented — may have these records used to discredit them as being people who lie and have a flagrant disregard for law and society.

As a result of the majority’s decision, evidence of prior sexual abuse was used extensively by the defence to attack the credibility of the complainant. In a case subsequent to O’Connor the defence sought this evidence to demonstrate that the complainant came from a dysfunctional background and had a tendency to lie. The evidence contained ‘expert’ opinion from a paediatrician who stated:

‘...such persons are a significant risk for establishing lifestyles based on disordered sexual perception, including prostitution. Such persons demonstrate a significant incidence of false reporting of sexual abuse and/or false identification of an individual as having sexually abused them’.

Evidence of such a nature could be effective in convincing the court that the complainant therefore lacks the ability to discern truth from fabrication or fantasy, and acquit the accused. With regard to the majority’s position as to when records would meet the test of ‘likely relevant’ where therapy or counselling may have influenced the memory of the complainant, the judgement reflects scepticism concerning the reliability of recovered memories of sexual abuse, and buys into the belief that rape counsellors, influenced by stereotypical feminist doctrine (that all driven by myths and stereotypes regarding females — they are asked to determine if the complainant’s recollection could have been affected as a result of treatment or a form of treatment. He held that, on the statements of the complainant herself, it was clear that she had endured experiences that could well affect her credibility or competence. See Busby (note 41 above) 376.

O’Connor (note 23 above) 173. The minority had held that the defence should have to show some basis that there is likely to be information that would relate to the complainant’s credibility on a particular issue at trial. See ibid at 217.

Busby (note 22 above) 162.

R v Darby New Westminster Res. No. 35588 (B.C.P.C).

Busby (note 22 above) 163.

Ibid.
men are rapists) are ideologically committed to forcing their clients into believing that they were abused.50

4.4 Motives for and Consequences of Using Personal Records

Kelly is of the opinion that the social context is vital to understanding why the defence requests personal records of the complainant and how the courts have accepted and endorsed this practice.51 In its most simple form, the reason why records are used is because they work.52 Records provide a known mechanism for assessing the competing accounts from the complainant and the accused. This is done within a context of patriarchal discourses about sexual violence, gender and mental illness.53

In a study conducted by Kelly, criminal justice personnel indicated that the records are investigated by both the Crown and the defence to establish whether the case involves a real sexual offence. Other issues looked for include therapeutic techniques that may have ‘contaminated’ the account of the assault, evidence of motives to lie, and evidence of medical or mental problems (use of drugs or history of delusions) indicating ‘mental instability’ which was viewed by most respondents as evidence that the complainant had no credibility.54 Kelly also found that records were used to intimidate and embarrass complainants. Use of personal information, under the guise of relevance, had the effect of women withdrawing charges and refusing to continue with trials.55

Finally, the research showed that the impact of use of personal records is extensive and devastating: fewer women will report the sexual offence; women are constructed as not being credible and thus not ‘rapeable’; fewer women will seek support and assistance from counselling groups for fear of their personal records being made public; and the continuation of focus on women in sexual offences trials as opposed to the actions of the accused.56

50 Ibid at 164.
51 Kelly (note 18 above) 186.
52 Ibid.
53 Ibid.
54 Ibid at 187–188. Any therapeutic treatment that a complainant may have received for mental illness automatically resulted in her credibility being reduced. Ibid at 188.
55 Ibid.
56 Ibid at 193.
4.5 Canadian Legislation: Bill C–46

Canada’s Bill C–46 (hereinafter referred to as ‘the Bill’) came into operation on 12 May 1997. Broadly, the legislation differs from the majority decision in O’Connor in three respects. Firstly, the two-step procedure from O’Connor applies to all records relating to the complainant and not only records that fall outside of the control and possession of the Crown. Secondly, the list of factors that the court must take into consideration before ordering production was expanded to include society’s interest in reporting sexual offences, encouraging counselling, and the effect on the integrity of the trial process. These factors must be weighed by the court at the first stage of the process to decide whether to review the records at all. The provisions list examples of what would be considered insufficient to establish ‘likely relevance’, including mere assertions by the accused that:

- the record/s exist;
- they relate to counselling or treatment;
- they relate to the credibility of the complainant, or the reliability of her testimony merely because she received counselling; or
- they relate to the complainant’s sexual activity with another person, or her sexual reputation.

Before the judge can order the production of records, the criterion ‘necessary interests of justice’ must be satisfied. The key differences are that the initial test to be met by the accused is more stringent: the production of the document to the judge must not only be ‘likely relevant’ but must also be ‘necessary in the interests of justice’. The accused must offer a realistic explanation why the records are sought. The legislation is also clear that mere speculation as to why the record may be relevant is not sufficient. The accused must indicate in what way the record is directly relevant to an issue at trial and must know of the existence of the particular record. Women’s groups, such as those included in the coalition that participated in the O’Connor case, would have preferred that the legislation prohibited the production of records at any time, but did support the Bill as a positive improvement on the Supreme Court case.

---

57 Statutes of Canada (note 25 above).
58 In passing this legislation, the Parliament of Canada recognised the need to balance the Charter rights of both the accused and victims, and the need to reconcile those rights to the greatest extent possible, while also making clear Parliament’s desire to encourage the reporting of sexual violence and the counselling of victims.
59 Section 278.2(2).
60 Section 278.5(2).
61 Section 278.3(4).
62 Section 278.5(1).
63 Koshan (note 17 above) 665.
5. South Africa

There have been no reported South African cases on the issue of disclosure of personal records of sexual offences victims. Anecdotally, the practice in South African courts is uncontested compliance by third parties of subpoenas issued to produce either documentary evidence or oral evidence about the complainant. In addition, the complainant is also compliant should she be asked by the defence to produce personal documents, such as diaries. This compliance is based on instructions from the prosecution, who have not, to date, questioned the practice of the defence requesting documentation or questioned the court in allowing this information into evidence. It must however be said that the practice of requesting this information is relatively rare and to a large extent is restricted to personal documents in the possession of the complainant, such as diaries. Generally there seems to be a combination of lack of awareness on the part of the prosecution and an accepted belief that information of this nature is per se relevant.

At present there is no legal provision, either at common law or in statute, that provides any protection specifically for victims of sexual offences or those who offer victims any form of support — be it counselling, medical treatment or psychiatric care — from the accused accessing their personal records in trial proceedings. There is also no literature or case law on this particular point. However, a recent interlocutory application before the High Court in the KwaZulu Provincial Division, originating from a criminal case in the Pietermaritzburg Regional Court, contained elements of disclosure of sexual offences victims’ records to the accused. This case will be discussed in some detail below. Relevance, admissibility and inadmissibility of evidence have been discussed in detail above. With those discussions in mind, the following section will explore the various methods that may be used by the accused in accessing the personal records of a victim of a sexual offence for trial purposes. The options that may be available to the complainant, the record holder and the prosecution, to resist access will then be explored, interrogating the concepts of privilege, and the Constitutional rights of privacy and equality.

64 Personal experience as a prosecutor and discussions with Specialist Prosecutors in Sexual Offences Courts.
65 Pillay and another v The Regional Court Magistrate, Pietermaritzburg and Others Case No 8708/2004 (Unreported).
66 S v Alex Henry Case No. R.C860/03 (Unreported).
68 Ibid section 14.
69 Ibid section 9.
5.1 Access to Personal Records in South Africa

The Constitutional Court held in *Shabalala v The Attorney General of the Transvaal and Another* \(^{70}\) that the common law pertaining to the contents of a police docket, which amounted to a ‘blanket docket privilege’, was unconstitutional. The court held that in order to ensure that the right of the accused to a fair trial as enshrined in the Constitution \(^{71}\) is upheld, the accused was entitled to access the statements of witnesses. In certain circumstances access could be justifiably denied \(^{72}\), but the basic principle held that the accused has access to the police docket. The importance of this judgment in this context is that access was not authorised by the court to any information that is not in the docket, thereby excluding any duty on the prosecution to inform or disclose any information that may be held by third parties in relation to the complainant. It is however trite law that the prosecution is obliged to disclose any information to the accused and the court which would further the administration of justice (i.e. the right to a fair trial) including exculpatory evidence for the accused.

The most common method of securing a witness to attend trial and/or produce a document at trial is to issue a subpoena in terms of section 179 of the CPA. The person issued with a subpoena *duces tecum* must either have some degree of custody of the document or control before she or he can be compelled to produce it. \(^{73}\) There are a number of ways that are available to a witness to avoid having to comply with a subpoena. A number of these are contained in the CPA, and will be discussed separately and analysed for effectiveness in the context of disclosure of personal records of sexual offences victims.

5.2 Privilege

The first ground for not complying with a subpoena is privilege. Privilege exists when a person is not obliged to testify in court or produce documentation, even though the information she or he may have is relevant. \(^{74}\) The witness must enter the witness box and then raise the privilege as the reason for not answering the questions or disclosing documents. \(^{75}\) This legal recognition of privilege of communications between two parties invariably involves two competing interests: one, society’s interest in presenting and promoting certain relationships; and two, the interest in the administration of justice in placing all relevant information before the court. \(^{76}\)

---

\(^{70}\) 1996 (1) SA 725 (CC).

\(^{71}\) The Constitution of the RSA (note 67 above) section 35(3).

\(^{72}\) *Shabalala* supra at par 55, read with par 40 at 751 E–H and 745 A–D.

\(^{73}\) *R v Mkwayi* 1956 (3) SA 406 (E) in E Du Toit *et al* Commentary on the Criminal Procedure Act (1987, as revised bi-annually) at 23–2.

\(^{74}\) Schwikkard & Van der Merwe (note 8 above) 115.

\(^{75}\) Ibid.

\(^{76}\) Ibid at 141.
Because the effect of privilege is to deprive the court of relevant evidence, the courts are slow to extend the currently legally recognised privileges. Unlike some other countries that have recognised privileges that have extended beyond the traditional privileges, such as sexual offence victim/counsellor privilege in Australia and the US, South Africa has a very limited range of legally recognised privileges. Many professions, such as doctors and psychologists have ethical duties to keep confidential any communications between them and their patients/clients, but this ethical duty is not recognised in law, and they may be subpoenaed and obligated to testify on the content of the communication. The only professional privilege recognised in South African law is the legal professional privilege (section 201 of the CPA) which provides that communications between a client and her or his lawyer may not be disclosed without the client’s consent.\footnote{Ibid at 134.} The Appellate division in \textit{Safatsa} recognised, for the first time, that legal privilege is a fundamental right derived from the requirements of procedural justice and not merely an evidentiary rule.\footnote{Schwikkard & Van der Merwe (note 8 above) 135.} It may be upon this very rationale that it can be argued that a privilege of a similar nature should extend to communications between victims of sexual offences and counsellors.

5.3 The “Just Excuse” Rule

The South African courts have rejected the extension of the legal professional privilege to other professions on the basis that no considerations of public policy would entitle that extension.\footnote{Smit v Van Niekerk 1976 (4) SA 293 (A); S v Cornelissen; Cornelissen v Zeelie NO 1994 SACR 41 (W).} Some writers have argued for the extension of the privilege to other groups such as the clergy\footnote{W Freedman ‘A Privilege for Members of the Clergy: Smit v Van Niekerk Reconsidered’ (1997) 10 SACJ 74.} and journalists\footnote{JCW V an Rooyen ‘The Disclosure of Journalists’ Sources in South African Law’ (1995) 11 S Afr HR 132.}. In arguing for this extension, consideration must be given to another section in the CPA, section 189. This section entitles the court to sentence a witness to imprisonment who does not comply with a subpoena to produce documentation or testify, unless the witness has a ‘just excuse’ for so refusing. A ‘just excuse’ arises from the law of privilege, compellability of witnesses or the admissibility of evidence, and has been held to apply to situations beyond a lawful excuse.\footnote{Freedman (note 80 above) 76.}

5.4 Attorney-General, Transvaal v Kader

In \textit{Attorney-General, Transvaal v Kader}\footnote{1991 (4) SA 727 (A).} it was held that a ‘just excuse’ in terms of the CPA was not limited to a lawful excuse, but could also be invoked if it were humanly
intolerable for the witness to testify.\textsuperscript{84} As Skeen points out, this recognition is not the same as a proper privilege but a ‘just excuse’ can, in certain circumstances, afford the witness the same rights as those holding a legal privilege. Evidence may therefore be withheld, which may have otherwise been admissible.\textsuperscript{85} For instance, it could be argued that it is ‘humanly intolerable’ for a counsellor to testify about her communications with a sexual offence victim and on those grounds satisfy the requirements of section 189 of the CPA. It is submitted however, that the courts will probably be reluctant to agree with this argument, as it was envisaged that this interpretation of ‘just excuse’ would involve situations where there was life at risk, or the questioning of a witness would result in serious, irreversible psychiatric damage.\textsuperscript{86}

5.5 \textit{Nel v Le Roux NO and others}

In a more recent case, the Constitutional Court considered the constitutionality of section 205 of the CPA. While the constitutionality arguments of \textit{Nel v Le Roux NO and others}\textsuperscript{87} do not concern the issues under discussion in this chapter, a number of observations by the court are of assistance to this writer’s argument in favour of protection for third party records on the grounds of ‘just excuse’. The court held that the provisions of section 205 applied to section 189.\textsuperscript{88} Referring to one of its previous decisions\textsuperscript{89} the court considered the meaning of and implications of section 418 of the Companies Act 61 of 1973 (as amended). This section requires a person to answer questions, failing which they shall be guilty of an offence. This consequence may be avoided should they have ‘sufficient cause’\textsuperscript{90} not to answer. The court held that ‘an examinee is not compelled to answer a question which would result in the unjustified infringement of any examinee’s Chapter 3 rights’.\textsuperscript{91} The court went further to say that ‘[...] if the answer to any question put at such an examination would infringe or threaten to infringe any of the examinee’s Chapter 3 rights, this would constitute “sufficient cause” [...] unless such a right of the examinee has been limited in a way which passes section 33(1) scrutiny’.\textsuperscript{92}

\textsuperscript{84} Freedman (note 80 above) 76 and PJ Schwikkard ‘Attorney-General, Transvaal v Kader Section 198 — What is Just Excuse?’ (1992) 2 SACJ 203 at 205.

\textsuperscript{85} A Skeen ‘What Amounts to a Just Excuse in Terms of Section 189(1) of the Criminal Procedure Act 1977’ (1992) 109 SACJ 587 at 590.

\textsuperscript{86} While Cornelissen held that journalists possess no legal privileges to refuse to give evidence as to the sources of their information, it was recognised that the refusal may, depending on the circumstances, amount to a just excuse. See Cornelissen 1994 SACR 41 (W).

\textsuperscript{87} 1996 (1) SACR 572 (CC).

\textsuperscript{88} Ibid.

\textsuperscript{89} Bernstein and Others v Bester NO and Others 1996 (2) SA 751 (CC).

\textsuperscript{90} Section 418(5)(ii)(aa).

\textsuperscript{91} Supra at para [60].

\textsuperscript{92} This judgment was in terms of the Constitution of the Republic of South Africa Act 200 of 1993.

\textsuperscript{93} Supra at para [61].
Drawing on this finding, the court in *Nel* found that there was “no material difference” between the expression of a ‘just excuse’ in section 189(1) of the CPA and ‘sufficient cause’ in section 418(5)(iii)(aa) of the Companies Act’.94 The impact of this finding is that if an answer to any question put to a witness would infringe or threaten to infringe any of the witness’s Chapter 3 rights (now Chapter 2 rights95), this would constitute a ‘just excuse’ for refusing to answer the question. The witness may however be compelled to answer the question (or produce documentation) if the infringement could be justified in terms of section 36 of the Constitution. The court unfortunately did not expand on the meaning of ‘just excuse’, but did direct that other courts that would be in a position to determine the meaning must bear in mind the duty imposed upon them by section 35(3) of the Constitution to have ‘due regard to the spirit, purport and objects’ of Chapter 3.96 This argument may be applied to the disclosure of personal records scenario, with the complainant and/or counsellor refusing to answer or produce documents relating to information in their possession.

In *Bernstein and Others v Bester NO and Others*97 the Constitutional Court held that the common law of privilege had not been limited by statute and that it was the function of all courts to have ‘due regard to the spirit, purposes and objects of the Chapter 3 [as it then was in the Interim Constitution] in the development of the common law of privilege’98. This makes way for the possibility of an extension to the privilege for victims of sexual offences and communications made in confidence to third parties. There is however concern that the courts may hold that the rights of the complainant in terms of Chapter 2 of the Constitution, those of equality and privacy (discussed below), will be justifiably limited in terms of section 36 of the Constitution to accommodate the rights of the accused to a fair trial.

5.6 Evidence Contrary to Public Interest

The last remaining possible option for a witness to resist a subpoena would be in terms of section 202 of the CPA. This section provides that no witness may be compelled or permitted to give evidence (or disclose documentation) if such evidence were contrary to public policy or would not be in the public interest. This section has been deemed to be concerned with two categories of evidence that is protected against disclosure: one, matters of public or state interest; and two, information given for the detection of crime99. A *prima facie* reading of this section indicated to this writer that this may indeed be a section that could possibly be used by a witness to resist a subpoena to testify or disclose documents concerning the personal communications

94 Supra at para [7].
95 In terms of Act 108 of 1996.
96 Supra at para [8].
97 Supra.
98 Ibid at para [63].
99 Ibid at 23–42Q.
of a sexual offence victim. Historically, public interest was called ‘state privilege’ referring to ‘...highest affairs of state, such as national security, state secrets in times of war and matters of great diplomatic importance’\textsuperscript{100}, and it was thus on these occasions that ‘most claims to immunity were made on behalf of central government by ministers of the Crown’\textsuperscript{101}. The privilege no longer seems to be restricted to the state\textsuperscript{102}, and may therefore possibly be used in the personal records context.

The courts have reiterated that the public interest in receiving relevant testimony has to be weighed against the disadvantages that the witness was likely to suffer if he or she were to testify.\textsuperscript{103} In striking this balance the public interest should be afforded much more weight than the individual. While the principle is agreed with, this writer questions the very concept of ‘public interest’. What or whose public interest is being protected by these rules? It may be argued that it is in the public interest that the communications of sexual offences victims be protected. This would be on the grounds of the public interest in encouraging the reporting of sexual offences for the good administration of justice. As has been discussed, disclosure of personal records leads to a reduction in victims reporting offences, bringing the administration of justice into disrepute.

A second challenge to this principle is that the balancing should not necessarily be seen to be between the public interest and the individual witness in the personal records context. The individual witness in this context represents a large part of the very population that informs ‘public interest’, that is sexual offence victims. Therefore that balancing act is between the ‘public interest’ that is historically informed by a male, patriarchal, and conventional view of the legal system and what is considered, in the best interests of justice, to be evidence that is worthy of protection, and the ‘public interest’ that is informed by the experiences of millions of victims of sexual offences, those who support them, those who are directly and indirectly affected by the sexual offence, and feminists who believe that the very construct of law is a reflection of the dominance of men in society. This male construct protects the interests that men hold to be important, and not the interests that may undermine their power and hold them responsible for the unacceptable levels of violence against women and children the world over.

5.7 Constitutional Arguments

As matters of this nature have not come before the South African courts as yet, it is possible that another basis on which to resist having to disclose personal communications of a sexual offence victim, would be to protect the constitutional

\textsuperscript{100} I Murphy \textit{Murphy on Evidence} 6ed (1997) 362 in Schwikkard & Van der Merwe (note 8 above) 146.
\textsuperscript{101} P Dennis \textit{Law of Evidence} (1999) 280 in Schwikkard & Van der Merwe (note 8 above) 146.
\textsuperscript{102} Schwikkard & Van der Merwe (note 8 above) 146.
\textsuperscript{103} Du Toit \textit{et al} (note 73 above) 26–16.
rights of the victim. Two constitutional rights of the victim that will be discussed are her rights to equality and privacy.

It is acknowledged at the outset of this section that both the rights of equality (with regard to gender) and privacy in the South African Bill of Rights are derogable rights, and can thus be limited in terms of section 36 of the Constitution, if the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

5.8 Equality
The issue of sexual violence is an equality issue as it is overwhelmingly perpetrated against women and girl children. In South Africa, more than 50 000 reports of rape were made to the police in 2006, with half of those being perpetrated against children.104 An added equality dimension is that in other jurisdictions, such as Canada where disclosure applications have been the order of the day for some twenty years, personal records are sought almost exclusively in sexual offences cases.105

In entering into an equality rights analysis, two issues must be addressed. First, what is the inequality and how is it created and maintained? What are the social constructs relied upon by law and its implementers to ‘justify’ the inequality? Secondly, what is the impact of this law and its implementation, especially the disproportional impacts?106 The reliance on evidence based on discriminatory beliefs, and the subsequent prejudicial effects on fact finding violates the equality rights of the victim.107 The reliance on beliefs such as women are likely to lie about sexual offences due to vindictiveness, and to protect their sexual reputations to justify the use of personal records, is fundamentally unfair to women as there is no proof the world over that women have a greater propensity to lie about sexual offences than any other victim of any other crime. The high levels of withdrawal of sexual offence cases cannot be attributed to false charges, but rather to victims being intimidated by perpetrators, victims losing faith in the system largely due to time delays in finalising cases, alternative resolution of cases through community structures or families, or lack of evidence.

5.9 Privacy
The right to privacy enshrined in the South African Constitution provides for the bearers of the right not to have their person or home or property searched, their possessions seized or the privacy of their communications infringed.108 In the Canadian case of O’Connor the accused’s defence attorney is on record saying that if sexual

105 Busby (note 22 above) 168.
106 Ibid.
107 Ibid at 169.
108 Own emphasis.
offence victims did not have anything to hide they would not object to releasing their personal records. This is a commonly held belief, revealing a misunderstanding of the right to privacy, and a disregard of the secondary victimisation experienced by sexual offence victims at the hands of the criminal justice system. The statement also reveals the perception that women lie about sexual offences and fabricate charges against innocent men. If the right to privacy were upheld in the case of personal records of sexual offence victims, this would presume against ordering disclosure. Privacy must be protected because of the intimate nature of communications between counsellor and victim, not because the ‘truth’ of ‘what really happened’ is being kept secret by both victim and counsellor.

The Constitutional Court has considered the right to privacy in a number of cases. In Bernstein and Others v Bester NO and Others the court considered the right in the context of a section 417 enquiry of the South African Companies Act 61 of 1973 (as amended). Briefly, the applicants were resisting the subpoena and the compulsion to answer particular questions in terms of this section. As no courts in South Africa have ruled on the issue of disclosure of personal records, it is this writer’s intention to draw on some comments from this Constitutional case on the rights to privacy and how they relate to resisting a subpoena to testify. The court discussed the concept of privacy in detail, saying that it is an amorphous and elusive one. It acknowledged the scope of privacy being closely linked to the concept of dignity and that it is not based on a notion of the unencumbered self, but on the notion of what is necessary to have one’s own autonomous identity. A breach of privacy occurs either when there is an unlawful intrusion upon the personal privacy of another or by way of unlawful disclosure of private facts of a person. The unlawfulness is judged in the light of the contemporary boni mores and the general sense of justice of the community as perceived by the court.

The courts have the opportunity to hold in the case of disclosure of personal records that the breach of privacy that occurs when communications between a sexual offence victim and counsellor are revealed to the defence constitutes an unlawful infringement as it is against the boni mores of the South African community.

---

109 Busby (note 22 above) 175.
110 Presumably, this theory is based on the suggestion that there is a conspiracy against men by women who cry rape (for the reasons discussed above) and either hoodwink the likes of counsellors into believing them or tell the counsellor the ‘truth’ — that the sexual offence did not occur, and together they decide for the victim to pursue the charges anyway for some unarticulated benefit or gain. Alternatively, it is the counsellors themselves who influence women that they have been sexually assaulted, and encourage them to lay charges against innocent men.
111 1996 (2) SA 751 (CC).
112 Ibid at para [65]. The court accepted that no right is absolute, and in the context of privacy, only the inner sanctum of the person, such as his or her inner family life, sexual preference and home environment is shielded from erosion by conflicting rights of the community. Ibid at para [67].
113 Ibid at para [68].
It is so because if the real voices of the community were heard on this matter, and opinions of the courts were informed by these voices, the rights of victims of sexual offences would be more adequately protected, and not disrespected by relying on antiquated notions and beliefs about women, children and sexual offences.

If it were held by the South African courts that the right to privacy of victims of sexual offences in relation to their private communications with their counsellors was justifiably limited in terms of section 36 of the Constitution, the courts themselves would have fallen prey to the very prejudices and stereotypes that the Constitution attempts to protect against. To justify access to these records on the basis of providing the accused a fair trial (because they may contain exculpatory evidence or evidence to the fact finding process) is to place our courts and the administration of justice firmly in the paradigm that discriminates against women and sexual offence victims simply because they are women and sexual offence victims, and they lie.

5.9.1  
S v Alex Henry and Pillay and another v The Regional Court Magistrate, Pietermaritzburg and Others

The case of Henry has highlighted this issue publicly for the first time. Briefly, the facts of the case are as follows: the complainant, a woman in her late twenties, began a counselling relationship with a psychologist as she was depressed, and was having trouble in her marriage. At some stage in the counselling, the complainant revealed to the psychologist that she had been raped by the accused when she was ten years old. The complainant then laid charges of rape and indecent assault against the accused. As part of the investigation the psychologist was asked to prepare an expert report on the effects of the sexual offence on the complainant, which she duly did, which was discovered to the defence.

On the basis of the report the defence asked for further and better particulars in relation to the report, requesting all the files and documents pertaining to the sessions of psychotherapy, copies of all the tests pertaining to psychological assessment and copies of all consultation notes from the sessions. The argument of the accused was based on the assertion of his right to a fair trial in that these notes were needed in order for him to prepare his cross-examination of the complainant and the expert witness (the psychologist). At this stage of the proceedings, counsel represented the complainant and psychologist. The argument of the complainant and psychologist in resisting production of the information was that the information was strictly confidential and was not relevant to the charges against the accused. They also alleged that the communication was privileged. The prosecution was silent on the issue.

The magistrate ordered that the state produce the information. The judgement of the magistrate, with respect, is flawed in a number of ways. The court ruled that as a result of the complainant’s decision to ‘go public with the matter’ by reporting the

114 Supra.
115 Supra at 4.
matter to the police she ‘herself had decided to let go of the confidential and privileged relationship between herself and the [psychologist]’. The court reasoned the complainant knew that the matter would be heard in open court and this amounted to a waiver of her rights to confidentiality with the psychologist. This reasoning is nothing short of absurd, has no foundation in law. However, the court was correct on one point that it raised: the report prepared by the psychologist was recognised as that of an expert, and for that reason, the information that formed the basis of the report and led to the conclusions reached in the report must be made available to the defence in order for him to adequately prepare his defence. This information was what the defence had requested and must therefore be handed over.

The complainant and psychologist took the decision of the magistrate on review to the Kwa-Zulu Natal High Court. The High Court held that the magistrate had misdirected himself on a different issue, and set the order aside (thereby making no ruling on the personal records issue). The matter was referred back to the Regional Court for trial, where the state indicated that it would not be making use of the psychologist as an expert witness or as the first report witness, thereby making the psychologist available to the defence as a witness (if the defence wanted to subpoena her). The state reserved the right to call any further expert witnesses. Once the trial commenced, and the complainant testified, the defence made an application in terms of section 227 of the Criminal Procedure Act 23 of 1977 to cross examine the complainant on her previous sexual history. The state opposed this application.

Based on the papers before the court, submitted by the applicants, the issues were conflated and misconstrued. The applicants based their refusal to produce the documentation on arguments of privacy and dignity of the complainant in terms of the Bill of Rights and the privilege of the confidential relationship between the complainant and her psychologist. Issues of public policy of the rights of sexual offence victims were raised and arguments put forward of the deleterious effects on sexual offence victims if this type of information is revealed to the defence, not only in this case, but in cases to follow.

While this writer is in full support of these arguments of the complainant and psychologist in relation to the issues of disclosure of personal information to the defence, and is of the opinion that personal information should never be disclosed on the basis that it is irrelevant to the fact finding process, this case differs fundamentally in one respect — the state was relying on an expert witness report (and potential testimony) as part of its case against the accused. The expert was the psychologist of the complainant in this case. On this basis alone, the accused was entitled to information that informed the expert report and opinion. The information from the psychologist sessions should therefore not be admissible on the basis of relevance in that it may reveal exculpatory evidence of the accused, but rather because it forms the basis of the expert report.

\[116\] Ibid.
6. Conclusion

The disproportionate impact of the practice of disclosing records of sexual offence victims is that this practice has (and probably will in South Africa) undermined supportive counselling relationships in other jurisdictions.\(^ {117} \) Victims cease to use these services, and counsellors have been forced to use other means to protect these communications such as destroying records, which have in turn negatively impacted on these services.\(^ {118} \) Moreover, access to records also disproportionately impacts on women and children who are heavily documented.

It is evident that there are four options available for legislative intervention to regulate the disclosure of victim communications to counsellors in sexual offence trials. Option one is an absolute prohibition, making all counselling records inadmissible on the premise that counselling records are never relevant to the facts in issue or the credibility of the complainant. Option two provides for a legal privilege and is based on the premise that it is in the public interest to protect confidentiality, and that it outweighs the public interest in an accused being able to access all relevant evidence. This privilege would either be absolute or, option three, would be subject to an exception if the accused could show that the communications contained evidence necessary to establishing the innocence of the accused. This option would be subject to procedural requirements and requirements of motivation and substantiation by the accused to avoid ‘fishing expeditions’. Option four would provide that the evidence is inadmissible unless the accused can show relevance, again with the concomitant procedural and evidential requirements on the accused.

Although no other jurisdiction has absolutely prohibited the use of victim-counsellor records in sexual offence trials, this is the option that is recommended for South Africa. Where courts have had the jurisdiction to rule on relevancy of evidence as it relates to sexual offence victims, the research shows that relevance is justified too often under the guise of affording the accused the right to a fair trial. The very premise of the objection by feminists supporting the non-disclosure of records is that they are irrelevant to the truth finding process. To entertain the possibility that this evidence may be relevant to any issue at trial, in particular the innocence of the accused is to buy wholesale into the myths about women and sexual offences. It not only fails women, but it fails the administration of justice. Perhaps the most effective manner in which to protect complainants of sexual violence is to create and recognise a privilege similar to that of the lawyer client privilege — that of a fundamental legal right.

\(^ {117} \) Ibid at 179.

\(^ {118} \) Without records, it is difficult for Rape Crisis Centres to justify the need for and access funding, and to keep accurate statistics of clients accessing their services.
1. Introduction

This chapter focuses on the psycho-social impact of rape and its implications for the use of expert evidence in criminal rape trials, with a particular focus on the use of the diagnosis of Post Traumatic Stress Disorder (PTSD). It is noteworthy that ss 210, 212(4)(a) and 222 of the Criminal Procedure Act 51 of 1977 (‘the CPA’) make provision for expert opinion evidence to be admissible in a court of law on account of its relevance. Although in 2002 the South African Law Reform Commission1 (‘the Law Commission) made recommendations for the inclusion in the proposed Criminal Law (Sexual Offences and Related Matters) Amendment Bill (‘the Bill’) of specific criteria with regard to the use of expert evidence in rape trials, these recommendations have not been incorporated into the Criminal Law (Sexual Offences and Related Matters) Amendment Act No 32 of 2007 (‘the Act’).2

With reference to the psycho-social impact of rape, the relevant sections in the Act are s 58 which concerns evidence of previous consistent statements, s 59 which deals with evidence of delay in reporting sexual offences and s 60 which provides that a court may not treat the evidence of a complainant with caution on account of the nature of the offence. Section 227 of the CPA which relates to ‘Evidence of character

---

2 Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (‘the Sexual Offences Act’ or ‘the Act’).
and previous sexual experience’ is also substituted by the Act under section 68(2) and is of relevance to this chapter.³

Limited attention will be given to several recommendations which relate to the psycho-social impact of rape which were made in the Law Commission’s 2002 Report as well as those discussed in the earlier Law Commission Discussion Paper 102 of 2002, which dealt with ‘process and procedure’.⁴ These recommendations emerged from the consultative process which began in 1997 and were supported and further developed by submissions made by a number of non governmental organisations and academic institutions nationally. Whilst some of the recommendations of the Law Commission relating to the identification and protection of vulnerable witnesses were incorporated into the Sexual Offences Bill⁵ as introduced, they have not been incorporated into the Act. Other recommendations, such as those relating to the presence of a support person of the witness’s choice to be present whilst the witness gives evidence and the provision of psychological treatment for survivors, the costs of which were to be borne by the state, were omitted from both the Bill and the Act.

It should be noted that this chapter focuses solely on the psycho-social impact of rape and its implications for the use of expert evidence in relation to female adult rape survivors, particularly in criminal cases. The issue of expert evidence with regard to child survivors, survivors who are mentally handicapped and male survivors of rape each require specific attention which is beyond the scope of this chapter. This chapter will begin with an overview of the gendered history of the study of trauma and how this has informed the body of research relating to the psychological and psychiatric impact of rape. The implication of this research on informing psychological expert testimony in rape trials is then considered, with a particular focus on the common use of PTSD in court. The chapter then goes on to outline the ramifications of this trend, highlighting both its potential advantageous and disadvantageous impact on complainants. In conclusion, recommendations are made for the use of psychological evidence in criminal rape trials.

2. The Psychological Impact of Rape

There is a broad body of research which suggests that rape is highly pathogenic.⁶ In comparison to other crimes, survivors of rape appear to suffer from higher levels of distress both in the immediate aftermath of the event and for an extended period

---

² Criminal Procedure Act 51 of 1977.
³ [B50–2003] (‘the Bill’).
thereafter.\textsuperscript{7} In the main, research suggests that in comparison to victims of other serious crimes female victims of ‘completed’ sexual assault experience the most trauma in response to the event.\textsuperscript{8}

This understanding of the profoundly pathogenic nature of rape has not always prevailed. The history of the study of the impact of trauma on the human psyche is a deeply gendered one. The way in which the psychological impact of rape has come to be understood has implications for current understanding of the psychological impact of rape on the survivor and how it is used in the legal arena both by the prosecution and the defence.

2.1 The gendered history of the study of psychological trauma

The earliest studies of psychological trauma can be traced back to the late 1800s during which the female hysteric became a focus of research. During this period, Freud came to hypothesise that the female hysteric’s symptoms were linked to the repression of intensely traumatic premature sexual experience — childhood sexual assault, abuse and incest. This hypothesis proved to be too challenging to the status quo and, faced with rejection by his peers, by the early 20th century Freud recanted and concluded that the experiences of sexual abuse which his patients disclosed were fantasies: expressions of unconscious desire.\textsuperscript{9}

For the next 60 years the study of trauma was dominated by brief, but intense periods of focus on psychological trauma as it related to war. In the First World War, British soldiers presented with a form of mental breakdown, initially termed ‘shell shock’. The Second World War brought with it a resurgence of interest in war neurosis. The aftermath of the Vietnam War led to the inclusion of PTSD in the Diagnostic and Statistical Manual (DSM) III.\textsuperscript{10} In essence, until the 1970s trauma research was guided by a focus on men’s experience of trauma and was studied by men. As such, trauma came to be defined as that which disrupted these particular lives.\textsuperscript{11} It was only with the rise of the feminist movement in the USA in the 1970s that the reality of the sexual exploitation of women and children was brought into public consciousness.

This fuelled an exponential increase in research in the field of sexual assault undertaken by women with women, which challenged conventional understandings of rape as a sexual act, focussing instead on rape as an act which maintains male

\begin{flushright}
\textsuperscript{7} M Harvey & J Herman (1992) ‘The trauma of sexual victimization: feminist contributions to theory, research, and practice’ The National Center for Post-Traumatic Stress Disorder: PTSD Research Quarterly, 3(3).


\textsuperscript{9} J Herman (1992) Trauma and recovery: the aftermath of violence — from domestic abuse to political terror.

\textsuperscript{10} American Psychiatric Association (1980) Diagnostic and Statistical Manual III.

\end{flushright}
dominance. With the recognition that rape was happening daily to thousands of women, the question of what the effects of rape trauma are on the survivor became central.

2.2 The psychological and psychiatric impact of rape

Focusing on rape, Burgess and Holstrom undertook a study which sought to ‘report the immediate and long-term effects of rape as described by the victim’. Burgess and Holstrom defined rape trauma syndrome (RTS) as a two phase reaction: the acute phase, which takes place in the first week after the rape, and the long-term reorganisation process following rape. As RTS is not a recognised psychiatric disorder, feminist researchers needed to locate the pernicious effects of rape within mainstream trauma discourse in order to develop visibility for the previously hidden trauma of rape. This became particularly salient in the legal sphere where there was a pressing need to present reliable and valid evidence of the pathogenic impact of gender based violence. To do this, research on rape drew increasingly on methods and instruments used to measure the impact of other traumas by assessing, for example, symptoms of PTSD, depression, anxiety, sexual dysfunction and social maladjustment. In particular, responses to rape trauma have come to be increasingly associated with PTSD and this correlation has been shown to be in excess of the link between PTSD and victims of other crimes. By the early 1990s an article reviewing the rape research literature observed that ‘post-assault psychopathology of rape may be best described as post-traumatic stress disorder’. Subsequent research has, in the main, continued to verify this finding.

In essence, the research on the impact of rape has come to locate itself most frequently within the medical model. Within this paradigm, the impact is measured in terms of the presence or absence of symptoms in the individual rape survivor and the identification of particular psychiatric disorders and/or behavioural disruptions which impact on the survivor’s day to day life. From this viewpoint a very broad, but nonetheless identifiable pattern of reaction and recovery amongst survivors of rape

12 S Brownmiller (1975) Against our will: men, women and rape.
15 Ibid.
18 Foa & Rothbaum (note 6 above). Also see F Norris (1992) ‘Epidemiology of trauma: frequency and impact of different potentially traumatic events of different demographic groups’ Journal of Consulting and Clinical Psychology, 60.
19 Foa & Rothbaum ibid; SALRC (note 4 above).
has been described. In the immediate aftermath, rape survivors report being in a state of extreme physical and emotional distress.\textsuperscript{20} Within the first week post rape the majority of survivors present with Acute Stress Disorder, which subsides significantly over the next 3 weeks. Survivors have also reported feelings of intense fear, depression, sexual dysfunction, lowered self esteem and difficulties in social adjustment.\textsuperscript{21} These are acute within the first two weeks and show a significant improvement over the following ten weeks.\textsuperscript{22} Despite the substantial improvement reported by survivors at three months, research suggests that survivors continue to experience significant levels of distress on a number of levels at 6 and 12 months post rape, which continues to affect some survivors 2, 3 and sometimes 6 years later.\textsuperscript{23}

Having established a generalised understanding of the impact of rape over time, the focus of research has now moved to understanding what predisposes some survivors to the development of PTSD post rape, as well as other diagnoses that PTSD could be masking or could co-exist alongside with, such as depression or anxiety disorders.\textsuperscript{24} With regard to predisposition, the role of, for example, gender, previous psychiatric history, current and past life stressors, subjective trauma severity and perceived uncontrollability have been considered when exploring vulnerability to the development of PTSD.\textsuperscript{25} Findings are equivocal. Whilst some studies suggest that a history of major depression and/or alcohol abuse and degree of injury resulting from the rape significantly increase the likelihood of developing PTSD\textsuperscript{26} others report that demographic factors such as personal history and assault variables were not correlated with a diagnosis of PTSD.\textsuperscript{27}

\textsuperscript{21} MR Burt & BL Katz (1985) 'Rape, robbery, and burglary: responses to actual and feared criminal victimization, with special focus on women and the elderly' Victimology: An International Journal 10(1–4) 325--358.
\textsuperscript{22} Resick (note 20 above).
\textsuperscript{23} Ibid.
\textsuperscript{25} EDunmore, DM Clark, & A Ehlers (2001) 'A prospective investigation of the role of cognitive factors in persistent Posttraumatic Stress Disorder (PTSD) after physical or sexual assault' Behaviour Research and Therapy 39(9), 1063--1084.
With regards to comorbidity of PTSD with other diagnoses, McFarlane and Yehuda\textsuperscript{28} point out that, despite the prevalence of PTSD diagnosis amongst rape survivors, a review of the trauma research indicates that PTSD accounts for only a minority of psychopathological outcomes post rape.\textsuperscript{29} It has also been observed that PTSD is usually accompanied by other disorders such as depression, anxiety, or substance abuse or dependence. Suicidality has also been found to be significantly higher in survivors of rape as compared to non-victims.\textsuperscript{30} Researchers have also demonstrated that, as a result of the rape, survivors may be diagnosed with dissociative or somatoform disorders and clinical signs associated with Borderline Personality Disorder.\textsuperscript{31} In addition, research suggests that rape survivors utilise medical health care far more frequently than victims of other crimes\textsuperscript{32} and display an increase in health anxiety.\textsuperscript{33}

Over and above psychiatric sequelae, rape trauma can have a profound psychological impact. Janoff-Bulman hypothesized that crime victims are more likely than non-crime victims to have their sense of invulnerability, self worth and meaning seriously challenged.\textsuperscript{34} Low self-esteem scores are particularly noticeable in rape survivors.\textsuperscript{35} Furthermore, there appears to be a link between low self-esteem and self-blame.\textsuperscript{36} This is further exacerbated by the social stigma with which many rape survivors struggle and which contributes to the survivor’s sense of defilement and contamination. This initial reaction is understood to inform the development, in some survivors, of obsessive compulsive disorder, where the compulsion is likely to be a survivor’s need to wash frequently.\textsuperscript{37} The long-lasting sexual difficulties which

\textsuperscript{28} A McFarlane & R Yehuda (1996) ‘Resilience, vulnerability, and the course of posttraumatic reactions’ in BA van der Kolk, AC McFarlance & L Weisaeth (eds) \textit{Traumatic stress: the effects of overwhelming experience on mind, body and society.}


\textsuperscript{30} Lenox & Ganon (note 20 above).


\textsuperscript{36} Burt & Katz (note 21 above). Also see Foa & Rothbaum (note 6 above), Lenox & Ganon (note 20 above) and Wasco ibid.

\textsuperscript{37} Foa & Rothbaum (note 6 above).
many rape survivors experience are also well documented. However, difficulties in one area, such as self-esteem relating to the physical self, do not necessarily predict difficulties in other areas of daily life. With regards to adjustment in the areas of work, social activities, intimate and familial relationships and economic functioning, Resick’s review presents a picture of inconsistent findings with no discernible pattern.

Added to the psychological trauma post rape, survivors presenting at a health facility are given a cocktail of drugs to prevent pregnancy and the transmission of sexually infectious diseases, not least of all HIV/AIDS. In addition to the number of side-effects this drug cocktail can cause, the fear of contracting a virus like HIV/AIDS is likely to add to the survivor’s levels of psychological distress. Given the very high prevalence rates for HIV/AIDS in South Africa, this is likely to be a serious and real concern for survivors in this context.

2.3 Variables affecting recovery

Despite the large body of research documenting the highly pathogenic nature of rape, not all rape survivors react in the same way. Whilst it seems clear that most survivors will experience distress in the acute phase, many do not develop longer standing difficulties. In order to make sense of this, researchers have sought to understand what variables may influence recovery, in particular pre-assault, assault and post-assault variables.

With regard to pre-assault variables, results of research into the role of demographic variables such as age, race and socio-economic status on the impact of and recovery from rape are ambiguous. Some researchers have found demographic variables have had little impact on a survivor’s response to rape, whilst others suggest that lower socio-economic status impacted negatively on a rape survivor’s recovery.

With regard to the influence of prior psychiatric history on recovery, the research suggests that in the acute post-rape phase (one month) survivors with a psychiatric history are likely to show more distress and are more vulnerable to developing diagnosable psychiatric disorders in the ensuing months. A link between childhood physical and/or sexual assault and subsequent re-victimisation has been partially

---

42 Lenox & Ganon (note 20 above).
supported by research findings, and Child Physical Abuse and Child Sexual Abuse appear to have a direct influence on the development of PTSD in later life, which is further complicated by rape trauma in adulthood.43 It seems that cognitive appraisal and adaptive coping mechanisms post trauma may be linked to experiences in infancy and childhood.44 Research suggests that patterns of early attachment set particular templates in place, which will influence responses and adjustments to trauma in adult life.45

Paradoxically, research suggests that an assumption of control and safety with regards to one’s life and circumstances prior to being raped may prove a hindrance to recovery, since the basic premises upon which the survivor had previously built her life has been proven to be erroneous.46 It would seem that a woman who is aware of her limited control and the dangerousness of her environment may be better prepared to adjust to the reality of having been raped, since this fits with the survivor’s world view and does not demand a reappraisal on her part.47 This is not to suggest that rape is less traumatic for oppressed women, but rather that coping mechanisms may differ depending on the context within which the survivor lives, which will inform cognitive appraisals of the trauma.

With regard to assault variables, research findings related to acquaintanceship status between the rapist and the victim are contradictory. Whilst some research findings suggest that stranger rape is more distressing than rape by someone known to the victim, the opposite has also been found, and other studies suggest that there is no difference between the two groups.48 In terms of the relationship between level of violence perpetrated during the assault and subsequent trauma, research has also yielded contradictory findings.49 What seems to be of more importance in informing the survivor’s post-rape reaction, is her subjective distress in response to the assault and her felt threat, rather than actual or objective levels of threat or violence.50

There is some evidence to suggest that supportive family relations are likely to mediate the negative impact of rape, although alternative research findings do not confirm such a hypothesis. However, unsupportive responses from the survivor’s social network do seem to be associated with more symptoms than those who receive

46 Janoff-Bulman (note 34 above).
47 Wasco (note 35 above).
48 Resick (note 20 above). Also see Wasco (note 35 above).
49 Resick ibid.
neutral or supportive responses. There is also a growing body of literature which suggests that the way in which survivors make meaning of the trauma they have experienced and the process of meaning-making itself is perhaps more salient than level of support received per se.

One of the most notable contributing factors to a positive recovery is the adequacy of community responses to rape, as reflected by the availability and legitimacy of services. There is a large body of literature which suggests that the experience of laying a charge, making a statement and then going through the legal process is a second ordeal, often described as ‘secondary victimisation’ for rape survivors. Whilst some research shows no differences in the level of depression or social adjustment between those who wished to prosecute and those who did not, other studies report a link between difficulties in overall adjustment and the involvement of police, hospitals and other agencies.

In a review of the American justice system’s response to rape survivors, Koss found that low rape conviction rates and the failure of the legal system to adequately deter perpetrators can exacerbate the rape victim’s levels of self-blame, resulting in secondary victimisation. Campbell et al’s findings suggest that rape survivors who encountered victim-blaming behaviour from legal or medical personnel had significantly elevated levels of post-traumatic distress compared to those who did not seek community assistance post-rape. This body of research illustrates the detrimental effects that institutional processing can have on the psychological wellbeing of rape survivors.

Certain provisions in the Sexual Offences Bill recognised the potential for secondary traumatisation in the criminal justice system, in particular those relating to the identification of vulnerable witnesses — based not only on age and intellectual impairment, but also on trauma, cultural differences and/or the possibility of intimidation. Although s 170A of the CPA provides for intermediaries to be appointed by a court, the Law Commission and commentators on the Bill identified

---

51 Resick (note 20 above).
54 S Stanton, M Lochrenberg & V Mukasa (1997) Improved justice for survivors of sexual violence? Adult survivor’s experiences of the Wynberg Sexual Offences Court and associated services. Also see L Vetten & Z Khan (2002) “We are doing their work for them”: An investigation into government support to Non-Profit Organisations providing services to women experiencing violence.
the need for the provision of support persons for those considered vulnerable and for therapeutic treatment to assist complainants. These recommendations have not been incorporated in the Act. Given the highly pathogenic nature of rape outlined above, as well as the potential for and impact of secondary traumatisation, this omission is cause for concern.

2.4 Critical overview of the research into the psychological impact of rape

The location of rape trauma within a medical model is not without its critics. Stefan argues that by measuring the effects of rape with standardised scales of mood and emotion, usually applied to measure psychopathology in clinical populations, research pathologises women’s responses to rape. In this way the broader context of oppression based on gender, which intersects with oppression based on class, race and ethnicity and informs the impact of rape trauma on the survivor, is obscured by the medical model’s focus on the individual.

Furthermore, many theorists have begun to question the applicability of categories that structure Western psychological discourse, arguing that non-Westernised cultures may have different understandings of post-traumatic distress. The research currently available on the psychological impact of rape is dominated by research conducted in ‘developed’ countries, particularly the USA. Wasco argues that this bias ‘may legitimate one socio-cultural manifestation of distress while excluding others’. Thus, whilst she recognises that post-traumatic stress is a useful framework for understanding the aftermath of sexual violence, she cautions that this framework should not preclude a careful examination of the contextual factors which impact on the actions and reactions of rape survivors from oppressed groups. These factors must include the very real daily impact of low socio-economic status and racism intersecting with sexism. Furthermore, the choices available to rape survivors living in oppressive contexts are also likely to be limited and this may in turn inform the impact of, and recovery from, rape.

Lira, Koss and Russo argue that social and cultural norms and relationship role

---


62 Wasco (note 35 above) 309.

expectations inform the survivor’s world view, which in turn influence post-rape disclosure experiences, the reactions from those in whom they may confide and how survivors themselves narrate and make meaning of their experiences of sexual violation. Bletzer and Koss' research findings appear to support the hypothesis that culture-specific gender role socialisation may be specifically related to post rape reactions and behaviours. Rape myth literature suggests that cultural contexts are very important in informing reactions to rape and recovery, resilience or post-traumatic growth post rape. It should, however, be noted that a number of these studies focus on what is termed ‘cultural differences’, a phrase which tends to obfuscate issues of oppression and the power differentials related in particular to class both between and within the groups being compared.

