

BIBLIOGRAPHY

TEXTBOOKS, JOURNALS AND NEWSPAPER ARTICLES

Albert, P. *et al.* "AIDS Practice Manual" (1991) USA: National Lawyers Guild Network.

Alschuler, A.W. "Plea-Bargaining and its History" 1979 *Columbia Law Review* 1.

Alswang, J. & van Rensburg, A. "An English Usage Dictionary" (1988) Johannesburg: Educum Publishers.

Andenaes, J. "The General Prevention Effects of Punishment" (1966) 14 *Pennsylvania Law Review* 970.

Ashworth, A.J. "Criminal Justice and Deserved Sentences" (1989) 36 *Criminal Law Review* 340.

Bailey, F.L. & Rothblatt, H.B. "Crimes of Violence: Rape and other Sex Crimes" (1991) Rochester: The Lawyers Co-operative Publishing Company.

Baltimore, D. "Quarantining will Help No One" (1987) 102 *US Newsworld Report* 70.

Barkas, J.L. "Victims" (1978) New York: Charles Scribner's Publishers.

Barrie, G. "Husband and Wife: Rape" (1992) 292 *De Rebus* 237.

Bekker, J.C. **“Seymour’s Customary Law in Southern Africa”** (1989) Cape Town: Juta

Beeld **“Ondersoek Gedoen na Amerikaanse Kits–HIV/ Vigs Toets”** 26 August 1995.

Beeld **“Verkragte Student Kry Vigmiddel”** 10 March 1999.

Beeld **“Verkragte Joernalis se Aanklag Teen Polisie, Hospitale, Regering-en Samelewing: My Lewe is nie R400 Werd nie”** 24 April 1999.

Bekker, T.W. **“Plea Bargaining in the United States and South Africa”** (1996) 29 *CILSA* 168.

Bennett, T.W. **“Human rights and African Customary Law”** (1995) Cape Town: Juta.

Bennett; T.W. **“The Equality Clause and Customary Law”** (1994) *SAJHR* 122.

Bergen, R.K. **“Wife Rape: Understanding the Response of Survivors and Service Providers”** (1996) California: Thousand Oaks.

Borkowski, M. **“Marital Violence: the Community Response”** (1983) London: Tavistock Publications.

Boston Herald American **“Two Women Sent to Prison for Life for Rape”** 19 April 1978.

Brownmiller, S. **“Against our Will – Men, Women and Rape”** (1975) Harmondsworth: Penguin Books.

Buchanan, D. **“Public Health, Criminal Law and the Rights of the Individual”** in **“African Network on Ethics, Law and HIV”** Senegal: United Nations Development Programme 1995.

Burchell, J. & Milton, J.R.L. **“Principles of Criminal Law”** (1997) Cape Town: Juta.

Burchell, J. **“Principles of Delict”** (1993) Cape Town: Juta.

Burgess, A.W. **“Rape and Sexual Assault”** (1985) New York: Garland Publishing Inc.

Burgess, A.W. **“Rape and Sexual Assault II”** (1988) New York: Garland Publishing Inc.

Burgess, A.W. & Holmstrom, L.L. **“Rape Trauma Syndrome”** (1974) 131 *American Journal of Psychiatry* 981.

Cameron, E. & Swanson, E. **“Public Health and Human rights–The AIDS Crisis in South Africa”** (1992) *South African Journal of Human Rights* 202.

Cameron, E; **“Sexual Orientation and the Constitution: a Test Case for Human Rights”** (1993) 110 *South African Law Journal* 450.

CDC Morbidity and Mortality Weekly Reports **“Public Health Service Guidelines for the Management of Health Care Worker Exposures to HIV and Recommendations for Post Exposure Prophylaxis”** 15 May 1998.

Colella, U. **“HIV-Related Information and the Tension between Confidentiality and Liberal Discovery”** (1995) *The Journal of Legal Medicine* 97.

Crime Control Digest **“Female Rapists Sought in Dallas”** 25 March 1977.

Crome, S. McCabe, M. & Ford, L. **“Male Rape Victims: Fact and Fiction”** (1999) *73 Law Institute Journal* 60.

Deckard, B.S. **“The Woman’s Movement: Political, Socio-economic, and Psychological Issues”** (1983) New York: Harper and Row.

De Jager, F.J. **“Vigs: Die Rol van die Strafreg”** (1991) *Tydskrif vir Suid-Afrikaanse Reg* 212.

D’Emilio, J. & Freedman, E.B. **“Intimate Matters: A History of Sexuality in America”** (1988) New York: Harper and Row.

Department of Health Summary Report “National HIV-Sero-Prevalence Survey of Women attending Public Antenatal Clinics in South Africa 1999” March 2000.

Donat, L.N. & Emilio, J.D. **“A Feminist Redefinition of Rape and Sexual Assault: Historical Foundations and Change”** (1992) 48:1 *Journal of Social Issues* 9.

Edwards, S.S.M. **“Sex and Gender in the Legal Process”** (1996) London: Blackstone Press.

Edwards, S.S.M. **“Female Sexuality and the Law”** (1981) Oxford: Robertson.

Elias, R. **“The Politics of Victimization”** (1986) Oxford: Oxford University Press.

Elliot, R. **“Criminal Law and HIV/AIDS: Final Report”** (1997) *The Canadian HIV/AIDS Legal Network and the Canadian AIDS Society* March 19.

Estrich, S. **“Rape”** (1986) 95 *The Yale Law Journal* 1155.

Evian, C. **“Primary AIDS Care”** (2000) Johannesburg: Jacana Education.

Feild, H. & Bienan, L. **“Jurors and Rape”** (1980) Massachusetts: Lexington Books.

Fettner, A.G. **“The AIDS Scare: Answers to Frightening Questions”** (1987) 168 *Redbook* 25.

Fettner, A.G. **“Women and AIDS”** (1986) 18 *Health* 61.

Finkelhor, D. & Yllo, K. **“License to Rape: Sexual Abuse of Wives”** (1985). New York: Holt, Rinehart, & Winston.

Frase, R.S. **“Sentencing Guidelines in Minnesota and other American States: A Progress Report”** (1995) *The Politics of Sentencing Reform* 169.

Galvin, H.R. **“Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade”** (1986) 70 *Minnesota. Law Review* 767.

Geldenhuys, T. & Joubert, J.J. (ed); **“Criminal Procedure Handbook”** (1996) Kenwyn: Juta.

Gostin, L.O. *et al.* **“AIDS Screening, Confidentiality and Duty to Warn”** *American Journal of Public Health* (1987) 77 361.

Gross, H. & Von Hirsch, A. **“Sentencing”** (1981) New York: Oxford University Press.

Groth, A.N. **“Men who Rape”** (1979) New York: Plenum Press.

Groth, A.N. *et al.* **“Rape, Power, Anger and Sexuality”** (1977) 134 *American Journal of Psychiatry* 1239.

Grubb, A. & Peral, D.S. **“Bloodtesting, AIDS and DNA Profiling”** (1990) Bristol: Jordan and Sons.

Hall, C. **“Rape: The Politics of Definition”** (1988) 105 *South African Law Journal* 67.

Henham, R. **“Back to the Future on Sentencing: The 1996 White Paper”** (1996) 59 *Modern Law Review* 861.

Hoffman, L.H. & Zeffert, D. **“South African Law of Evidence”** (1988) Durban: Butterworths.

Hopkins, J. (ed). **“Perspectives on Rape and Sexual assault”** (1984) New York: Harper & Row.

Hough, M. & Mayhouse, P. **“The British Crime Survey: Home office Research Study no 76”** (1983) London.

Huckle, P.L. **“Male Victims Referred to a Forensic Psychiatric Service”** (1995) 35:3 *Medicine, Science and the Law* 191.

Hunt, P.M.A. **“South African Criminal Law and Procedure II: Common Law Crimes”** (1982).

Isakov, N.M. & Van Zyl Smit, D. **“Negotiated Justice and the Legal Context”** (1985) *De Rebus* 173.

