

DISCUSSION DOCUMENT

commissioned by the
Deputy Minister of Justice

LEGAL ASPECTS OF RAPE IN SOUTH AFRICA

30 April 1999

Rape Crisis (Cape Town)

Women & Human Rights Project,
Community Law Centre, UWC

Institute of Criminology (UCT)

ACKNOWLEDGEMENTS

The authors wish to thank the following persons for their contribution to the production of this document:

- Ms Farahnaaz Safodien, documentalist at the Women & Human Rights Documentation Centre at the Community Law Centre (University of the Western Cape), for assistance in locating research material;
- Ms Dana Roach, research intern to the Women & Human Rights Project at the Community Law Centre (University of the Western Cape), for research assistance on the section dealing with admissibility of previous sexual history;
- Dr Cathi Albertyn, Gender Research Project, Centre for Applied Legal Studies, (University of the Witwatersrand), for comments on the first draft of the document;
- Adv Patricia Lambert for facilitating the completion of this document.

INTRODUCTION

ORIGIN OF THE DISCUSSION DOCUMENT

The writing of this discussion document came as a result of an invitation by the Deputy Minister of Justice, Dr Manto Tshabalala-Msimang, to address and to make proposals for amendments to the laws relating to rape.

The Deputy Minister has long been committed to the advancement of women in South Africa and, more specifically, to the issue of violence against women. She has consistently advocated for changes to the criminal justice system and to the laws that underpin it in order to encourage women to approach the system for assistance and to improve the experiences of women who choose to enter into the criminal justice system.

We hope that this discussion paper will do justice to this objective. In other words, we hope that it will contribute to the transformation of the criminal justice system and be a positive step towards a justice system that is sensitive to the particular needs of women, and that unambiguously respects and implements their rights as guaranteed in the South African Constitution.

PURPOSE OF THE DOCUMENT

The purpose of this discussion document is to present an analysis of South Africa's current legal position on rape and to recommend 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. This document does not claim to be a definitive or final discussion of rape law, but rather one that will provide the reader with a sound basis for the discussion and analysis of current rape law and potential reform.

It must be emphasised that the brief for this discussion paper was to consider the **law** regarding rape. Although this document acknowledges the importance of other issues relating to the operation of the criminal justice system, including training of criminal justice personnel and the development of necessary support structures and services to victims of rape, its scope and purpose do not allow for a detailed analysis of these aspects.

The Ministry of Justice and the authors see this document as an introductory discussion on the issue of rape law and its reform. We hope that it will be considered by a broad spectrum of people in both government and civil society including policy makers, non-governmental organisations, community-based organisations, academics, political parties, members of government departments and any other interested groups or individuals. We therefore strongly encourage people to participate actively in the development of this process. We see this project as

an ongoing one, and we therefore welcome any additions and comments to the content of this document.

THE AUTHORS

Bronwyn Pithey (BA LLB)

Ms Pithey is an admitted attorney who is currently working as the head of the Advocacy Department at Rape Crisis, Cape Town, a position she has held for the last five years. The principal aim of her work is to take women's experiences of rape and their treatment in the criminal justice system into the political and legal arenas. She has also worked extensively with rape complainants as a pre-trial legal adviser and has developed a pre-trial consultation programme that has been widely supported by prosecutors throughout the Western Cape.

Lillian Artz (BA Hons (Crim) MA)

Ms Artz is a feminist criminologist and senior researcher at the Institute of Criminology at the University of Cape Town. She has been with the Institute since 1995, undertaking empirical and legal research in the areas of policing gender-based violence; access to justice for rural women; feminist jurisprudence and feminist criminology. Her teaching curriculum includes feminist epistemology and research methods, victimological debates, and policy and legislation relating to gender-based violence. She has also had several years of research experience in Canada, and has also done post-graduate work there in clinical psychology, in the area of 'mental health, law and policy'.

Heléne Combrinck (B Iur LLB (Hons BA) LLM)

Ms Combrinck is a senior researcher at the Women and Human Rights Project of the Community Law Centre at the University of the Western Cape. She has extensive experience in the prosecution of rape cases, and worked as a prosecutor at the Wynberg Sexual Offences Court at its inception in 1993. She joined the Law Faculty of the University of the Western Cape in 1995, and has taught courses in the Law of Evidence, Criminal Law and Gender Law. She has published articles on the law of evidence, criminal procedure and international women's rights, and recently participated in the South African Law Commission's investigation of the law on domestic violence as a member of the Project Committee. She is an advocate of the High Court of South Africa.

Nicolette Naylor (B Proc LLB)

Ms Naylor is a candidate attorney at a law firm in Cape Town and is also an associate researcher at the Women and Human Rights Project of the Community Law Centre at the University of the

Western Cape. She graduated from this university with several awards for academic excellence. She has done voluntary work on behalf of Rape Crisis, Cape Town.

CHAPTER 1: ANALYTICAL FRAMEWORK

1. WHY IS RAPE DIFFERENT FROM OTHER VIOLENT OFFENCES?

Rape is a crime that is not comparable to any other form of violent crime. It is a crime that affects all women, their sense of safety and their physical integrity. Rape, and the fear of rape, restricts women's mobility and freedom of movement.

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

The boundary of the body itself is broken by force and intimidation, a chaotic but choreographed violence.¹

Force, violence and subordination are central to the act of rape. The consequences for the rape victim are severe and life-long, and include the loss of the ability to trust, of freedom and identity.

For the rape victim, restitution is never fully realised even if the offender is 'brought to justice'. Rape victims, unlike other victims of crime, are not venerated for their bravery in coming forward with their experiences. Instead they are ignored, dismissed, questioned and shamed by the very people meant to support them - their families, communities, the criminal justice system and civil society in general.

In the Canadian judgment in *R v Seaboyer; R v Gayme*, L'Heureaux-Dubé J remarked as follows:²

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

conviction rates for sexual assault are among the lowest for all violent crimes. Perhaps more than any other crime, the fear and constant reality of sexual assault affects how women conduct their lives and how they define their relationship with the larger society. Sexual assault is not like any other crime.

2. THE INCIDENCE OF RAPE IN SOUTH AFRICA

It is widely accepted that the statistics for reported rape reflect only a small percentage of the actual incidents of rape in South Africa.

NICRO³ estimates that only 1 out of every 20 rapes is reported to the police while the South African Police Service [SAPS]⁴ places the estimate of reported rapes at 1 out of every 35 rapes. Whatever the exact figure, it can be safely argued that there is substantial and significant discrepancy between the number of rapes that are reported to the police, the number of rapes that are revealed as a result of research and the actual number of rapes that occur in South Africa.

The reasons for this include the following:

- The narrowness of the definition of the crime effectively excludes a number of acts that, although they do not fit into the legal definition of rape, are nevertheless still experienced as rape by both women and men;⁵
- The fear of not being believed;
- Self-blame;
- The anticipation of secondary victimisation by state officials and the legal system;
- The fear of retaliation by the perpetrator; and
- A lack of access to police and the legal system - especially in rural areas.⁶

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

In 1997, the South African Police Central Information Management Centre (CIMC) reported the following in its *Quarterly Report on Rape and Attempted Rape*:⁷

- Between January and September of 1997, 36 147 rapes, including attempted rapes, were reported to the police nationally. This was a 28.9% increase from the first three quarters of the previous year.
- That the incidence of rape is again on the increase after showing signs of stabilisation during the first 6 months of 1997.

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

More recent statistics reported by CIMC for the period of January to June 1998 show that for the first 6 months of 1998, 23 374 rapes were reported nationally. A breakdown of these figures for the Western Cape, where the only Sexual Offences Court was operating at the time,⁸ reveals the following:

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

Broken down as percentages, these figures show that:

- Only 5% of incidents of rape are reported;¹⁰
- Only 56.62% of reported rapes were referred to court;
- Only 18.67% of reported rapes were prosecuted;
- Only 10.84% of reported rapes received guilty verdicts.

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

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

3. RESEARCH METHODOLOGY

In this document, we have tried to provide an analysis of the existing laws relating to rape and have suggested recommendations for change to the laws in the light of the following:

- Constitutional provisions, including the rights of both the victim and the accused;
- Norms prescribed by international human rights law;
- Developments in laws on rape in comparative foreign jurisdictions;
- Empirical and legal research on rape and criminal justice;
- The experiences of service providers in the area of rape; and
- The experiences of rape complainants themselves.

The analytical framework of the document operates on three levels:¹¹

1. The formal level - what the law says;
2. The ideological level - the values, beliefs and morals that are held/or expressed by the persons in the criminal justice system responsible for implementation of the law; and
3. The practical level - the daily experiences of rape complainants and those who assist them, both in the NGO sector and in the formal justice system.

Inherent in this analysis is the idea that mainstream critical legal theory, jurisprudence and legal practice are impoverished because they do not pay adequate attention to the real experiences of women. In fact, they often make women invisible. On closer examination of legal processes and procedures, the court system and the very laws themselves are clearly revealed as unreflective of women's reality of justice, life and law.

Robin West, an American legal scholar, supports this contention and suggests that:

The distinct values women hold, the distinctive dangers from which we suffer, and the distinctive contradictions that characterize our inner lives are not reflected in legal theory because legal theory is about actual, real life, enacted, legislated, adjudicated law, and women have, from law's inception, lacked the power to make law protect, value, or seriously regard our experience.¹²

Rape legislation in particular, continues to exclude the sexual integrity of rape victims within criminal procedure, in the name of an objective standard of proof in adversarial systems of justice. Working within the straightjacket of criminal law and procedure, there has been little

attempt to deconstruct the nature of rape trials. We have therefore, in the writing of this document, been committed to taking people's experiences of rape seriously, as an essential element of our analysis. This approach does not make the legal analysis of the present rape law less vigorous. On the contrary, we believe that it adds an absolutely crucial element in that it ensures that the experiences of rape victims' in the criminal justice process are fully included in the legal analysis.

The World Bank¹³ (1996) says that translation of statutory law and the administration and enforcement of laws to redress systemic gender discrimination is intensely problematic. The operation of law may be hampered because -

- it is poorly constructed;
- is inherently discriminatory against women;
- does not reflect the needs and capacities of women; or
- is simply ignored by those applying it.

In many instances, women do not know their legal rights, nor do they have the effective means of asserting them.

We see this document as a vehicle for proposing **appropriate** legislation to deal with the issue of rape, and by 'appropriate' we mean appropriate to the reality of women's lives and to their experiences, both of the legal system generally, and the criminal justice system in particular. This will necessarily mean a departure from current constructions of 'justice' and a move towards a construction of justice that is significant to women. We do not see this main-streaming of gender based realities as a contradictory imperative, nor as a competing ideology in the legal debate, but as a new, experientially based framework for the analysis and development of the law of rape.

4. CONSTITUTIONAL FRAMEWORK

4.1 Balancing of Rights

The introduction of the 1993 Constitution¹⁴ saw, for the first time in South African law, the entrenchment of a justiciable Bill of Rights.¹⁵ Steytler¹⁶ explains that the primary function of the Bill of Rights is to protect the rights of individuals when they come into contact with organs of state, and the Bill therefore places constraints on police, prosecutorial and judicial powers. The introduction of the Bill of Rights has thus understandably led to profound changes to the operation of the criminal justice system.¹⁷

However, at the same time the Bill of Rights imposes positive duties on the state to protect the interests of the country's inhabitants,¹⁸ including the rights to dignity,¹⁹ privacy²⁰ and freedom from all forms of violence.²¹ These state duties are described in section 7(2) of the Constitution, which directs the state to 'respect, promote, protect and fulfil the rights in the Bill of Rights'. One of the most severe threats to the establishment of a constitutional democracy in South Africa is the current incidence of violent crime. The courts have recognised that the unacceptable high crime rates hold the danger of undermining the very goals which the Constitution seeks to attain.²²

When considering potential reforms of the criminal justice system, it is therefore necessary to balance two sets of interests: on the one hand, the rights of persons accused of criminal offences, and on the other hand, the interests of society and the rights of persons who look to the State for protection from crime. This symmetry was described by Madala J in *S v Makwanyane*:²³

... a balancing of the interests of society against those of the individual, for the maintenance of law and order, but not for the dehumanising and degrading of the individual.

In the context of rape, the courts have shown a marked willingness to consider the interests of society and the prevention of crime as a counterweight to the rights of accused persons. Davis AJ expressed this as follows in his assessment of the application of the cautionary rule in rape cases in *S v M*:²⁴

A court can take judicial cognisance of police statistics which indicate a far greater incidence of rape in this country being unreported. Hence, although the magistrate is obliged, as is this court, to apply the cautionary rule, the rule should also be evaluated carefully *so as not to deter a complainant from coming before a court to tell her story truthfully and ensure that justice is done*.²⁵

A similar view was taken by Melunsky J in *Klink v Regional Court Magistrate NO and Others*,²⁶ where section 170A of the Criminal Procedure Act 51 of 1977 was challenged on the ground that its provisions deprived the accused of his right to a fair trial by limiting his right to cross-examine. The court, while recognising the right to confront and cross-examine as part of a fair trial, held that it was still necessary to balance the rights of the accused with the rights of witnesses not to be subject to further traumatising events in their pursuit of justice.

This discussion document has been prepared with an acute awareness of the delicate balancing process of divergent rights, and every attempt has been made to accommodate the interests of accused persons along with those of victims of rape. While we recognise that a number of the

measures proposed here may constitute a limitation of the rights of accused persons, we will argue in each case that such limitation is reasonable and justifiable in terms of the factors set out in section 36(1) of the Constitution.²⁷

4.2 Rights of Rape Victims

While the rights of arrested, detained and accused persons are clearly articulated in the Constitution,²⁸ there are no similar provisions which *expressly* deal with the rights of victims of crime.²⁹ However, this does not mean that victims of crime are without constitutional protection: we argue that the rights to equality, dignity, and, specifically, to freedom from all forms of violence, mean that constitutional recognition is by implication given to the interests of victims. This section will briefly examine the importance of the entrenchment of these rights for victims of rape.

The Right to Equality

The South African Constitutional Court has repeatedly emphasised the crucial importance of the right to equality in the overall context of the South African Constitution and the Bill of Rights.³⁰

Substantive Equality

There can be little doubt that section 9 of the 1996 Constitution refers to a *substantive* (rather than formal) understanding of equality. The distinction between formal and substantive equality can be described as follows: formal equality means *sameness of treatment* - the law must treat individuals in the same manner regardless of their circumstances. Substantive equality, on the other hand, takes these differing circumstances into account in order to ensure *equality of outcome*.³¹

In its recent judgment in *National Coalition for Gay and Lesbian Equality and Another v The Minister of Justice and Another*, the Constitutional Court again confirmed that it interprets the provisions of the 'equality clause' (section 9 of the 1996 Constitution) as indicating substantive equality.³²

In this document, we have attempted to propose measures which would contribute to a position of substantive equality for rape victims. Substantive equality implies, on one hand, that we will argue for the reform of existing provisions on the grounds that such provisions violate the equality rights guaranteed in sections 9(1) and/ or 9(3) of the Constitution. This applies, for example, to our argument below that the current policy regarding the provision of post-exposure

prophylaxis constitutes a violation of section 9(1).³³

On the other hand, we will argue that in order to attain substantive equality, the State has a duty to enact specific measures relating only to rape victims (as opposed to victims of other forms of violence crime) – for example, the introduction of provisions requiring courts to consider ‘victim impact statements’ before sentence.

Non-identical Treatment

In *President of the Republic of South Africa v Hugo*, the Constitutional Court recognised that the objective of substantive equality will not necessarily be achieved by the *identical* treatment of different social groups in all circumstances.³⁴

[T]he impact of the discriminatory action upon the particular people concerned [must be considered in order] to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context.

It is with this understanding in mind that we propose measures that will, in practice, have the effect that rape victims are treated different from other victims of violent crime - we believe that such differential treatment is necessary to achieve the constitutional objective of substantive equality³⁵.

Contextual Analysis

The above statement by Goldstone J in the *Hugo* case is significant not only in recognising that substantive equality implies non-identical treatment, but also in confirming that substantive equality requires an examination of the *context* in which the disputed provision operates.

A contextual analysis, according to Albertyn and Goldblatt, shifts the legal enquiry away from ‘an abstract comparison of “similarly situated” individuals to an exploration of the actual impact of an alleged rights violation within the existing socio-economic circumstances.’ It also requires an examination of the individual within, and outside of, different social groups.³⁶

We therefore propose that when examining a disputed provision (such as, for example, the application of the cautionary rule in rape cases), a contextual analysis requires a clear understanding of the manner in which rape victims as a group have in the past been subjected to patterns of disadvantage or harm,³⁷ in addition to knowledge of the ‘real life experiences’ of rape victims.³⁸

We argue further that a contextual approach to equality also implies that the complex effects of ‘intersectoral’ discrimination should be considered. It should be accepted that the experiences of a working-class black rape victim living in a rural area may be significantly different from the experiences of a middle-class white victim living in an urban area.³⁹

The Right to Freedom from Violence

Section 12(1)(c) of the Constitution provides that ‘everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources’.

Since section 12(1)(c) refers to the right to *freedom* rather than *protection* from violence, the question arises whether this section merely creates a ‘negative’ state duty to refrain from infringement of this right (in other words, to refrain from committing acts of violence against individual persons) or whether it also imposes a ‘positive’ duty on the state to take steps to prevent and punish acts of violence.

However, the effect of section 7(2), read with section 12(1)(c), is to impose clear duties on the state to ‘respect, promote, protect and fulfil’ the right to freedom from violence – which implies protection against and punishment of rape.

International human rights jurisprudence provides useful guidelines in determining the nature and extent of state duties towards rape victims.⁴⁰ International tribunals (such as the Inter-American Court of Human Rights)⁴¹ have examined the obligations which human rights documents place on states, and found that -

- States had positive obligations to establish and maintain the necessary legal and other institutions and remedies through which human rights can be guaranteed; and
- States should exercise due diligence to prevent violations by non-governmental actors where the acts of private parties threaten to undermine the rights guaranteed.⁴²

In addition, the obligation to ensure the exercise of rights included the following:

[S]tates must prevent, investigate and punish any violation of the protected rights recognized by the Convention and moreover, if possible, attempt to restore the right violated and provide compensation as warranted for damages resulting from this violation.⁴³

We accordingly argue that the constitutional entrenchment of the right to freedom from violence imposes certain positive duties on the South African state to prevent, investigate, punish and, where possible, compensate for a violation of this right in the form of rape. This means that the state has duties on a broad level to, for example, enact appropriate legislation aimed at the punishment of and compensation for acts of rape. In addition, duties are also imposed on a narrower level on individual state officials to perform certain functions relating to, for example, the protection of rape victims and the investigation of alleged incidents of rape.⁴⁴

The Right to Dignity

Section 10 of the 1996 Constitution guarantees every person the right to dignity. In its judgment in *National Coalition for Gay and Lesbian Equality and Another v The Minister of Justice and Another*, the Constitutional Court described the nature of the right to dignity as follows:⁴⁵

The violation of dignity under section 10 offers protection to persons in their multiple identities and capacities. This could be to individuals being disrespectfully treated, such as somebody being stopped at a roadblock. It also could be to members of groups subject to systemic disadvantage, such as farm workers in certain areas, or prisoners in certain prisons, such groups not being identified because of closely held characteristics, but because of the situation they find themselves in. These would be cases of indignity of treatment leading to inequality, rather than of inequality relating to closely held group characteristics producing indignity.

We contend that the protection of the dignity of rape victims should, for example, be considered when examining measures which may have the effect of limiting cross-examination by the defence - see in this regard our discussion of the provisions of section 170A below.⁴⁶

5. TERMINOLOGY

Rape

This document uses the word ‘*rape*’ to denote instances of sexual assault as detailed in the definition section below. This implies a broader understanding of the term rape than the one currently in use, since it may also incorporate, for example, anal penetration, or vaginal penetration by means of an instrument other than a penis.

The terminology surrounding ‘rape’, ‘sexual assault’ and ‘criminal sexual conduct’ has been the subject of considerable debate. Without going into this debate in detail, we have chosen to use the word ‘rape’ rather than ‘sexual assault’ or any other term, because we believe that it most appropriately reflects the fact that what we are dealing with is essentially a crime of violence rather than a sexual crime. We believe that the terms ‘sexual assault’, ‘indecent assault’ and ‘criminal sexual conduct’ run the risk of over-emphasizing the sexual element of a crime that is not experienced by victims in any sexual sense at all.

Victims/Complainants

While we recognise the ongoing debate on whether the term ‘*rape survivor*’ is preferable to ‘*rape victim*’ (by reason of denoting empowerment rather than powerlessness and vulnerability), we have elected to make use of ‘*victim*’ for purposes of this document. This is based on the fact that the term ‘victim’ is an accepted term in related areas (for example, in the context of the Victim Empowerment Programme).

We also make use of the term ‘complainant’ in referring to the police investigation and the criminal trial proceedings, since this term enjoys wide use in this specific context.

ENDNOTES

1. Andrea Dworkin *Life and Death* (1997) 23.
2. L'Heureux-Dubé J (dissenting judgment) in *R v Seaboyer; R v Gayme* 1991 2 RCS at 648-649.
3. National Institute for Crime Prevention and the Rehabilitation of Offenders [NICRO].
4. South African Police Service: Central Information Management Centre Website.
5. See discussion of the substantive definition of rape in Chapter 3 below.
6. Lillian Artz *Access to Justice for Rural Women* (1998).
7. Central Information Management Centre of the South African Police Service *Quarterly Crime Report* (1997 & 1998).
8. A Sexual Offences Court was instituted at Wynberg, Cape Town, on 3 March 1993.
9. Based on the estimate that only 1 out of 20 cases of rape are reported to the police.
10. Based on the '1 out of 20' figure.
11. F Heidensohn *Women & Crime* (1985) has developed this analytical approach in looking at legal reforms for criminal women. The approach has been adopted, but modified for the purposes of this document.
12. Robin West 'Jurisprudence and Gender' (1998) 55 *University of Chicago Law Review* at 231.
13. World Bank Website.
14. Constitution of the Republic of South of South Africa Act 200 of 1993 [referred to as 'the interim Constitution'].
15. Chapter 3 of the interim Constitution; Chapter 2 of the Constitution of the Republic of South Africa Act 108 of 1996 [referred to as '1996 Constitution'].
16. Nico Steytler *Constitutional Criminal Procedure* (1998) 1.
17. Changes in the sphere of criminal justice resulting from constitutional challenges included the abolition of the death penalty in *S v Makwanyane* 1995 2 SACR 1 (CC), the ruling that corporal punishment is unconstitutional (*S v Williams* 1995 2 SACR 251 (CC)) and the recognition of right the right of an accused person to have full access to the

- contents of police dockets (*Shabalala v Attorney-General of Transvaal* 1995 2 SACR 761 (CC)).
18. Steytler *loc cit* note 16.
 19. Section 10 of the 1996 Constitution.
 20. Section 14 of the 1996 Constitution.
 21. Section 12(1)(c) of the 1996 Constitution.
 22. See eg *S v Makwanyane* 1995 6 BCLR 665 (CC) at Par 117.
 23. *S v Makwanyane* note 23 at Par 250.
 24. 1997 2 SACR 682 (CPD).
 25. At 685E-F. Emphasis added.
 26. 1996 3 BCLR 402 (E).
 27. For a detailed analysis of the operation of section 36(1) in the context of the criminal justice system, see Steytler *op cit* note 16 at 18-25.
 28. Subsections 35(1), (2) and (3) of the 1996 Constitution.
 29. This is one of the factors motivating repeated calls for the enactment of a South African 'Victims' Charter' which would spell out the rights of victims.
 30. *Brink v Kitshoff* NO 1996 6 BCLR 752 (CC), *Fraser v Children's Court, Pretoria North* 1997 2 BCLR 153 (CC), *Prinsloo v Van der Linde* 1997 6 BCLR 759 (CC); *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC), *Harksen v Lane* NO 1998 1 SA 300 (CC), *City Council of Pretoria v Walker* 1998 3 BCLR 257 (CC); *National Coalition for Gay and Lesbian Equality and Another v The Minister of Justice and Another* CCT 11/98 (9 October 1998).
 31. De Waal et al *The Bill of Rights Handbook* (1998) 154-155. See also Catherine Albertyn and Janet Kentridge 'Introducing the right to equality in the interim Constitution' (1994) *SAJHR* (1994) 149-178; Titia Loenen 'The equality clause in the South African Constitution: some remarks from a comparative perspective' (1997) *SAJHR* 401-420.
 32. *National Coalition for Gay and Lesbian Equality v Minister of Justice* note 30 at Par 62.
 33. See below.

34. *President of the Republic of South Africa v Hugo* note 30 at Par 41.
35. We have submitted an analogous argument in support of differential treatment of victims of domestic violence - see Women & Human Rights Project et al *Submission to South African Law Commission on Domestic Violence* (1997) at 7.
36. Catherine Albertyn and Beth Goldblatt 'Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *SAJHR* at 260-261.
37. See in this regard Louise Fryer 'Law versus prejudice: views on rape through the centuries' (1994) *SACR* 61-77.
38. These considerations are related to the factors which a court has to consider when determining the impact of a disputed provision (as part of the inquiry into 'unfairness' under section 9(3) of the 1996 Constitution):
 - a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage;
 - b) the nature of the provision and the purpose sought to be achieved by it;
 - c) the extent to which the discrimination has affected the rights or interests of the complainants and whether it has led to an impairment of their fundamental dignity or constitutes an impairment of a comparably serious nature.See *Harksen v Lane NO* note 30 at Par 51.
39. Albertyn and Goldblatt *op cit* note 36 at 253.
40. See discussion below.
41. See *Velasquez Rodriguez* Case Judgment of 27 July 1988, Inter-American Court of Human Rights, Ser C, Vol 4.
42. *Idem* at Par 164.
43. *Idem* at Par 166.
44. We discuss specific duties imposed on individual state officials below.
45. *National Coalition for Gay and Lesbian Equality v Minister of Justice* note 30 .
46. See discussion below.