With regard to South Africa, international research findings offer us a useful point of departure. However, due to our Apartheid history, for the majority of the South African population their daily lived experience does not match the US context. Artz and Kunisaki argue that on the basis of available statistics and the living conditions in which the majority of women find themselves, rape in South Africa is similar to rape during armed conflict. This ‘abnormal context’ contains multiple possibilities for ongoing traumatisation on a number of levels, including economic, physical and psychological. Next to children, black women are most vulnerable to the impact of these multiple sites of oppression and trauma and are also the victims of the majority of rapes reported in this country. This is likely to inform the psycho-social impact of rape.

In more recent years there has been a growing interest in the diverse ways in which

---


67 These conditions have been the focus of a number of key studies conducted by the Medical Research Council (MRC) which explores gender based inequalities and the impact these have on women’s lives KL Dunkle et al (2003) ‘Prevalence and patterns of gender-based violence and revictimization among women attending ante-natal clinics in Soweto’ South Africa. American Journal of Epidemiology 160(3), 230–239; R Jewkes, JB Levin & LA Penn-Kekana (2003) ‘Gender inequalities, intimate partner violence and HIV preventative practices: findings of a South African cross-sectional study’ Social Science and Medicine 56, 125–134. In addition the MRC has conducted key epidemiological studies related to rape in South Africa, including R Jewkes et al (1999) “He must give me money, he mustn’t beat me.” Violence against women in three South African Provinces. Similarly, the Centre for the Study of Violence and Reconciliation (CSV) has produced a number of media articles, reports and studies related to GBV, including rape. See e.g L Vogelman (1990) The sexual face of violence: rapists on rape; L Vetten (1997) ‘Roots of rape crisis’ Crime and conflict 8; L Vetten & J Dladla (2000) ‘Women’s fear and survival in inner-city Johannesburg’ Agenda 45.
survivors show both resilience in the face of psychological trauma, and evidence of post-traumatic growth. Harvey conceptualises resilience as both informed and facilitated or hindered by the reciprocal relations between people and context. She argues that recovery is a multidimensional phenomenon in which resilience may be evident in one particular domain of functioning which remains unaffected by trauma, for example the ability to continue working, which the survivor can then draw from to facilitate repair and recovery in another domain, for example lowered self-esteem. Post-traumatic growth is understood to be distinct from the research into resilience. In their review of the post-traumatic growth literature Linley and Joseph report on a number of studies which show that survivors are likely to both suffer and recover simultaneously.

Despite the growing interest in resilience and post-traumatic growth and the critiques of the body of research regarding the impact of rape, the medical model continues to inform our understanding of post-rape trauma, both in the psychiatric and psychological arena, and in the courtroom. This has broad implications for rape survivors, particularly in terms of how this information is interpreted by the criminal justice system.

3. Psychological Expert Testimony in Rape Trials

3.1 Legal Admissibility criteria for expert testimony

According to Zeffertt, Paizes and Skeen, ‘the opinion of expert witnesses is admissible, whenever by reason of their special knowledge and skill; they are better qualified to draw inferences than the judicial officer.’ Opinion evidence must fulfil the criteria of being reliable, helpful to the judge and non-prejudicial. Expert witnesses are, in principle, required to substantiate their opinions with scientifically valid reasons (reasons that would be generally accepted within the relevant scientific community) in order to assist the court. Psychological experts are often asked to assist

70 Harvey (note 68 above).
73 Linley and Joseph (note 69 above).
a court which may not be familiar with the typical post-traumatic symptoms of a rape victim.\textsuperscript{75}

Expert testimony on the psychological consequences of rape may be introduced at several points in a criminal rape trial. It may be used during the trial itself to substantiate that a rape did indeed take place, by providing the court with evidence that demonstrates the pernicious effects of the alleged rape on the complainant, or to explain conduct on the part of the complainant that may affect her credibility. Expert evidence may also be introduced at the sentencing stage of a criminal trial in aggravation of sentence to provide evidence of the psychological damage sustained by the complainant as a result of the rape. The nature and purpose of the expert evidence informs the stage at which it is introduced in a rape trial.\textsuperscript{76}

In South Africa, because of lack of resources in the criminal justice system, expert evidence is seldom employed in criminal trials involving rape charges. When it is utilised, this is most frequently at the sentencing stage. In light of this it should be noted that many rape cases are tried in the Magistrate’s Court and then referred to the High Court for sentencing. Sections 51 and 52 read with Schedule 2 Part I of the Criminal Law Amendment Act 105 of 1997 provide for minimum sentences for certain sexual offences and prescribe life imprisonment for rape in a number of cases. A court must apply the prescribed minimum sentence unless there are ‘substantial and compelling circumstances’ justifying a departure.\textsuperscript{77}

The Law Commission’s Discussion Paper 102 suggested that, in addition to assisting the court in understanding the experiences of sexual offence complainants, experts should ‘explain the context in which an individual sexual offence complainant acted and . . . the possible reasons for this action’.\textsuperscript{78} The Law Commission argues that this is necessary because ‘the emotional responses and consequences of these offences turn conventional wisdom on its head and what would often be regarded as a ‘normal’ response is in fact most unlikely’\textsuperscript{.79} Furthermore the Law Commission suggests that experts in the fields of social work, psychology and psychiatry should only be used if they have specialised knowledge in the area of sexual offences, which can otherwise be equally ‘credibly and reliably done by trained and experienced lay counsellors’.\textsuperscript{80} The Commission recognised the


\textsuperscript{76} Although expert evidence may also be utilised in a civil claim for damages to provide evidence to the court of the extent of psychological damage sustained by the complainant in order to assist in quantifying her damages, this is beyond the scope of this chapter.

\textsuperscript{77} For a detailed discussion of sentencing in rape cases see Chapter 10 in this volume.

\textsuperscript{78} SALRC Discussion Paper 102 (note 4 above) 52.

\textsuperscript{79} Ibid 54.

\textsuperscript{80} Ibid 53.
difficulty of assessing conflicting expert evidence as led by both the defence and the prosecution and considered the possibility of the use of neutral experts. The Law Commission’s 2002 Report on Sexual Offences did not recommend this as a viable option. It was suggested instead that the presiding officer either subpoena a witness who is regarded as an expert or appoint an assessor who specialises in the field and has practical experience with victims of sexual offences.

The 2002 Report on Sexual Offences recommended that the proposed Sexual Offences Bill provide for evidence to be adduced regarding the surrounding circumstances and impact of any sexual offence upon a complainant in order to address issues such as the cause of a late disclosure. The proposals from the Commission included that a court in criminal proceedings may, with the complainant’s consent, order that she be assessed by a suitably qualified person in order to establish the impact of the offence upon the complainant. Furthermore, the Commission suggested an amendment to s 145 of the CPA and s 93ter of the Magistrates’ Court Act 32 of 1944 to the effect that the court must be satisfied that the expert witness possesses sufficient knowledge of the impact of sexual offences on victims of such offences, the characteristics of sexual offenders or knowledge of the circumstances that may contribute to the vulnerability of victims of sexual offences. These recommendations were however not incorporated in the Act.

Whilst the Law Commission’s recommendations highlight some of the complexities that need to be considered when using expert testimony in rape cases, there are several additional issues which need to be taken into account. The first of these relates to who is considered to be an expert. Discussion Paper 102 argues for the use of experts who have both the necessary qualifications and practical experience, thereby including trained and experienced lay counsellors. This inclusion seems to be related to the recognition of the fact that rape complainants may have received counselling after the rape from lay counsellors and/or professionals such as a psychologist or psychiatrist. It seems self-evident that the counsellor or professional who saw the complainant after the rape would be in a good position to give input on the effects of the rape on the complainant.

This is of particular importance because an expert called in specifically for the rape trial is likely to only meet the complainant some time after the rape. Their assessment will therefore have to be retrospective and as such will have to rely on what the complainant says about the time immediately after the rape and on whatever collateral evidence is available to support the complainant’s report. However, two serious problems become evident when considering the use of the counsellors or therapists as experts. The first relates to disclosure of the complainant’s personal records and raises serious concerns with regards to invasion of privacy and the use of these records to discredit the complainant, as well as the ethical dilemma in which the counsellor or therapist is then placed.

Secondly, expert evidence which relies on the counsellor’s or therapist’s reports at the time of the sexual offence raises particular legal concerns with regard to the use of
previous consistent statements. The rule against narrative or self-corroboration challenges the admissibility of a counsellor’s or therapist’s testimony. This may, however, be admitted insofar as the testimony is used to rebut the suggestion that the complainant’s story is a ‘recent’ fabrication. Section 58 of the Sexual Offences Act addresses this issue as it confirms that previous consistent statements by a complainant may be used as evidence, whilst also asserting that no inference may be drawn from the absence of any previous statements.

The particular omission of the Law Commission’s recommendations with regard to expert evidence does not affect the right to lead expert evidence in a rape trial, since this is provided for in the CPA. However, through its silence on this issue, and in particular the exclusion of the Commission’s proposal that a court may appoint lay counsellors as expert witnesses, the legislature has failed to address the practical limitations we face in the South African criminal justice context with regard to the use of expert testimony. These include the high cost of engaging professionals as experts in rape trials, which may prove to be prohibitive for both the prosecution and the defence. This cost factor is partially a result of the requirements to qualify as expert witnesses. Currently only a clinical psychologist or psychiatrist with experience in this area would typically qualify as such an expert. However, the prevalence of rape in South Africa and the development of lay expertise in working with survivors of rape has resulted in the creation of a pool of counsellors who have significant practical expertise in working in this field and who are not being utilised as expert witnesses, because they do not fit the traditional criteria necessary to qualify as an expert. The challenges of calling upon a complainant’s counsellor to act as an expert need to be balanced against the recognition that in South Africa rape has reached pandemic proportions and resources for rape survivors are extremely limited. It is therefore suggested that more flexible, less restrictive rules for establishing expertise would create a more enabling legal system for rape complainants.

3.2 The use of psychology in expert testimony in rape trials

The Sexual Offences Act does not alter the criteria for expert evidence. Given the current stringent admissibility criteria based on the legal system’s positivist institutional epistemology, it is not surprising that expert testimonies based on ‘soft’ behavioural science such as psychology have been scrutinised. However, the importance of expert evidence in rape trials has become central and has far-reaching implications for the case of the complainant. This is due in part to the nature of the

81 Zeffertt et al (note 74 above).
crime of rape itself. It is arguable that in no other crime other than rape is the veracity of the complainant’s allegations scrutinised to the same degree as the accused’s culpability. Typically, a large part of court proceedings focuses on the credibility and psychological stability of the complainant.83

This focus on the complainant is not surprising, since Western society has a long history of holding persistent and harmful myths about rape and a resultant shift in critical focus from the accused to the complainant.84 Such rape myths include the misconceptions that women who have been raped could always have done more to prevent it and would not delay reporting the offence to the authorities. An example of such rape myths informing the criminal justice system is the ‘hue and cry rule’ under English law, operative in South African courts as late as 1983. This doctrine presumed that if a victim does not complain at the first reasonable opportunity there is a likelihood that she has not been sexually assaulted.85 Section 59 of the Act now expressly provides that ‘in criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and reporting thereof’.86

The reforms in ss 58 and 59 of the Act and the amendments to s 227 of the CPA are welcomed. However, research demonstrates that rape myths evidence significant resistance to change or replacement.87 Consequently, the complainant’s background and behaviour often remain under intense scrutiny despite ‘rape shield laws’, which are primarily aimed at countering the use of irrelevant evidence, often sexual in nature and employed by the defence to suggest a promiscuous past on the part of the complainant and to discredit her.

In an effort to more successfully prosecute rape cases, prosecutors may look towards expert psychological or psychiatric testimony as an additional means of combating rape myths. It is not unreasonable to assume that the majority of rape survivors are traumatised, and highlighting such trauma may result in dispelling rape

---


84 Boeschen et al (note 29 above). Also see Brownmiller (note 12 above).

85 Zeffert et al (note 74 above).

86 In other contexts our courts have recognised the reasons for delayed reporting of sexual offences. In Ntsabo v Real Security CC (2003) 24 ILJ 2341 (LC) the Labour Court interpreted in a contextual manner the requirement contained in s 60 of the Employment Equity Act 55 of 1998 that a complainant report complaints of sexual harassment to an employer ‘immediately’. The Court acknowledged that if ‘it has been done in “reasonable time” will of course differ from case to case and be determined by the relevant circumstances which prevail.’ In the case of Van Zijl v Hoogenhout 2005 (2) SA 93 (SCA), the Supreme Court of Appeal acknowledged the phenomenon of delayed reporting in the case of adult survivors of childhood sexual abuse.

myths about the typical reactions of a rape survivor which still prevail in the South African legal system. Without expert opinion, otherwise legitimate responses to a sexual offence may be interpreted as irrational or confusing conduct on the part of the complainant, thereby affecting her credibility.

The arena of rape expert testimony has been strongly informed by the growing body of research on rape-related PTSD. As outlined above PTSD is a recognised psychiatric disorder. PTSD is therefore arguably more robust than the ‘softer’ aspects of research on the psychological impact of rape, which may not meet the stringent legal requirements of credibility and scientific reliability. Thus, of all the ways in which rape trauma can be conceptualised and understood, PTSD is seen by many as best able to meet the legal criteria required for admission of expert evidence and the use of a PTSD diagnosis by an expert psychological witness in rape trials can have many benefits. Such evidence has not, however, been without controversy and debate.

3.3 Problems with PTSD in Court

Although PTSD is the strongest rape-related diagnosis on which to base expert testimony, there are several limitations to this diagnosis which suggest it is not a litmus test for whether rape occurred. Inclusion in the DSM–IV does not unequivocally enhance the credibility of the diagnosis in a court. In addition to problems which stem largely from a lack of demonstrably valid diagnostic techniques and high error rates, Raifman identifies core problems with a PTSD diagnosis in court because it is based on an assumption of the complainant’s honesty, the comorbidity of symptoms with symptoms of other disorders, and confounding premorbid factors. These are discussed further below.

3.3.1 Assumption of the complainant’s honesty

PTSD diagnoses are often solely based on self-report and the assumption that the complainant was truthful. One of the most significant problems with a PTSD diagnosis is the fact that many of the symptoms, such as the tendency to dissociate, are self-reported by the complainant. This raises the possibility of malingering on the part of the complainant, as research shows that PTSD symptoms can in fact be faked. This difficulty returns us to the thorny issue relating to the use of the

---


89 Boeschen et al (note 29 above).

90 Dahir (note 88 above).

complainant’s counsellor or therapist as an expert. Despite the complex issues this raises, s 58 of the Sexual Offences Act allows for the presentation of evidence which corroborates the complainant’s evidence. Alternatively, the use of an expert who relies on their assessment of the complainant ex post facto may also, by virtue of s 58, draw on collateral witnesses to substantiate their findings with regards to evidence of PTSD. Finally, it is arguable that an attitude of scepticism towards the complainant with regards to her reports of PTSD symptoms is evidence of the way in which, more than in any other crime, the veracity of her complaint of rape is questioned. This attitude is deeply informed by a gender bias which generally doubts the female rape complainant as evidenced in the cautionary rule now clearly abolished in s 60 of the Act. It is therefore important that expert evidence also highlights for the court the degree of social stigma that female survivors of rape endure and how this in turn affects the way in which they respond to the rape, including decisions about whether to report the rape. The reasons why survivors of rape delay reporting may be linked to the social stigma of rape itself and fear of secondary victimisation rather than to the complainant’s credibility.

3.3.2 Comorbidity
The PTSD diagnosis is further complicated by the fact that many of its symptoms (such as fear, anxiety and depression) occur in other mental disorders, the criteria for which overlap with PTSD symptoms. This renders it difficult to make strong conclusions based on the presence of such symptoms. Even if a complainant was indeed suffering from symptoms of PTSD, there may be no conclusive evidence to suggest that such symptoms were related to a specific incident in question. It is possible that many other confounding factors may have traumatised the complainant, not least of which is the actual court case itself, in light of research on secondary victimisation. However, research indicates that in comparison with other victims of serious crimes, female victims of completed sexual assault experience the most trauma92 and it is therefore not unlikely that a complainant of rape has experienced psychological distress directly as a result of the rape itself.

3.3.3 Premorbid factors
Premorbid factors may create complications for a PTSD diagnosis. A review of the scientific literature on rape suggests that the symptoms of PTSD may well be caused by other traumatic events which occurred prior to the rape.93 Psychological literature suggests that PTSD symptoms may be attributable to childhood sexual abuse or other

92 Markesteyn (note 8 above).
93 Frazier & Borgida (note 17 above).
significant prior trauma.\textsuperscript{94} Herman, for example, proposes a ‘complex PTSD’
categorisation for people who have suffered from chronic interpersonal violence
such as childhood sexual abuse.\textsuperscript{95} Despite the fact that many symptoms of PTSD,
such as phobias and recurring nightmares, relate directly to the incident, one cannot
ignore the possibility of previous traumatisation as a confounding variable in a PTSD
diagnosis. This need not, however, weaken the expert’s testimony on behalf of the
prosecution, provided such traumas are accounted for. The delictual ‘egg skull rule’
recognises that a wrongdoer must take a victim as he or she finds them. This means
that they may be held liable for the harm which results from a particular weakness
that leads the victim to suffer more serious loss as a result of the wrongdoer’s action
than would otherwise have been the case. Although the rule is not applicable in
criminal law, it is suggested that any previous vulnerabilities, weaknesses or
conditions that a victim to a crime may have, ought not to detract from the severity
of the impact of the crime on the survivor, particularly where sentencing is
concerned. In sentencing, such vulnerabilities could be regarded as an aggravating
factor when evaluating the severity of the crime.

3.3.4 PTSD as a prescription

Due to the variability in reactions to rape, the PTSD diagnosis may not be broad
enough to account for rape survivors who suffer mainly from depression or sexual
dysfunction. This causes significant problems in the courtroom for rape survivors
who do not meet the specific diagnostic criteria of PTSD.\textsuperscript{96} The use of a PTSD
diagnosis in court inevitably leads to the conclusion of a uniform response to rape,
resulting in post-traumatic symptoms becoming a prescription for rape survivors, not a
description.\textsuperscript{97} The use of a PTSD diagnosis may result in the complainant being
expected to fit in with the court’s idea of how a rape victim should act. Expert
witnesses for the prosecution may have little choice but to look for evidence of
PTSD in order to win the case. Similarly, the use of the diagnosis in rape trials may
lead the defence to use evidence of a lack of PTSD symptoms in order to prove that
an alleged rape did not occur. The prosecution’s use of a PTSD diagnosis inevitably
opens itself up to a challenge by the defence, as all the defence needs to rebut the
prosecution’s claim of PTSD is to find instances where the complainant did not
demonstrate post-traumatic symptoms as evidence that the complainant was not

\textsuperscript{94} J Castle (2001) Women’s response to the threat of rape, Syracuse University. Also see M Giles (1996)
Long-term consequences of sexual victimisation and mediators of these consequences, University of Arkansas;
childhood sexual abuse and other family background risk factors on adult adversities in female outpatients
treated for anxiety disorders and depression’ Child Abuse and Neglect 28, 61–78.
\textsuperscript{95} Herman ibid.
\textsuperscript{96} Boeschen \textit{et al} (note 29 above).
\textsuperscript{97} Stefan (note 59 above).
raped. A PTSD diagnosis in court, then, may set a ‘one-size-fits-all’ prescriptive precedent into which the complainant must fit in order to be believed. This often results in the forced finding and matching of behaviour to PTSD symptoms in order to prove a stronger case for the prosecution, and the finding of evidence of a lack of symptoms to prove a stronger case for the defence.

Atypical reactions to rape render a PTSD diagnosis problematic. Testimony about PTSD inherently posits causality between present, observable behaviour and a particular past event. It is, however, dangerous to assume a perfect correlation between being raped and suffering from PTSD. One cannot always point to post-traumatic symptoms as evidence of traumatisation, let alone rape, just as one cannot always point to the lack of post-traumatic symptoms as evidence that the survivor is not traumatised and was therefore not raped.

It is important to recognise that introducing evidence of PTSD may open up a Pandora’s Box of problems and may have a prejudicial impact on both the prosecution and defence. Furthermore, the use of expert evidence in informing sentencing may be problematic in that it fails to consider survivors who show resilience and/or post-traumatic growth in the face of rape trauma. Certainly, the fact that a rape survivor is ‘not traumatised’ at the time of the trial ought not to result in a court imposing a lesser sentence on the rapist. However, while caution should be observed in the use of expert evidence in rape trials, it should not preclude the leading of expert evidence in cases in which it is clearly warranted.

3.4 Prejudicial impact of a PTSD diagnosis

Zeffert et al state that in order to be admitted, evidence must be more probative than prejudicial.98 The use of PTSD in rape trials may be considered to be prejudicial on multiple levels and therefore unable to meet the court’s demands for neutrality. The most obvious violation of this demand is the fact that providing evidence of PTSD necessarily implies that the expert witness believes the complainant’s testimony that a rape occurred. It would therefore seem obvious that illustrating evidence of PTSD has a prejudicial impact on the court’s judgement which favours the complainant. How the brief is presented to the psychological expert witness by either the prosecution or the defence may limit the extent to which psychological experts present a satisfactorily unbiased testimony. Psychological experts are often asked to only answer specific questions in their testimony which may result in a one-sided account.

However, research suggests that such specific expert testimony does not appear to impact negatively on the accused’s credibility. In a study conducted by Brekke and Borgida, mock juries were asked to listen to re-enactments of rape cases containing either no expert testimony, expert testimony related to general post-traumatic

98 Zeffert et al (note 74 above).
symptoms, or testimony specific to that particular case. They found that the expert testimony did serve to counteract dominant rape myths which prejudice the court’s judgement against the complainant, but that the accused’s credibility was not affected across conditions. Thus, there is no evidence to suggest that expert testimony of PTSD is prejudicial to the accused.

3.4.1 Violation of rape shield laws

There are, however, areas of significant potential disadvantage for the complainant that must not be ignored. Perhaps the most serious is that PTSD evidence in court may open the door to questioning surrounding previous sexual history. Evidence that it may well have been a prior incident which caused the trauma may lead to questions concerning the credibility of the complainant. Focusing on the behaviour and reactions of the complainant may result in the undoing of rape shield reforms aimed at curtailing the presentation of irrelevant evidence regarding the complainant’s sexual history. In terms of the Act’s amendment to s 227 of the CPA, the admissibility of evidence relating to the previous sexual history of the complainant depends on a preceding finding of relevance by the court. A court may grant such leave where a PTSD diagnosis has been raised and the accused looks to the prior (sexual) history of the complainant to account for the trauma. A PTSD diagnosis by a psychological expert witness therefore has the potential to decrease the complainant’s right to protection under rape shield laws. It should, however, be borne in mind that the rape shield laws are there to protect rape complainants from allegations of promiscuity which impact on her credibility, they are not there to protect the rape complainant from disclosure of previous traumatic events in her life, whether these are of a sexual nature or not. Should the latter occur the issues discussed under the subsection above titled ‘Premorbid Factors’ need to be taken into account and the expert needs to demonstrate the link between previous and current levels of traumatisation.

3.4.2 Pathologising the complainant

The use of PTSD in the courtroom may also have a prejudicial impact on the court’s judgement on a more fundamental level. When evidence of PTSD is allowed in courts as proof of rape, the complainant may be represented as being a pathological and pathetic victim with limited credibility. Stefan, arguing from a feminist perspective, claims that when a woman accuses a man of rape, she wants to be believed, not to hear someone else explain her reactions as pathological and pitiable. During a criminal trial a PTSD diagnosis focuses attention on her reactions to the event as a vehicle of proof. This calls her sanity and credibility into

99 Borgida & Brekke (note 75 above).
100 Stefan (note 59 above).
101 Ibid.
question, when in fact it is her story which should be weighed up as evidence. Cases involving expert testimony on psychological disorders have been described by feminist legal theorists as resounding with sex-stereotypes of female incapacity and unreasonableness, rendering it difficult to translate women’s experiences honestly to courts without depicting them as crazy or helpless.\textsuperscript{102}

### 3.4.3 The problem of reasonable doubt

Another aspect of the prejudicial impact of psychological diagnosis relates to the reasonable doubt needed by the defence in a criminal trial to win the case. Due to the complexity of the subject matter, psychology is at best a science based on norms, theoretical generalisations and probabilities. For example, Ziskin and Faust purport that psychology has not developed the scientific rigour necessary to satisfy the court’s accountability demands.\textsuperscript{103} They argue that despite the ever increasing utilisation of psychiatric and psychological evidence in the legal process, such evidence frequently does not meet reasonable criteria of admissibility and should therefore not be admitted in a court of law. Their argument is supported by the fact that most psychiatric diagnoses are not based upon hard empirical data, but the result of consensus and politics. Matarazzo adds that ‘there is currently no body of research that indicates that psychological assessment . . . is valid or is other than clinical art’.\textsuperscript{104} Put simply, there are serious theoretical issues surrounding the reliability and validity of DSM–IV-type differential diagnoses that scientists and professionals in the field are unable to resolve. Even if one could develop a scientifically reliable instrument to measure the presence of PTSD, each survivor has a unique response to rape and not all are diagnosed with the disorder.

Therefore there may be substantial theoretical limitations as to how much a diagnosis can assist the prosecution in conclusively determining that a rape occurred beyond reasonable doubt. It may, however, assist in the argument of the defence. The doubts surrounding the scientific credibility of a psychological diagnosis are not nearly as problematic when it comes to the rebuttal. On the contrary, they may provide the defence with the exact ambiguity crucial to prove the reasonable doubt needed to win the case. As a result, psychological diagnoses may be prejudicial towards the complainant. For this reason, feminist legal theory emphasises that expert testimony should not be used in isolation but rather integrated with the overall facts and problems of the case, where it may have corroborative value.\textsuperscript{105}


\textsuperscript{104} D Matarazzo (1990) ‘Psychological assessment versus psychological testing: validation from Binet to the school, clinic and courtroom’ \textit{American Psychologist} 45, 1015.

\textsuperscript{105} H Ludsin & L Vetten (2005) \textit{Spiral of entrapment: abused women in conflict with the law}. Also Schneider (note 102 above).
4. Recommendations

There is an evident need for the criminal justice system to recognise the high prevalence of rape among women and children, in particular, and that rape is highly pathogenic. Historically, South African law has failed to acknowledge these issues, and court cases have been characterised by prejudicial practices which have discriminated against rape complainants. The Sexual Offences Act demonstrates an attempt to recognise these limitations. However, in omitting the Law Commission’s proposed clauses relating to the State’s obligation to provide support persons and psychological treatment to complainants, the legislature has fallen short of providing complainants with maximum protection. In its omission, the Act inadvertently continues to allow for the possibility of secondary traumatisation.

With regard to the use of psychological expert evidence in rape trials, three key issues need to be considered. Firstly, given the prevalence of rape in South Africa it is imperative that courts be made aware of the highly pernicious effects of rape. Sections 210 and 222 of the CPA make this possible. However, the prohibitive costs of leading expert evidence in conjunction with the significant practical experience of lay counsellors working in the field of rape, raises the question of who should be regarded as an expert. The complexity of calling on a complainant’s counsellor notwithstanding, there is a need for an enabling legal system which has more flexible rules when establishing expertise.

Secondly, whilst PTSD has proven useful in assisting courts to recognise the seriousness of the effects of rape, it may also paradoxically confirm rape myths by pathologising women as well as by creating a prescription for post-rape behaviour to which all complainants must comply in order to be believed. It is therefore important that such evidence not be used in isolation from a comprehensive understanding of the context within which rape occurs. Ultimately, expert evidence needs to be informed by a feminist understanding of rape and its sequela, which goes beyond a clinical understanding in order to transcend the historically discriminatory practices of the criminal justice system. To this end both the court and the expert need to ensure that the purpose of leading expert evidence is understood and clearly addressed.

Finally, the need for expert testimony in criminal rape cases must be balanced against the possible damaging effects of such testimony on the complainant. It is imperative that a rape complainant be made aware of her right to utilise expert evidence whilst being fully informed of the possible ramifications of such a choice. The complexity of rape trials and the use of expert evidence in them highlights the need for specialised sexual offences courts in which the skills of both the legal and mental health fraternity can be developed to ensure the provision of ‘adequate and effective protection to the victims of sexual offences’ as envisaged in the Preamble to the Sexual Offences Act.
1. Introduction

Sexual offences affect children and adults alike. However, there are special considerations that affect children who are either victims of sexual offending or who are sexual offenders. This chapter does not purport to deal with every matter pertaining to children and sexual offences, such as specific offences, sentencing principles and the like, but rather seeks to concentrate on specific issues that have developed through law reform in South Africa over the last decade. The developments that will be discussed have emerged through different law reform efforts including the process leading up to the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the 'Sexual Offences Act'),\(^1\) ad hoc general law amendments to the Criminal Procedure Act 51 of 1977 (the 'CPA') and the Child Justice Bill 49 of 2002. In addition, case law, policy and practice have contributed to the manner in which children are treated, either as victims of sexual offences or as offenders.

One can view the evolution of the manner in which children are treated in a number of ways. Firstly, the myriad legislative changes could suggest a disjointed, unplanned and fumbling attempt to ensure children are catered for in this area of criminal justice. On the other hand, the legislative developments as a whole can be seen as a combined and concerted effort to ensure that children are adequately catered for in the different streams of criminal law and procedure (as victims and offenders) and that their needs are addressed in different ways (eg case law and ad hoc

\(^*\) Jacqui Gallinetti BA LLB LLM (UCT) PhD (UWC) is senior researcher and project co-ordinator at the Children’s Rights Project, Community Law Centre, University of the Western Cape. The authors wish to acknowledge the support of the Ford Foundation that contributed to the drafting of this chapter. We also wish to thank Yonina Hoffman-Wanderer for her extensive edits to the chapter, which have, in our opinion, significantly contributed to it, and for writing the section on support persons.

\(^**\) Daksha Kassan BA LLB LLM (UWC) is senior researcher and project co-ordinator at the Children’s Rights Project, Community Law Centre, University of the Western Cape.

\(^1\) In addition to the Sexual Offences Act, various other versions of the Criminal Law (Sexual Offences and Related Matters) Amendment Bill (the 'Bill') will be referred to in this chapter where necessary, namely the draft Bill released by the South African Law Reform Commission along with its report in 2002 (the 'Law Commission version'); and the Sexual Offences Bill introduced into Parliament as Bill 50 of 2003 (the '2003 version'). During 2003, the Portfolio Committee on Justice and Constitutional Development held deliberations and also called for public hearings on the 2003 version, which was debated again during 2004 but was not finalised. During 2006, the 2003 version was again debated by the Portfolio Committee and three versions emerged thereafter — the June 2006 version, the November 2006 version and the February 2007 version. These versions were substantively similar, with respect to the provisions relevant for this paper, to the final version appearing in the Sexual Offences Act.
legislative amendments) when necessary. Whatever the view, this chapter seeks to trace the developments that, at the end of the day, have sought to ensure legal certainty and protection for children either as victims or offenders.

By examining two separate — though related — law reform processes, one dealing with sexual offences and one with child justice, an important phenomenon of South African law reform is highlighted; namely, a reluctance to fully adopt the recommended protective mechanisms for children, prioritising, instead, the rights of the accused — in the case of child victims — and, ironically, a more punitive approach to accused children in certain instances.

The first part of this chapter deals with children as victims of sexual offences and in particular focuses on procedural mechanisms that were recommended, during the law reform process, to protect them in the criminal justice process. To a large extent, these mechanisms already existed in the CPA, but were not being sufficiently implemented. This paper examines the decisions that were made to adopt or reject those recommendations and the anticipated impact of these decisions.

The second part of the chapter examines children as sex offenders and attempts to show how appropriate and effective interventions with this category of child offenders can lead to a reduction in re-offending, hence a reduction in violence against women, while at the same time addressing their needs as young sex offenders. In this section, too, the results (so far) of law reform efforts and their anticipated impact are discussed.

2. Protective Mechanisms for Child Victims Appearing in Court

It is helpful to contextualise the various legal avenues available to children who are victims of some form of abuse, including sexual abuse. While the criminal justice system seems to be the most popular recourse when a child has fallen victim to some form of abuse, there are three sources of law that are designed to protect children that are at risk of abuse or abused, namely criminal law, public law or the child protection system and civil law.

Public law or child protection proceedings generally refer to matters that fall outside the private, or family law, domain and that have state involvement. The primary mechanism for this type of protection of children is presently contained in the Child Care Act 74 of 1983, though this may soon be repealed when the Children’s Act 38 of 20052 is promulgated. In order to fulfil its objective of providing for the protection and welfare of certain children, the Child Care Act places various obligations and duties on a range of state officials including commissioners of child welfare, social workers and the police.

2 Although the Children’s Act 38 of 2005 (a product of the law reform process which commenced in 1997 when the South African Law Reform Commission was tasked with investigating and reviewing the Child Care Act) has been passed and signed by the President, it is not yet promulgated and will only be implemented once certain amendments are effected and the regulations are finalised. The provisions of the Child Care Act currently still remain in force until such time that the Children’s Act is enacted.
The child welfare system centres on the children’s court, which is a civil magistrate’s court. These courts, their functioning, the establishment of certain institutions to care for children and the protection and welfare of certain children are all dealt with in the Child Care Act. More recent legislation, namely, the Children’s Act, is much wider in scope, increasing the powers and jurisdiction of the children’s court to provide for increased protection for children. Court procedure as set out in the Children’s Act remains very similar to that contained in the Child Care Act, with some provisions creating a more child friendly atmosphere.

The three ‘layers’ of protection provided by the criminal, public and civil law systems complement each other and together form a protective mantel around a child who is at risk of abuse or has been abused. It is useful to bear all three remedies in mind when attempting to provide recourse for a child victim of sexual abuse, particularly if it has occurred within the family. This chapter, however, focuses only on the remedies provided by the criminal justice system under the new sexual offences legislation.

A primary objective of the new sexual offences legislation is to ensure that complainants of sexual offences are afforded the maximum and least-traumatising protection that the law can provide.\(^3\) In order to realise this objective, the Sexual Offences Act expressly states, inter alia, that complainants and their families need to be protected from secondary victimisation and traumatisation and that the needs of victims must be recognised through timeous, effective and non-discriminatory investigation and prosecution.\(^4\)

Victims may experience secondary victimisation at various stages of the criminal justice process. These may include: coming face-to-face with the perpetrator in the courtroom; relating the painful and often humiliating details of the offence, both prior to and during the trial; being aggressively cross-examined by the defence; and, in many cases, hearing the presiding judge acquit the accused, thereby questioning the victim’s traumatic experience and evoking feelings of humiliation and shame.

In each of these situations, the victim is forced to relive the traumatic events that she or he has endured, under the critical and judgmental eyes and ears of courtroom role-players and, often, the public as well. This process further violates the victim’s rights to privacy and dignity, as they are scrutinised and questioned, not only as to the perpetrator’s acts, but as to the victim’s actions and reactions before and after the event in question.

Research indicates that the stresses that results from secondary victimisation ‘affect the emotional and psychological well-being of the child (during and after the trial),

---

\(^3\) See preamble of the Sexual Offences Act.

\(^4\) Section 2.
the quality and accuracy of the child’s evidence and the way that the court interprets the child’s evidence and manner.’\(^5\) Further,

[t]he majority of child complainants report extreme fear and anxiety at the prospect of facing the accused in court. This exacerbates confusion and influences the ability of the child to remember details of the event. The child may, as a result of the anxiety or as a result of shame at speaking to strangers and the public about the sexual offence, withhold important information or close down completely in order to protect themselves from the memory and the perceived emotional danger.\(^6\)

It is clear that a systemically protective approach to children who are victims of sexual abuse is long overdue and that there is a pressing need to effectively combat child abuse in general. If the legislation supports the expeditious and effective prosecution of physical and sexual abuse cases then, it is submitted, this will go a long way to create an atmosphere conducive to and supportive of a child rights culture as envisaged in the United Nations Convention on the Rights of the Child and the South African Constitution.

This section will examine the proposals of the South African Law Reform Commission (the ‘Law Commission’) and existing CPA provisions around a number of procedural issues that seek to create a protective mantle for child victims when they are drawn into the criminal justice system, including: support persons, testimony by closed circuit television (CCTV) or other indirect means, the use of intermediaries, the prohibition against identifying child victims, and in camera proceedings. According to the Law Commission’s Bill, these measures would have been accessible to children and adult complainants of sexual offences through their automatic designation as ‘vulnerable witnesses’. For the most part, these proposals were not adopted in the Sexual Offences Act. The following sections will discuss each of these proposed measures and the impact of their inclusion or exclusion in the Sexual Offences Act.

2.1 Vulnerable witnesses

At present, there is no provision in the CPA for a category of ‘vulnerable witnesses’. Despite this, the vulnerability of certain witnesses, especially children, has led to a variety of changes in court practice and procedures aimed at making it easier for such witnesses to give evidence.\(^7\)

The Law Commission thus proposed that it would be in the interests of justice to create a category of vulnerable witnesses, particularly including children and victims of a sexual offence, who would be automatically entitled to certain protective measures. These would add to the existing protective measures contained in the

\(^{5}\) S Waterhouse (2007) Submission to the NCOP on the Criminal Law (Sexual Offences and Related Matters) Amendment Bill.

\(^{6}\) Ibid.

Accordingly, s 16 of the draft bill attached to the Law Commission’s Report on Sexual Offences published in 2002 (the ‘Law Commission version’ or the ‘Law Commission Bill’; and the ‘Law Commission Report’ or the ‘2002 Report’, respectively) stated that a court, in criminal proceedings involving the alleged commission of a sexual offence, must declare a witness who is to give evidence in that proceeding a vulnerable witness if such witness is the complainant or a child. In so doing, the vulnerable witness becomes eligible for one or more of certain protective measures.9 Such measures include: allowing a witness to be accompanied by a support person, allowing a witness to give evidence by means of closed-circuit television (CCTV), allowing a witness to give evidence through an intermediary, prohibiting the publication of the identity of the complainant and directing that the proceedings be held in camera. These proposals were maintained in the version of the Sexual Offences Bill introduced into Parliament as Bill 50 of 2003 (the ‘2003 version’) but were rejected by Parliament and are, therefore, not included in the Sexual Offences Act.10

In order to understand the implications of this decision, it is necessary to review those conditions under which these protective measures can be accessed without the designation of ‘vulnerable witness’ and to understand how those conditions would have changed under the vulnerable witnesses provision.

2.2 Support persons

Section 153(3A) of the CPA permits certain people to remain in the courtroom during an in camera proceeding at the complainant’s request or, if the complainant is a minor, at the request of his parent, guardian or a person in loco parentis. It does not elaborate as to who might qualify as such a person (if, in fact, there are any prerequisite qualifications at all) or as to any role that that person might fulfil.

The Law Commission version of the Bill built on this possibility by providing for the appointment of a ‘support person,’ recognising the unique vulnerability of a sexual offence victim and the particular assistance that a support person might render to the complainant. Section 17 of the Law Commission Bill thus recommended, after discussion of submissions based on Discussion Paper 102 and subsequent amendments, that:

- the police investigator should be responsible for advising sexual offence complainants and child witnesses of their right to be accompanied by a support person, without need of a court appointment, while making any statement,

---

9 Section 16(4) of the Law Commission version.

10 The version of the Bill included in the SALRC’s Discussion Paper 102 included the additional measure of allowing electronic pre-recorded evidence given by the witness. This measure was removed from the Bill after the Commission concluded that ‘video-taped evidence is an extremely complex issue and deserving of more detailed research.’ SALRC (note 7 above) 118.
undergoing any examination, including a medical one, and being interviewed or 
questioned; and that

• the court be entitled to appoint, at its own initiative or upon request from a person
‘acting in the interests of the witness’, a support person to accompany the witness
when giving evidence in court.

The witness could request to waive appointment of a support person and the court
would have certain discretion as to appointing the person chosen by the witness,
removing a support person and appointing another support person in his or her place.

The support person’s job is to assist the witness and to accompany the witness and
sit with the witness when he or she is giving testimony, being interviewed or making
statements. The support person would be entitled to receive witness fees, intended to
cover transport costs and the like.

This support mechanism was incorporated into the vulnerable witness provision as
one of the protective measures that the court may direct be adopted to assist
complainants in sexual offence cases and child witnesses. Neither the proposed s 17
nor the vulnerable witness provision were included in the Sexual Offences Act,
leaving s 153(3A) as the sole basis for permitting a support person to remain with a
child complainant or witness in the courtroom during an in camera proceeding.

According to the minutes of the Portfolio Committee on Justice and Constitu-
tional Development (the ‘Portfolio Committee’) meeting on 6 August 2003 the
provisions relating to support persons were not approved by Cabinet and were,
therefore, not referred to the Portfolio Committee for deliberation, due to the
anticipated expenditure that would be required to implement such provisions.
Presumably, the expenditure referred to is the witness fees to which support people
would be entitled.

This hardly seems like sufficient grounds to completely reject the proposed
support mechanism. First, as noted by the Fact Sheets presented by the National
Working Group on the Sexual Offences Bill in 2006, ‘these fees are already paid to
parents and caretakers who bring their children to court to testify.’ Second, the
proposed provisions could have been included without providing for witness fees.11
While there is a risk of a discriminatory effect of such provisions, where wealthier
complainants would have support persons in practice, while those with less means
would not, creative solutions could, perhaps, have been found. Third, fees could
have been provided for support persons only for child complainants and not for all
‘vulnerable witnesses.’ It is, unfortunately, not clear whether any solutions were
sought for this budgetary problem.

11 Such a suggestion was, in fact, made in a submission by Rape Crisis Cape Town Trust and Idasa, dated
September 2003.
2.3 Testimony by CCTV

Section 158 of the CPA provides that a court may, on its own initiative or on application by the public prosecutor, an accused or a witness, order that the witness or an accused may give evidence by means of CCTV or similar electronic media. The right to grant such an order is contingent upon the availability of the necessary facilities and provided that it appears to the court that to do so would, inter alia, prevent the likelihood that prejudice or harm might result to any person if he or she testifies or is present at such proceedings.\(^\text{12}\)

In addition, the court may, to ensure a fair and just trial, order that the giving of evidence be subject to such conditions as it thinks necessary, provided that the prosecutor and the accused have the right, by means of that procedure, to question a witness and observe the reaction of that witness.

One of the problematic aspects of s 158 of the CPA, as rightly noted by the Commission in Discussion Paper 102, is the lack of available CCTV facilities, which necessarily limits the provision’s application. The Law Commission, therefore, recommended that, in cases where the court was of the opinion that it was ‘imperative’\(^\text{13}\) that a witness testify via CCTV, the court have the option of transferring the case to another court where such facilities could be obtained. The Commission further suggested that certain other factors be taken into account by the court before deciding to transfer the case, such as the costs and delays involved in the transfer and the convenience for the complainant. It is unclear what happened to these proposals, as they appeared in the Law Commission version, but had been deleted when the 2003 version was introduced into Parliament.\(^\text{14}\)

While Parliament was clearly concerned about the budgetary implications of automatically conferring the right to CCTV testimony on all sexual offence complainants (see, for example, the words of the Portfolio Committee Chairperson from the Committee Minutes of 6 August 2003, who is quoted as saying: 'he could not pass a law when he knew that it could not be implemented, such as closed-circuit TV’) this does not explain the Committee’s rejection of the proposals. First, amendment of s 158 of the CPA to provide for transfer to a court where CCTV facilities are available would not have conferred an automatic right and provided sufficient discretion as to allow flexibility in implementation. Second, even the ‘vulnerable witnesses’ provision did not automatically confer the right to CCTV, but

---

\(^{12}\) There was some discussion in the South African Law Reform Commission Report (note 7 above) 143–4, as to whether subsections 158(3) (a) — (c) are cumulative requirements — in addition to either (d) or (f) — or whether any one of these factors is sufficient for an order to give testimony by CCTV. Given the different interpretations offered, the Commission recommended amending the introduction to subsection 158(3) so as to make it clear that these were alternative conditions.

\(^{13}\) The Western Cape joint submission argued that the word ‘imperative’ will result in too limited an application of the provision. This comment was not accepted. SALRC (note 7 above) 142.

\(^{14}\) The only amendment to s 158 that was retained at that point, but was later deleted, was the proposal to clarify the alternative — non-cumulative — nature of the conditions set forth in s 158(3) of the CPA.
the right to one or more of the protective measures. Thus, the amendment would not necessarily require each court to be fitted with the necessary CCTV facilities. As with many of the Law Commission’s proposals discussed herein, these proposals seem to have fallen off the Committee’s radar without thorough consideration or debate.

The only amendment to s 158 of the CPA contained in the Sexual Offences Act is the addition of a new subsection (4) that requires the court to provide reasons for refusing an application for the giving of evidence by a child complainant below the age of 14 by means of CCTV or other electronic media. This amendment appears to have been proposed by Mr Potgieter of the Law Commission in a meeting of the Portfolio Committee on 19 October 2006. At this point, however, the proposal’s application was not limited to children younger than 14. It is unclear why, when such a provision was included in a working draft of the Bill dated 25 October 2006, the arbitrary age distinction was inserted. The Sexual Offences Act also requires, in s 66(2)(ii), that the National Director of Public Prosecutions (‘NDPP’) publish directives as to the circumstances in which the prosecution must apply for permission to give evidence via CCTV. Strangely, the directive must apply ‘in particular’ to child complainants under 16 years of age. The inconsistency between the age distinctions contained in these provisions does not appear to have any rationale.

While the addition of the subsection (4) amendment improves on the existing situation — as it recognises the importance of this kind of testimony, as a rule, for young children, and shifts the burden to the court to find good reasons not to allow it — the arbitrary age distinction also renders it very problematic. It implies that older children are more likely not to need protection. Further, adult complainants are not mentioned at all, implying that the legislature does not think that, as a rule, they should benefit from this type of protection. As noted, however, by the Rape Crisis Cape Town Trust in its June 2006 submission,

\[ \text{M} \] any adult survivors find the experience of facing the accused and testifying about their experience in court extremely traumatic, which results in a poor standard of evidence being placed before the court. Most courts fail to appreciate this impact on adult survivors.

The flaw in the reasoning to limit furnishing of reasons for refusal to allow evidence to be given by CCTV on the basis of age is that the courts have decided that giving testimony by CCTV does not violate the defendant’s right to a public trial.\textsuperscript{15} If that is the case, and given the overwhelming psychological evidence as to the secondary victimisation caused to many victims of sexual offences of all ages when coming face-to-face with their attackers, this measure should be available to all complainants. At the least, the court should be required to give reasons for refusing such protection to any complainant who seeks it. This would subject those reasons to public scrutiny, allowing for a public debate around their underlying assumptions.

\textsuperscript{15} See the discussion below of \textit{K v The Regional Court Magistrate NO and Others} 1996 (1) SACR 434 (E).
In the end, neither of the amendments seems likely to greatly increase the use of CCTV protection for complainants. The legislation signals to courts that such protection is not considered crucial for witnesses over the age of 14, and the fact that prosecutors may be required to apply more regularly for such protection for witnesses up to age 16 will not necessarily change the way in which courts exercise their discretion.

2.4 Intermediaries

The South African Constitution guarantees accused persons the right to a public trial in the presence of the accused. Given, however, that appearing as a witness in court proceedings can be traumatic and intimidating, especially for children, s 170A of the CPA empowers a presiding officer in a criminal trial, if it appears that a child would be exposed to undue stress and suffering were they to testify at the proceedings, to appoint a competent person to act as an intermediary between the child and the court.

Once the intermediary has been appointed, no examination, cross-examination or re-examination of the child, except by the court, may take place other than through that intermediary. Section 170A2(b) of the CPA allows for the intermediary to convey the general purport of any question (unless the court directs otherwise) to the witness. This enables the child to avoid being spoken to directly, or having to speak directly, to the accused or his or her counsel. Rather, questions are put to the intermediary, who repeats their essence, in age-appropriate language, to the child witness.

This section is the result of research done and recommendations made by the Law Commission’s Project 71 in its working paper 28, entitled The Protection of the Child Witness, published in 1989. It was based on the fact that ordinary adversarial trial procedure is at times insensitive to the needs of child victims, especially involving child victims of sexual abuse, and s 170A of the CPA is aimed at striking a balance between the need to protect the child and the need to ensure an accused is given a fair trial.

It has been noted that this provision makes a serious inroad upon the ordinary trial procedure in terms of which parties can generally formulate their own questions during examination, cross-examination and re-examination and that the impact of the section is the greatest in respect of the cross-examiner. It is argued that the court should be very careful not to allow an intermediary to frustrate the fundamental purposes of cross-examination, namely, to give an accused the opportunity to present

16 Sections 35(3)(c) and 35(3)(e) of Act 108 of 1996.
17 Per s 170A(2)(a).
19 Ibid.
20 Ibid 22–32A.
his defence through the pertinent and probing questioning of those who testify against him and that in the final analysis the right to a fair trial should be the controlling factor. While this is, perhaps, true, the line between ‘probing’ and ‘intimidating’ or ‘accusing’ can be a thin one and courts should exercise their discretion in a manner that ensures that the intermediary maintains the former substance, while enabling her or him to protect the witness from the latter tone. Ultimately, this requires a skilled intermediary who will be faithful to their protective role but also to the adversarial nature of the trial. If intermediaries fail to achieve this balance, courts will lose faith in the mechanism and be reluctant to apply it.