Joubert, W.A.; **LAWSA** (1981) 6 Durban: Butterworths.

Kirby, M. **“Colloquium, AIDS, Health and Human Rights”** (1994) 6:2 *AIDS Care* 248.

Koss, M. P. *et al.* "Stranger and Acquaintance Rape: Are there Differences in Victim's Experiences?" (1988) 12 *Psychology of Women Quarterly* 1.

Kramer, E.J. "When Men are Victims: Applying Rape Shield Laws to Male Same-Sex Rape" (1998) 73 *New York University Law Review* 296.

Labuschagne, J.M.T. "Die Klage by Seksmisdade" (1978) 11 *De Jure* 18.

Labuschagne, J.M.T. "Die Opkoms van 'n Abstrakte Penetrasiereg by Geslagsmisdade" (1997) 114 *South African Law Journal* 461.

Labuschagne, J.M.T. "Die Penetrasiereg by Verkragting Heroorweeg" (1991) 108 *South African Law Journal* 148.

Labuschagne, J.M.T. "Die Suid-Afrikaanse Verkragtingsreg: 'n Strafrechtsvergelykende Onderzoek" (1972) Unpublished LLD thesis UPCHO.

Labuschagne, J.M.T. "Geslagsmisdade" (1981) 44 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 23.

Labuschagne, J.M.T. "Hoge Raad 22 Feb 1994, NJ 1994, 379" (1995) 28 *De Jure* 241.

Labuschagne, J.M.T. "Misdade Tussen Gades" (1980) 43 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 39.

Labuschagne, J.M.T. "Nie-konsensuele Geslagsmisdade: 'n Misdaadsistematiese Herwaardering" (1981) 44 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 30.

Labuschagne, J.M.T. **“Oningelige Geslagsomgang met ‘n Vigs-lyer en die Vraagstuk van Toestemming by Verkragting”** (1993) 126 *De Jure* 417.

Labuschagne, J.M.T. **“Onregmatigheidskriterium in die Straf-en Deliktereg: ‘n Regsevolusionere Beskouing”** (1993) 56 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 663.

Labuschagne, J.M.T. **“Ons Gemenerereg en Wetsuitleg”** (1984) 117 *De Jure* 364.

Labuschagne, J.M.T. **“Regterlike Misdaadskepping: Is die Engelsregterlike Benadering Versoenbaar met die Sekerheidseis van die Strafrege?”** (1994) 15 *Obiter* 124.

Labuschagne, J.M.T. **“Deliktuele Aanspreeklikheid weens Verkragting”** (1994) 15 *Obiter* 242.

Labuschagne, J.M.T. **“Verkragting binne Huweliksverband”** (1991) 24 *De Jure* 402.

Labuschagne, J.M.T. **“Verkragting in die Inheemse Reg”** 1994 (15) *Obiter* 85.

Labuschagne, J.M.T. **“Vigs, Gevolgsaanspreeklikheid, Bedrieglike Weerhouding Van Inligting en Die Vraagstuk van Toestemming by Gewelds-en Geslagdismisdade”** (2001) 3 *TSAR* 558.

Labuschagne, J.M.T. **“Voltooingsaanspreeklikheid, Verkragting en Vigs: ‘n Rigtingwyser van die Natuur”** (1993) 56 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 129.

Lachman, S.J. **“Heterosexual HIV/AIDS as a Global Problem”** (1995) South Africa TPS Drug information Centre.

LaFree, G.D. **“Rape and Criminal Justice: The Social Construction of Sexual Assault”** (1989) Belmont: Wadsworth.

Laurie, G.T. **“AIDS and Criminal Law”** (August 1991) *Journal of the Law Society Scotland* 317.

Lee, R.W. **“An Introduction to Roman-Dutch Law”** (1915) Oxford: Clarendon Press.

Le Roux, J. **“Geweldsmisdade binne Huweliksverband”** (1994) unpublished LLD thesis UP.

Le Roux, J. **“Die Toepassing van Strafbeginsels op HIV Oordrag: ’n Diagnose”** (2000) 33 *De Jure* 293.

Leclerc-Madlala, S. **“Crime in an Epidemic: the Case of Rape and AIDS”** (1996) 9:2 *Acta Criminologica* 31.

Lillah, R. **“Men who Rape Men”** (July 1996) *Drum Magazine* 134.

Marsch, C. *et al.* **“Rape and the Limits of Law Reform”** (1982) Boston: Auburn House

Matthews, N.A.; **“Confronting Rape”** (1994) London: Routledge.

McKendrick, B. & Hoffman, W. (ed.). **“People and Violence in South Africa”** (1990) Cape Town: Oxford University Press.

McLeod, W.T. (ed). **“The New Collins Thesaurus”** (1985) London: Collins.

Mezey, G.C. & King, M.B. **“Male victims of Sexual Assault”** (1987) 27:2 *Medical Law Journal* 123.

Mezey, G.C. & King, M.B. (ed); **“Male Victims of Sexual Assault”** (1992) Oxford: Oxford University Press.

Milton, J.R.L. **“The Sexual Offences Act”** (1988) 1 *South African Journal of Criminal Justice* 269.

Milton, J.R.L. **“South African Criminal Law and Procedure Volume II: Common Law Crimes”** (1996) Cape Town: Juta.

Milton, J.R.L. **“Unfair Discrimination on the Grounds of Gender, Sex... (or) Sexual Orientation: How the Sexual Offences Act does it all”** (1997) 10 *South African Journal of Criminal Justice* 297.

Milton, J.R.L. **“The Young Man’s Defence”** (1991) 4 *South African Journal of Criminal Justice* 172.

Milton, J.R.L. **“Redefining the Crime of Rape: The Law Commission’s Proposals”** (1999) 12 *South African Journal of Criminal Justice* 364.

Morgan-Taylor, M. & Rumney, P. **“A Male Perspective on Rape”** (1994) 144 *New Law Journal* 1490.

Mphahlele, M.S. **“From Legal Rape to a Crime. Does that Solve the Problem?”** (1993) 18:2 *Journal for Juridical Science* 165.

Naffine, N. **“Possession: Erotic Love in the Law of Rape”** (1994) 57 *Modern Law Review* 10.

Neethling, J. **“Personnelheidsreg”** (1991) Durban: Butterworths.

New York Times **“The Rape Crisis Behind Bars”** 29 December 1993.

Odem, M.E. & Clay-Warner, J. **“Confronting Rape and Sexual Assault”** (1998)
Delaware: SR Books.

Olivier, N.J.J. *et al* **“Indigenous Law”** (1995) Durban: Butterworths.

Olivier, N.J.J. *et al*. **“Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes”**
(1989) Durban: Butterworths.

Olivier, N.J.J. **“Regspluralisme in Suider-Afrika”** (1987) unpublished LLD thesis
University of Pretoria.

Olivier, C **“Evaluating Mandatory Minimum Sentences: What will be Practical,
Fair and Effective”** (1998) 11:2 *Acta Criminologica* 88.

Orthmann, R. **“FDA Approves new HIV test”** (1996) *Law and Policy Reporter* 55.

Parrot, A. & Bechhofer, L. **“Acquaintance Rape: The Hidden Crime”** (1991)
Chichester: John Wiley.

Pieterse, M. **“Beyond the Reach of the Law? HIV, African Culture and
Customary Law”** (2000) 3 *Tydskrif vir Suid Afrikaanse Reg* 428.

Pretoria News **“Indecent Assault Gets Man 14 Years”** 1 October 1999.

Pretoria News **“Six Small Girls Share Rape Horror”** 14 January 2000.

Pretoria News “**Staggering Statistics on Child and Teenage Sex**” 9 September 1995.

Price, T.W. “**The Future of Roman-Dutch Law in South Africa**” (1947) *South African Law Journal* 494.

Quina, K. & Carlson, N.L. “**Rape, Incest and Sexual Harassment**” (1989) New York: Praeger.

Robinson, D. “**Criminal Sanctions and Quarantine**” in “**AIDS and the Law**” (1992) New York: Wiley Law Publications.