CHAPTER 2: STATE COMMITMENTS TO ADDRESS THE LEGAL ASPECTS OF RAPE

1. INTRODUCTION

In Chapter 1, we discussed the state obligations arising from the constitutional entrenchment of certain rights, for example, the right to freedom from violence.¹ When considering potential reform of the law relating to rape, it is also important to recognise that the South African government has committed itself on various additional levels to the promotion and protection of the rights of rape victims.² These commitments arise both from policies operating on national level and from international human rights documents. This section will briefly explore the nature and extent of state commitments to address the law relating to rape.

2. NATIONAL POLICY DOCUMENTS

We recognise that there are a number of national strategies and programmes which relate to rape and the rights of rape victims - for example, the National Crime Prevention Strategy³ (which includes the development of a Victim Empowerment Programme as one of its four pillars). This Strategy prioritizes gender-based violence and emphasizes that 'because of their prevalence and profoundly negative impact on the empowerment and rights of women, rape and domestic violence require a special focus'.⁴ Resources and budget allocations must be adjusted in accordance with this priority.⁵

However, we believe that the Gender Policy Statement⁶ recently published by the Department of Justice represents the most clear exposition of the government's commitments to implement changes to the law relating to rape.

The Gender Policy Statement takes a critical look at some of the ways in which the legal system fails women and how this results in severe injustices. In its Chapter 1, the Statement acknowledges some of the shortcomings in the legal system:

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

Strategic areas of intervention are identified within the Gender Policy Statement. In relation to sexual violence, the Justice Department commits itself to developing a legal framework for addressing sexual violence. This framework includes the following:⁷

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

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

3. INTERNATIONAL DOCUMENTS

3.1 The Convention on the Elimination of All Forms of Discrimination Against Women⁸

The Convention on the Elimination of All Forms of Discrimination Against Women [‘the Women’s Convention’] is regarded as the definitive international document on the human rights of women. Although this Convention does not contain any provisions which expressly address violence against women,⁹ the Committee on the Elimination of Discrimination Against Women (CEDAW)¹⁰ has compiled a general recommendation stating how the Women’s Convention should be interpreted to cover violence against women and explaining the nature of government obligations to address such violence.¹¹

Article 1 of the Women’s Convention defines discrimination against women as any distinction made on the basis of sex which has the effect of impairing the enjoyment by women of human rights and fundamental freedoms. It is significant that this definition has expressly been adopted

by the Department of Justice in its *Gender Policy Statement*. Article 2 commits states to pursue, by all appropriate means and without delay, a policy of eliminating discrimination against women.

General Recommendation Number 19 states that the prohibition of discrimination against women includes ‘gender-based violence - that is, violence that is directed at a woman because she is a woman or that affects women disproportionately’.¹² This recommendation also confirms that violence against women constitutes a violation of women’s human rights irrespective of whether the perpetrators are state officials or private individuals, noting that:

States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and to provide compensation.¹³

In addition, CEDAW also set out specific recommendations regarding the duties resting on states:

- States should ensure that laws against family violence and abuse, rape sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity;¹⁴
- States should take all legal and other measures that are necessary to provide women with effective protection against gender-based violence, including -
 - effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence;
 - preventive measures, including public information and education programmes to change attitudes concerning the roles and status of men and women; and
 - preventive measures, including refuges, counselling, rehabilitation and support services for women who are the victims of violence or who at risk of violence.¹⁵

The Women's Convention has been ratified by the South African government, which means that in terms of international law, South Africa is bound by the obligations created by the Convention.¹⁶ Although General Recommendation No 19 does not form part of the body of the Convention (and therefore does not constitute a legally binding provisions), the comments by CEDAW contained in the Recommendation may have a strongly persuasive effect.¹⁷

The South African government recently prepared its first report for submission to CEDAW as required under the Convention.¹⁸ In the discussion of government actions relevant to Recommendation No 19, the government's statement that 'all laws regarding rape' will be subjected for review is significant.¹⁹

3.2 Declaration on the Elimination of Violence Against Women²⁰

This Declaration was adopted by the UN General Assembly in 1994. In contrast with the Women's Convention, this Declaration is not a treaty, but rather a non-binding resolution which sets out a common international standard that member states of the United Nations should follow.²¹ In terms of international human rights law, the provisions of the Violence Declaration therefore have less 'legal force' than the Women's Convention.²²

Article 4 of the Violence Declaration lists a number of measures to be taken by states in order to achieve the result of elimination of violence against women. These measures are reminiscent of the legal, preventive and protective actions set out in CEDAW's General Recommendation No 19. States are required to -

- Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons;²³
- Develop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence;²⁴
- Provide women who are subjected to violence with access to the mechanisms of justice, and, as provided for in national legislation, to just and effective remedies for the harm that they have suffered;²⁵
- Ensure that the revictimisation of women does not occur because of laws insensitive to gender considerations, enforcement practices or other interventions;²⁶ and
- Include in government budgets adequate resources for their activities related to the elimination of violence against women.²⁷

3.3 Beijing Declaration and Platform for Action²⁸

The Beijing Platform for Action, adopted at the 4th UN Conference on Women held in Beijing in 1995, identifies violence against women as one of its twelve priority areas or 'critical areas of concern'. In each of these critical areas of concern, strategic objectives are proposed, with

concrete actions to be taken by governments, the international community and civil society (including non-governmental organizations and the private sector) in order to achieve these objectives.²⁹

Governments are called upon to take certain actions in order to address violence against women. These actions include duties to -

- Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons;³⁰
- Adopt and/ or implement and periodically review and analyse legislation to ensure its effectiveness in eliminating violence against women, emphasizing the prevention of violence and the prosecution of offenders;³¹
- Take measures to ensure the protection of women subjected to violence and access to just and effective remedies, including compensation and indemnification and healing of victims;³²
- Provide women who are subjected to violence with access to the mechanisms of justice, as provided for in national legislation, to just and effective remedies for the harm they have suffered;³³
- Inform women of their rights in seeking redress through mechanisms of justice;³⁴
- Create or strengthen institutional mechanisms so that women can report acts of violence against them in a safe and confidential environment, free from the fear of penalties or retaliation;³⁵
- Create, improve or develop training programmes for judicial, legal, medical and police personnel to sensitize such personnel to the nature of gender-based acts of violence so that fair treatment of victims can be assured;³⁶ and
- Allocate adequate resources within the government budget for activities related to the elimination of violence against women.³⁷

While the Beijing Platform is not a legally binding document, it does embody solemn political commitments by states. The South African government has repeatedly committed itself to compliance with the provisions of the Platform,³⁸ and this commitment is reaffirmed in the Gender Policy Statement recently issued by the Department of Justice.³⁹

3.4 Regional Documents on Violence Against Women

In addition to the international documents referred to above, regional documents addressing violence against women have also been developed.

Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women⁴⁰

This Convention (also referred to as the ‘Convention of Belém do Pará’) was adopted by the Organization of American States in June 1994. This Convention is significant in the sense that it is the first *legally binding* treaty focussing specifically on violence against women. Although the Convention is only open to (and binding on) members of the Organization of American States, it may also exert a broader influence in the consolidation of customary international law.⁴¹

Article 3 of the Convention explicitly states that every woman has the right to be free from violence in both the public and private spheres, and article 6 links the right to be free from violence with the right of women to be free from all forms of discrimination. In terms broadly similar to article 4 of the Violence Declaration, article 7 sets out that states parties agree to pursue policies and legislation to prevent, punish and eradicate violence against women and undertake to comply with a number of specific duties to achieve this result. For instance, states parties are required to adopt ‘legal measures to require the perpetrator to refrain from harassing, intimidating or threatening the woman’.⁴²

Addendum to the SADC Declaration on Gender and Development

At their summit meeting held during September 1998, the SADC Heads of State adopted an addendum to the SADC Declaration on Gender and Development⁴³ that is specifically aimed at the prevention and eradication of violence against women (and children). The Addendum, signed on 14 September 1998, forms an integral part of the 1997 SADC Declaration on Gender and Development.⁴⁴

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

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

- Enacting such laws as sexual offences and domestic violence legislation making various forms of violence against women clearly defined crimes, and taking appropriate measures to impose penalties, punishment and other enforcement mechanisms for the prevention and eradication of violence against women and children;⁴⁵
- Reviewing and reforming the criminal laws and procedures applicable to cases of sexual offences, to eliminate gender bias and ensure justice and fairness to both the victim and the accused;⁴⁶ and
- Providing accessible, affordable and specialised legal services, including legal aid, to ensure the just and speedy resolution of matters regarding violence against women and children.⁴⁷

4. CONCLUSION

It is clear that these international instruments contain both *legally binding obligations* (in the case of the Women's Convention) as well as *persuasive guidelines* (for example, the Violence Declaration and the Beijing Platform) on the nature and extent of state duties. The following themes emerge from the provisions of the documents referred to:

1. States are not only responsible for the acts of state officials, but may also be responsible for private acts if they fail to act with due diligence to -
 - Prevent violations of rights;
 - Investigate acts of violence;
 - Punish acts of violence; and
 - Provide compensation for acts of violence.⁴⁸
2. States are required to take effective legal, preventive and protective measures to address violence against women, including (amongst others) -
 - Enactment of just and effective remedies for acts of violence, including criminal sanctions, civil remedies and compensatory provisions;
 - Providing victims of violence with access to mechanisms of justice (including specialised legal services);
 - Preventing revictimisation of women; and
 - Adopting and reviewing legislation to ensure its effectiveness.

3. States have a duty to allocate sufficient resources within the government budget to enable compliance with state obligations.

We therefore believe that international human rights law offers overwhelming evidence of the state's commitments to consider and enact legislative measures which will reflect its duties to prevent, investigate, punish and compensate for acts of rape (either from public or private sources).

ADDITIONAL COMMENTS ON INTERNATIONAL LAW:

It should be noted that in addition to the provisions in international human rights law which directly bind the South African state or set standards which states should aspire to, international law may also be significant in the interpretation of the Bill of Rights. Section 39(1)(b) of the 1996 Constitution provides that a court, when interpreting the Bill of Rights, 'must consider international law'.

In *S v Makwanyane*,⁴⁹ Chaskalson P stated that the consideration of international law is not limited to binding law, but also includes non-binding law.⁵⁰ This approach has the advantage that guidance may be sought in the language employed in multilateral human rights conventions and the decisions of convention-interpreting bodies.⁵⁰ This means that a South African court called on to interpret, for example, the right to freedom from violence, could find guidance in CEDAW's Recommendation No 19 or the provisions of the Violence Declaration.

ENDNOTES

1. Section 12(1)(c) of the 1996 Constitution.
2. See in this regard generally Helène Combrinck 'Positive state duties to protect women from violence: recent South African developments' (1998) 20 *Human Rights Quarterly* 666-690.
3. Departments of Correctional Services, Defence, Intelligence, Justice, Safety and Security, and Welfare *National Crime Prevention Strategy* (1996).
4. *Idem* at Par 5.7.4.1.
5. *Idem* at Par 5.7.0.2.2.
6. Department of Justice *Gender Policy Statement* (March 1999).
7. *Gender Policy Statement* Chapter 3.
8. UN Doc A/RES/34/180 (1980). The Convention was adopted for signature and ratification and accession by the UN General Assembly on 18 December 1979 and entered into force on 3 September 1981. South Africa ratified the Convention on 15 December 1995.
9. It has been argued that at least six articles of the Convention (viz Articles 2, 3, 6, 11, 12, and 16) relate to violence against women. See Joan Fitzpatrick 'The use of international human rights norms to combat violence against women' in R Cook (ed) *Human Rights of Women: National and International Perspectives* (1994) at 532.
10. This Committee is tasked with overseeing the implementation of the Convention.
11. General Recommendation 19 (11th session, 1992), UN Document CEDAW/C/1991/L/1/Add.15 (1992).
12. *Idem* at Par 6.
13. *Idem* at Par 9.
14. Par 24(b).
15. Par 24(t).
16. See eg Ian Brownlie *Principles of Public International Law* 4 ed (1990) at 12.

17. Combrinck *op cit* note 2 at 680.
18. South African Government *Convention on the Elimination of All Forms of Discrimination Against Women: First South African Report (1997)*.
19. See *First South African Report* Discussion of General Recommendation 19.
20. Declaration on the Elimination of Violence Against Women, GAOR 48th Session, 23 February 1994, UN Doc A/Res/48/104/1994 [referred to as 'the Violence Declaration'].
21. Brownlie *op cit* note 15 at 14 .
22. Combrinck *loc cit* note 17.
23. Article 4(c).
24. Article 4(d).
25. *Ibid.*
26. Article 4(f).
27. Article 4(h).
28. UN Doc A/Conf.177/20 (recommended to the UN General Assembly by the Committee on the Status of Women on 7 October 1995).
29. Par 45.
30. Par 124(b).
31. Par 124(d).
32. *Ibid.*
33. Par 124(h).
34. *Ibid.*
35. Par 124(l).
36. Par 124(n).
37. Par 124(p).

38. See eg Department of Welfare *Report on the South African Government's Commitments arising out of the Fourth UN Women's Conference, Beijing (1995)* 3.
39. See Chapter 2 'Guiding Principles' at Par 5.
40. OEA/Ser.P/AG/doc.3115/94 Twenty Fourth Regular Session, 7 June 1994.
41. We further hope that this Convention will provide an example for the development of a similar document with legally binding effect in the Southern African region.
42. Art 7(d).
43. The SADC Declaration on Gender and Development was signed by SADC Heads of State or Government on 8 September 1997.
44. Par 28.
45. Par 8.
46. Par 10.
47. Par 18.
48. In 1994 the UN Commission on Human Rights appointed a Special Rapporteur on Violence against Women to report on the causes and consequences of violence against women and to recommend ways of eliminating such violence. The Special Rapporteur's first report (which focused on domestic violence), clearly stated that in the context of norms recently established by the international community, a state that did not act against crimes of violence against women was 'as guilty as the perpetrators'. States were accordingly placed under a positive duty to prevent, investigate and punish crimes associated with violence against women. (*Preliminary Report submitted by the Special Rapporteur on Violence Against Women, Its Causes and Consequences* UN Doc E/CN.4/1995/42, 22 November 1994 at 18.)
49. *S v Makwanyane* 1995 2 SACR 1 (CC).
50. *Idem* at Par 35.

CHAPTER 3: THE SUBSTANTIVE DEFINITION OF RAPE

‘You lawyers can play around with words as much as you like. *I* know what really happened.’

Rape complainant during a pre-trial interview with author at Wynberg (Cape Town), September 1992. [Translated from Afrikaans.] The five accused in this matter were acquitted.

1. CURRENT POSITION IN SOUTH AFRICA

The common law offence of rape consists in a man having unlawful, intentional sexual intercourse with a woman without her consent.¹

Liability for this offence thus requires proof of the following elements:

- Unlawfulness;
- Intention;
- Sexual intercourse;
- With a woman; and
- Absence of consent.

Although the South African Law Commission concluded in its 1985 report that there was no basis for redefining the offence of rape,² this definition has, in recent years, been the subject of considerable criticism.³ The objections to the definition will be discussed in detail below.

2. OVERVIEW OF DEVELOPMENTS IN OTHER JURISDICTIONS

It is significant to note that a number of jurisdictions (including Canada, Australia, and certain states in the US) have made changes to the common law definition of rape that currently still operates in South African law. Although the scope of this document does not allow a comprehensive analysis of recent reforms of the legal definition of rape in foreign jurisdictions, we will briefly discuss certain general trends in the development of the definition.

The legislative changes to the common law definition of rape were generally characterised by:

- A shift in emphasis away from the perception of rape as an offence against 'public morals' and towards a perception of an offence against the personal dignity and sexual autonomy of the complainant;⁴
- A shift in focus away from the 'sexual' element of the crime towards the element of 'violence';⁵
- A shift away from the question of whether or not the complainant had consented to the sexual act towards the question of whether the accused had used force in order to have sex with the complainant.

In some jurisdictions such as Michigan (US), this shift in emphasis was made by introducing the idea of sex 'under coercive circumstances', coupled with a detailed definition of 'circumstances where there is a lack of consent'. It is significant that the statutory definitions of these 'coercive circumstances' tend to either confirm or clarify rules on vitiation of consent which had developed under common law or statute.⁶

Further changes have included a move away from the gender-specificity of the definition towards a gender-neutral definition and the alteration of the 'name' of the crime from 'rape' to, for example, 'sexual assault' or 'criminal sexual conduct'.

Legislation enacted in Michigan (US) provided a model for many of the subsequent enactments in other countries.⁷ Australian legislation, for example, defines 'criminal sexual conduct' as sexual penetration with another person using force or coercion to accomplish the sexual penetration.⁸ The legislation also provides an extended definition of 'sexual penetration' and 'force or coercion'.

The Namibian Combatting of Rape Bill similarly proposes a gender-neutral offence of 'rape' which consists of the intentional performance, with another person, of a sexual act under coercive circumstances.⁹ The clause defines a sexual act and the coercive circumstances in considerable detail.

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

- The sexual penetration, however slight -
 - of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
 - of the mouth of the victim by the penis of the perpetrator;
- by coercion or threat or force against the victim or a third person.

The trial chamber of the Tribunal considered the principles of law common to the major legal systems of the world, and concluded that there is at present a trend to broaden the definition of rape. The chief element of the offence is *forced physical penetration*.¹⁰

3. DISCUSSION

3.1 Criticism of the Elements of the Definition

‘Sexual Intercourse’

The act of rape consists of the penetration of a woman's vagina by the male penis.¹¹ In terms of the current definition, no other forms of sexual activity 'qualify' as rape

This limitation excludes the possibility of penetration of other parts of the body, including the anus and the mouth, and similarly excludes the possibility of penetration by means of other instruments, for example sticks and bottles.

Who is to say that the sexual humiliation suffered through forced oral or rectal penetration is a lesser violation of the personal private inner space, a lesser injury to mind, spirit and sense of self?... All acts of sex forced on unwilling victims deserve to be treated as equally grave offences in the eyes of the law, for the avenue of penetration is less significant than the intention to degrade.¹²

‘With a Woman’

In terms of the current definition, a man cannot be raped and nor can a woman be convicted as the perpetrator of rape.¹³ However, sexual assault of a man in the form of forced anal penetration

is also often described as 'rape' in common parlance.¹⁴ Although such act would be punished by criminal law, this would take the form of a charge of indecent assault.

It should also be noted that the present definition does not allow for the 'rape' of a man who has undergone surgical 'sex change' procedures to be punished as an instance of rape.¹⁵

□ **'Absence of Consent'**

The fact that a lack of consent is regarded as an essential element of the definition of rape has 'ensured that the focus of rape trials was... on the complainant - investigating whether she had consented, based on her behaviour at other times and in other circumstances and with other people, and if not, whether she had clearly communicated that she was not consenting to the accused'.¹⁶

The inclusion of an 'absence of consent' in the definition of rape stands in marked contrast to the common law position relating to assault, where proof of non-consent is not required before the accused can be held criminally liable.¹⁶ While consent is recognised as a ground of justification that excludes unlawfulness, and therefore criminal liability, absence of consent is not one of the essential elements that the prosecution has to prove beyond reasonable doubt.¹⁷

A similar comparison can be drawn between rape and theft where the common law, while requiring that the 'taking' of an object must be without the consent of the owner, assumes that the taking is non-consensual rather than requiring any particular level of proof of this factor.¹⁸

Because an absence of consent is included as one of the elements of the offence of rape, the state firstly bears the notoriously difficult burden of proving a negative proposition, that is, that the complainant had not consented to sexual intercourse.¹⁹ Secondly, the issue of consent invites questions about the woman's sexual history or allegations of promiscuity. It is this emphasis on her actions which puts the complainant 'on trial' as well as the accused.²⁰

3.2 Gender-specificity of the Definition

Where the common law definition has been replaced by progressive statutory measures, the definition is consistently framed in gender neutral terms.²¹ While a gender-neutral definition of rape on the one hand eliminates the difficulties described above, it also on the other hand poses the risk of obscuring the reality that the overwhelming majority of victims of rape (in the broad sense of the term) are women.²²

] 3.3 Terminology

It is interesting to note that most of the statutes aimed at reform of the common law position have substituted the term 'rape' with terms such as 'sexual assault'. This tendency forms part of an attempt to emphasize the violence associated with rape rather than to focus on the sexual component of the act.

However, Bagen and Fishwick report that many women consider that the word rape itself is a powerful signifier of the violence (whether overt or covert) and the aggression that accompanies the offence.²³ Consequently, increasing calls are being made for the retention or restoration of the term 'rape' in the definition of the offence.²⁴ Significantly, the draft Namibian Bill uses the term 'rape'.

3.4 Development of the Definition in other Jurisdictions

The Michigan provisions were hailed as a major advance in the protection of women's sexual autonomy, in that their purpose was to shift the focus of the trial on to the presence of coercive circumstances, with no requirement that the prosecution prove absence of consent.²⁵ Unfortunately, the prevailing influence of the common law has diluted the intention of the legislature in that consent is still, whether overtly or covertly, a predominant element in rape trials.²⁶

It is important for South African law to adopt a definition of rape based on the Michigan model, and to develop progressive jurisprudence around such definition. The use of the Michigan model should ensure that consent is not seen as central to the inquiry into the guilt or innocence of the accused. However, the defence of consent would remain available to the accused, as would have been the case where an accused is charged with assault or theft.

4. RECOMMENDATIONS

We recommend the legislative enactment of the following definition of the crime of rape:

- 1. A person (hereinafter referred to as the actor) who intentionally performs or continues to perform a sexual act with another person (hereinafter referred to as the complainant) under coercive circumstances or who under coercive circumstances intentionally causes another person to perform a sexual act (whether with the actor or with the complainant himself or herself or with a third person or persons), is**

guilty of rape.

2. **For the purposes of this Act, a sexual act shall mean:**
 - (a) **contact with or the insertion of, to any extent whatsoever, the penis of the actor into the vagina, anus or mouth of the complainant;**
 - (b) **contact with or insertion of, to any extent whatsoever, the penis of an animal into the vagina, anus or mouth of the complainant;**
 - (c) **the contact with or insertion of any object or part of the body of the actor or of an animal into the vagina, anus of the complainant: provided that the contact with, or insertion, of any object or part of the body of the actor constitutes medical treatment that is generally accepted by the medical profession, shall not be a sexual act;**
 - (d) **simulation of oral sex with any object or part of the body of the actor or of an animal into the mouth of the complainant;**
 - (e) **cunnilingus or fellatio.**
3. **For the purposes of this section, the term "vagina" shall include the whole or part of the female sexual organ or surgically constructed vaginas.**
4. **For the purposes of subsection (1), coercive circumstances shall include, but shall not be limited to -**
 - (a) **the use of physical force, whether explicit or implicit, direct or indirect;**
 - (b) **threats (whether verbal or through conduct, direct or indirect) to use physical force (either against the complainant or another person) in the present or in the future;**
 - (c) **threats (whether verbal or through conduct) to cause harm other than physical harm (either to the complainant or to another person) in the present or in the future;**
 - (d) **circumstances where the complainant is unlawfully detained by the actor;**
 - (e) **circumstances where the complainant is affected by -**
 - (i) **sleep or lack of sleep;**
 - (ii) **drugs, alcohol or other substances; or**
 - (iii) **mentally, physically or otherwise disabled or incapacitated, whether**

on a temporary or permanent basis;

to such an extent that he or she is unable to appreciate the nature of the sexual act concerned, or that he or she is unable to resist against the performance of the sexual act concerned, or that he or she is unable to communicate unwillingness;

➤ **NOTE:**

Although this formulation is consistent with that found in a number of other jurisdictions, we are concerned that firstly, this section re-introduces an unwarranted reliance on the notion of consent and secondly, that it increases the elements to be proved by the state. One should also be wary of creating the impression that the finding of coercive circumstances is contingent on the complainant's ability to resist or to indicate unwillingness.

- (f) **circumstances where the complainant believes that the actor or the person in respect of whom the complainant performs the sexual act, is another person;**
 - (g) **circumstances where the complainant is mistaken as to whether a sexual act is performed by the actor;**
5. **No marriage or relationship shall constitute a defence to a charge of rape as defined in this Act.**
 6. **Subject to the provisions of this Act, any reference to "rape" in any law shall be deemed to include a reference to rape as defined in this section.**
-

ENDNOTES

1. Jonathan Burchell & John Milton *Principles of Criminal Law* 2nd ed (1997) at 487; CR Snyman *Criminal Law* 3rd ed (1995) 424.
2. South African Law Commission *Report on Women and Sexual Offences* (1985) at Par 2.19 - 2.21.
3. See, for example: Colleen Hall 'Rape: the politics of definition' (1988) *SALJ* 67; Kathryn Ross 'An examination of South African rape law' in *Women, Rape and Violence in South Africa* Community Law Centre (1993) 12-15; Managay Reddi 'A feminist perspective of the substantive law of rape' in Saras Jagwanth et al (eds) *Women and the Law* (1994) at 159.
4. In Canada, for example, the Criminal Law Amendment Act S.C. 1980-81-82, c. 125 moved a number of crimes, including rape and indecent assault, from Part IV of the Criminal Code dealing with sexual offences, public morals and disorderly conduct, to Part VI which relates to offences against the person and reputation - see Christine Boyle 'Recent developments in the Canadian law of sexual assault' in Jagwanth et al (eds) *op cit* note 3 at 178.
5. See Boyle *loc cit* note 4.
6. Jenny Barga and Elaine Fishwick *Sexual Assault Law Reform: A National Perspective* (1995) at 64.
7. *Ibid.*
8. See sections 750.520a - 750.520e of the Criminal Sexual Conduct Act 1974.
9. Clause 2 of the Combatting of Rape Bill (dated 21 April 1998). This legislation was in draft form at the time of completion of this document.
10. *The Prosecutor v Anto Furundzija* (Case IT-95-17/1-T10) cited in Judith Robb and Jacqueline Cassette 'Rape - a war crime' (April 1999) *De Rebus* 60-61.
11. Snyman *op cit* note 1 at 425 n 7 and authority cited there.
12. Susan Brownmiller *Against Our Will* (1976) 378.
13. However, it is possible for a woman to be convicted as an accomplice to rape - see Snyman *op cit* note 1 at 425.
14. See Reddy *op cit* note 3 at 163-164.