As far as the actual giving of evidence is concerned, in terms of s 170A(3) of the CPA, the court may direct that the child give his or her evidence at any place:

- which is informally arranged to set the witness at ease;
- which is so situated that any person whose presence may upset that witness is outside the site and hearing of that witness; and
- which enables the court and any person whose presence is necessary at the relevant proceedings to hear and see, either directly or through the medium of any electronic or other devices, that intermediary as well as the witness during his or her testimony.

This provision may thus be applied in tandem with s 158 of the CPA — testimony through CCTV — as discussed above, though intermediaries may also be used in the courtroom.

There have been a number of judgments dealing with the appointment of an intermediary and the constitutionality of s 170A of the CPA. For example, in *K v The Regional Court Magistrate NO* a constitutional challenge was raised on the grounds that the section deprived the accused of the right to confront his accusers and to cross-examine his accusers. It was also contended that the physical separation of the complainant from the courtroom resulted in a violation of the accused’s right to a public trial. The court analysed the background and purpose of s 170A of the CPA and concluded that a child witness may often find it traumatic and stressful to give evidence in the adversarial atmosphere of a courtroom. It found that forceful cross-examination by a skilled counsel may, in such circumstances, be more likely to obfuscate than to reveal the truth. The court recognised the importance of confrontation and cross-examination as elements in affording the accused the right to a fair trial, as is enshrined in s 35(3) of the South African Constitution, but held that it was necessary to balance the rights of the accused on the one hand with the rights of the witnesses not to be subject to further traumatising events in the pursuit of justice. The court pointed out that the giving of evidence, particularly in cases involving sexual complaints, exposed complainants to
further trauma and it was necessary to balance these competing rights in such a way as to ensure fairness to both sides. The court accordingly held that s 170A of the CPA did not infringe the accused persons’ right to a fair trial.

Following this case, the guidelines as to how and in what circumstances this section should be invoked were set out in S v Stefaans. In this case Mitchell AJ stated that a court, faced with an application for the provisions of s 170A of the CPA to be invoked, should be mindful of the dangers which are inherent in the use of an intermediary which might prejudice the right of the accused to a fair trial. These are that:

- Cross-examination through an intermediary may be less effective than direct cross-examination of a witness.
- An accused prima facie has the right to confront his accusers and be confronted by them.
- Human experience shows that it is easier to lie about someone behind his back than to his face.

Mitchell AJ listed the following guidelines which, if adhered to, would reduce the risk of the accused not being afforded a fair trial:

- The provisions of the section will find application more readily in cases involving a physical or mental trauma or insult to the witness than in other types of cases.
- The giving of evidence in court is inevitably a stressful experience and in order for the section to apply, the section requires the court to be satisfied that such stress will be ‘undue’, namely, something in excess of the ordinary stress. In this regard, it seems fair to say that the younger (and more emotionally immature) the witness, the greater the likelihood that such stress will be ‘undue’.
- A witness who is unknown to the accused may more likely be unduly stressed by the need to testify as opposed to a witness who is known to the accused and may fear intimidation.
- If the application to invoke the section is not opposed, it may be granted more readily.
- If an accused is unrepresented, the presiding officer should carefully explain to him his right to oppose the application. In the case of a plea of guilty, if there is any doubt about whether the accused understands the matter, the application should be treated as opposed.
- If the application is opposed, the presiding officer should request that appropriate evidence be adduced to enable him or her to exercise proper discretion as to whether the section should be invoked or not. In the case of a younger witness in a matter involving mental or physical trauma, such evidence may consist of nothing more than a statement of the nature of the charge and the age of the

23 1999 (1) SACR 182 (C).
witness. In other matters, evidence of a suitably qualified expert (a social worker, psychologist or psychiatrist) may be necessary.

- If the section is invoked the presiding officer should be aware of the risk that the efficacy of cross-examination may be reduced by the intervention of the intermediary. The judicial officer should be alert to this and should be prepared to intervene to insist that the exact question, rather than the import thereof, be conveyed to the witness.

These guidelines raise a number of important problems. The interpretation of the word ‘undue’ as it appears in s 170A of the CPA as ‘something in excess of the ordinary stress’ appears unnecessary and leads to limited application of s 170A protection. ‘Undue’ could, rather, be understood as ‘undeserving’ or ‘inappropriate’. While it is true that giving evidence in court is likely always to be stressful, and it may be desirable to, nonetheless, encourage children to testify, such stress is never deserved. A child who has suffered the trauma of a sexual offence deserves protection and healing; additional stress and victimisation can certainly not be said to be ‘due’ to such a child.

The judge’s assumption that ‘the younger the witness, the greater the likelihood that the stress will be undue’ is also questionable. While it is certainly the case that most young child victims will experience severe and ‘undue’ stress if required to testify, slightly older children may experience similar — if not greater — stress levels for different reasons. Expectations from older children are greater, as is their understanding of court processes. Defence counsel may also examine slightly older children more aggressively.

The assumption that a witness who is ‘unknown to the accused may more likely be unduly stressed’ than one who is known to the accused ‘and may fear intimidation’ is also highly suspect. Where a prior relationship exists between the witness and the accused, the witness potentially has much more at stake. Clearly, the heartbreaking ambivalence that a child must feel when testifying against a sexually abusive parent or relative, whom they also love, must create enormous and ‘undue’ stress, not just because the child fears intimidation, but because the child is torn apart by her or his conflicting feelings.

The foregoing comments highlight the need for an amendment to the intermediary provision that would ensure broader application and greater access for children (and many adult complainants) to this protective mechanism.

Accordingly, the Law Commission version of the Bill provided that an intermediary had to be appointed for a child upon being declared a vulnerable witness, unless the interests of justice justified the non-appointment of an intermediary.24 As noted above, however, the Sexual Offences Act has excluded the vulnerable witness clause. This has had the effect of denying the almost automatic application of the protective mechanisms that had applied through that provision.

---

24 See ss 16(5) and 15(5) respectively.
Instead, minimal amendments were made to s 170A of the CPA via the Sexual Offences Act. These include:

- extending application of the provision to persons under the biological or mental age of 18 years (s 170A(1) of the CPA);
- requiring that the court provide reasons for refusing a request to appoint an intermediary for complainants younger than 14 years old (new s 170A(7) of the CPA);
- the addition of a summons procedure to ensure the attendance of an intermediary at court (new s 170A(8) of the CPA); and
- specification of the consequences of the absence of an intermediary in court or for their inability, in the court’s opinion, to continue to act as intermediary (new s 170A(9) of the CPA).

Section 170A(9) of the CPA further provides that, in the interests of justice and after hearing arguments from the accused and the prosecutor, the court may: postpone the proceedings; summons the intermediary to furnish reasons for his or her failure to attend (pursuant to which the court can act in any manner in which it deems fit and this would ordinarily include the possibility of finding the intermediary in contempt of court); revoke the intermediary’s appointment and either appoint another in his or her place or continue the proceedings without an intermediary. Subsections (8) and (9) appear to be attempting to prevent the situation where failure of an intermediary to attend court might lead to undue delays in the finalisation of cases, thereby negatively impacting on child witnesses waiting to testify.

While these amendments are generally welcome, the arbitrary requirement that courts justify their failure to permit the appointment of an intermediary only for children younger than 14, raises, again, the problems referred to earlier with respect to testimony by CCTV. While older children may have greater ability to understand the questions put to them by counsel, perhaps alleviating the need for more age-appropriate formulations, the importance of mitigating the secondary victimisation that may be caused by an accusatory, intimidating or incredulous tone of interrogation remains just as important for children between the ages of 14 to 18, as for some adult complainants.

Again, it is unclear where this arbitrary age distinction came from. It is unfortunate that it was inserted into the legislation at such a late stage, leaving no opportunity for public debate and submissions.

The Sexual Offences Act also requires a NDPP directive as to the circumstances in which the prosecution must request appointment of an intermediary. Once again, this directive is to apply in particular to children under the age of 16 — and once again there is no clear reason for the inconsistency between the age distinctions in

25 Schedule 1.
26 Section 66(2)(a)(iii).
s 170A(7) of the CPA and in this provision. Furthermore, inasmuch as the ‘undue stress’ requirement remains unchanged, and courts retain the same discretion in applying this measure, this directive is unlikely to have a real impact.

2.5 Identification of child victims

The identification of child victims is an important issue in both the criminal justice and child welfare systems. The media have highlighted and raised public awareness of the problem of child abuse and for that they must be commended. It is submitted, however, that certain media reports have actually contributed to the secondary abuse of children.

By indirectly identifying child victims — through identification of their parents, schools and the like — the media places the child in the spotlight, inviting the public to delve into the intimate and humiliating details of the traumatic event that the child has suffered. This severely infringes the child’s rights to privacy and dignity, which have already been horribly violated by the perpetrator, thereby causing further, or secondary, victimisation.

Section 154(3) of the CPA prohibits the publication of any information that reveals or may reveal the identity of an accused or witness at criminal proceedings under the age of 18. The presiding officer is the only person who can authorise such publication if he or she is of the opinion that publication is just and equitable and in the interest of any particular person.

Although this prohibition exists, the issue of identification of child witnesses was raised during the law reform process because of the problematic practices of the media that attempt to circumvent the prohibition; and because the prohibition is not sufficiently prosecuted or enforced. One of the main ways by which the media attempt to circumvent the prohibition is through consensual interviews with the child victim’s parents, teachers and other such individuals. In this way, although the child’s name may not be explicitly revealed, she or he is indirectly identified and the secondary victimisation referred to above may occur.

Indirect identification has been found by the courts to violate the s 154 prohibition in at least two cases, where leading newspapers were prosecuted for contravening s 154(3) of the CPA.27 In the first appeal to the Transvaal Provincial Division (TPD), Franklin J held that:

---

27 S v Citizen Newspapers (Pty) Ltd and another; S v Perskorporasie van Suid Afrika Bpk and another 1980 (3) SA 889 (T) (hereafter the Citizen Newspapers case 1) and S v Citizen Newspapers (Pty) Ltd en ‘n ander; S v Perskorporasie van Suid Afrika Bpk en ‘n ander 1981 (4) SA 18 (A) (hereafter the Citizen Newspapers case 2). These cases involved two appeals by two different newspaper owners and editors against their convictions of contravening s 154(3) of the CPA. Both of them had published information that identified or might have identified an accused who was under 18 years and did so without the authorisation of the judicial officer. Although the text of the articles differed, both appeals were based on identical legal grounds and on substantially identical factual grounds.
the proper approach to be adopted in determining whether there was any contravention of the provisions of section 154(3) is to enquire whether the articles in question either reveal or may reveal the identity of CH as the accused person to a hypothetical ordinary, average reader of the newspaper articles in question who has no prior or special knowledge of any of the incidents or persons referred to in the article, and who therefore reads each article as a separate news item divorced from anything that may previously have been published about such incidents or persons.28

Applying this approach, the court held that, regard being had to the reaction of the hypothetical, normal, level-headed, right-minded and reasonable person who would read the report in an ordinary and unprejudiced manner, the 16 year old accused’s identity was revealed — or at the very least there was a reasonable possibility that the articles would reveal it.29 The court upheld the conviction but reduced the fine imposed on the editors of the newspapers. The conviction was upheld on appeal, although the appellate court deemed the reduction in the fine unjustified.

A similar judgement was given in Prinsloo and another v Bramley Children’s Home and others.30 The applicants were the accused in a criminal trial and were charged with indecent assault upon the second and third respondents (who were children) in the matter, as well as possession and production of pornography. The applicants applied for an order granting them access to information in the possession of the first respondent in whose care the children had been placed. The information sought was thought to be of importance to the applicants for cross-examination purposes in their forthcoming criminal trial.

Before dealing with the merits of the matter, Bertelsman J raised some initial issues, including that of s 154(3) of the CPA. The court held, relying on the Citizen cases, that children are protected from being identified even through indirect means. The judge went on to state that although the accused’s trial had not yet started, criminal proceedings had already started, a trial date set and ‘however much this application may have donned the garb of a civil application in motion proceedings, it therefore forms part and parcel of the criminal proceedings’.31 The court therefore held that by identifying children in court papers that related to criminal charges s 154(3) of the CPA was contravened.

Unfortunately, the only consequence of this violation was the court’s expression of regret that the children’s identity had been revealed — perhaps providing good reason for accepting the recommendation submitted to the Law Commission by the Western Cape joint submission to require prosecution of such violations, as will be further discussed below. Nevertheless the case represents a progressive approach on the part of the judiciary in applying the available protective mechanisms for children.

28 Ibid at 894 G–H of the Citizen Newspaper case 1.
29 Ibid at 895 E–F of the Citizen Newspaper case 1.
30 2005 (2) SACR 2 (T).
31 Ibid at page 6.
Such decided case law, however, has been unsuccessful in bringing the media’s indirect identification of child victims to a halt. For this reason, submissions were made to the Law Commission recommending that s 154(3) of the CPA be amended so that it clearly states that ‘no parent, guardian or care-giver may consent to the identity of a witness or accused below the age of 18 years being revealed.’ It was thought that this would put both members of the media and parents and guardians on notice as to the extent and nature of the s 154(3) prohibition, thus strengthening its effect. The Law Commission did not, unfortunately, see a need for this amendment, arguing that ‘[i]f a law is not being applied, there is very little possibility that another law saying the same thing (albeit in a different manner), will be applied.’ The Commission also argued that the issue of indirect identification is already sufficiently dealt with in the ‘non-legislative recommendation that the National Director of Public Prosecutions prioritise prosecuting persons or corporate bodies that publish prohibited personal particulars in violation of the provisions of the Criminal Procedure Act.’ The Law Commission further rejected a recommendation to include a positive statutory duty on the NDPP to prosecute violations of s 154(3) of the CPA, arguing that such a duty would ‘usurp the discretion of the prosecution service.’

At the same time, the vulnerable witnesses provision specifically provided s 154 protection, prohibiting publication of the identity of the complainant. In this provision, it was specifically stipulated — presumably based on the foregoing submission — that publication of the identity of the complainant’s family, including publication of information that may lead to such identification, was also prohibited. Unfortunately, since the vulnerable witnesses provision was excluded from the Sexual Offences Act, such protection has fallen away. What remains is the NDPP’s obligation to publish a directive as to the circumstances in which the prosecution must request that the court impose the foregoing prohibitions.

The Law Commission did recommend revising sub-section (5) of s 154 of the CPA by increasing the maximum penalty for violating the s 154(3) prohibition and inserting a new subsection (6) which provides for courts to make a compensatory order when found guilty of violating s 154(3). Both of these recommendations were included in the Sexual Offences Act.

32 SALRC (note 7 above) 156.
33 Ibid.
34 Ibid.
35 There appears to be an internal inconsistency in the approach of the Law Commission, as it rejected this addition as unnecessary — as discussed above — in connection with the CPA provision, but included it in the vulnerable witnesses section.
36 Section 66(2)(a)(v).
37 Sexual Offences Act, Schedule, Laws Amended or Repealed by Section 68. Another problem not dealt with by the Commission relates to an accused child who turns 18 during the criminal proceedings. Section 154(3) has been interpreted as allowing the media to publish the name of an accused once he or she turns 18.
In the final analysis, the problem with identifying child victims is one of practice and enforcement. The question is how one might succeed in changing the practice. It is possible that the first amendment recommended by the Western Cape joint respondents (namely, the reference to indirect identification) — and included in the vulnerable witnesses draft provision — would not have made a difference to the practice. At the same time, it does not appear likely that the increased penalty or compensatory order included in the Sexual Offences Act can have any impact in this regard if violators are not prosecuted. The only recommendation that appears likely to make a significant difference is that made by the Western Cape joint respondents, that the NDPP be required to prosecute, but this was rejected.

2.6 In camera proceedings

It is a well established legal principle that all trials must take place in open court, although courts may direct otherwise in special cases. In addition, the South African Constitution provides that an accused person has a right to a public trial.

Despite this there are a number of pieces of legislation that allow for in camera or closed proceedings when children are involved. In terms of s 153 of the CPA, the court has the discretion to direct that proceedings be held in camera in certain circumstances including where:

- It is in the interests of the security of the state.
- It is in the interests of good order.
- It is in the interests of public morals.
- It is in the interests of the administration of justice.
- The complainant has to testify about indecent acts.

Section 153(5) of the CPA specifically states that where a witness is under 18 years of age the court may direct that no person except the witness, his or her parent or guardian or a person in loco parentis may be present in court unless such presence is necessary and authorised by the court.

In S v Mothopeng the court held that once a ruling to hold the proceedings in camera has been made under s 153 of the CPA, special circumstances must exist before it is relaxed. The court held that, at the very least, the persons requesting to be present

---

38 Section 16 of the Supreme Court Act 59 of 1959; s 5 of the Magistrates Court Act 32 of 1944 and s 152 of the Criminal Procedure Act.
39 Section 35(3) of Act 108 of 1996.
40 Section 8(2) of the Child Care Act; s 11(1) of the Domestic Violence Act and s 10(4) of the Maintenance Act 99 of 1998.
41 1979 (4) SA 367 (T).
at the trial would have to possess a proper and legitimate interest in being present and they would have to satisfy the court that their presence would not be a cause for harm to the witnesses or their relations.42

Section 153 of the CPA has been interpreted as not in any way affecting the accused’s rights to counsel and to hearing the evidence against him or her.43 It has also been said that if women saw that they would be spared public humiliation and embarrassment they might be more willing to lay charges and testify in sexual offence cases.44 In spite of this, the Commission noted in Discussion Paper 102 that enforcement of the in camera provision is problematic and recommended stricter monitoring and additional enforcement mechanisms — such as an obligation to post notices on courtroom doors of in camera proceedings taking place.45

Although none of the versions of the Sexual Offences Bill purported to change the in camera provision itself, the vulnerable witness clause recommended by the Law Commission reinforced the application of this mechanism by providing that once a witness has been declared vulnerable — which would apply to all children and adult complainants of a sexual offence — the court must apply one or more of the provision’s protective measures, including the in camera provision, regardless of any qualifying criteria set out in s 153 of the CPA. The main effect of this proposal would have been for adult complainants as s 153 is aimed at protecting children. As noted already, the vulnerable witnesses clause was excluded from the Sexual Offences Act.

As with the other protective measures included in the vulnerable witnesses clause, the Sexual Offences Act does require, in s 66(2)(a)(iv) that the NDPP issue a directive regarding the circumstances in which the prosecution must request an in camera proceeding.

Generally, this method of replacing each of the proposed protective measures (from within the vulnerable witnesses provision) with a directive to prosecutors as to when such measures must be requested is a clear indication of the legislature’s ambivalence as to the need of complainants in sexual assault cases for such measures. The legislature clearly has not bought into the idea that all complainants in sexual offence cases — including adults — can be and must be shielded from secondary victimisation in the courtroom. By requiring directives, which encourage the prosecution authorities to exercise discretion, the legislature suggests that these measures are necessary only in certain circumstances — mainly for children younger

42 In this matter, application was made to relax the order that the proceedings be held in camera in order to allow certain foreign diplomats to attend the trial. The court refused the application as the diplomats did not have a proper or legitimate interest in attending the trial. The court held that the only inference that could be drawn was that the diplomats wished to see whether the court, the prosecutor and possibly the defence were behaving in a way which met with their approval and that this did not constitute a proper or legitimate interest in attending the trial.
43 Du Toit et al (note 18 above) 22–6B.
44 Ibid, referring to S v Staggie and another 2003 (1) SACR 232 (C), 2003 (1) BCLR 43 (C).
45 SALRC (note 7 above) 150–1.
than 16. As suggested below, this ambivalence creates internal inconsistency between the rhetoric of the Sexual Offences Act and the way in which it is likely to be implemented.

Having reviewed each of the protective mechanisms that would have been accessible to complainants through the vulnerable witnesses provision, we turn now to the reasons for and the implications of that provision’s exclusion from the final legislation.

3. Exclusion of the Vulnerable Witness Provision from the Sexual Offences Act

The minutes of the Portfolio Committee’s debates on the vulnerable witnesses clause of the 2003 version of the Sexual Offences Bill sheds some light on the possible reasons for its exclusion from the Act. At the briefing held on 6 August 2003, the inclusion of clause 15 relating to vulnerable witnesses was questioned, as the former Chairperson of the Committee felt that adequate protection for witnesses was available in the present CPA. In addition, it was argued that the vulnerable witness clause would place an obligation on the court to declare any women or child complainant of a sexual offence as a vulnerable witness, when our law had just moved away from the concept that a female witness was different from any other witness. The former Chairperson continued questioning the logic and sense behind vulnerable witnesses on the basis that the clauses create a separate category of witnesses and, receiving no information on whether the clauses had been costed, said that he was reluctant to pass a law if it could not be implemented.

It is unfortunate that the discussions in the Portfolio Committee focused on these issues, as the clause would allow for added protections for children who, it is common cause, are regularly subjected to secondary traumatisation through the court process of giving evidence. Although many of the protections covered by the vulnerable witness clause are already contained in the CPA (for example giving evidence through CCTV or the use of intermediaries) the declaration of a woman or child to be a vulnerable witness would mean automatic conferral of one or more of the protective mechanisms irrespective of the qualifying criteria in respect of those mechanisms presently contained in the CPA. Therefore the vulnerable witness clause would make protective measures for children (and adults) more accessible.

The Chairperson’s reasons for excluding the provision are, moreover, flawed. First of all, the vulnerable witnesses provision was gender neutral, dealing with complainants and child witnesses, generally. Second, the new legislation indeed moves away from the concept that female witnesses are different from any other witnesses. Specifically, the Sexual Offences Act clearly rejects application of the cautionary rule to victims of sexual abuse — most often women, recognising that the underlying assumption of this rule — that women are likely to lie about being victims

46 PMG minutes, 6 August 2003.
of sexual offences — is incorrect and is based upon inappropriate stereotypes and myths about women and about sexual offences.47 Women are therefore no different than other witnesses in that they are just as likely as any other victim of crime to tell the truth about what happened. This, however, does not mean that sexual offence victims are no different than victims of other crimes in other respects. Indeed, among the explicit objectives of the Sexual Offences Act, as set out in section 2(c)(ii), is to recognise the special needs of sexual offence victims ‘through timeous, effective and non-discriminatory investigation and prosecution.’ In other words, the legislation aims both to recognise difference — by taking into account the personal and intimate nature of the crime and the resulting need, in many cases, for special protection to avoid secondary victimisation — and to ensure equality, by treating women and, theoretically, children, as competent and reliable witnesses, against whom an act of violence has been perpetrated. Thus, the Chairperson’s assertion that evidentiary equality requires abandoning special protections against secondary victimisation demonstrates a severe misunderstanding of the key principles that were meant to — and, rhetorically, at least, still do — underlie the Sexual Offences Act.

This is, perhaps, a telling indication of the general approach taken by the legislature to sexual offences law reform efforts. While the need for equality and non-discrimination against victims of sexual offences is one which parliamentarians understand, the unique nature and consequences for victims of sexual crimes have still not been internalised or appreciated. In this regard, law reform efforts have had only limited success, as they have succeeded in imbibing the law with this important perspective only at the level of rhetoric and not of practice. The rhetoric, however, is an important step on which to build. As indicated throughout this part of the paper, a number of basic protections necessary for victims of sexual offences are available by law, if courts choose to implement them. Prosecutors may now rely upon the Act’s rhetoric, such as the Objects set out in section 2, in arguing for increased implementation of protective mechanisms. This is not ideal. But law reform is not a process that begins or ends with the legislative process.

4. Child Sex Offending

The Law Commission was initially requested to investigate sexual offences by and against children48 — thereby including a focus on children who commit sex offences — before the scope of the investigation was expanded to include sexual offences against adults. However, it must be emphasised that the Sexual Offences Act primarily seeks to afford complainants of sexual offences the maximum and least traumatising protection the law can provide and therefore does not comprehensively deal with the treatment and management of sex offenders except for ensuring more

47 See Chapter 4 in this volume for a further discussion of the cautionary rule.
48 SALRC (note 7 above) 1.
effective and efficient investigation and prosecution of perpetrators of sexual offences.49

On the other hand, law reform in the area of child justice has resulted in the Child Justice Bill which addresses the management of children in conflict with the law and this necessarily includes the management of child sex offenders within the criminal justice system.50 The Child Justice Bill recognises that children who come into conflict with the law need to be treated differently from adults to ensure that they are treated in a manner that allows for their rehabilitation and reintegration into society and that appropriate interventions are imposed on them. This sentiment was echoed in the Law Commission version of the Sexual Offences Bill where it was stated that the child sexual offender should receive special consideration in respect of sanctions and rehabilitation.51

Therefore, this section focuses on the developments in the area of child justice by examining the provisions of the Child Justice Bill and the cases that have come before our courts that have enhanced this field of law.

4.1 Why intervene with young sex offenders?

Pickup argues that gender analysis of human development indicates that one of the main causes of violence against women lies in the unequal power relationship between women and men that entrenches male dominance over women.52 She looks at a number of strategies to combat and challenge violence against women including direct support to survivors of violence, challenging attitudes and beliefs and challenging the State’s responses to violence against women.

One of her strategies is challenging violent men. She notes, however, that mainstream development and humanitarian organisations have not tended to work with men and resist this idea for a number of reasons.53 These include the fact that there are limited resources available for violence against women and these should not be used on the perpetrators but rather the survivors. Likewise, women activists and gender and development policy-makers are reluctant to dilute the political power of their focus on women.

The reason given for developing strategies to engage male perpetrators is that most forms of violence against women will not end until men change.54 It is argued that by...

---

49 For some additional discussion of the sentencing, management and treatment of sex offenders, see Chapter 10 in this book.
50 The Law Commission report mentions the fact, in the section on the sentencing of sex offenders, that the Law Commission Project Committee on Juvenile Justice made detailed recommendations on the sentencing of child offenders and that the Law Commission in its Discussion Paper on Sexual Offences therefore made no further recommendations. SALRC (note 7 above) par 7.6.1.
51 Section 1(m)(iv) of the Law Commission version of the Bill.
53 Ibid 204.
54 Ibid 203.
directly challenging the behaviour of violent men, and ensuring that men and boys are encouraged to reject violence, the goal of achieving safety for women can be reached.55

4.2 Who are young sex offenders?

It is noted that there is a range of types of children who display sexually deviant behaviour. Friedrich explains:

Some children who are called sexually aggressive may not even be intrusive with other children but are simply reacting to their own victimisation in a compulsive, self-stimulating manner. Other sexually aggressive children may engage in very extensive but largely mutual interaction with other children, typically other sexually abused children. Finally, there are sexually aggressive children who truly are intrusive and coercive, but they are quite different from children who are simply reactive to their sexual abuse.56

It is therefore important not to simply generalise when speaking of young sex offenders, but to realise there are varying degrees and classes of offending of this nature.

Likewise, there are differing motives behind children who are sexually aggressive. Araji explores these as follows:57

- Self control: children who are impulsive or compulsive or both.
- Emotions expressed: sexually aggressive children demonstrate deep feelings of anger, rage, shame and loneliness.
- Abuse histories: sexually aggressive children may have been sexually abused but not necessarily. All have experienced some type of abuse — physical, sexual, or emotional — usually multiple types.
- Abuser-Victim relationships: sexually aggressive children seek out others who are perceived as less powerful, unequal in status and who can be controlled.
- Environments: the majority of sexually aggressive children live in dysfunctional-type homes or environments that include families that lack boundaries, especially in the area of sexual activities.
- Treatment outcomes: of all children demonstrating problematic sexual behaviours, children who act sexually aggressive are the most resistant to treatment.

It is therefore evident that appropriate interventions aimed at addressing offending behaviour can be of great benefit in the management of these types of offenders.

In the context of South Africa, there have been limited studies relating to child sex offenders and what causes children to commit sexual offences. In the development of

55 Ibid 201.
57 Ibid 43–44.
the South African Young Sex Offenders Programme (SA YStOP) diversion programme it was decided to develop an intervention that would take into account the specific profile and context of sex offending in South Africa.\textsuperscript{58} A study was therefore conducted which involved interviewing and psychometric testing of 20 South African male sex offenders between the ages of 7–15 years of age.\textsuperscript{59} The results of this study revealed a number of psychological, sociological, behavioural and interpersonal characteristics of children who had allegedly committed a sex offence and this data was used to create a basic profile of the young South African male sex offender.\textsuperscript{60} Some of the central findings\textsuperscript{61} of this study indicated that:

- The child resides in an urban or rural area which is characterised by overcrowding, alcohol abuse, domestic violence and crime.
- He selects a known victim who is younger than him and the offending behaviour is likely to be carried out by one or more co-offenders.
- The child is likely to have been involved in previous incidents of sexual abuse but not likely to have been previously convicted for committing a sexual offence.
- The child may have been a victim of physical or sexual abuse by a relative, step parent or older adolescent.
- He has engaged in consenting sexual interactions with a female peer prior to the offence, he is sexually naïve and has not received any suitable sex education.
- He is likely to have committed a non-sexual offence such as shoplifting, theft and housebreaking prior to the referring sexual offence.
- The child attends school but has usually failed one or more times.
- Behaviourally the child is easily angered, has poor impulse control, plays truant, picks fights, wets his bed, experiences difficulties falling asleep and can be cruel towards animals.
- He is likely to live in a community where he regularly witnesses violence, including murder.
- He is also likely to have witnessed others engaging in sexual intercourse.

Following this study, SAYStOP conducted a third follow-up study in 2003 as part of the evaluation of the diversion programme.\textsuperscript{62} This study included an analysis of 100 assessment forms of youth referred to SAYStOP and semi-structured interviews


\textsuperscript{59} This study was conducted by Wood, Welman and Netto in 2000. Wood highlights that the profile of the young sex offender was generated from information received from a narrowly focused group and the children were from the Western Cape province only. Also, a very small sample of children was interviewed due to difficulties in obtaining participants and any interpretation and discussion of this profile must be considered within these limitations.

\textsuperscript{60} Wood and Ehlers (note 58 above) 8.

\textsuperscript{61} Ibid.

conducted with 67 youth and caregivers who participated in SAYStOP in 2002. The profile indicates that the majority of youths referred to SAYStOP are from the Western Cape, male, 14–16 years of age, Afrikaans speaking and scholars (Grade 6–8). Over 40% of youths experience substance abuse at home or have family members in conflict with the law, whilst approximately 20% have been removed from care. The majority are first time offenders who committed indecent assault. Most offended in a group and in most instances, victims were friends.

Regionally, the study suggests that youth in the Western Cape are younger, offend mostly in groups and commit spontaneous acts of indecent assault. The victim in most instances is a friend or schoolmate. There appear to be high levels of alcohol abuse, domestic violence and delinquency within the home and social group. In the Eastern Cape, the youth seemed to be older, and offend alone with rape being most common. The victim can be a friend or a stranger and there appeared to be greater premeditation. Families appear smaller and mostly headed by single mothers or grandparents with sex being a strong cultural taboo.

A study undertaken by Linda Dhabicharan of Childline, KwaZulu-Natal, in 2003 entitled *The Life Experiences of Adolescent Sex Offenders: Factors within the family that contributed to offending behaviours* highlights the factors in the life of the young sex offender that pre-disposed him to sexually offending and to the behaviour and the immediate factors that led to the offence. The methodology involved a qualitative study using purposive sampling based on an ecosystemic paradigm with 25 adolescent sex offenders and the data was gathered over a period ranging from 6 months to 2 years.

The study revealed that the adolescents were exposed to difficult family dynamics where 78% of the adolescents were exposed to domestic violence and 68% were exposed to either one or both parent engaging in substance abuse. All of the adolescents experienced interactional and relationship problems with their parents. Some were exposed to parental depression and parental immaturity. Most of the children had mentioned that they had poor parental role models and single parents were a common factor amongst the study participants, with the father being absent either physically or emotionally. In addition, intergenerational patterns of abuse emerged from the study. Further, the study showed that 44% of the participants had negative, disrespectful and distorted views of women, 48% presented with poor school performance and 88% were exposed to pornographic material and inappropriate sexual messages from family and peers.

What is evident is that there is a dearth of information on child sex offenders in South Africa, and likewise a very small number of interventions to address their problems. There is a pressing need to undertake a comprehensive study into child sex offending in South Africa as well as a review of interventions — specifically

---

63 By the third follow-up study the diversion programme had been rolled out to the Eastern Cape.
examining the issues of ‘what works’ and ‘what doesn’t work’ — in order to inform how their problems and behaviour can be addressed.

5. Background to Child Justice Developments in South Africa

Prior to 1994 special focus had been placed on children accused of crimes and detained for their political beliefs. However, once the transition to a democratic form of government occurred, attention turned to children who were detained for common criminal offences. During the 1990s, concerted efforts were undertaken by both government and non-governmental organisations to ensure that the rights of children in conflict with the law were adequately protected.

Against the backdrop of the ratification of the United Nations Convention on the Rights of the Child and some ad hoc amendments to the Correctional Services Act in relation to children awaiting trial in prison,64 a project committee of the Law Commission was appointed in 1996 to investigate juvenile justice. The Child Justice Bill was a product of four year’s work that included extensive consultation with role-players, experts and even children themselves.

The Child Justice Bill was aimed at protecting the rights of children accused of committing crimes as well as regulating the system whereby a child is dealt with and ensuring that the roles and responsibilities of all those involved in the process are clearly defined in order to provide effective implementation. The effect of the Bill being adopted as legislation would be to revolutionise the criminal justice system in South Africa in so far as it affects children in conflict with the law.

The Law Commission version of the Child Justice Bill was handed to the Department of Justice and Constitutional Development (DoJ) in 2000. A period of planning for implementation of the Bill then commenced with the DoJ, inter alia, commissioning a costing of the Bill and liaising with other departments regarding their implementation responsibilities. In 2002 the Bill was approved by Cabinet and introduced into Parliament as Bill 49 of 2002.

This tabled version of the Bill had not significantly changed from the Law Commission version. While there were cosmetic changes to the text such as the introduction of certain technical terms and the re-structuring of certain sections in the Bill, the substance of the Bill essentially remained the same. The tabled version of the Bill still called for all children who had been arrested to be assessed, to appear at the preliminary inquiry process and to be eligible to be considered for diversion irrespective of the offence with which they were charged.

---

64 In 1995 s 29 of the Correctional Services Act was amended to allow for the release from detention of all children in prison awaiting trial except in certain limited circumstances. Unfortunately, due to the fact that welfare facilities could not cope with the sudden influx of children, the implementation of this provision was not successful and s 29 was amended again. This amendment, which came into effect in May 1996, provided for the detention of children awaiting trial who were older than 14 years of age and who were charged with certain offences.
It should be stressed that such a piece of legislation, aimed at ensuring that rights of children who are in conflict with the law are protected, should not be seen as ‘being soft on crime’. While addressing crime is a dire need in South Africa today, these efforts must be directed and co-ordinated in such a way that, in the case of children, the rights of the accused are protected and steps are taken by the State to manage the offender in a way that will impact on and change behaviour patterns to prevent re-offending. It is argued that an overall punitive approach towards offenders, especially towards child offenders, is not desirable except in necessary cases, and that restorative justice and the systems that will facilitate this should be prioritised. The outcome of ensuring that certain procedural mechanisms are in place for children in conflict with the law means not only that the child receives individualised treatment aimed at ensuring the best possible outcome for him or her, but that the outcome also addresses public safety.

5.1 Tracing the development of the Child Justice Bill

It is important to note some of the sections of the Child Justice Bill 49 of 2002 that significantly change the present state of our child justice law. These relate to the proposed preliminary inquiry, assessment, diversion and sentencing. While these provisions contribute to the reform of the child justice system in general, they are also of considerable importance in the context of young sex offenders.

The Law Commission version of the Child Justice Bill created a wholly new procedure to facilitate the management of children in conflict with the law, namely, the preliminary inquiry, which makes use of current resources and personnel. This inquiry has a number of objectives, which include establishing whether a child can be diverted and, if so, identifying a suitable diversion option; determining the release or detention of a child and establishing whether the child should be referred to the children’s court to be dealt with in terms of the Child Care Act 74 of 1983 (or once promulgated the Children’s Act 38 of 2005).65

The Bill also required that any child who is to appear at a preliminary inquiry must be assessed prior to that appearance,66 although an assessment can be dispensed with in certain circumstances. An assessment is conducted by a probation officer and it is intended to serve a number of purposes: estimating the age of a child; establishing the prospects for diversion; establishing whether a child is a child in need of care; making recommendations relating to the release or detention of a child and determining steps to be taken in relation to children below 10 years of age.

The result of the assessment is a set of recommendations submitted to the preliminary inquiry magistrate pertaining to the management of the child. This procedure will be invaluable in determining which children can be dealt with outside of the criminal justice system and then ensuring that they realise that opportunity.

65 Clause 56(4).
66 Clause 42.
Specifically in relation to young sex offenders, assessment can play a vital role in determining the suitability of diversion. Assessment can determine whether the child needs interventions that could, for instance, address the need for awareness of appropriate sexual behaviour towards others, help the child identify different feelings that people have and create an understanding of feelings of powerlessness and how this relates to situations of abuse — thereby initiating the process of preventing relapse. As noted above, these proposals contained in the Law Commission version of the Bill were retained in the tabled version introduced to Parliament in 2002.

As is the case with assessment, diversion does not feature in our criminal justice legislation at present. Despite this, diversion practices have been implemented in some of our courts since the early–1990s. Diversion involves the referral of children away from the criminal courts, where appropriate, in order to serve a number of purposes, which include encouraging the child to accept responsibility for his or her actions, allowing the victim to express his or her views on the harm caused, promoting reconciliation between the offender and the victim(s) and community, avoiding stigmatising the child and preventing him or her having a criminal record.

The Law Commission version of the Child Justice Bill proposed various forms of diversion. These options ranged from receiving a formal caution or compulsory school attendance order to the attendance of a specified programme or referral to a programme with a residential element. The Bill also set out certain criteria and minimum standards applicable to diversion programmes to ensure due process protections, the avoidance of harmful or exploitative practices and the inclusion of restorative justice elements, as well as ensuring the development of the child’s understanding of the impact of his or her behaviour on others. Again, these proposals were retained in the 2002 tabled version of the Bill.

In relation to young sex offenders, there had been a gradual realisation that specific diversion programmes needed to be developed to address this particular category of child offender. Over the last 10 years certain programmes have been developed and are regularly used by courts as appropriate interventions for specific offending behaviour. These interventions include:

- **Childline, Kwa-Zulu Natal**, which offers a rehabilitation programme aimed at sex offenders — both adult and child. It operates as a diversion programme which is also available for sentenced sex offenders.
- **The Teddy Bear Clinic at the University of the Witwatersrand**, which started as a medico-legal clinic in 1986, extended its services in 2000 to offer therapeutic interventions, child witness court preparation programmes, forensic assessments and juvenile offender programmes.
- **SAYStOP, the South African Young Sex Offender’s Programme**, which was formed in 1997 for the purpose of seeking innovative and effective interventions to treat and manage young sex offenders with the aim of preventing a pattern of deviant behaviour from being established and decreasing the possibility of further
offending, developed a diversion programme specifically for young sex offenders in the Western and Eastern Cape.

- Sex offender programmes offered by some of the provincial Departments of Social Development as well as the Department of Correctional Services.

Whilst the CPA contains a wide range of sentencing options to be used in matters pertaining to children, the Law Commission decided to re-appraise the sentencing of child offenders as it recognised the impact of the concept of restorative justice on the criminal justice system, the effect of our Constitution on the traditional aims of punishment and the shift in the international approach to sentencing from rehabilitation to reintegration into society. Therefore the Child Justice Bill, as introduced in Parliament, is constructed in such a way as to encourage the use of alternative sentences and allow for the imprisonment of children only as a last resort and for the shortest period of time. These alternatives to prison provide a viable manner for children to be held accountable and receive age appropriate interventions to address offending behaviour, such as sex offending, and reduce the chance of recidivism. Some of the alternatives used can be the same programmes that are available for diversion, as set out above.

### 5.2 Changes effected to the Child Justice Bill by Parliament

In 2003 the Portfolio Committee on Justice and Constitutional Development held public hearings and was briefed by government departments and civil society on Bill 49 of 2002. During the debates that took place before the Portfolio Committee in 2003, the Bill underwent certain changes. Although the ethos of the Bill remained the same — in that the processes of assessment, diversion, the preliminary inquiry and alternative sentencing remained intact — the overall child rights nature of the Bill that focused on the individual child offender was whittled away by the Portfolio Committee. The result was that at the end of 2003, the Bill was not yet finalised. The instruction was given by the Portfolio Committee to the drafters to make certain provisions of the Bill far more punitive in nature and the Committee also made it clear that they did not want to allow for many of its provisions to apply to children charged with serious scheduled offences, possibly including rape.

At the end of 2003 Parliament went into recess in anticipation of the 2004 general elections. When Parliament reconvened with a newly appointed Portfolio Committee the following year, the Child Justice Bill was not on the parliamentary agenda. In fact the Portfolio Committee failed to discuss the Bill at all during 2004, 2005 and

---

67 Clause 87 and 88.

68 The authors of this chapter attended all the parliamentary debates and noted the discussions that occurred resulting in the changes.

69 Other changes relate to the imprisonment of children under the age of 14 years in relation to both awaiting trial and sentenced children.
2006. Only late in 2007 was the Bill placed before Cabinet again and new submissions called for.

The 2007 version of the Child Justice Bill differed significantly from the 2002 tabled version of the Bill. The proposed changes that the Portfolio Committee had made during the 2003 deliberations had been effected and the Bill now excluded some children from assessments based on the nature of the offence with which they were charged; excluded some children from the preliminary inquiry based on their age and offence with which they were charged; and excluded some children from the possibility of diversion based on their age and the offence with which they were charged.

Importantly, the changes have consequences for sexual offences committed by children. The Law Commission version and 2002 tabled version of the Child Justice Bill allowed for the possibility of all children to be diverted away from the criminal justice system, irrespective of the offence that the child had committed, provided obviously that diversion was appropriate and the child had met certain criteria. However when Bill 49 of 2002 was debated by the Portfolio, the Committee was not in favour of such a provision and excluded certain serious scheduled offences from the possibility of diversion. In line with the Committee's punitive approach to serious child offenders, not only were they excluded from the possibility of diversion, but children charged, for example, with murder would also be excluded from the assessment procedure and attendance at the preliminary inquiry. Initially, the Committee decided that all children charged with rape would also be excluded from diversion, assessments and the preliminary inquiry.

After a written submission by Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN), an NGO dealing with child victims, the Committee reversed this decision so as to allow certain children — those below age 14 or 16 — the possibility of diversion if charged with rape. However, the determining age was not finalised during the 2003 debates. While it was encouraging that the Committee was prepared to consider the possibility of diversion for rape, precisely because of the argument that intervening with young sex offenders can reduce the risk of re-offending, it was concerning that they still wished to exclude some children from this provision on account of their age. This is despite the fact that current child justice practice allows for any child charged with rape to be diverted (if appropriate) to programmes such as the SAYStOP diversion programme or the Childline programme.

The 2007 Cabinet version of the Child Justice Bill made provision for including the Portfolio Committee's views on diverting children charged with rape and so excludes children 14 years and older who are charged with rape from the possibility of diversion. Written submissions were called for on the 2007 Cabinet version of the Child Justice Bill and public hearings were held in February 2008. Civil society was unanimous in its condemnation of the bifurcation of the application of the Bill's processes based on the age of children and the offences with which they were
charged. The call for all children to be assessed, attend the preliminary inquiry and be eligible for diversion was made not only by organisations dealing with offender issues, but also child victim organisations such as Childline and RAPCAN. At the time of writing, the Portfolio Committee is still deliberating on the Bill and it remains to be seen whether they will revert to the original version or retain the approach embodied in the 2007 Cabinet version.

6. Case Law Developments Relating to Child Justice

In the interim, and in the absence of the Child Justice Bill being enacted, our superior courts have developed specific child justice jurisprudence that has emphasised the need for a separate child justice system, confirmed South Africa’s international and constitutional obligations in relation to child offenders, and endorsed the protections afforded to children in trouble with the law as proposed in the Child Justice Bill, through for example, pre-sentence reports, diversion and alternative sentencing.

Case law has ensured that the seriousness of the offence does not trump the need for pre-sentence reports. The decisions have made it clear that courts require such reports irrespective of the offence for which the child is found guilty. This accords with the fact that a sentencing officer needs to be informed of all the relevant circumstances in the case and of the accused before being able to hand down an appropriate sentence. In the case of sex offenders, this is all the more imperative if one has regard to the research mentioned above. Appropriate interventions with young sex offenders, based on knowledge of the circumstances of children who offend sexually, can result in the reduced possibility of re-offending.

7. Conclusion

Since children are arguably the most vulnerable members of our society and in need of protection particularly when victims of a sexual offence, all efforts must be made to

---

70 S v Petersen en ’n ander 2001 (1) SACR 16 (SCA); [2001] 2 All SA 349 (A); S v Buys en ’n ander 2002 (JOL) 9662 (C); S v Lugwali and another 2001 (JOL) 7696 (Ck); S v Mabila and another 1999 (JOL) 5111 (T); S v Tafeni and another 2001 (JOL) 8251 (Tk); S v Masibi 2005 (JOL) 15159 (T); S v Bhoqwana and another 2004 (JOL) 12833 (Tk); S v S 2001 (2) SACR 321 TPD; S v Van Rooyen 2002 (1) SACR 608 (C).

71 S v Z en 4 ander sake 1999 (1) SACR 427 (E).

72 S v R 1993 (1) SACR 209 (A).

73 Child sex offenders were only dealt with in the Sexual Offences Bill terms of s 23(1) of the Law Commission version of the Bill and s 20(1) of the 2003 version. In terms of these provisions a court could declare a person who has been convicted of a sexual offence a dangerous sexual offender if that person had more than one conviction for a sexual offence, was convicted of a sexual offence which was accompanied by violence or threats of violence or had been convicted of a sexual offence against a child unless that person was a child himself or herself. This test for a dangerous sexual offender was very broad and inclusive. For example, s 20(1)(a) of the 2003 version, resulted in a scenario where a person could be declared a dangerous sexual offender if they had been convicted of two sexual offences, irrespective of whether those offences were accompanied by violence or other aggravating circumstances. This section was removed from later versions of the Bill and did not make it into the Sexual Offences Act.
ensure that when they are required to appear in court and be subjected to the daunting criminal justice system, appropriate mechanisms are available to them to lessen the trauma that this experience may expose them to. Likewise, one of the results of the intensive work in child justice over the last two decades has been the recognition that there are certain groups of child offenders, within the greater category of children who come into conflict with the law, that need special management and interventions. For South Africa, this realisation first manifested itself in relation to young sex offenders.

The Sexual Offences Act seeks to ensure that victims of sexual crimes are adequately protected under the law — both by improving procedural aspects of our law as well as expanding the substantive law to reflect the nature of sexual offences committed against women and children in our present society. Although there are a number of provisions that do exist in the CPA that aim to protect children who appear in court to testify, these are not adequately implemented by the courts. It is, therefore, disappointing that the classification of vulnerable witnesses as a special category of witnesses requiring protective measures, identified by the Law Commission through its extensive consultative process, has been excluded from the Act.

In relation to child sex offenders the development of programmes to address their behaviour as well as law reform efforts to create a separate child justice system where their needs can be determined and addressed shows, on the one hand, a commitment to prevent re-offending and further violence against women and children. However, on the other hand, it is unfortunate that the South African legislature appears to be relatively unconvinced of the beneficial nature of appropriate interventions for children who sexually offend.

In both of these areas of law, both the Law Commission and the Department of Justice invested very extensive efforts to formulate recommendations aimed at achieving a legal environment that better upholds and protects the basic rights and needs of children. Unfortunately, it appears that this goal is less of a priority for Parliament. It is important that law reformers explore more deeply the reasons for Parliament’s reluctance in this regard so that child right advocates are better informed about the obstacles they face.

Notwithstanding the above, the efforts made to date do constitute real developments in the treatment of children within this particular field of criminal justice. Whether these are enough remains to be seen and, as is the nature of law reform, it is only implementation that will determine the effectiveness of the legislative provisions and the extent to which they realise the rights of children as vulnerable and in need of protection.

In the meantime, while the Child Justice Bill remains un-finalised, there still exists the chance that concerted advocacy and information dissemination might result in a child justice system that effectively addresses the needs of both victims of sexual offences as well as the offenders.
HALF-HEARTED HIV-RELATED SERVICES FOR VICTIMS

STEFANIE ROEHRS*

1. Introduction

South Africa is currently confronted with two intersecting legal and public health concerns: extremely high levels of violence against women and a very high prevalence of HIV infection. In 2006/2007 the South African Police Service (SAPS) received 52 617 reports of rape and this is just the tip of the iceberg, given that sexual offences are highly underreported.1 At the same time, experts estimate that around 5.37 million people are infected with HIV in South Africa.2 The legislature therefore felt compelled to explore appropriate state responses to reduce the risk of HIV infection in victims of sexual offences.