Rogers, P. “**Male Rape: The Impact of a Legal Definition on the Clinical Area**” *Medicine, Science and the Law* (1995) 35:4 303.

Rumney, P. & Morgan Taylor, M. “**Sentencing for Male Rape**” (1996) 146 *New Law Journal* 262.

Rumney, P. & Morgan-Taylor, M. “**Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part One**” (April–June 1997) 6 *Anglo-American Law Review* 198.

Rumney, P. & Morgan-Taylor, M. “**Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part Two**” (July-September 1997) 6 *Anglo-American Law Review* 330.

Russell, D.E.H. “**Rape in Marriage**” (1982) New York: Collier Books.

Russell, D. E. H. (1990). **Rape in Marriage**. New York: Macmillan Press.

“SAPS Crime Information Analysis Departmental letter 410/2000” (22 August 2000) South African Police Services.

Saturday Star **“Cops Query Baby-Rape Probe”** 19 January 2002.

Scholtemeyer, J. & Hasse, P. **“Legal Latin”** (1990) Pretoria: Academica.

Schurink, E. **“Statistics of Shame: South African Child Protection System Disintegrating”** (1996) *Focus Forum* 4.

Schwartz, M.D & DeKeseredy, W.S. **“Sexual Assault on the College Campus”** (1997) Newbury Park, CA: Sage Publications.

Seymour, S.M. **“Customary Law in South Africa”** (1982) Cape Town: Juta.

Seymour, W.M. **“Native Law and Custom”** (1911) Cape Town: Juta.

Snyman, C.R; **“Criminal law”** (1995) Durban: Butterworths.

Sorenson, S.B. & Siegel, J.M. **“Gender, Ethnicity, and Sexual Assault: Findings from a Los Angeles Study”** (1992) 48:1 *Journal of Social Issues* 93.

Spohn, C.C. & Horney, J. **“The Impact of Rape Law Reform on the Processing of Simple and Aggravated Rape Cases”** (1996) 86 *Journal of Criminal Law and Criminology* 882.

Steytler, N.C. **“Constitutional Criminal Procedure”** (1998) Durban: Butterworths.

Strauss, S.A. **“Doctor, Patient and the Law”** (1991) Pretoria: Van Schaik.

Temkin, J. **“Rape and the Legal Process”** (1987) London: Sweet & Maxwell.

Temkin, J. “Towards a Modern Law of Rape” (1982) 45 *Modern Law Review* 399.

The West Australian “HIV Sex Man Found Guilty” 4 October 2002.

Thio, A. “Deviant Behaviour” (1995) New York: Harper Collins College Publishers.

Times-Picayune “Male Rape Victims Hide in Shame” 15 June 1997.

Tollison, C.D. & Adams, HE; “Sexual Disorders, Treatment, Theory, Research” (1979) New York: Gardner Press.

Van der Linden, J. (translated by Henry, J) “Institutes of the Laws of Holland” (1828) London: Shackell and Baylis

Van Leeuwen, S. “Censura Forensis” (1741)

Leeuwen, S. (ed Decker, C.W.) “Commentaries on Roman-Dutch Law Volume II” (1923) London: Sweet & Maxwell.

Van der Merwe, D. “Marital rape, judicial inertia and the fatal attraction of the Roman-Dutch Law” (1993) 56 *Tydskrif vir Hedendaagse Romeins-Hollanse Reg* 674.

Van der Merwe, S.E. “Redefining Rape: Does The Law Commission Really Wish To Introduce A Reverse Onus?” (2001) 14 *South African Journal of Criminal Justice* 60.

Van Wyk, C. “The Need for a New Statutory Offence aimed at Harmful HIV-Related behaviour: The General Public Interest Perspective” (2000) 41 *Codicillus* 2.

Van Wyk, C.W. **“Vigs en die Reg: ‘n Verkenning”** (1988) 51 *Tydskrif vir Hedendaagse Romeins-Hollanse Reg* 317.

Verschoor, T. **“Misdad, Verweer en Straf”** (1986) Durban: Butterworths.

Verwey, ET & Louw, D.A. **“Die Verkragter: Deel I”** (1989) 2 *South African Journal of Criminal Justice* 21.

Verwey, ET & Louw, D.A. **“Die Verkragter: Deel II”** (1989) 2 *South African Journal of Criminal Justice* 309.

Verwey, ET & Louw, D.A. **“Die Verkragter—‘n Empiriese Onderzoek”** (1990) 3 *South African Journal of Criminal Justice* 150.

Viljoen, F. **“Stigmatising HIV/AIDS, Stigmatising Sex? A Reply to Professor van Wyk”** (2000) 41 *Codicillus* 11.

Voet, J. **“Commentarius ad Pandectus”** 1698.

Watson, A (ed). **“The Digest of Justinian Volume IV”** (1985) Pennsylvania: University of Pennsylvania Press.

Whiteside, A & Sunter, C **“AIDS: The Challenge for South Africa”** (2000) Cape Town: Human & Rousseau.

WEBSITES

<http://196.36.153.56/doh/facts/index.html> **"Facts and Statistics"** accessed 30 August 2002.

<http://www.crystalinks.com.stress/html> **"Stress-Post Traumatic Stress Disorder"** accessed 1 August 2002.

<http://www.cs.nsw.gov.au/facilities/ecsas/men-surv.html> **"Survivors of Child Sexual Assault"** accessed 4 January 2002.

<http://www.greenleft.org.au>. **"Rape Laws: the Other Assault"** accessed 30 August 2002.

<http://healthyplace.com.communities/abuse/survivors/male/reality.html> **"Male Survivors"** accessed 1 August 2001.

<http://www.home.intekom.com/crisis/stats.html> **"Crimes Against Children"** accessed 1 August 2002.

[http://www.interpol.int/Public/Children/Sexual Abuse/National laws](http://www.interpol.int/Public/Children/Sexual%20Abuse/National%20laws). **"Sexual Offences Laws–Australia (State of Victoria)"** accessed 20 February 2002.

<http://www.rapecrisis.org.za/dealing/trauma.htm> **"Dealing With Rape: Rape Trauma Syndrome"** accessed 1 August 2002.

<http://www.rapecrisis.org.za/statistics> **"Statistics"** accessed 4 August 2002.

<http://www.saps.co.za/index.html> **"SAPS Central Information Management Centre Website"** accessed 4 November 2001.

http://www.saps.org.za_8crimeinfo/bulletin/942000q/rsa.html **“SAPS Crime Information Bulletin”** accessed 4 November 2001.

<http://www.silent-no-more.org/index.html> **“The Sexual Assault Crisis & Support Center”** accessed 1 August 2002.

<http://www.survive.org.uk/PTSD.html> **“Post Traumatic Stress Disorder in Rape Survivors”** accessed 1 August 2002.

<http://www.vaw.umn.edu/1/vawnet/mrape/htm> **“Marital Rape”** accessed 30 November 2001.

<http://www.vix.com/men/rawdeal/seyer.html> **“Shane Seyer Case”** accessed 4 August 2002.