15. *Idem* at 164-166.
16. Bargaen & Fishwick *op cit* note 6 at 59.
17. Burchell and Milton *op cit* note 1 at 198-199.
18. Bargaen & Fishwick *op cit* note 6 at 59.
19. Reddi *op cit* note 3 at 170.
20. Dianne Hubbard 'A critical discussion of the law on Rape in Namibia' in Susan Bazili (ed) *Putting Women on the Agenda* (1991) 144-145.
21. Bargaen & Fishwick *op cit* note 6 at 61.
22. Regina Graycar and Jenny Morgan *The Hidden Gender of Law* (1990) at 340.
23. Bargaen & Fishwick *op cit* note 6 at 60.
24. *Ibid.*
25. *Idem* at 64.
26. Allison Morris 'International reform initiatives regarding violence against women: successes and pitfalls' in Jagwanth et al (eds) *op cit* note 3 at 360-362.

CHAPTER 4: THE RAPE COMPLAINANT AS ANCILLARY PROSECUTOR

‘If the rapist has a lawyer, who will be my lawyer?’

[Rape complainant during a pre-trial consultation
conducted by author at Rape Crisis, Cape Town

1. CURRENT POSITION IN SOUTH AFRICA

The South African criminal justice system is ostensibly adversarial in nature. Criminal trials are viewed as two sided battles between the state - represented by the public prosecutor - and the accused, who has a right to legal representation.¹ The judge or magistrate in the criminal trial acts as an impartial ‘umpire’ who decides the guilt or innocence of the accused once all the evidence has been adduced by both sides.

The prosecutor’s primary function is to assist the court in arriving at a just verdict and, in the event of a conviction, a fair sentence based upon the evidence presented.² The position of the prosecutor differs from that of the defence counsel in the sense that the latter is representing a particular client, whose interests are predominant in determining the nature of counsel's ethical obligations. There is, for instance, no reciprocal duty on defence counsel to disclose evidence which could potentially be favourable to the prosecution.³

In the South African system, as in any other adversarial system, rape is also seen as a crime against the state and not against the rape victim.⁴ The effect of this is that the complainant in a rape case is, despite the nature of the crime, no more than a state witness. She, together with any other witnesses that the prosecution may call to assist the state in proving its case beyond a reasonable doubt, is only part of a chain of evidence.

The reality is that rape victims experience the rape and subsequent criminal trial as intensely personal. In our experience, rape victims often refer to the incident as ‘my rape’, to the

perpetrator as ‘my rapist’, and to the criminal trial as ‘my case’.⁵ 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.

The conviction rate for rape trials in South Africa is particularly low.⁶ One of the major difficulties in securing a conviction in a rape trial is that the state evidence frequently depends on the evidence of a single witness, i.e. the complainant. It is therefore imperative to ensure that this evidence is placed before court in the best form possible. However, there are at present several factors which prevent the evidence of the complainant reaching the court in optimum form. We argue that the interests of justice in securing the conviction of perpetrators of rape require measures to address these difficulties experienced by complainants during the trial.

However, it should be noted that the ‘interests of justice’ extend beyond the boundaries of the criminal trial - where an accused, for example, violates bail conditions by further intimidating or assaulting the victim, these interests are also severely prejudiced by the effect which such intimidation or further violence may have on the ability or willingness of the victim to participate in the criminal trial as well as on the quality of her evidence.

We will briefly discuss these factors, with specific reference to events preceding and during the trial.

Before the Criminal Trial

The time period from when the rape is reported to the police to when the matter goes to trial is often very long - it may occasionally take a case years to reach trial stage. This length of time may have a negative effect on the quality of the complainant’s evidence.

The complainant is usually not included in the investigation of the matter after providing her initial statement about the rape. This implies that potentially useful information (for example, communication between the accused and the victim subsequent to the rape)⁷ is not brought to the attention of the prosecution until the trial stage. The victim is ‘on her own’ in the sense that:

- Little if any information is communicated to her as to the progress of the investigation of the case;
- She is not given information as to whether the accused has been granted bail;

- She is not given information about the conditions attached to a successful bail application on the part of the accused.

In addition, the complainant is not given information about crucial steps in the progress of the case, for example -

- Her recourse if bail conditions are broken by the accused;
- Any other recourse she may have in law to protect herself from the accused if he is out on bail, in terms of the *Witness Protection Act 112 of 1998*.
- The date of court appearances of the accused;
- Decisions made by the Director of Public Prosecutions or his delegated authority as to whether they are going to prosecute the matter or not;
- The date of the trial.⁸

A further significant defect in the system is the fact that complainants are seldom given an opportunity to meet with the prosecutor before trial to discuss any or all of the following:⁹

- ◆ The process and procedures of the trial, who the various role players in the court are and what they do;
- ◆ The structure and layout of the court room;
- ◆ Where to go and what to do on arrival at the court on the day of the trial;
- ◆ The evidence the complainant will be expected to give and why (prosecutors often fail to explain to rape complainants why it is necessary, for example, to relate details of whether there was penetration of her vagina by the penis of the accused)¹⁰;
- ◆ Potential differences between the police statement and the evidence that he or she will give in the courtroom, and what the consequences of such differences are likely to be;
- ◆ The sort of questions to be expected from the defence and what the purpose of cross-examination is;
- ◆ The nature of the other evidence to be presented by the prosecution (for example, medical evidence);
- ◆ The likely time frames of the trial;

- ◆ What the process will be if the accused is convicted; and
- ◆ The complainant's role in sentencing.

Differences between the complainant's initial police statement and her evidence in court present a serious difficulty that has received little attention. Very often complainants who report rape do not speak English or Afrikaans. More often than not, the police statement is written in English or Afrikaans. This means that the complainant's account of what has happened to her needs to be translated by a police officer who is not a qualified translator but happens to speak both the complainant's language and English or Afrikaans. The complainant is then required to sign the statement written in a language she does not understand, swearing it to be a true reflection of what happened.

Another reason why statements differ from what complainants report to police is that the quality of statement-taking is extremely low. The version of the complainant as relayed to the police official taking her statement is frequently reflected inaccurately or altogether omitted from the statement. This is largely due to a lack of training on and commitment to the issue of rape, as well as the general apathy in the SAPS.¹¹ A further complicating factor is the universal use of 'set formulae' by police officials to describe incidents of rape, which contributes to the contamination of the complainant's version.

Due to the nature and the effects of rape on women, few complainants identify the inadequacy of the statement, at the time of the report, as something worth pursuing.

The Criminal Trial

Frequently, the true nature of the complainant's experience and its traumatic effects do not emerge during her testimony. This can be ascribed to a number of reasons:

- Where a pre-trial meeting with the prosecutor does take place, due to staff shortages and a high level of staff turnover the prosecutor who appears for the State during the trial may not be the same as the one who did the interview;
- As a result of the lack of understanding and insensitivity to rape survivors and the limited space in most courts, many rape complainants often wait to testify in the corridors of the criminal courts where the accused, together with his supporters, also wait - leading to intimidation and a great deal of distress on the part of the complainant;

- The rape complainant is then expected testify in a court room full of strangers who do very little to allay her fears. It is possible that at this stage the only person she may actually recognise is the accused. She is required to tell these ‘strangers’ about the most intimate, traumatic event in her life in graphic detail, without any explanation as to why she is being asked such questions.
- Her testimony is limited to answering questions she is asked by the prosecutor or defence, and thus there are often details of the rape that are omitted simply because she is not asked about them.
- She may be too ashamed to speak about such intimate matters.
- She may be intimidated by the presence of the accused in the courtroom.
- The questions that she is asked by the accused’s legal representative, or by the accused himself, are often intended to -
 - badger her;
 - shame or humiliate her further;
 - create an impression that she is lying; or
 - imply that she is a morally questionable person.
- Due to inexperience and overwhelming case loads, prosecutors are often underprepared for trial and therefore not familiar with the subject matter of the particular case.

In conclusion, we submit that the above factors greatly influence and effectively jeopardize the testimony of the rape complainant. Due to the fact that she has been given so little information about the trial and what is expected of her, it is of little surprise that the rape complainant's testimony is often unclear, contradictory and incomplete. These inadequacies are explained in terms of a framework of a lack of credibility of the complainant (‘she must be lying, that's why her testimony doesn't really make sense’) rather than by looking at other factors which may have influenced the quality of such testimony. As Carol Smart explains:¹²

The experience she wishes to convey in court is quite incomprehensible (except in those cases where her rape fits precisely with the legally acceptable notion of rape). The language she will use to explain her experience will be seen as flawed, and may introduce ‘ambiguities’ which immediately imply she is guilty of consent.

We argue below that in order to address these obstacles influencing the quality of the complainant's testimony, the introduction of a system where the complainant can join the criminal proceedings as an ancillary prosecutor is necessary.¹³

2. CURRENT POSITION IN OTHER JURISDICTIONS

2.1 Germany

The German criminal law system is inquisitorial in nature, and not adversarial. Pizzey and Perron explain that this implies a system in which:¹⁴

[T]he judges have an obligation at trial to examine, evaluate, and weigh all relevant evidence in order to reach an accurate determination of the issues. Because the judges have an affirmative obligation to inquire into the charges, it is the judges, not the parties, who have the primary responsibility for deciding which witnesses will be heard at trial, and it is the judges, not the parties, who usually conduct the bulk of the examination of those witnesses.

Since the judicial function within this system comprises an investigative inquiry aimed at establishing the truth, the state and the accused are not pitted against each other in an adversarial contest to win the case.¹⁵

The German system allows for a complainant who has been injured by an unlawful act to participate as an ancillary accuser (*'Nebenklager'*) in the criminal prosecution of the accused.¹⁶ The procedure is limited in that it is available only in crimes that have a very personal impact on the victim, including murder, assault, kidnapping, and rape.¹⁷

The *Nebenklager* procedure allows 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.¹⁸ 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.¹⁹ She may also under certain circumstances apply to receive state-funded legal representation if she is indigent.²⁰

Where a legal representative is appointed, he or she represents the interests of the complainant at trial. 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 judge, bring appropriate motions, apply to have evidence adduced and present a closing argument at the end of the trial.²¹

The *Nebenklager* procedure allows for the witness to explain fully all she knows about the crime and its surrounding circumstances. Instead of answering questions, she gets the opportunity to tell her own story, in her own words, through her own legal representative. This process ensures that the evidence is presented to the court in a manner that is nearest to its original form as possible – untainted by police, defence and prosecutorial interpretation of the events.

The rationale for allowing the victim to join as an ancillary prosecutor is not the public interest of the prosecution of crimes, but her personal interest in obtaining satisfaction for the suffering that is the consequence of the crime.²² In addition to this, a type of protection of her interests is essential because of the nature of the rape trial. The rape complainant is often subjected to harsh cross examination by the defense counsel about the previous sexual history of the complainant, late reporting of the sexual assault and alleged spurious accusations of sexual assault.

2.2 United States of America: Ohio

Section 2907.02(f) of the Ohio Criminal Code states that:

Upon approval of the court, the victim may be represented by counsel in any hearing in chambers or other proceedings to resolve the admissibility of evidence. If the victim is indigent or otherwise unable to obtain the services of counsel, the court, upon request, may appoint counsel to represent the victim without cost to the victim.

This section was introduced primarily to protect the victim in relation to evidence about her previous sexual history and is based on the rationale that it is the adducing of this type of evidence which is so traumatic and damaging to the rape complainant.²³

We argue that this reasoning should be accepted and extended in the South African context. This means a case can be made for the fact that there are many other aspects of the rape trial, including but not limited to the adducing of evidence of the rape itself, which are extremely traumatic for the complainant and thus make a reconsideration of her participation in the trial necessary.

2.3 Namibia

The Namibian Law Reform and Development Commission recognised in its report on the law relating to rape that the rights of the complainant in a criminal case are extremely limited and are confined to attending the case and to suggesting lines of cross-examination to the prosecutor.²⁴ The Commission also acknowledged that public prosecutors are not the representatives of complainants, but of the state, and may fail to object to hostile or degrading cross-examination. The conclusion was that the complainant should have more rights in a criminal trial and that the special nature of a rape trial justifies such provisions.²⁵

Clause 10 of the draft Bill annexed to the report thus provided for certain special rights for the complainant.²⁶

- 10 (1) In criminal proceedings where the accused has been charged with rape, the complainant has the right (either personally or through a legal representative) to-*
- (a) address the court on any issue on which the prosecutor may address the court;*
 - (b) put any question to a witness called by the prosecutor that the prosecutor might have put to such a witness;*
 - (c) object to any evidence adduced by the prosecution or the defence, or to any question put to any witness, whether by the prosecution or the defence;*
 - (d) adduce any admissible evidence, which the prosecution has not adduced;*
 - (e) cross-examine any witness (including the accused) who is called by the defence.*
- (2) Subject to the provisions in subsection (1), a witness called by the complainant shall for all purposes be regarded as a witness called by the prosecution.*
- (3) A complainant whose presence is required in order to avail himself or herself of the rights contemplated in subsection (1), shall, unless the court on good cause shown allows otherwise, give his or her evidence before any other witness has testified.*

3. DISCUSSION

It should be recognised that with regard to the investigation and prosecution of rape, the interests of the complainants are different to those of the state. As stated previously, the objective of the prosecution is to assist the court in arriving at a just verdict, while the interests of the complaint are those of obtaining personal satisfaction for the suffering as a consequence of the rape. The interests of these two parties thus do not always coincide and it is therefore necessary that each party's interests are properly represented.

An example of this is the often harsh cross examination of a rape complainant by defence counsel about his or her previous sexual history. The prosecution may believe that a series of negative responses (denying sexual experience) from the complainant may strengthen his or her case, whereas the complainant may not only resent the questioning but may also refuse to answer such questions.²⁷ This may lead the court to draw incorrect conclusions about the complainant's 'lack of co-operation'.

If this were indeed a strategy of the prosecution, it would probably not have been communicated to the complainant, leaving her feeling abandoned and unsupported by the prosecutor. Even if the prosecution did communicate this strategy to the complainant, there is no guarantee that the complainant would share the view of the prosecutor that allowing this line of questioning would 'benefit' the state case. She or he may feel that the cost of the embarrassment and humiliation that results from this line of questioning outweighs the 'benefit' of such questions.

3.1 Substantive Participation by the Complainant

We believe that a rape trial must include substantive participation by the complainant in order to achieve true justice, and we therefore propose the adoption of a system similar to the German *Nebenklager* procedure. Furthermore, we believe that the proper operation of a system of 'ancillary prosecution' is heavily dependant on complainants having separate legal representation, as unrepresented complainants will not likely be in an ideal position to exercise the rights accorded them under the proposed system.

It is not enough that rape complainants receive informal assistance in the form of envisaged 'victim assistance programmes', as this does not ensure that complainants may, through legal representation, fully participate in the pre-trial and trial process.²⁸ In order to achieve real representation of his or her interests, the complainant needs to be formally recognized as a party to the proceedings and to have the same legal rights to participate in the criminal justice process as do the prosecution and the accused.

We acknowledge that there is currently no precedent for this measure in South African law, but we contend that the adoption of this measure is necessary in order to further the interests of justice by enhancing the quality of testimony of rape complainants (thus ensuring a higher conviction rate). We also argue that this measure is required in order to ensure the protection of the constitutional rights of the rape victim - most notably, the rights to freedom from violence and to dignity.

3.2 The Constitutional Imperative

The Right to Freedom From Violence

We have argued earlier that the constitutional entrenchment of the right to freedom from violence in section 12(1)(c) of the 1996 Constitution has the effect of imposing certain positive duties on the state to ensure realisation of this right.²⁹ We also argued that if one turns to international human rights law for guidance in the interpretation of this right, it is clear that the constitutional guarantee of this right implies that the state has a duty to prevent, investigate, punish and, where possible, compensate for violations of the right to freedom from violence such as rape. This is borne out by our analysis of international human rights law.³⁰

We submit that in order to comply with the duty to effectively investigate and punish perpetrators of rape, the state should take measures to ensure -

- effective participation of the complainant in the pre-trial investigation;
- that the evidence of the complainant is presented to the court in optimum form.

We believe that, given the current realities of the South African criminal justice system, these objectives will only be met by allowing the complainant substantive participation in the process.

The Right to Dignity

We submit that due to the unique context of a rape trial with the high likelihood of secondary victimisation of the complainant, the complainant's right to dignity³¹ is specifically vulnerable to violation.³² It is our belief that rape complainants find themselves in the group identified by the Constitutional Court in *National Coalition for Gay and Lesbian Equality v Minister of Justice*:³³

[M]embers of groups subject to systemic disadvantage, such as farm workers in certain

areas, or prisoners in certain prisons, such groups not being identified because of closely held characteristics, but because of the situation they find themselves in.

We therefore argue that the admission of the complainant as an ancillary prosecutor is essential in order to adequately safeguard the right to dignity.

□ **The Rights of the Accused**

While we acknowledge that the introduction of this measure may (arguably) constitute a limitation of the accused's right to a fair trial, we believe that this limitation would withstand scrutiny under section 36(1) of the 1996 Constitution. Once again, one has to engage in a balancing of the rights of the accused on the one hand, and the rights of the complainant (and ultimately, societal interests in securing a conviction by preserving the quality of the complainant's evidence). In line with our argument in support of other 'protective measures', we believe that the participation of the complainant as ancillary prosecutor will not be inconsistent with the Constitution.

3.3 Alternative Measures?

Institution of Private Prosecution

Section 7 of the Criminal Procedure Act, which allows for the institution of private prosecutions, does not provide a viable alternative to participation of the complainant as an ancillary prosecutor for the following reasons:

- It only applies where the Director of Public Prosecutions declines to prosecute;
- It undermines the seriousness of the offence, since the trial no longer includes the involvement of the state; and
- It places an unduly harsh financial burden on the rape complainant to conduct the proceedings.³⁴

Civil Claims

Although it is possible for the complainant to institute civil proceedings against the accused we submit that this also is not a viable alternative to the participation of the complainant as an ancillary prosecutor for three reasons:

- It too places an unduly harsh financial burden on the rape complainant to conduct the proceedings;
- Very few accused are in a financial position to pay damages to the complainant should she be successful in her civil claim; and
- Civil law does not carry the same level of societal condemnation as does criminal law.

The participation of the complainant as an ancillary prosecutor in no way precludes her from instituting a civil claim against the accused should she so wish.

4. RECOMMENDATION

We recommend the enactment of the following provisions:

- 1. Once the state has instituted proceedings against the accused, the complainant shall be informed by the prosecutor that she may participate as an ancillary prosecutor in the case against the accused.**
- 2. Should the complainant decide to participate as an ancillary prosecutor, she becomes a party to the criminal trial and has the right to -**

Legal representation;

Inspect the state docket;

Address the court at any stage of the criminal proceedings, including bail and sentencing;

Call witnesses and adduce admissible evidence at the criminal trial;

Cross-examine and/ or re-examine any witness called by the prosecution or the defence, including the accused, at the criminal trial;

Object to any evidence adduced by the prosecution or the defence at the criminal trial;

Object to any question put to any witness, whether by the prosecution or the accused at the criminal trial; and

Appeal against any finding by the court on questions of fact or law and, in the event of conviction of the accused, against the sentence imposed.

3. Should the complainant be legally represented, the rights of the complainant shall extend to the legal representative.

4. Should the complainant be legally represented, the legal representative shall have the right to be present -

When the complainant is giving her statement to the police;

When the complainant is examined by a medical practitioner for the collection of forensic evidence;

At an identity parade which the complainant attends for the purposes of identifying the accused.

ENDNOTES

1. Section 35(3)(f).
2. See the National Prosecution Policy recently tabled in Parliament by the National Director of Public Prosecutions (in terms of sections 21 and 22(2) of the National Prosecuting Authority Act 32 of 1998, read with section 179(5) of the 1996 Constitution) at 3. This formulation differs slightly from the formulation found in case law: it has generally been accepted by the courts that the paramount duty of the prosecutor is to assist the court 'in determining the truth' - see eg *S v Jija* 1991 2 SA 52 (E) at 67J-68A.
3. See Helène Combrinck *Ethics in Prosecution: A South African Perspective* (Unpublished paper read at Conference on International Perspectives on Crime, Justice and Public Order, Ireland, June 1996).
4. See in this regard Louise Fryer 'Law versus prejudice: views on rape through the centuries' *SACJ* (1994) at 60-77.
5. See, for example: Charlene Smith 'Rape victims are not statistics' *Mail & Guardian* 9-15 April 1999.
6. See Chapter 2.
7. For example, where the accused attempts to threaten or bribe the complainant into withdrawing the charges.
8. Our practical experience has shown that complaints have on occasion been informed of the court date as late as a day before the trial.
9. Bronwyn Pithey & Lillian Artz *The Victim Rights Movement in South Africa: Shifting From Policy to Practice from a Gender Perspective* (Unpublished paper read at the World Conference on Modern Criminal Investigation, Organised Crime and Human Rights, South Africa, September 1998).
10. The present definition of rape requires penile penetration of the vagina in order to satisfy the element of 'sexual intercourse' - see Chapter 3 above.
11. Research has shown that the greatest practical problems around the state response to violence against women lie with the South African Police Service - see Human Rights Watch Africa *Violence Against Women in South Africa - State Response to Domestic Violence And Rape* (1995).
12. Carol Smart *Feminism and the Power of Law* (1989) at 34.
13. This discussion relies in part on earlier research set out in *Women & Human Rights*

- Project, Community Law Centre et al *Submission to the South African Law Commission on Domestic Violence* (1997) at 4 and Pithey & Artz *op cit* note 9.
14. WT Pizzi and W Perron ‘Crime Victims in German Courtrooms: A Comparative Perspective on American Problems’ (1996) 37 *Stanford Journal of International Law* at 44.
 15. Damaska ‘Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study’ (1973) *Univ Pa* at 580-582.
 16. Section 395(1) of the German Strafprozessordnung [StPO].
 17. *Ibid.*
 18. Section 396(1) of the StPO.
 19. Section 397(1) of the StPO.
 20. Section 397a of the StPO.
 21. Sections 240(2) and 244(3) -244(6) of the StPO.
 22. Pfeiffer *Karlsruher Kommentar zur Strafprozessordnung und zum Gerichtsverfassungsgesetz mit Einfuhrungsgesetz* (1993) at 1603.
 23. Ohio Revised Code *Annotated Title XXIX* Commentary on Section 2907.02(f).
 24. Namibia Law Reform and Development Commission *Report on Draft Combatting of Rape Bill* (July 1997) at 7.
 25. *Ibid.*
 26. It should be noted that this clause is not contained in the most recent version of the Combatting of Rape Bill (dated 21 April 1998).
 27. In addition, prosecutors often believe that the sight of a complainant ‘breaking down’ in court tends to strengthen the state’s case, and therefore do not immediately intervene when the complainant is visibly experiencing distress.
 28. Pithey & Artz *op cit* note 9 argue convincingly that the present model of victim empowerment (developed as one of the four pillars of the National Crime Prevention Strategy) is largely inappropriate in cases of rape.
 29. See Chapter 2 above.

30. See Chapter 3 above.
31. Section 10 of the 1996 Constitution.
32. In *S v Cornelius* 1999 JDR 0145 (C) it was recognised that protracted, offensive and unnecessary cross-examination of the complainant in a rape trial constituted a 'gratuitous violation' of the dignity of the complainant - at 18. See also Chapter 6 below.
33. *National Coalition on Gay and Lesbian Equality And Another v Minister of Justice and Others* CCT 11/98 (9 October 1998) at Par 124.
34. Section 9 of the Criminal Procedure Act requires the private prosecutor to pay an amount as security that she will prosecute the charge against the accused to a conclusion without undue delay, and as security for costs which may be incurred by the accused.

CHAPTER 5: HEARINGS *IN CAMERA*

‘I did not think that I was going to be able to give evidence in the presence of people. I felt uncomfortable to give evidence in front of the suspect and another difficult thing for a rape victim is to give evidence in front of men and in court it was men all over so to speak.’

Interview with Complainant X4: Stanton et al *Improved Justice for Survivors of Sexual Violence?* (1997) at 128. [Translation from Xhosa]

1. CURRENT SOUTH AFRICAN POSITION

It is now a matter not only of public policy but also of constitutional right that all criminal trials are held in open court.¹ The requirement of a public trial is based on the dual interests of protecting accused persons from secret trials and enhancing public confidence in the administration of justice.²

In *Nel v Le Roux NO*, the Constitutional Court confirmed that there are well-recognised exceptions to the rule that all criminal proceedings should be held in open court.³ These exceptions are set out, for example, in section 153 of the Criminal Procedure Act⁴ and also in section 5 of the Magistrate’s Court Act.⁵ Steytler explains that every exception as provided for by statute is *prima facie* unconstitutional but may be justified in terms of the limitation clause.⁶

Section 153(3) and (3A) allow for the exclusion of certain persons from a criminal trial. The relevant subsections read as follows:

153(3) *In criminal proceedings relating to a charge that the accused committed or attempted to commit -*

- (a) *any indecent act towards or in connection with any other person;*
- (b) *any act for the purpose of procuring or furthering the commission of an indecent act towards or in connection with any other person; or*

(c) *extortion or any statutory offence of demanding from any other person some advantage which was not due and, by inspiring fear in the mind of such other person, compelling him to render such advantage;*

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

153(3A) *Any person whose presence is not necessary at criminal proceedings referred to in paragraphs (a) and (b) of subsection (3), shall not be admitted at such proceedings while the other person referred to in those paragraphs is giving evidence, unless such other person, or if he is a minor, his parent or guardian or a person in loco parentis, requests otherwise.*

2. CURRENT POSITION IN OTHER JURISDICTIONS

United States

In the United States it has been accepted that hearings *in camera* in respect of rape cases may be a legitimate exception to the rule that all trials be heard in open court. This was held in the decision of *Richmond Newspapers Inc. v Virginia*⁷ where Richmond Newspapers challenged the validity of a statutory provision which required judges at trials for specified sexual offences involving victims under the age of 18, to exclude the press and general public from the courtroom during the testimony of that victim. The plaintiff contended that this was a violation of the guarantee of freedom of the press in the First Amendment to the US Constitution.