The deliberations of the South African Law Reform Commission (‘the Law Commission’ or ‘the Commission’) and Parliament’s Portfolio Committee on Justice and Constitutional Development (‘the Committee’ or ‘the Portfolio Committee’) focussed on two distinct services: (1) the administration of post-exposure prophylaxis (PEP); and (2) compulsory HIV testing of alleged sex offenders at the request of victims. This chapter critically reviews the law reform process relating to these two services and carefully analyses their potential benefits and drawbacks. Although both services appear well intended, it will be shown that they actually fail to afford victims the envisioned ‘maximum and least traumatising protection that the law can provide’.3 The analysis of the compulsory HIV testing provisions raises the question

* Stefanie Roehrs, Dr of Law (Würzburg) is a researcher at the Gender, Health and Justice Research Unit in the Faculty of Health Sciences at the University of Cape Town. Sincere thanks go to Sarai Chisala for her contributions to this chapter.


2 R Dorrington, I Johnson, D Bradshaw and J Daniel (2006) The Demographic Impact of HIV/Aids in South Africa 8. According to media reports, the Development Bank of South Africa (DBSA) estimates that more than 7.6 million South Africans are HIV positive. See E Momberg ‘Development Bank releases shocking statistics on Aids in SA’ The Sunday Independent 4 May 2008. The Mail & Guardian, however, reported that these figures have not been validated by the DBSA. See ‘Suspicious’ Aids figures not validated Mail & Guardian Online. Available at http://www.mg.co.za/article/2008-05-06-suspicious-aids-figures-not-validated.

3 Section 2 (1).
of whether the legislature truly aimed to assist victims of sexual offences, or simply wanted to create a measure that was geared at assuaging (misplaced) public concerns.

When evaluating the law reform process, one has to bear in mind that until recently the political will to address HIV/AIDS has been limited to say the least, and that even today political decision-makers struggle with implementing an appropriate response to the epidemic. Despite the welcome rhetorical commitment contained in the National Strategic Plan on HIV and AIDS 2007–2011, shortcomings and inconsistencies remain in practice. Recent examples include the delay in updating national health policies and the charges levelled at an HIV clinician for giving dual therapy to his patients where this was indicated. Sarai Chisala’s chapter in this volume provides a more detailed overview of the social context of rape and HIV/AIDS.

2. Post-Exposure Prophylaxis

In addition to various other traumatising effects, rape survivors face the risk of having been exposed to HIV/AIDS through a sexual offence. The risk of HIV transmission is particularly high following violent sexual intercourse. Rape, especially repeated rapes, may lead to (micro) injuries in the genital organs and/or anus, which facilitate the transmission of the virus. In multiple-perpetrator or gang rapes, which researchers estimate account for a third of rapes in South Africa, there is not only an increased risk for injury, but also more than one potential source of HIV infection. In addition, women — disproportionately victims of sexual assault — are physiologically more susceptible to HIV transmission because the vagina has a greater mucosal surface than the penis and semen has a higher viral load (making it more infectious) than vaginal fluids.

---


5 See B Beresford ‘SA behind the times on HIV treatment’ Mail & Guardian Online 14 April 2008. Available at http://www.mg.co.za/article/2008-04-14-sa-behind-the-times-on-hiv-treatment. With regard to the HIV clinician who was charged see ‘KZN doctor cleared on treatment charge’ Mail & Guardian Online. Available at www.mg.co.za/articlePage.aspx?articleid=332968&area=/breaking_news/breaking_news_national. In a nutshell: An HIV clinician who treated babies of HIV infected mothers with dual therapy (two types of antiretroviral drugs instead of just one drug) was charged with misconduct in KwaZulu-Natal because he had acted against national policy. The charges were, however, dropped after a public outcry and protest by health care professionals around the country.


Due to rape survivors’ vulnerability to HIV, it is essential that they are provided with PEP. The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (‘Sexual Offences Act’ or ‘the Act’) is the first piece of legislation that stipulates that rape victims have a right to receive PEP if they have been exposed to HIV as the result of a sexual offence.9

2.1 Background on PEP

PEP is a 28-day antiretroviral treatment that reduces the likelihood of HIV infection after potential exposure.10 PEP must be started within 72 hours of exposure to HIV, which means within 72 hours of the commission of the sexual offence. Fong, however, points out that the medication is most effective if it is started within one or two hours of exposure.11 The United States based Centers for Disease Control and Prevention, though reluctant to give a concrete timeframe, emphasise that the earlier the drug-cocktail is started the more effective it is.12

Although the risk of HIV infection and the efficacy of PEP have been well documented in occupational settings, there is insufficient data regarding the use of PEP post-sexual assault.13 Very few South African studies have explored the efficacy of the drugs after a sexual offence.14 Part of the problem when measuring their efficacy is to determine whether an HIV-seroconversion (ie becoming infected with HIV) is a result of failure of the medication, or whether it has been caused by other factors, such as unprotected sexual activity during the 28-day treatment period or failure to complete the drug regimen.15

Critics of PEP post sexual assault have expressed concerns about a number of issues, including the lack of data on the efficacy of PEP, adherence to the complicated drug regimen, side effects, the potential for as yet unknown long-term

---

9 Section 28(1)(a)(i).
10 World Health Organisation ‘Post Exposure Prophylaxis’. Available at www.who.int/hiv/topics/prophylaxis.
13 C Fong (note 11 above) 242.
15 Victims may have been infected, for example, through unprotected sexual intercourse with another sexual partner during the 28-day treatment. An infection could also result from missing too many tablets or not completing the 28-day treatment.
complications, and costs. These concerns can partly be rebutted. Animal studies show that after initial exposure to the virus, HIV replicates within cells of the skin and mucosa before spreading into a systemic infection. This delay of transmission leaves a ‘window of opportunity’ for PEP, which is designed to block the replication of HIV. The medication intends to prevent the virus from entering and multiplying in the cells of the host, thereby avoiding chronic HIV infection. Furthermore, patients’ adherence can be improved by treating side effects, intensive adherence counselling and other interventions, such as follow-ups with the patients. While the cost of a full course of PEP is considerable (the tender price is between R130 and R450 for a 28-day course, depending on the drug regimen chosen), it pales in comparison to the lifetime costs of treatment for an HIV positive individual.

The bottom line is that PEP reduces the chance of infection in individual people and can increase the control that victims of sexual violence have over their own health.

2.2 State response to PEP for victims of sexual offences

Despite the fact that the South African government still entertained dissident views around HIV, it began to address HIV/Aids treatment for certain vulnerable groups in 2002. In all likelihood, this initiative can be linked to judicial pressure in the form of a temporary ruling of the Constitutional Court in the case of Minister of Health v Treatment Action Campaign. The government adopted a policy of providing a comprehensive package of care for victims of sexual assault, including access to antiretrovirals as preventative drugs in public health institutions. A disjointed rollout of the new treatment policy followed. In the absence of a national implementation plan (until very recently), provinces responded individually to the roll-out of PEP. In 2004 Human Rights Watch (HRW) reported that many

---

16 Canadian Aids Treatment Information Exchange (no date) PEP: Post-exposure prophylaxis (treatment after exposure to HIV) Available at www.catie.ca.


18 Ibid.

19 Roland et al. (note 14 above).

20 For a detailed analysis of the cost and cost-effectiveness of PEP see N Christofides, D Muirhead, R Jewkes, L Penn-Kekana and N Conco (2006) Including Post-Exposure Prophylaxis to Prevent HIV/Aids into Post-Sexual Assault Health Services in South Africa: Costs and Cost Effectiveness of User Preferred Approaches To Provision Medical Research Council, 40.


22 Minister of Health v Treatment Action Campaign 2002 (5) SA 703 (CC).


government facilities were still unaware of the new policy.25 Many rape survivors had not received PEP simply because neither they nor the various agencies charged with providing services had any idea that PEP existed, where to get the medication, or how to administer it.26

Although there are now policy guidelines in place that set out the management of HIV for sexual assault survivors,27 it is still doubtful that these guidelines are fully implemented in public health facilities across provinces. Furthermore, as will be discussed below, these guidelines are particularly problematic for children under the age of 14.

2.3 The Law Commission’s recommendations

In 2001, following their investigation into sexual offences, the Law Commission recommended that medical treatment and counselling should be provided to victims of sexual offences at State expense.28 The provision was slightly broadened in the Commission’s Report on Sexual Offences,29 making specific reference to sexually transmitted diseases. The relevant clause in the draft Bill proposed in this Report read:

21(1) Where a person has sustained physical, psychological or other injuries as the result of an alleged sexual offence, such person shall, immediately after the alleged offence, receive the appropriate medical care, treatment and counselling as may be required for such injuries.

(2) If a person has been exposed to the risk of being infected by a sexually transmissible infection as the result of a sexual offence, such person shall, immediately after the reporting of the alleged offence to the South African Police Services or to a health care facility —

(a) be advised by a medical practitioner or a qualified health care professional of the possibility of being tested for such infection; and

(b) have access to all possible means of prevention, treatment and medical care in respect of possible exposure to a sexually transmissible infection.


26 Ibid.


(1) If it has been established that a person has sustained physical or psychological injuries as a result of a sexual offence, such person shall, as soon as is practicable after the offence, receive adequate medical care, treatment, and counselling as may be required for such injuries.

(2) The State shall bear the cost of the medical care, treatment and counselling referred to in subsection (1).

(3) The State shall bear the cost of the care, treatment, testing, prevention and counselling as referred to in this section.

The treatment provision deliberately avoided specifying the type of treatment that victims should receive, thereby leaving the provision open to changes in science. However, bearing in mind the timeframe within which PEP is thought to be effective, the Commission stipulated that a victim should receive appropriate medical care immediately after the alleged offence. In an attempt to ensure that victims receive comprehensive and adequate information around the possibility of having been exposed to HIV, the provision imposed a duty on the attending healthcare professional to advise the victim of the possibility of being tested for infection. It furthermore required the State to bear the cost for appropriate medical care, treatment and counselling for all physical, psychological or other injuries in sexual offence cases. This comprehensive treatment provision then went before the Portfolio Committee.

2.4 The Portfolio Committee’s deliberations

It was clear that the Law Commission’s proposed treatment provision would lead to substantial financial expenditure for the State. In 2003, Cabinet removed the treatment provision from the draft legislation, arguing that by legislating such an obligation, the State would be bound to ensure that financial resources were available to provide for such treatment. A Cabinet spokesperson expressed the view that such responsibility should not be placed on government but should rather be a ‘principled position’.

Concerned non-governmental organisations (NGOs) appealed to the Portfolio Committee to reinstate the treatment clause, arguing that this would ensure the enforceability of the PEP provision as well as the formal resource allocation for HIV/Aids treatment needs. In response to the Committee’s questions concerning the cost of PEP treatment, an NGO spokesperson stated that treatment cost around R200, pointing out that this did not seem an inordinate amount given the cost of treating a woman who had contracted HIV/Aids.

---

31 PEP is most effective within two hours of exposure, but is recommended up to 72 hours after exposure. See Fong (note 11 above) 244.
32 SALRC (note 29 above) Annex A, s 21 (2).
33 Ibid. Section 21 (3).
35 Ibid.
When the Portfolio Committee reconvened in 2004, the treatment clause was still absent from its working draft of the Criminal Law (Sexual Offences and Related Matters) Amendment Bill (Sexual Offences Bill or ‘the Bill’). The Chair explained that the treatment clause would not reappear until the Committee received an indication by the Department of Health that it had conducted the necessary cost evaluation.37

The Committee authorised the Chair to cooperate with the Department of Justice and develop a revised version of the Bill for further deliberations after the 2004 elections.38 This redrafted version was presented in 2006. It contained a new chapter dealing with services for victims and the compulsory HIV testing of sexual offenders.

In the 2006 version of the Bill the provision stipulated that if a victim had been exposed to the risk of infection as a result of a sexual offence, they were entitled to receive PEP at designated health establishments. The proposed provision that was subsequently incorporated into the Sexual Offences Act reads as follows:

28(1) If a victim has been exposed to the risk of being infected with HIV as the result of a sexual offence having been committed against him or her, he or she may—

(a) subject to subsection (2)—

(i) receive PEP for HIV infection, at a public health establishment designated from time to time by the cabinet member responsible for health by notice in the Gazette for that purpose under section 29, at State expense and in accordance with the State’s prevailing treatment norms and protocols;

(ii) be given free medical advice surrounding the administering of PEP prior to the administering thereof; and

(iii) be supplied with a prescribed list, containing the names, addresses and contact particulars of accessible public health establishments contemplated in section 29(1)(a).

It is obvious from the provision that the complainant’s right to treatment has been significantly reduced. The entitlement is now conditional upon the victim either laying a charge with the SAPS or reporting the sexual offence at a designated health facility and the treatment itself is only available at those designated facilities.39 Furthermore, the clause fails to stipulate any medical treatment other than PEP and does not include counselling.

2.5 Critical analysis and implementation challenges

Since it is imperative that victims of sexual violence have access to PEP, it is commendable that the Act provides for this treatment at State expense. However, as the law reform process progressed, the debate moved from whether the State should

38 PMG Minutes of 19 June 2006.
39 The nomination of ‘designated health facilities’ must be made by the Department of Health, see s 66(3)(a) of the Act.
provide PEP for victims of sexual offences to how the legislation should do so. The critical question was whether PEP should be made available in health institutions everywhere — including private health facilities — or only in designated clinics. Ultimately, the legislature’s answer to this question, and consequently its approach to addressing the health needs of survivors of sexual violence, seems rather half-hearted.

2.5.1 Access to PEP

Access to PEP is limited, since a victim is only eligible for treatment if they lay a charge or report the incident at a designated health establishment. The condition of laying a charge seems to prioritise the interests of the criminal justice system over the victim’s need to immediately access PEP. A number of adverse consequences may follow. If a victim must first lay a charge, this increases the risk of being lost in the system between referrals, resulting in no access to the potentially life-saving medication. The requirement of reporting the alleged offence may also lead to time delays in relation to the initiation of the medication. As has been pointed out earlier, PEP should be started as soon as possible after HIV exposure, since its efficacy decreases rapidly over time. The legislature’s view that paperwork is more important than getting the patient started on the drugs may therefore increase victims’ risk for HIV transmission. It should also be taken into account that secondary victimisation often accompanies reporting.

Furthermore, in light of the need for immediate access to PEP, it is of extreme importance that treatment be available and accessible in all public healthcare facilities and not only those designated by the Department of Health. This is especially pertinent because of the distances victims of sexual violence often have to travel to reach a healthcare facility, as well as resource constraints. Delays in initiating PEP, and low adherence levels thereafter, can often be traced back to access and cost factors related to reaching police stations or health facilities.

2.5.2 Adherence to PEP

Another anticipated difficulty is the reportedly low adherence to PEP treatment. In recognition of this, positive duties need to be imposed upon health-care workers to do all that is within their power to ensure that patients adhere to their PEP regimens. This may be accomplished through comprehensive National Regulations relating to the PEP provisions accompanied by comprehensive training on PEP and adherence.

---

41 Section 28(2).
42 Kistner (note 24 above) 25.
43 Ibid.
interventions. In general, there is a great deal of invaluable expertise among the many NGOs that have been providing antiretroviral therapy services in the country. These NGOs need to be consulted extensively when formulating and implementing protocols for the examination, treatment and support of victims.\textsuperscript{45} Alarminglgy, the first draft of the National Regulations fails to impose appropriate duties on both police officers and medical staff dealing with the PEP provision. Important aspects of the management of PEP (such as urgency of initiation, adherence, window period etc) are not mentioned at all in the draft document.\textsuperscript{46}

2.5.3 Management of children
A further gap in the PEP provision is the lack of specific reference to the management of children younger than 14 years. This is alarming because a high number of sexual offences are committed against children.\textsuperscript{47} Children require special treatment and care, including a different drug regimen than adults. In the absence of legislation, existing policy guidelines apply. The National Department of Health’s \textit{Policy Guidelines for Management of Transmission of Human Immunodeficiency Virus (HIV) and Sexually Transmitted Infections in Sexual Assault},\textsuperscript{48} do not, however, apply to children younger than 14 years of age. More general policies, such as the \textit{National Antiretroviral Treatment Guidelines},\textsuperscript{49} only address general antiretroviral treatment for children who are infected with HIV, but fail to make reference to the administration of PEP (type of drug, dosage etc). Only the Department of Health’s 2004 \textit{National Management Guidelines for Sexual Assault Care}\textsuperscript{50} entail a brief description of types of drugs and dosages for children under the age of 14, but the policy does not provide comprehensive guidance on how best to manage child victims.

One aspect that is particularly difficult in the management of child complainants is consent to the treatment. Health legislation and sexual assault policies emphasise that

\textsuperscript{45} Ibid.
\textsuperscript{46} Draft Regulations in Terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, DR41207B (SOBReg15208).
\textsuperscript{47} There seem to be no exact numbers on how many children below the age of 14 have been sexually abused. Simelela, a clinic for rape survivors in Khayelitsha, reports that the 63\% of survivors presenting at the clinic are girls younger than 18 years. See Simelela (2006) \textit{Surviving Rape — An Integrated Service for Rape in Khayelitsha, South Africa} 17. Vetten found that of a sample of 83 cases, 18 were committed against children below the age of 16. See L Vetten (2008) \textit{The Mismeasure of Harm: An Analysis of Rape Sentences Handed Down in Regional and High Courts in Gauteng Province} 11. The Centre for Aids Development, Research and Evaluation (CADRE) also gives a useful overview of experiences and statistics from various NGOs operating in the area of child abuse. See CADRE (2004) \textit{Child Abuse and HIV/AIDS in South Africa} 15.
\textsuperscript{48} National Department of Health (note 27 above).
\textsuperscript{49} National Department of Health (no date) \textit{National Antiretroviral Treatment Guidelines}. Available at www.doh.gov.za/docs/factsheets/guidelines/artguidelines04/index.html.
\textsuperscript{50} National Department of Health (2004) \textit{National Management Guidelines for Sexual Assault Care}. 
medical treatment requires the consent of the patient/victim. Generally, children below the age of 14 cannot legally consent. This suggests that if a child is unaccompanied or his or her parents refuse to grant the necessary consent, the child can neither be tested for HIV, which is a prerequisite to obtain PEP, nor be treated with the drugs.

The Children’s Act 38 of 2005, on the other hand, stipulates that in the case of an HIV test, a child can give consent if the child is 12 years of age or under the age of 12 years but ‘is of sufficient maturity to understand the benefits, risks and social implications’ of being tested. As a result, a rape complainant who is 12 years old or has adequate maturity could consent to an HIV test. The relevant clause of the Children’s Act only refers to consent for an HIV test, though, and does not make any reference to medical treatment or PEP. So what is the age of consent for PEP?

The Children’s Act also deals with consent to medical treatment and surgical procedures. Section 129(2) of the Children’s Act stipulates that a child may consent to his or her medical treatment if the child is over the age of 12 years and is of ‘sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the treatment’. It is unclear why the legislation in this instance requires the biological age of 12 and sufficient maturity, whereas consent to an HIV test only demands the biological age of 12 or adequate maturity. Possibly this inconsistency was an unintended drafting error. However, as long as the legislation is not amended, the inconsistency leads to the absurd scenario that a 12 year old rape survivor can consent to an HIV test but may be found incapable of consenting to PEP where his or her mental capacity to understand the benefits and risks of antiretroviral treatment are limited due to the emotional trauma.

Another problem is that so far, only certain provisions of the Children’s Act have been promulgated. On 1 July 2007 a number of provisions of the Act came into force, including the clause on consent to HIV tests (s 130 of the Children’s Act). However, at the time of writing, section 129 of the Children’s Act has not yet been enacted. As a result, there are now different ages for consent: children can consent to an HIV test when they are 12 or have sufficient maturity, but they may only consent to medical treatment such as PEP when they are 14 years old. Given the inconsistent phrasing mentioned above and the limited enactment, the legal situation regarding the consent of children to PEP is somewhat confusing to say the least and may lead to children having serious difficulties in accessing PEP.

---

52 Section 130(2)(a) of the Children’s Act.
Notwithstanding the poor drafting of the Children’s Act, it appears to be a positive development that the age of consent to medical treatment and procedures has been lowered to ‘around’ 12 years. The lower age barrier gives children the opportunity to make autonomous decisions about their health. However, the legislature should address the inconsistency between ss 129 and 130 of the Children’s Act. Furthermore, the successful implementation of the PEP provision of the Sexual Offences Act means that policy guidelines guiding the administration of PEP to children under the age of 14 must be developed.

2.5.4 Comprehensive health-care package
Last but not least, the legislature did not ensure that victims of sexual offences have a right to comprehensive health care. Instead of adopting the holistic treatment clause that was proposed by the Law Commission, the Portfolio Committee cut down the provision. A comprehensive ‘care package’, including all treatment that is necessary as a result of the crime (emergency contraception, antibiotics, counselling etc) would have been an appropriate response to sexual assault. Researchers have repeatedly highlighted that the provision of PEP alone is insufficient to address the needs of rape survivors and that only comprehensive and high-quality health care services will have a real impact on rape victims’ wellbeing. It is disappointing that the resource constraint argument outweighed the interests of survivors of sexual violence.

3. Compulsory HIV Testing of Alleged Sexual Offenders
Another HIV-related service that the Sexual Offences Act provides for is testing alleged sexual offenders for HIV infection on request of the victim or an investigating officer. The inclusion of this measure into the legislation happened in 2006, relatively late in the rape law reform process. Under this provision rape victims are allowed to apply for an HIV test of the person alleged to have raped them, to find out whether the person is HIV positive and consequently whether the victim has been exposed to HIV/Aids. Although this may seem like a commendable development in light of the legislature’s aim of ‘giving proper recognition to the needs of victims of sexual offences’ (s 2(e)(ii) of the Sexual Offences Act), compulsory HIV testing entails, in fact, more drawbacks than benefits.

3.1 Comparative Position
Internationally, compulsory HIV testing of alleged offenders has been approached in different ways. Some countries have refrained from enacting legislation, while others have laws that enable HIV testing of alleged or convicted sexual offenders, or both.

The brief review included below highlights how contested the issue of forced HIV testing is, with inconsistencies between and within countries. Except for the US,

54 Vetten and Haffejee (note 44 above); Christofides et al (note 20 above) 41.
55 Sections 28 and 32 of the Sexual Offences Act.
which took a rather draconian position at a time when concerns about HIV transmission were at their most alarmist, most countries oppose compulsory HIV testing generally, or reject the communication of the test result to the victim. Although the motives for this position may vary across jurisdictions, there are a number of good reasons to refrain from enacting legislation providing for compulsory HIV tests, as will be shown in the analysis of the South African approach.

3.1.1 Sub-Saharan Africa
Legislation across Sub-Saharan Africa varies. In Namibia, no provisions for the compulsory HIV testing of accused or convicted offenders were enacted during their recent rape law reform process. In Zimbabwe, the Sexual Offences Act 8 of 2001 provides for compulsory HIV testing of alleged sexual offenders. The legislation aims at ascertaining whether the alleged sexual offender was HIV positive at the time of committing the offence.56 The Botswana Penal Code (Amendment) Act of 1998 and legislation in Lesotho provide for the compulsory HIV testing of persons who have been convicted of rape.57 Reviewing these various approaches Strode et al argue that none of the testing provisions were designed to serve the rape victim.58 Instead they are only used for sentencing purposes.59

3.1.2 Canada
In Canada, the possibility of compulsory HIV testing for accused and convicted sexual offenders was examined and discussed by the National Advisory Committee on Aids as early as 1987, and by the Interdepartmental Committee on Human Rights and Aids in 1993.60 The final report of the Interdepartmental Committee concluded that imposing compulsory HIV antibody testing on persons accused of sexual assault is not the most effective way of dealing with the survivor’s concerns.61 The provisions were, thus, not enacted and victims of sexual offences may only request that their assailant voluntarily undergo HIV testing.62

3.1.3 United States of America
Legislation is inconsistent among the various US states. All states, however, have been strongly influenced by federal policy. In 1990, federal legislation required states

---

56 Section 17(2).
57 Section 3 of the Penal Code Amendment Act.
59 Ibid.
61 Ibid.
62 Ibid.
to provide mandatory HIV testing programs for convicted sexual offenders upon the request of victims, in order to qualify for federal funds. The main purpose was the (supposed) psychological benefit for the victim. To date, all but a few states have enacted legislation that complies with the federal conditions. Most of these require disclosure of the test result to the victim who may in turn disclose the outcome of the test to others under certain circumstances.

3.1.4 Australia
Legislation in Australia varies between the territories. In a number of territories, like Queensland, Victoria, Tasmania and the Northern Territories, specific legislation permits the taking of blood samples. In these cases, however, the collection of evidence — rather than disclosure to the victim — is the object. Thus, in terms of HIV-testing, all such laws require reasonable grounds for believing that the blood sample will provide evidence relating to the commission of an offence where HIV could be an aggravating factor. Tasmania’s HIV/Aids Preventive Measures Act 25 of 1993 is the only Australian law which specifically addresses compulsory HIV testing of persons charged with having committed crimes of a sexual nature.

3.2 South Africa’s compulsory HIV testing Bill
As early as 1998, the South African Law Reform Commission began to examine the possible enactment of legislation to allow for compulsory HIV testing of alleged sexual offenders. The inquiry was motivated by mounting public concern regarding the high prevalence of sexual offences and HIV/Aids. After its deliberations, the Law Commission’s project committee concluded that there is a need for statutory intervention and proposed a draft Bill for ‘compulsory HIV testing of arrested persons in sexual offence cases’ (for non-evidentiary purposes) at the instance or on behalf of the victim.

---

64 Ibid.
65 Ibid 53.
66 Ibid.
68 Ibid.
69 Section 10(1) of the Preventive Measures Act. The outcome of the test will be disclosed to the person who was tested and to the Secretary of the Department of Health in the case of a positive test result (under s 15(1)). Further disclosures of the result require the written consent of the person who was tested (s 19(1)).
71 Ibid viii. See also the proposed ‘Criminal Procedure Amendment Bill’ in the same report at 284.
The purpose was to afford victims of sexual offences the opportunity to find out whether they had been exposed to HIV, seek proper treatment if necessary, and obtain emotional relief. The provisions also envisioned notifying the offender of his status so that he too could make the necessary decisions regarding treatment and modifying his own behaviour.\textsuperscript{72}

In 2003, the Portfolio Committee began its deliberations on the Bill, which subsequently became the Compulsory HIV Testing of Alleged Sexual Offenders Bill. The Portfolio Committee discussed public submissions, some of which correctly questioned the value and utility of the envisaged legislation, particularly in light of the window period.\textsuperscript{73} However, neither the window period nor other concerns were able to sway the Committee from proceeding with the development of this legislation.

A major amendment to the Bill occurred in March 2003, after the Committee was briefed by a representative from the SAPS. The SAPS representative informed the Committee that although the Criminal Procedure Act 51 of 1977 (CPA) provides for police and magistrates to apply for/order a blood sample of an alleged rapist, magistrates were reluctant to issue such orders.\textsuperscript{74} He furthermore stressed that the provisions in the CPA were ‘not written with HIV/Aids testing in mind’. As a result, the Committee decided to introduce to the existing provisions contained in the Bill the possibility for an application to be brought by a police officer.\textsuperscript{75}

It is unclear when it was decided to incorporate the Compulsory HIV Testing Bill into the Sexual Offences Bill. By the time the Portfolio Committee again considered the Sexual Offences Bill, the two had been collapsed, presumably at the instance of the Department of Justice.

3.3 Law Reform

Besides highlighting further changes to the provisions in the drafting process, the following section will give a brief outline of their content. Since the incorporation of compulsory HIV testing into the Sexual Offences Bill and later into the Sexual Offences Act, there have been some major changes that have given the legislation a whole new direction.

3.3.1 Application by or on behalf of the victim

The 2003 version of the Compulsory HIV Testing Bill empowered only the victim of a sexual offence to apply to a magistrate for a court order that the offender be tested for HIV. The purpose of the legislation was to afford the victim of sexual assault a speedy process by which to discover whether they might have been exposed to

\textsuperscript{72} Ibid 328.
\textsuperscript{73} PMG Minutes of 5 February 2003.
\textsuperscript{74} Section 37 of the Criminal Procedure Act.
\textsuperscript{75} PMG Minutes of 27 March 2003.
These principles were maintained with the incorporation of the provisions into the Sexual Offences Bill and later the Act. Accordingly, the 2003 version, which was substantially included in the Act, provided that a magistrate must order an HIV test if satisfied that there is prima facie evidence that —

- a sexual offence has been committed against the victim by the alleged offender;
- the victim may have been exposed to the body fluids of the alleged offender; and
- no more than 60 calendar days have lapsed from the date on which it is alleged that the offence in question took place.

The 60 day limit for the application, which was originally set at 50 days, was extended to 90 days under the Act. The confusion about this time limit is directly indicative of an equal confusion around the length of the so-called ‘window period’. Up to three months (but usually only between three to six weeks) after contracting the HIV-virus, a person who has been infected will not present HIV antibodies. Accordingly, the victim of a sexual offence would only be able to find out, using the standard antibody test, whether they had been infected with HIV after the ‘window period’. Thus, in the reasoning of the Department of Justice, the mandatory HIV test would only be justifiable until the victim can obtain a reliable test result of their own status.

The Act provides that an application for an HIV test must be handed to the investigating officer, who must submit it to a magistrate having jurisdiction. Whereas the original Compulsory HIV Testing Bill made no provision for the accused to submit evidence, the Sexual Offences Act allows the magistrate to consider evidence by or on behalf of the alleged offender if to do so will not give rise to any substantial delay.

---

76 See Memorandum on the Objects of the Compulsory HIV Testing Bill.
77 Section 33 (1)(a) (version of 6 September 2006).
78 Section 30 (1)(a) (version of 10 November 2006).
79 Certain blood tests that test for the HIV-virus instead of antibodies can detect HIV at an earlier stage (approximately 10 days after seroconversion). These tests are called Polymerase Chain Reaction (PCR) tests. As PCR tests are much more expensive than antibody tests and require special laboratories for analysis, it is uncertain how widely they are being or would be used in the public health system. There are also differences between the various HIV antibody tests. The latest HIV antibody tests (third generation ELISA + p24 test) are able to pick up an HIV infection approximately 14 days after seroconversion. This test is available at national regional and tertiary hospitals. (Conversation with Dr Steve Andrews, HIV–Clinician, Claremont, South Africa).
81 Section 30(4).
82 Section 31(1).
83 Section 31(2).
Non-compliance with an HIV-testing order constitutes an offence.\textsuperscript{84} The Act stipulates that the test results may be communicated only to the alleged offender and the applicant.\textsuperscript{85}

\textbf{3.3.2 Application by an investigating officer}

One of the most significant changes that happened after the incorporation of the Compulsory HIV Testing Bill into the Sexual Offences Bill was that the focus shifted from affording support services to victims of sexual offences to more general policing and prosecution interests. In particular, provision was made for applications to be made by investigating officers. When a representative of the Department of Justice briefed the members on changes to the Bill, he explained with regard to this particular amendment that:

\begin{quote}
[m]otivation for the inclusion of such a provision is, among others, rooted in the fact that the Criminal Law Amendment Act, 105 of 1997, provides for the imposition of a minimum sentence in those cases where an HIV positive person is convicted of rape. This provision will place an investigative tool in the hands of the police to enable them to place a case before the prosecuting authority that has been comprehensively investigated.\textsuperscript{86}
\end{quote}

This argument ties in with the statement that the representative of the SAPS had made three years earlier. However, it leaves out an important piece of information: that existing legislation already provides the necessary tool in s 37 of the CPA. Critically, as far as the police are concerned, compulsory HIV testing was extended through the Sexual Offences Act to any offender, where their HIV status is relevant to the investigation.\textsuperscript{87}

The prerequisites for an investigating officer to obtain an order for an HIV test are slightly different from those that apply to an application by a victim. The magistrate must make an order for a compulsory HIV test of the alleged offender if he is satisfied that there is \textit{prima facie} evidence that —

• the alleged offence has been committed by the alleged offender; and
• HIV testing would appear to be necessary for purposes of investigating or prosecuting the offence.\textsuperscript{88}

The initial Compulsory HIV Testing Bill stipulated that the HIV test results would not be admissible as evidence in any criminal or civil proceedings. The Sexual

\textsuperscript{84} Section 38(2).
\textsuperscript{85} Section 33(1)(e)(i).
\textsuperscript{86} Department of Justice (note 80 above) 13.5.1.
\textsuperscript{87} According to the briefing by the Department of Justice (note 80 above), the provisions are not limited to the investigation of sexual offences but may also be applied where ‘the HIV status of the offender may be relevant for the investigation or prosecution of any other offence.’
\textsuperscript{88} Section 32 (2) and (3).
Offences Act, however, allows the victim and the investigating officer to use the test results in any ensuing trials. According to the Briefing by the Department of Justice,

\dots the (Portfolio) Committee was of the view that the test results should not only be confined to use \dots for purposes of personal decisions but \dots also \dots [for] ensuing criminal and civil proceedings. 

In anticipation of privacy concerns, the Portfolio Committee stressed the importance of ensuring that the issue of confidentiality was addressed adequately elsewhere in the Bill. Accordingly, the Act now states that the result of the HIV test may only be communicated to the person who applied for the order, the alleged offender, a prosecutor (where applicable) or any other person who needs to know the test results for purposes of any civil proceedings or an order of court.

3.4 Critical analysis and implementation challenges

The compulsory HIV testing provision has serious constitutional, medical and practical implications. These are discussed further below.

3.4.1 Constitutional concerns

An individual’s HIV status is an extremely intimate matter. Forcing someone to undergo an HIV test, and disclosing the test result without their consent, severely violates that person’s constitutional right to privacy. It is open to debate whether such violation satisfies the tests of justifiability under the limitation clause — determined by the purpose, nature and extent of the limitation. In relation to compulsory HIV testing, the nature and extent of the infringement are drastic: an accused (not a convicted offender) is forced to undergo a medical test for an incurable, sexually transmitted and highly stigmatised disease and the result thereof may become known to a number of people, including the victim, the investigating officer, the prosecutor and the magistrate. The only justification for such limitation would be that the limitation serves an important purpose that could not be achieved by any other means. This ‘purpose’ is considered further below.

3.4.1.1 Application by the police

The rationale for a police application is to enable the SAPS to investigate a case comprehensively and to allow the prosecution to use the test result as evidence in a

---

89 Section 34.
90 PMG Minutes of 19 June 2006 (note 80 above).
91 Section 37.
92 Section 14 of the Constitution. The testing also infringes the alleged offender’s right to bodily integrity (s 12 of the Constitution). The argument that a rapist forfeits his rights by committing a rape is not applicable here because the person to be tested is an accused person and not a convicted criminal.
93 Section 36 of the Constitution.
criminal trial. This motivation is unnecessary because, as noted earlier, s 37 of the CPA already permits mandatory blood tests for investigative and evidentiary purposes. Section 37 of the CPA explicitly allows police and magistrates to request a blood sample and other medical tests in order to obtain evidence. The fact that the provision in the CPA was not drafted with HIV testing in mind and does not make any specific reference to HIV does not obstruct its applicability. Section 37 of the CPA is phrased broadly enough to cover HIV tests. Since the provisions of the Sexual Offences Act that allow investigating officers to apply for an HIV test are not necessary to achieve the envisioned purpose, it is argued that they would not pass constitutional scrutiny.

3.4.1.2 Application by or on behalf of a victim

With regard to an application by or on behalf of a victim, the Sexual Offences Act stipulates that the HIV test results may be used to—

34(a) inform a victim or an interested person whether or not the alleged offender in the case in question is infected with HIV with the view to—

(i) reducing secondary trauma and empowering the victim to make informed medical, lifestyle and personal decisions; or
(ii) using the test results as evidence in any ensuing civil proceedings as a result of the sexual offence in question[.]

The purpose of enabling victims to make ‘informed medical, lifestyle and personal decisions’ presumably refers to the victim’s choices about sexual conduct and whether to start or continue taking PEP. As many respondents and experts pointed out during the drafting process, the test result cannot assist the victim because the alleged offender may be in the ‘window period’ when they are tested. The virus cannot be detected during this period through standard antibody testing, although the risk of transmission is especially high at this time because of an increased viral

94 Section 34(a)(ii) and (b).
95 Section 37(1)(c) of the CPA states that ‘Any police official may 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 [. . .].’ Section 37(3)(a) of the CPA states that ‘Any court before which criminal proceedings are pending may in any case in which a police official is not empowered under subsection (1) [. . .] order [. . .] that the steps, including the taking of a blood sample, be taken [. . .].’
96 During the drafting process, respondents with this view included the Acting Director of Public Prosecutions Venda High Court, the Society of Advocates of Natal, Mr Ronald Louw, Pretoria Aids Training, Counselling and Information Centre (ATICC), Northern Province ATICC, the South African Prisoner’s Organisation for Human Rights (SAPOHR), representatives of the South African Law Commission’s Sexual Offences Project Committee, and the Aids Legal Network. See SALRC (note 70 above) 197. See also the submissions to the Portfolio Committee on Justice and Constitutional Development in 2006 by the Sex Worker Education and Advocacy Taskforce (SWEAT), Resources Aimed at Prevention of Child Abuse and Neglect (RAPCAN), Childline South Africa, and the Aids Legal Network.
Consequently, the test result can give clarity neither on the HIV status of the alleged offender nor on the victim’s risk of infection. The victim must, therefore, start PEP as early as possible and proceed with the medication as well as safer sex practices regardless of the outcome of the test. Instead of assisting the victim in that sense, the test result might create a false sense of security for victims and their partners and thereby result in delayed or misinformed decisions around crucial antiretroviral treatment. The purpose of ‘reducing trauma’ is equally non-achievable, since the victim will only experience emotional relief once they have conclusive knowledge about their own HIV status.

This leaves the use of the test results in ensuing civil proceedings. Again, the utility of this provision is questionable. First of all, the relevance of this provision is unclear, since it is not known how many rape victims are actually willing to pursue a civil trial after the criminal trial. For a number of reasons, including the traumatising effect of having to once again recount the experience of rape in another forum, it is probable that the number, and hence, the relevance, is probably very low. It is also unclear how the test results are supposed to prove (a) that the sexual offence occurred, and (b) that the plaintiff was infected with the virus through the rape. The test result fails to provide information on either and, as argued above, is furthermore unreliable.

In summary, a rape victim does not benefit from a compulsory HIV test of the accused. In the absence of any significant benefit, the limitation of the alleged offender’s right to privacy appears unjustified.

3.4.2 Practical challenges

In addition to the concerns set out above, the implementation of compulsory HIV testing may prove to be very difficult for the relevant role-players, particularly the SAPS, and may entail further risks for rape survivors.

3.4.2.1 Criminalisation of rape survivors

The compulsory HIV testing provision may actually victimise rape survivors rather than empower them. The focus of concern is the potential criminalisation of rape survivors through the envisioned penalty clauses. Section 38(1)(a) of the Sexual Offences Act states that:

[a]ny person who, with malicious intent lays a charge with the South African Police Service in respect of an alleged sexual offence and makes an application in terms of section 30(1) [for a compulsory HIV test], with the intention of ascertaining the HIV status of any person, is guilty of an offence.

97 Please see note 79 above in relation to different HIV tests. The author believes that PCR tests that can detect HIV during the window period will not be used for compulsory HIV testing of alleged sexual offenders, mainly because of the cost involved and the additional technical expertise required. See also K Goyer (2001) ‘Compulsory HIV testing for alleged sex offenders: Victim empowerment or violation of rights’ 6 Aids Analysis Africa 8.
Research indicates that only between 5% and 9% of reported rape cases result in conviction of the accused. Accordingly, the vast majority of alleged offenders walk free after the criminal proceedings. Under these circumstances, those who are acquitted, or where the National Prosecuting Authority (NPA) declines to prosecute, and who were forced to undergo compulsory HIV testing may try to sue the victim for damages, or have them prosecuted for requesting an HIV test with malicious intent under the penalty provision. This provision might therefore not only deter victims from applying for the HIV test, but even prevent them from reporting the rape in the first place.

The Sexual Offences Act also makes the unauthorised disclosure of the test result an offence. The victim may therefore not disclose the test result to anybody. Although such a provision arguably appears necessary to protect the alleged offender’s privacy, it is extremely problematic for victims who are confronted with an HIV positive test result. It is vital for the victim’s psychological wellbeing — and surely necessary to assist in following through on the informed choices envisaged by the Act — for him or her to be able to tell their sexual partner, friends or caregiver about the sexual offence and the possible exposure to HIV. It appears half-hearted to allow the victim to have the accused tested but simultaneously prohibit a disclosure of the test result.

Although the Act requires the Director of Public Prosecutions’ authorisation for the institution of a prosecution for a malicious charge or disclosure of the test result, the penalty provisions send out the wrong message to rape survivors and are inconsistent with the objects of the provision and the Act.

### 3.4.2.2 Endangerment of victims

Another important issue that was overlooked in the deliberations of the Portfolio Committee is the personal safety and security of the victim during the application process. The incarceration of the alleged offender is not a prerequisite for an application for a compulsory HIV test. If the alleged offender has not been arrested or is out on bail, the victim’s safety is at risk once the alleged offender is asked to do the HIV test. HIV and Aids are highly stigmatised in our communities. The accused may therefore feel deeply resentful at having to undergo the test. While there is a real possibility that the alleged offender will try to intimidate the complainant in order to

---

98 Human Rights Watch reported in 2004 that less than 5% of perpetrators of rape against adult women are convicted; the conviction rate in cases of rape of children is approximately 9%. See www.hrw.org/english/docs/2003/12/31/safric7010.htm.

99 This would be very alarming, because sexual offences are already highly underreported. See the references cited at note 1 above.

100 Section 38(1)(b) of the Act states: ‘Any person who with malicious intent or who in a grossly negligent manner discloses the test results of any HIV tests in contravention of section 40 is guilty of an offence and is liable to a fine or to imprisonment for a period not exceeding three years.’
get her or him to withdraw the application, the Act fails to provide for any measures to protect the victim from threats by the alleged offender.

3.4.2.3 Implementation by the SAPS

Besides the serious implications for rape victims, it remains questionable whether the provisions are feasible. Compulsory HIV testing is a complex process. Its implementation requires an efficient and swift response from various role-players in the health and criminal justice system, but mostly from the police. It seems likely that the SAPS — without sufficient support — will struggle to implement the manifold duties that the Act imposes on them.

First of all, compulsory HIV testing will significantly increase the workload of police officers dealing with sexual offences. It is unclear how an already understaffed and under-resourced police service, which is struggling to fight crime and deliver ‘regular’ services, can be expected to comply with these additional duties. The increased workload requires that the budget of the SAPS be adjusted accordingly, and human resources increased.

Secondly, the implementation of the legislation necessitates comprehensive and in-depth training of all relevant members of the SAPS because, according to the Act, police officials will have to inform the victim of the following:

- The importance of obtaining PEP for HIV infection within 72 hours after the alleged sexual offence.
- The need to obtain medical advice and assistance regarding the possibility of other sexually transmitted infections.
- The following services and details:
  - provision of free medical advice surrounding the administering of PEP;
  - provision of PEP for HIV infection at a public health establishment at state expense;
  - a list containing the names, addresses and contact particulars of accessible public health establishments;
  - the option of applying to a magistrate for an order that the alleged offender be tested for HIV at state expense.

It is unrealistic to expect the police to be able to deal with public health matters such as HIV tests and PEP. Members of the police must thus be trained on sexual offences, HIV transmission, PEP, compulsory HIV testing and ‘communication skills’ to ensure that they are able to answer the rape survivor’s questions (eg ‘What is PEP?’ or

---


102 Section 28 (3).
‘Why 72 hours?’) and explain the matters in a sensitive way. Asking the police to deal with sensitive issues such as forced HIV tests overestimates current police qualifications and underestimates the impact of involuntary HIV tests. It is the authors view that this is not a policing function, that it further distracts from their core business and that they are, in general, not equipped to deal with such a delicate health issue. Thirdly — and quite frankly — there is very little chance that the accused will be apprehended within the 90-day timeframe. Given that not all victims report the crime immediately, the tight timeframe may be further reduced.  

Finally, the way in which the victim and the suspect will be informed of the outcome of the HIV test is very concerning. The police are required to notify the applicant and the alleged offender by handing them a sealed envelope with the test result as well as a ‘notice containing prescribed information on the confidentiality of and how to deal with the HIV test results’. According to the Act, the contents of the notice must be explained if necessary. The advantage of handing the result over in a sealed envelope is that this procedure leaves it up to the victim and the alleged offender to decide whether, when and where they want to expose themselves to the test result. However, it is problematic that the legislation does not envision any post-test counselling with the handing out of the result.

Generally, HIV testing must include pre- and post-test counselling. It seems unethical that the victim and alleged offender will not receive any counselling at all. Post-test counselling is essential for the support of persons who test HIV positive. In the case of compulsory HIV testing after an (alleged) sexual offence, the need to provide post-test counselling is critical and would serve additional purposes. For the accused, such counselling seems particularly important given that the HIV test was involuntary. For the victim, although she or he has not been tested themselves, counselling is also crucial. The complainant, who will be in a traumatic state when they receive the outcome of the test, must be informed of the implications of a positive test for their own health and made aware of the unreliability of a negative test result due to the window period.

103 Even if the accused has been found and notified of the court order, he may go into hiding. Unless the notification of the court order and the HIV test are carried out at the same time, the accused may hide, wait until the 90 days have passed, and thereby avoid HIV testing altogether.

104 Section 33(1)(e).


106 According to the national policy supra, post-test counselling is vital to give feedback and explain the result. If the result is negative, post-test counselling should provide strategies for risk reduction and explain the possibility of infection in the window period. If the result is positive, post-test counselling should cover the following: (1) immediate emotional reaction and concerns; (2) personal, family and social implications; (3) difficulties a patient may foresee and possible coping strategies; (4) who the client wants to share the results with, including responsibilities to sexual partners; (5) immediate needs and social support identification; (6) follow-up supportive counselling; (7) and follow-up medical care.
Without post-test counselling, the victim and the alleged perpetrator will be left alone with their questions, apprehensions and emotions. At the very least, they should be provided with contact details of organisations that offer support services for people infected with or affected by HIV/AIDS.

4. Conclusion

Given the high prevalence of HIV and the social context of rape in South Africa (such as the inordinate number of multiple-perpetrator rapes), it is imperative that victims of sexual offences have access to PEP. It is thus laudable that the Sexual Offences Act provides for this medication at State expense. However, it is unfortunate that PEP will only be available at certain designated health facilities. To facilitate access, particularly for rural women, a national roll-out to all public health facilities would have been preferable. Furthermore, the legislation fails to adequately regulate the management of rape survivors younger than 14 and to clarify contradictions in relation to the age of consent.

It should also be noted that the drafting process started out with a commendable comprehensive treatment clause aimed at comprehensive health care for victims of sexual offences. Unfortunately, the provision of PEP is now all that remains from the original clause. Although the Act still stipulates that one of its objects is to provide victims with the maximum protection, this objective has been lost in the course of the legislative process.

With regard to compulsory HIV testing, it has been shown that enabling police officers to obtain HIV tests for evidentiary purposes is unnecessary in light of existing provisions in the CPA. Furthermore, compulsory HIV tests at the request of victims lack practical utility. The comfort that a victim may gain from potentially ‘knowing’ the alleged offender’s HIV status does not diminish their vulnerability to infection, and a negative test result could lull the survivor into a false sense of security about their risk of infection and own HIV status.

Besides the lack of practical utility, the compulsory HIV testing provision bears additional risks such as the criminalisation, and thus secondary victimisation, of rape survivors. Since most of these concerns have repeatedly been pointed out during the drafting process of the Sexual Offences Act — both to the Portfolio Committee and the National Council of Provinces’ Select Committee — it seems that populist ideas have outweighed good legal sense in the creation of the provision.
1. Introduction

Sexual offences constitute a major challenge for the police and for the criminal justice system more generally. While the resultant trauma and other psycho-social effects of sexual assault are well-documented, the impact of victim trauma on the criminal justice process is only beginning to emerge through focused, qualitative research. In addition to the experience of a violent sexual assault, victims may also be subject to interpersonal, social and legal responses that may contribute to what is commonly known as ‘secondary trauma’. Rape victims may, for instance, be pressured to not report rape, and when they do, may experience indifference and even hostility from the police. Adding to this already discouraging range of social and institutional responses to rape, traditional policing methods are often not effective in obtaining adequate information from rape complainants, nor are they able to provide adequate support and protection for traumatised victims. In this chapter we explore how the South African Police Service (SAPS) police sexual offences and the problems that have arisen in this regard. Recommendations made in relation to ‘policing rape’ during the rape law reform process are also discussed. It should be noted at the outset that, while the reforms by the Sexual Offences Act 32 of 2007 described elsewhere in this book will make a significant impact on what the police must investigate, these amendments do not address the more pressing issue of how the police should manage rape cases reported to them. Our discussion therefore takes the opportunity to step outside of the debates on policing during the rape law reform process and to look more broadly at shifts in police policies and practice relating to sexual offences.