SOUTH AFRICAN CASE LAW

Castell v De Greef 1996 4 SA 408 (C)

Clarke v Hurst 1992 4 SA 630 (D)

Foster v Foster 1921 152 TLR 70

Jansen van Vuuren and Another v Kruger 1993 4 SA 842 (A)

Minister van Polisie v Ewels 1975 3 SA 590 (A)

National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others 1999 1 SA 6 (CC)

R v Abrahams 1918 CPD 590

R v C 1952 4 SA 117 (O)

R v Dumezweni 1961 2 SA 751 (A)

R v Du Plessis 1950 1 SA 297 (C)

R v Gannon 1906 TS 114

R v Giles 1926 WLD 211

R v Gumede 1946 1 PHH 68 (N)

R v H 1959 4 SA 427 (A)

R v Handcock 1925 OPD 147

R v K 1951 4 SA 49 (C)

R v K 1958 3 SA 420 (A)

R v M 1950 4 SA 101 (T)

R v M 1953 4 SA 393 (A)

R v Mazibuko 1945 NPD 276

R v Ndhlovu 1945 AD 369

R v Osborne 1905 1 KB 55

R v Peverett 1940 AD 213

R v Ryperd Boesman 1942 1 PHH 63 (SWA)

R v T 1937 TPD 389

R v V 1957 2 SA 10 (O)

R v V 1957 3 SA 633 (O)

R v Williams 1931 1 PHH 38 (E)

R v Z 1960 1 SA 739 (A)

S v A 1995 2 BCLR 153 (C)



S v Bernadus 1965 3 SA 287 (A)

S v Bhulwana 1994 2 SACR 706 (C)

S v Binta 1993 2 SACR 553 (C)

S v Blaauw 2001 [3] All SA 588 (C)

S v Chretien 1981 1 SA 1097 (A)

S v Coetzee and Others 1997 (1) SACR 379 (CC)

S v D 1969 2 SA 591 (RA)

S v D 1989 4 SA 709 (T)

S v F 1982 (2) SA 580 (T)

S v H 1988 2 SA 750 (N)

S v H 1993 (2) SACR 545 (C)

S v Hibbert 1974 (4) SA 717 (D)

S v I 1976 1 SA 781 (RA)

S v J 1989 (1) SA 525 (A)

S v Jansen 1975 1 SA 425 (A)

S v Johnson 1969 1 SA 201 (A)



S v Jonathan 1987 1 SA 633 (A)

S v K 1966 1 SA 366 (A)

S v Khumalo 1984 3 SA 327 (A)

S v M 1984 4 SA 111 (T)

S v M 1990 1 SACR 456 (N)

S v M 1990 2 SACR 509 (E)

S v M 1992 1 SACR 124 (N)

S v M 1993 1 SACR 126 (A)

S v M (2) 1990 (1) SACR 456 (N)

S v Mahlinza 1967 (1) SA 408 (A)

S v Malgas [2001] 3 All SA 220 (A)

S v Maphumulo 1996 2 BCLR 167 (N)

S v Mngomezulu 1968 2 PHH 96 (N)

S v Muvhaki 1985 4 SA 317 (ZH)

S v Myeza 1985 4 SA 30(T)

S v N 1979 4 SA 633 (C)



S v Jonathan 1987 1 SA 633 (A)

S v K 1966 1 SA 366 (A)

S v Khumalo 1984 3 SA 327 (A)

S v M 1984 4 SA 111 (T)

S v M 1990 1 SACR 456 (N)

S v M 1990 2 SACR 509 (E)

S v M 1992 1 SACR 124 (N)

S v M 1993 1 SACR 126 (A)

S v M (2) 1990 (1) SACR 456 (N)

S v Mahlinza 1967 (1) SA 408 (A)

S v Malgas [2001] 3 All SA 220 (A)

S v Maphumulo 1996 2 BCLR 167 (N)

S v Mngomezulu 1968 2 PHH 96 (N)

S v Muvhaki 1985 4 SA 317 (ZH)

S v Myeza 1985 4 SA 30 (T)

S v N 1979 4 SA 633 (C)

S v Ncanywa 1992 1 SACR 209 (Ck)

S v Ncanywa 1993 1 SACR 297 (CkA)

S v Ngubane 1985 3 SA 677 (A)

S v R and Others 2000 1 SACR 33 (WLD)

S v Rabie 1975 4 SA 855 (A)

S v Robinson 1968 1 SA 666 (A)

S v S 1971 2 SA 591 (A)

S v Steenberg 1979 (3) SA 513 (B)

S v Stellmacher 1983 2 SA 181 (SWA)

S v Toms: S v Bruce 1990 2 SA 802 (A)

S v Van den Berg 1991 1 SACR 104 (T)

S v Volschenk 1968 2 PHH 283 (D)

S v Von Mollendorff 1987 1 SA 135 (T)

Scagell v Attorney General of the Western Cape 1996 2 BCLR 1446 (CC)

Venter v Nel 1997 4 SA 1014 (D)

Waring and Gillow Ltd v Sherbourne 1904 TS 340

FOREIGN CASE LAW

Bolduc and Bird v R 1967 63 DLR 2nd 82 SCC

Brinson v The State 1973 Fla. App. D1 278 SO 2d 317

Commonwealth v Gonsalves 1986 Mass.App.Ct 499 N.E. 2d 1229

Commonwealth v Quartman 1983 Pa. Super. Ct. 458 A.2d. 994

Doe v Connell 1992 583 NYS 2d 707

Doe v University of Maryland Medical System Corporation 1995 50F 3d 1261

Hoge Raad 22 February 1994 NY 1994 379

Holborn v Holborn 1947 1 All ER 32

Hutto v Finney 1978 437 US 678

Iss v R 1987 163 CLR 447

Meloon v Helgemoe 1977 CA 1 NH 564 F 2d 602

Olden v Kentucky 1988 488 US 227

People v Hackett 1984 Mich. 365 NW 2d 120

People v Liberta 1984 NYS 485 2d 207

People v Yates 1995 637 NYS 2d 625

R v Billam 1986 8 Cr App R (S) 48

R v C 1991 1 All ER 755

R v Cuerrier 1999 127 CCC (3d) 1 (SCC)

R v Diana Richardson 1998 2 CR R 2d

R v Fenton 1992 13 Cr App R (S) 85

R v Hiscock 1992 13 Cr App R (S) 24

R v Hodgson 1968 52 Cr App R (S) 113

R v Jackson 1988 10 Cr App R (S) 297

R v Kaitamaki 1980 NZLR 60

R v Laz 1998 1 VR 453

R v Mendez 1992 13 Cr App R (S) 94

R v Payne 1994 15 Cr. App. R (S) 395

R v R 1991 4 All ER 481

R v Richards 1996 2 Cr App R (S) 167

R v Wall 1989 11 Cr App R (S) 111

Willan v Willan 1960 2 All ER 463

R v Wilson 1993 Cr App R (S) 627

State v Bealieu 1996 Supr. Ct. Rhode Island 674 A 2d 377

State v Lankford 1917 Del Ct Sess 102 A 63

State v Levier 1976 16 Wash. App. 332 555P 2d 1003

State v McGee 1982 Minn. 324 NW 2d 232

State v Rogers 1991 Tenn.Crim.App. LEXIS 648 (Aug 16, 1991)

State v Saldanha 1982 Minn. 324 NW 2d 227

State v Sibley 1895 Mo. 33 SW 167

State v Ssenyanga 1992 Ont. 76 CCC 3d 216

State v Stevens 1986 510 A 2d 1070; 67 ALR 4th 1123

United States v Bailey 1980 444 US 394

United States v Madkour 1991 2d Cir 930F.zd 234

United States v Smith, William and Komak 1978 574 F 2d 988

DOMESTIC LEGISLATION

Constitution of the Republic of South Africa Act 200 of 1993

Constitution of the Republic of South Africa Act 108 of 1996

Criminal Law Amendment Act 105 of 1997

Criminal Procedure Act 51 of 1977

Criminal Procedure Amendment Bill of 1999

Criminal Procedure Second Amendment Act 85 of 1997

Domestic Violence Act 116 of 1998

Government Gazette 11014, 30 November 1987

Government Gazette 3226 GN 1376, 30 July 1943

Law of Evidence Amendment Act 45 of 1988

Law of Evidence and Criminal Procedure Amendment Act 103 of 1987

Prevention of Family Violence Act 133 of 1993

Riotous Assemblies Act 17 of 1956

“SALC Discussion Paper 80 on Aspects of the Law Relating to AIDS” (1999)
South African Law Commission.

“SALC Discussion Paper 84 on Aspects of the Law Relating to AIDS” (1999)
South African Law Commission.

“SALC Discussion Paper 85 on Sexual Offences” (1999) South African Law
Commission.

“SALC Discussion Paper 91 (Appendixes) on Sentencing” (2000) South African
Law Commission.