In its analysis of the First Amendment in relation to access to criminal trials, the court found there had always been ‘an unbroken tradition of openness’, but added that there was at least one notable exception to this tradition:

In cases involving sexual assaults, portions of trials have been closed to some segments of the public, even when the victim was an adult.

The court further held that the mandatory closure rule furthered genuine state interests and that these interests would be defeated if a case-by-case determination were used. Thus, even though mandatory closure would result in a temporary diminution of the public's knowledge at these trials, the court did not think that it was of such a nature to render the statute invalid, especially when considering the statute's scope and intention in terms of being sensitive to the needs of victims.

A different approach was taken in *Globe Newspapers Co v Superior Court for Norfolk County*⁸ where the appellant had likewise been excluded from a rape trial, and challenged the constitutionality of the statute.

The court held that the statutory provision in question did violate the First Amendment on the following basis: the right of access to criminal trials needed to be protected and by providing for trials to be open to the press and public, one ensured that the right played a significant role in the functioning of the judicial process. However, the court added that the right of access to criminal trials was not absolute and there might be circumstances where the press and public could be barred. In this regard the state must show that the denial of such right is necessitated by a compelling governmental interest and is narrowly tailored to serve that interest.

As far as the statute in question was concerned, it was found that the provision was designed 'to encourage young victims of sexual offences to come forward and to preserve their ability to testify by protecting them from undue psychological harm at trial'. While the court recognised that these were important interests, it found that these interests did not justify a mandatory closure in all cases and held that it should be determined on the basis of the trial court's discretion (i.e. on a case by case basis).

The court found here that barring the press had not been warranted, based on the fact that the press had already been given the names of the parties involved and had access to the criminal transcript. The court found that while the exclusion may be unconstitutional in one case it may not be so in another case and in weighing up the trauma to the victim one needed to have regard to the facts of each individual case.

While this case does create problems in terms of leaving the decision in the hands of the judicial officer, the case is illustrative in the sense that the court recognised that the right of access to the public is not an absolute right and that there may be instances where the state has a compelling interest to protect the interests of the witness.

□ **Canada**

In *Canadian Newspapers v Canada (Attorney General)*⁸ the press challenged the constitutionality of section 442(3) of the Canadian Criminal Code. This section provided that in sexual cases the court is obliged to make an order (on application by the complainant or prosecutor) prohibiting the publication of the complainant's identity. It was argued that this provision infringed on the right to a public hearing.

The Supreme Court of Canada held that the publication ban did not violate the right to a public trial, by virtue of the fact that the press could enter the courtroom. It could however be said to violate the freedom of the press. The court's conclusion was that the provision was saved by application of the 'limitation' test under section 1 of the Charter, and was therefore not inconsistent with the Charter.

The court expressed the opinion that the legislative objective, i.e. to encourage complainants to come forward without fear of the embarrassment and humiliation which widespread publication would engender, was 'a pressing and substantial concern'. This provision sought to facilitate the prosecution of sexual offenders and ultimately the suppression of crime.

3. DISCUSSION

3.1 The Constitutionality of Section 153(3)

Although hearings *in camera* may contravene an accused's right to a public trial, it is a recognised constitutional principle that fundamental rights are not 'absolute'. Their boundaries are set by the rights of others and the legitimate interests of society. In the 1996 Constitution, a general limitation clause sets out the criteria for the justifiable restriction of the rights in the Bill of Rights.⁹

The statutory provisions in section 153(3) and (3A) therefore have to be measured against the criteria stipulated in Section 36(1)(a) of the Constitution. This section lists certain factors which should be taken into account by the court when considering the reasonableness and justifiability of a limitation:

- The nature of the right;
- The importance and the purpose of the limitation;
- The nature and extent of the limitation;
- The relation between the limitation and its purpose; and
- Less restrictive means to achieve the purpose.

As far as the *nature* of the right is concerned, section 35(3)(c) of the 1996 Constitution deals with the right of an accused person to have a public trial before an ordinary court as an aspect of the right to a fair trial. We argue that the limitation of one facet of this right does not have the effect of nullifying the right in its entirety: the accused is still given an opportunity to fully participate and present his defence as if the trial were in open court.

The *purpose* of the limitation created by section 153(3) is of great significance, as the section seeks to protect a rape complainant in a situation which has now been accepted as being a traumatic experience affecting her dignity. Complainants often report that their encounters with police, district surgeons and courtroom personnel were more traumatic than the rape itself, since they were regarded as ‘just another piece of evidence with the court having little or no concern for their feelings’.¹⁰

Lastly, there is no less restrictive way of achieving the purpose of section 153(3), since the only way to protect the complainant and prevent the exposure of intimate sexual details in open court would be to remove members of the public.

We therefore believe that these sections will withstand constitutional scrutiny, especially if one has regard to the purpose of the limitation.

3.2 Test for Application of Section 153(3)

Section 153(3) provides that the court may, at the request of the victim, order the exclusion of certain persons from the proceedings. It is important to note that there is no requirement that the court should be satisfied that any harm or prejudice should result to the victim if such persons were to remain present. Yet, in our experience, presiding officers often require an indication of potential harm or prejudice before allowing this exclusion. In addition, prosecutors often fail to inform complainants of the possibility of making such a request.

We therefore propose the imposition of a statutory duty on the prosecutor to inform the complainant of the right to make a request for exclusion of certain persons, and also recommend that the provisions of sections 153(3) and (3A) be included in training programmes for presiding officers and prosecutors.

3.3 Presence of Certain Persons At The Request of Complainant

Although section 153(3A) expressly provides for the exclusion of persons ‘unless the witness requests otherwise’, experience has shown that prosecutors seldom inform complainants in rape matters of this option, with the result that family members or counsellors who might provide the

complainant with support during her evidence are also excluded. In addition, presiding officers are reluctant to allow these requests because of an incorrect assumption that section 153(3) implies a 'blanket exclusion'.

In conclusion, it may be said that the present provisions of section 153(3) and (3A) are reconcilable with constitutional demands regarding the accused's right to a public trial. Although the legislation is adequately framed to protect the interests of complainants in rape trial, the underlying rationale is often frustrated due to the incorrect implementation of these sections.

4. RECOMMENDATION

We recommend -

- 1. The inclusion of measures analogous to subsections 153(3) and 153(3A) in rape legislation;**
 - 2. The enactment of legislation to impose a duty on prosecutors in rape cases to inform the complainant -

of the right to apply for the trial to be heard in camera; and

that a family member or person with whom they feel comfortable may be allowed to stay in court during the trial.**
 - 3. The enactment of legislation to confirm that the exclusion of persons shall not automatically be a blanket exclusion and that complainants have the right to have person(s) of their choice present during the trial.**
 - 4. The inclusion of appropriate training regarding the hearing of rape trials in camera in official training programmes for presiding officers and prosecutors.**
-

ENDNOTES

1. Section 35(3)(c) of the 1996 Constitution provides for the right of an accused person to a public trial before an ordinary court. Prior to the introduction of the Interim Constitution, the Criminal Procedure Act 51 of 1997 already provided (in section 152) that criminal proceedings 'shall take place in open court' (except where expressly provided otherwise).
2. Nico Steytler *Constitutional Criminal Procedure* (1998) at 250.
3. 457 US 1982.
4. 1996 1 SACR 572 (CC).
5. Act 51 of 1977.
6. Act 32 of 1944.
7. 448 US 556 (1980).
8. (1988) 52 DLR (4th) 690 (SCC).
9. Section 36(1) of the 1996 Constitution.
10. Carol Bohmer *Judicial Attitudes to Rape* in Chappell et al (eds) *Forcible Rape* (1977) at 161.

CHAPTER 6: PROTECTIVE MEASURES FOR THE TESTIMONY OF THE COMPLAINANT

' [I was afraid of] going to court where this man would be in the same room and I would have loved it to be different. But they informed me it was going to be like that... He has to be in the same room, so I feared I might not be able to do it...And now we have to face each other and it scared me because I don't want him to see me clearly...to come after me.'

Interview with Complainant E1: Stanton et al. Improved Justice for Survivors of Sexual Violence?? (1997) at 119

1. CURRENT POSITION IN SOUTH AFRICA

At present, there are two provisions allowing for a complainant to testify outside the presence of the accused under certain circumstances:

1. Section 170A of the Criminal Procedure Act¹ provides that a court has a discretion to appoint an intermediary where it appears that a complainant under the age of 18 years would be exposed to undue mental stress or suffering if he or she testifies at the criminal proceedings (i.e. in the presence of the accused).

Where such an intermediary has been appointed, the court may also direct that electronic and other measures may be employed to ensure that the accused or any other person whose presence may upset the complainant is outside the sight and hearing of the complainant. This allows for the use of systems relying on closed circuit television or one-way mirror screens.

2. In terms of section 158(3) of the Criminal Procedure Act, a court may order that a witness (if he or she consents thereto) give evidence outside of the presence of the accused by means of closed circuit television or similar electronic media. However, the court may only make such an order if facilities therefor are readily available and if it appears to the court that to do so would -
 - Prevent unreasonable delay;
 - Save costs;

- Be convenient;
- Be in the interest of the security of the State or of public safety or in the interests of justice or the public; or
- Prevent the likelihood that prejudice or harm might result to any person if he or she testifies or is present at such proceedings.

Because of the fact that both sections 158(3) and 170A were enacted relatively recently,² the courts have not yet been presented with much opportunity to examine the constitutional implications of these sections or analyse the requirements set for the application of these measures. We will briefly recount how these issues were dealt with in two recent matters (both relating to section 170A).

□ **Constitutionality of Section 170A**

In the case of *Klink v Regional Court Magistrate NO and Others*³ a constitutional challenge was made to section 170A on the basis that this section deprived the accused of his right to a fair trial and limited his right to cross-examine state witnesses. While the court (*per* Melunsky J) recognised the right to confront and cross-examine as part of a fair trial, it was held that it was still necessary to balance the rights of the accused with the rights of witnesses not be subjected to further traumatising events in their pursuance of justice. The court emphasised that in rape cases, complainants are exposed to further trauma, possibly as severe as the trauma caused by the crime.

It is significant that Melunsky J found that constitutional interpretation required more than an attempt to ascertain the intention of the legislature from the language used. He held that constitutional questions ‘must be examined in their broader political, social and historical context in order to attempt any kind of meaningful constitutional analysis’.⁴ The learned judge then added that section 170A should be considered in this light and emphasised that -

Nothing in this section precludes an accused from representing himself or from having the right to legal counsel. Nor is an accused person, either personally or where represented through Counsel, prevented from asking questions in cross-examination. When the section is applied, the cross-examiner’s questions are put to the witness by the intermediary. This does not appear to me to be a limitation of the right to cross-examine.⁵

As a result, the court concluded that the provision did not deny the accused a right to a fair trial. Even if one were to give a broad and liberal interpretation to the fundamental rights of the accused to a fair trial, the court was satisfied that the right to cross-examine had not been violated by the provisions of section 170A of the Act.⁶

Test for the Application of Section 170A

In the recent Cape Provincial Division judgment in *S v Stefaans*⁷, the court held the trial of the appellant had not been procedurally fair, due to the fact that the trial court's appointment of an intermediary (in terms of section 170A) had not been warranted.

The prosecutor in the trial court had been informed that the complainant was afraid of the accused and would feel more confident to give evidence through an intermediary. A report by a social worker contained a similar recommendation, and the court *a quo* had accordingly granted the application for appointment of an intermediary.

On appeal, the High Court found that the criterion that the witness would be 'exposed to undue mental stress of suffering' had not been satisfied. It held that the term 'undue mental stress' ('*onredelike geestesspanning*') connoted a degree of stress greater than the ordinary stress which witnesses, including witnesses in rape cases, may experience. The likelihood of such 'undue mental stress' had not been demonstrated adequately, which implied that the intermediary should not have been appointed. The conviction was set aside.

2. CURRENT POSITION IN OTHER JURISDICTIONS

Canada

In Canada it was been held (in the case of *R v Levogiannis*)⁸ that although the right to a fair trial is a principle of fundamental justice, it does not 'entitle the appellant to the most favourable procedures that could possibly be imagined'. The argument that evidence through an intermediary or on videotape affects the right of an accused to effectively cross examine the complainant has been held not to limit the right to a fair trial, as it ultimately allows the judge to discover the entire truth and the accused is still allowed to present a complete defence.⁹

The right to cross-examine is not without limits, and the Canadian courts have held that complainants ‘should not be unduly harassed and pilloried to the extent of becoming a victim of an insensitive judicial system’.¹⁰

In the case of *R v L (D.O)*,¹¹ the Canadian Supreme Court upheld the provision in the Criminal Code that allowed for videotaping of evidence of a witness who is under the age of 18, just as it has upheld the provision allowing a witness to testify from behind a one-way screen.¹² Even though in both these cases the witnesses in question were children under the age of 18, the principle that there was a need to reduce the stress of the witness and to enhance the reliability of the evidence was clearly recognised. Significantly, it was found that these provisions did not prejudice the fairness of the trial in any way.

3. DISCUSSION

3.1 Constitutionality of Sections 158(3) and 170A of the Criminal Procedure Act

The first question to be addressed is whether or not these sections infringe the accused’s right to a fair trial. The aspects of the right to a fair trial in question here would be the right to be present when tried (in the case of section 158(3)) and the right to adduce and challenge evidence (in the case of section 170A). These rights are entrenched in the 1996 Constitution as sections 35(3)(e) and 35(3)(i) respectively.

Right To Be Present At Trial

According to section 158 of the Criminal Procedure Act, the accused must be present at all criminal proceedings. Section 158(3) clearly presents an exception to this rule. However, Steytler argues (convincingly) that this exception does not appear to be inconsistent with an accused’s right to be present at trial.¹³ While one should acknowledge that section 158(3) constitutes a limitation of the right of the accused to be present, we argue that this limitation is reasonable and justifiable when measured against the criteria prescribed in section 36(1) of the Constitution.

□ **Right To Adduce And Challenge Evidence**

The right of an accused person to challenge and adduce evidence includes the right to confront and cross-examine state witnesses (including the rape complainant). In providing for an intermediary who is only required to convey the general purport of questions during cross-examination, the section does at first glance constitute a limitation of the accused's right to cross-examine witnesses. The physical separation of the complainant from the courtroom may present a further limitation, similar to the position created by the application of section 158(3).

However, it is important to note that South African common law recognises the principle that the right to cross-examine is not an absolute one, and that cross-examination may be limited by the court where it appears to be unreasonable and a deliberate attempt to exhaust and humiliate a witness. This acknowledges that the interests of the witness are an important consideration. This was confirmed by the Appellate Division in *R v Rall*,¹⁴ where it was held that cross-examination may be limited where it appeared to be an unreasonable and deliberate attempt to exhaust and humiliate the witness.

The limitation of the accused's rights of cross-examination in order to 'protect' witnesses was therefore a well-established principle in South African law prior to the enactment of the Interim or 1996 Constitution. We submit that the entrenchment of the right to adduce and challenge evidence has not watered down this principle. On the contrary, the recent enactment of section 166(3) of the Criminal Procedure Act serves to confirm the powers of the court to curtail cross-examination by the accused (without limiting the accused's constitutional right to challenge evidence).¹⁵ This provision allows for the court to request the cross-examiner to disclose the relevancy of any particular line of examination and to impose reasonable limits on both the length and line of such cross-examination if it appears that cross-examination is being protracted unreasonably, thereby causing the proceedings to be delayed unnecessarily.

In *S v Cornelius*,¹⁶ Doney AJ expressed the opinion (in an *obiter dictum*) that the protection of the dignity of a rape victim may constitute a reasonable and justifiable limitation to an accused's right to a fair trial.¹⁷ The cross-examination of the complainant by the unrepresented accused had lasted for more an excessively long period of time, and had been filled with offensive elements which 'served no forensic purpose'. Doney AJ stated that cross-examination in this manner constituted a gratuitous violation of the dignity of the complainant:

In this matter the fairness of the appellant's trial would not have been affected in any way had the offending questions to the appellants defence been investigated and then ruled inadmissible.

Based on the principle that the right of an accused to cross-examine witnesses is not absolute, and may be limited in order to offer protection of the rights of a rape complainant, we argue that the provisions of section 170A should withstand constitutional scrutiny.¹⁹

3.2 The Tests for Application of Section 158(3) and 170A

□ Disparity between the Sections

Subsection 158(3)(e) proposes a different requirement for the use of protective measures to the one found in section 170A. In terms of section 158(3) the court should consider 'prejudice or harm' to the witness, while section 170A poses 'undue stress' to the witness as a criterion. This disparity is unsatisfactory, as appears from the following example:

- Ms X is 20 years old but mentally disabled to an extent that she has a cognitive age of 8 years. She wishes to give evidence by way of a closed circuit television system, which is readily available, and on applying the test of harm or prejudice the court grants her application in terms of section 158(3). However, due to her mental disability her testimony would obviously benefit from the appointment of an intermediary and therefore section 170A should be invoked.

The two sections clearly need to be reconciled with each other and in their present form this is not possible. As a general rule of interpretation one section in a statute should not, when applied, lead to the nullity of another section, and on this basis alone the sections need to be brought in line with each other.

Appropriateness of Present Requirements

We submit that in affording the presiding officer a broad discretion to interpret the terms 'prejudice or harm' and 'undue mental stress or suffering', both sections 158(3) and 170A permit judicial interpretation to frustrate the very purpose of the sections. The protection to be afforded to the

witness ultimately depends on the views and perceptions of the judge or magistrate, as is evident from the recent judgement in *S v Stefaans*.²⁰

In this matter, the court set out certain guidelines for the application of section 170A. These guidelines include the following (amongst others) -

- ‘It is proposed that a court is to be mindful of dangers inherent in the use of an intermediary as it may prejudice the rights of an accused in that cross-examination will be less effective, the accused has a right to confront his accusers, and it is easier to lie behind someone’s back.’²¹
- ‘The giving of evidence is inevitably stressful and therefore a judicial officer should be satisfied that “undue stress” will result as will no doubt be the case with younger or more immature witnesses.’²²
- ‘A witness who is known to the accused and who knows the accused is less likely to be unduly stressed by the need to testify before the accused than one who is unknown to the accused.’²³

We submit that these guidelines are, with respect, founded on stereotypical and misguided perceptions of rape victims, and underestimate the levels of secondary traumatisation experienced by complainants. In addition, the guidelines place an undue emphasis on the rights of the accused.

We believe that this particular decision is incorrect and should not to be followed. However, on a broader level, the judgment illustrates the dangers inherent in the broad discretion allowed by the present provisions. These potential pitfalls may be addressed by providing courts with more concrete guidelines on how to determine whether or not protective measures should apply to the testimony of complainants in rape trials.

Additional Aspects to be Considered for Reform

We have identified the following additional difficulties regarding the present provisions:

- Section 170A appears to refer to biological or chronological age only, which severely prejudices those mentally disabled victims who have a cognitive age lower than 18 years, and whose testimony would therefore benefit from the appointment of an intermediary.

- The effectiveness of these sections is at present undermined by the fact that public prosecutors often fail to inform witnesses of the availability of measures provided for under these sections. Although it is recognized that the decision whether to make an application for these special measures lies with the prosecutor, (and the court ultimately has a discretion whether to allow the application of the special measures), a duty should be placed on prosecutors to inform witnesses of the potential availability of these procedures and to provide reasons for decisions not to make an application under sections 158(3) or 170A.

4. RECOMMENDATION

We recommend the inclusion of measures permitting the use of protective measures (analogous to the provisions in sections 158(3) and 170A of the Criminal Procedure Act) in rape legislation.

In respect of these statutory measures, we further recommend -

1. The formulation of one consistent test to determine -

**whether or not an intermediary should be appointed; and
whether or not the evidence of the complainant may be heard by electronic or other means outside the presence of the accused.**

2. The development of guidelines to assist presiding officers in determining whether protective measures should be used. These guidelines should set out the factors to be considered by the court, including -

**the complainant's attitude towards the use of protective measures;
recommendations submitted by an expert witness (for example, a social worker or rape counsellor);
the need to protect the complainant from further traumatisation during her testimony;
the need to protect the dignity of the complainant by means of such protective measures;
the interests of justice in ensuring that the complainant's evidence is fully heard.**

3. The imposition of a duty on prosecutors to inform complainants of the measures provided for in these sections;

- 4. A provision allowing the court to make an order for the use of protective measures on application by either the prosecutor or the complainant.**
- 5. A provision allowing the complainant the right of recourse to appeal and review procedure where an application for the use of protective measures is denied.**

We further recommend the inclusion of appropriate training regarding these protective measures in official training programmes for presiding officers and prosecutors.

ENDNOTES

1. Act 51 of 1997.
2. Section 170A came into operation on 30 July 1993, and section 158(3) on 1 September 1997.
3. 1996 (3) BCLR 402 (E).
4. At 411F-H.
5. At 411H-I.
6. At 413G-H. See Nico Steytler *Constitutional Criminal Procedure* (1998) at 349-350 for a different conclusion.
7. *S v Stefaans* 1999 1 SACR 182 (C).
8. [1993] 4 S.C.R 475 at 492.
9. *R v Levogiannis* note 8 at 487.
10. *R v Osolin* [1993] 4 S.C.R 595 at 669.
11. [1993] 4 S.C.R 419.
12. *R v Levogiannis* note 8.
13. Nico Steytler *op cit* note 6 at 295.
14. 1982 (1) SA 828 (A).
15. See Steytler *op cit* note 6 at 348.

16. 1999 JDR 0145 (C).
17. At 18.
18. At 18.
19. Steytler correctly points out that the test applied by the court in the *Klink* judgment (i.e. the balancing of interests between the accused and the child witness) is essentially ‘a limitation enquiry’. This step usually follows after a finding that a right has in fact been violated in order to establish whether this violation is reasonable and justifiable. The court’s conclusion that the right to cross-examination is not limited is therefore at odds with this limitation enquiry. See Steytler *op cit* note 6 at 349 n 37.
20. *S v Stefaans* note 7 at 187I-188I.
21. Ibid.
22. Ibid.
23. Ibid.

CHAPTER 7: THE APPLICATION OF THE CAUTIONARY RULE IN RAPE CASES

‘It is not only the risk of conscious fabrication which 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.’

1. CURRENT POSITION IN SOUTH AFRICA

Cautionary rules are rules of practice that require presiding officers to exercise caution before accepting the evidence of certain witnesses. They are based on the assumption that the evidence of such witnesses is inherently potentially unreliable.¹

The cautionary rules have been evolved because the collective wisdom and experience of judges has found that certain kinds of evidence cannot be safely relied on unless accompanied by some satisfactory indication of trustworthiness. Corroboration may be sufficient indication of trustworthiness, but there are many others.²

The cautionary rules apply to the evidence of the following witnesses:³

- Complainants in sexual offence cases;⁴
- Single witnesses;
- Accomplices;
- Children; and
- Police informers.

The rationale for the application of a rule of caution to sexual offences has been explained by the South African Law Commission as follows:⁵

Rape usually takes place in secret and it is easy to lay a false charge and difficult to refute it. Furthermore, a complaint could be motivated by an emotional reaction or spite, an innocent man may be falsely accused because of his wealth, the complainant may be forced by circumstances to admit that she had intercourse and then represent willing intercourse as rape.

When called on to consider the scrapping of the application of this rule in sexual offence cases, the Law Commission concluded in its 1985 report that there was no need for reform in relation to this aspect of South African law.⁶ The Commission emphasized that, subject to the qualification that the rule must be 'correctly applied' and must not be elevated to a rule of evidence, those who applied it deemed it a necessary rule of practice which presented no problems to 'experienced presiding judges and magistrates'.⁷

The application of the cautionary rule in sexual offence cases has in recent years been the subject of judicial scrutiny on a number of occasions. In *S v D*⁸ the Namibia High Court (*per* Frank J) criticised the application of the cautionary rule in sexual offence cases for its irrationality, based on the absence of any empirical evidence that false charges are laid more frequently in sexual offence cases than in other criminal cases.⁹ The judge also pointed out that the vast majority of complainants in sexual assault cases were women, and added:¹⁰

... I am of the view that the so-called cautionary rule has no other purpose than to discriminate against women complainants. This rule thus probably also is contrary to art 10 of the Namibian Constitution which provides for the equality of all persons before the law regardless of sex.

The South African Appellate Division subsequently assessed these arguments in *S v M*,¹¹ and held that it was misconceived to construe the cautionary rule as discriminatory since it applied whether the complainant was male or female.¹² The court listed the dangers inherent in a complainant's evidence, which included the consideration that because of the nature of the evidence, it was always possible for the complainant to be influenced to portray voluntary participation as involuntary.

It is important to recognise that this judgment was handed down before the introduction of the Interim Constitution in 1993.¹³ The significance of the constitutional developments is the entrenchment of the notion of equality before the law and the prohibition of unfair discrimination based on sex or gender. This should cast a significantly different light on the application of the cautionary rule in rape cases.