1.1 Policing Rape: Facts, Figures and Failures

There is general agreement within feminist scholarship that perceptions based on stereotypes about the ‘nature’ of women and the nature of rape, coupled with a
continued legacy of patriarchy, impacts on policing of sexual offence cases and undermines attempts to reform the criminal justice response to rape.2 Research has also suggested that the attitudes held by the police generally reflect the same attitudes and misconceptions regarding sexual offences predominant in the broader society. It has further demonstrated that approaches to rape cases by the police are often dominated by prevalent rape myths and stereotypes, and in particular, the notions that women easily lie about rape and that where there are no signs of violence it is unlikely that a rape has occurred.3 This results in an inflated perception of the rate of false reporting of rape, which in turn influences the standard of investigation and the attitude and manner of police officials towards the complainant.4

Police officers generally have a poor understanding of the impact of trauma on the rape victim and of the consequent needs of the victim. Jan Jordan’s interviews with women who have reported rape show that most police officers are perceived by complainants as unable to provide the respect, care, support and ongoing information that victims need.5 This results in a failure to build trust and undermines the quality of the investigation, as the victim is more likely to withdraw or withhold information that is considered too private or humiliating to disclose. The impact of these entrenched belief systems is that victims are more likely to report what they consider to be ‘serious’ rapes and rapes perpetrated by strangers. It is also likely that in these cases a victim will receive a more sympathetic service. A range of research shows that the decision to report rape may be associated with issues of denial, concerns about safety, feelings of fear and shame, and self-blame.6 As the police are the victim’s point of entry into the criminal justice system, negative experiences at this point may influence the quality of evidence provided by the victim and result in the victim withdrawing her complaint. Reports of negative experiences promote mistrust of the system and serve as a deterrent to reporting in general.7

It is not surprising then that the high levels of sexual offences in South Africa appear to be coupled with low police reporting rates. A 2005 National Youth

---

2 J Jordan (2005) Rape, Reform and Resistance Institute of Criminology, Victoria University of Wellington, New Zealand.
4 L Kelly, J Lovett and L Regan (2005) Home Office Research Study 239 A Gap or a Chasm? Attrition in reported rape cases Child and Woman Abuse Studies Unit, London Metropolitan University, 83. Kelly et al find that at a maximum these reports amount to nine, but that it is probably closer to three of all reported cases.
5 Jordan (note 2 above) 5.
6 Ibid 4.
7 Ibid.
Victimisation Study\(^8\) indicated that although 83.2% of victims of sexual assault informed someone of the incident, only 11.3% of these cases were reported to the police. This supports the findings of a study by the Medical Research Council which found that only one in nine rapes is reported to the police.\(^9\) Once reported, the majority of cases are withdrawn by the police or the prosecution. The Crime Information Analysis Centre reported, for example, that during 2000 between 40% — 60% of rape cases reported in South Africa were withdrawn by the police or prosecution.\(^10\) The most common reasons cited by police for their decision to withdraw rape cases is the perception that complaints are ‘false’\(^11\) or that victims withdraw for their own ‘personal reasons’. Studies in New Zealand\(^12\) and the UK\(^13\) have found that rape law reforms in those jurisdictions, including changes to the laws of evidence and procedure and the redefinition of rape, have had little effect on the police processing of rape complaints at an institutional level, despite shifts in individual attitudes and approaches.\(^14\) Jordan suggests that this is because rape law reform is attempting to act on an ‘occupational culture profoundly influenced by traditional patriarchal thinking’.\(^15\) As Carol Goldberg-Ambrose states, ‘(t)he goal of rape reform legislation that seems most difficult to achieve is change in knowledge, values and attitudes about gender and sexuality’.\(^16\)

---


\(^9\) R Jewkes, L Penn-Kekana et al (1999) *Violence Against women in three South African Provinces* Medical Research Council. Of further concern is the fact that a significant proportion of the sexual offence cases reported to the police are cases in which the victim is a child. The 2005/6 South African Police Service Annual report indicates that 42.7% of all rape cases and 48.2% indecent assault matters involve victims under the age of 18.\(^57\)

\(^10\) While it might be tempting to attribute this solely to the dysfunctionality of the South African criminal justice system, the unfortunate reality is that statistics from England and Wales, collected by the British Home Office, show that in that jurisdiction 44% of cases reported during the study period were withdrawn in this way. The US Senate Judiciary Committee study found a pretrial dismissal rate of 48% of reported cases, although there were significant differences noted between States. See respectively J Harris & S Grace (1999) *A Question of Evidence? Investigating and Prosecuting Rape in the 1990s*, Home Office Research Study 196 and US Senate Judiciary Committee (1993) *The Response to Rape: Detours on the Road to Equal Justice*.


\(^14\) Jordan (note 12 above) 704.

\(^15\) Ibid 702.

2. The Existing Policy Environment

2.1 Policies

Police are charged primarily with receiving, recording and investigating reports of rape.\textsuperscript{17} How this is done is framed by policy and legislation. In this section we review the key SAPS policies\textsuperscript{18} on crimes against women and children since 1994. This review shows encouraging developments in the understanding of SAPS’s role in policing sexual offences over the past 13 years and demonstrates a clear shift in conceptualising these crimes as priorities. It also, however, highlights that police capacity to translate the ‘prioritisation of sexual offences’ into effective operational actions, has been largely ineffective.

Cabinet developed the National Crime Prevention Strategy (NCPS) in 1996. This strategy placed substantial emphasis on the development of an integrated departmental approach to crime prevention and identified gender violence and crimes against children as one of seven priority policing areas. In spite of the prioritisation of both the crime itself and the accent on appropriate responsiveness, the NCPS is surprisingly unclear on what the exact role of SAPS is in relation to sexual violence. In 2000 SAPS developed the National Crime Combating Strategy (NCCS), which adds more detail and specificity to these strategic priorities.

According to the NCCS crimes against women and children are to be dealt with by:

- Conformance with the regulatory framework provided by international conventions and the Domestic Violence Act (DVA).\textsuperscript{19}
- ‘Vigorous’ implementation of the DVA.
- The implementation of victim empowerment and support programmes.
- Partnerships with relevant institutions such as the National Network on Violence against Women, the Commission on Gender Equality and the South African Human Rights Commission.
- Adopting best practices, including an inter-sectoral approach, crisis centres, and awareness programmes, to be rolled out in priority areas.
- Strengthening of specialised Family Violence, Child Protection and Sexual Offences Units (FCSUs).

In theory, these interventions add depth to the strategic priorities of the police. If they were to be implemented on a broad scale, they would address some of the

---

\textsuperscript{17} These functions are fulfilled by the Visible Policing division and Detective Services of the SAPS respectively. In addition to these key functions, police activities relating to sexual offences also include other crime prevention efforts, such as presenting lectures to children and adults. The impact of these ‘softer’ efforts has not been measured.


\textsuperscript{19} Act 116 of 1998.
difficulties inherent in policing sexual offences. However, the past eight years has seen little commitment to achieving these objectives with any uniformity across the country.

The Department of Safety and Security’s Strategic Plan for 2005 to 2010 also lists crimes against women and children as one of four key strategic priorities.\(^{20}\) The plan states that the purpose of the strategy ‘is to reduce the incidence of crimes against women and children, as well as to ensure the proper investigation of sexual offences such as rape and indecent assault’.\(^{21}\) Again, although the crimes are prioritised, the interventions identified by the NCCS are not used to elaborate programme outcomes and indicators in this document. This highlights a critical lack of understanding by the SAPS in relation to what should be done with regard to improving policing in these matters. A more detailed understanding of the causal, contributory and risk factors leading to sexual offences would improve the ability of the SAPS to develop targeted interventions to increase reporting, detection rates and decrease case attrition.

The Strategic Plan states that SAPS will address these crimes by focussing on rape, domestic violence, assault and child abuse, and notes that the strategy is further developed within other state programmes and initiatives:\(^{22}\)

- The Anti Rape Strategy;
- Implementation of the Domestic Violence Act;
- The Victim Empowerment Programme;
- Youth Crime Prevention Capacity Building Programme;
- Prevention of Violence Programme;
- Reactive Measures;
- Conversations with Women Initiative.

The integration of these operational priorities into more concrete programmes represents a somewhat more pragmatic approach to sexual offences than the broad ‘management’ principles contained in the NCCS. The Anti Rape Strategy is a provincial interdepartmental strategy to reduce rape and improve investigation and prosecution of rape. The Victim Empowerment Programme includes the establishment of ‘victim friendly’ facilities at police stations and generalised training within SAPS ‘to give members the skills to handle all victims of crime in a sensitive manner’.\(^{23}\) This programme therefore has the potential to improve the initial experience of victims at the police station. Interestingly, the Prevention of Violence Programme includes, amongst a range of interdepartmental programmes and processes ranging from the Moral Regeneration Programme to the Victim

---

21 Ibid 39.
22 Ibid 39.
23 Ibid 41.
Empowerment Policy and the Victim’s Charter, ‘the development of an implementation strategy for the Sexual Offences Bill’,\(^{24}\) to be coordinated by the Department of Justice and Constitutional Development. Under ‘Reactive Measures’ the strategy includes ‘steps taken by the investigating officer on receiving a sexual offences case,’\(^{25}\) which focus on explaining procedures and processes to victims. Lastly, the Conversations with Women Initiative relates to communication with women who are victims of crime.\(^{26}\)

### 2.2 National Instructions

Legislative and policy priorities developed at a national level are given effect at a station level through national instructions and guidelines issued by the National Police Commissioner in terms of the South African Police Service Act.\(^{27}\) The National Instructions on Sexual Offences include extensive guidelines for investigating rape cases and the treatment of rape victims.\(^{28}\) They specify, for example, that victims should be given immediate attention, be treated with respect and courtesy, provided with information and referred to victim services.\(^{29}\) Police officers are given step by step instructions on how to handle a rape complaint from the moment that the victim arrives at or makes a call to the police station.\(^{30}\) Appended to the National Instructions is a checklist containing seventy-seven questions that should be asked of the victim at the time her statement is taken.\(^{31}\) These questions are remarkably detailed. Their aim is to obtain a composite picture of what lead up to the attack, including: the nature of the interaction between the victim and the suspect, the exact nature of the attack, the extent to which force was used or threats were made, how

\(^{24}\) Ibid 42.  
\(^{25}\) Ibid 42.  
\(^{26}\) It is noteworthy that the list makes no specific mention of the continued strengthening of Family Violence, Child Protection and Sexual Offence Units. This could, however be contained within provincial anti rape strategies and is currently contained within The Western Cape Anti Rape Strategy Action Plan. Of concern is that there is no longer an express national objective to ensure that these units continue to be strengthened.  
\(^{27}\) In terms of s 25(1)(b) of the South African Police Service Act 68 of 1995. The aim is to provide for the ‘establishment and maintenance of uniform standards of policing’.  
\(^{29}\) Ibid par 3.  
\(^{30}\) Para 4. These include ascertaining whether the victim is in immediate danger or in need of medical assistance, obtaining a description of the suspect, interviewing the victim (with strict instructions only to take down notes and not a full statement at this point), opening a case docket, and safeguarding the crime scene.  
\(^{31}\) Annexure C.
the attack ended, to whom the victim first reported the attack as well as any relevant characteristics of the suspect. In our experience this template is never used.\textsuperscript{32}

Deviation from the Instructions is allowed only where there are compelling reasons\textsuperscript{33} and specific provision is made for disciplinary action in respect of police officers who act contrary to the Instructions. Indications are, however, that police are often not familiar with the existence or contents of the instructions and are never disciplined for deviating from them. National Instructions are critical in standardising the processing and management of cases; they reflect the official position of police leadership on a policy question and, if widely implemented, can ultimately have the effect of shifting systemic cultural practices and established ‘working rules’. But this requires enforcement. At best, as the South African Law Reform Commission recognised in its 2001 Discussion Paper, police leadership has been ‘noncommittal’.\textsuperscript{34}

3. Challenges in Policing Sexual Violence

Research conducted over the past two decades into the criminal justice response to rape and violence against women more generally in South Africa has identified numerous problems, which need to be considered in thinking about rape law reform. In our view, one of the key issues affecting police management of rape cases is attrition, through which the majority of cases do not in fact make it through the criminal justice system to trial.\textsuperscript{35} In this section we consider this problem in greater detail.

3.1 The Problem of Attrition

At each stage of the criminal justice process there are multiple opportunities for cases to be lost to the system and a confluence of factors that enable this.\textsuperscript{36} As it pertains to rape cases, this problem was forcefully illustrated in the findings of a CIETafrica study published in 1998.\textsuperscript{37} Drawing on a sample of 394 rapes committed in the Southern

\textsuperscript{32} The authors have perused more than 1,500 rape dockets during the course of various studies and have never seen this template used.

\textsuperscript{33} National Instruction 22/1998 par 1.

\textsuperscript{34} SALRC Project 107 (2001) Discussion Paper 102 par 3.2.9.2.


\textsuperscript{36} Evidence on the extent of attrition at this point is obtained by comparing the findings of victim surveys (how many women say they were raped) with the number of rapes recorded by the police during that year. See Jewkes et al (note 9 above).

Johannesburg Metropole, the study shows that of these 272 (69%) were reported to the police. Only 17 (6%) of these became ‘rape cases’;\(^{38}\) 1 of the 17 was lost in a manner considered fraudulent, 5 were referred to court for prosecution and 1 resulted in a conviction.\(^{39}\) At each of these attrition points criminal justice personnel are exercising substantial discretion. It is exactly this discretion that should be addressed in the context of law reform if attrition rates are to decrease and prosecutions and convictions are to increase.

Most rapes in South Africa are never reported to the police. Rape victims who have not reported their cases express the fear that police will not believe them, that the perpetrator will retaliate against them, that they will be blamed for the attack and that they will not be able to cope with the court process.\(^{40}\) Many victims believe that even if they reported the matter to the police, the police would not respond effectively.\(^{41}\) This is particularly salient in situations where the rape does not fit what Estrich and others have called the ‘real rape template’\(^ {42}\) and in situations where the perpetrator is known to the victim.\(^ {43}\) A rural South African woman interviewed by Lillian Artz makes the following observation about police responses to marital rape:

> Sometimes husbands listen (to intervention from their family) but they mostly say it is nonsense and if the women do not like it they must leave the house. What must we do? Go to the police? Even if you are raped by a stranger they don’t believe you, and now you must tell them that your husband is raping you? They are just as bad as the husbands. They ridicule you too and tell you that you are full of shit and you are wasting their

\(^{38}\) It should be noted that some of the ‘excluded’ cases may result from re-labelling of the offence to, for example, indecent assault. A substantial portion reflects, however, police decisions to close the matter or victims that decide (or are persuaded) to drop the case.

\(^{39}\) CIETafrica (note 37 above) iv.

\(^{40}\) Artz (note 40 above). Again this is not unique to South Africa. For example, Statistics Canada’s excellent 1993 survey on violence against women reports that 50% of respondents who had not reported their assault to the police based this decision on a belief that the police would not be able to do anything, 41% cited criminal justice attitudes. See Statistics Canada, (above at note 40 above).

\(^{41}\) Artz (note 40 above). Real rapes, according to Susan Estrich, are those involving a weapon and injury, committed by a stranger, out of doors. These are the cases that police take seriously. In the English context, Liz Kelly similarly speaks of the ‘real rape template’ adopted by police and prosecutors. She argues that conformity to this template (which also informs the victim’s self-conception of the assault as a rape and her belief that the police will see it that way), along with support from friends and family are the strongest predictors of whether a rape will be reported. Women know what the system considers to be rape and many will choose not to risk further victimisation by reporting assaults that may not fit that template.
time. You can have scars on your face . . . bleeding . . . and the police will send you home to ‘sort it out with him’. Rape by your husband is only real in the law.44

Once a rape victim gains access to the criminal justice system, there is no guarantee that her case will be properly investigated or ultimately prosecuted. There are four categories under which a case may be disposed of by the police without being referred to court: undetected, unfounded, withdrawn by complainant and warrant issued. The SAPS Standing Orders on the Closing of Dockets45 are clear that a case may only be closed as undetected when the investigation reveals that the complaint is well-founded, but fails to reveal the identity of the perpetrator. Logically, in the context of rape, we would not expect to see any acquaintance rapes filed under this category.46

In a case of ‘no consequence’ a complainant may request upon an affidavit that the charge to be withdrawn and a police officer may close the case on this basis. No guidance is given as to what constitutes a case of ‘no consequence’, although one would expect that rape cases would never fall within this category of ‘withdrawn by complainant’. In practice many rape cases are closed by the police at the request of complainants and this category also encompasses those cases where the complainant, after laying an initial charge, cannot be found. Finally, where the police believe the complainant has lied about the alleged rape, they will file the case as ‘unfounded’.47

Once the case has been investigated and a suspect identified the matter is referred to the prosecutor’s office for a decision on whether to prosecute.48 If the prosecutor does not believe that there is a substantial likelihood of a successful prosecution he or she will decline to prosecute the matter and issue a certificate of nolle prosequi.49 This must be distinguished from a decision to withdraw the matter once the trial has started, which arises sometimes where the State decides it no longer has an interest in the matter, but more often because the investigation has not been concluded and the

44 Ibid. Like their counterparts in other Anglo-American jurisdictions police in South Africa seem to distinguish which rapes they will take seriously and which they will not on the basis of subjective beliefs about who is a ‘victim’ and who is not. See, eg, J Temkin (note 13 above) and J Jordan (note 12 above) 702.

45 South African Police Service, Standing Orders on the Closing of Case Dockets, SO(G)325 (issued 21 October 1993).

46 Where the perpetrator is known, but cannot be traced, a warrant is issued for his arrest.

47 These categories are often conflated due to poor administration. They are also sometimes conflated because the police have a perverse incentive to file cases as unfounded. All cases referred to court, all cases in which warrants are issued, all cases in which the complaint is withdrawn and all cases categorised as unfounded are counted together as constituting successful investigations or cases resolved. In contrast, cases closed as ‘undetected’ constitute unsuccessful investigations. T Leggett (2003) What do the police do? Performance measurement and the SAPS, Institute for Security Studies Paper No 66.

48 Depending on the practice of particular police stations, cases that could technically be closed at station level are also referred to the prosecutor for her approval, further confusing matters.

49 A certificate of nolle prosequi, proof that the State has declined to prosecute the matter, theoretically opens up the possibility for the victim to institute a private prosecution. Criminal Procedure Act 51 of 1977, s 7.
magistrate refuses to grant further postponements. While withdrawal of cases in court may sometimes go to the credibility of the complainant (if it becomes clear during testimony, for example, that she was lying) and may relate to complainant decisions to withdraw the matter, it also reflects on the quality of police investigations. Incomplete or inadequate investigations account for a substantial number of withdrawn cases at this point in the process. Finally, there are a small number of cases that make it to trial and judgment.

Very few rapes are reported and very few of those reported go to trial and result in a conviction. At each stage of the criminal justice process these cases leak out of the system, as criminal justice agents exercise discretion and respond to institutional pressures, and as complainants make their own decisions about how the matter should be resolved. A scan of the process shows that the police exercise substantial power in these decisions and that the majority of cases reported are closed by the police. The following section considers some of the factors explaining attrition at this stage in the criminal justice process.

3.2 Explaining Attrition at Police Level

As an institution, the SAPS must be seen as embedded in and responding to South Africa’s social and historical context. Like much of South Africa’s civil service, it is an institutional product of South Africa’s negotiated transition and our efforts at transformation. Like many government institutions, it struggles to overcome chronic resource and capacity constraints. This section considers these constraints and looks at how they act to fuel attrition in rape cases.

3.2.1 Human & Material Resources

There is a widely shared perception that the SAPS is lacking both the human and material resources to cope with South Africa’s high levels of crime. This view is apparent in the following remark by a magistrate, who had just previously been complaining about police ineptitude:

> Most of the investigating officers, when I start asking them questions they all tell me: ‘What do you want us to do, the workload is bad. This is not the only rape or the only charge that’s been laid over the weekend. There were fifteen murders. What do you want us to do?’ Then I can’t also say anything. Then I just keep quiet because I can’t even think to, I can’t even imagine to think how the environment is over there. 

50 A distinction must be made between the prosecution’s decision to withdraw the case prior to a plea being entered and at any time after the accused has pleaded. In the former case no verdict results, whereas in the latter (with some exceptions) the accused is entitled to be acquitted. Criminal Procedure Act, s 6.

51 From our observations of case dockets.


53 Barday & Combrinck (note 52 above) 63.
How valid is this perception? South Africa has approximately 125,000 police personnel, amounting to some 320 per 100,000 of the population. In the US this ratio is 300 per 100,000, which suggests that the SAPS is in fact reasonably well staffed. Furthermore, actual ‘crime-to-cop’ ratios are not excessive when compared with the US or Canada. The problem, Ted Leggett suggests, is that fewer than 20% of these police officers are detectives, and that less than 10% of these detectives are actually trained as detectives. This distribution of functional responsibilities in the SAPS is characterised by Martin Schönteich as ‘the opposite of international policing norms’ and by Leggett as ‘absurd’. Although the Law Commission pointed out this critical constraint in a footnote to its discussion on service providers and agencies, it took the issue no further.

The result of this staffing structure is that some detectives are carrying upwards of a hundred rape dockets at any one time. These caseloads leave very little time for investigative work and can lead to a situation where police officers focus their attention on easier cases or those that personally outrage them most. Police officers would be more likely, in this context, to marginalise cases that present them with ambiguous fact patterns, to encourage victim withdrawal or to assume that a false report has been made.

Resource constraints also play into poor quality police work. While the SAPS National Instructions on Sexual Offences require police officers with specialised training to take the victim’s statement, what happens in practice is that the first officer on the scene or the officer on duty at the station actually does so. The problem with this, as pointed out by the Law Commission is that these officers ‘are not in any way skilled or specialised in sexual offences, or even broadly trained in the

54 Leggett (note 47 above) 6.
57 Leggett (note 47 above).
60 SALRC (note 34 above) para 3.2.6.1.
62 Research into these responses is tied into developing a better profile of why cases are unfounded. To date this has not been researched in South Africa. It is the subject of one of the authors’ JSD dissertation.
64 Ibid para 6.
65 SALRC (note 34 above) para 3.2.6.1.
taking of statements. Raygaanah Barday and Helène Combrinck similarly report that very few of the investigating officers at the 13 police stations that they studied had received specific training on sexual offences. A number of those who had been trained had received no refresher courses, which would have been necessary to bring them up to date on medico-legal developments and the contents of the national instructions and policy guidelines. For most police officers it is a case of ‘learning on the job’. Even for those police officers who do receive training the suggestion has been that this is inadequate, providing them with little practical experience and insight into dealing with the messy realities of sexual violence. Janine Rauch argues that an effective training program would have to be ‘based on an appreciation of, and a challenge to, the power of police culture in shaping attitudes towards women and violence’, and that this is not currently the case.

Normative responses to rape victims and the cases that they report do not operate independently of structure. Police who are under-trained and overburdened and working under pressure, are more likely to fall back onto their personal store of stereotypes to interpret a situation. Examples of this include not taking cases of intimate partner sexual violence seriously and concerns over lack of productivity when police spend time comforting or ‘chasing after’ victims who are ‘unavailable’. There are, however, also critical systemic barriers to effective policing. When police are forced into a position where they are making choices about which calls to respond to due to restricted resources and unmanageable case loads, it is the system itself that contributes to attrition. The obvious and critical shortage of resources that police require to do a thorough investigation of a rape complaint provides a perverse incentive to cut caseloads. Unfortunately it is the victims who bear the brunt of these systemic shortfalls. If these wider structural limitations on policing in South Africa are not addressed, we will continue to see police refuse cases, encourage victims to withdraw their complaints and conduct perfunctory investigations before closing dockets as undetected or unfounded. Even the most skilled and responsive police officer is likely to exercise their discretion inappropriately under unfavourable, low-resource conditions.

3.3 Police Attitudes

The disjuncture between progressive legislation aimed at addressing violence against women and unprogressive attitudes, argue Parenzee et al, ‘can create hostility and
resentment...towards complainants’.71 Victims of sexual offences accessing the police face a culture of disbelief. Combrinck and Skepu recount how one police officer ‘went around’ the victim’s neighbourhood asking community members questions like ‘what she’s like?’.72 These actions serve to further stigmatise an already traumatised victim. The greatest fears that women consistently express around sexual violence are of retaliation, community humiliation and being ostracized by their families.73 Personal views that reflect scepticism about motive filter through into docket notes: ‘suspect complainant only opened the docket so as to secure lawful abortion at Groote Schuur’74 appears on one docket; ‘preliminary investigation suggests that complainant and her friend are prostitutes’ appears on another. ‘Boyfriend-girlfriend’ cases are often not even opened.75 There is a widely held view amongst police personnel that women lie about being raped.76 Criminal justice personnel respond to scepticism that women would ever willingly expose themselves to such stigmatisation by saying that in certain communities laying a charge of rape against an unfaithful boyfriend or an ex-lover who refuses to pay maintenance is so common-place and doing so is so relatively simple that it is not in the least bit stigmatising.77 Violence against women is also more generally cast by police officers as something that is over-dramatised by most women. As one police officer interviewed by Parenzee and her colleagues for a study on domestic violence said:

71 Parenzee et al (note 52 above) 83.
73 L Artz (note 40 above) 13. Artz interviewed 168 women in 15 Southern Cape communities. According to Artz a common complaint amongst her interviewees was ‘the police asking a victim of rape to find her attacker and let them know where he is’. Ibid 15.
74 Abortion has been legal on request in South Africa since 1996. That piece of news had obviously not filtered through to this particular policeman.
75 Ibid 58.
77 We have discussed this matter with a number of police officers and prosecutors. Although they tend to portray this as a widespread problem, discussions generally centre around one or two jurisdictions viewed as being particularly problematic. This is a matter that requires urgent research. If the police are wrong this excuse must be removed from their arsenal; if they are right, there is obviously a need for targeted intervention in those communities.
Women, I have respect for women and we should all have equal rights. But there are women who abuse this law. Not all women, because we do have cases — about 4 out of every 12 per month — that really need assistance.\(^78\)

While police officers clearly recognise that rape and domestic violence are a reality, they just do not see that many cases that fit their conceptions of these offences. Sometimes the decision to discontinue a case reflects the move from being a ‘victim’ of rape to being a ‘survivor’. At other times the agency of victims in making these decisions is compromised by a lack of support from criminal justice personnel and even by active dissuasion on their part. The ways in which attitudes and sometimes even direct advice shapes agency are apparent from the following response from a victim to a question about the relationship between her and the officer investigating her case:

> He treated me in a way that showed me that he did not care at all what happened to me and he also made me feel that it was my fault that I got raped. He never gave me any information regarding the process of the case, instead he recommended that I drop the charges because the case was not going anywhere.\(^79\)

Counsellors and victims have also expressed their concern that cases ‘just disappear’ from the criminal justice system, with police officers losing interest as time passes or when cases are transferred to other investigating officers.\(^80\) The combined effect of these practices with disbelieving attitudes towards rape complainants creates a context in which pursuing the legal process becomes untenable for victims. With the critical structural and resource problems that characterise policing as an institution, the potential of ‘law reform’ to reduce attrition and secondary victimisation becomes even more questionable. For it to be remotely effective, the leadership of the SAPS needs to take seriously the intentions of available legal frameworks and mechanisms and to ensure that they are satisfactorily resourced.

### 3.3.1 Supervision and Leadership

Poor attitudes towards rape victims are reinforced by poor leadership. Our discussion of policy initiatives shows that over time the South African government and the SAPS have committed themselves on paper to addressing high levels of violence against women. This is reinforced by the enactment of progressive legislation and policies in pursuit of this goal. In order for these to filter through there must be a commitment from line managers at the station level to enforce certain norms and standards. Generally speaking this commitment is absent. Based on an analysis of finalised dockets at 13 police stations, Barday and Combrinck observe that:

---

\(^{78}\) Parenzee et al (note 52 above).

\(^{79}\) Combrinck & Skepu (note 72 above) 18.

\(^{80}\) Ibid 19.
in some cases arrests had not been made even where the investigating officer knew the identity of the perpetrator and his address. No reasons were noted on these dockets for the failure to arrest the perpetrator, and it was not evident why these cases were closed without further investigation. Many of these dockets only contained an initial . . . statement by the complainant.\textsuperscript{81}

They go on to point out that if a complainant were to request reasons for the closure of the case it would be impossible to establish these from the docket.\textsuperscript{82} They similarly report finding six dockets, all closed by the same police officer with the same reason given. On each docket was written ‘the complainant doesn’t have time to attend court’.\textsuperscript{83} The SAPS Standing Orders on closing of case dockets\textsuperscript{84} make it very clear that, prior to closing a docket, the station commander is ‘responsible for ensuring that the case was properly investigated and that all possible sources of information have been explored’.\textsuperscript{85} Barday and Combrinck’s findings strongly suggest that this is not happening. The standing orders admonish that failure to comply will be ‘viewed in a very serious light’ and that ‘neglect with the reckless disregard of consequences may possibly be regarded as defeating the ends of justice’.\textsuperscript{86} Again, the threat of internal sanction seems to make no discernable difference — purely on the basis of the dockets discussed above these provisions should have come into effect.

Leadership also manifests in the setting of key performance indicators through which to quantitatively monitor job performance. Civil society activists have expressed concern that national strategies have been glibly translated into provincial targets calling for a reduction in the number of reported rapes.\textsuperscript{87} The Western Cape has, for example, identified rape as one of eight crimes that must see a reduction of 10–12\% during 2007/2008.\textsuperscript{88} In the context of already high rates of under-reporting in these cases, experts are concerned that this will result in more victims being turned away from police stations and their reports of rape not being recorded.\textsuperscript{89} In this way, a well-intentioned management intervention aimed at monitoring the effectiveness

\textsuperscript{81} Barday & Combrinck (note 52 above) 33.
\textsuperscript{82} Ibid.
\textsuperscript{83} Ibid 31
\textsuperscript{84} Note 45 above.
\textsuperscript{85} Ibid1.2.
\textsuperscript{86} Ibid.
\textsuperscript{87} See, for example, D Smythe ‘The truth behind those statistics’ Mail & Guardian, 13 July 2007.
\textsuperscript{88} South African Police Service Operational Plan 2007 — 2008: People Focus Western Cape
\textsuperscript{89} This concern was raised by Joan Van Niekerk, National Coordinator of Childline, at a National Working Group on the Sexual Offences Bill meeting held in Gauteng on 22/23 February 2007. A more strategic approach would be to aim for an increase in the number of rape cases that are reported, as this would indicate greater public faith in the ability of the police and the criminal justice system to effectively and sensitively manage these cases. Although this target would benefit a political agenda bent on creating the impression that rape is on the decrease it is likely to be harmful to women and children and undermine service delivery in these cases.
of rape prevention can backfire against victims who have been raped, with the statistical reduction in reporting becoming an end in itself.

3.3.2 Perceptions of Police Corruption

Intimidation by perpetrators and police complicity with perpetrators are cause for much concern for rape victims. While intimidation of complainants can be expected and is very difficult to deal with, police complicity with perpetrators and direct collusion is of very serious concern. The following excerpt illustrates the horrific potential of the pernicious relationships between police and gang members:

One cop attempted to rape a girl in overnight police custody, and the family laid a charge with the ICD [Independent Complaints Directorate]. She was gang raped the day after her release. . .

Similar allegations that police officers have themselves raped victims when they went to report a prior sexual assault were reported to Parliament’s Office on the Status of Women and published in a 2000 report.

Corruption has also been cited as a factor affecting the management of rape cases in South Africa. CIETafrica has reported that rape dockets can be ‘lost’ by police and prosecutors for as little as R20. They estimate that in Southern Johannesburg one in twenty dockets is lost in this way. Other allegations of corruption include victims being asked by police for payment to complete the investigation. Admittedly the problem of corruption is one that goes beyond police responses to rape victims, with Gareth Newham and David Bruce arguing that it is ‘endemic within the SAPS’ and that ‘(d)emanding money to release a suspect or assist a complainant, and theft is commonplace’. Clearly this raises profound issues for the regulation of criminal
justice personnel in the South African context. When dealing with sexual offences its impact on already vulnerable complainants cannot be ignored.

3.3.3 Victim Responses

Some of the claims made by police and prosecutors that victims ‘abuse’ the system may be justified. The ways in which victims interact with the system, the agency exercised in this process and the instrumentality of that interaction are complex. For instance, some victims may decide to withdraw from the legal process because they find the prospect of the trial too traumatic; others, after having been in the system for 18 months or more, may decide that the trial process is simply too burdensome. Often, where this is financially feasible, this means relocating. In Cape Town, with its large migrant worker population, it may mean returning to the relative safety of home in the Eastern Cape. Many women simply want to close the book on a traumatic experience and perhaps seek healing elsewhere. Understanding the cycles of violence in which many women find themselves trapped in their intimate relations, it should not be surprising that some will even be reconciled to the perpetrator.

A more problematic aspect of victim withdrawals is the allegation that families are sometimes paid to withdraw the case, whether through direct contact with the perpetrator or through the mediation of the community. Charlene Smith writes in the Mail & Guardian of December 4, 2003:

In Meadowlands, Soweto, Superintendent Nico Snyman says 90% of rape is against children aged 12 or younger. He says they arrest around two-thirds of perpetrators, but are lucky to get convictions in a fifth of the cases. The reason? Many parents are happy to accept as little as R50 to drop charges.98

Smith claims that such payments are one of the most common reasons for unsuccessful prosecutions in South Africa.99 But there are claims that the police themselves are doing the brokering, such as the case reported by Combrinck and Skepu where ‘the police’ set up a meeting between the perpetrator, who was a policeman, and his victim, at which the perpetrator ‘offered her family R5,000 for her to drop the charge’.100 In this scenario police corruption and complicity become entangled in narratives of restorative justice, complicated by the question of what victims gain from their engagement with the criminal justice system. The resource constraints of crime victims in South Africa cannot be ignored. Most victims of sexual offences will be socially and economically vulnerable and ‘(m)any people in

99 This does not appear to be true of the Western Cape, where Dee Smythe’s research has not shown up any examples.
100 Combrinck & Skepu (note 72 above) 25.
South Africa are operating at survival level, in which their needs for housing, food, water and health care precede their needs for a violence-free existence’. Where the perpetrator is a member of the community, victims come under immense pressure to drop charges. A rape victim interviewed by Combrinck and Skepu for their study on bail in sexual offences cases recounts how ‘...his mother phoned my mother to ask her to tell me to drop the charges’, and that:

I met [his friends] at the shop, they asked why I went to report their friend and I told them that he had raped me and it was my right to do so. They told me that I was wrong and I should go and drop the case ... I was very upset, because I knew they were people who ... could do anything they wanted to.

These descriptions raise questions about the extent and authority of powerful informal mechanisms of social control in the form of gangs and informal justice mechanisms, in mediating the relationship between rape victims and the criminal justice system.

3.3.4 Vicarious Trauma

Criminal justice personnel and care-givers dealing directly with the high levels of violence in South Africa run the risk of being traumatised themselves. This phenomenon, termed ‘vicarious trauma’, has been well documented in respect of, for example, rape counsellors and others in ‘caring’ professions, who are constantly engaging with stories of trauma. Psychological and emotional symptoms may

101 Parenzee et al (note 52 above) 103.
102 Combrinck & Skepu (note 72 above) 21.
104 This is a question which goes beyond the scope of this chapter, but one that certainly requires further research.
105 KW Saakvitne & LA Pearlman (1996) *Transforming the Pain: A Workbook on Vicarious Traumatization*. Jan Richardson describes vicarious trauma as follows: Vicarious trauma is the experience of bearing witness to the atrocities committed against another. It is the result of absorbing the sight, smell, sound, touch and feel of the stories told in detail by victims searching for a way to release their own pain. It is the instant physical reaction that occurs when a particularly horrific story is told or an event is uncovered. It is the insidious way that the experiences slip under the door, finding ways to permeate the counsellor’s life, accumulating in different ways, creating changes that are both subtle and pronounced. Vicarious trauma is the energy that comes from being in the presence of trauma and it is how our bodies and psyche react to the profound despair, rage and pain. Personal balance can be lost for a moment or for a long time. The invasive and intrusive horrors infiltrate and make their mark. The waves of agony and pain bombard the spirit and seep in, draining strength, confidence, desire, friendship, calmness, laughter and good health. Confusion, apathy, isolation, anxiety, sadness and illness are often the result.
107 See, eg, S Baird & SR Jenkins (2003) ‘Vicarious Traumatization, Secondary Traumatic Stress, and Burnout in Sexual Assault and Domestic Violence Agency Staff’ 18 *Violence and Victims* 1; V Folette et al. (1994) ‘Mental health and law enforcement professionals: Trauma history, psychological symptoms, and
include feelings of being overwhelmed, numbing, intolerance, increased anxiety and fear for one’s own safety or that of others close to you, aggression, withdrawal, various stress-related somatic symptoms and psychological distancing from victims (by, for example, looking to blame victims for the harm that has been done to them).  

Studies suggest that the effects of working with trauma are exacerbated by heavy workloads, a lack of institutional support and debriefing, inadequate supervision, poor self-care and poor education, all of which are reflective of the SAPS work environment. It is not surprising then that individual police officers say that:

Sometimes it feels like a no-win situation. No matter what you do, no one is going to be satisfied. 

So much is expected of police officers without the provision of ‘necessary guidance, support or resources to do so’. The lack of institutional support sets individuals up for failure, creates a hostile work environment where neither the expectations of senior officials nor those of complainants are being met, where their individual contribution is not seen as valuable in making a difference to an enormous problem, but they perceive themselves to be implicated in a system that is not performing. ‘It seems obvious,’ Parenzee et al conclude, ‘...that an environment such as this is not conducive towards ensuring that law enforcement agents are functional, enthusiastic and caring in carrying out their assigned duties...’


It is into the institutional and social context described above that the Law Commission’s recommendations regarding to the policing of rape were made. In this section we consider those recommendations, concluding that ultimately they do not show an adequate understanding or response to this context.

In its discussion paper on process and procedure the Law Commission recognised that standardised guidelines or protocols for dealing with victims of sexual offences in

impact of providing services to child sexual abuse survivors’, 25 Professional Psychology: Research and Practice 3, 275-82.


109 Parenzee et al (note 52 above) 82.

110 Ibid 83.

111 Ibid.
South Africa had not been at all successful, because ‘certain disciplines (had) remained noncommittal’ to their implementation. They also acknowledged that training of criminal justice personnel was fragmented, ad hoc and, in fact, not even required for working with rape cases. Nonetheless the Commission concluded its examination of the police by simply recommending that National Instruction No. 22 on the investigation of rape cases be ‘revisited, amended if necessary, and brought to the attention of all police officers’. Nothing of substance was recommended.

Our experience with the DVA has shown that an effective way of dealing with systemic intransigence is to impose statutory duties on specific sectors, as contained in s18 of the Act, which places positive duties on the police. Discounting that experience and without going into reasons for adopting this approach, the South African Law Commission (SALC) concluded that ‘measures requiring legislation should be kept to a minimum’ and that it should be left to criminal justice agencies to develop their own rules, procedures and directives. The Commission went on to make a number of non-legislative recommendations with the hope that they would ‘encourage action by the appropriate government structures’. The recommendations made by the Law Commission to the Department of Safety and Security included the following:

- That the SAPS National Instructions on Sexual Offences be brought to the attention of all police officers.
- That better screening procedures be put in place for selection of police members dealing with victims of sexual offences.
- That better training be put in place, including ‘on-the-job’ training of inexperienced police members by experienced colleagues.
- That regular debriefing of police members be made available and encouraged.
- That there be ‘obligatory facilitation of contact, information sharing, and collection of evidence’ between investigating officers and the prosecuting authority prior to the trial.
- That the Departments of Safety and Security and of Justice and Constitutional Development run awareness campaigns for adult victims of sexual violence ‘to instil confidence in a responsive authoritative protection system in order to make it easier for such victims to report incidents of sexual violence’.
- That the police review procedures for unfounding and withdrawing complaints and that these be included in the National Instructions.

---

112 SALRC (note 34 above) para 2.5.1, fn 20.
113 Ibid para 2.5.1 and fn 21
114 Ibid 3.2.9.2.
115 Parenzee et al (note 52 above).
116 SALRC (note 34 above) para 1.3.4.
118 Ibid 302–306.
• That police members be informed that they have no discretion in accepting and fully investigating a complaint of sexual assault.
• That a docket monitoring system be introduced at police stations with regard to sexual offences cases.
• That a statement of duties of individual police officers to provide information to complainants be written into a police code of good practice.
• That the agency which has primary responsibility for the victim at any time should be responsible for providing her with information.
• That a complainant should be informed of her right to ask the National Director of Public Prosecutions to review any decision made not to initiate or proceed with an investigation into an alleged sexual offence committed against her.
• That provision be made for charging complainants in sexual offences cases ‘for laying false charges, making false statements, obstructing the course of justice and perjury’. 119

The only one legislative recommendation that was made was that the decision whether to close a police investigation should rest with the National Director of Public Prosecutions. 120 This provision was welcomed by civil society groups and by the National Prosecuting Authority (NPA). In a joint submission to the Portfolio Committee on Justice and Constitutional Development by the Gender, Law and Development Project121 at UCT’s Institute of Criminology and the NPA during 2003, Lillian Artz and Bronwyn Pithey argued for the constitutionality of this provision. Based on research122 into and experience with the Thuthuzela model of prosecutor-guided investigation in rape cases they argued that putting the onus onto the prosecution to decide on the finalisation of a case resulted in better criminal justice outcomes. They also argued that ultimately any decision in this regard was based on the likelihood of a successful prosecution, a decision best made by the NPA.123

5. Evaluation of the Law Commission’s approach

A number of the Law Commission’s recommendations had the potential, if properly implemented, to improve the experience of rape victims engaging with the criminal justice system and to curb police discretion in accepting, investigating and referring rape complaints. Unfortunately the deeply rooted attitudes towards violence against women presents a fundamental problem, which does not appear to have been

119 Other recommendations relate to the conduct of identity parades, bail proceedings and coordinated medico-legal services. They are not directly relevant to this paper. Ibid 306.
121 This project subsequently became the nucleus of the Gender, Health & Justice Research Unit in the Faculty of Health Sciences at UCT.
122 Artz, Smythe and Leggett (note 61 above).
123 Minutes of this meeting are available at www.pmg.org.za/docs/2003/appendices/030916uct.htm.
meaningfully addressed through this process. On a close reading of the non-legislative recommendations made by the Commission and listed above it is apparent that all but four are already, in essence, contained in existing protocols, guidelines and instructions. One of the four is a clarification of who should be responsible for providing the victim with information on her case (the agency that has primary responsibility for the case at the time), an aspect of an existing obligation under the National Instructions. A second is the sharing of information between the police and prosecution — good investigative practice. The third is particularly disturbing, especially when read with the reasons why the Commission thinks a docket may be closed; it relates to the charging of rape complainants for ‘laying false charges, making false statements, obstructing the course of justice and perjury’. The assumption that women are making false reports of rape in sufficient numbers to justify such a recommendation is one that pervades the system and requires urgent investigation.

The final recommendation is substantive and important: that an investigating officer must inform the victim that she has a right to ask the National Director of Public Prosecutions (NDPP) to review any decision not to initiate or proceed with an investigation into an alleged sexual offence committed against her. The only problem is that with Parliament’s rejection of the recommendation for ultimate authority in the rape investigation to lie with the NDPP, there is no statutory basis for asserting a complainant’s right to have her case reviewed by the NDPP. Most disturbing to us is that most of the other recommendations are already contained in the National Instructions, which have been in place since 1998.

The Commission says in its final report that police decisions to continue with or to close a rape investigation are made ‘almost invisibly’, and that this occurs for any of four possible reasons: the police do not believe the complainant; they do not perceive it to be a prosecutable case; victims themselves drop the matter; and victims make false allegations. Failure to empirically ascertain why cases are unfounded by the police and to address the question of why it is that police ignore or are unaware of existing instructions, leaves the Commission in a fog where it moves backwards and forwards between lamenting the fact that existing instructions are ignored on the one hand, and bewailing on the other hand the fact that certain obligations are not contained in the National Instructions. The Commission’s one legislative recommendation that prosecutors be ultimately responsible for the decision to close rape dockets was roundly rejected by the Portfolio Committee. This is perhaps not

124 SALRC (note 117 above) 353.
125 The reasons for unfounding rape cases, the extent of false reporting and the question of why such high numbers of victims apparently withdraw their complaints form the focus of our current research.
126 SALRC (note 117 above) 353.
128 SALRC (note 117 above) 95.
129 Eg, at para 3.2.5.5 (noting that nothing in the instructions mandates contact between the police and the prosecution).
surprising given the lack of empirical support offered by the Law Commission for this recommendation, but should also be seen in context of the detailed submission on this topic made by Artz and Pithey, which contained substantial evidence of inadequate police investigations into rape complaints and the effectiveness of an integrated response that included police and prosecutors in the investigation and disposal of rape cases. The Transformative Human Rights Unit (THRU) and the Southern African Media and Gender Institute (SAMGI) went even further, arguing for a provision specifying that SAPS had to investigate fully all complaints of rape and sexual assault and had to pass all dockets to the prosecution regardless of the police officers opinion on the merits of the case. They suggested that this would also allow for better monitoring of SAPS procedures and attitudes towards crimes of this nature.

Drawing on the arguments put forward by Artz, Smythe and Leggett, the UCT/NPA submission also argued cogently for the necessity of going beyond the explication of expectations in National Instructions, saying that:

By imposing positive duties on the SAPS through legislation, the State’s expectations of the quality of service to be delivered by the SAPS is made explicit. Likewise the threat of sanction for non-compliance. Furthermore, legislation being far more accessible than an internal police document, citizens are better apprised of their rights in respect of police conduct.

In similar vein, Sam Waterhouse, speaking for Rape Crisis, noted that SAPS personnel were unaware of or reluctant to implement the National Instructions.

These submissions were made in September 2003. In January 2004 the Committee met again and the drafters reported back that both the police and, surprisingly, the NPA were set against the imposition of statutory duties regarding the disposal of cases, preferring directives. Without referencing civil society concerns regarding the enforceability of these directives, the Chairperson accepted this position, stating that they were enforceable under administrative law. Given the level of legal literacy required and the difficulty and expense involved in taking an administrative decision on review, this argument seems disingenuous and not a little glib. It is unlikely that a rape victim whose case had been discontinued would have access to the Instructions or be sufficiently knowledgeable about her rights in this regard to institute review proceedings, even if she could afford to do so.

130 See text accompanying note 123 above.
132 Ibid.
6. The Sexual Offences Act

On the basis of the recommendations made by the Law Commission, the Sexual Offences Act provides for the establishment of an Inter-sectoral Committee charged with developing and monitoring a National Policy Framework (NPF),\textsuperscript{135} which will set performance standards for various departments, including the police, in relation to sexual offences. It is hoped that this development, which is generally viewed as positive, will result in greater accountability and synchronicity between the various criminal justice departments.

The Act also requires the development of National Instructions by the SAPS on ‘all matters which are reasonably necessary or expedient to be provided for and which must be followed by all police officials who are tasked with receiving reports of and the investigation of sexual offence cases’.\textsuperscript{136} Section 66(1) of the Act specifies that the following issues should be included in the instructions:

(i) The manner in which the reporting of an alleged sexual offence is to be dealt with by police officials.
(ii) The manner in which sexual offence cases are to be investigated by police officials, including the circumstances in which an investigation in respect of a sexual offence may be discontinued.
(iii) The circumstances in which and the relevant sexual offence or offence in respect of which a police official may apply for the HIV testing of an alleged offender as contemplated in section 33.
(iv) The manner in which police officials must execute court orders for compulsory HIV testing contemplated in section 33 in order to ensure the security, integrity and reliability of the testing processes and test results.
(v) The manner in which police officials must deal with the outcome of applications made and granted in terms of section 31 or 32 in order to ensure confidentiality; and
(vi) The manner in which police officials must hand over to the victim or to the interested person, as the case may be, and to the alleged offender the test results.

Further, the Act requires the development of training courses on the National Instructions and social context training regarding sexual offences to promote uniform norms, standards and procedures.\textsuperscript{137} The Act states that the purpose of this is to ensure that as many police officials as possible are in a position to manage sexual offence cases in an appropriate, efficient and sensitive manner.

The fact that the Act only broadly outlines the areas for which National Instructions are necessary with regard to dealing with reports and the manner of investigations means that the extent to which the legislation will improve existing

\textsuperscript{135} Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, Part 3.
\textsuperscript{136} Section 66(1)(a).
\textsuperscript{137} Section 66(1)(b).
practice can only be assessed when these instructions are developed. It is of concern that four of the six enumerated areas to be dealt with relate to the relatively obscure (and probably unconstitutional) provisions mandating the testing of alleged sex offenders for HIV.\textsuperscript{138} It is unlikely that the new Instructions, as they pertain to reporting and investigation, will look substantively different from the current Instructions, which are, in any event, very thorough. Just as with the current Instructions the pressing issue will be to ensure that they are adequately communicated to members and rigorously enforced. This is where the inclusion of a requirement that SAPS members receive training on the legislation is important. It is all the more pleasing as it includes the development of social context training, which is a critical component of efforts to shift the widely held misconceptions and beliefs regarding rape and women which undermine efforts to reform policing in these cases.\textsuperscript{139}

The widespread failure of SAPS members to adhere to existing rules and regulations pertaining to the treatment of rape complainants suggests more than just a lack of knowledge about those rules on the part of individual members. It also suggests that the problem does not lie with individual police officers who are purposefully thwarting the best intentions of the institution — which is what the Commission’s recommendation for better selection and training of police members would suggest. Rather, it seems to reflect an institutionalised response, where certain values and norms have become deeply entrenched in the attitudes and practices of police members. Understanding therefore that addressing police responses to violence against women is about institutional reform is central to any programmatic intervention in this area. In this context the specialised Family Violence, Child Protection and Sexual Offence Units (FCS) constitute a critical intervention, which has been left by the wayside of the current rape law reform process. In fact the current restructuring process suggests a move away from police specialisation in the area of gender-based violence, despite the policy imperatives described above, regardless of the relative success of these units, and in contrast to the international trend towards specialisation, including dedicated police and the delivery of services at multipurpose centres.\textsuperscript{140} The provisions of the Act and current SAPS policy do not provide assurance that FCS units will be further extended and properly capacitated to deliver the necessary level of services to victims of these crimes.