“SALC Discussion Paper 102 on Sexual Offences” (2002) South African Law
Commission.

**“SALC Fourth Interim Report on Aspects of the Law Relating to AIDS Project
85” (2000)** South African Law Commission.

“SALC Issue paper 10 on Sexual offences against Children” (1997) South
African Law Commission.

“SALC Report on Women and Sexual offences in SA Project 45” (1985) South
African Law Commission.

FOREIGN INSTRUMENTS

African Charter on the Rights and Welfare of the Child 1990

Common Law Consolidation Act 1935 – Interpol (Victoria)

Crimes Act 1900 (Australia)

Crimes Act 1958 (Victoria)

Criminal Justice and Public Order Act 1994

Florida Statutes (USA) 1997

Law Reform Commissioner Victoria Report 1976

Queensland Criminal Code Act 1899

Rape Statute – Non-Genital Intercourse 3 ALR 4th 1009

Revised Code Washington (ARCW) 1994

Southern Australia Law and Consolidation Act

Tennessee Annotated Code (USA) 1994

The Criminal Law Amendment Bill (Zimbabwe)

The Florida Statutes 1997



The Sexual Offences Act 23 of 1957

The Sexual Offences Act 1956 (Britain)

The Sexual Offences Amendment Act 1976 (Britain)

The United States Draft HIV Prevention Bill 1997

United Kingdom Law Commission Report No 218 (1993)

United Nations Convention on the Rights of the Child 1990

Western Australia Criminal Code 1913



ANNEXURE A

THE SEXUAL OFFENCES BILL INTRODUCED BY THE SOUTH AFRICAN LAW COMMISSION IN DISCUSSION PAPER 85 OF 1999 (RELEVANT SECTIONS)

Preamble of the proposed Bill

Whereas the Bill of Rights in the Constitution of South Africa 1996 (Act 108 of 1996) enshrines the rights of all people in the Republic, including the right to equality and the right to freedom and security of the person, which incorporates the right to be free from all forms of violence from either public or private sources...

♦ Chapter 1: Definitions

“child” means –

- (a) for the purposes of Chapter 3, a person under the age of 16 years,¹ and,
- (b) for the purposes of Chapter 5, a person under the age of 18 years.²

“coercive circumstances” include any circumstances where –

- (a) there is an application of force, whether explicit or implicit, direct or indirect, physical or psychological against any person or animal;
- (b) there is any threat, whether verbal or through conduct, direct or indirect to cause any form of harm to any person or animal;

¹ Sexual offences against children.

² Commercial sexual exploitation of children.

- (c) the complainant is under the age of twelve years;
- (d) there is an abuse of power or authority, whether explicit or implicit, direct or indirect, to the extent that one person is inhibited from indicating his or her resistance to an act of sexual penetration, or his or her unwillingness to participate in such an act.
- (e) a person's mental capacity is affected by -
 - (i) sleep;
 - (ii) any drug, intoxicating liquor or other substance;
 - (iii) mental or physical disability, whether temporary or permanent, or
 - (iv) any other condition, whether temporary or permanent to the extent that he or she is unable to appreciate the nature of an act of sexual penetration, or is unable to resist the commission of such an act, or is unable to indicate his or her unwillingness to participate in such an act.
- (f) a person is unlawfully detained.
- (g) a person believes that he or she is committing an act of sexual penetration with another person, or
- (h) a person mistakes an act of sexual penetration which is being committed upon him or her for something other than an act of sexual penetration;

“mentally impaired person” means a person affected by any mental disability irrespective of its cause, whether temporary or permanent, to the extent that he or she is unable to appreciate the nature of a sexual act, or is unable to resist the commission of such an act or is unable to communicate his or her unwillingness to participate in such an act;

“sexual act” means any indecent act and includes an act which causes –

- (a) direct or indirect contact between the anus, breasts, penis or vagina of one person and any part of the body of another person, or
- (b) exposure or display of the genital organs of one person to another person, and further includes an act of sexual penetration;

“sexual penetration” means any act which causes penetration to any extent whatsoever –

- (a) by the penis of one person -
 - (i) into the anus, ear, mouth, nose or vagina of another person or
 - (ii) into any body orifice of an animal.
- (b) by any object or part of the body of one person -
 - (i) into the anus or vagina of another person, or
 - (ii) into any body orifice of another person in a manner which simulates sexual intercourse, or
- (c) by any part of the body of an animal -
 - (i) into the anus or vagina of a person, or
 - (ii) into any body orifice of a person in a manner which simulates sexual intercourse;

“vagina” means the whole of the female sexual organ and includes a surgically constructed vagina;

♦ **Chapter 2: General Sexual Offences**

Rape

- 2.(1) Any person who intentionally and unlawfully commits an act of sexual penetration with another person, or who intentionally and unlawfully causes another person to commit such an act is guilty of an offence.
- (2) For the purposes of this Act, an act of sexual penetration is prima facie unlawful if it takes place in any coercive circumstances.
- (3) No marriage or other relationship shall be a defence against a charge under this section.
- (4) No person shall be charged with or convicted of the common law offence of rape in respect of an act of sexual penetration after the commencement of this Act.
- (5) Subject to the provisions of this Act, any reference to “rape” in any law shall be construed as a reference to the offence of rape under this section, unless it is a reference to rape committed before the commencement of this Act which shall be construed to be a reference to the common law offence of rape.

Compelled Sexual Acts

- 3.(1) Any person who intentionally compels another person-
 - (a) to engage in a sexual act with that person; or
 - (b) to engage in a sexual act with a third person; or
 - (c) to engage in a sexual act with himself or herself;
is guilty of an offence.

- (2) Any person who intentionally causes another person to engage in a sexual act with an animal is guilty of an offence.

Inducement to allow sexual act

4. Any person who intentionally induces another person by false pretence or fraudulent means to allow him or her to commit a sexual act with that other person is guilty of an offence.

Incest

6. From the date of promulgation of this act the definition of sexual penetration contained in this Act shall be applied mutatis mutandi for the purposes of the common law offence of incest.

Chapter 3: Sexual offences against children

Child molestation

7. (1) Any person who intentionally commits a sexual act with a child at least two years younger than him or her, shall be guilty of an offence.
- (2) Any person who commits an act with the intent to invite or persuade a child at least two years younger than him or her, to allow any person to commit a sexual act with that child shall be guilty of an offence.
- (3) Consent by a child to any sexual act shall not be a defence to a charge under this section.

Chapter 4: Sexual Offences against mentally impaired persons

- 9.(1) Any person who intentionally commits a sexual act with, or in the presence of a mentally impaired person shall be guilty of an offence.



(2) Any person who commits any act with the intent to invite or persuade a mentally impaired person to allow any person to commit a sexual act with that mentally impaired person shall be guilty of an offence.

ANNEXURE B

SEXUAL OFFENCES BILL INTRODUCED BY THE SOUTH AFRICAN LAW COMMISSION IN DISCUSSION PAPER 102 OF 2002 (RELEVANT CLAUSES)

Preamble of the proposed bill

WHEREAS the Bill of Rights in the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), enshrines the rights of all people in the Republic of South Africa including the right to equality and the right to freedom and security of the person which incorporates the right to be free from all forms of violence from either public or private sources....

♦ **Chapter 1: Definitions**

“genital organs” include the whole or part of male and female genital organs and further include surgically constructed genital organs;

“indecent act” includes an act which causes-

- (a) direct or indirect contact between the anus, breasts or genital organs of one person and any part of the body of another person,
- (b) unjustified exposure or display of the genital organs of one person to another person, or
- (c) exposure or display of any pornographic material to a person below the age of 18 years or to any person against his or her will

but does not include an act of sexual penetration or an act which is consistent with sound medical practices which is carried out for proper medical purposes;



"mentally impaired person" means a person affected by any mental impairment irrespective of its cause, whether temporary or permanent, to the extent that he or she is or was unable to appreciate the nature and consequences of an indecent act or an act of sexual penetration, or is or was unable to resist the commission of any such act, or is or was unable to communicate his or her unwillingness to participate in any such act;

"sexual offence" means any offence in terms of this Act, excluding the Schedule, and includes any common law sexual offence;

"sexual penetration" means any act which causes penetration to any extent whatsoever by-

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

Rape

3.(1) Any person who intentionally and unlawfully commits an act of sexual penetration as defined in section 1 with another person, or who intentionally and unlawfully compels, induces or causes another person to commit such an act, is guilty of the offence of rape.