However, against this expectation, the 1997 judgment of the Cape Provincial Division in *S v M*¹⁴ (unrelated to the earlier case discussed above) came as a disappointment. The appellant, appealing against a conviction of rape, argued that the trial magistrate had not applied the cautionary rule in a satisfactory fashion. Davis AJ conceded that it was highly problematic 'to assume automatically that women lie about rape when approaching a court',¹⁵ but accepted (without any discussion of this point) that he was bound to apply the cautionary rule in this matter.¹⁶

In applying the cautionary rule, a South African court must in terms of s 35(3) of the Republic of South Africa Constitution Act 200 of 1993, develop and apply the common law in terms of the spirit, purpose and object of the Constitution. For this reason the application of the cautionary rule shall not undermine the unequivocal constitutional commitment to gender equality.¹⁷

He therefore directed that the application of this rule in sexual offence cases should be evaluated carefully so as not to deter a complainant 'from coming before a court to tell her story truthfully and ensure that justice is done'.¹⁸ He found that in the circumstances of the case, there was no evidence that suggested an improper motive as to why the complainant should not have told the truth, and consequently did not see any reason for disturbing the magistrate's finding.

After the Cape decision, the Supreme Court of Appeal was presented with an opportunity to re-examine the application of the cautionary rule. In *S v Jackson*,¹⁹ the appellant, convicted of attempted rape in the regional court, appealed unsuccessfully to the Cape Provincial Division against his conviction and sentence, and then approached the Supreme Court of Appeal. He contended, amongst other things, that the trial court had misdirected itself in not effectively applying the cautionary rule in respect of the evidence of the complainant. The prosecution disagreed, and also argued that the basis, meaning and ambit of the cautionary rule in sexual offence cases should be revisited, since this rule was 'discriminatory against women, should not

be countenanced, is unnecessary and unfairly increases the burden of proof resting on the State in cases involving sexual offences'.²⁰

Olivier JA agreed with the prosecution's argument that the notion that women are habitually inclined to lie about being raped was without any basis, and that the reliance on the strength of 'collective wisdom and experience' for the perpetuation of the rule was, at best, suspect.²¹ Interestingly, the court conceded that the rule affected the State's burden of proof - which goes against the view expressed in the 1992 judgment in *S v M*.²²

Olivier JA then proceeded to examine the position in other legal systems where the cautionary rule and its variations had been abolished, and came to the following conclusion:

In my view, the cautionary rule in sexual assault cases is based on an irrational and out-dated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. In our system of law, the burden is on the State to prove the guilt of the accused beyond reasonable doubt - no more and no less. *The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule.*²³

The court thus removed the 'obligation' resting on a presiding officer to regard the evidence of complainants in sexual offence cases with caution merely because of the nature of the offence. In rephrasing the rule, however, Olivier JA still left considerable discretion to presiding officers to apply the rule in those cases 'calling for a cautionary approach'. He found guidance in the recent English judgment in *R v Makanjuola; R v Easton*²⁴ (discussed below), and referred to one of the guidelines formulated there as particularly significant for South African law:

'In some cases, it may be appropriate for the judge to warn the jury to exercise caution before acting upon the unsupported evidence of a witness. This will not be so simply because the witness is a complainant of a sexual offence not will it necessarily be so because a witness is alleged to be an accomplice. There will need to be an evidential basis for suggesting that the evidence of the witness may be unreliable. An evidential basis does not include mere suggestions by cross-examining counsel.'²⁵

Olivier JA's conclusion was that the magistrate had not been obliged to apply such cautionary rule. While this judgment has been hailed for its 'scrapping' of the cautionary rule, we argue that the Supreme Court of Appeal has at best left presiding officers with significant leeway to continue the application of the cautionary rule in sexual offence cases.

2. CURRENT POSITION IN OTHER JURISDICTIONS

It is significant to note that the application of the cautionary rule in sexual offence cases has been abolished in a number of foreign jurisdictions. This rule was typically expressed in other systems (depending on the nature of the specific system) as a judicial duty either to regard the evidence of complainants in sexual offence cases with caution, or to warn the jury about the dangers associated with basing the conviction of a person who is accused of a sexual offence solely on uncorroborated evidence given by the complainant.

Namibia

As set out above, the comments made by Frank J in *S v D*²⁶ suggested that the application of the cautionary rule in rape cases was inconsistent with constitutional provisions. However, because of the fact that these statements were made *obiter*, this judgment did not have the effect of 'abolishing' the cautionary rule in rape cases. (In spite of his conclusion on the potential unconstitutionality of the cautionary rule in rape cases, Frank J nevertheless proceeded to apply the rule.)²⁷

Clause 6 of the draft Combatting of Rape Bill²⁸ now provides that no court shall treat the evidence of the complainant in criminal proceedings where the accused is charged with rape or an offence of an indecent nature with special caution merely because such accused is charged with rape or an offence of an indecent nature.

The enactment of this provision will align the legal position with the judgment of the Namibia High Court in *S v D*.²⁹

England

Section 32(1) of the Criminal Justice and Public Order Act (1994) abolished the obligation to warn a jury about convicting the accused on the uncorroborated evidence of a person merely because that person is a complainant in a sexual offence case. It should be noted that this provision removed the obligation to give a warning to the jury, but still left a *discretion* to do so.

This distinction was canvassed in detail in the judgment in *R v Makanjuola, R v Easton*³⁰ which was handed down after the legislative amendments. Lord Taylor CJ stated that to carry on giving ‘discretionary’ warnings to the jury in the same way that the previously obligatory warnings had been given would be contrary to the policy and purpose of the enactment of section 32(1) of the 1994 Act. Whether judges should exercise their discretion to give any warning, and if so, the strength and terms of the warning, must depend on the content and manner of the witness’s evidence, the circumstances of the case and the issues raised. The judge may often decide that no special warning is required at all.³¹

Canada

Section 274 of the Criminal Code of Canada states that where an accused is charged with a sexual offence no corroboration is required for a conviction. This section also provides that the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration.

Notwithstanding this section, the trial judge still has a discretion when reviewing the facts with a jury to discuss the weight they may see fit to attach to the unsupported evidence of the complainant.³²

Australia

All Australian States and Territories have introduced legislation stating that a judge in a rape trial is not obliged to warn the jury about the need for corroboration of a complainant’s evidence.³³ The Australian High Court has commented that these provisions abolished the requirement to give a warning to the jury, but not a judge’s discretion to comment on the circumstances of the case. Brennan J explained as follows:³⁴

No longer may the judge tell the jury that it is dangerous to convict in the circumstances... because the experience of the courts has shown it to be so, but the judge may invite the jury in sexual cases (as is done in other criminal cases) to make their own evaluation of the alleged victim's evidence in the light of common human experience...

Bargen and Fishwick argue (convincingly) that an examination of recent cases where judges had deemed a warning to the jury necessary, reveals that despite the clear messages of new legislation, judicial scepticism towards the credibility of women complainants still prevails.³⁵

3. DISCUSSION

As one may expect from the South African Law Commission's formulation of the rationale for the application of the cautionary rule in sexual offence cases (cited above), this issue has been the subject of considerable and heated debate. In the period subsequent to the production of the 1985 Law Commission report, the abolition of this rule has been called for with increasing insistency.³⁶

The basis of the objections against the cautionary rule in sexual offence cases is primarily that its use rests on the assumption that women have an 'innate' inclination to lie in matters relating to sexual offences.³⁷ This contention, which has found no empirical support in studies comparing the prevalence of false claims in sexual offence cases with those in other criminal offences,³⁸ is based on nothing more substantial than the age-old stereotyping of women. The 1992 judgment of the Appellate Division in *S v M*³⁹ unfortunately perpetuates these objectionable assumptions.

A further objection is that although the rule is framed in gender-neutral terms (it also applies where the complainant in a sexual offence case is a man), experience has shown that the vast majority of complainants in these cases are women.⁴⁰ The rule thus operates to disproportionately affect women as a group (thus providing a classic example of 'indirect' and systemic discrimination against women).

Jagwanth and Schwikkard⁴¹ present a lucid analysis of the cautionary rule in sexual offence cases within the framework of the recent series of Constitutional court judgments on gender equality. We support their conclusion, viz that the application of the cautionary rule in sexual offence

cases is irredeemably inconsistent with the equality provisions.⁴²

The authors also (correctly) express the opinion that the 1996 Constitution, with its use of a more powerful injunction to shape the common law in accordance with the Bill of Rights, should provide the impetus for the courts to be more proactive in the fashioning of the common law.⁴³

It is against this background that the judgment in *Jackson* disappoints on a number of levels. In the first place, it is unfortunate that some of the objections apparently raised by the prosecution were not dealt with in more detail, most notably the contention that the application of the cautionary rule in sexual offence cases was discriminatory. Seen in the light of the constitutional equality provisions, a more detailed analysis of this aspect may have led Olivier JA to a different conclusion. Although he referred to conclusions drawn in other jurisdictions that the rule, for example, denied women equal protection of the law,⁴⁴ he stopped short of applying this to the South African position.

The difficulty with the court's ultimate conclusion is that while it (arguably) removes the *obligation* to treat evidence of victims of sexual assault with caution, the *discretion* to do so remains. The guideline given for the exercise of the discretion, taken from the *Makanjuola* judgment, is that there needs to be an evidential basis for suggesting that the evidence of the witness may be unreliable (thus requiring a cautionary approach). This approach holds the danger that the requirement of an 'evidential basis' for suggesting unreliability may serve to broaden the issues in dispute, leaving room for the introduction of evidence, for instance, on the previous sexual history of the complainant. Such evidence, which might otherwise have been irrelevant, would be saved from inadmissibility because of its potential utility in establishing that the evidence of the witness should be approached with caution.

Olivier JA's suggestion that the evidence in a 'particular case' may call for a cautionary approach is somewhat unclear, since it is not immediately apparent from the judgment whether this specifically refers to sexual offence matters (which appears to be the case from the context), or whether this is a broader rule applying in all criminal cases. The latter interpretation implies that in any criminal matter there may be aspects which suggest that caution is advisable (for example, that the witness is a single witness, or that the quality of evidence is not satisfactory). This approach is the general one followed in the evaluation of evidence, and one which can not be faulted in any way.

However, the alternative which suggests itself from the reading of Olivier's *dictum*, is that there are certain sexual offence cases where caution should apply *because of the nature of the case*. This version is, with respect, problematic, since it leaves judges or magistrates with a very broad discretion as to whether or not a particular case warrants this cautionary approach. In essence, this implies that a 'residual' cautionary rule may still apply in sexual offence matters.

To complete this discussion, it should also be noted that it is not exactly clear whether Olivier JA's ultimate intention was to 'abolish' the cautionary rule or to redefine it. We argue that far from 'scrapping' the cautionary rule in sexual offence cases, the judgment merely serves to reformulate the existing rule. At this stage, one has to consider the question of whether this would fall within the ambit of 'development' of the cautionary rule, and if so, whether this development is in accordance with the provisions of the Bill of Rights. (We believe that this is not the case.) This is essentially the problem which exercised the mind of Davis AJ in the recent Cape decision in *S v M*,⁴⁵ and it is regrettable that this aspect received no mention at all in *Jackson*.

We submit (with respect) that the analytical paucity of the judgment in *S v Jackson* leaves no alternative but legislative intervention. The presumption of innocence, the burden of proof on the State to prove its case beyond reasonable doubt and the rule which requires caution to be exercised where the state case depends on the evidence of a single witness, more than adequately safeguard the accused against an unjustified conviction.⁴⁶

4. RECOMMENDATION

We recommend the enactment of legislative provisions to ensure that the evidence of complainants in rape cases may not be treated with caution merely because of the nature of the alleged offence.

ENDNOTES

1. See LH Hoffmann & DT Zeffert *The South African Law of Evidence* (4th ed) 1988 572-582; Pamela-Jane Schwikkard et al *Principles of Evidence* (1997) 388-392.
2. Hoffmann & Zeffert *op cit* note 1 at 572.
3. *Idem* at 573 *et seq*; Schwikkard et al *op cit* note 1 at 388 *et seq*.
4. Although we have used the term ‘rape’ in the broad sense (as defined in Chapter 3) through the document, we elected to retain the phrase ‘sexual offence cases’ for purposes of the discussion in this chapter. This is motivated by the fact that there is a broader category of sexual offences (eg the offence of indecent assault) which may not fall under the proposed extended definition of rape, but nevertheless warrant the application of the cautionary rule.
5. South African Law Commission *Report on Women and Sexual Offences* (1985) at Par 3.55.
6. *Idem* at Par 3.69
7. *Idem* at Par 3.51.
8. 1992 1 SA 509 (NmHC).
9. At 516A.
10. At 516H.
11. 1992 2 SACR 188 (W).
12. At 194H.

13. Constitution of the Republic of South Africa Act 200 of 1993.
14. 1997 2 SACR 682 (C).
15. At 685D.
16. At 685E.
17. At 685H-I.
18. At 685E-F.
19. 1998 1 SACR 470 (SCA).
20. At 473J-474A.
21. At 474H.
22. At 193D.
23. At 476E-F. Emphasis added.
24. [1995] 3 All ER 730 (CA).
25. *R v Makanjuola, R v Easton* note 24 at 733C-D.
26. *S v D* note 8.
27. At 515I.
28. Dated 28 April 1998.
29. *S v D* note 8.

30. *R v Makanjuola, R v Easton* note 24.
31. At 732.
32. See, for example, *R v Saulnier* (2 March 1989) Unreported (NSCA).
33. Australian Capital Territory: sec 76F of the *Evidence Ordinance*; South Australia: sec 341 of the *Evidence Act*; Tasmania: sec 316 of the *Criminal Code*; Western Australia: sec 50 of the *Criminal Code Act*; Victoria: s 51 of the *Crimes Act*; New South Wales: sec 450C of the *Crimes Act*.
34. *Longman v R* (1989) 168 (CLR) 79 at 87.
35. Jenny Barga and Elaine Fishwick *Sexual Assault Law Reform: A National Perspective* (1995) at 72.
36. See, for example, Desiree Hansson 'Working against violence against women' in Susan Bazili (ed) *Putting Women on the Agenda* (1991) 185-186; Victoria Bronstein 'The cautionary rule: an aged principle in search of a contemporary justification' (1992) *SAJHR* 556; Pamela-Jane Schwikkard 'Sexual offences - the questionable cautionary rule' (1993) *SALJ* 46; Kathryn Ross 'An examination of South African rape law' in *Women, Rape and Violence in South Africa* Community Law Centre (1993) 14; Pamela-Jane Schwikkard 'A critical overview of the rules of evidence relevant to rape trials in South African law' in Saras Jagwanth et al (eds) *Women and the Law* (1994) 212; Pat Singh 'Protection from violence is a right' in Sandra Liebenberg (ed) *The Constitution of South Africa from a Gender Perspective* (1995) 37-38.
37. Schwikkard *op cit* note 36 at 207.
38. Dianne Hubbard 'A critical discussion of the law of rape in Namibia' in Susan Bazili (ed) *Putting Women on the Agenda* (1991) 34.
39. *S v M* note 11.

40. Compare Frank J's estimate in *S v D* note 8 that in at least 95% of the cases involving sexual assault heard in the Namibia High Court during 1990 the complainants were women - at 516G-H.
41. Saras Jagwanth and Pamela-Jane Schwikkard 'An unconstitutional cautionary rule' (1998) *SACJ* 87-96.
42. *Idem* at 94.
43. *Idem* at 96.
44. See, for example, Olivier JA's reference to the judgment of the Supreme Court of California in *P v Rincon-Pineda* (14 Cal 3d 864) - at 476D-E.
45. *S v M* note 14 .
46. See also Schwikkard *op cit* note 36 at 212.

CHAPTER 8: ADMISSIBILITY OF PREVIOUS CONSISTENT STATEMENTS

‘I mean this question that they keep asking you - why did you take so long to report it? - I mean what the hell... It is because - look, look at the statement first of all before you even ask that question. Because in the statement they ask you that question and I answered that question. Because he abused (threatened) me...’

Interview with Complainant E4: Stanton et al. *Improved Justice for Survivors of Sexual Violence?* (1997) at 132.

1. CURRENT POSITION IN SOUTH AFRICA

South African law of evidence prohibits the admission of statements that were made by witnesses prior to their giving evidence during a criminal trial, even where these statements contain the same information as the evidence later given in court.¹ This is described as a rule against ‘narrative’ or ‘self-corroboration’.²

An exception to this common law rule is allowed in rape cases: where the complainant makes a statement reasonably soon after the incident, to the effect that she was raped, this ‘previous consistent statement’ is admissible in court.³

In practice, this usually means that the prosecution will call the first person told of the rape by the complainant to describe the circumstances around this complaint to the court. This evidence can make a powerful contribution towards countering a defence of consent.

Requirements For Admissibility

In order for evidence of an earlier complaint to be admitted, it must have been made voluntarily and at the first reasonable opportunity.⁴ The determination of what constitutes a 'reasonable opportunity' rests with the presiding officer, and will largely depend on the age and understanding of complainants, and their opportunities for speaking to a person to whom a complaint might 'reasonably' be made.⁵ (Complaints by young children have been admitted in spite of a relatively long lapse of time - for example, a period of six weeks.)⁶ A further requirement for admissibility is that the complainant should testify at the trial.⁷

Origin of the Rule

The admission of a complaint made at the 'first reasonable opportunity' bears the influence of the English 'hue and cry' rule.⁸ In medieval England it was a defence to an allegation of rape that the complainant had not 'raised the hue and cry' immediately after the alleged offence - in other words, had not raised the alarm immediately after the rape. The complainant was required 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 her to men of good repute, the blood and clothing stained with blood, and her torn garments...'⁹

By the eighteenth century, it was still regarded as a 'strong but not necessarily conclusive presumption' against a complainant of rape that she had made no complaint in a reasonable time after commission of the alleged offence.¹⁰

According to Schmidt, the rationale for the current existence of the rule is to be found in the fact that 'experience' has shown that allegations of sexual misconduct should be treated with suspicion, and the earlier complaint will always be relevant in that it serves to rebut this suspicion.¹¹

Value of Evidence on Earlier Complaint

An earlier complaint may not be admitted to prove the truth of its contents, but merely to show consistency in the complaint.¹² While evidence regarding an earlier complaint would usually contribute towards establishing a lack of consent, it will be admissible even if consent is not in

issue.¹³

2. CURRENT POSITION IN OTHER JURISDICTIONS

Canada

Section 275 of the Criminal Code expressly abolishes the rules allowing evidence of an earlier complaint to be admissible in rape matters. This places an earlier complaint of rape on the same footing as any other evidence of previous consistent statements: this evidence is generally inadmissible, unless it can be allowed under another exception recognised by the law of evidence.

Namibia

The Namibian Law Reform and Development Commission has recognised that the trauma experienced by the complainant may cause her to delay the laying of a complaint. It also noted that it may not always be possible for her to give an explanation for the delay which will be regarded as ‘satisfactory’ by the court.¹⁴

In order to balance this consideration with the accused's right to a fair trial, the Commission proposed that the court should not assume that a ‘late’ complaint (in other words, a complaint which is not made at the first ‘reasonable’ opportunity) would in itself cast a negative light on the complainant's credibility. The court may therefore only draw an inference from a late complaint if it, together with other evidence, suggests that the charge may be false.¹⁵

Clause 7 of the draft Combatting of Rape Bill¹⁶ allows for evidence relating to all earlier complaints made by a complainant to be admissible in rape cases, provided that no inference may be drawn only from the fact that no earlier statements had been made. This means that even where the complainant did not make the complaint at the first ‘reasonable’ opportunity, this evidence may still be admitted by the court. If the court does allow the evidence, it will not be permissible for the judge or magistrate to assume that the fact that the complainant did not report the rape as soon as possible implies that she was not raped.

In addition, Clause 8 provides that in criminal proceedings where the accused is charged with rape, the court shall not draw any inference only from the length of the delay between the commission of the act and the laying of a complaint.

□ **Australia**

In most Australian jurisdictions, the common law rules on earlier complaints (which were essentially the same as the current position in South Africa) have been set aside by laws that require the judge in a rape trial to warn the jury that -

- Absence of a complaint or delay in complaining does not necessarily indicate the allegation is false; and
- There may be good reasons why a victim of sexual assault may hesitate in making, or may refrain from making a complaint about the assault.¹⁷

It has been found that because these provisions do not preclude judges from commenting on a delay in making a complaint, some judges continue to direct the jury that evidence about the absence of a swift earlier complaint can and should be used to undermine the complainant's credibility.¹⁸

By contrast, section 76C of the Evidence Act (1971) of the Australian Capital Territories provides that no evidence relating to the making of a complaint (or the terms of such complaint) by the complainant may be admitted in rape trials,¹⁹ except if such earlier complaint is admissible under any other legal rule.²⁰

3. DISCUSSION

3.1 Practical Implications of the Earlier Complaint Rule

Although the acceptance of evidence on an earlier complaint may have the effect of supporting the complainant's credibility,²¹ practical experience has shown that the rule is problematic. Where the

complainant did not make a statement at what is regarded as 'the first reasonable opportunity', the defence usually succeeds with an argument that a negative inference should be drawn about the credibility of the complainant.²² if the rape really happened, the complainant would have complained as soon as possible.

In its 1985 report, the South African Law Commission came to the conclusion that there appeared to be no need for reform in this area of law:²³

The Commission is of opinion (sic) that the correct application of the rule can in no way prejudice a rape victim. Where she did complain to someone, this could only benefit the State's case. Where no complaint was laid she would usually be able to give a good reason for not doing so. Judges and regional magistrates who try rape cases are, thanks to their wide experience, good judges of character. Where a witness had not complained owing to shock, feelings of guilt or depression, they would be able to make the correct inferences from all the circumstances...

3.2 Recognition of Recent Developments

We can not support the view expressed by the South African Law Commission. The fact that a negative inference is accepted at all by the courts reflects assumptions about the psychological effects of rape and the conduct expected of a 'reasonable' complainant which are not borne out by recent empirical advances in this area. It is now widely recognised that there are many psychological and social factors which may inhibit a complainant from reporting rape 'at the first reasonable opportunity'.²⁴ This militates against the theory that the absence of an earlier complaint should, of necessity, have a negative bearing on the reliability of the complainant.

There has been some recognition by the courts of the invalidity of the assumption that 'no earlier report means there was nothing to report'. In the recent judgment in *Holtzhausen v Roodt*,²⁵ Satchwell J analysed the rules relating to previous consistent statements, and confirmed that valid reasons may very well exist for a complainant's failure to immediately report the rape.²⁶ However, our practical experience has shown that this enlightened view is by no means the prevailing one.

3.3 Options for Law Reform

Our analysis of the manner in which the common law rules on early complaint evidence have been dealt with in other jurisdictions suggests that there are three possible strategies for reforming the common law:

- The first option is for legislation to clearly state that the rule allowing for the admissibility of evidence on earlier complaints should no longer be recognised, and that previous consistent statements may only be admitted under the general rules which allow for the admissibility of previous consistent statements under certain narrowly defined exceptions.²⁷

This approach, which would be similar to the measures adopted in Canada and the Australian Capital Territories, implies that no evidence may be led on earlier complaints, unless the evidence falls under one of the other recognised exceptions to the rule that previous consistent statements are inadmissible, for example, where a previous consistent statement is allowed to counter an allegation that the version of the witness is a recent fabrication.

- The second option is to allow evidence of earlier complaints, but to dispense with the rule that the complaint must have been made at the first reasonable opportunity. This option, which is found in Clause 7 of the Namibian Combatting of Rape Bill, means that all earlier complaints, irrespective of any delay in the reporting, would be admissible, provided that the other requirements for admissibility have been complied with. However, this would not eliminate the possibility that the presiding officer may draw a negative inference where there was a delay in making a complaint of rape.
- The third option is to state clearly that such a negative inference may not be drawn only from the absence of a complaint or a delay in making the complaint. This would retain the present requirement that a complaint must have been made at the first reasonable opportunity, which may result in evidence about the complaint not being admissible and therefore not being placed before court - this would result in the 'absence of a complaint' for purposes of trial evidence. On the other hand, it eliminates a negative inference based *solely* on the timing of the complaint. (It would be problematic to state that the court may never draw a negative inference, since this would interfere with a trial court's broad powers to evaluate evidence.)

Clause 8 of the Namibian Combatting of Rape Bill is an example of this option, and is also reminiscent of the provisions found in the Australian state legislation discussed above.

We believe that the third option is preferable, because it directly addresses the problem that exists at present, without unduly curtailing judicial discretion to evaluate evidence. Clause 7 of the Namibian Bill is instructive, in that it effectively combines the second and third options.

4. RECOMMENDATION

We recommend the inclusion of provisions similar to Clauses 7 and 8 of the Namibian Combatting of Rape Bill in rape legislation.