\textsuperscript{138} See further in this volume Chapter 8.
\textsuperscript{139} Jordan (note 2 above) 11.
\textsuperscript{140} S Shivpuri (2006) Internal Working Paper on Specialised Policing of Sexual Offences, Gender Health and Justice Research Unit, University of Cape Town. On file with the authors.
7. Conclusion

Estimates suggest that only around one in nine rapes committed in South Africa is reported to the police.\textsuperscript{141} We have a conviction rate for rape of approximately 7 % of cases that are reported,\textsuperscript{142} indicating a common failure to address the needs of the vast majority of rape victims. This failure is not limited only to the lack of success in conviction, but also to the exposure of victims to further harm, humiliation, indignity and disrespect by members of the criminal justice system.

The Law Commission’s response to the inadequacies identified over years of research and experience with the policing of sexual violence was extremely disappointing. It was particularly surprising, given our positive experience with statutory duties placed on the police by the DVA, that they did not recommend legislating specific duties regarding the opening of cases once a complaint was made and the way in which cases should be closed. Parliament also did not take this critical issue any further. As a result the Sexual Offences Act speaks very little to this critical aspect of rape case management in the criminal justice system and fails to adequately bridge the divide between the identification of a particular act as a ‘crime’ and the consequent obligation on the State to provide justice to the victim. It remains to be seen whether the ‘soft’ solutions proposed can mitigate this failure.

\textsuperscript{141} Jewkes et al (note 9 above).
\textsuperscript{142} R Paschke and H Sherwin (2000) Quantitative research report on sentencing, Institute of Criminology, University of Cape Town.
1. Introduction

In *S v Ntuli* Visser J justified his departure from a mandatory life sentence for the multiple rape of a fourteen year old girl as follows:

The complainant being the pretty girl that she is might have brought out the animal in the accused spontaneously, and it would be wrong to deprive the accused of the opportunity of rehabilitation and being a useful citizen.

I have to bear in mind the sentiments of society and of the community, which demand that crime should be punished severely. It is fortunate for the accused that the evidence in this case indicates that the complainant has suffered no emotional disturbances or ill-effects as a result of her experience, and that she suffered no serious injuries. There is also the fact that her HIV tests proved negative.2

Instead of the mandatory life sentence prescribed, the judge sentenced the offender to eight years imprisonment, half of which was suspended. Cases such as this one illustrate both the persistent failure of South African courts to recognise the violent nature of rape and the courts’ continued reliance upon rape myths that shift blame from the offender to the victim.3 They also demonstrate how ineffective the Criminal Law Amendment Act 105 of 1997 (‘the CLAA’) has been in ensuring severe and consistent punishment for sexual offenders and underline the urgent need for sentencing law reform.

---

* Yonina Hoffman-Wanderer LLB LLM Hebrew University of Jerusalem is a senior researcher at the Gender, Health and Justice Research Unit in the Faculty of Health Sciences at the University of Cape Town.


2 At 34.

3 For in depth discussion of beliefs held with respect to rape and, in particular, the distinctions made by the criminal justice system in practice between ‘stranger rape’ and rape accompanied by physical violence (in addition to that inherent in rape) on the one hand, and ‘simple’ rape, such as date-rape, see S Estrich (1987) *Real Rape: How the legal system victimizes women who say no*. Although the book was published in the United States in 1987, it is clearly still relevant. See, for example, the incident related on page 9, where a prosecutor distinguished between a case of ‘technical rape’ — where the rapist was an ex-boyfriend, the victim accompanied him to his apartment willingly, had no bruises and did not fight, though she clearly ‘said no, she didn’t want this, and got up to leave’ — and ‘cases that one prosecutes.’ In relating the story, the prosecutor also noted that ‘[t]he victim came to his office for the meeting dressed in a pair of very tight blue jeans. Very tight. With a see-through blouse on top.’ When asked whether this mattered, the prosecutor responded ‘Are you kidding!’ See also the studies discussed on page 13, where findings demonstrated, *inter alia*, that ‘most adolescent victims do not perceive their experience of victimization ‘as legitimate,’ meaning that ‘they do not involve strangers or substantial violence’.”

In the narrow sense, however, sentencing is only minimally dealt with in the Act. This matter has been (and continues to be) dealt with by the Law Commission within the context of other projects, including Project 82, which has undertaken the task of drafting a general Sentencing Framework Bill. Part one of this chapter therefore critically reviews the current and proposed sentencing frameworks for sexual offenders, focusing on the CLAA and the Sentencing Framework Bill.

Part two of the chapter examines provisions related to the management of sexual offenders that were recommended by the Law Commission’s Project Committee on Sexual Offences (‘the Project Committee’), and reviews why certain provisions were included in the Act while others were excluded. These decisions and their possible impact are critically discussed. The last section of this part discusses the sexual offender registration scheme established by the Sexual Offences Act and compares this scheme to the existing National Child Protection Registry. Based on an analysis of the two sets of provisions, the chapter evaluates the usefulness of the new register and discusses possible constitutional challenges.

The scope of this paper does not extend to issues relating to the sentencing of child offenders. For a discussion of child offending generally, and comments on sentencing child offenders, see Chapter 8 of this volume.

2. Part 1: Sentencing Sexual Offenders

An effective sentencing framework must take into account the specific context and resources in and with which it will be implemented. This section therefore begins with a brief discussion of the social and political context within which sexual offenders in South Africa are convicted and sentenced.

The sentencing framework itself incorporates three elements: the philosophy or theory that informs sentencing law and practice; the legislation or common law that establishes the sentencing authority of the judiciary; and the case law that interprets and applies the law. These are discussed below. Ideally, there should be harmony among these three elements: the legislation should be crafted, interpreted and applied by the courts in a way that reflects the punishment goals that the legislature seeks to achieve. In fact, there seems to be little consistency in the way courts understand and apply the CLAA with relation to sexual offenders, and this greatly undermines its legislative aims.

Also discussed below is an amendment to the CLAA, enacted in 2007, and aimed

---

4 Criminal Law (Sentencing) Amendment Act 38 of 2007 (the ‘2007 Amendment’).  

---
at improving the minimum sentencing process and providing additional guidance to the courts in their interpretation and application of the legislation. Such guidance was particularly aimed at the interpretation of the ‘substantial and compelling circumstances’ exception to mandatory sentences.5

The proposed Sentencing Framework Bill would, presumably, replace the CLAA. This section is completed by examining the draft legislation in light of the difficulties experienced in applying the CLAA. For purposes of comparison, certain aspects of the sentencing guidelines developed in the State of Minnesota, USA (‘the Minnesota Guidelines’)6 are examined, along with a brief discussion of certain aspects of the Sentencing Framework Bill law reform process.

2.1 The Social and Political Context

In 2006/7 52,617 rapes and 9,367 indecent assaults were reported to the South African police.7 Research has shown that the crime of rape is significantly under-reported, suggesting that the number of actual rapes in South Africa is substantially higher.8

Yet, as of 31 July 2007, only 25,163 inmates were incarcerated in South African prisons for sexual offences. Although this reflects a significant increase since 1998, at which time only 11,569 inmates were incarcerated for sexual offences,9 the overall number still seems very low. This is particularly so considering the minimum sentencing legislation that took effect in 1997, which requires judges to impose a minimum sentence of imprisonment, ranging from 10 years for a first non-aggravated rape offence to a life sentence when certain aggravating circumstances are present.10 The low incarceration rate may be partly explained by the fact that so few rape cases go to trial and even fewer result in conviction.11

Researchers have found that the CLAA ‘has resulted in the “average sentence length for crimes of sexual violence to increase sharply”, and has resulted in greater

5 Section 51(3)(a) of the CLAA. According to this provision, courts may depart from the mandatory sentences prescribed by the legislation if they find ‘substantial and compelling circumstances’ that justify such a departure. The legislation does not provide guidance as to what kind of circumstances may be considered ‘substantial and compelling’ in this context. See section entitled ‘Application of the CLAA in Cases of Rape’, below, for a discussion of this clause.

6 Minnesota Sentencing Guidelines and Commentary, revised August 1, 2007 (‘MSGC’), established in accordance with section 244.09, 2007 Minnesota Statutes. Available at http://www.msgc.state.mn.us/guidelines/guide07.DOC.


8 R Jewkes et al (1999) ‘He must give me money, he mustn’t beat me.’ Violence against women in three South African Provinces. It is generally accepted that one in nine rapes is reported to the police.

9 Ibid at 27.

10 Section 51 of the CLAA.

11 The national conviction rate for rape is currently around 7%.
consistency and predictability'. At the same time, judges far too frequently find 'substantial and compelling circumstances' that, in their opinions, justify departure from the prescribed minimum sentences. As illustrated in the judgement above, such circumstances often rely upon outdated and inappropriate myths regarding the crime of rape. Such myths remain deeply entrenched in society and are reinforced by statements made by highly regarded leaders in South Africa.

Consider, for example, the very public rape trial of Jacob Zuma, former Deputy President of South Africa and newly elected President of the African National Congress — who was acquitted on the charge of rape after claiming that he had consensual sex with the complainant. Among the suggestions made by Zuma in his testimony, was that ‘the woman’s decision to wear a knee-length skirt and later a kanga, a traditional African wrap, were other indications of her desire to have sex with him.’ In discussing the lessons to be learned from the Zuma trial, we have been warned by a local NGO that:

Zuma’s claims that sex between he and the complainant was consensual should sound alarm bells about men’s understanding of what constitutes sexual consent and their sense of entitlement to women’s bodies. In workshops across the country, we have heard many men argue that sexual consent is established when a woman gives her cell phone number, accepts a drink, dances closely, or comes back to their house. These definitions of consent then provide men with a convenient justification for not respecting women’s right to say no to sex.

Where rape is nonetheless deemed to have occurred, such circumstances may be perceived as reducing the moral blameworthiness of the offender, thereby constituting ‘substantial and compelling’ reasons to reject the mandatory sentence.

2.2 Theories of Punishment

Bound by the Constitution, the State must ensure that a punishment that restricts a person’s basic rights is justifiable. Justifiability is largely dependent on the punishment having an important and attainable purpose that is consistent with a democratic society based on human dignity, equality and freedom.


13 S v Zuma 2006 (2) SACR 191 (W), 2006 (7) BCLR 790 (W).

14 As reported on http://english.peopledaily.com.cn/200605/09/eng200605090...264078.html.

15 B Khumalo and D Peacock (Co-Directors, Sonke Gender Justice Project) We must act on the lessons learned during the Zuma rape trial. Available at http://www.genderjustice.org.za/index.

16 Justifiability is essentially determined in accordance with the limitation clause of the Constitution (s36). A person may be incarcerated, for example, thereby restricting their freedom of movement, in accordance with a law of general application, including a general provision of the criminal law, if it is ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account... (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and
Theories of punishment suggest a number of possible purposes that may be served by punishment under the criminal law. The ‘absolute’ theory argues that punishment is retributive; that it is an end in itself. When a person commits a crime they deserve to be punished. The criminal owes a debt to society that must be paid. The punishment, therefore, must be proportionate to the crime committed, and to the debt thus owed.17 ‘Relative’ theories suggest that punishment serves a number of possible secondary purposes: the prevention of crime (the preventive theory); the deterrence of crime (the deterrent theory); and rehabilitation of the offender (the reformative theory).18

In reality, courts in South Africa, as in other Western countries, do not accept a single theory and determine sentences based on a combination of them.19 As Snyman notes, courts in South Africa speak of three main considerations taken into account in sentencing: the crime, the criminal and the interests of society.20 These correspond with: the harm for which there must be retribution; the personal circumstances of the offender that may be related to chances of rehabilitation; and society’s interests in preventing, deterring or seeking retribution for the crime.21

It has been argued that as section 51 of the CLAA draws on the Minnesota guidelines, which are predicated on the ‘principle of desert’, this principle should provide guidance in its interpretation, including the ‘substantial and compelling circumstances’ exception.22

2.3 Legislation: Minimum Sentencing for Sexual Offences

In accordance with the common law tradition, South African courts have historically had full discretion to determine the specific sentence to be imposed for a particular offence. This broad discretion contributed to the development of a number of specific problems that led to the establishment in 1996 of a committee of the Law Commission on sentencing (the ‘1996 Committee’). These include: a perceived lack of uniformity of sentences (ie ‘like cases not being treated alike’); leniency of sentences with respect to certain serious offences, including sexual offences; lack of

---

19 Ibid 22.
20 Ibid 23, referring to footnote 27.
21 Ibid.
imagination with respect to restorative justice alternatives for less serious offenders; and insufficient attention paid to the interests of victims of crime. Also raised was the fact that prisoners are often granted an early release from prison.23

The 1996 Committee was opposed to the enactment of mandatory minimum sentences as a temporary measure (as was clearly intended by government) but investigated this option as a possible aspect of sentencing reform.24 In the end, the 1996 Committee ended its term without submitting any specific proposals. Before the succeeding committee was appointed in 1998 (the ‘Sentencing Committee’) section 51 of the CLAA was enacted.25

Section 51 of the CLAA substantially limited the discretion of judges in determining sentence, requiring that judges impose minimum sentences for a variety of offences, including rape. Rape that is not committed with aggravating circumstances26 is subject to a minimum sentence of ten, fifteen or twenty years, depending on whether the offender is a first, second or third (or subsequent) time offender.27 When particular aggravating circumstances are present, a life sentence must be imposed.28 In each case, however, if there are ‘substantial and compelling circumstances,’ a lesser sentence may be imposed.29

The minimum sentencing legislation has been criticised by both its proponents and opponents. The judiciary has argued that it inappropriately restricts judicial discretion.30 There is no reason, however, that the judiciary ought to have unfettered discretion in determining sentence. Although in the past the criminal law developed in the courts through the common-law, in modern democracies, like South Africa, the power to make law resides with the legislature, representing the will of the people. As the legislature determines what act or omission constitutes an offence, it is entirely appropriate for it also to determine just how much of a crime that act or omission should be; in other words, to what extent and in what manner it should be

---

23 SALRC (note 22 above) s 1.8.
24 Ibid s 1.12.
25 Ibid s 1.16
26 Part 1 of Schedule 2 of the CLAA lists specific aggravating circumstances which would make the offence one which is subject to a mandatory life sentence, including: where the victim was raped more than once or by more than one person (with a common purpose or conspiracy); where the offender has been convicted of two or more offences of rape, but has not yet been sentenced in respect of such convictions; where the offender knows he has HIV/Aids; where the victim is under the age of 16, is physically disabled or mentally ill; or where the rape involves the infliction of grievous bodily harm.
27 Section 51(2)(b) and Part III of Schedule 2 of the CLAA, as amended by s 68(2) and the Schedule to the Sexual Offences Act.
28 Section 51(1) and Part I of Schedule 2 of the CLAA, as amended by s 68(2) and the Schedule to the Sexual Offences Act.
29 Submission to the Minister of Justice and Constitutional Development in Response to the Evaluation of the Criminal Law Amendment Act 105 of 1997, prepared by the Western Cape Consortium on Violence Against Women, 4 March 2005 (the ‘Western Cape Consortium Submission’) Section B(a).
punished. In this vein, the Constitutional Court has rejected arguments that the minimum sentencing legislation violates the constitutional separation of powers. The Constitutional Court has also rejected the argument that the legislation violates the accused’s right to a fair trial. This argument was based on cases where the CLAA mandated a more severe sentence than magistrates were authorised to impose. In such cases, magistrates were required to transfer the case to the High Court for sentencing. It was submitted that this caused fragmentation of the criminal process. Other opponents of the legislation have argued that minimum sentencing does not reduce crime or make any difference to the sentencing tariff, arguing that failure to renew the minimum sentencing legislation (in 2007) would be ‘unlikely to lead to significant reductions in the length of sentences imposed (as) over the years, minimum sentences have informed judicial officers on what sentences are expected. Heavier sentences have become the norm for violent and sexual offences.’ It is further argued that minimum and mandatory sentences do not have the benefits claimed. They do not promote consistency — as judges tend to try to avoid having to impose the minimum sentence — or act as a deterrent. Moreover, mandatory minimums are contributing (or will contribute) to prison overcrowding.

Proponents of the need for minimum sentencing legislation believe that the legislation is necessary in order to guarantee appropriately severe sentences and thereby ensure the safety of women. The legislation also forces the judiciary to explicitly provide reasons for handing down more lenient sentences, which enables increased public scrutiny and debate. Proponents argue, however, that the very broad ‘substantial and compelling circumstances’ exception undermines the original intent of the legislation, allowing judges to circumvent its requirements. As discussed below, some of the blame for this phenomenon should be placed on the way the legislation is structured.

2.4 Application of the CLAA in cases of rape

According to s 51(3)(a) of the CLAA, sentencing courts may depart downwards from the prescribed sentence only where there are ‘substantial and compelling circumstances’. Presumably this was intended to allow the judiciary to exercise its discretion

---

31 S v Dodo 2001 (1) SACR 594 (CC), 2001 (5) BCLR 423 (CC).
32 The Western Cape Consortium Submission (note 30 above), citing S v Dzukuda and Others (unreported decision in the WLD of 17 May 2000), overturned by 2000 (2) SACR 443 (CC), 2000 (11) BCLR 1252 (CC).
35 Western Cape Consortium Submission, s 1(b)(iii), referring to criticism that emerged from Judge Fagan, the Inspecting Judge of Prisons. See also O’Donovan and Redpath (note 33 above) 46.
36 O’Sullivan (note 12 above) 65.
37 Ibid.
in unusual cases. The legislation does not provide guidance as to the kinds of circumstances that were contemplated.

In cases of sexual offences, criticism of judicial applications of the CLAA focuses on the kinds of circumstances considered by courts to be ‘substantial and compelling’. This criticism revolves around three issues: the way courts (mis)understand the nature and consequences of rape; the way in which judicial interpretations undermine the legislation’s aim; and the structure of the legislation itself.

The arguments related to these three issues are set out in the next three sections.

2.4.1 Misunderstanding the nature of rape

Rape is a crime of violence. Regardless of the physical injuries sustained by the victim of rape — or the supposed lack thereof — rape always causes its victim severe harm.\(^{38}\) The reasons given by some judges for departing from mandatory sentences reflect a misunderstanding of these basic facts.

It is argued, in this regard, that the practice of justifying a departure from the mandatory sentence has created a jurisprudence that minimises the inherent violence of rape and creates a ‘false distinction between rape and rape that causes physical injury.’\(^{39}\) This approach perpetuates ‘mythical rape paradigms’, suggesting that ‘mere’ rape is not violent.\(^{40}\) This has long-term negative effects on sentencing, as courts fail to recognise and adequately punish crimes of rape unless other specific acts of violence — over and above the violence inherent in rape itself — have also been perpetrated.\(^{41}\)

In addition, irrelevant factors, historically used to justify or rationalise the act of rape, such as the victim’s appearance or the prior relationship between the victim and perpetrator, are often included in the ‘substantial and compelling circumstances’ put forward to justify a departure.\(^{42}\) Consider, for example, the 2004 case of Nholeng v S.\(^{43}\) The appellant was convicted of five counts of rape against girls under 16 years of age. The judge himself referred to the appellant as a serial rapist.\(^{44}\) Notwithstanding

\(^{38}\) For a discussion of the psycho-social harm associated with rape, see Chapter 7 of this book.


\(^{40}\) Ibid 85.

\(^{41}\) Ibid 81. For an analysis of the ways in which the courts understand the harm of rape and the ways in which a perceived absence of harm affects rape sentences, see also: L Vetten and F van Jaarsveld (2008) ‘The (Mis)measure of Harm: An Analysis of Rape Sentences Handed Down in the Regional and High Courts of Gauteng Province’ Tshwaranang Legal Advocacy Centre Working Paper No 1 and SALRC (note 22 above) s 1.31.

\(^{42}\) Eg S v Ntuli supra and S v Mvamvu 2005 (1) SACR 54 (SCA), [2005] 1 All SA 435 (SCA) at 440, where the estranged customary marriage between the perpetrator and the victim was considered among the ‘substantial and compelling circumstances.’

\(^{43}\) [2004] JOL 13024 (O).

\(^{44}\) Ibid 10.
this fact, the judge based his finding of ‘substantial and compelling circumstances’ *inter alia* upon the following facts:\(^{45}\)

- ‘All the complainants did not sustain any physical injuries other than those incidental to forced penetration and even those were not of a serious nature. . .’\(^{46}\)
- ‘The appellant did not use excessive force and appears to have intended no harm other than to satisfy his sexual lust.’\(^{47}\)
- ‘. . .these were not rapes of the worst kind. . .’\(^{48}\)
- ‘He is a married man of 34 (now) with minor children. He was fully employed. . .’\(^{49}\)
- ‘The court *a quo* described the appellant as an enlightened and responsible person. It can be accepted that he is not the type that should be permanently removed from society.’\(^{50}\)

Based on these factors the court imposed a 10 year and 13 year sentence respectively to the two counts of rape qualifying for a mandatory life sentence.

These statements reflect the view that rape is a sexual rather than a violent act. The harm caused by forced penetration is merely ‘incidental’ to the sexual act and, therefore, insignificant. Moreover, the perpetrator cannot be blamed for causing this type of harm; after all, he was just having sex. The underlying assumption is that it is excusable for a man to use force when he wants to have sex, as long as he doesn’t beat the woman up or shove a gun in her face. According to this approach, forced penetration is only technically unlawful; it is not the ‘real rape’ for which the legislature intended to impose a life sentence.

### 2.4.2 Undermining the legislative aim

On a related, though more general, level critics argue that some judicial interpretations of the requirements of the ‘substantial and compelling’ provision undermine the legislative aims of the CLAA and create incoherence in the way it is read.

The CLAA sought to attribute an objective level of severity to crimes committed under certain circumstances, specifically excluding the possibility of mitigating factors, except in special cases. Judicial interpretations of the relevant provisions,

---

\(^{45}\) Ibid 13. Technically, the minimum sentencing legislation was applicable only to two of the five counts of rape, since three counts were committed prior to the legislation coming into effect. The judge appeared to consider these factors to be mitigating also with respect to the other three counts.

\(^{46}\) Ibid 11.

\(^{47}\) Ibid.

\(^{48}\) Ibid 12. The judgement here refers to the precedent set in *S v Mahomotsa* 2002 (2) SACR 435 (SCA) at 444.

\(^{49}\) Ibid 12.

\(^{50}\) Ibid.
however, allow the sentencing court to re-evaluate the severity level of the offence based on its own judgment of the circumstances of the case.

Thus, in *S v Majalefa* Leveson J held that ‘notwithstanding the new legislation [the CLAA] the starting point remained that consideration had to be given to all aggravating and mitigating factors in the traditional way.’ This approach was largely endorsed by the Supreme Court of Appeal (‘the SCA’). Following the Constitutional Court, the SCA further concluded that: ‘[i]f the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.’

This judgment essentially led to the development of a legal principle in which courts determined whether, in the facts of the specific case, a life sentence was considered just. Such a test suggests that the ‘substantial and compelling’ language requires no more than a subjective assessment by the court of all the traditionally considered aggravating and mitigating factors in order to determine if a life sentence is appropriate. The legislature’s intention to deal harshly with the crimes enumerated in the legislation appears irrelevant at this stage.

If a life sentence was considered unjust under the circumstances of the particular case, the court was entitled to depart from the mandatory sentence. Only at this point do we see the impact of the legislation, as the sentence actually imposed still had to be sufficiently severe enough to show due regard to the ‘bench-mark’ set by the legislation. This approach understands the legislation only as requiring more severe sentences, with the mandatory sentence acting as a maximum sentence, rather than a mandatory one. This understanding disregards the plain meaning of the legislation.

With these standards in mind, the court in *S v Abrahams* agreed with the sentencing court that it would be ‘unjust’ to impose a life sentence for the offender’s rape of his 14 year old daughter. Among the ‘substantial and compelling circumstances’ cited were:

- The fact that the accused ‘reached his middle years without a criminal conviction.’

---

51 Unreported judgement delivered on 22 October 1998 in the WLD, referenced in SALRC (note 22 above) 12 (hereafter: ‘Majalefa’).
52 SALRC (note 22 above) 12
53 (SCA) Case No: 117/2000, 19 March 2001, unreported. Quotation cited in *S v Dodo* 2001 (1) SACR 594 (CC), 2001 (8) BCLR 423 (CC) at 430. The full summary of the ‘step by step procedure’ set out by the SCA, and endorsed by the Constitutional Court, can be found in *Dodo* at 430.
54 At 425.
56 Ibid.
57 Ibid 22.
• The fact that the victim ‘was not physically injured’... ‘apart from the ultimate intrusion and violation that are the essence of rape.’  

• The fact of the suicide of the offender’s son, which ‘adversely influenced his conduct within the family and led to a diminution in the judgment he brought to bear as a father.’  

• ‘That this is not one of the worst cases of rape.’

The legislature, however, clearly intended that a life sentence would be appropriate and just in these circumstances, perhaps with the exception of the circumstance related to the suicide of the accused’s son. Moreover, the court reached its conclusion that the mandatory sentence was unjust by weighing mitigating factors that are specifically precluded by a coherent reading of the legislation.

The issue of first-time offending was dealt with elsewhere in the legislation and is overridden by the fact that the rape was of a minor. If this circumstance was intended to be ‘substantial and compelling,’ the legislature surely would have subjected the mandatory sentence in s 51(1) to the same kind of scale that appears in s 51(2), based on previous offences.

The second and fourth circumstances (the fact that there was no physical injury other than that inherent in the rape and the fact that the case was ‘not one of the worst cases of rape’) relate to physical harm. Section (c) of the list of aggravating circumstances for which a mandatory sentence is required refers to rape ‘involving the infliction of grievous bodily harm.’ This is an alternative to section (b)(i) concerning rape of a minor. The court’s reasoning, however, suggests that grievous harm must be done as a supplemental condition to the fact that the victim was a minor. Nowhere does such a condition appear in the legislation. In fact, the opposite is true: the legislation requires a life sentence for every rape of a minor, except in unusual circumstances. Thus, the court reads the legislation as requiring precisely the opposite of its plain meaning, which is that the mandatory sentence be applied only in cases that go beyond the basic elements of rape of a minor. Judgements such as these fly in the face of the legislature’s dictate of what is just and render a life sentence unusual, thereby undermining the law’s clear intent.

2.4.3 The structure of the legislation

Judicial interpretations of ‘substantial and compelling’ that undermine the legislative aims of the CLAA can be partly attributed to a problematic legislative structure. The CLAA prescribes the sentence of life imprisonment for rape in certain aggravating

58 Ibid.
59 Ibid 23.
60 Ibid.
61 Section 51(2)(b).
62 Part 1 of Schedule 2.
circumstances, and permits departure from this sentence only as an exception. This implies that as a general rule all such aggravated cases of rape are equally severe.

At the same time, no two cases of rape, even such cases of aggravated rape, are ever committed under precisely the same set of circumstances. For example, the ages of both the perpetrator and the victim are likely to be different in each case; the manner in which the victim is ‘lured’ to the site of the offence may be different; the level of violent and threatening behaviour may be different; the personal circumstances (including marital status, education, employment) of both the perpetrator and victim may be different; and so forth.

The fact that the maximum penalty has been attached to rape in each of the aggravating circumstances set out in the legislation, knowing that in each case these factors are likely to be different (there might be more threatening behaviour in one case than in another or greater or fewer physical injuries), suggests that the legislature intended that these factual differences should not, as a rule, affect the severity of the sentence.

Judges are used to considering a wide range of mitigating and aggravating circumstances, including some, if not all, of those factors mentioned above. Notwithstanding the fact that every rape is violent, causes serious injury and must be punished by a severe sentence, it seems reasonable, based on such factors, to impose a lighter sentence in some cases. For example, it seems reasonable to impose a lighter sentence for the single rape of a 15 year old girl by an 18 year old boy, without use of a weapon, than for the multiple rape of a 9 year old girl, at gunpoint, by a 35 year old man. This need to distinguish between ‘bad’ and ‘worse’ cases of rape prevents judges from letting go of those factors traditionally taken into account, even when s 51 of the CLAA applies. As a result, only the worst possible cases are deemed heinous enough to receive the mandatory life sentence.

63 Terblanche (note 22 above) argues that the courts ‘had no choice in this matter’ because the Constitution’s prohibition against cruel, inhuman or degrading punishment requires that sentences be proportionate to the gravity of the offence (page 5). The question is who decides at what point an offence is grave enough to deserve life imprisonment. In terms of the CLAA, the legislature has clearly decided that each of the stipulated cases of aggravated rape is grave enough for such punishment. The fact that some of those cases may be committed under circumstances that make them even more grave does not mean that all of the cases are not sufficiently grave. It only reflects the fact that life imprisonment is the maximum punishment that the law can impose. The alternative is to hand down a sentence that the judge does not think is justified but which he believes is required by the legislature’s assessment of gravity inherent in the minimum sentencing legislation. In imposing such a sentence, a judge would have the prerogative of stating his dilemma, thereby bringing these concerns to the legislature’s attention. These two courses of action represent different understandings of the role of the judiciary which cannot be explored within the narrow scope of this paper. See also comments on this structural problem in Vetten and van Jaarsveld (note 41 above) and SALRC (note 22 above) s 1.31.

64 The case law provides examples of cases deemed not sufficiently heinous to justify the mandatory life sentence (eg S v Abrahams and S v Mathamotsa 2002 (2) SACR 435 (SCA)) and some examples of those considered the ‘worst kind of rape’ (eg Vaaltyn v S [2005] JOL 15342 (C), where the court says ‘The victim
2.4.4 A more coherent approach to ‘substantial and compelling circumstances’

Although seemingly rejected by the Law Commission, a much more rational approach was offered by Stegmann J in S v Mofokeng. In this case, judicial discretion was limited to circumstances ‘of an unusual and exceptional kind that Parliament cannot be supposed to have had in contemplation when prescribing standard penalties for certain crimes.’ This approach recognises the objective level of severity imposed by the legislature, but understands that Parliament cannot possibly have taken into account every set of unusual circumstances in which a crime might have been committed, allowing for discretion in such cases. Unlike the position taken in Majela, it does not permit the court to re-evaluate whether and to what extent ‘normal’ factual differences (that might otherwise be legitimately considered as aggravating or mitigating circumstances) ought to affect the severity level of punishment.

Applying the Stegmann approach requires an assessment of what Parliament in fact ‘had in contemplation’ when enacting the CLAA. The legislation sets out a number of circumstances that constitute aggravated rape for which a minimum life sentence must be imposed:

- Where the victim was raped more than once;
- Where the victim was raped by more than one person (acting with a common purpose or conspiracy);

has been gravely affected by the commission of the crime. In my view, this was a rape of a most serious gravity. The accused was armed with a firearm and a knife when he raped a 12-year-old child. Not only did he rape her but, under threat of death, he compelled complainant’s two young nephews to engage in an act of sexual intercourse with another small girl. . . This is not a ‘borderline’ case of rape, but rather one which falls inside ‘the worst category of rape’), it is an entirely subjective determination. No guidelines are provided as to what makes a case fall into either category. This completely undermines the legislation’s goal of achieving consistency in sentencing.

65 In its review of judicial interpretations of the phrase ‘substantial and compelling’, the Stegmann approach is offered as one of the extreme interpretations. In s 3.1.11 of the SALRC Sentencing Report (note 22 above), explaining the recommendation in s 4 of the Sentencing Framework Bill, the SALRC notes that ‘In the view of the Commission the most recent jurisprudence on the interpretation of these words offers a point of departure for the development of what is the most complex component of any sentencing system, namely a mechanism to provide for departures in truly deserving cases while ensuring that like cases are treated consistently by giving primacy to the seriousness of the offence.’ This reference to ‘most recent jurisprudence seems to refer to what the Law Commission calls the more ‘nuanced approach’ found in S v Blauw 1999 (2) SACR 295 (W) and the approach found in S v Schwartz 1999 (2) SACR 380 (C). These approaches are quite different, with the latter being closer to the approach suggested in this paper.


67 Ibid 35.

68 Part I of Schedule 2. This part of the legislation is amended by virtue of s 68(2) of the Sexual Offences Act and the Schedule thereto. The only substantive change wrought by this amendment is the application of the mandatory sentence to both the newly defined offence of rape (s 3 of the Sexual Offences Act) and the new crime of compelled rape (as contained in s 4).
• Where the offender has been convicted of two or more offences of rape, but has not yet been sentenced in respect of such convictions;
• Where the offender knows he has HIV/AIDS;
• Where the victim is under the age of 16;
• Where the victim is physically disabled;
• Where the victim is mentally ill;
• Where the rape involves the infliction of grievous bodily harm.

These circumstances relate to the nature or severity of the crime, the criminal history or, perhaps, dangerousness, of the offender, and the age or particular vulnerability of the victim. As noted above, the criminal history of the offender is also taken into account when rape is committed without aggravating circumstances. Parliament can therefore be assumed to have contemplated circumstances related to these factors. Any rational reading of the Act must, then, preclude the consideration of such factors as 'substantial and compelling'. This should be true even where these factors appear in the aggregate. This can be demonstrated by a simple exercise in logic.

Section 51 provides that if A, B or C occurs (i.e., one of the aggravating factors), the court must impose a life sentence. If A has occurred, the fact that B has not occurred cannot be a mitigating factor. Once A has occurred, the condition set out in the provision has been satisfied. It does not matter whether B has occurred or not. The same logic applies if neither B nor C occurs. If the non-occurrence of B and/or C is taken into account, the provision is read as requiring additional conditions to those set by the legislature, thereby replacing the legislature’s judgement with judicial discretion.

What is left for ‘substantial and compelling circumstances’? One possibility relates to the ‘moral blameworthiness’ or culpability of the offender. In keeping with the foregoing logic, circumstances of this nature should be considered ‘substantial and compelling’ only if it is reasonable to assume that they are not likely to have been considered by the legislature when establishing the relevant proportionate sentence. Thus, inasmuch as it is not unusual for sexual offences to be committed while under the influence of either drugs or alcohol, this should not qualify as a ‘substantial and compelling circumstance’.

Further, in cases of sexual assault, courts should be wary of a claim of reduced culpability based upon the actions of the victim. Unlike other cases of assault, where a person who has been attacked can be provoked to strike back, ‘provocation’ by the victim of a sexual offence (for example, that she had a sexy dress on and ‘led him on’) does not reduce the moral blameworthiness of the offender. To suggest that a man

---

69 Accordingly, minimum sentences of ten, fifteen and twenty years are established for first, second and third (or subsequent) offenders, respectively. See Part III of Schedule 2 of the CLAA.
70 This suggestion is made by Judge Stegmann himself.
71 Thus the first scenario offered by Stegmann J in Mofokeng (note 66 above) at 33 as an example of reduced moral blameworthiness must be rejected unequivocally.
can be provoked in such ways to rape is to suggest that men are incapable of controlling their sexual urges. It also wrongly implies that rape is an act of lust rather than an act of violence. Such an approach reinforces stereotypical rape myths, as set out above.72

Possibly ‘substantial and compelling circumstances’ might relate to the effect of a mandatory prison term on the offender. This might include, for example, circumstances related to the offender’s anticipated health in prison. An offender who is suffering from full-blown AIDS at the time of sentencing, and who provides a medical certificate testifying to a high-risk of imminent death should he be sentenced to life imprisonment, might qualify as a case of ‘substantial and compelling circumstances’.73 This might be the case even though the offender should have qualified for a minimum life sentence because of his knowledge of his HIV status.74

Although circumstances related to the offender’s health are among the factors traditionally considered as mitigating factors in sentencing and may be assumed to have been considered in drafting the CLAA, the foregoing example presents such an extreme case that it may be considered exceptional and not likely to have been contemplated by the legislature. Where precisely to draw the line in this regard, however, must surely be left to judicial discretion — based on relevant interrogation and expert testimony — on a case by case basis.

Another possible set of ‘substantial and compelling circumstances’ might be where the offender would be treated differently, by application of the mandatory minimum legislation, than other offenders in his position. For example, where one remorseful participant in a gang rape testifies against his co-offenders without securing a plea bargain agreement while other participants secure an agreement that ensures them a lesser sentence. An offender who comes forward of his own accord, without benefit of a plea bargain, would, as a result, be at risk of receiving a more severe sentence than a similar offender who insists on a plea bargain agreement before testifying against others. This would appear to be an unjust result, particularly as the offender who did not require a plea bargain in order to come forward, has shown more remorse and moral responsibility than those who testify subject to a plea bargain. In such a case, imposing the mandatory sentence would also violate the constitutional commitment to equality, resulting in different treatment for similar offenders, rather than the consistent treatment at which the legislation aims. Such

---

72 Supra, note 2.
74 Section 51(1)(a) and Part 1 of Schedule 2. Though HIV is an element in both factors, it is related, in the former case, to the actual health consequences for the offender should s/he be incarcerated for life; his/her HIV status alone would be insufficient as grounds to depart from the mandatory life sentence.
circumstances cannot have been intended by the legislator to fall within the ambit of the mandatory sentences.\textsuperscript{75}

2.5 Amendment of the CLAA

In response to some of the foregoing criticism, an amendment to the CLAA was enacted on 31 December 2007.\textsuperscript{76} Pursuant to s 1 of the amendment, a Regional Court that convicts an offender of an offence subject to a minimum life sentence, would have the power to impose that sentence and would not have to refer the case to the High Court. This change not only responds to the argument regarding fragmentation of the criminal process, it also has tremendous importance for the protection of victims of sexual offences as it avoids the trauma of additional testimony after the case has been referred for sentencing.

The amendment also responds to criticism and policy recommendations made by the Consortium on Violence Against Women regarding the interpretation of ‘substantial and compelling circumstances’. It expressly states that certain types of circumstances may not be used to justify departure from the relevant minimum sentence. These circumstances include:

- the complainant’s previous sexual history;
- an apparent lack of physical injury to the complainant;
- an accused’s cultural or religious beliefs about rape; and
- a prior relationship between the accused and the complainant.\textsuperscript{77}

Notably, these circumstances are not actually relevant at all to a determination of the severity of a sexual offence. By excluding them as factors that justify departure from the mandatory sentence, the legislature challenges certain deeply ingrained rape myths, including the belief that if the perpetrator and the victim previously had a sexual relationship, the perpetrator’s subsequent forced penetration of the victim is not ‘real rape’\textsuperscript{78} — thereby educating judges about sexual crimes.

Although exclusion of the foregoing circumstances from those that may rightly be considered ‘substantial and compelling’ is an important step, the amendment does not go far enough. First, it does not include a number of other types of circumstances

\textsuperscript{75} These suggestions are not meant to be a closed list of those circumstances that might legitimately be considered ‘substantial and compelling.’ The point is that the legislation provides no guidance as to what might properly be considered within this exception and this lack of guidance is particularly problematic in cases of rape, where misunderstandings of the crime are so pervasive.

\textsuperscript{76} Criminal Law (Sentencing) Amendment Act 38 of 2007.

\textsuperscript{77} According to the Minutes of the Portfolio Committee meeting on 21 November 2007, the NCOP wished to delete the first and fourth set of circumstances (ie subs-s 51(3)(aA)(i) and (iv)) due to concerns as to ‘unintended consequences’ arising from these exclusions. As a compromise, it was agreed that the Department of Justice would review and report on any such consequences within 24 months.

\textsuperscript{78} For a discussion of beliefs held about rape and about the different ways in which the criminal justice system deals with ‘stranger rape’ and/or rape accompanied by physical violence (in addition to that inherent in rape itself) and ‘simple rape,’ see Estrich (note 3 above).
often problematically found by the courts to be ‘substantial and compelling’ (alone or in addition to other circumstances). One example is the outward appearance of the victim (such as the fact that the victim was a ‘pretty girl,’ as noted by the court in *S v Ntuli*, quoted above) or the ‘personal circumstances’ of the perpetrator, such as character, marital status, employment or education. 79 It is highly questionable whether these factors should be at all relevant to sentencing for rape. Consideration of the latter factors might easily lead to prejudicial judgments and unfair discrimination against those in our society who have been disadvantaged.

Second, the amended CLAA does not provide further guidance as to those types of circumstances actually envisioned by ‘substantial and compelling circumstances.’ What, for example, of factors considered relevant to the possibility of rehabilitation? Is the likelihood of rehabilitation a factor legitimately considered ‘substantial and compelling’? If the CLAA prioritises the retributive theory of punishment, 80 where do different punishment aims, such as rehabilitation, fit in? These are the types of questions on which the legislature could have provided guidance.

Unfortunately, it seems unlikely that further guidance on interpreting the ‘substantial and compelling’ clause will be forthcoming. Hopefully the CLAA amendment will at least have some impact in educating the judiciary about the nature of rape, thereby reducing the frequency with which courts rely on irrelevant factors to depart from minimum sentences. The most important problem that remains following the amendment is the basic structure of the CLAA, which provides no room for judges to distinguish between ‘bad’ and ‘worse’ cases of rape. The next

79 For example, the fact that the perpetrator was ‘an enlightened and responsible person,’ married and employed, as noted by the judge in *Ntholeng v S* supra at 12 and the fact that the perpetrator was ‘until the time of the incident a useful sober-minded member of society with a happy family life’ as noted by the judge in *Bruintjies v S* [2007] JOL 19384 (E) at 4. The amendments did not cover all the issues raised in the Consortium’s submission. The Consortium pointed to the following as requiring statutory exclusion: the previous sexual history of the complainant; an accused’s cultural beliefs about sexual assault; an accused’s use of intoxicating substances prior to the assault; an accused’s lack of intention to cause harm to the complainant in committing the rape; a lack of education, sophistication or a disadvantaged background of the accused; a lack of ‘excessive force’ used to perpetrate the rape; a lack or apparent lack of physical harm to the complainant; a lack or apparent lack of psychological harm to the complainant; and any relationship between the accused and the complainant prior to the offence being committed (including a consensual sexual relationship).

80 This seems to be the opinion expressed by David J in *S v Schwartz*, as quoted in the SALRC Sentencing Report, 15 (‘Given that the minimum sentencing provision of s 51 draws on that of Minnesota and the Minnesota system is predicated on the principle of desert, the latter is an important guideline to be applied in such cases.’). Given that the severity of the crime seems to be the determinative factor in s 51(1) of the CLAA, regardless of rehabilitation possibilities, criminal history and the like, this seems like a reasonable view. Note, however, that it has been argued that the Minnesota Guidelines actually support a theory more accurately referred to as the ‘limiting retributivism theory’. RS Frase (2004) ‘Sentencing Guidelines in Minnesota, 1978–2003’ *Crime And Justice: A Review Of Research* 32. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=623281.
section briefly examines whether and how the proposed Sentencing Framework Bill deals with the concerns raised above.

2.6 The Sentencing Framework Bill

The Sentencing Framework Bill was included in the Report on Sentencing published by the Sentencing Committee of the Law Commission and submitted to the Minister of Justice and Constitutional Development in 2000 (the ‘Sentencing Report’).\textsuperscript{81} As of the end of the reporting period covered by the 2006/7 Annual Report of the Law Commission, the report was still under consideration by the Department of Justice.\textsuperscript{82}

2.6.1 The Sentencing Framework Bill structure

The Sentencing Framework Bill provides for the development of binding sentencing guidelines to be established by a Sentencing Council, based on a statutory set of sentencing principles. As in existing jurisprudence, these principles reflect a combination of sentencing theories. Thus, consistent with the retributive theory, subsections 3(1)-(2) of the Sentencing Framework Bill require proportionality of the sentence to the seriousness of the offence committed, which is determined based upon both the harmfulness (or risked harmfulness) of the offence and the degree of culpability of the offender. Subject to the proportionality requirement, however, subsection 3(3) of the Sentencing Framework Bill requires that sentences ‘seek to offer the optimal combination’ of restoration of rights to the victim, protection of society against the offender (prevention and/or deterrence theory) and rehabilitation opportunities for the offender (reformation theory). In addition, the absence or existence of previous convictions may modify the sentence in terms of subsection 3(4) of the Sentencing Framework Bill.

With these principles in mind, the Sentencing Council would be required to categorise existing offences, and sub-divisions thereof, into varying levels of severity, attaching to each offence or sub-division a particular type and severity (based on the length of time or extent of fine) of punishment. The Council may provide for different options of punishment and for an increase or decrease of up to 30% in the severity of a sentencing option.\textsuperscript{83}

\textsuperscript{81} SALRC (note 22 above) 94.

\textsuperscript{82} SALRC 2006/7 Annual Report, Annexure G. According to the Law Commission’s 2004 Annual Report (p 4), the Sentencing Framework Bill had been previously referred back to the Commission to address concerns regarding an appendix related to the amendment and repeal of legislation related to the Child Justice Bill. According to the Annual Report, ‘the Annexure reflecting the repeal of provisions of the Criminal Procedure Act as recommended in the sentencing report will only be finalised after finalisation of the Child Justice Bill. As the Child Justice Bill has not yet been finalised, this may explain why the Sentencing Framework Bill is still under consideration of the DOJ.

\textsuperscript{83} For example, ‘rape with a lethal weapon’ might be a sub-category of rape, to which the Sentencing Council might attach a minimum sentence of ten years’ imprisonment, with an option of increasing or
Beyond the severity range that may be specified in a particular guideline, s 6(4)(a) of the Sentencing Framework Bill permits a departure from a particular guideline upwards or downwards ‘in circumstances that increase or decrease substantially the degree of harmfulness or risked harmfulness of the offence or the culpability of the offender’. Furthermore, the relevant guideline may be departed from downwards if there are ‘substantial and compelling circumstances,’ beyond those that relate to harmfulness or culpability, that justify the reduction. This arrangement seems to undermine the system of sentencing guidelines, once again leaving a tremendous amount of discretion in the hands of individual judges.

2.6.2 Departures from Sentencing Guidelines under section 6(4)(a)
Departures under s 6(4)(a) of the Sentencing Framework Bill must be based on the degree of harmfulness of the offence or the degree of culpability of the offender. These are the same two factors on which the Sentencing Council is meant to determine the severity of the offence for purposes of the sentencing guideline. These factors are undefined in the Sentencing Framework Bill and may be evaluated in very different ways.

Harmfulness may refer to harm done to society or to the victim. It may be narrowly construed to refer only to physical harm or broadly understood (as it should be) to include loss of dignity and self-esteem and loss of a sense of security and well-being. It is precisely this difficulty in consistently understanding the type of harm caused to the victim in cases of sexual assault that has resulted in departures from the mandatory life sentence because the court believes that ‘the complainant has suffered no emotional disturbances’.

As for culpability, it is not clear how the Sentencing Council itself will evaluate culpability. The problematic nature of this assessment was noted in the Law Commission’s report, as follows: ‘… a way must be found of determining culpability, which does not lead to inconsistency, thereby ensuring equality and excluding unfair discrimination on any of the grounds mentioned in section 9(3) of the Constitution.’ Without guidelines as to how such determinations are made, judges will have no choice but to use their own discretion in evaluating this factor, undermining the goal of achieving consistency in sentencing. This factor is particularly problematic in cases of rape, where judges might be inclined to find the offender less culpable merely because the victim was pretty, as illustrated by the case law above, or as a result of factors such as the complainant’s previous sexual history.

decreasing that period of incarceration by three years. A departure from that guideline would mean an increase or decrease of that period of incarceration by more than three years.

84 Section 6(4)(b).
85 See Chapter 7 of this book for an understanding of the psycho-social impacts of rape.
86 See S v Ntuli, quoted in the introduction to this chapter and note 1 above.
87 SALRC (note 22 above) 36.
It is also surprising that the Sentencing Framework Bill permits such departures even if circumstances are not ‘substantial’ or ‘compelling.’ Moreover, it is unreasonable to allow departures both upwards and downwards based on either of these elements. Although it is impossible for the Council to anticipate all possible circumstances that might substantially affect the degree of harmfulness or culpability of the offence or offender, it is crucial that judges not be permitted to re-evaluate the degree of harmfulness or culpability in circumstances already considered by the Council. The only way to achieve this is for the Council’s determination to be understood as reflecting transparent thresholds of harmfulness and of culpability.

In other words, the Council’s evaluation must be assumed to be based on the minimal, threshold degree of harm that follows when rape is committed, and on a ‘normal’ level of blameworthiness. The severity level of the offence of rape, for example, must be presumed to be based on the basic, inherent, violence and injury that must — as a normative matter — be deemed to occur whenever rape is committed. Likewise, the severity level must presume that the offender acted freely. For example, a judge may not argue that in the circumstances of a particular case the victim did not sustain any physical injuries and the degree of harmfulness of the offence, therefore, justifies a downwards departure from the presumptive sentence. As a matter of law, victims of rape must be assumed to always suffer a basic degree of harm; and it is on this basic degree of harm that the presumptive punishment must be seen to be based.

If presumptive punishments are not based on a known threshold the courts cannot possibly know whether the harm done in each particular case is more or less than that presumed by the Sentencing Council in setting the mandatory or minimum sentence. This would make it not just legitimate, but necessary, to subjectively re-evaluate the severity level of the crime. Understood in this way, there can be no place for downwards departures based on harmfulness or upwards departures based on culpability.