(2) For the purposes of this Act, an act of sexual penetration is prima facie unlawful if it is committed-

- (a) in any coercive circumstance;

- (b) under false pretences or by fraudulent means; or
 - (c) in respect of a person who is incapable in law to appreciate the nature of an act of sexual penetration.
- (3) Coercive circumstances, as referred to in subsection (2)(a), include any circumstances where-
- (a) there is any use of force, whether explicit or implicit, direct or indirect, physical or psychological against any person or any use of force which damages or destroys such person's movable or immovable property;
 - (b) there is any threat, whether verbal or through conduct, direct or indirect, to cause any form of harm to any person or to damage or destroy such person's movable or immovable property;
 - (c) there is an abuse of power or authority, whether explicit or implicit, direct or indirect, to the extent that the person in respect of whom an act of sexual penetration is committed is inhibited from indicating his or her resistance to such an act, or his or her unwillingness to participate in such an act; or
 - (d) a person is lawfully or unlawfully detained.
- (4) False pretences or fraudulent means, as referred to in subsection (2)(b), include circumstances where a person in respect of whom an act of sexual penetration is being committed is led to believe that -
- (a) he or she is committing an act of sexual penetration with a particular person who is in fact a different person;
 - (b) an act of sexual penetration is something other than such act; or

- (c) an act of sexual penetration will be beneficial to his or her physical, psychological or spiritual health.
- (5) The circumstances in which a person is incapable in law to appreciate the nature of an act of sexual penetration as referred to in subsection (2)(c) include circumstances where such person is -
- (a) asleep;
 - (b) unconscious;
 - (c) under the influence of any medicine, drug, alcohol or other substance to the extent that the person's consciousness or judgement is adversely affected; or
 - (d) a mentally impaired person as defined in section 1.
- (6) For purposes of this Act a person is incapable in law to appreciate the nature of an act of sexual penetration if that person is below the age of 12 years.
- (7) A marital or other relationship, previous or existing, shall not be a defence to a charge of rape.
- (8) The common law relating to-
- (a) the irrebuttable presumption that a female person under the age of 12 years is incapable of consenting to sexual intercourse; and
 - (b) the offence of rape, except where a person has been charged with, but not convicted of such offence prior to the commencement of this Act, is repealed.

- (9) Subject to the provisions of this Act, any reference to "rape" in any law shall be construed as a reference to the offence of rape under this section, unless it is a reference to rape committed before the commencement of this Act which shall be construed to be a reference to the common law offence of rape.
- (10) Nothing in this section may be construed as precluding any person charged with the offence of rape from raising any defence at common law to such charge.

Compelled or induced indecent acts

4. Any person who intentionally and unlawfully compels, induces or causes another person to engage in an indecent act as defined in section 1 with -
- (a) the person compelling, inducing or causing the act;
 - (b) a third person;
 - (c) that other person himself or herself; or
 - (d) an object, including any part of the body of an animal, in circumstances where that other person:
 - (i) would otherwise not have consented to the commission of the indecent act; or
 - (ii) is incapable in law of appreciating the nature of an indecent act, including the circumstances set out in paragraphs (a) to (d) of section 3(5)

is guilty of the offence of having compelled, induced or caused a person to engage in an indecent act.

Extension of common law incest

5. From the date of promulgation of this Act the definition of sexual penetration contained in section 1 of this Act applies to the common law offence of incest.

Acts of sexual penetration or indecent acts with consenting minors

6. (1) Any person who commits an act of sexual penetration as defined in section 1 with a child who is at least 12 years of age, but not yet 16 years is, notwithstanding the consent of that child to the commission of such an act, guilty of the offence of having committed an act of sexual penetration with a minor.

- (2) It is a defence to a charge under subsection (1) if-

- (a) the accused was a person below the age of 16 years at the time of the alleged commission of the offence;
- (b) the age of the accused did not exceed the age of such child by more than three years at the time of the alleged commission of the offence; or
- (c) it is proved on a balance of probabilities that such child or the person in charge of such child deceived the accused into believing that such child was over the age of 16 years at the time of the alleged commission of the offence.

- (3) The provisions of this section do not apply if-

- (a) the accused is related to such child by blood or affinity; or
- (b) such child lacked the intellectual development to appreciate the nature of an act of sexual penetration.

- (4) Any person who commits an indecent act as defined in section 1 with a child below the age of 16 years is, notwithstanding the consent of that child to the commission of such an act, guilty of the offence of having committed an indecent act with a minor.
- (5) The provisions of subsections (2) and (3) apply, with the changes required by the context, to a person charged under subsection (4), unless the child concerned was below the age of 12 years at the time of the alleged commission of the offence.
- (6) A person may not be charged under this section if a valid or legally recognised marriage existed between that person and a child as referred to in this section, unless the child concerned was below the age of 12 years at the time when any offence in terms of this section was allegedly committed.

Indecent acts or acts of sexual penetration with mentally impaired persons

- 7.(1) Any person who intentionally commits an indecent act as defined in section 1 with a mentally impaired person, also defined in section 1, is guilty of the offence of having committed an indecent act with a mentally impaired person.
- (2) It is a defence to a charge under subsection (1) or to a charge of rape under section 2 if-
 - (a) the mentally impaired person was over the age of 16 years at the time of the alleged commission of the offence and it is proved, on a balance of probabilities, that such mentally impaired person induced the commission of an indecent act or an act of sexual penetration; and
 - (b) it is proved, on a balance of probabilities, that the accused was unaware that the mentally impaired person who induced the

commission of an indecent act or act of sexual penetration was so impaired or was below the age of 16 years at the time of the alleged commission of the offence in question.

Acts of sexual penetration or indecent acts committed in presence of minors or mentally impaired persons

8. Any person who intentionally commits an act of sexual penetration or an indecent act as defined in section 1 with another in the presence of a person below the age of 16 years or a mentally impaired person as defined in section 1, is guilty of the offence of having committed such an act in the presence of a minor or a mentally impaired person, as the case may be.

Children competent to testify in criminal proceedings involving sexual offences

10.(1) No child below the age of 18 years, other than a child who for any reason does not have the capacity, verbal or otherwise, to respond to simple questions, shall be precluded from giving evidence in court in criminal proceedings involving the alleged commission of a sexual offence.

(2) The evidence given by a child referred to in subsection (1) shall be admissible in criminal proceedings contemplated in that subsection, and the court shall attach such weight to such evidence as it deems fit.