Where an accused is charged with rape -

- 1. Evidence relating to previous consistent statements by the complainant shall be admissible, provided that no inference may be drawn only from the fact that no such previous statements have been made;**
- 2. The court shall not draw any inference regarding the credibility of the complainant only from the length of time between the commission of the act and the laying of a complaint.**

ENDNOTES

1. See DL Hoffmann & AD Zeffert *The South African Law of Evidence* 4th ed (1988) at 117; Pamela-Jane Schwikkard et al *Principles of Evidence* (1997) at 95.
2. Hoffmann & Zeffert *loc cit* note 1; Schwikkard et al *op cit* note 1 at 95-96.
3. It should be noted that the term ‘previous consistent statements’ relates to all such statements, irrespective of admissibility. In order to distinguish the specific form of such statements we refer to here (i.e. a report of rape), we employ the term ‘*earlier complaint*’. This term refers to a so-called ‘first’ report of the rape, but is not limited to complaints made ‘at the first reasonable opportunity’.
4. See *R v C* 1955 4 SA 40 (N).
5. See Hoffmann & Zeffert *op cit* note 1 at 119.
6. *R v T* 1937 TPD 398.
7. See eg Schwikkard et al *op cit* note 1 at 99 n 37 and authority cited there.
8. See Hoffmann & Zeffert *op cit* note 1 at 118 *et seq*; Pamela-Jane Schwikkard ‘A critical overview of the rules of evidence relevant to rape trials in South African law’ in Saras Jagwanth et al (eds) *Women and the Law* (1994) at 199-200; Louise Fryer ‘Law versus prejudice: views on rape through the centuries’ *SACJ* (1994) 60-77.
9. H de Bracton *On the Laws and Customs of England* translated by FR Thorne (1968) 415 cited in Schwikkard *op cit* note 8 at 200.
10. Hoffmann & Zeffert *op cit* note 1 at 118; Fryer *op cit* note 8 at 73.
11. CWH Schmidt *Bewysreg* 3rd ed (1989) at 381.
12. *R v Kgaladi* 1943 AD 255.

13. *R v Osborne* [1905] KB 551.
14. Namibia Law Reform and Development Commission *Report on Draft Combatting of Rape Bill* (July 1997) at 6.
15. *Ibid.*
16. Draft Combatting of Rape Bill (dated 21 April 1998).
17. New South Wales: section 405B of the Crimes Act (1990). See also Tasmania: Section 371A of the Criminal Code Act; Victoria: section 61 of the Crimes Act; Western Australia: section 36BD of the Evidence Act.
18. Jenny Barga and Elaine Fishwick *Sexual Assault Law Reform: A National Perspective* (1995) at 69.
19. Section 76C(1).
20. Section 76C(2).
21. See, for example, *S v S* 1990 1 SACR 5 (A), where the evidence of an earlier report contributed towards the conviction of the accused.
22. For example: *R v M* 1959 1 SA 352 (A). See generally Schwikkard *loc cit* note 9.
23. South African Law Commission *Report on Women and Sexual Offences* (1985) at Par 3.50.
24. See Schwikkard *op cit* note 8 at 201 n 17 and authority cited there.
25. [1997] 2 All SA 552 (W).
26. At 561H-J.
27. Schwikkard *op cit* note 8 at 200-201.

CHAPTER 9: EVIDENCE OF THE PREVIOUS SEXUAL HISTORY OF THE COMPLAINANT

'They were irrelevant questions, for example, he asked me when did I have my first relationship, but I felt that question was irrelevant because it had nothing to do with me being raped.'

Interview with Complainant X4: Stanton et al *Imprvoed Justice for Survivors of Sexual Violence?* (1997) at 132. [Translation from Xhosa.]

1. CURRENT POSITION IN SOUTH AFRICA

Evidence relating to the character of witnesses in criminal cases is generally regarded as irrelevant to the credibility of such witnesses. Evidence which is solely directed at establishing that a witness has a bad (or good) character is therefore prohibited.¹

An exception to this general rule is to be found in cases involving charges of rape or indecent assault. In terms of section 227(2) of the Criminal Procedure Act (as amended in 1989),² the admissibility of evidence relating to the previous sexual history of the complainant depends on a preceding finding of relevance by the court:

227 (2) *Evidence as to sexual intercourse by, or any sexual experience of any female against or in connection with whom any offence of a sexual nature is alleged to have been committed, shall not be adduced, and such female shall not be questioned regarding such sexual intercourse or sexual experience, except with the leave of the court, which leave shall not be granted unless the court is satisfied that such evidence or questioning is relevant: Provided that such evidence may be adduced and such female may be so questioned in respect of the offence which is being tried.*

- (3) *Before an application for leave contemplated in subsection (2) is heard, the court shall direct that any person whose presence is not necessary may not be present at the proceedings, and the court may direct that a female referred to in subsection (2) may not be present.*

The provisions of section 227(2) are reminiscent of legislation enacted in other jurisdictions aimed at curtailing the presentation of irrelevant evidence regarding the complainant's sexual history - referred to as so-called 'rape shield laws'. (In the Canadian case of *R v Seaboyer; R v Gayme*³ McLachlin J correctly points out that this term is unfortunate, since the legislation offers protection not against rape, but against the 'questioning of complainants in trials for sexual offences'.)

Prior to the introduction of section 227 in its present form in 1989, the admissibility of evidence on previous sexual history was determined with reference to the common law position.⁴ This enabled the defence to question the complainant as to her previous sexual relations with the accused. Although the accused was prohibited from leading evidence of the complainant's sexual relations with other men, she could be cross-questioned on this aspect since it was viewed as relevant to credibility. Evidence to contradict denials of previous sexual history by the complainant could only be led if such evidence was relevant to consent. These rules implied that in practice, evidence on previous sexual history was admitted relatively freely.⁵

The current formulation of section 227 followed a recommendation of the South African Law Commission in its 1985 report that legislation was required to afford complainants the necessary protection against unwarranted disclosure of their previous sexual history.⁶ The Law Commission however pointed out that a distinction should be drawn between evidence concerning previous sexual experience with the accused on the one hand and with a person other than the accused on the other hand:

In the case of the former, the questions will always be relevant and their limitation by the legislature may involve a very real danger of prejudicing the accused.⁷

This view is reflected in the subsequent amendment of section 227 in the form of the proviso to subsec 227(2), which states that the presentation of evidence and cross-examination regarding the previous sexual history of the complainant is allowed in respect of 'the offence which is being tried'.

2. CURRENT POSITION IN OTHER JURISDICTIONS

Although 'rape shield laws' have been enacted in a number of foreign jurisdictions,⁸ this analysis will focus on recent developments in *Canadian* legislation. We are of the opinion that Canadian jurisprudence may be of particular significance to South African law, given the similarities in the relevant constitutional provisions of South Africa and Canada.

The relevant provisions are sections 276 and 277 of the Canadian Criminal Code. The development of section 276 is significant, and will be explored here in some detail. The present version of section 276 was preceded by provisions⁹ which considerably limited the admissibility of evidence of previous sexual history by stating that no evidence could be adduced by or on behalf of the accused concerning the sexual activity of the complainant with any person other than the accused unless -

- It was evidence that rebutted evidence of the complainant's sexual activity or absence thereof that had previously been adduced by the prosecution;
- It was evidence of specific instances of the complainant's sexual activity tending to establish the identity of the person who had had sexual contact with the complainant on the occasion set out in the charge; or
- It was evidence of sexual activity that had taken place on the same occasion as the sexual activity that formed the subject-matter of the charge, where that evidence related to the consent that the accused alleged he had believed the complainant to have given.

2.1 The Constitutional Challenge in *R v Seaboyer*; *R v Gayme*

The constitutionality of sections 276 and 277 was challenged in *R v Seaboyer*; *R v Gayme* on the basis that these sections allowed for the exclusion of admissible evidence which may be relevant to the defence, thus permitting an infringement of the constitutionally protected rights to life, liberty and security¹⁰ and to a fair trial¹¹.

In a landmark judgment, the Supreme Court of Canada (per McLachlin J) held that section 276 was indeed inconsistent with sections 7 and 11(d) of the Charter, and that this inconsistency was not justified under section 1 of the Charter. Section 277 was held not to be inconsistent with the Charter.

McLachlin J explained that the first objection to section 276 was its failure to distinguish between the different purposes for which evidence of previous sexual conduct may be tendered.¹² The evil to be addressed was not evidence of sexual activity *as such*, but the misuse of evidence of sexual activity for irrelevant and misleading purposes, namely the inference that the complainant had consented to the act or that she was an unreliable witness. This misperception had led to legislation in the form of an absolute prohibition of evidence of previous sexual activity, regardless of the purpose for which it is tendered.¹³

The second objection against section 276 was that its format (a blanket exclusion supplemented by certain narrowly delineated exceptions) was incapable of dealing adequately with the real evidential concern (i.e. whether or not the evidence is truly relevant, and not merely irrelevant and misleading). This in effect amounted to predicting relevance on the basis of a series of categories.¹⁴ The court pointed out that relevance was very much a function of other evidence and issues in a case, and it was therefore problematic to rely on categories of admissible evidence which could never anticipate the multitude of circumstances which would arise in trials for sexual offences.¹⁵ (The governing concept should instead be whether the evidence was being tendered for an irrelevant, ‘illegitimate’ purpose.)

McLachlin J found that section 276 had the potential to exclude otherwise admissible evidence which could be necessary for an accused to make full answer and defence.¹⁶ Such evidence is excluded absolutely, without any means of evaluating whether in the circumstances of the case the integrity of the trial process would be better served by receiving it or excluding it.¹⁷ Section 276 thus permitted the infringement of the rights enshrined in sections 7 and 11(d) of the Charter.¹⁸

The next step was to ask whether such infringement was justified under section 1 of the Charter and the court’s ultimate conclusion was that section 276 could not be saved.¹⁹ While its purpose - the abolition of outmoded, sexist-based use of sexual conduct evidence - was laudable, its effect went beyond what was required or justified by that purpose.

At the same time, striking down section 276 did not imply reversion to the old common law rules, which permitted evidence of the complainant's sexual conduct even though it may have had no probative value to the issues in dispute. McLachlin J instead suggested the following approach:²⁰

Instead, relying on the basic principles that actuate our law of evidence, the courts must seek a middle way that offers the maximum protection to the complainant compatible with the maintenance of the accused's fundamental right to a fair trial.

The court then proceeded to lay down certain guidelines to be followed in the evaluation of the admissibility of evidence of previous sexual history.²¹ (These guidelines are discussed in more detail below.)

Section 277 (which was also challenged) was, by contrast, held not to infringe the right to a fair trial, since this provision prohibited evidence of sexual reputation for the purpose of challenging or supporting the credibility of the complainant. It therefore excluded evidence which could serve no legitimate purpose in the trial without touching evidence which may be tendered for valid purposes.²²

2.2 Legislative Amendments following *R v Seaboyer*

In response to the *Seaboyer* decision, the Canadian legislature enacted the current version of section 276.²³ In terms of section 276(1), evidence of the complainant's previous sexual activity is inadmissible to support an inference that, by reason of the sexual nature of that activity, the complainant is more likely to have consented to the sexual activity that forms the subject matter of the charge or is less worthy of belief. This applies even where the previous sexual activity took place between the complainant and the accused.

Further, evidence that the complainant has engaged in sexual activity (whether with the accused or with any other person) other than the sexual activity forming the subject-matter of the charge, is prohibited unless the presiding officer determines that this evidence -

- Is of specific instances of sexual activity;
- Is relevant to an issue at trial; and

- Has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.²⁴

Subsection 276(3) lists the eight factors which the presiding officer must consider in determining the admissibility of evidence of previous sexual history of the complainant:

- The interests of justice, including the right of the accused to make full answer and defence;
- Society's interest in encouraging the reporting of sexual assault offences;
- Whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
- The need to remove from the fact-finding process any discriminatory belief or bias;
- The risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
- The potential prejudice to the complainant's personal dignity and rights of privacy;
- The right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
- Any other factor that the presiding officer considers relevant.

If the defence seeks to introduce sexual history evidence under subsection 276(2), it must submit a written application to the presiding officer for a hearing to determine the admissibility of such evidence.²⁵ This application must contain detailed particulars of the evidence which the accused seeks to adduce and must set out the relevance of the evidence to the issue at the trial.²⁶ A copy of the application must be given to the prosecutor and the clerk of the court at least seven days (or such shorter interval as the presiding officer may allow where required by the interests of justice) before the consideration of the application.²⁷

Where the presiding officer finds that the application complies with the requirements regarding the contents and the timely submission of copies of the application, and that the evidence is capable of being admissible under subsection 276(2), a hearing will be conducted (in the absence of both the jury and the public).²⁸ At the conclusion of the hearing the judge will determine whether the evidence (in whole or in part) is admissible. The judge must give reasons in writing for the decision and state in particular how sexual history is relevant to the issue at trial.²⁹ The complainant may not be compelled to testify at such hearing.³⁰

It is significant that the Preamble to the amendment act details the legislature's concern with the

incidence of sexual violence in Canadian society (in particular the prevalence of sexual assault against women and children). The Preamble also recognises the unique character of the offence of sexual assault and how sexual assault, and more particularly, the fear of sexual assault, affects the lives of people. The intention of Parliament is to promote and help ensure the full protection of the rights guaranteed under sections 7 and 15 of the Canadian Charter of Rights and Freedoms.

The legislature sets out its wish to encourage the reporting of incidents of sexual violence, and to provide for the prosecution of offences within a framework of laws that are consistent with the principles of fundamental justice and that are fair to complainants as well as accused persons. The new legislation is enacted in a belief that at trials of sexual offences, evidence of the complainant's sexual history is rarely relevant and that its admission should be subject to particular scrutiny, bearing in mind the inherently prejudicial character of such evidence.³¹

2.3 Constitutionality of New Provisions

The constitutionality of the 'new' section 276 was recently challenged in *R v Darrach*.³² The appellant in this matter had initially been convicted of sexual assault in the Ontario Court (Provincial Division). On appeal to the Ontario Court of Appeals he alleged, amongst other things, that section 276(1) was unconstitutional since it contained a 'blanket prohibition' against the admission of a complainant's previous sexual history.

Morden ACJO referred to the *Seaboyer* judgment for guidance in evaluating the admissibility of previous sexual history evidence, and applied the following principle as set out in *Seaboyer*. Evidence that the complainant has engaged in consensual sexual conduct on other occasions (including past sexual conduct with the accused) is not admissible solely to support the inference that the complainant is by reason of such conduct more likely to have consented to the sexual conduct at issue in the trial or less worthy of belief as a witness.

The court found that the critical question was the meaning and scope of section 276(1), and whether it was in accordance with the above principle, which was aimed at excluding resorting to evidence of previous sexual activity on the basis of the reasoning underlying the 'twin myths' - i.e. that an unchaste woman is more likely to have consented and is less credible. Inferences solely for these purposes are invalid.

While the wording in sec 276(1) was not in all respects the same as the statement of principle in *Seaboyer*, both were intended to prohibit the admissibility of evidence sought to be admitted in recourse to either of the twin myth inferences. It was clear that the legislature had contemplated the concept of ‘potential multiple relevance’ and had intended to place an absolute prohibition on only one use of sexual history evidence - the use for ‘twin myth’ purposes. (Admissibility of the evidence for other uses would have to be decided under subsection 276(2)). Therefore, a proper reading of sec 276(1) would show that it did not exclude relevant and ‘probative’ evidence, and therefore passed constitutional muster. The other provisions of sec 276 challenged by the appellant similarly conformed to the *Seaboyer* guidelines.

Because the *Darrach* judgment arose from a factual situation where the complainant had a prior sexual relationship with the appellant, the court specifically pointed out that the application of sec 276(1) to sexual activity with the accused was in line with the guidelines in *Seaboyer*. Although the evidence of previous sexual activity with the accused will likely satisfy the requirements of admissibility in sec 276(2) more often than that of sexual activity with others, this did not mean that such evidence would always be admissible.

3. DISCUSSION

It is trite law that the criterion for the admissibility of evidence is relevance. Traditionally, evidence on the previous sexual history of complainants in rape cases was believed to be relevant to consent and the credibility of the complainant as witness.³³ This rule provides a stark exception to the general rule that the character of a witness is not relevant to credibility (or lack thereof),³⁴ and implies that a woman who has previously engaged in sexual activity is more likely to consent to sexual activity on any other occasion. Further, she is also generally more inclined to be untruthful and thus unreliable as a witness.

Schwikkard notes that the 1989 amendments to section 227 unfortunately did not go far enough to provide complainants in rape cases with protection against unwarranted disclosure of their previous sexual history.³⁵ The very purpose for which the amended section was enacted, is undermined by the wide discretion conferred on presiding officers, since the same judicial officers who in the past had failed to exercise their discretion to exclude irrelevant previous sexual history evidence are now required to make the decision regarding the relevance of such evidence.³⁶

According to our analysis, legislative provisions that regulate the admissibility of previous sexual history evidence may be placed on a continuum. On the one end we find provisions which confer a virtually unfettered discretion on presiding officers to determine the admissibility of such evidence on the broad (and subjective) basis of ‘relevance’. While this model runs no risk of infringing the right of the accused to a fair trial through curtailment of the right to adduce and challenge evidence, it does potentially expose the complainant to an increased level of scrutiny of her past sexual history. This contributes to the secondary victimisation and humiliation of the complainant, and eventually deters complainants from reporting sexual offences.³⁷

On the other end of the spectrum we find an absolute prohibition of admissibility, with a narrow range of defined categories where such evidence may be admitted. This model has been suggested as a solution to the problems caused by the present provisions of section 227(2).³⁸ Interestingly, the amendments regarding admissibility of evidence of previous sexual history proposed in the Namibian Combatting of Rape Bill are also based on this model.³⁹

However, we are concerned that this option may not withstand constitutional scrutiny, and may suffer a fate similar to that of the previous version of section 276 of the Canadian Criminal Code. The current version of sections 276 and 277 are located between the two ends of the continuum, and is capable of balancing the right to a fair trial of the accused with the protection of the interests of the complainant and broader societal interests. We therefore propose the enactment of similar measures.

4. RECOMMENDATION

We recommend the inclusion of provisions similar to the present sections 276 and 277 of the Canadian Criminal Code in rape legislation:

Clause 1: Evidence of Previous Sexual History of Complainant

- (1) Where an accused is charged with rape or attempted rape, evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that by reason of the sexual nature of the activity, the complainant**
 - (a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or**

- (b) is less worthy of belief.
- (2) In proceedings in respect of an offence referred to in subsection (1), no evidence shall be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines, in accordance with prescribed procedures, that the evidence -

 - (a) is of specific instances of sexual activity;
 - (b) is relevant to an issue at trial; and
 - (c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.
- (3) In determining whether evidence is admissible under subsection (2), the court shall take into account -

 - (a) the interests of justice, including the right of the accused to make a full answer and defence;
 - (b) society's interest in encouraging the reporting of sexual assault offences;
 - (c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
 - (d) the need to remove from the fact-finding process any discriminatory belief or bias;
 - (e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;

- (f) **the potential prejudice to the complainant's personal dignity and rights of privacy;**
- (g) **the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and**
- (h) **any other factor that the court considers relevant.**

Clause 2: Procedure to Determine Admissibility

- (1) **Application may be made to the court by or on behalf of the accused for a hearing to determine whether evidence is admissible under subsection 1(2) above.**
- (2) **Such application must be made in writing and must set out -**
 - (a) **detailed particulars of the evidence that the accused seeks to adduce; and**
 - (b) **the relevance of that evidence to an issue at trial,**
- (3) **A copy of the application must be given to the prosecutor and to the clerk of the court.**
- (4) **The court shall consider the application *in camera*.**
- (5) **Where the court is satisfied -**
 - (a) **that the application was made in accordance with subsection (2);**
 - (b) **that a copy of the application was given to the prosecutor and to the clerk of the court at least seven days previously, or such shorter interval as the court may allow where the interests of justice so require; and**

- (c) that the evidence sought to be adduced is capable of being admissible under subsection (2) -

the court shall grant the application and hold a hearing under section 3 to determine whether the evidence is admissible under subsection 1(2).

Clause 3: Hearing to Determine Admissibility of Evidence

- (1) A hearing to determine whether evidence is admissible under subsection 1(2) shall take place *in camera*.
- (2) The complainant is not a compellable witness at the hearing.
- (3) At the conclusion of the hearing, the court shall determine whether the evidence, or any part thereof, is admissible under section 1(2) and shall provide reasons for that determination, and
- (a) where not all of the evidence is to be admitted, the reasons must state the part of the evidence that is to be admitted;
 - (b) the reasons must state the factors referred to in subsection 1(3) that affected the determination; and
 - (c) where all or any part of the evidence is to be admitted, the reasons must state the manner in which that evidence is expected to be relevant to an issue at trial.
- (4) The reasons provided under subsection (3) shall be entered in the record of the proceedings, or where the proceedings are not recorded, shall be provided in writing.

Clause 4: Evidence of Sexual Reputation

In proceedings in respect of a charge of rape or attempted rape, evidence of the sexual

reputation of the complainant, whether general or specific, is not admissible for the purpose of challenging or supporting the credibility of the complainant.

ENDNOTES

1. See Pamela-Jane Schwikkard et al *Principles of Evidence* (1997) at 60.
2. Amended by section 2 of the Criminal Law and Criminal Procedure Amendment Act 39 of 1989.
3. *R v Seaboyer; R v Gayme* [1991] 2 R.C.S. 577 at 604.
4. Section 227 of the Criminal Procedure Act 51 of 1977 (prior to amendment in 1989).
5. Schwikkard et al *op cit* note 1 at 60-61.
6. South African Law Commission *Report on Women and Sexual Offences* (1985) Par 3.24 - 3.31.
7. *Idem* at Par 3.24 - 3.25.
8. For example Section 2 of the Sexual Offences (Amendment Act) 1976 (England).
9. R.S.C., 1985, c. C-46 (formerly sections 246.6 and 246.7 of the Criminal Code).
10. Section 7 of the *Canadian Chapter of Rights and Freedoms*.
11. Section 11(d) of the *Charter*.
12. *R v Seaboyer* note 3 at 618.
13. At 618-619.

14. At 619.
15. At 620-621.
16. At 616.
17. At 620.
18. At 620, 625.
19. At 626-627.
20. At 598.
21. At 632-636.
22. At 612-613
23. Enacted by R.C., 1992, c. 38, s. 2, which came into force on 15 August 1992.
24. Subsection 276(2).
25. Subsection 276.1(1).
26. Subsection 276.1(2).
27. Subsection 276.1(4)(c).
28. Subsection 276.2(1).
29. Subsection 276.2(3).
30. Subsection 276.2(2).

31. See Preamble to S.C. 1992, c. 38.
32. *R v Darrach* [Judgment by Ontario Court of Appeals dated 4 February 1998, Judgment No C19455.]
33. See Etienne du Toit et al *Commentary on the Criminal Procedure Act* (1993) at 24.100A.
34. Schwikkard et al *op cit* note 1 at 60.
35. *Idem* at 61.
36. *Ibid.*
37. South African Law Commission *op cit* note 6 at Par 3.28; Pamela-Jane Schwikkard ‘A critical overview of the rules of evidence relevant to rape trials in South African law’ in Saras Jagwanth et al (eds) *Women and the Law* (1994) at 204.
38. Schwikkard *op cit* note 37 at 205-206.
39. Clause 17 of the *Draft Combatting of Rape Bill* (dated 21 April 1998).

CHAPTER 10: EXPERT EVIDENCE

'I am of the view that it would be unwise and it would be irresponsible for myself as a judicial officer, who is lacking in special knowledge and skill, to attempt to draw inferences from facts which have been established as evidence, without welcoming the opportunity to learn and to receive guidance from an expert who is better qualified than myself to draw inferences that I am required to draw.'

Satchwell J in *Holtzhausen v Roodt* 1997 3 All SA 551 at 561 G-H.

1. CURRENT POSITION IN SOUTH AFRICA

Opinion evidence is generally inadmissible in South African courts because it lacks probative value - it cannot assist the court in determining the *facta probanda* of a case. There are, however, generally two situations where opinion evidence is admissible on account of its relevance:

- Expert opinion evidence is admissible to prove matters or issues of specialised knowledge; and
- The opinion of a lay witness may be received on matters within the competence and experience of people generally.

Opinion evidence may therefore be admissible if it can assist the court in determining the ultimate issue or if it is of material assistance to the court. Thus, if the issue is of such a nature that a witness

is in a better position than the court to form an opinion, the opinion will be admissible on the basis of its relevance.¹ Any opinion, however, whether expert or non-expert, which is expressed on an issue which the court can decide without receiving such opinion is in principle inadmissible because it is deemed 'superfluous' and thus irrelevant.²

A witness, who is by reason of their special knowledge and skill, better qualified than the court to draw proper inferences and who can furnish the court with information falling outside the knowledge and experience of any reasonable court, is considered an expert. A party to the proceedings who wishes to call an expert should satisfy the court that the witness is indeed an expert in his or her field and an expert for the purpose for which she or he is called.³

In *Mohamed v Shaik*⁴ it was said that it is the function of the court to decide whether an expert has the necessary qualifications and experience to enable her or him to express reliable opinions. Formal qualifications are not always essential and in many instances the practical experience of the witness might be decisive.⁵ The fundamental test is still whether the evidence can assist the court and the result is that in certain circumstances formal qualifications without practical experience, may not be enough to qualify the witness as an expert.⁶

Legal scholars have argued that the necessary qualifications of an expert witness have been narrowly defined.⁷ Judicial interpretation has not only defined who is an expert, but has also defined those instances where expert evidence is essential. The problem with the admission of expert testimony, therefore, is not with the rules of the law of evidence, but with the interpretation of these rules.

It is accepted that the true function of an expert witness is to guide the court to a correct decision on questions falling within the former's specialised field, but that the court must still decide the issues in dispute.⁸ The opinion of the expert, therefore, should not displace the decision which the court is required to make.

A general framework for the admissibility of expert testimony in criminal cases is set out by Hoffmann and Zeffert:⁹

- The court must be satisfied that the witness possesses sufficient skill, training or experience to assist it.
- His or her qualifications have to be measured against the evidence he or she has to give in

order to determine whether they are sufficient to enable him or her to give relevant evidence.

- It is not always necessary that the witness's skill or knowledge be acquired in the course of his or her profession. It is dependent on the topic.
- An expert witness may be asked to state his or her opinion either as an inference from facts within his or her personal knowledge, or upon the basis of facts proved by others (the testimony's probative value is increased if reasons are given for the opinion).
- The weight of the expert's opinion really depends on his or her reasons for that opinion and why it gives relevant assistance to the court. Expert witnesses are, in principle, required to support their opinions with valid reasons. They should be able to explain why they hold a particular belief or draw a particular inference. If proper reasons are advanced in support of an opinion, the probative value of such opinion will of necessity be strengthened. Expert evidence should also be linked with the other facts of the cases and will of necessity lose all evidential value if its factual basis is found not to have been proved.