2.6.3 Departures from Sentencing Guidelines under section 6(4)(b)

The Sentencing Framework Bill also recognises the existence of mitigating factors that are not related to the degree of harmfulness of the offence or the degree of culpability of the offender, such as the personal circumstances of the offender. Substantial and compelling factors of this nature may justify a downwards departure, based on s 6(4)(b) of the Sentencing Framework Bill. This provision also allows an undesirable amount of discretion.

One reason for this relates to the way in which presumptive sentences reflect the punishment principles set by the legislature. The Council is mandated to determine sentencing guidelines by applying sentencing principles contained in s 3 of the Sentencing Framework Bill. According to these principles sentences must seek to offer the optimal combination of restoration of rights to the victim, protection of
society, and opportunity for rehabilitation. Sentencing guidelines should be deemed, as a normative matter, to reflect the optimal combination of these goals. The discretion permitted by section 6(4)(b) of the Sentencing Framework Bill allows the sentencing court to re-evaluate this determination.

In respect of rape the Council may take the view that the goals of restoring rights to the victim and protecting society should take priority over rehabilitation and set the sentencing guidelines accordingly. At the same time, a sentencing court may consider a particular rapist to be a good candidate for rehabilitation — for possibly discriminatory reasons such as being employed and a ‘contributing member of society’ — and may consider this a ‘substantial and compelling’ reason to reduce the minimum sentence. Section 6(4)(b) of the Sentencing Framework Bill permits this reasoning, enabling individual courts to re-determine which punishment goals should, in their opinions, be prioritised.

It is important to note again that the Sentencing Council is permitted to provide a number of sentencing options, and a range of severity levels within each option (up to 30% more or less than specified by the guideline). Assuming that the Council implements this practice, it should severely limit those instances in which ‘substantial and compelling circumstances’ can legitimately be deemed to justify a downward departure from the guidelines. This seems at odds with the very broad and unguided discretion granted in s 6(4) of the Sentencing Framework Bill.

According to the Sentencing Report, the Committee was persuaded by foreign experts not to list specific legitimate grounds for departure from the sentencing guidelines and not to list factors that may never be grounds for departure as this might ‘distort the framework’. This is peculiar since the Minnesota sentencing system, which is reportedly the source of the ‘substantial and compelling’ language, provides a list of permitted and forbidden grounds for departure. The next section briefly examines certain aspects of the Minnesota guidelines, in an attempt to understand how this system deals with the issues discussed above.

88 Section 3(3).
89 S v Ntuli supra.
90 SALRC (note 22 above) 40. This comment was made in connection with draft s 4 of the Sentencing Framework Bill. This section deals with ‘Departure from sentence proportionate to the seriousness of the offence’ — presumably referring to establishment of the guideline by the Sentencing Council — as opposed to s 6, which deals with the application of sentencing guidelines by the courts.
91 Ibid 14.
92 The foreign experts’ recommendation was made in connection with s 4 of the Sentencing Framework Bill, in the context of a guidelines system. To the extent that such guidance would also be relevant to the CLAA, it appears to have been at least partially disregarded by Parliament’s decision to amend the CLAA by inserting forbidden grounds for departure from mandatory sentences in the case of rape. Note, however, as discussed above, that the types of prohibited grounds for departure that are now included in the CLAA are specific to the crime of rape and relate to the nature of the crime rather than to what would traditionally be thought of as aggravating or mitigating circumstances.
2.7 The Minnesota guidelines

The Minnesota sentencing guidelines system was established by statute in 1978.93 According to this system, courts are expected to sentence an offender within the range established by a sentencing commission.94 The Minnesota guidelines were approved by the legislature and seemingly went into effect without any opposition from the judiciary. This lack of opposition has been partly attributed to representation from stakeholder representatives, including the judiciary, on the commission and the extensive and intensive consultation processes that it undertook while developing the guidelines.95

Presumptive sentences established by the guidelines are based on two factors: the offence and the previous criminal history of the offender.96 Courts may depart, upward or downward, from presumptive sentences if they find substantial and compelling reasons for doing so.97 The guidelines include a list of factors that should not be used as reasons for departure from the guidelines.98 These include race, sex, employment factors, social factors (such as level of education or marital status) and the exercise of constitutional rights during the adjudication process.99

93 Frase (note 80 above) at 3. The current statute establishing the Minnesota Sentencing Guidelines Commission can be found in s 244.09, 2007 Minnesota Statutes.
94 Subdivision 5, s 244.09 of the 2007 Minnesota Statutes. According to the principles set out in the MSCG, ‘[w]hile the sentencing guidelines are advisory to the sentencing judge, departures from the presumptive sentences established in the guidelines should be made only when substantial and compelling circumstances exist.’ According to Frase (ibid, 12) ‘[j]udges may depart from the presumptive sentence only if they cite ‘substantial and compelling circumstances.’
95 Frase ibid 26.
96 MSGC 2 and 4.
97 Ibid 29.
99 The non-exhaustive list of factors that may provide grounds for departure from the guidelines is much greater, although the list of mitigating factors is considerably shorter than that of aggravating factors. Only six categories of mitigating factors are listed, four of which relate to culpability. The six mitigating factors are: (1) The victim was the aggressor in the incident. As discussed above, this factor appears relevant to violent offences, generally, but not with regard to sexual assault; (2) The offender played a minor role in the crime or participated under coercion or duress; (3) The offender’s judgment was impaired. This specifically, however, excludes intoxication or substance abuse. (4) Either the severity level of the current conviction is low (level I or II) and all prior felony sentences were received during less than three separate court appearances; or the severity level of the current conviction is higher (level III or IV) but all prior felony sentences were received at one court appearance. (5) ‘Other substantial grounds exist which tend to excuse or mitigate the offender’s culpability, although not amounting to a defence.’; and (6) Mental illness requires alternative placement. Of interest, perhaps, is the criminal history factor. Given that the guidelines are themselves based, in part, upon criminal history, it seems odd that such a factor should be considered a second time for purposes of reducing the presumptive sentence. The focus here, however, seems to be on the number of court appearances in which prior sentences were imposed, which is apparently not taken into account in the determination of presumptive sentences. In other words, a person who has five prior sentences at five different times has been more criminally active and has proven less likely to be deterred — and, therefore, is presumed more dangerous — than someone who has five prior sentences that were
The sentencing guidelines limit judicial discretion in three important ways, while still allowing discretion in evaluating the facts of a particular case. First, they permit departure from presumptive sentences only where circumstances are ‘substantial and compelling.’ Second, they restrict the use of social factors, such as employment, as grounds for departure. Third, they indicate that circumstances related to culpability are unlikely to be aggravating, while those related to harmfulness are unlikely to be mitigating. This creates transparency as to the levels of harmfulness and culpability taken into account already by the Commission — a minimal threshold of harmfulness and a maximal one of culpability — and warns judges against re-evaluating these assessments.

With respect to sexual offences in particular aggravating circumstances, judicial discretion is more severely limited. A person convicted of criminal sexual conduct in the first or second degree,100 in particular circumstances,101 must be sentenced to life without the possibility of release if one of two aggravating circumstances are present. These are that (1) two or more ‘heinous elements’102 have been found, or (2) the offender was convicted previously of a similar offence103 and one ‘heinous element’ exists for the current offence.104 This would seem to prevent a judge from suggesting that the basic injuries inherent in any sexual offence constitute the type of ‘great bodily harm’ that may be a ‘heinous element.’ Where a life sentence is mandatory and there is the possibility of release, the court must specify ‘a minimum term of imprisonment, based on the sentencing guidelines or any applicable mandatory

---

100 Criminal sexual conduct in the first degree, under section 609.342 of the 2007 Minnesota Statutes, refers to a person who ‘engages in sexual penetration with another person, or in sexual contact with a person under 13 years of age’ (as the relevant terms are defined) in certain specified circumstances. Criminal sexual conduct in the second degree, under section 609.343, refers to a ‘person who engages in sexual contact with another person’ (as the relevant terms are defined) in certain specified circumstances.

101 In the case of criminal sexual conduct in both the first and second degree, a mandatory life sentence without the possibility of release is prescribed under five specified circumstances (paragraphs (c), (d), (e), (f) and (h) of s 609.342 or 609.343, subdivision 1), including, for example, where ‘circumstances existing at the time of the act cause the complainant to have a reasonable fear of imminent great bodily harm to the complainant or another’ (para. (c)) and where ‘the actor is armed with a dangerous weapon. . .and uses or threatens to use the weapon. . .to cause the complainant to submit.’ (para. (d)).

102 This term is defined in s 609.4544, subdivision 1 and includes eight possible circumstances, such as torture, intentional infliction of great bodily harm and intentional mutilation of the complainant.

103 Criminal sexual conduct in the first degree (s 609.342), criminal sexual conduct in the second degree (s 609.343) or criminal sexual conduct in the third degree (s 609.344).

104 Section 609.3455, subdivision 2, of the 2007 Minnesota Statutes. An element of the underlying specified violation cannot also be considered a ‘heinous element.’ Section 609.3455, subdivision 2(b) of the 2007 Minnesota Statutes.
minimum sentence, that must be served before the offender may be considered for supervised release.\textsuperscript{105}

Under the Minnesota guidelines the sentencing guidelines are irrelevant\textsuperscript{106} and departures from the mandatory life sentence without the possibility of release are precluded in specific cases of aggravated sexual offences. These cases are very detailed in terms of the specific aggravated circumstances to which the life sentence is applicable, the specific additional actions taken by the offender that constitute ‘heinous elements’, and the minimum number (two) of ‘heinous elements’ required. These provisions severely limit judicial discretion in these very specific cases. It remains up to the sentencing court, however, to determine whether the necessary factors, such as the heinous elements, exist. If the judge does not find such factors to be present, they will still be bound by the next statutory sentencing level (for example, a mandatory life sentence with the possibility of release) or by the sentencing guidelines, as the case may be.

This is very different from the situation under the CLAA and the Sentencing Framework Bill. Under the CLAA only the specific aggravating circumstances that trigger the mandatory life sentence are detailed, but departures downwards are always permitted in ‘substantial and compelling circumstances’. This structure offers no guidance as to the kinds of ‘heinous elements’ actually contemplated by the legislature when it set the mandatory sentence (though the legislature must certainly be presumed to have contemplated the injuries inherent in the relevant offences) and no indication of the possible factors that ought to mitigate such sentences.

Under the Sentencing Framework Bill, all categorisation of offences for purposes of sentencing will be done by the Commission, but departures both upwards and downwards from whatever guideline is established are always permissible, based on an assessment of the very same elements — harmfulness and culpability — on which the guideline was based. Though it remains to be seen precisely what form the Sentencing Framework Bill will take, nothing seems to prevent the court from re-evaluating inherent elements of the offence in assessing the severity level of the particular case. While this system may work in areas other than sexual offences, where thresholds of harm and of culpability are better understood, current understandings of the nature and consequences of rape render such broad and unguided discretion particularly undesirable.

2.8 The Sentencing Framework Bill and Rape Law Reform

As noted in the introduction to this chapter, the Sexual Offences Act deals very little with issues related to sentencing. As demonstrated below, the few recommendations made by the Law Commission’s Project on Sexual Offences with respect to the management of sexual offenders, were mostly rejected by the Portfolio Committee

\textsuperscript{105} Section 609.3455, subdivision 5, 2007 Minnesota Statutes. See also MSGC 21.

\textsuperscript{106} MSGC ibid.
on Justice and Constitutional Development (‘the Portfolio Committee’). The most notable innovation of the Act with respect to the management of sexual offenders is the establishment of the new sex offender register, which seems to be an unnecessary, though perhaps popular, step.

Given the failure of at least some judges to properly understand the nature and consequences of rape, one might have expected the Sexual Offences Project Committee to provide the Sentencing Committee with substantial input in this regard. Yet, in Discussion Paper 102 the Sexual Offences Committee made only three general recommendations, aimed at the Sentencing Council, to be established under the Sentencing Framework Bill, as follows:107

- that the proposed Sentencing Council should receive input from people ‘skilled in the management of sexual offenders’;
- that the Sentencing Council should bear in mind the heterogeneity of sexual offenders, which requires different approaches for different offenders; and
- that the Sentencing Council should consider the need to develop ‘sentencing guidelines on a community protection model which entails long term supervision of dangerous offenders’ and the need for treatment programmes.

These recommendations are not repeated in the Sexual Offences Report published in 2002.108 Moreover, while these recommendations are important, they do not go to the heart of the problem noted above: dealing with misconceptions around sexual offences. Criminologists urged the Sexual Offences Committee to bring to the Sentencing Committee’s attention various problematic provisions in the Sentencing Framework Bill, as they relate to sexual offenders, including how ‘serious offences’ are to be defined, what ought to constitute a ‘substantial or compelling circumstance’ for purposes of departing from a prescribed sentence, and what mandatory minimum sentence should be imposed in cases of sexual assault.109 These issues are not discussed in the Sexual Offences Report and it is unclear whether they have been otherwise communicated to the Sentencing Committee. This apparent lack of communication between law reform committees is likely to impact adversely on the final products of law reform in both areas.

At the same time, the Sentencing Committee appears to have learnt an important lesson regarding stakeholder consultation from the CLAA experience. The CLAA appears to have been enacted without consultation with the judiciary, imposing on

108 The 2002 Report notes (p 265) that ‘the penalty and sentencing provisions in the proposed Sexual Offences Bill give expression to a balance between the community’s demand for retribution, fairness to the accused and community protection’ and considers there to be no need for further legislative intervention other than to link the new statutory offences to the CLAA.
The only possible input from judges regarding the sentencing of those offenders covered by the CLAA has been through the ‘substantial and compelling circumstances’ clause, meaning that if judges wanted to ‘have a say’ in sentencing, they have been forced to depart from the minimum or mandatory sentences. This has, perhaps, led to an almost principled rejection of the sentences established by the legislature.

It is presumably this experience (as well as the more positive experience of the Minnesota system) that led the Sentencing Committee to propose that the judiciary be involved in the establishment and implementation of the Sentencing Framework Bill in various ways. While it is important to involve the judiciary, our analysis suggests that it may be problematic to give a more jurisprudential role to the judiciary. An important factor in the success of the Sentencing Framework’s success will be the Council’s fulfilment of its obligation to ‘facilitate the establishment of a programme of judicial education on sentencing,’ particularly in the area of sexual offences.

3. Part II: The Management of sexual offenders

Although the rape law reform process did not deal with the central aspect of sentencing — ‘punishment’ — it did deal with a number of other issues related to the management of sexual offenders, including testing and treatment for drug and alcohol abuse, sex offender orders, supervision, treatment and counselling, and a sexual offender register. This section reviews the recommendations made by the Law Commission with respect to these issues.

3.1 Testing and Treatment for Drug and Alcohol Abuse

The Law Commission cites research showing that ‘[d]rug and alcohol abuse are major contributing factors in the commission of crime and sexual crimes in

---

110 According to the Law Commission’s research on mandatory minimum sentences, at the time the CLAA was adopted there was considerable opposition from the judiciary to a scheme of legislated fixed sentences. There was also significant opposition to binding guidelines developed by an independent sentencing commission (although the idea of a system like the Minnesota Guidelines, which are generated by an independent commission, received the support of the majority of the members of the Natal bench of the High Court). SALRC (note 22 above) 24.

111 They suggest that the Council should include four members of the judiciary: two judges of the Supreme Court of Appeal or the High Court, as well as two magistrates. The Sentencing Framework Bill requires the Council to consult widely before establishing or reviewing a sentencing guideline, including with the judiciary (section 10(6)). Finally, the Sentencing Committee envisions that, through the built-in flexibility of the system, the judiciary would ‘be able to develop jurisprudence on the grounds for departure from the guidelines that will form a cornerstone of the proposed new sentencing partnership.’ SALRC (note 22 above) 21.

112 Noted in s 8(4) of the Sentencing Framework Bill.
particular'. Although the Department of Correctional Services (DCS) reports important progress in its 2006/7 Annual Report on the development and implementation of correctional programmes regarding substance abuse and sexual offences, the number of offenders actually participating in these programmes remains low. Only 2,329 offenders participated in substance abuse programmes and a mere 1,897 offenders participated in sexual offences programmes during that reporting period.

The Sexual Offences Project Committee initially recommended a provision authorising a court to order a sexual offender to submit to treatment for alcohol or drug abuse if it is satisfied that the offender is ‘dependent on or has a propensity to misuse alcohol or any drug and may benefit from treatment.’ The court would also have been able to order the offender to submit to drug or alcohol tests during the period of treatment. Many considered these orders potentially helpful ‘in both treating offenders and discouraging re-offending.’

The Project Committee later reconsidered the need for such a provision on the basis that s 296 of the Criminal Procedure Act (CPA) would provide the necessary authority, if amended so that the court was permitted to make such an order in addition to an unsuspended sentence. This recommendation did not find favour with the Portfolio Committee, which decided in its deliberations of January 2004 that it was unnecessary, stating that ‘should it be shown to be necessary, it should be in the CPA.’

There does not seem to have been further discussion of this proposal, although such a provision could, presumably, have been easily included in the numerous amendments to the CPA made in the Sexual Offences Act. This suggests a definite possibility that the recommendation will simply be forgotten. The result is a highly unsatisfactory state of affairs, where only offenders who have not committed

113 SALRC (note 108 above) 245, citing J Loffell, who found that ‘approximately 90% of cases of reported child abuse involve alcohol abuse by the offender.’
114 Department of Correctional Services Annual Report 2006/7, 18–19.
115 Clause 23, as proposed in Discussion Paper 102. SALRC (note 108 above) 246.
116 Ibid 247.
117 Act 51 of 1977.
118 SALRC (note 108 above) 248.
120 Section 32 of the draft Prevention of and Treatment for Substance Abuse Bill, presented by the Department of Social Development at an initial briefing of the Social Development Portfolio Committee on 27 February 2008 retains the condition of a wholly suspended sentence before an order for commitment of a convicted person to a treatment centre, under the conditions set forth therein. Briefing available at www.pmg.org.za/report/20080227-prevention-and-treatment-substances-abuse-bill-department-briefing.
sufficiently serious crimes to warrant an unsuspended sentence may be ordered to undergo treatment.

3.2 Sex Offender Orders

As noted by the Law Commission, the purpose of a sex offender order is to ‘protect the community or individuals by limiting the movement of convicted sexual offenders or with whom they associate ostensibly to avoid the commission of a further offence before it occurs.’ Such an order may prohibit a person, inter alia, from acting in certain ways, frequenting certain places or having contact with certain people. According to the initial recommendation of the Commission, a court would have been able to issue such an order even after an offender had completed their sentence.

A number of serious concerns were raised regarding this provision in submissions to the Law Commission. These included questions of double jeopardy, potential implementation problems and possible constitutional challenges. As a result, the Commission withdrew its recommendation to include the provision in the Sexual Offences Bill. Given that conditions similar to those that might have been included in a sex offender order may already, as noted by the Commission itself, be stipulated as a condition of either bail or parole, exclusion of the provision does not seem to have serious adverse consequences.

3.3 Supervision of dangerous sexual offenders

There is a serious concern as to how best to protect society against repeat offending by known offenders after their release from prison. The proposed Sentencing Framework Bill deals with this concern (as it relates to offenders generally) by allowing the court to declare an offender to be a ‘dangerous criminal’ under certain circumstances. A person who has been declared a ‘dangerous criminal’ may be

---

121 SALRC (note 108 above) 249.
122 Ibid 249–250, referring to Discussion paper 102.
123 Submissions by Prof. Burchell and Judge Bertelsmann. See SALRC (note 108 above) 251.
124 Submissions by Mr Edmund Sandrahi (Director Public Prosecutions, KZN); Mr P Mabuza (Save the Children: Sweden); and Ms BJ Matshego (probation officer, Dept. of Correctional Services). SALRC (note 108 above) 251.
125 Submission by Judge Bertelsmann SALRC (note 108 above) 251.
126 SALRC (note 108 above) 253.
127 Ibid.
128 Section 18 of the Sentencing Framework Bill which would replace the current category established by the CPA of ‘habitual offenders’ (section 286 of the CPA). According to the Sentencing Framework Bill, a person may be declared a ‘dangerous criminal’ if they are (1) convicted of an offence that involves serious physical harm (or the threat of such harm); (2) sentenced to an unsuspended fixed term of imprisonment of at least five years; and (3) the court, having made certain inquiries and followed specified procedures, is satisfied ‘that there is a substantial risk that the person concerned may commit a further offence involving serious physical injury to any other person.’
detained in prison for an *indefinite period*, provided that there is a reassessment of their status upon completion of the sentence and at periodic intervals thereafter of not more than five years.

Given that the provision of the Sentencing Framework Bill would not necessarily have been applicable to sexual offenders\(^{129}\) the Law Commission initially recommended inserting a similar provision in the Sexual Offences Bill, tailored to sexual offenders.\(^{130}\) In this case, a ’dangerous sexual offender’ was defined as an offender who was convicted more than once for a sexual offence; convicted of a violent sexual offence; or convicted of a sexual offence against a minor. Someone who was declared as such would have been subjected to ’supervision of a rehabilitative nature for a period of not less than five years,’ subject to regular review.

Following submissions, the Commission revised the proposed provision extensively. Among the important changes made were:

- the addition of an obligation of the court to obtain various probation and social worker reports with respect to matters such as the suitability and benefits of such an order for the particular offender, proposed rehabilitation programs and personal information about the offender;
- a stipulation as to specific items that must be included in such an order, such as the nature and duration of rehabilitation programmes that are to be attended and an order, if applicable, to refrain from using or abusing alcohol or drugs; and
- the grant of authority to include in the order specific restrictions or rules such as to refrain from visiting certain places and/or from seeking certain employment and to subject oneself to certain monitoring mechanisms.

The Portfolio Committee raised a number of concerns regarding the provision, including a lack of information regarding its financial implications and possible problems of constitutionality.\(^{131}\) In the end, the provision was suspended until the necessary financial information was provided. Ironically, the Portfolio Committee noted the particular importance of the financial implications given the fact that ’too many sexual offenders are convicted every year.’\(^{132}\) Of course, the truth is that not enough sexual offenders are convicted every year, though far too many sexual offences are committed. Following this request and suspension, no further discussion of this provision was found.

It is unfortunate that provisions such as this one were so lightly dropped from the law reform agenda, particularly as the Law Commission recommendations were

\(^{129}\) The ’physical harm’ conditions of the Sentencing Framework Bill provision may have preclude its use with respect to those sexual offenders who do not cause serious physical injury, but are nonetheless dangerous and likely to re-offend.

\(^{130}\) SALRC (note 108 above) 254.


\(^{132}\) Ibid.
presumably made only after investing substantial time and effort in research and consultation. Too often, one of the reasons given for such action seems to be a lack of information as to financial implications.\textsuperscript{133} As noted in the Law Commission report, it is the responsibility of the Department of Justice and Constitutional Development to prepare a memorandum for cabinet providing information on the cost implications of any proposed legislation.\textsuperscript{134} Determining such implications is, moreover, supposed to be a precondition of introducing the legislation in Parliament.\textsuperscript{135} It is unclear why this obligation appears regularly to be overlooked.

3.4 Treatment of sexual offenders

It is important that all sexual offenders who may benefit from treatment are able to obtain it and that the period of correctional supervision during which such treatment is provided is long enough to be effective. To achieve this goal, the Law Commission recommended that s 276A of the CPA be amended to provide, specifically with respect to sexual offenders, that correctional supervision should be increased from three to five years and should include treatment at either the offender’s or the state’s expense, depending upon financial means. This proposal was included in the Schedule of laws amended by section 68 of the Sexual Offences Act, with two amendments. The first deals with the phrase ‘accredited treatment programme’ and is intended to ensure a certain standard in such programmes.\textsuperscript{136} In terms of the second amendment, the Portfolio Committee was unwilling to see the state bear the expense of treatment required under this provision, where such expense could not be borne by the offender. This deviation from the proposal seems to significantly undermine its effectiveness, as the financial means of many sexual offenders are likely to be minimal. Moreover, the expense of a treatment programme is likely to be less than the cost of the criminal justice process that would entail should the offender re-offend. This seems to suggest that the Portfolio Committee either does not expect sexual offenders to re-offend, or does not believe that treatment programmes work. Clearly, not all offenders re-offend, and treatment programmes do not work for all offenders all of the time.\textsuperscript{137} but if Parliament is to

\textsuperscript{133} See also, for example, the minutes of the Justice and Constitutional Development Committee meeting of 6 August 2003 with respect to Clause 15, Vulnerable witness, where the Chairperson ‘questioned if the processes had been costed, to which there was no reply.’ Available at http://www.pmg.org.za/viewminute.php?id=3031.

\textsuperscript{134} SALRC (note 108 above) 7.

\textsuperscript{135} Ibid.

\textsuperscript{136} At the request of the Portfolio Committee, this phrase was replaced with the phrase ‘treatment programme as prescribed in terms of’ the Act. Minutes of the Justice and Constitutional Development Portfolio Committee, 19 September 2006 and 20 October 2006.

\textsuperscript{137} According to one ‘longitudinal study that followed 4,724 known sex-offenders over a period of 15 years, 24% were charged with, or convicted of, a new sexual offence.’ T Fortney, J Levenson, Y Brannon & JN Baker (2007) Myths and Facts about Sexual Offenders: Implications for Treatment and Public Policy, citing AJR.
take the possibility of treatment seriously, such programmes must be seen as mandatory rather than as a luxury for the wealthy.

3.5 The Sex Offender Register

The most extensive provisions related to the management of sexual offenders that were included in the Sexual Offences Act are those relating to registration. In its Sexual Offences Report the Law Commission opposed the establishment of a new register for sexual offenders. It recommended instead that minimal changes be made to existing South African Police Service (SAPS) forms so that the existing SAPS register would be capable of more effectively and efficiently providing information on convicted sexual offenders. This information would be open to prospective employers of people who might work with, supervise, or be in a position of authority, trust or responsibility over children. The Commission also recommended including a provision in the Act that makes non-disclosure of a sexual offence conviction by a person applying to work with children (or offering or agreeing to work with children) an offence. The Commission further noted that the existing SAPS registry would work in conjunction with the proposed National Child Protection Register, which was later established by the Children’s Act, passed in 2005.

Although the Law Commission recognised a number of arguments in favour of creating a new sex offender register, many more arguments were made against such a step, including that:

• Registration of offenders who have already paid their debt to society is inconsistent with individual liberties.
• Registration implies that sexual offenders are more dangerous than other offenders, such as murderers.
• Registration may encourage vigilantism.
• Registration may unintentionally infringe the privacy of victims, particularly in the case of incest.


136 SALRC (note 108 above) 278.
137 Ibid 278–9.
138 Including the following: ‘(i) Creating a registry assists law enforcement as it is a tool that can be used both to solve crimes and prevent them; (ii) Registration laws may establish legal grounds to detain known offenders who do not comply with registration and are later found in suspicious circumstances; (iii) Detering sex offenders from committing new offences because once registered, offenders know that they will be monitored. Some believe that the possibility of being registered may discourage first-time sex offenders; (iv) Offering the community information is intended as a means of public protection, particularly for parents to protect their children.’ SALRC (note 108 above) 269.
139 Ibid 269–270.
The possibility of a new sex offender register was nonetheless reconsidered at the request of the Chairperson of the Portfolio Committee during its August 2003 deliberations, who asked that further information be gathered in this regard, including from departments that already had relevant registers, such as the SAPS. Regarding the recommended disclosure requirement, a concern was raised that the provision was too narrow, as it should protect rape victims generally, rather than just children.\textsuperscript{142}

The revised Sexual Offences Bill provided to the Portfolio Committee in February 2004\textsuperscript{143} contained a new Chapter 6 requiring the creation of a national register of sexual offenders. According to the working draft, the purpose of such a register was to have a record of people who are unsuitable to work with children as a result of a sexual offence conviction. Such records were to be used to provide a defined group of applicants with certificates as to whether people falling into defined categories, such as prospective employees for work with children, have been convicted of a sexual offence. Although the drafting changed as the details of the system were worked out, these objects were essentially preserved in the Sexual Offences Act, with the important exception that the register is intended to protect the mentally disabled in addition to children.

3.5.1 The provisions of the National Sex Offender Register

The Sexual Offences Act requires the establishment of a national register that will contain information regarding convicted sexual offenders who have committed offences against children or the mentally disabled and people who have allegedly committed such an offence but have been found mentally incompetent to stand trial. In the latter case, the registration obligation would apply only if the court has found that the accused has committed the act in question.\textsuperscript{144}

Three categories of people or institutions are required to check whether the names of certain people appear in the register. Employers are required to investigate potential employees who will in some way work with or come into contact with children or the mentally disabled.\textsuperscript{145} A further category is licensing authorities, who must investigate an applicant for a license to operate a business related to the


\textsuperscript{144} Section 42(1).

\textsuperscript{145} Section 45(b).
supervision of children or the mentally disabled. Finally, social welfare authorities must apply with respect to people applying to foster, adopt or otherwise care for children or the mentally disabled. In addition to the obligations placed on these categories of people to investigate certain individuals, the Act also places disclosure obligations on them. Non-compliance with these obligations by either side constitutes an offence.

Prospective employees who will in some way work with children or the mentally disabled, and whose names appear in the register, may not be employed in that capacity. People whose names appear in the register may also not be granted a license to operate a business related to the supervision of children or the mentally disabled or foster, adopt, become the curator of, or otherwise care for children or the mentally disabled.

The register should contain various identifying details of the offender, including names, profession/trade, address, identity numbers; the offence of which he or she has been convicted and certain details regarding the conviction and sentence; details of the medical institution and practitioner, with respect to an alleged sex offender; and other details prescribed by regulations. Notice of changes in these details must be given to the registrar within fourteen days.

The period of registration depends on the sentence imposed. A person sentenced without the option of a fine and for a period of imprisonment, periodical imprisonment or correctional supervision for a period in excess of 18 months, or a person with multiple convictions, may not be removed from the register. Other offenders may be removed, upon application, after five to ten years, depending on the sentence and provided that there is no investigation or charge of a sexual offence pending against the applicant.

The information contained in the register is confidential. Unauthorised disclosure constitutes an offence.

---

146 Section 47(1).
147 Section 48(1).
148 Sections 46(1)-(2), 47(2) and 48(2).
149 Sections 45(3), 46(3), 47(3) and 48(3).
150 With respect to people already employed at the time the register is established, the Act first requires that the employer take steps to prevent such person from continuing to gain access to children or the mentally disabled, such as by transferring them to a different position. Sees 45(2)(a) and (d).
151 Section 41.
152 Section 49(b).
153 Section 50(8).
154 Section 51(2).
155 Section 51(1) and (3)(b).
156 Section 52.
3.5.2 The Child Protection Registry

As noted above, the Portfolio Committee was made aware of the fact that a registry with a similar purpose had recently been established by the Children’s Act 2005. In fact, a briefing prepared for the Portfolio Committee by the Department of Justice on 19 June 2006 specifically reviews the important similarities and differences between the proposed sex offender register and the child protection registry.157

The listed similarities relate to purpose, consequences (i.e., registered persons may not work with children) and the obligation to disclose a sexual offence conviction if applying to work with children.158 The differences seem far more technical.159

The fact that the proposed sex offender register involves duplication of the provisions of the child protection register was repeatedly commented on in submissions to the Committee.160 Having been apprised of this explicitly, it is difficult to understand why the Portfolio Committee pursued the establishment of the sex offender register.161


158 The Children’s Act (2005) requires the establishment of a National Child Protection Registry, consisting of two parts. Part A records cases of child abuse and neglect and is intended to protect children from child abuse and neglect, to assist in monitoring such cases and other related purposes. It contains reports of abuse, convictions on charges of abuse or deliberate neglect and findings of a children’s court that a child is in need of protection because of abuse or neglect (section 114). The purpose of Part B of the Register is ‘to have a record of persons who are unsuitable to work with children and to use the information in the Register in order to protect children in general against abuse from these persons.’ (s 118). This part of the register contains details of people found unsuitable to work with children by either a children’s court, a civil or criminal court or a recognised disciplinary forum dealing with a person’s conduct vis-à-vis a child (s 120). A person who’s name appears in Part B of the registry may not be involved in managing or operating child welfare services or working with children in a child welfare institution; be permitted to become a foster or adoptive parent; work in a police unit tasked with child protection; work with or have access to children as an employee of the public service or in terms of the Municipal Systems Act; or work in any other prescribed employment or activity. A person who appears in Part B of the Register may apply for removal of his/her particulars ‘on the ground that the affected person has been rehabilitated’; after at least five years; and ‘after considering the prescribed criteria.’

159 They relate to: (1) the party responsible for establishing and maintaining the register; (2) who is included in the register (the child protection register requires a judicial finding of ‘unsuitability’). However, a person convicted of, inter alia, rape or sexual assault, must be found ‘unsuitable’ to work with children by the criminal court; (3) notification obligations; and (4) different conditions under which a person’s particulars may be removed. However, both registers do not allow removal of a person’s particulars if they have been convicted more than once of a sexual offence against a child.


161 The Committee’s persistence in this regard does not appear related to the inclusion, in the proposed register, of the mentally handicapped as a protected group, since this important difference between the two registers was only included in the sex offender register as of 31 October 2006. See the deliberations of the Portfolio Committee on 31 October 2006 and the documents attached thereto. Available at www.pmg.org.za.
The reason given by the Portfolio Committee Chairperson, during deliberations on 15 August 2006, is that the Children’s Act ‘had not yet come into operation [. . .] there might thus very well be many provisions in that Act that might not be implementable.’ The Chairperson further believed that ‘it could very well take a long time for the more comprehensive register in the Children’s Act to be implemented and start running, if this happened at all’ although she recognised that ‘once both procedures were up and running, the Departments might well have to see how best to correlate the two registers.’

While it is, in fact, unclear when the child protection register will be fully operational, this situation does not seem to justify the bureaucracy and expense of establishing two completely separate registers that have such a similar purpose. There appears to be no reason, for example, why the Sexual Offences Act could not simply have amended the Children’s Act to expand the scope of the child protection register in whatever ways were deemed necessary — for example, to include registration of those convicted of sexual offences against the mentally handicapped.

Moreover, it is unfortunate that other law reform initiatives with similar purposes, such as the supervision of ‘dangerous criminals,’ were seemingly rejected for reasons of expense, while the sex offender register — which must be an extremely costly venture — was included unnecessarily.

3.5.3 Constitutionality of the register

As noted above, among the objections initially raised by the Law Commission to the establishment of a sex offender register were two constitutional concerns: that registration is inconsistent with the individual rights of the offender who has already paid his debt to society; and that the privacy of victims may be unintentionally violated, as in the case of incest.

Registration also clearly violates the right to privacy of the offender himself. Although it is a matter of public record when an adult has been convicted of a sexual offence, the proposed registry requires registration of a number of details regarding the private lives of sexual offenders, such as their nicknames, professions, last known address and contact details. Moreover, sexual offenders may be considered to have particularly strong privacy interests with respect to such information because of the potential for vigilante activities against them.

Given these constitutional concerns, it is necessary, if the legislation is to pass constitutional muster, to show that the register has a legitimate purpose, that this

163 The Children’s Act has not yet come into force in its entirety. It is anticipated that regulations will be finalized, and the outstanding provisions will come into effect, in the second half of 2008. It is available at http://ci.org.za/site/frames.asp?section=lawreform.
164 Section 49(b).
purpose is achieved by the proposed limitation of rights and that no less restrictive means are available to achieve this purpose.¹⁶⁵

There seems no doubt that the protection of children and the mentally ill from sexual offenders, by ensuring that convicted offenders are not provided easy access to potential victims, is a legitimate goal. It is, in fact, a more limited and realistic goal than that which registries in some other jurisdictions seek to achieve. So, for example, the preamble to Ontario’s ‘Christopher’s Law’¹⁶⁶ justifies its sex offender registration scheme, inter alia, by the ‘need to ensure the safety and security of all persons in Ontario and that police forces require access to information about the whereabouts of sexual offenders in order to assist them in the important work of maintaining community safety.’ Offenders subject to registration under this law are not limited to those who offend against children, though there is no procedure by which the public, other than the offenders themselves, may access information.¹⁶⁷

Similarly, in the US ‘Megan’s Law’ was enacted to require states to release relevant information concerning registered child molesters and sexually violent offenders when necessary to protect the public¹⁶⁸ while leaving it to the discretion of the States to decide what information must be released, to whom and how.¹⁶⁹

Further, the South African legislation restricts the violation of privacy inherent in the register by permitting only limited categories of people to apply for a certificate from the register and imposing strict confidentiality vis-à-vis others. Compare this, for example, with community notification procedures common in many US states, which maintain publicly accessible registries through such means as websites, toll-free telephone services and print copies maintained at local law enforcement agencies.¹⁷⁰ In some states, communities are further notified of the presence of sexual offenders through fliers and leaflets distributed by mail or by other means.¹⁷¹

While the effectiveness of the scheme set out in the sex offender register cannot be

¹⁶⁵ In terms of s 36 of the Constitution.
¹⁶⁷ Sections 1 (definition of ‘offender’) and 3 of Christopher’s Law. Regarding public access, see sections 6 and 10.
¹⁷¹ In Pennsylvania, for example, ‘The State Police prepares fliers, and the local police or municipal department notifies the victim (for sexually violent predators only), and qualifying neighbors. . . Community meetings may be held.’ (ibid).
empirically proven, the relationship between its limited purpose (to protect specific groups of children or the mentally handicapped, such as children requiring foster homes or mentally impaired persons in care, from known sexual offenders) and its narrowly tailored provisions seems obvious. Given this narrow purpose, research from other jurisdictions that questions whether registration policies have a significant effect on re-offending patterns or on the number of rapes committed seems to have little relevance.\textsuperscript{172}

4. Conclusion

The Sexual Offences Act does not primarily deal with sentencing. Sexual offences, however, are different in a number of important ways that impact upon the sentencing and management of the perpetrators of these crimes. Rape myths continue to pervade judgments in sexual offences cases. These affect the exercise of judicial discretion with respect to mandatory sentences and are likely, without further guidelines, to affect the way the Sentencing Framework Bill is applied, if and when it is enacted by Parliament. The impact on the victim of a sexual offence is also different from that of other serious crimes and is not sufficiently understood. Similarly, sexual offenders have particular treatment and rehabilitation needs that must be met if we are to reduce the risk of re-offending.

These issues do not seem to have been sufficiently dealt with in the sexual offences law reform process. Perhaps one explanation is that the Sexual Offences Committee felt that the Sentencing Committee has greater expertise on matters related to sentencing. Given that the Sentencing Framework Bill was published in 2000, one might have expected more critical feedback on this bill, as it would be applied to sexual offenders, from the Sexual Offences Committee.

Provisions related to the management of sexual offenders which were included in the Sexual Offences Bill were mostly rejected by the Portfolio Committee, which chose to focus — and to expend resources — on the establishment of a new, and seemingly redundant, sex offender register. This approach has resulted in legislation that is more punitive in nature, with less consideration given to rehabilitation and restorative justice.

\textsuperscript{172} JT Walker, S Maddan, BE Vasquez, AC VanHouten and G Ervin-McLarty (2005) \textit{The Influence of Sex Offender Registration and Notification Laws in the United States Arkansas Crime Information Center}, noting that limited available research has found that: (1) the recidivism rate for sexual offenders is not higher than for other offenders and almost never exceeds 40% (citing RK Hanson and MT Bussiere (1998) \textit{Predicting relapse: A meta-analysis of sexual offender recidivism studies} \textit{Journal of consulting and clinical psychology} 66(2) 348–362); (2) except in the case of child pornographers, sexual offenders with child victims were less frequently re-arrested for a sex crime than those who victimized adults (citing LL Sample (2001) \textit{The social construction of the sex offender Unpublished Dissertation}); (3) registration policies have not been found to significantly influence re-offending patterns; and (4) based on a study of ten states in the US, sex offender registration and notification laws \textit{have had no systematic influence on the number of rapes committed in these states as a whole}. 
Inasmuch as the law reform process on sentencing has not yet ended, it is hoped that some of the issues and criticisms raised in this chapter will be considered and addressed by the Sentencing Committee. In the meantime, education of the judiciary on sexual crimes, including those issues that impact on sentencing, cannot wait.
1. Introduction
It is clear from Jacob Zuma’s rape trial that in the 21st century a woman who decides to lay a charge of rape still has to face insurmountable challenges.¹

During the early months of 2006, the rape trial of Jacob Zuma, South Africa’s former deputy president, unfolded with the destructive force of a hurricane.² For days and weeks, the proceedings played themselves out to saturation media coverage. This trial exposed all the faultlines of South African society, including gender stereotypes, rape myths, HIV/AIDS (un)awareness and contested cultural practices.³

The trial and surrounding events also posed a number of difficult questions to women’s rights activists, such as whether more than a decade of ongoing advocacy for rape law reform had had any effect — if the complainant in this case could be flayed open on public display as she was. The admission in court of questions about the origin of her HIV infection, the scrutiny of her private memoirs documenting events years before this incident, daily burnings of her image outside the courtroom by supporters of the accused are all reminders of how little has changed. Many

² In brief: Jacob Zuma was charged with the rape of ‘Khwezi’, a 31-year old woman living with HIV. It was common cause that the complainant, who was well known to the accused, had visited his home on the date in question, and that, later that evening, unprotected sexual intercourse had taken place between them. The details of the events leading up to the intercourse were disputed to a greater or lesser extent, but the material difference between the state and defence versions lay in whether or not the complainant had consented to the intercourse — see S v Zuma 2006 2 SACR 191 (W) at 191f–192b. One of the contentious aspects of the trial was a ruling by the court (per Van der Merwe J) allowing the defence to cross-examine the complainant on her past sexual history and also to lead evidence in connection with this history — see S v Zuma supra at 198f.
³ The scope of this chapter does not allow for a comprehensive gender analysis of the Zuma trial. See in this regard eg Motsei (note 1 above) 145–171; S Robins (2006) ‘Sexual rights and sexual cultures: Reflections on “the Zuma affair” and “new masculinities” in the new South Africa’ Horizontes Antropológicos 12(26) 149–183; P Govender ‘You have struck a woman, you have struck a rock’ Mail & Guardian Online, 17 March 2006.
activists understandably found themselves asking whether any progress had been made in the struggle for the rights of sexual assault victims.

A few days before the verdict of ‘not guilty’ was handed down in the Zuma case, the South African Cabinet approved a rejuvenated version of the seemingly long-forgotten Criminal Law (Sexual Offences) Amendment Bill.\(^4\) A question that almost automatically came up in the public debate following this resurrection was whether it would have made any difference to the outcome of the Zuma trial if the Bill\(^5\) had been enacted and in operation at the time of the trial.\(^6\)

This chapter sets out to address this question — but not in the conventional sense suggested by its formulation above. Instead of asking whether the accused might have been convicted if the Sexual Offences Act\(^7\) had been in place at the time of the trial, we ask whether the legislation might have introduced measures to protect the rights of the complainant to a greater degree. The Zuma rape trial starkly brought into the public domain the fragile equilibrium between the complainant’s rights to privacy and dignity and the accused’s fair trial rights, for example, the right to challenge and confront his accuser in an open court. It accordingly provides us with a useful, if graphic, starting point to consider victims’ rights in the Sexual Offences Act.

By means of introduction, the chapter briefly considers the meaning of the term ‘victims’ rights’, and then provides an overview of the difficulties and disjunctures experienced by sexual assault victims when they enter the criminal justice system. I subsequently recount attempts to introduce systemic reforms to the criminal justice system and the criminal trial process, including proposals for recognition of the victim as ancillary prosecutor and the introduction of legal representation for victims. I also examine various other options for improving the position of sexual assault victims that were considered during the legislative process, such as the inclusion of victims’ rights in sexual offences legislation and the introduction of a Victims’ Charter. The chapter then returns to the initial question by evaluating how strongly these victims’ rights feature in the final version of the Sexual Offences Act.

It is not the purpose of this chapter to dwell on the opportunities lost and casualties incurred in the law reform process. However, in order to understand the Sexual

\(^4\) The judgment was delivered on 8 May 2006; Cabinet approved the new version of the Bill on 3 May 2006. Prior to this date, a period of more than two years had passed since the previous deliberations of the National Assembly portfolio committee on Justice and Constitutional Development on the Bill as introduced in 2003. See in this regard H Combrinck (2006) ‘Well worth the wait? The Sexual Offences Bill in 2006’ 17 SA Crime Quarterly 1, 1–2.

\(^5\) When the Bill was reintroduced in parliament in 2006, it was still officially referred to as the Criminal Law (Sexual Offences) Amendment Bill B50–2003, albeit with the qualifier ‘as introduced on 19 June 2006’ in order to distinguish it from the previous version dating from 2003. All references to ‘the Bill’ hereinafter are to the 2006 version, unless specifically indicated otherwise.


\(^7\) Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (‘the Sexual Offences Act’).
Offences Act in its final form, it is necessary to explore the different options considered by the South African Law Reform Commission (‘the Law Reform Commission’) as well as the deliberations of the parliamentary portfolio committees at some length. The in-depth examination of the legislative process in this chapter should be read in this light.

2. What are ‘victims rights’?

The term ‘victims’ rights’ is used very broadly and not always with regard to precision of legal definition. There also appears to be a somewhat facile assumption that while the South African Constitution guarantees the rights of detained and accused persons, it does not provide any protection for the rights of victims of sexual assault (or crime in general). This is not correct. The Constitution admittedly does not contain a provision analogous to subsection 35(3), which makes explicit provision for the various aspects of an accused person’s right to a fair trial, in respect of victims’ rights. However, the ‘general’ rights in the Bill of Rights, such as the rights to equality, dignity, privacy and specifically the right to freedom from all forms of violence do include victims in the ambit of their protection. As the Constitutional Court emphatically confirmed in its judgment in Masiya v Director of Public Prosecutions (Pretoria), the contemporary conceptualisation of the offence of rape owes its existence to a recognition of women’s ‘legal personhood and right to equal protection’.

It goes without saying that this protection extends to victims. As we have seen in a number of judgments, reliance on the rights to dignity and privacy of victims giving evidence in court have served to justify placing a limitation on the rights of the accused, thereby carving out ‘concessions’ for these witnesses such as testifying outside the presence of the accused. In addition, making reference to international human rights law in the interpretation of women’s right to freedom from violence, as our courts have now repeatedly done, may add further dimensions to these constitutional safeguards.

8 Constitution of the Republic of South Africa Act 108 of 1996 (‘the Constitution’).
9 Section 35.
10 Discussed further below.
11 Section 9.
12 Section 10.
13 Section 14.
14 Section 12(1)(c).
15 2007 (5) SA 30 (CC).
16 At para 28.
17 See e.g. Klink v Regional Court Magistrate NO 1996 (1) SACR 434 (E), 1996 (3) BCLR 402 (SE); S v Staggie 2003 (1) SACR 232 (C). See also our discussion further below.
18 See e.g. S v Baloyi 2000 (1) SACR 81 (CC) para 13; Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC) para 62; Van Eeden v Minister of Safety and Security 2003 (1) SA 389 (SCA) para 15.
The question that needs to be considered throughout, therefore, is the extent to which these rights translate in practice into specific rights for sexual assault victims. For example, does the right to equality imply that the victim and accused are entitled to an equal number of supporters to be present in court during the rape trial? Does the right to privacy entail that the victim may refuse to answer defence questions about her previous sexual history, even after the court has ruled in favour of the defence in an application brought in terms of s 227 of the Criminal Procedure Act? Does the right to bodily integrity imply that a sexual assault victim has the ‘right’ to know the HIV status of the person who allegedly assaulted her? These are some of the practical questions that arise when considering the scope of victims’ rights in the context of the Sexual Offences Act, an inquiry that also has to be contextualised against the backdrop of the criminal justice system.

3. The problem with the criminal justice system

When a victim of sexual assault opts to lay criminal charges with the police, she (in theory) enlists the assistance of an array of state resources on her behalf. However, she also in effect hands over control of the matter to the state: from this point onwards, the assault will be prosecuted as an offence against the state or social order, and not as a dispute between her and the accused. (It would be interesting to establish how many sexual assault victims, if they had an informed choice at this point and the resources to pursue either option, would willingly opt for criminal prosecution rather than a civil claim against the perpetrator.)

Commentators pointed out early in the law reform process that one consequence of South Africa’s predominantly adversarial criminal justice system is to exclude the sexual assault victim from participation as a party in the criminal trial. Her role is

---

19 In the Zuma trial, the court allowed the following arrangement: the victim’s evidence was given in camera, and she and the accused were both allowed fifteen supporters in the courtroom during her testimony. The accused had to identify his supporters in advance and the victim had a ‘veto right’ if she didn’t want a specific person to be present. In addition, accredited media reporters were allowed in court. See Anon ‘Zuma trial adjourned for in camera testimony’, 6 March 2006. Available at www.iol.co.za.

20 Act 51 of 1977 (the CPA). I discuss s 227 further below.

21 We have argued elsewhere that given the HIV testing regimes currently available in the South African public health system, coupled with the need for the victim to initiate post-exposure prophylaxis within 72 hours after the incident of sexual assault, establishing the HIV status of the alleged perpetrator as envisaged in the Sexual Offences Act will be of limited, if any, practical use to the victim. See H Combrinck ‘A victory for victim’s rights — or a false sense of security?’ Iminyange (2006) Vol 1(1) 3. See also, in this volume Chapter 8.


limited to that of a state witness, and she has no procedural rights. This means that she is not entitled to any form of representation, and may not challenge any interlocutory decisions, for example, to release the accused on bail. She may not adduce or challenge any evidence, and cannot appeal against an acquittal or, in the event of a conviction, against the sentence imposed on the accused.