Vulnerable witnesses

13.(1) A court, in criminal proceedings involving the alleged commission of a sexual offence, must declare a witness, other than the accused, who is to give evidence in that proceedings a vulnerable witness if such witness is –

- (a) the complainant in the proceedings pending before the court; or

- (b) below the age of 18 years and has witnessed the offence being tried.
- (2) The court may, on its own initiative or on application by the prosecution or any witness who is to give evidence in proceedings referred to in subsection (1), and if that witness is below the age of 18 years, on application by that witness, if at least ten years of age, or his or her parent, guardian or a person in loco parentis, declare any such witness, other than the accused, a vulnerable witness if in the court's opinion he or she is likely to be vulnerable on account of –
- (a) age;
 - (b) intellectual impairment;
 - (b) trauma;
 - (d) cultural differences; or
 - (e) the possibility of intimidation.
- (3) The court may, if in doubt as to whether a witness should be declared a vulnerable witness in terms of subsection (2), summon any knowledgeable person to appear before and advise the court on the vulnerability of such witness.
- (4) Upon declaration of a witness as a vulnerable witness in terms of this section, the court must, subject to the provisions of subsection (5), direct that such witness be protected by one or more of the following measures –
- (a) allowing that witness to be accompanied by a support person as provided for in section 14;

- (b) allowing that witness to give evidence by means of closed circuit television as provided for in section 158 of the Criminal Procedure Act, 1977;
 - (c) directing that the witness must give evidence through an intermediary as provided for in section 170A of the Criminal Procedure Act, 1977;
 - (c) directing that the proceedings may not take place in open court as provided for in section 153 of the Criminal Procedure Act, 1977;
 - (e) prohibiting the publication of the identity of the complainant as provided for in section 154 of the Criminal Procedure Act, 1977, or of the complainant's family;
 - (f) allowing electronically prerecorded evidence given by that witness;
or
 - (g) any other measure which the court deems just and appropriate.
- (5) If the court has declared a person below the age of 18 years a vulnerable witness, the court must, subject to the provisions of subsection (8), direct that an intermediary as referred to in subsection (4)(c) be appointed in respect of such witness unless there are exceptional circumstances justifying the non-appointment of an intermediary, in which case the court must record the reasons for not appointing an intermediary.
- (6) The court may direct that the protective measures referred to in paragraphs (b) to (e) of subsection (4) must be applied in respect of a vulnerable witness, irrespective of any other qualifying criteria that may be prescribed by the provisions of the Criminal Procedure Act, 1977, referred to in those paragraphs.

- (7) In determining which of the protective measure or protective measures as referred to in subsection (4) should be applied to a witness, the court must be satisfied that such measure or measures is or are likely to improve the quality of evidence to be given by that witness, and must have regard to all the circumstances of the case, including –
- (a) any views expressed by the witness, if ten years of age or older;
 - (b) views expressed by a knowledgeable person who is acquainted with or has dealt with the witness;
 - (c) the need to protect the witness's dignity and sense of safety and to protect the witness from further traumatising; and
 - (d) the question whether the protective measure or protective measures is or are likely to prevent the evidence given by the witness from being effectively tested by a party to the proceedings.
- (8) The court may at any time revoke or vary a direction given in terms of subsection (4) upon the request of the prosecution or the witness concerned: Provided that where a witness is below the age of 18 years, such revocation or variation may only be effected upon the request of that witness or his or her parent, guardian or a person in loco parentis and if that witness is at least ten years of age.

Appointment of support persons

14.(1) Whenever criminal proceedings involving the commission of any sexual offence are pending before any court and a witness, including the complainant, is to give evidence in such court, the court may at any time on its own initiative or upon request by –

- (a) the prosecutor;



- (b) such witness;
- (c) the parent, guardian or person in loco parentis of such witness if that witness is below the age of 18 years;
- (d) a social worker;
- (e) a lay counsellor; or
- (f) a medical officer

direct that such witness be accompanied by a support person of the witness's choice when making statements to any person, being interviewed or giving evidence in court.

- (2) The court may, notwithstanding a request in terms of this section, refuse the appointment of a support person of the witness's choice if the court is of opinion that the appointment of such person as support person will not be in the interests of justice.
- (3) A support person appointed in terms of this section may accompany and be seated next to the relevant witness while such witness is making statements to any person, being interviewed or giving evidence in court.
- (4) The court may, if it deems it to be in the interests of justice and in the best interests of the witness, at any time revoke the appointment of a support person and may appoint another person in his or her place.
- (3) Whenever a witness in respect of whom a support person has been appointed is to give evidence in court, such person shall affirm to the court prior to giving support that he or she will –
 - (a) assist the court to the best of his or her ability; and

- (b) not in any manner interfere with the witness or the evidence being given.
- (6) The State shall pay to a support person appointed in terms of this section a prescribed transport allowance for the duration of the period that such person is required to assist a witness giving evidence in court.

Disclosure of personal records

15.(1) Subject to the provisions of subsections (3) and (5), no personal record may be adduced as evidence in criminal proceedings involving the alleged commission of a sexual offence.

(2) For purposes of subsection (1) a personal record refers to a record of communications, written or oral, made by a person against whom a sexual offence was alleged to have been committed in confidence to a registered medical practitioner or registered counsellor and includes a record that existed prior to the alleged commission of a sexual offence against that person.

(3) A court may, upon application by any interested party, order disclosure of a personal record in full or in part in any manner that the court deems fit after it has considered any potential prejudice to the dignity, privacy and security of the person to whom the record relates, including the nature and extent of any harm that would be caused to such person and if it is satisfied that -

(a) the evidence contained in such record will, on its own or in conjunction with any other evidence, have substantial probative value to a fact in issue;

(b) no other evidence that has similar probative value to the fact in issue is available; and

- (c) the public interest outweighs the protection of the dignity, privacy and security of such person.
- (4) The application referred to in subsection (3) must satisfy the court that -
 - (a) a personal record exists and is held by an identified record holder;
 - (b) such record contains information which is likely to be relevant to a fact in issue at the proceedings pending before the court or to the competence of a witness to give evidence;
 - (c) the grounds upon which the party making the application relies to establish that the contents of such record is likely to be relevant are sufficient to warrant consideration of disclosure; and
 - (d) granting the application will be in the interests of justice and in the interests of the person to whom such record relates.
- (5) A court may, notwithstanding the provisions of subsection (3), order disclosure of a personal record if the person to whom the record relates consents to such disclosure or if a personal record has been prepared for purposes of any legal proceedings arising from the commission or alleged commission of a sexual offence.
- (6) A court shall, upon receipt of a personal record after its disclosure, consider the contents of such record prior to granting access to that record to any party and may, upon furnishing reasons, grant or refuse access to that record.

Evidence of psycho-social effects of sexual offence

- 18.(1) Evidence of the psycho-social effects of any sexual offence upon a complainant may be adduced at criminal proceedings where such offence is tried in order to –

- (a) show that the sexual offence to which the charge relates is likely to have been committed
 - (i) towards or in connection with the complainant concerned;
 - (ii) under coercive circumstances as referred to in section 2;
 - (b) prove, for purposes of imposing an appropriate sentence, the extent of the harm suffered by that complainant.
- (2) In determining the weight to be attached to evidence adduced in terms of subsection (1), the court shall have due regard to -
- (a) the qualifications and practical experience of the person who has given such evidence in matters relating to sexual offences; and
 - (b) all other evidence given at the proceedings.

Evidence of period of delay between sexual offence and laying of complaint

19. In criminal proceedings at which an accused is charged with a sexual offence, the court shall not draw any inference only from the length of any delay between the alleged commission of a sexual offence and the laying of the complaint in connection with such offence.

Abolition of cautionary rule

20. Notwithstanding the provisions of the common law, any other law or any rule of practice, a court may not treat the evidence of a witness in criminal proceedings involving the alleged commission of a sexual offence pending before that court with caution merely because that witness is —
- (a) the complainant in such proceedings;
 - (b) less than 18 years of age; or

- (c) the only witness to the offence in question.

Provision of treatment

22.(1) If it has been established that a person has sustained physical or psychological injuries as the result of a sexual offence, such person shall, as soon as is practicable after the offence, receive the best possible medical care, treatment and counselling as may be required for such injuries.

- (2) The State shall bear the cost of the medical care, treatment and counselling as referred to in subsection (1).

Sex offender orders

24.(1) A court may, upon application by a person referred to in subsection (2), grant an order prohibiting a person convicted of a sexual offence, notwithstanding the fact that the convicted person has lodged an appeal or instituted review proceedings regarding his or her conviction or sentence, from –

- (a) acting in a way that is intended to cause serious harm to any particular person or members of the public;
- (b) frequenting any specified location;
- (c) establishing or attempting to establish contact with any specified person.