2. DISCUSSION

It is acknowledged here that 'expert evidence' spans a broad range of areas of speciality. In the following sections however we will address, firstly, the admissibility of evidence on the phenomenon of Rape Trauma Syndrome, and will then consider the broader implications of the admission of expert evidence on the effects of rape in the trial on the merits.

2.1 The Admissibility of Evidence on Rape Trauma Syndrome in South Africa

Although the presentation of expert evidence on the psychological effects of rape for the purposes of sentencing is not unprecedented in South Africa, Rape Trauma Syndrome [RTS], as a recognised phenomenon, however, was only accepted in 1992 in *S v Daniels and Three Others*.¹⁰ This case involved a young working class woman who, after leaving a nightclub, was abducted and robbed by four young working class men who then took her to a deserted beach where they raped her repeatedly. The rape victim was assessed by a clinical psychologist who prepared a comprehensive report on the impact of this rape on the victim and gave evidence on RTS in court. The evidence of

RTS was considered favourably by the court:

The state led evidence that highlighted the horror of this trauma in a very insightful manner. I accepted [the clinical psychologist's] testimony. She submitted a detailed report, and this as well as her testimony helped the court to understand in greater depth, the consequences of this cruel assault. Her description of what is appropriately termed 'Rape Trauma Syndrome', made sense and helped me to understand the variety of psychological problems as manifestations of a recognized pattern.

Though this case served its purpose in both assisting the court on the often disparate symptoms of rape victims as well as advancing expert testimony on RTS in sentencing, there is need to ensure that evidence relating to RTS is led at trial stage. RTS has a sufficient scientific basis and acceptance within the counselling, psychiatric and psychological communities to satisfy the test of admissibility during the course of the trial on the merits, as well as at the sentencing stage.

2.2 The Admissibility of Expert Evidence on the Effects of Rape in Trial on the Merits

The value of expert evidence was specifically examined in the recent case of *Holtzhauzen v Roodt*.¹¹ Here, the Witwatersrand Local Division of the High Court had to assess the admissibility of expert evidence relating to Rape Trauma Syndrome, in the face of an objection that the relevance of such evidence was questionable.¹² The principles applied by Satchwell J to the admissibility of the expert evidence were similar to the general framework of admissibility set out by Hoffmann and Zeffert.¹³

Satchwell J found that the expert witness testifying in this case did indeed qualify as an expert, for the following reasons:

- Her evidence was 'of assistance to the court' and 'helpful', and that these are the criteria that the court should use in its assessment as to whether or not the evidence is relevant.
- Though it was argued by the defence that the expert's testimony would not assist the court in coming to the conclusion as whether or not there had been a rape and, because the expert did not have any knowledge of the defendant, the expert's evidence could not be relevant because her evidence would be only conjecture and would not offer any reasonable inferences, the court held that general evidence was indeed frequently used by the court and thus the

evidence was admissible. The court, itself, she stated, engaged in its own process of inferential reasoning and thus the expert's testimony was admissible.

- In relation to the special knowledge and skill of the expert witness, Satchwell J said that the rape of a woman is unlikely to be a topic or experience within the personal knowledge or experience of many judicial officers or any at all. She further stated that:¹⁴

[T]he ability of a judicial officer such as myself to fully comprehend the kaleidoscope of emotion and experience, of both rapist and rape survivor, is extremely limited. In such circumstances I am of the view that it would be unwise and it would be irresponsible for myself as a judicial officer, who is lacking in special knowledge and skill, to attempt to draw inferences from facts which have been established by evidence, without welcoming the opportunity to learn and to receive guidance from an expert who is better qualified than myself to draw the inferences which I am required myself to draw.

- With regard to who should decide on the qualifications of an expert witness, Satchwell J held that it is for a judge to determine whether the witness has undergone a special course of study or has such experience or skill as will render him or her an expert in a particular subject. She also stated that it is certainly not necessary for the expertise to have been acquired 'professionally'.
- Finally, the value attached to the evidence would be assessed in light of all the evidence presented: the court would determine the probative value of the evidence and the extent to which it assisted the court in understanding the evidence presented before it.

We submit that the purpose of expert testimony in rape cases, should not only be to assist the court in understanding the 'common' experiences of rape victims, but to explain the context in which an individual rape victim acted and thus explain the possible reasons for her actions. The symptomology, contexts and circumstances of rape are complex - the degree and importance of which will vary from cases to case - and requires expert opinion. Presenting the individual woman's perspective in a criminal trial, educates the judge about these complex dynamics of rape, to the extent that they explain the complainant's conduct, which can be argued as perfectly legitimate responses to the rape.

Expert evidence is also a logical extension of the prosecution's case against the accused in that it

can address issues such as -

- The reasons for delays in reporting or disclosure of a rape;
- The short and long term psychological and emotional effects of rape on the victim;
- The statements given at first report to the police and possible inconsistencies in reports made at later stages;
- The reluctance of victims to testify;
- The disintegration of the victim just before trial or while testifying;
- The withdrawing of charges;
- The corroboration of the victim's assertion that the conduct was not consensual; and
- The possible explanation of memory lapses.

The expert can thus assist the court by pointing out the similarities between traumatic symptoms, like Rape Trauma Syndrome, and the facts in the complainant's case. Expert evidence is particularly crucial in situations where a complainant's actions or responses to the rape depart from the traditional notions of how a rape victim should behave.

The court's knowledge can be enhanced by the expert's knowledge and experience of the effects of rape and can, without a doubt, also clear up the myths and stereotypical assumptions about rape victims' behaviour during and after a rape and the reasonableness of their actions. The importance of expert evidence is illustrated in the *Holtzhauzen* judgment, where the expert explained why the complainant may not have reported the rape immediately, contributing to the establishment of the credibility of the complainant's testimony about the rape.

Instead of casting further doubt on the accuracy of the victim's testimony about the course of events during and after the rape, the explanation of possible 'inconsistent' statements and behaviour by an expert witness, can actually reinforce their credibility.

2.3 The Role of Lay Counsellors in Rape Cases

Although the expertise of psychologists and psychiatrists is generally regarded as acceptable in rape cases, lay counsellors however are still perceived as unqualified to testify, though they may be suitably trained and have many years of experience working with rape victims.

We believe that there is an unwarranted degree of faith in the 'qualifications' of psychologists and psychiatrists as psychological explanations of behaviour may too be based on theoretical positions unsubstantiated by empirical data or even experience in counselling rape victims. International research is also beginning to challenge the assumption that medical or clinical professionals (psychologists or psychiatrists) are either 'better trained' or better able to provide reliable evidence relating to the behaviours and psychological condition of rape victims than lay counsellors. Studies have shown that there is almost no evidence that psychologists and psychiatrists with extensive experience or special qualifications perform better as expert witnesses in rape trials than other mental health professionals in their area.¹⁵

The use of experts from psychology and psychiatry in rape trials should be limited to matters relating to specialised clinical judgement, unless the expert has some specialisation in the area of rape, such as RTS. There is some confusion as to the role (and credibility) of these professionals in rape cases and it is submitted here that the explanation of the *sequelae* of behaviours of rape victims could credibly and reliably be done by lay counsellors.

The issues of expertise (the extent to which the expert is capable of making correct assertions based on skill, training, knowledge and experience) and trustworthiness (the degree to which the court perceives those assumptions to be valid), will emerge in cross-examination and reveal credibility.¹⁶ It is submitted here that lay counsellors have the requisite expertise to render opinions on RTS and other behavioural issues relating to the responses or actions of the victim during and after an alleged rape. Prosecutors and judicial officers, however, must be prepared to establish the credibility of counsellors in the courtroom and ask questions designed to demonstrate the competence, expertise and trustworthiness of these witnesses.

From the *Holzhausen* judgement, one can indeed infer that lay counsellors may qualify as 'experts' and should be recognised by the courts as such.

The admissibility of lay counsellor's evidence is thus both relevant to the issue at hand and meets the general standards governing the admissibility of expert testimony, allowing the court to make its own inferences about the likelihood of the rape. The use of counsellors may be of great assistance to the court, provided that:

- They are adequately briefed on the true nature of the legal question or issue they were asked to testify on;
- The court ensures the expert is not drawing unjustified conclusions for the trier of fact;
- The expert is not diverted from the question of fact by either the prosecution or the defence;
- The qualifications of lay counsellors as expert witnesses includes both specialised training in counselling or assessment of rape survivors; and experience with rape survivors that is current, direct and relevant to the issue or issues considered.

3. RECOMMENDATIONS

We recommend that -

Expert evidence detailing the symptomology and experiences of rape victims should not be limited the sentencing stage.

Prosecutors recognise the scope, function and utility of lay counsellors' expertise in rape trials and make increased use of such counsellors to place expert evidence before court.

ENDNOTES

1. Pamela-Jane Schwikkard et al *Principles of Evidence* (1997) at 80.
2. *Ibid.*
3. *S v Nangutuuala* 1974 2 SA 165 (SWA) 167C-E.
4. 1978 4 SA 523 (N).
5. Schwikkard et al *op cit* note 1 at 88.
6. *Ibid.*
7. LH Hoffmann & D Zeffert *The South African Law of Evidence* 4th ed (1988) at 83-104.
8. See *S v Gouws* 1967 4 SA 527 (C) at 528.
9. Hoffmann & Zeffert *loc cit* note 7.
10. *S v Daniels* (Unreported) Cape Provincial Division, Case Number SS 162/92.
11. 1997 3 All SA 551.
12. Rape Crisis (Cape Town) and Women & Human Rights Project, Community Law Centre, UWC *Prosecutors' Training Workshop: Rape Trauma Syndrome*.
13. See Part 1 of this chapter.
14. At 561F-G.
15. See D Faust & J Ziskin *The Expert Witness in Psychology and Psychiatry* (1988) at 31 -35; D Faust & J Ziskin *Coping with Psychiatric and Psychological Testimony* (1988).
16. J Greenberg & A Wursten 'The psychologist and the psychiatrist as expert witnesses: perceived credibility and influence' *Profession Psychology: Research and Practice* Vol 19 (1988) at 373-8.

CHAPTER 11: THE PRODUCTION OF PERSONAL RECORDS IN RAPE CASES

1. CURRENT POSITION IN SOUTH AFRICA

Documents are a form of evidence which may be tendered to the court to assist in the determination of the guilt or innocence of the accused:

The word 'document' is a very wide term and includes everything that contains the written or pictorial proof of something.¹

A party who wishes to rely upon statements contained in a document must ordinarily comply with three general rules:

- The contents of a document may be proved only by production of the original. (This rule is subject to various exceptions.)
- Evidence is normally required to satisfy the court of a document's authenticity.
- The document may have to be stamped in accordance with the provisions of the Stamp Duties Act, 1968.²

There are presently four situations in which a witness in a trial may refuse to disclose or permit others to disclose admissible evidence.³ These are:

- The privilege against self-incrimination;⁴
- Marital privilege;⁵
- Privilege against answering questions which tend to show that the witness has committed adultery or *stuprum*; and
- Legal professional privilege which is a privilege vested in the client, who may refuse to answer questions upon privileged matters him or herself and may also prevent his or her legal advisor or an agent of either of them from doing so.⁶

At present, South African law does not regard communication between, for example, medical doctors and their patients or rape counsellors and their clients as privileged for the purposes of judicial proceedings.⁷ This means that any document which contains information about the rape complainant and the rape incident is potentially admissible evidence and can be used as such, unless it falls into one of the above situations. This allows for the accused or the court to subpoena documents in the possession of the rape complainant or a third party (for example a counsellor or psychologist) which may contain information about the complainant or the rape.⁸

2. CURRENT POSITION IN CANADA

In 1997, legislation was passed in Canada to specifically deal with the production of personal records of the complainant or other witnesses.⁹ These provisions require a person accused of a sexual offence seeking production of a record containing information about the complainant to bring an application before court setting out specific grounds showing that the record contains information that is relevant to the accused's defence. The trial judge determines whether the record should be produced, firstly to the judge for review, and secondly, after that review, to the accused. In determining whether and to what extent the record should be produced, the judge is required to consider the rights of the accused under the Canadian Charter of Rights and Freedoms and other specific factors set out in the legislation.

Sections 278.1 to 278.9 of the Canadian Criminal Code -

1. Provide that, in sexual offence proceedings, records or any part of a record shall not be produced to the accused unless the trial judge so determines, based on a two-stage application;¹⁰
2. Define 'records' broadly to include any form of record where there is a reasonable expectation of privacy and certain examples are specifically listed;¹¹
3. Provide that at the initial stage, the accused must establish:¹²
 - that the records exist and are held by a named record holder;

- that the records contain information which is likely relevant to an issue at trial or to the competence of a witness to testify; and
 - the specific grounds upon which the accused relies to establish that the information is likely relevant.
4. Provide that assertions by the accused will not be sufficient to satisfy the requirement that the accused set out the grounds relied upon to establish the ‘likely relevance’ of the records. This provision makes it clear that speculation about why a record might or may be relevant will not provide the grounds for the application. An ‘assertion’ is simply a statement not supported by other information. An accused must offer a realistic explanation why the records sought will be likely relevant to an issue at trial or to the competence of a witness to testify.¹³
5. Specifically state that any one or more of the following assertions are not sufficient to establish that the record is likely relevant:¹³
- that the record exists;
 - that the record relates to medical or psychiatric treatment, therapy or counselling that the complainant or witness has received or is receiving;
 - that the record relates to the incident that is the subject-matter of the proceedings;
 - that the record may disclose a prior inconsistent statement of the complainant or witness;
 - that the record may relate to the credibility of the complainant or witness;
 - that the record may relate to the reliability of the testimony of the complainant or witness merely because the complainant or witness has received or is receiving psychiatric treatment, therapy or counselling;
 - that the record may reveal allegations of sexual abuse of the complainant by a person

- other than the accused;
- that the record relates to the sexual activity of the complainant with any person, including the accused;
- that the record relates to the presence or absence of a recent complaint;
- that the record relates to the complainant's sexual reputation; or
- that the record was made close in time to a complaint or to the activity that forms the subject matter of the charge against the accused.

NOTE:

These are not impermissible grounds for production of records *per se*. Where the accused satisfies the trial judge that the records, for example, will contain an inconsistent statement that is likely relevant to issue at trial, the judge would not be prevented from reviewing the records.

6. Provide that in determining whether to order production of the record, or any part of the record, to the trial judge for review, the trial judge shall first:¹⁵
 - consider the effects of ordering production of the records to the accused, having regard to the accused's ability to make full answer and defence, and the complainant's rights to privacy and equality; and
 - consider the following factors:
 - the extent to which the record is necessary for the accused to make full answer and defence;
 - the probative value of the record in question;
 - the nature and extent of the reasonable expectation to privacy vested in that record;

- whether production of the record is based on discriminatory belief or bias;
 - the potential prejudice to the dignity, privacy or security of any person to whom the record relates;
 - society's interest in encouraging the reporting of sexual offences;
 - society's interest in encouraging the obtaining of treatment by complainants of sexual offences; and
 - the effect of the determination on the integrity of the trial process.
7. Provide that at the second stage, the trial judge would review the records in private and determine whether to order production to the accused; in making such determination the judge must consider the Charter rights of both the complainant and accused and the specific factors set out in the legislation (i.e. the same considerations that are taken into account at the first stage).¹⁶
8. Provide that if the judge is satisfied that the records are likely relevant to an issue at trial or the competence of a witness to testify and their production to the accused is necessary in the interests of justice, the judge may order production to the accused of only those parts of the record found to be likely relevant.¹⁷
9. Establish the procedures governing the determination of an application of production and provide additional safeguards for the complainant of witness's privacy including:
- the application shall be made to the trial judge in writing, setting out the specific grounds upon which the accused is relying for production;¹⁸
 - a subpoena *duces tecum* in a new form shall be served on the witness in possession of the records together with the notice of motion;¹⁹
 - adequate notice (usually 7 days) of the application shall be provided to the record holder, Crown, complainant or witness, and any person to whom the record relates;²⁰

- the determination of whether or not production should take place is conducted *in camera*;²¹
- the judge shall consider the imposition of appropriate conditions where production of records is ordered;²²
- the contents of the application, information provided at the hearing and the judge's determination shall not be published or broadcast;²³
- records produced to an accused shall not be used in any other proceedings,²⁴ and
- the records produced to the judge but not produced to the accused are retained by the court until the final appeal and are then returned to the original custodian.²⁵

3. DISCUSSION

Many rape complainants seek assistance, support and advice after being raped. This assistance is sought from a variety of people, including rape counsellors, traditional healers, religious leaders, psychologists and psychiatrists. During the counselling process rape complainants may speak about intensely private and intimate experiences (the rape as well as other traumatic experiences triggered by the rape), or may express doubts about reporting the rape or pursuing the rape case if it has been reported. The expression of doubt is not because complainants are lying about the rape, but may occur because they are afraid, they feel humiliated, and/ or they are in the process of recovering from trauma.

However, in the hands of the accused or his representative, statements about, for example, a reluctance to report the rape, may be given a different interpretation - one that is highly damaging to the complainant's credibility. If rape complainants know that their private thoughts, expressed to a professional therapist, counsellor or healer in a supportive environment, are going to become a matter for open debate in a public court of law, they may be deterred from reporting the offence to the police and may be discouraged from seeking the support they may need after the rape.

A further disadvantage of mandatory production of personal records is that the work of those who

provide services and assistance to rape complainants may also be detrimentally affected. Service providers may avoid asking rape complainants certain questions or may avoid certain therapeutic processes, which may be of great use to the complainant, for fear of the information being manipulated and used against the rape complainant at trial.

The Canadian legislation referred to above recognises the potentially damaging consequences of compelling the production of personal records in sexual offences cases. It recognises that while the production of personal information regarding any person (including the complainant) to the court and to the accused person may be necessary in order for an accused to make a full answer and defence, such production may breach the person's right to privacy and equality. Therefore the determination of whether to order the production of the information should be subject to careful scrutiny.

Due to the similarity between the South African and Canadian constitutions containing provisions protecting the rights of the accused to a fair trial, as well as the rights to privacy and equality of the complainant it is submitted that South Africa should adopt a similar approach to Canada in passing legislation which protects the confidentiality of documents in rape cases. This will encourage the reporting of incidents of rape and is based upon principles of fairness to rape complainants as well as the accused.

4. RECOMMENDATION

We recommend the inclusion of measures analogous to those set out in sections 278.1 to 278.9

of the Canadian Criminal Code in South African rape legislation.

ENDNOTES

1. *Secombe and Others v Attorney General and Others* 1919 TPD 270 at 277.
2. LH Hoffmann & D Zeffert *The South African Law of Evidence* 4th ed (1988) at 389.
3. *Idem* at 236.
4. Section 203 of the Criminal Procedure Act 51 of 1997.
5. Section 198 of the Criminal Procedure Act.
6. Section 201 of the Criminal Procedure Act.
7. Etienne du Toit et al *Commentary on the Criminal Procedure Act* (1993) at 23.39.
8. Section 179 of the Criminal Procedure Act.
9. Sections 278.1 - 278.9.
10. Section 278.1.
11. Subsection 278.3(3).
12. Subsection 278.3(4).
13. *Ibid.*
14. Section 278.5.
15. Sections 278.6 and 278.7.
16. Section 278.7.
17. Subsection 278.3(3).
18. Subsection 278.3(5).
19. Subsection 278.7(3).
20. Subsection 278.4(1).
21. Subsection 278.7(3).
22. Section 278.9.

23. Subsection 278.7(5).
24. Subsection 278.7(6).

CHAPTER 12: SENTENCING GUIDELINES

1. CURRENT POSITION IN SOUTH AFRICA

South African courts have a broad discretion to determine the appropriate sentence in a particular criminal matter. This discretion may not be exercised arbitrarily, and a court is expected to act within the limits prescribed by the legislature and in accordance with the guidelines laid down by higher courts.

According to Du Toit,¹ the existence of a sentencing discretion is a pillar of our law which should be guarded jealously by everybody involved. In cases such as *S v Tom; Bruce*² the Appellate Division expressed the view that it did not take kindly to a restriction of its sentencing powers by the legislature.³ The main advantage of a broad discretion is that courts can adapt sentences to provide for the slightest differences between cases. (However, we argue that in the context of rape cases, the exercise of the sentencing discretion inevitably depends on the personal views and biases of the judge or magistrate and his or her perceptions regarding rape and its consequences.)

The generally accepted standard applied by our courts was laid down in the case of *S v Rabie*⁴ in the following terms:

Punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances.⁵

Furthermore, our courts have time and again emphasised the importance of the main purposes of punishment: retribution, deterrence, prevention and rehabilitation.⁶

As highlighted by the South African Law Commission,⁷ sentencing has recently been the focus of much attention in the media with an outcry from the community; both for more stringent punishment and that offenders should serve a more realistic portion of the sentences imposed by our courts.

In this regard the comments by Mahomed CJ in the matter of *S v Chapman*⁸ should serve as a guide:

The courts have a duty to send a clear message to the accused and to other potential rapists and to the

community that the courts are determined to protect the equality, dignity and freedom of all women and show no mercy to those who invade those rights.

In respect of rape, recent amendments set out in 51 of the Criminal Law Amendment Act 105 of 1997 provide that the High Court shall, if it has convicted a person of rape committed under certain circumstances, sentence the person to imprisonment for life. These circumstances include incidents of rape where the victim was raped -

- More than once, whether by the accused or by any co-perpetrator or accomplice;
- By more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;
- By a person who has been convicted of two or more offences of rape, but has not yet been sentenced in respect of such convictions;
- By a person knowing that he has the Acquired Immune Deficiency Syndrome or the Human Immunodeficiency Virus; or
- under circumstances involving the infliction of grievous bodily harm.⁹

In addition, this provision also applies where the victim -

- Is a girl under the age under 16 years;
- Is a physically disabled woman who, due to her physical disability, is rendered particularly vulnerable; or
- Is a mentally ill woman as contemplated in section 1 of the Mental Health Act 18 of 1973.¹⁰

Where the High Court has convicted a person of rape in circumstances other than those referred to above, the Court shall sentence the person -

- In the case of a first offender, to imprisonment for a period not less than ten years;
- In the case of a second offender, to imprisonment for a period not less than fifteen years;
- In the case of a third or subsequent offender, to imprisonment for a period not less than twenty years.¹¹

However, if the court is satisfied that ‘*substantial and compelling*’ circumstances exist which justify the imposition of a lesser sentence than the prescribed sentence, it shall enter those circumstances on

the record of the proceedings and may impose such lesser sentence.¹²

2. CURRENT POSITION IN UNITED STATES

3. DISCUSSION

an in-depth study of the current interpretation of section 51(3)(a) by the courts in rape matters; and

•based on the results of this study, the development of legislative guidelines to inform the implementation of the provisions on minimum sentences in rape matters.

ENDNOTES

1. *Du Toit Straf in Suid-Afrika* (1980) 127.
2. 1990 (2) SA 802 (A).
3. At 822C-D.
4. 1975 (4) SA 855 (A).
5. At 862G.
6. *S v Whitehead* 1970 (4) SA 424 (A) at 436E-F.
7. South African Law Commission *Sentencing Mandatory Minimum Sentences* Issue Paper 11 Project 82.
8. 1997 (3) SA 341 (SCA).
9. Section 51(1).
10. *Ibid.*
11. Section 51(2)(b).
12. Section 51(3)(a).
13. Geldenhuys & Joubert *Criminal Procedure Handbook* (1994) at 221; see also Dianne Hubbard 'Should a minimum sentence for rape be imposed in Namibia?' in Christina Murray (ed) *Gender and the New South African Legal Order* (1994) at 233.
14. MA Adams 'The Federal Sentencing Guidelines as Legal Process Jurisprudence' (Vol 31) *American Law Review* at 259.
15. *Idem* at 262.

16. The provisions of section 60(11) of the Criminal Procedure Act 51 of 1977, which require an accused charged with an offence listed in Schedule 6 to adduce evidence to satisfy the court that '*exceptional circumstances*' exist permit his release, are analogous to the formulation in section 51(3)(a).

CHAPTER 13: INTRODUCING ‘VICTIM IMPACT STATEMENTS’ FOR PURPOSES OF SENTENCING

'Rape is an experience so devastating in its consequence that it is rightly perceived as striking at the very fundament of human, particularly, femal privacy, dignity and personhood. Yet, I acknowledge that the ability of judicial officer such as myself to fully comprehend the kaleidoscope of emotion and experience, or both rapist and rape survivor, is extremely limited.'

GENERAL

The South African Law Commission has defined a victim impact statement as follows:¹

The Victim Impact Statement is a statement made by the victim and addressed to the presiding officer in the sentencing decisions. The Victim Impact Statement consists of a description of the harm, in terms of the physical, psychological, social and economical effect that the crime had, and will have in future, on the victim. Sometimes this statement may include the victim's statement of opinion on his (*sic*) feelings about the crime, the offender and the sentence that he feels is appropriate.

The use of victim impact statements can be seen as a measure to give victims an opportunity 'to voice their opinion about the case'.² Although a victim impact statement usually takes the form of a written statement that is presented to the court as part of the

pre-sentence proceedings, it can also be submitted in the form of an oral statement made in court by the victim prior to sentencing.³

At present, legislation allowing for some form of 'victim participation' is in force in the United States (in 48 states), Canada, New Zealand and Australia.⁴ The form, contents and means of implementation of victim impact statements vary greatly between different jurisdictions. Responsibility for the preparation of the Victim Impact Statement can rest with criminal justice personnel, like the prosecutor, police or probation officer, or it can rest with an independent outside organisation, such as an NGO providing services to victims.⁵

CURRENT POSITION IN SOUTH AFRICA

South African law does not, at present, contain any express provisions on the use of victim impact statements. Although there are no legal rules precluding the acceptance of a statement by the victim on the impact of the sexual assault, there are also no measures that require the preparation and submission to the court of such statements as a matter of course. According to section 274(1) of the Criminal Procedure Act 51 of 1977, the court may hear such evidence as it deems appropriate in order to inform itself as to the proper sentence to be passed.