It is our experience that these legal principles often sound harsh to sexual assault victims, whose encounter with the criminal trial is intensely personal. Pithey et al explain this as follows:

[R]ape victims often refer to the incident as ‘my rape’, to the perpetrator as ‘my rapist’, and to the criminal trial as ‘my case’. This contradicts the understanding (dictated by the rules governing the operation of the criminal justice system) that she is not a party to the criminal trial.

Apart from relinquishing control over how the criminal case is conducted, the victim in principle even gives up the right to decide whether or not the case should proceed at all. Although prosecutors currently appear to comply fairly readily with victims’ wishes to withdraw charges of sexual assault, a victim may in theory be compelled to continue with the case against her wishes. This means that once at court, she would run the risk of conviction and imprisonment if she refused to be sworn in or to make the required affirmation, or to answer any question put by the prosecution, defence or presiding officer. She may also be charged with perjury or the statutory offence of making conflicting statements under oath if she knowingly gives false evidence under oath, which could be the case if she retracted her original police statement on

---

24 See K Müller & A van der Merwe (2006) ‘Recognising the victim in the sentencing phase: The use of victim impact statements in court’ SAJHR 22 647, 653 contra — the authors refer to the victim’s clear ‘procedural right to provide information [to the court] in the form of a victim impact statement’.

25 Combrinck & Skepu (note 22 above) 7–8.

26 Müller & Van der Merwe (note 24 above) 35–36.

27 Section 195 of the CPA makes provision for witnesses to be compellable to give evidence under certain circumstances. For example, the wife or husband of an accused is compellable to give evidence for the prosecution where the accused is charged with inter alia ‘any offence committed against the person of either of them or of a child of either of them or of a child that is in the care of either of them’ — sub-s (1) as amended by the Sexual Offences Act.

28 Section 189(1) of the CPA provides that the court may summarily inquire into whether a witness who refuses to take the oath or answer a question has a ‘just excuse’ for her refusal. If the court finds that she does not have such a just excuse, she may be sentenced to imprisonment for a period not exceeding two years, and in the case of an offence referred to in Part III of Schedule 2 of the CPA, to imprisonment for a period not exceeding five years.


30 Contravention of sub-s 319(3) of the Criminal Procedure Act 56 of 1955.
the witness stand. She would similarly run the risk of punishment if she failed to attend court (if already subpoenaed).31

A practical example further illustrates the disempowerment of the sexual assault victim. If a victim felt dissatisfied with the court’s ruling allowing the defence to cross-examine her on her previous sexual history,32 she would have no procedural recourse within the ambit of the trial. Once her evidence has been finalised (or, more likely, after completion of the trial) she would be able to bring an administrative complaint against the prosecutor,33 if she felt that she or he did not object vociferously enough on her behalf against the admission of such evidence. She would similarly be able to lodge a complaint against the presiding officer for violating her rights to privacy and dignity by admitting this evidence.34 However, in terms of refusal to submit to the offensive cross-examination, she would have no options other than to run the gauntlet of s 189 of the CPA and the possibility of conviction and punishment. In the event of the accused being acquitted, her only prospect of an appeal against such outcome lies with the prosecutor, who may in any event only appeal against the court’s findings on the law, and not against factual findings.35

4. The problem with sexual assault trials

Women frequently describe their trauma in the courtroom as a further abuse. This may sound hysterical and exaggerated, but part of the problem is that a woman’s powerlessness in the trial evokes all the feelings of powerlessness that were experienced in the original rape.36

The well-documented37 problems encountered by sexual assault victims when reporting the incident, in the course of the criminal investigation and during the court trial, are often grouped together under the heading of ‘secondary victimisation’. This phenomenon has been described as the unsympathetic,

---

31 Section 188 of the CPA states that failure by a witness to attend court or remain in attendance in court if subpoenaed or warned to do so constitutes a criminal offence.

32 See s 227 of the CPA.

33 Such a complaint would be pursued through the hierarchy of the prosecuting authority up to the National Director of Public Prosecutions. See Department of Justice and Constitutional Development (2004) Minimum Standards on Services for Victims of Crime 18.

34 Ibid 19. At the time of writing, the complaints mechanisms for magistrates and judges are the Magistrates’ Commission and the Judicial Service Commission respectively.

35 Section 310 of the CPA. Prior to the introduction of the Sexual Offences Act (2007), the law relating to sexual assault was regarded as fairly well-settled, which meant that in practice the outcome in these cases very rarely turned on the law; but rather on the court’s assessment of the facts. This further limited the prospect of an appeal against an acquittal.

36 H Kennedy (1992) *Eve was Framed* 128.

disbelieving and inappropriate responses that victims of sexual assault experience at the hands of society in general and at each stage of the criminal justice process. The United Nations Office for Drug Control and Crime Prevention notes that secondary victimisation through the criminal justice process may occur because of difficulties in balancing the rights of the victim against those of the accused. More often, however, it happens because those working in the criminal justice system do so without taking into account the perspective of the victim.

Secondary victimisation is typically characterised by the exclusion or alienation of the victim (where, for example, she is not provided with information about key events, decisions or processes in the investigation or criminal trial). This is exacerbated by systemic and structural weaknesses, such as those resulting in poor quality of statement-taking by police officials, lack of opportunity for in-depth consultation prior to the trial and prosecutors being under-prepared for cases. Revictimisation occurs when the victim feels intimidated by the presence of the accused in the courtroom or is subjected to cross-examination aimed at eroding or destroying her credibility. Similarly, such revictimisation can take place when a victim is cross-examined about her previous sexual history.

Finally, there is the devaluation and silencing that follows when victims’ experiences are misunderstood, re-cast or wrongly interpreted: for example, when a court reaches the conclusion that the complainant had consented to sexual intercourse when she knew that she did not. The resulting sense of outrage was clearly expressed by the complainant in the Zuma matter when she spoke after the verdict was handed down:

I see myself being described and defined by others, the media, the defence, the judge.
I am not mad. I am not incapable of understanding the difference between consensual

39 UNODCCP ibid.
40 Ibid.
41 See Combrinck & Skepu (note 22 above) 29–30 for examples.
44 The Zuma matter is a case in point. Van der Merwe J repeatedly emphasised that the purpose of admitting the cross-examination of the complainant and evidence led by the defence ‘was not to show that she misbehaved with other men’. Rather, it was aimed at ‘showing misconduct in the sense of falsely accusing men in the past’ — S v Zuma (n 2 above) at 204g-h. This ruling in effect meant that the complainant, whose conduct in respect of the evening in question was already open to minute scrutiny, was now facing the same micro-examination relating to a series of several events dating back to her childhood. The court ultimately accepted the defence version of the complainant’s history of false rape allegations, and imputes this history to her being ‘a sick person who needs help’ (at 223e).
and non-consensual sex. The fact that I have been raped multiple times does not make me mad. It means there is something very wrong with our world and our society.\(^\text{45}\)

5. Proposals for ‘systemic’ interventions

In order to address the difficulties confronting sexual assault victims as outlined above, South African commentators proposed a range of reform measures. These included comprehensive reforms to the criminal justice system itself, as well as to the structure of the criminal trial in sexual assault matters. In this section, we discuss the substance of these proposals, and consider whether they have in any way been incorporated in the new Sexual Offences Act.

5.1 Adversarial versus inquisitorial criminal procedure

The South African Law Reform Commission’s Discussion Paper on Process and Procedure includes an analysis of the ‘adversarial versus inquisitorial types of criminal procedure’.\(^\text{46}\) This account forms part of the Commission’s consideration of the system of criminal procedure that should govern the conduct of trials in relation to sexual offences.\(^\text{47}\)

Following a comparative survey of other jurisdictions, the Commission notes that the criminal justice system is not an end in itself; it exists to satisfy the needs of society. In the context of society, the need is for ‘an effective system that brings perpetrators to book and protects innocent suspects from wrongful conviction’, while ensuring respectful treatment of all witnesses in court.\(^\text{48}\) According to the Commission, it is safe to say that the courts have not been able to meet these needs. A determination accordingly needs to be made to assess in what ways the system is failing complainants and victims and what can be done to remedy that, given South Africa’s human and financial resource constraints.

The Commission then explains that the South African Constitution guarantees accused persons ‘a phalanx’ of rights.\(^\text{49}\) This emphasis on the rights of the accused must be understood in the context of our history. In the process, however, —

\[\ldots\] the rights of victims of crime seem to have been subordinated in an attempt to ensure that suspects or accused are not subjected to the abuses of the past.\(^\text{50}\)

The Commission finally concludes that although there is a need to revise various rules of evidence and procedure in relation to sexual offences, it does not propose to change the entire mode of criminal procedure as it pertains to sexual offences.

\(^{45}\) Interview with ‘Khwezi’ — D Cavanagh & P Mabele ‘I was raped and I was sane’ City Press, 14 May 2006 cited in Motsei (note 1 above) 150–151.

\(^{46}\) SALRC (note 37 above) Chapter 12.

\(^{47}\) Ibid para 12.1.1.


\(^{49}\) Ibid para 12.4.12.

Instead, the issue is ‘how to make the current system work better’. According to its assessment, the current South African system, although largely adversarial, in any event has numerous inquisitorial elements within it. The Commission then lists a number of rules of evidence and procedure to be investigated, including cross-examination, obligatory use of an intermediary, protective measures (for example, trial in camera and allowing the witness to testify by means of closed-circuit television system), and the viability of the introduction of victim representation.

5.2 The victim as ancillary prosecutor

In 1999, Pithey et al proposed the introduction of a mechanism drawn from the German system, namely the Nebenkläger or ancillary prosecutor procedure. This procedure allows for the complainant to apply to the court by way of affidavit to participate as an ancillary prosecutor once the state has instituted proceedings against the accused. Once permission is granted by the court, the victim becomes a party to the criminal trial and receives treatment equal to that of the accused in that she has the right to be present throughout the proceedings and can participate through her legal representative like the accused. She may also under certain circumstances apply to receive state-funded legal representation if she is indigent.

A legal representative for the complainant thus functions much like the prosecutor and the legal representative for the accused, and will all have the rights to question witnesses, inspect records, request the recusal of a presiding officer, bring appropriate motions, apply to adduce evidence and present a closing argument at the end of the trial. The author specifically relies on the right to freedom from violence (as supported by international human rights law) and the right to dignity as support for the introduction for this measure.

The proposal to allow the victim to participate in the trial as an ancillary prosecutor was considered by the South African Law Reform Commission in its Discussion Paper on Process and Procedure. The Commission was not won over, and expressed its opinion as follows:

The Commission takes the view that it is sounder, in law, to introduce measures aimed directly at the harmful and often unhelpful rules and regulations that are the real obstacles to the protection of a victim’s/complainant’s interests in a sexual offence trial. The Commission is further of the view that the recommendations contained in this

---

52 Ibid para 12.15.
53 Section 395(1) of the German Strafprozessordnung cited in Pithey et al (note 23 above) 40.
54 Pithey ibid.
56 Pithey (note 23 above) 44–45.
57 SALRC (note 37 above) para 16.3.
Discussion Paper will greatly assist complainants and advance the protection of their interests in a manner consistent with the constitutional imperatives applying to the State.\textsuperscript{58}

Unfortunately the Commission does not specify here which ‘harmful and often unhelpful rules and regulations’ it sees as the ‘real obstacles’ to the protection of a sexual assault victim’s interests in a criminal trial. This makes it more difficult to assess at this point which of the proposals that the Commission refers to here have survived the legislative process (and made their way into the Sexual Offences Act), and which fell by the legislative wayside. Such assessment would be crucial to establish whether the Act indeed removes the ‘real obstacles’ referred to by the Commission. However, we assume for purposes of this chapter that the same protective measures referred to elsewhere were also intended here.\textsuperscript{59}

5.3 Legal representation for victims

In 2002 Dee Smythe submitted a proposal to the Law Reform Commission aimed at the introduction of legal representation for sexual assault victims.\textsuperscript{60} She pointed out that this proposal, based on similar reforms introduced in Denmark, Norway and Ireland, should be distinguished from the ancillary prosecutor model.\textsuperscript{61} The legislation should stipulate that a victim of a sexual offence shall have a right to obtain legal representation. Such a legal representative may represent the client in all her dealings with the South African Police Services (SAPS) and National Directorate of Public Prosecutions (NDPP), in respect of bail hearings and at the time that the victim is giving evidence.\textsuperscript{62} It would entail the imposition of a positive duty on any member of the SAPS taking down a rape complaint to inform the victim before she makes a statement or before the initial interview that she has the right to legal representation.\textsuperscript{63} The legal representative may also represent the victim at sentencing in respect of the impact that the crime has had on the victim and when speaking to the issue of compensation, at parole hearings in respect of the conditions to be attached to an offender’s release, and at any other time during the process where appropriate and reasonable to directly protect the rights and interests of the victim.\textsuperscript{64}

In its final report, the Law Reform Commission states that it is not persuaded that sexual assault victims should have legal representation, firstly because the state-
funded legal aid system does not currently have sufficient funds and other resources to meet its basic obligations, for example, providing accused persons with legal aid. On the other hand, should such legal representation for victims be privately funded, a dual system will operate where rich victims will have access to representation and poor victims will have to do without. Against this background, the Commission ‘does not deem it appropriate’ to recommend legal representation for sexual assault victims. Importantly, the Commission does not appear to have a principled objection to the notion of the protection of victims’ rights through legal representation; its reservations appear to be based on a lack of resources only. Similar to its argument regarding ancillary prosecution, the Commission expresses the view that many of the problems intended to be solved through legal representation are in fact addressed through the recommendations proposed in its report.

To summarise at this point: efforts to arrange increased participation for the sexual assault victim in the adversarial criminal trial process and to reduce secondary victimisation by means of structural mechanisms such as ancillary prosecution or legal presentation for the victim were not successful.

6. Proposals for inclusion of rights and duties in the Bill during the Legislative Process

6.1 Background

As set out above, the Law Reform Commission identified what appears to be an imbalance in the constitutional protection of the rights of accused persons compared to those of the victim. The Commission then put forward five options for strengthening the procedural position of sexual assault victims.

The first option would be to amend the Constitution to include a section on victims’ rights. These rights would be included not to merely balance the rights given to the offender but rather in order to ‘enshrine an uncompromising commitment to the empowerment of victims’. A second option would be to adopt specific legislation on the rights of victims of crime. The same objective as the first option would be achieved, namely fostering respect for victims’ rights.

As a third option, rights of victims of sexual offences could be incorporated into specific sexual offence legislation. In the same fashion as the Domestic Violence Act, attendant sanctions for non-compliance would give uncooperative officials
‘the necessary motivation’ to comply. The fourth option would be to adopt a Victims’ Charter. A Victims’ Charter, which could be regularly updated, could set out the responsibilities of the different agencies (including non-governmental organisations). However, the status and enforceability of such a Charter is unsure.

The fifth and final option would be to review all aspects of criminal procedure regarding victims so that legislation appropriate to victims’ rights can be incorporated in general criminal procedure. This option would ‘weave victims’ rights into the heart of criminal procedure’.

In its final report, the Commission expresses the view that the various measures it includes in its draft Bill, such as according the victim vulnerable witness status and concomitant protective measures, would go a long way to improve outcomes for victims. Regarding the five options for strengthening the position of sexual assault victims, it states that although it is clear that all victims (and not only victims of sexual assault) need protection, it is not within the scope of this particular investigation to fully develop these five proposals. The Commission therefore recommends that the various options put forward be further investigated, but it does not explicitly pursue any of the five options for purposes of its proposed Bill.

In the following section, we will examine whether any of the options examined by the Commission in fact materialised during the subsequent formative processes of the legislation, and if so, to what extent they could potentially contribute to the protection of the rights of sexual assault victims.

6.2 Option 3: Inclusion of rights in the Sexual Offences Bill

The Law Reform Commission’s 1997 Issue Paper set out a number of guiding principles for the management of sexual offences. These principles were inter alia derived from the UN Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child and the Constitution of the Republic of South

---

71 South African Law Reform Commission (note 37 above). See sub-s 18(4)(a) of the Domestic Violence Act, which deals with the failure of police officials to comply with an obligation imposed in terms of the Act.

72 SALRC (note 37 above).

73 Clause 16 of the Bill proposed by the Law Reform Commission in its final Report.

74 According to sub-clause 16(4), these protective measures would include one or more of the following: allowing the witnesses to be accompanied by a support person, allowing the witness to give evidence by means of closed-circuit television as provided for in s 158 of the CPA (irrespective of any additional qualifying criteria prescribed by that section), directing that the witness must give evidence through an intermediary as provided for in s 170A of the CPA (irrespective of any additional qualifying criteria prescribed by that section), directing that the proceedings may not take place in open court as provided for in s 153 of the CPA, prohibiting the publication of the identify of the complainant as provided for in s 154 of the CPA, or any other measure that the court deems ‘just and appropriate’.

75 SALRC (note 65 above) para 6.2.4.

76 SALRC Project 107 (1997) Issue Paper 10: Sexual Offences Against Children. At this point, the inquiry was limited to acts of sexual assault committed by and against children.
Africa.77 In the Law Reform Commission’s first Discussion Paper,78 the guiding principles were expanded, with reference to various international documents, to include the interests of adult victims.79 The question was posed what role these principles should play in proposed legislation (eg should they be included in the Preamble, or form part of a substantive provision, etc).80 In the Bill proposed by the Commission as part of its final report, these principles constitute a substantive clause entitled ‘Objectives’.81

The clause lists a number of objectives that should be considered in the application of the provisions of this Act. This list of objectives emphasises that complainants should be treated with dignity and respect and should be ensured access to the mechanisms of justice. They should be informed of their rights and the procedures within the criminal justice system that affect them. Complainants should furthermore have the right to express an opinion, to be informed of all decisions, and to have their opinion taken seriously in any matter affecting them. In addition, complainants should have the right to have matters explained to them in a clear, understandable manner and to have procedures dealt with expeditiously in time frames appropriate to the complainant and the office. Complainants should have the right to confidentiality and privacy and to protection from publicity about the offence.

In the version of the Bill tabled in parliament in 2003, the guiding principles had been removed from the substantive provisions, and had become Schedule 1 to the Bill.82 During the deliberations of the Portfolio Committee on Justice and Constitutional Development, it became clear that the guiding principles as conceptualised by the Law Reform Commission would not survive.83 In the ‘Working Document’ dated 10 February 2004, a new clause 2 was introduced, which was clearly the precursor of the present s 2 of the Act, and which bore little, if any, resemblance to the guiding principles.84 At the same time, Schedule 1, containing the guiding principles, was removed from the ‘Working Document’.

Significantly, the present s 2 of the Act does not contain explicit reference to any ‘rights’, except for sub-s 2(f), which refers to the provision of services to victims of sexual offences, including affording such victims ‘the right to receive Post Exposure

---

77 Para 2.1.1.
79 In 1998 the Commission’s mandate was broadened to also include sexual assault of adults. SALRC Annual Report (1998) 80.
80 SALRC (note 65 above) para 2.4.4.3.
81 Clause 1.
83 See minutes of the portfolio committee meeting on 28 January 2004. The archived minutes are accessible on the website of the Parliamentary Monitoring Group at www.pmg.org.za.
Prophylaxis in certain circumstances’. Subsection 28(2) of the Act circumscribes this right by providing that victims may only receive Post Exposure Prophylaxis [PEP] if they lay a charge relating to a sexual offence with the South African Police Service or report the incident at a designated health establishment within 72 hours after the alleged sexual offence took place.85

6.3 Option 4: The Victims’ Charter

In 2004, the National Department of Justice and Constitutional Development introduced a Victims’ Charter aimed at ‘consolidation of the present legal framework in South Africa relating to the rights of and services provided to victims of crime’.86 According to the Preamble, the objectives of this Charter are to eliminate secondary victimisation in the criminal justice process and to ensure that victims remain central in this process. A further purpose is to clarify the service standards ‘that can be expected by, and are to be accorded to, victims’ whenever they come into contact with the criminal justice system, and to make provision for recourse when these standards are not met.87

The Charter addresses victims’ rights under seven broad headings, namely the rights to be treated with fairness and with respect for dignity and privacy, to offer information, to receive information, to protection, to assistance, to compensation and to restitution.88 The entitlements of victims are set out concisely in terms of each right. Certain of these rights are subject to qualifications such as ‘if necessary’ and ‘where possible’, which would prove to have significant implications in practice. For example, under the right to offer information, victims are provided with the following information:

This right means that you can participate (if necessary and where possible) in criminal justice proceedings, by attending the bail hearing, the trial, sentencing proceedings and/or Parole Board hearing.89

As explained above, victims’ opportunities to participate in criminal trials are fairly limited. The qualifier ‘if necessary and where possible’ included in the above statement makes it clear that this Charter intends to go no broader than the existing

85 While the period of 72 hours is determined by current medical evidence regarding the probable efficiency of the treatment, the value of linking access to PEP to enlisting the criminal process is not immediately apparent.
87 Ibid.
88 The phrasing of these rights is reminiscent of the ‘Objectives’ originally included in the Law Reform Commission’s Sexual Offences Bill discussed above.
89 Our emphasis.
legal position. In addition, one is concerned, reading this document on its own, that a victim who is not aware of these existing limitations may be left with unrealistic expectations. It is crucial for the Charter to be read with the accompanying exposition of ‘Minimum Standards’, discussed below, to gain a more comprehensive picture of what victims can actually expect.

It is further clear that the Charter assumes a fair degree of independent agency on the part of the victim. For example, it informs her that she can ask for explanations in her own language of anything that she doesn’t understand, and can request information regarding court dates, witness fees and the witness protection programme. Instead of these services being offered, their availability is premised on her first requesting the services.

The Department of Justice and Constitutional Development also produced a companion document to the Victims’ Charter entitled Minimum Standards on Services for Victims of Crime. This is an information document that was developed in order to elaborate on the rights set out in the Victims’ Charter and to enable victims to exercise their rights. The document sets out the minimum service standards that victims can expect from service providers and also presents information on the relevant complaints procedures.

The ‘Minimum Standards’ document contains a number of principles that are of particular significance to sexual assault victims. For example, it is stated that if the case goes to court, the victim can expect that the presiding officer will ensure that the trial proceedings are conducted in a manner that does not violate her right to fair treatment and respect for her dignity and privacy. Cases involving sexual offences will be heard in specialised courts where such courts are available. Prosecutors are expected to protect victims from unduly aggressive, harmful and degrading cross-examination.

As could be expected, the ‘Minimum Standards’ are again subject to certain qualifications. The following two examples are representative. The document states that court staff will ‘do their best’ to protect victims from being further victimised or traumatised by what happens in court. Similarly, it provides that if the case goes to court, persons with disabilities will be given the necessary support ‘where available’.

The standards set out in this document fill an important gap, and could potentially address a number of the difficulties experienced by sexual assault victims in practice.

---

90 An exhaustive critique of the Victims’ Charter goes beyond the scope of this chapter. See in this regard e.g. L. Artz & D. Smythe (2005) ‘South African legislation supporting victims’ rights’ in L. Davis & R. Snyman (eds) Victimology in South Africa 131, 137–18.
91 Department of Justice and Constitutional Development (note 34 above) (‘the Minimum Standards’).
92 Ibid Part III para 1.10.
93 Ibid Part III para 5.12.
94 Ibid para 3.12.
95 Ibid para 1.15.
96 Ibid Part III para 5.11.
For example, victims often encounter resistance from the police when they request copies of their initial witness statements.97 For this reason, it is significant that the ‘Minimum Standards’ document confirms that victims are entitled to request a copy of their police statement.98

However, accessibility is a potential impediment (perhaps the major impediment) that could obstruct victims from making extensive use of the Victims’ Charter and the Minimum Standards document. In order for victims to exercise their rights, and to hold the relevant state agents to account as envisaged in these two documents, they would have to firstly be aware of the documents and be familiar with their contents and secondly have the capacity to act on the information set out in the documents. Given the relatively low levels of legal literacy in South Africa generally, it is our belief that the Department of Justice and Constitutional Development would have to go to significant lengths to ensure that users of the criminal justice system are aware of the Victims’ Charter and ‘Minimum Standards’ and have access to copies of the documents.

On a formal level, it should be noted that the ‘Minimum Standards’ document does not address the issue of how far a victim’s recourse goes. In other words, she may ask the prosecutor for reasons for a decision on whether to prosecute or not; but to what extent may she challenge such a decision? In the same vein, she can expect to be informed of the outcome of the case and ‘whether there is an appeal against the conviction or sentence’. Regrettably, the documents do not explain whether the victim can question or challenge this outcome.

What is clear from an examination of both the Victims’ Charter and the ‘Minimum Standards’ documents is that they are not intended to extend the boundaries of the present legal framework in any way. Returning to the example above, these instruments do not accord the victim, aggrieved with the court’s ruling that the defence may cross-examine her on her previous sexual history, with any additional recourse beyond that already described.

It is to be expected that the Victims’ Charter and the ‘Minimum Standards’ will be amplified by the National Instructions and Directives that must be issued in terms of s 66 of the Sexual Offences Act.99 These Instructions and Directives should at least

97 Author’s personal experience.
98 Department of Justice and Constitutional Development (note 34 above) Part III Par 2.4. Strictly speaking, there is of course a difference between being entitled to request a copy of one’s statement and being entitled to a copy of the statement.
99 Subsection 66(1)(a) requires the National Commissioner of the South African Police Service to issue national instructions regarding all matters which are reasonable necessary to be provided for and which must be followed by all police officials who are tasked with receiving reports of and the investigating of sexual offence cases, in order to achieve the objects of the Act. Similarly, the National Director of Public Prosecutions must issue directives to be followed by all members of the prosecuting authority who are tasked with the institution and conducting of prosecutions in sexual offence cases — see sub-s 2(a). For further discussion of obligations placed on the police see in this volume Chapter 10.
provide victims with additional information on the standards of service-delivery they can expect from police and prosecution in the investigation and prosecution of their cases.100

6.4 Another option: Statutory duties

A further option that was briefly touched on by the Law Reform Commission, but not explored in any detail, is that of imposing statutory duties on officials tasked with the implementation of the Sexual Offences Act, coupled with sanctions for non-compliance.101 In 1999, Pithey et al argued for the inclusion of positive duties on state officials (specifically police officials, prosecutors and members of the Parole Board) in sexual assault legislation.102 The author contends that the combined weight of the Constitution and international human rights law implies that duties are imposed on individual state officials to perform certain functions when they encounter victims of rape.103 This is in addition to the more generalised duties resting on the state, for example, the obligations to enact appropriate legislation to address rape and to allocate sufficient state resources to ensure proper implementation of such legislation.

I have argued consistently that the positive duties resting on state officials should be clearly set out in national legislation (as opposed to regulations or ‘internal’ or departmental directives or guidelines).104 This argument is based firstly on the concern that such policy guidelines may not be accessible, and secondly, on the question of what the consequences would be of such a failure to comply with the guidelines.

Interestingly, the Law Reform Commission itself links the increased levels of accountability of state officials in terms of the Domestic Violence Act to the duties imposed by the Act:105

The recently enacted Domestic Violence Act has ensured that state officials can no longer act with indifference or impunity when dealing with intra-familial violence. The rights of domestic violence victims (which includes those victims who have been sexually abused) and the concomitant obligations placed on state officials by this Act, accord such victims the legislative protection which they desperately need.106

However, activists’ attempts to have similar duties included in the Sexual Offences

---

100 This comment assumes that the National Instructions and Directives issued in terms of the Sexual Offences Act will not simply be a restatement of those already in place.
101 See discussion above.
102 K Müller & A van der Merwe (note 24 above) 156–162.
103 Ibid 156.
104 Ibid 162; Western Cape submission (note 60 above) 21.
105 Sections 2 and 4(2) of the Domestic Violence Act impose duties on police officials and clerks of the courts respectively.
106 SALRC (note 37 above) para 40.3.6 our emphasis.
Act were unsuccessful both with the Law Reform Commission and in parliament. Significantly, s 66 of the Act which requires that national directives and instructions be issued by the three key Departments of Safety and Security, the National Prosecuting Authority and Health, is silent on how to address the issue of failure on the part of officials to comply with such instructions or directives.

To summarise: among the five options for strengthening the procedural position of sexual assault victims identified by the South African Law Reform Commission, one alternative has to some degree featured in the subsequent legislative process. This is the option of including certain victims’ rights in sexual offences legislation, which saw the light as ‘Objectives’ in Clause 2 of the Commission’s proposed Bill, was remodeled into Schedule 1 of the version tabled in parliament, and was eventually written out of the Bill when this Schedule was replaced by the precursor of the current s 2. The only right explicitly accorded to victims by the Act is to receive PEP; however, as noted above, this right is contingent on the victim’s compliance with certain conditions.\(^{107}\)

Another option investigated by the Law Reform Commission was that of a Victims’ Charter. As indicated, the Victims’ Service Charter and ‘Minimum Standards’ produced by the Department of Justice and Constitutional Development subsequent to the conclusion of the Commission’s investigation, are of potential significance to sexual assault victims, in spite of the ‘terms and conditions’ included in the documents. A third mechanism, the inclusion of statutory duties for state officials, was not utilised in the Sexual Offences Act, in spite of the fact that this appears to have enhanced state accountability in the case of the Domestic Violence Act.

7. Evaluation: Adding it all up

I believe that two points can be distilled from the exposition above. Firstly, it is disconcerting that many of the measures that the South African Law Reform Commission saw as solutions to the ‘real obstacles’ to the protection of a sexual assault victim’s interests, such as the mandatory protective measures concomitant with ‘vulnerable witness’ status, were excluded from the final version of the Act. Secondly, it is important to observe that the ‘instruments’ holding the greatest promise for protection (and potential expansion) of the rights of sexual assault victims lie outside the Sexual Offences Act: the Constitution, with specific reference to the Bill of Rights, and the Victims’ Charter and ‘Minimum Standards’, to be read with the national instructions and directives required in terms of the Act. It is therefore this expanded framework that should be emphasised and drawn on in the interpretation and implementation of the Act.

In this regard, our courts have demonstrated an ability to balance the rights of victims of sexual assault with those of accused persons in the context of the criminal

\(^{107}\) One could also argue that the Act confers on sexual assault victims a ‘right’ to bring an application for an order that the alleged offender be tested for HIV and that the results be disclosed to the victim in terms of sub-s 30(1).
trial, in particular the rights of the accused to a public trial,\textsuperscript{108} to be present when being tried\textsuperscript{109} and to challenge evidence.\textsuperscript{110} This is apparent from matters such as Klink \textit{v} Regional Court Magistrate NO,\textsuperscript{111} S \textit{v} Cornelius,\textsuperscript{112} and S \textit{v} Staggie.\textsuperscript{113} In the Klink and Staggie cases, the courts were specifically dealing with the interpretation of sections 170A and 158(3) of the Criminal Procedure Act.\textsuperscript{114} These are two key provisions in the context of providing sexual assault victims with a measure of ‘protection’ while giving evidence in the criminal trial: the former section allows for a witness under the age of eighteen years to give their evidence through an intermediary and the latter makes provision for the witness to testify by means of closed circuit television or other electronic media outside the presence of the accused. These provisions also featured prominently in the Law Reform Commission’s protective measures.

Significantly, the amendments to s 227 of the Criminal Procedure Act do introduce a duty on the presiding officer to explicitly consider the rights of the victim.\textsuperscript{115} In determining whether the evidence or cross-examination relating to previous sexual experience is relevant, the court has to inter alia take into account whether such evidence or cross-examination is not substantially outweighed by its potential prejudice to the complainant’s personal dignity and right to privacy.\textsuperscript{116} Other factors to be considered include whether such evidence or cross-examination is in the interest of justice, with due regard to the accused’s right to a fair trial, or is in the interest of society in encouraging the reporting of sexual offences. The court is therefore enjoined to perform the type of ‘balancing’ exercise referred to above.

It is unfortunate that a proposal to include an interpretation clause in the Sexual Offences Act was not accepted by parliament;\textsuperscript{117} such a clause could have served to emphasise that all provisions in the Act must also be viewed through the prism of victims’ rights. While the rights-based jurisprudence that is developing around these sections is encouraging, Smythe observes correctly that this development will remain piecemeal and \textit{ad hoc} in the absence of a more systemic approach to the entrenchment

\begin{itemize}
\item \textsuperscript{108} Sub-s 35(3)(c) of the Constitution.
\item \textsuperscript{109} Ibid sub-s (3)(e).
\item \textsuperscript{110} Ibid sub-s (3)(i).
\item \textsuperscript{111} 1996 (3) BCLR 402 (SE).
\item \textsuperscript{112} 1999 JDR, 0145 (C).
\item \textsuperscript{113} 2003 (1) SACR, 232 (C).
\item \textsuperscript{114} Act 51 of 1977.
\item \textsuperscript{115} See further in this volume Chapter 5.
\item \textsuperscript{116} Sub-s 227(5) of the CPA as amended by sub-s 68(2) of the Sexual Offences Act — see article 11 of the Schedule to the Act.
\end{itemize}
of victims’ rights in the interpretation of these provisions.\textsuperscript{118} An interpretation clause in the Sexual Offences Act could well have provided the catalyst for such a systemic approach.

As it stands, the Preamble to the Act makes reference to the rights to equality, privacy, dignity and freedom from all forms of violence. It has now become an accepted principle in South African law that the Preamble to an Act is an important tool of interpretation, and it may be consulted to obtain further information on the meaning of the legislation and its purpose.\textsuperscript{119} There is accordingly no reason why our courts should not draw on this Preamble in order to infuse the application of the Sexual Offences Act with a strongly rights-based approach. This approach may, for example, be significant in the interpretation of the provisions relating to admissibility of previous consistent statements.\textsuperscript{120}

It should further be remembered that the Act will be implemented and interpreted within the broader context of constitutional jurisprudence that has been built up through the cases from \textit{S v Baloyi}\textsuperscript{121} to the more recent judgments in \textit{K v Minister of Safety and Security}\textsuperscript{122} and \textit{Omar v Government of South Africa}.\textsuperscript{123} This is an evolving framework that has not yet reached the full extent of its development.\textsuperscript{124}

8. Conclusion

Violence against women provides States and other actors with a critical entry point for an effective implementation of human rights law.\textsuperscript{125} Violence against women can be described as ‘one of the most extreme manifestations of power inequality between women and men’.\textsuperscript{126} I have argued elsewhere\textsuperscript{127} that given this imbalance of power, it is not surprising that women look to the state for both responsive and proactive intervention to address such violence. It appears somewhat

\begin{itemize}
\item \textsuperscript{118} D Smythe (2005) ‘Moving beyond 30 years of Anglo-American rape law reforms: Legal representation for victims of sexual offences’ \textit{SACJ} 167, 185. Smythe sees a solution to some of these systemic shortcomings as lying in the introduction of legal representation for sexual assault victims — ibid.
\item \textsuperscript{119} See e.g J de Ville (2000) \textit{Constitutional and Statutory Interpretation} 146 and 149.
\item \textsuperscript{120} Sections 58 and 59.
\item \textsuperscript{121} 2000 (1) SACR 81 (CC).
\item \textsuperscript{122} 2005 (9) BCLR 835 (CC).
\item \textsuperscript{123} \textit{Omar v Government of the RSA} 2006 (2) SA 289 (CC). For a discussion of this development, see H Combrinck (2005) ‘The dark side of the rainbow: Violence against women in South Africa after ten years of democracy’ \textit{Acta Juridica} 171, 175–185.
\item \textsuperscript{124} G Carpenter (2003) ‘The Carmichele legacy — enhanced curial protection of the right to physical safety’ 18 \textit{SAPR/PL} 252, 265–266.
\item \textsuperscript{125} United Nations Special Rapporteur on Violence Against Women (2006) \textit{The Due Diligence Standard as a Tool for the Elimination of Violence Against Women} para 93.
\item \textsuperscript{127} Combrinck (note 123 above) 175.
\end{itemize}
incongruous, then, that victims’ enlistment of state power and assistance in the form of criminal proceedings should also imply a deeply disempowering experience.

It is noteworthy that very few of the feminist commentators who spoke about the Zuma verdict afterwards felt that the court’s ultimate finding of not guilty was incorrect. For the most part, there was (tacit) agreement that the state had not proved its case beyond reasonable doubt. Rather, it was the patriarchal reasoning by way of which Judge Van der Merwe had reached his conclusions (including his reliance on antediluvian assumptions about rape and rape victims),128 the manner in which the trial had been conducted,129 and the tragic losses of dignity for the complainant,130 which had left most of us disappointed and dismayed.

If I then return to the original question of whether the Sexual Offences Act would have made a significant contribution to the protection of the complainant’s rights in the Zuma trial, on the surface the answer would have to be in the negative. However, as I have demonstrated, the Act will be implemented and interpreted in a context that compels the balancing of the rights of the accused with those of the victim; and it is likely to be the conscious development of the Act within this matrix that does hold promise for increasing the somewhat illusory protection currently offered to sexual assault victims.

---

128 See, for example, Van der Merwe J’s analysis of the events: S v Zuma (note 2 above) at 217i — 218h.
129 It remains an open question whether Van der Merwe’s concession to formal equality in permitting an equal number of supporters for the victim and the accused (fifteen on each side) to remain in attendance while she testified, served to protect her dignity or privacy in any meaningful way.
130 The ultimate loss was probably the fact that the complainant no longer felt safe to remain in South Africa, and relocated to the Netherlands following the conclusion of the trial — K Maugham ‘Why I wish that Zuma was dead’ The Star 6 July 2007. Available at www.iol.co.za.
# TABLE OF CASES

<table>
<thead>
<tr>
<th>Case</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Attorney-General, Transvaal v Kader 1991 (4) SA 727 (A)</td>
<td>112</td>
</tr>
<tr>
<td>Bernstein and Others v Bester NO and Others 1996 (2) SA 751</td>
<td>113</td>
</tr>
<tr>
<td>(CC)</td>
<td>114</td>
</tr>
<tr>
<td>Borchers v Estate Naidoo 1955 (3) SA 78 (A)</td>
<td>73</td>
</tr>
<tr>
<td>Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC)</td>
<td>264</td>
</tr>
<tr>
<td>Carmichele v Minister of Safety and Security 2003 (2) SA 656 (C)</td>
<td>8</td>
</tr>
<tr>
<td>DPP v Kilbourne 1973 AC 729</td>
<td>101</td>
</tr>
<tr>
<td>Holtzhauzen v Roodt 1997 (4) SA 766 (W)</td>
<td>85, 89</td>
</tr>
<tr>
<td>Jones v South Eastern &amp; Chatham Railway Co’s Managing Committee</td>
<td>86</td>
</tr>
<tr>
<td>(1918) 118 LT 802</td>
<td></td>
</tr>
<tr>
<td>K v Ministry of Safety and Security 2005 (6) SA 419 (CC)</td>
<td>8, 281</td>
</tr>
<tr>
<td>K v The Regional Court Magistrate NO and Others 1996 (1) SACR 434 (E)</td>
<td>151, 153</td>
</tr>
<tr>
<td>Klink v Regional Court Magistrate NO 1996 (3) BCLR 402 (SE)</td>
<td>264, 280</td>
</tr>
<tr>
<td>M.C v Bulgaria [2003] ECHR 646, Judgment, 4 December 2003</td>
<td>30</td>
</tr>
<tr>
<td>Minister of Health v Treatment Action Campaign 2002 (5) SA 703 (CC)</td>
<td>178</td>
</tr>
<tr>
<td>Nel v Le Roux NO and others 1996 (1) SACR 572 (CC)</td>
<td>113</td>
</tr>
<tr>
<td>Ntsabo v Real Security CC (2003) 24 ILJ 2341 (LC)</td>
<td>136</td>
</tr>
<tr>
<td>Omar v Government of South Africa 2006 (2) SA 289 (CC)</td>
<td>281</td>
</tr>
<tr>
<td>People v John Z (2003) 29 C.4th 756</td>
<td>40</td>
</tr>
<tr>
<td>People v Liberta (1984) 64 NY 2 d 152</td>
<td>25</td>
</tr>
<tr>
<td>People v Vela (1985) 172 Cal.App. 3d 237</td>
<td>41</td>
</tr>
<tr>
<td>Pillay and another v The Regional Court Magistrate, Pietermaritzburg</td>
<td>110, 118</td>
</tr>
<tr>
<td>and Others Case No 8708/2004 (Unreported)</td>
<td></td>
</tr>
<tr>
<td>Prinsloo and another v Bramely Children’s Home and others 2005 (2)</td>
<td>158</td>
</tr>
<tr>
<td>SACR 2 (T)</td>
<td></td>
</tr>
<tr>
<td>Prosecutor v Akayesu Case No. ICTR–96–4–T, Judgment, 2 September</td>
<td>24</td>
</tr>
<tr>
<td>1998</td>
<td></td>
</tr>
<tr>
<td>Prosecutor v Furundzija Case No. IT–95–17/1–T, Judgment, 10 December</td>
<td>24, 28</td>
</tr>
<tr>
<td>1998</td>
<td></td>
</tr>
<tr>
<td>Judgment, 22 February 2001</td>
<td></td>
</tr>
<tr>
<td>Prosecutor v Muhimana Case No. ICTR–95–1–B–I, Judgment, 25 April</td>
<td>29</td>
</tr>
<tr>
<td>2005</td>
<td></td>
</tr>
</tbody>
</table>
Prosecutor v Niyitegeka Case No. ICTR–96–14-T, Judgment, 16 May 2003......................................................... 28

R (D) v Camberwell Green Youth Court [2003] 2 Cr App R 257 ........................................................ 92
R v Adamstein 1937 CPD 331 ........................................................ 94
R v C 1955 (4) SA 40 (N) ........................................................ 87
R v Cargill [1913] 2 KB 271 ........................................................ 94
R v Cockcroft (1870) 11 Cox CC 410 ................................................... 94
R v Cuerrier [1998] 2 SCR 371 ........................................................ 31, 58, 64
R v Darby New Westminster Res. No. 35588 (B.C.P.C) ........................................................ 107
R v Ewanchuck [1999] 1 SCR 330 ........................................................ 32
R v F (C) [1997] 120 CCC (3d) 225 ................................................ 93
R v Gayme [1991] 2 SCR 572 ........................................................ 32
R v J 1966 (1) SA 88 (RA) ........................................................ 73
R v L (D.O.) (1993) 85 CCC (3d) 289 ................................................... 93
R v M 1959 (1) SA 352 (A) ........................................................ 87, 88
R v Manda 1951 (3) SA 158 (A) ........................................................ 78, 81
R v Manyana 1931 AD 386 ........................................................ 86
R v Mkwayi 1956 (3) SA 406 (E) ........................................................ 111
R v O’Connor [1995] 4 S.C.R. 411 ................................................ 103, 106
R v Osborne [1905] 1 KB 551 ........................................................ 87
R v Oslin (1994) 109 DLR (4th) 478 ................................................... 102
R v P 1967 (2) SA 497 (R) ........................................................ 87
R v Ranikolo 1954 (3) SA 255 (O) ................................................... 81
R v Rautenbach 1949 (1) SA 135 (A) ................................................ 75
R v Riley (1887) 15 QBD 481 ........................................................ 94
R v Roberts [1942] 1 All ER 187 (CCA) ................................................ 86
R v Schaube-Kuffler 1969 (2) SA 40 (RA) 50 ................................................... 101
R v Seaboyer [1991] 2 SCR 572 ................................................... 32, 97
R v W (R) (1992) 74 CCC (3d) 134 ................................................... 79

S v Abrahams 2001 (2) SACR 358 (C) ................................................... 8
S v Abrahams 2002 (1) SACR 116 (SCA) ........................................................ 233, 235
S v Alex Henry Case No. RC860/03 (Unreported) ................................................... 8, 110
S v Artman 1968 (3) SA 339 (A) ........................................................ 73
S v B (G) (1990) 56 CCC (3d) 200 ................................................... 79
S v Balhuber 1987 (1) PH H22 (A) ................................................... 75
S v Baloyi 2000 (1) SACR 81 (CC) ................................................... 264, 281
S v Bhoqwana and another 2004 (JOL) 12833 (Tk) ................................................... 173
S v Blauw 1999 (2) SACR 295 (W) ................................................... 236
S v Bruuintjes [2007] JOL 19384 (E) ................................................... 240
<table>
<thead>
<tr>
<th>TABLE OF CASES</th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>S v Buys en 'n ander 2002 (JOL) 9662 (C)</td>
<td>173</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S v Chapman 1997 (3) SA 341 (SCA)</td>
<td>42</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S v Citizen Newspapers (Pty) Ltd and another 1980 (3) SA 889 (T)</td>
<td>157, 158</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S v Cornelissen; Cornelissen v Zeelie NO 1994 SACR 41 (W)</td>
<td>112</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S v Cornelus, 1999 JDR 0145 (C)</td>
<td>280</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S v Cornick 2007 (2) SACR 115 (SCA)</td>
<td>77</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S v D 1992 (1) SACR 143 (Nm)</td>
<td>75, 77</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S v De Villiers 1999 (1) SACR 297 (O)</td>
<td>89</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S v Dodo 2001 (1) SACR 594 (CC), 2001 (5) BCLR 423 (CC)</td>
<td>230, 233</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S v Domingo 2005 (1) SACR 571 (C)</td>
<td>91</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S v Dzikuda and Others 2000 (2) SACR 443 (CC)</td>
<td>230</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S v F 1989 (3) SA 847 (A)</td>
<td>75</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S v F 1999 (1) SACR 571 (C)</td>
<td>91, 93</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S v Hlapezula 1965 (4) SA 439 (A)</td>
<td>73</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S v Jackson 19981 SACR 470 (SCA)</td>
<td>7, 76, 77</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S v Lugwali and another 2001 (JOL) 7696 (Ck)</td>
<td>173</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S v M 1999 (1) SACR 664 (C)</td>
<td>89</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S v M 2002 (2) SACR 411 (SCA)</td>
<td>97</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S v M 2003 (1) SA 341 (SCA)</td>
<td>95</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S v M 2006 (1) SACR 135 (SCA)</td>
<td>76</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S v M. 1997 (2) SACR 682 (C)</td>
<td>76</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S v Mabila and another 1999 (JOL) 5111 (T)</td>
<td>173</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S v Mahomotsa 2002 (2) SACR 435 (SCA)</td>
<td>8, 232, 235</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S v Majalefa WLD Case No 365/98 (Unreported)</td>
<td>233</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S v Masibi 2005 (JOL) 15159 (T)</td>
<td>173</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S v Mosokeng [1999] JOL 5403 (W)</td>
<td>236</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S v Mofokeng 1979 (4) SA 367 (T)</td>
<td>160</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S v Mpondi 2007 (2) SACR 245 (C)</td>
<td>77</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S v Munn 1973 (3) SA 734 (W)</td>
<td>81</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S v Mvamvu 2005 (1) SACR 54 (SCA)</td>
<td>8, 231</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S v Ncanywa 1992 (2) SA 182 (Ck)</td>
<td>22</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S v Ntholeng[2004] JOL 13024 (O)</td>
<td>231, 240</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S v Ntuli [2005] JOL 12442 (ECLD)</td>
<td>224, 231, 240, 242, 244</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S v Perskorporasie van Suid Afrika Bpk and another 1980 (3) SA 889 (T)</td>
<td>157</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S v Perskorporasie van Suid Afrika Bpk en 'n ander 1981 (4) SA 18 (A)</td>
<td>157</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S v Peterson en 'n ander 2001 (1) SACR 16 (SCA), [2001] 2 All SA 349 (A)</td>
<td>173</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S v R 1993 (1) SACR 209 (A)</td>
<td>173</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S v S 1990 (1) SACR 5 (A)</td>
<td>74</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S v S 2001 (2) SACR 321 TPD</td>
<td>173</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S v Schwartz, 1999(2) SACR 380 (C)</td>
<td>228, 236, 240</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S v Snyman 1968 (2) SA 582 (A)</td>
<td>73</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

TABLE OF CASES 285
S v Staggie 2003 (1) SACR 232 (C), 2003 (1) BCLR 43 (C) ... 91, 161, 264, 280
S v Stefaans 1999 (1) SACR 182 (C) ......................... 93, 154
S v T 1963 (1) SA 484 (A) ...................................... 87
S v T 1973 (3) SA 794 (A) ...................................... 81
S v Tafeni and another 2001 (JOL) 8251 (Tk) ............. 173
S v Vaalryn [2005] JOL 15342 (C) ............................ 235
S v Van der Ross 2002 (2) SACR 362 (C) ................. 77, 89
S v Van Rooyen 2002 (1) SACR 608 (C) ................... 173
S v Z en 4 ander sake 1999 (1) SACR 427 (E) ............ 173
S v Zuma 2006 (2) SACR 191 (W), 2006 (7) BCLR 790 (W) ... 76, 95, 96, 227, 262, 263, 268, 282

Shabalala v The Attorney General of the Transvaal and Another 1996 (1)
SA 725 (CC) .................................................. 111
Smit v Van Niekerk 1976 (4) SA 293 (A) ................. 112
State v Masiya 2007 (2) SACR 435 (CC) ............... 8, 23, 264

Van Eeden v Minister of Safety & Security 2002 (4) SA 346(SCA) .... 8, 264
Van Zijl v Hoogenhout 2005 (2) SA 93 (SCA) ............ 136

Woji v Santam Insurance Co Ltd 1981 (1) SA 1020 (A) ........ 78