(2) An application referred to in subsection (1) shall be made on affidavit to the magistrate's court in whose area of jurisdiction it is alleged that the convicted person is or was acting in a way referred to in that subsection, and may be brought by –

- (a) a police official;

- (b) a police reservist;
 - (c) a director or authorised employee of a non-governmental or community based organisation;
 - (d) any member or employee of a private security institution;
 - (e) a social worker;
 - (f) a medical officer; or
 - (g) an official designated by a local authority.
- (3) Any person may request a person referred to in subsection (2) to bring an application as contemplated in this section and may, upon failure of such person to bring an application within 48 hours of the request without good reason, make such application to the court referred to in subsection (2).
- (4) The court hearing the application for an order as contemplated in this section may only grant such order if it is satisfied that the person in respect of whom the order is sought has been convicted of a sexual offence and that the order is necessary for the purpose of protecting any particular person or members of the public from serious harm by the convicted person and may, if so satisfied, direct that the convicted person is prohibited from acting in any way which the court deems fit.
- (5) An order contemplated in this section shall have effect for a period of at least five years from the date of the order or for such longer term as may be prescribed in the order, and may only be revoked by the court within a shorter period of time upon application by the person who first obtained the order or by the convicted person with the consent of the person who first obtained the order.

- (6) A convicted person in respect of whom an order has been issued by a court as contemplated in this section, and who contravenes any prohibition or direction stipulated in such order, is guilty of an offence and shall be liable, upon conviction, to a fine or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

Supervision of dangerous sexual offenders

25. (1) Whenever a dangerous sexual offender has been convicted of a sexual offence by a court to imprisonment without the option of a fine, the court may order, as part of the sentence, that when such offender is released either after completion of the term of imprisonment or on parole, the Department of Correctional Services shall ensure that the offender is placed under long term supervision by an appropriate person.
- (2) For purposes of subsection (1) a dangerous sexual offender includes an offender who has –
- (a) more than one conviction for a sexual offence;
 - (b) been convicted of a sexual offence which was accompanied by violence or threats of violence; or
 - (c) been convicted of a sexual offence against a minor and long term supervision means supervision of a rehabilitative nature for a period of not less than five years.
- (4) If the consent of the Director of Public Prosecutions to institute prosecution has been obtained as referred to in subsection (3), prosecution may be instituted in any appropriate court within such Director's jurisdiction.

Penalties

28. Any person who is convicted of an offence in terms of this Act, must be sentenced in accordance with the provisions of Chapter 3 of the Sentencing Framework Act, Act No. xx of 20xx.

ANNEXURE C

THE PROPOSED AMENDMENT TO SECTION 37 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977

The proposed Criminal Procedure Amendment Bill provisions reads as follows:

* **The Criminal Procedure Amendment Bill³**

Amendment of Section 37 of Act 51 of 1977, as amended by Section 1(a), (b) and (c) of Act 64 of 1982.

1. Section 37 of the Criminal Procedure Act, 1977 (hereinafter referred to as the principal act) is hereby amended by the insertion in the principal Act after Section 37 of the following section:

Compulsory testing of arrested persons for non-evidentiary purposes

37A(1) Any person who alleges that he or she has been the victim of any sexual offence in which exposure of the bodily fluids of the arrested person may have occurred, may at the earliest possible opportunity after laying a charge and before or after an arrest is effected, apply to a magistrate orally or in writing for an order that the person arrested on the charge or on suspicion of having committed the offence in question be tested for HIV or any other life-threatening sexually transmissible disease.⁴

³ As introduced by the South African Law Commission in Discussion Paper 84 on ix.

⁴ The victim's test for HIV/AIDS may be negative due to the window period and it would be more easily ascertainable as to whether the victim has been infected, by performing blood tests on the accused due the greater likelihood that the latter may have passed the window period phase.

- (2) If the alleged victim is incapacitated or is a minor, any person with legal standing may apply on his or her behalf for an order in terms of subsection (1).
- (3) The magistrate of the district in which the offence is alleged to have occurred or in which the victim resides has jurisdiction to grant the order, and shall as soon as is reasonably practicable consider the application.
- (4) The magistrate, if satisfied from information on oath that prima facie evidence exists that an offence as described in subsection (1) has been committed, shall order any designated local authority to test the person or persons arrested and to inform the magistrate of the result.
- (5) Any police officer may take such steps as may be reasonably necessary to carry out the order.
- (6) The proceedings shall be held in camera and the magistrate shall not communicate the fact that an order has been granted or the result of the test or tests to any person other than -
 - (a) the victim of the alleged offence or the person acting on his or her behalf and
 - (b) the arrested person.
- (7) No order granted under this section shall be carried out more than four months after the date upon which it is alleged that the offence in question took place.
- (8) The Minister of Health and Justice may promulgate policy on the testing methods and procedures to be used for purposes of this section.



- (8) “Test” in this section means any medically recognized test for determining the presence of HIV or any other life threatening sexually transmissible disease.

ANNEXURE D

THE CRIMINAL PROCEDURE ACT 51 OF 1977 (RELEVANT CLAUSES)

- 37(1)** Any police official may –
- (a) take the finger-prints, palm – prints or foot –prints or may cause to be taken –
 - (i) of a person arrested upon any charge;
 - (ii) of any such person released on bail or on warning under section 72;
 - (c) take such steps as he may deem necessary in order to ascertain whether the body of any person referred to in paragraphs (a)(i) or (ii) has any mark, characteristic or distinguishing feature or shows any condition or appearance: Provided that no police official shall take any blood sample of the person concerned.
- 37(2)(a)** Any medical officer of any prison or any district surgeon or, if requested thereto by any police official, any registered medical practitioner or registered nurse may take such steps, including the taking of a blood sample, as may be deemed necessary in order to ascertain whether the body of any person referred to in paragraph (a)(i) or (ii) of subsection (1) has any mark, characteristic or distinguishing feature or shows any condition or appearance.

37(3) Any court before which criminal proceedings are pending may –

- (a) in any case in which a police official is not empowered under subsection (10 to take finger-prints, palm-prints or footprints or to take steps in order to ascertain whether the body of any person has any mark, characteristic or distinguishing feature or shows any condition or appearance, order that such prints be taken of any accused at such proceedings or that the steps, including the taking of a blood sample, be taken which such court may deem necessary in order to ascertain whether the body of an accused at such proceedings has any mark, characteristic or distinguishing feature or shows any condition or appearance;
- (b) order that the steps, including the taking of a blood sample, be taken which such court may deem necessary in order to ascertain the state of health of any accused at such proceedings.

ANNEXURE E

PRE-IMPLEMENTATION: TABLE 5 OF SALC DISCUSSION PAPER

91 APPENDIX C ⁵

CRIME	POLICE JURISDICTION	AVERAGE YEARS IMPRISONMENT	NUMBER OF ACCUSED
MURDER	Western Metropole	8	16
	Boland	8	23
	Port Elizabeth	8.5	28
	Cradock	6.8	27
	Durban	10	12
	Midlands	10	20
	Johannesburg	11	26
	East Rand	10	15
RAPE	Western Metropole	7	19
	Boland	6	33
	Port Elizabeth	7	23
	Cradock	6	34
	Durban	7	27
	Midlands	8.5	12
	Johannesburg	10	25
	East Rand	8.5	34
CULPABLE HOMICIDE	Western Metropole	0	15
	Boland	2.8	14
	Port Elizabeth	1	11
	Cradock	0	10
	Durban	0	5
	Midlands	1	7
	Johannesburg	0	6
East Rand	0	9	

⁵ See on 32 in this regard.

ANNEXURE F

POST IMPLEMENTATION: SENTENCES IMPOSED EXPRESSED AS A PERCENTAGE

JURISDICTION	MURDER I	MURDER II	RAPE I	RAPE II
Western Metropole	0%	0%	-	20%
Boland	0%	26.3%	-	61.5%
Port Elizabeth	0%	80%	0%	-
Cradock	0%	36.4%	25%	72.7%
Durban	0%	0%	0%	71.4%
Midlands	-	33.3%	40%	50%
Johannesburg	-	80%	0%	85.7%
East Rand	-	50%	0%	83.3%
Minimum Sentence	40 years*	15 years	40 years	10 years

* *Equated as a life sentence.*