The factors that should be taken into consideration by South African courts when imposing sentence are well known. The court has to examine -

- The nature and seriousness of the offence;
- The interests of the community; and
- The personal circumstances of the accused.⁶

It has been argued (convincingly) that this traditional 'triad' fails to consider the interests of the victims of crime.⁷ This is especially true in cases of rape. In order to adequately

gauge the seriousness of the offence (as well as, we submit, the impact on the interests of the community) it is crucial for the presiding officer to have sufficient information about how the rape affected the victim.

While it is strictly speaking ideal for facts in mitigation or aggravation of sentence to be placed before the court by presenting the evidence of a witness under oath, such facts may also be placed before the court by handing in sworn statements, without the witness testifying in court, or by means of an address to the court by the representatives for the prosecution and defence respectively.⁸ Information conveyed in the last way will not bear much weight, unless the other party admits to it. If the other party does agree to the admission of such statements, they will carry the same weight with the court as accepted evidence under oath.⁹

Despite the general rule that the rules of evidence applying to the merits of the case will also apply to sentencing proceedings, a somewhat more liberal attitude is adopted as far as evidence on sentence is concerned.¹⁰

This does not imply that all the rules of evidence are to be ignored during the stage of sentencing, but that in suitable cases, a strict and technical application of these rules should not be adhered to, since this may result in the exclusion of information which is relevant and helpful in deciding on a suitable sentence. The hearsay rule, for example, may occasionally be relaxed for purposes of sentence proceedings.¹¹

CURRENT POSITION IN OTHER JURISDICTIONS

3.1 Canada

Section 772 of the Canadian Criminal Code requires a court to consider ‘any statement of a victim of the offence describing the harm done to, or loss suffered by, the victim arising from the commission of the offence’ for the purpose of determining sentence. Such

statement must be prepared in writing. The fact that a victim impact statement has been prepared does not prevent the court from considering any other evidence concerning the victim of the offence for purposes of sentencing.

For the purposes of this section, the term ‘victim’ includes not only the person to whom harm was done or who suffered physical or emotional loss as a result of the commission of the offence, but could also (where the victim is dead, ill or otherwise incapable of making a statement) include, amongst others, the spouse or a relative of the victim.

3.2 Australia

Certain Australian jurisdictions have enacted legislation requiring courts to consider victim impact statements before sentencing. Sec 429AB of the Crimes Act 1900 of the Australian Capital Territories, for example, requires a court to have regard to a victim impact statement, and prohibits the drawing of any inference about the harm suffered by a victim from the fact that a victim impact statement is not tendered in respect of the offence. The victim must consent in writing to the submission of a victim impact statement by the prosecutor.

The term ‘harm’ is defined to include:

- Physical injury;
- Mental injury or emotional suffering, including grief;
- Pregnancy;
- Economic loss; and
- Substantial impairment of rights accorded by law.

DISCUSSION

4.1 The Duty to Consider Victim Impact Statements

In its Issue Paper on Restorative Justice, The South African Law Commission proposes that victim impact statements ought to be generally admissible at sentencing hearings. The purpose of such statements should be to provide a measure of the seriousness of the offence.¹²

As explained above, we believe that the current legal position already allows for ‘victim impact statements’ to be admissible for purposes of sentencing, even though there are no express provisions to this effect. The real question is whether there is any obligation on the part of the presiding officer to consider a complainant’s statement on the effects of the rape.

In practice, the complainant’s evidence on the impact of the sexual assault is often led during the course of presentation of evidence during the ‘main trial phase’ aimed at determining the guilt or innocence of the accused.¹³ However, it may occur that the information is not made available to the court by the prosecution, for example, where the evidence was not led during the main trial, or where the court ruled that it was not admissible for purpose of determining whether or not the accused should be convicted, and the prosecutor then fails to present the information during sentencing proceedings.

Apart from the fact that such omission potentially denies the presiding officer a comprehensive understanding of the impact of the rape on the complainant, it also allows room for inappropriate assumptions about the effects of the rape. Hansson recounts the example of a rape trial where the victim had been abducted, raped and then held captive overnight in a deserted building by the accused. In sentencing, the regional court magistrate commented that this complainant was unlikely to have suffered psychological damage, because of the fact that she was not a virgin at the time.¹⁴

In the light of the significance that information on the impact of the rape *should* have in the determination of an appropriate sentence and the fact that, in practice, it may occur

that this evidence is neither produced by the prosecution nor requested by the court, we recommend the introduction of a legislative provision that *directs* the consideration of such information by the court for sentencing purposes, rather than allowing the court to use its discretion about whether or not to consider the information. This would be in line with similar provisions in other jurisdictions.

It is important that vocal evidence, as well as written statements, should be permitted. It seldom happens that the proceedings on the merits and the sentencing phase are finalised on the same court day. If evidence of the impact of the rape on the complainant is not heard during the 'main' trial, the presentation of this information will require that she returns to court for a second time to testify. This not only implies additional expense to the State and additional inconvenience to the complainant, but may significantly contribute to secondary victimisation caused by being confronted with the accused, and possibly being cross-examined by the defence, a second time.

For this reason, we believe that legislation should also clearly provide for the presentation of such evidence by affidavit. In keeping with the general rules set out above, this affidavit will only be regarded as accepted evidence under oath if the other party admits to the contents of the statement. If the other party does not agree with the contents, the complainant will have to testify in person, and may be cross-examined.

4.2 Definition of 'Victim' and 'Harm'

The Canadian legislation defines the term 'victim', for purposes of victim impact statements, as broader than the conventional understanding of the term victim. The South African Law Commission also suggests that the term 'victim' should be defined broadly as:¹⁵

the person against whom the offence was committed or who was a witness to the act of actual or threatened violence and who suffers injury as a result of the offence.

We support the extension of the notion of ‘victim’. We also believe that it is essential to define ‘harm’ in order to adequately reflect the wide-ranging consequences of rape. The Australian provisions, while limited, are useful in this regard, and should be expanded for purposes of South African legislation.

4.3 Should the Statement Include the Victim’s Opinion on Sentence?

While we acknowledge the broad discretion which the courts have in determining an appropriate sentence, we believe that complainants should be allowed an opportunity to express their opinion in the victim statement on the question of an appropriate sentence, as is permitted in certain other jurisdictions.¹⁶ However, the South African Law Commission has suggested that victim impact statements should be limited to the harm suffered by the complainant, and should not address the question of an appropriate sentence.

4.4 Duty to Prepare A Victim Impact Statement

In terms of responsibility for the preparation of the victim impact statement, we propose that the prosecution should have the ultimate duty to ensure that such evidence or statement is available for submission in court. As a matter of policy, prosecutors should be directed to enlist the assistance of NGOs providing specialised services to victims of sexual assault in the preparation of such statements.

In conclusion, it should be recognised that the introduction of victim impact statements should not be regarded as the only measure to enhance victim satisfaction with the criminal justice system. Research in other jurisdictions indicates that dissatisfaction with the courts and prosecution stems from the failure of the authorities 'to show any interest in the victim as an individual'.¹⁷ The proper use of evidence on the impact of rape may go some way towards addressing this problem, and will also serve to lay a basis for an

appropriate order for compensation.

5. RECOMMENDATION

We recommend that:

1. Legislation should be enacted to direct the court in a rape matter to consider evidence on the consequences of the rape given in person, or in the form of an affidavit, by the rape victim.

2. The term ‘victim should be defined -

**•to include the person who suffered harm or loss as a result of the rape;
•where such person is dead, ill or otherwise incapable of making a statement, to include -**

**the spouse or a relative of the person;
anyone who has in law or in fact custody of that person or is responsible for the care or support of that person;
any dependant of that person;**

•to include the person who was a witness to the rape and who suffered harm or loss as a result of the rape.

3. The term ‘harm or loss’ should be defined to at least include -

**physical injury;
mental injury or emotional suffering;
pregnancy;
sustaining HIV/AIDS or any other sexually transmitted disease;**

**economic loss; or
a substantial impairment of right accorded by law.**

ENDNOTES

1. South African Law Commission *Sentencing Restorative Justice* (Issue Paper 7 Project 28) at Par 2.30.
2. Lirieka Meintjies-Van der Walt 'Towards victims' empowerment in the criminal justice system' (1998) *SACJ* at 166.
3. South African Law Commission *op cit* note 1 at Par 2.31.
4. Meintjies-Van der Walt *loc cit* note 2.
5. South African Law Commission *op cit* note 1 at Par 2.32.
6. *S v Zinn* 1969 2 SA 547 (A).
7. Meintjies-Van der Walt *op cit* note 2 at 169.
8. See generally Etienne du Toit et al *Commentary on the Criminal Procedure Act* (1993) 28.2-28.3.
9. *Ibid.*
10. Du Toit et al *op cit* note 8 at 28.4.
11. See *S v Qgabi* 1964 1 SA 261 (T).
12. South African Law Commission *op cit* note 1 at Par 4.7.
13. Meintjies-Van der Walt *op cit* note 2 at 167.
14. Desiree Hansson 'Interim reflections on the Cape attorney general's task group on rape' in Saras Jagwanth et al (eds) *Women and the Law* (1994) at 413.
15. South African Law Commission *loc cit* note 12.

16. See Meintjies-Van der Walt *op cit* note 2 at 166.

17. Meintjies-Van der Walt *op cit* note 2 at 167

CHAPTER 14: COMPENSATION AND RESTITUTION

1. GENERAL

Internationally, compensation and restitution to victims of violent crimes have been established in two ways - through state compensation schemes or through the offenders themselves. Where state compensation schemes do not exist, the offenders may be required to make the compensation or restitution. This can be done in one of the following ways:¹

- The victim must bring a civil claim against the offender;
- The state must make a diversion agreement, that is, an appropriate order that may not necessarily involve monetary compensation; or
- The court must make a compensation order that forms part of the sentence of the offender.

The issue of compensation is contained in Sections 12 and 13 of the *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1992), to which South Africa is a signatory. It provides that:

12 *When compensation is not fully available from the offender or other sources, States should endeavor to provide financial compensation to:*

•Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;

•The family, in particular dependents, of persons who have died or become physically or mentally incapacitated as a result of such victimization.

13 *The establishing, strengthening and expansion of national funds or compensation to victims should be encouraged. Where appropriate, other funds may also be established for this purpose, including in those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm.*

2. CURRENT POSITION IN SOUTH AFRICA

2.1 Compensation by the Accused

In South Africa, section 300 of the Criminal Procedure Act 51 of 1977 makes provision for the payment of compensation to victims of crime at the request of the prosecutor, provided he or she is instructed to do so by the complainant in the case. The Act specifically provides that the court may award compensation where an offence causes ‘damage to or loss of property’.

Presently, the award of compensation to an individual applies in situations where -

- There has been a conviction;²
- The conviction relates to an offence that caused damage to or the loss of property, including money;³
- It is established that the loss or damage was caused as a direct result of the commission of the offence of which the accused was convicted;⁴
- There is an application after the conviction by the complainant;⁵ and
- All relevant facts have to be obtained and in this regard the accused is entitled to lead evidence and to address the court.⁶

The Act, however, does not make provision for compensation to victims who have suffered losses or injuries, other than damage or loss of property, as a result of a crime.

2.2 State Compensation Scheme

There is at present no state-funded compensation scheme for victims of violence crime in operation in South Africa.

3. CURRENT POSITION IN OTHER JURISDICTIONS - CANADA

In Canada, the courts have increasingly made use of compensation orders as a sentencing option. The courts are now required to consider restitution in all cases involving either harm to property, or expenses arising from bodily injuries. In granting restitution, the court may consider a victim impact statement, and must take into consideration the offender's ability to provide restitution. If monetary compensation is ordered, payments can be spread over a period of time. Restitution can also be made in the form of work. The penalty for ignoring a court order granting restitution is imprisonment.

4. DISCUSSION

Meintjies-van der Walt submits that, aside from the fact that the Criminal Procedure Act does not make provision for victims of personal crime, there are also other problems with the application of this Act.⁷ She sets these out as follows -

- The determination of compensation may be difficult for presiding officers because the present judicial mind-set appears to have difficulty reconciling what they see as an essentially civil procedure with criminal sentencing. She cites the judgement in *S v Lombaard*⁸ as an example of this problem. In this matter the court held that the determination of compensation was a complicated civil matter which could only be decided if all the points in issue were defined in pleadings, and evidence was led.
- The question of what should happen if an offender fails to comply with a compensation order is problematic. Meintjies-Van der Walt refers to a review of the judgement of *S v Medell*⁹ in which the court held that an order for compensation that was not carried out, could not result in imprisonment, because the incarceration of an offender for the failure to abide by a compensation order amounted to civil

imprisonment for debt, which has been judged unconstitutional.

In response to public dissatisfaction with the criminal justice system and the emerging victim's rights movement in South Africa, the South African Law Commission has published an issue paper on Restorative Justice, which addresses the issue of victim compensation. The Law Commission argues that the introduction of a central compensation scheme for victims of crime in South Africa is a matter of urgency. They believe that this will restore confidence in the administration of justice.

They recommend that a compensation scheme be established that should be known as the 'Criminal Injuries Compensation Scheme', and they set out the following:

1. The scheme should be funded by some or more of the following -
 - 20% of all fines that are imposed by the courts;
 - A surcharge of R50 for every conviction in court, to be paid by the accused;
 - The proceeds of crime;
 - An allocation within the annual state budget.

2. The definition of a 'victim' and special reference to rape victims. They define 'victims' as: 'persons who, individually or collectively have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws'.

The term therefore includes direct victims (the person who was directly prejudiced by the commission of the crime) as well as indirect victims (persons who were not directly involved in the crime, but who were directly prejudiced as a result thereof, for example the family of a victim of murder).

3. Which victims can be awarded compensation.

4. The requirements for securing victim compensation.

The scope of this discussion document does not allow an analysis of the content or merits of

the Law Commission Issue Paper. We do however, in principle, support the development of such a compensation scheme.

Like the Law Commission, we recognise the enormous financial burden that a scheme of this nature may have on the state. We also know that the physical, emotional and psychological damage to a rape victim is unquantifiable and cannot really be measured in monetary terms.

Moreover, we are concerned about the ramifications of monetary compensation in relation to rape. Our experience of rape trials has repeatedly confirmed our idea that rape complainants have to fight a battle to be believed in a court of law, to be regarded as credible witnesses and to be treated with dignity and respect. We are sensitive to the fact that any form of monetary compensation for rape may in fact result in counsel for the defense casting the aspersion on complainants that they are only claiming to have been raped because they are aware that they might, if the court finds the accused guilty, receive monetary compensation. Rather than assisting in the recovery of the rape survivor, monetary compensation may become a further source of 'secondary victimisation'.

5. RECOMMENDATION

We in principle support the development of a state compensation scheme for rape victims. We recommend, however that:

- ◆ **Until a compensation scheme is operational and is proved to serve more than a mere symbolic gesture to victims of crime, in the case of rape, the state bears the cost of any medical and/or psychological treatment incurred by the victim/survivor;**
- ◆ **Section 300 of the Criminal Procedure Act be extended to include compensation for loss or injury beyond damage or loss of property.**

ENDNOTES

1. Lirieka Meintjies-Van der Walt 'Towards victims' empowerment strategies in the criminal justice process' (1998) 11 *SACJ* at 162.
2. Subsection 300 5(b)(1).
3. Subsection 300 5(b)(2).
4. *Idem.*
5. Subsection 300 5(b)(4).
6. Subsection 300 5(b)(7).
7. Meintjies-Van der Walt *loc cit* note 1.
8. 1997 (1) SACR 80 (T).
9. 1997 (1) SACR 682 (C) at 686B-C.
10. South African Law Commission *Sentencing Restorative Justice* (Issue Paper 7 Project 28).

CHAPTER 15: HIV POST-EXPOSURE PROPHYLAXIS FOLLOWING RAPE

that's like an epidemic, probably would have probably had this man

Interview with Complainant E1: Stanton et al *Improved Justice for Survivors of Sexual Violence?* (1997) at 97.

1. INTRODUCTION

'Post Exposure Prophylaxis' [PEP] is a type of preventive antiviral therapy for human immunodeficiency virus (HIV) that is designed to reduce (but not eliminate) the possibility of infection with the virus after a known exposure.¹ The treatment is comprised of -

- AZT (also known as Retrovir and Zidovudine),
- 3TC (also known as Lamivudine); and
- Crixivan (also known as Indinavir).

The addition of *3TC* and *Crixivan* to *AZT* is recommended in high risk exposures. This is known as 'triple therapy'.

In order for the PEP treatment to be effective the drugs must be taken for 28 days after exposure to HIV. Studies have shown that PEP may not be effective after 24 to 36 hours, and the Centres for Disease Control and Prevention in the United States therefore recommends starting PEP within 2 hours of exposure. However, this agency also recommends PEP for some individuals presenting 36 hours or more after exposure.²

2. CURRENT POSITION IN SOUTH AFRICA

The drugs required for PEP treatment are available in South Africa, but are not readily accessible to most people. Although the drugs are available at most state hospitals, few district surgeons and even fewer private medical practitioners have them.

The health care of rape victims is generally problematic in South Africa. The practice of district surgeons and other medical personnel is inconsistent and therefore unreliable in relation to medical examination and treatment of the rape victim. District surgeons are required to collect forensic evidence from the rape victim. They are under no obligation to provide rape victims with-

- Prophylactic treatment for sexually transmitted diseases [STD's];
- The 'morning after pill' to prevent possible pregnancy; or
- Medical treatment of injuries sustained as a result of the rape

Moreover they often fail to inform rape victims of the possibility of STD infection (including HIV) and pregnancy (which would have enabled these victims to seek further medical assistance and advice.) Although some district surgeons do provide these services, the majority do not. In addition to this, many women who have been raped have to wait long periods of time (sometimes up to 36 hours) before a district surgeon will examine them.

The result of this is that many rape complainants who are at risk of HIV infection are not informed:

- Of the possibility of HIV infection after the rape;
- About the existence of PEP treatment; or
- How and where to access the drugs should they choose to take them.

Should a rape complainant be aware of the risk of HIV infection and wish to take PEP treatment she has to find and pay for the drugs herself. The present cost of the drugs is -

- R663,68 for AZT;

- R912,00 for 3TC; and
- R2 195,00 for Crixivan.³

It is standard practice for the state to provide PEP to state employees who incur occupational injuries and are exposed to HIV in the course of their professional duties, for example, a medical doctor who incurs a needle stick injury while operating on a known HIV positive patient. This treatment is at the state's expense.

The *Rape Management Protocol* which has been operational for one year at Grootte Schuur Hospital in Cape Town provides for the following:⁴

- Women who have been raped and who present within 48 - 72 hours of being raped are provided with *AZT*.
- Grootte Schuur Hospital (which is a state hospital) bears the cost of the *AZT* treatment should the woman not be able to afford it.
- Each woman is informed of the risks of HIV transmission and is offered an HIV test.
- AZT* is given for one month after the rape.
- In addition to receiving PEP, women are routinely treated for other STDs (eg syphilis, chlamydia, gonorrhoea) and are given 'the morning after pill' where appropriate.
- Women are followed up in the outpatient division to monitor side-effects to medication, including *AZT*.
- Each rape victim is assessed individually by a gynaecology registrar and her case is discussed with the hospital HIV expert, who authorises the use of *AZT*.
- AZT* is available 24 hours a day to ensure that treatment is started immediately.

3. CURRENT POSITION IN OTHER JURISDICTIONS

3.1 United States

In the United States the health care system is restricted from charging rape complainants for services necessitated as a result of the rape. Therefore, if PEP is offered and taken by the rape complainant, the local health care system must bear the costs of the medication. In San Francisco the local health department pays for the medications, while in New York the State AIDS Office has mandated the local health department to pay for the medication.⁵

3.2 France

The state-funded health care system pays for the cost of PEP medication for either rape or consensual sexual exposure.⁶

4. DISCUSSION

4.1 The Medical Imperative for Provision of PEP

Currently PEP is used primarily for the prevention of infection in cases where there has been a known high risk occupational exposure. This practice is based on evidence that antiretroviral treatment prevents HIV infection after occupational exposure, for example, in the case of needle stick injuries incurred by health care workers.⁷ Evidence of the efficacy of PEP in occupational settings is based on a multicentre case-control study of health care workers.⁸ This study showed that there was a 79% reduction in the odds of infection for those workers who had received PEP.

More recently Cardo et al published the results of a second retrospective case control study that showed an 81% reduction in odds of seroconversion for health care workers who took

AZT following occupational exposures compared to those who did not.⁹ Based on the first study referred to above, the Centres for Disease Control and Prevention [CDC] produced its current guidelines for occupational PEP.¹⁰

It has been argued that if the risk of HIV transmission and thus infection through certain sexual practices is of the same order of magnitude as those occupational exposures, PEP would seem to be appropriate for people after sexual exposures.¹¹ There is presently no direct evidence showing that PEP treatment prevents infection after sexual exposure, and it is unlikely that this evidence will become available. This is largely due to the ethical objections to a placebo-controlled trial, and also to the fact that in order to conduct this research, large sample sizes would be required.¹²

However, many experts maintain that PEP treatment preventing infection after sexual exposure is biologically plausible, given the efficacy of treatment after transcutaneous occupational exposure and the similarities between immune responses to transcutaneous and transmucosal exposures.¹³ (By *transcutaneous* we mean ‘through the skin’ and by *transmucosal* we mean ‘through a mucus membrane’, for example, the mucus membrane of the vagina.)

In addition to this, researchers from a number of centres maintain that by using the best available epidemiologic information, clinicians can estimate the risk (probability) of HIV transmission for any given exposure and compare it with risks for which the CDC recommends occupation-related PEP.¹⁴ More recently PEP following sexual and drug exposures has also been recommended by researchers from the Department of Public Health, San Francisco, the Department of Medicine, University of California, UCSF/SFGH Epidemiology and Prevention Interventions and the San Francisco General Hospital, University of California, San Francisco.¹⁵

Lurie et al state that establishing the probability of HIV transmission is dependent on three factors:¹⁶

- The frequency of exposure;
- The probability that the source is HIV positive; and
- The probability of transmission if the source is infected.

They base their recommendations for PEP after sexual exposure on the CDC's recommendations from extrapolated data on the benefits of PEP after occupational exposure.

Based on the above arguments that the information on the effectiveness of PEP in occupational settings should be extended to sexual exposure, this would obviously include rape. It is well documented that male to female transmission of HIV is very efficient in consensual sex,¹⁷ although the risk of transmission is highly variable, with some individuals becoming infected after one sexual exposure and other remaining uninfected after multiple sexual exposures.

A number of factors indicate that the risk or probability of transmission of HIV in a rape is even higher than in consensual sex. These factors may include -

- The number of times a woman is raped (either by multiple perpetrators or by one perpetrator raping her repeatedly);
- The fact that the woman's vagina may not lubricate making penetration likely to cause injury; and
- The fact that force may have been used in the rape which may cause injury.

Lurie et al acknowledge that the risk of HIV transmission in rape may be greater than from consensual sex because of genital and rectal trauma and bleeding, exposure to multiple assailants, or exposure through multiple receptive sites.¹⁸ They accordingly recommend PEP to all victims of rape. Bamberger et al also state that rape may increase the risk of HIV infection compared to consensual sex for two reasons.¹⁹ Firstly, trauma is more likely in the case of rape, and secondly STD's causing genital lesions may be more prevalent.

As has been stated earlier, immediate PEP treatment is vital for it to be effective. Katz and Gerberding²⁰ as well as Lurie et al²¹ recommend that PEP treatment should be initiated within a few hours of exposure, with a cut off point at 72 hours.

In May 1994 the Working Group on HIV Testing, Counselling and Prophylaxis after Sexual

Assault in the United States published proposals for the development of policies and principles of clinical intervention in the care of rape victims.²² They believe that the decision to take PEP after a rape should be based on a risk assessment of the exposure. This assessment should consider:

- Available information of the HIV status of the accused rapist;
- Type of exposure (anal, vaginal or oral penetration and ejaculation);
- Nature of the physical injuries; and
- The number of times the victim was raped.

It should be noted that in the majority of cases, information about the HIV status of the accused is unavailable. This is because at the time when a victim may present for medical care the perpetrator will not have been apprehended. Therefore each case must be assessed by considering the other three factors.

While it is useful to draw on international protocols (mainly in the United States and Canada) in deciding whether PEP is appropriate in a specific case, one should be mindful that the HIV/AIDS situation in South Africa is very different to that in many developed countries. In the United States, for example, the prevalence of HIV in the general population is about 1% and therefore presumably the same in rapists.²³

This is very different in South Africa. According to Dr Helen Rees (Director, Reproductive Health Research Unit, Department of Obstetrics and Gynaecology, Chris Hani Baragwanath Hospital), we can assume that 20% of male rapists are HIV positive using adult rates of infection. She holds the same opinion as Lurie et al, saying that rape is more likely to result in trauma than consensual sex and this predisposes the victim to HIV infection. She adds that South Africa has very high rates of STD's in sexually active populations. STD's predispose to HIV infection and are therefore another risk factor for seroconversion after rape.

Dr Rees believes that noting all these factors women in South Africa are at greater risk of becoming infected with HIV than, for example, women in the United States. Even though she concedes that we cannot presently quantify that risk and that there is no clear evidence that PEP treatment given to health care providers after needle stick injury would apply to women who have been raped, she recommends triple therapy (*AZT*, *3TC* and *Crixivan*) for one

month after the rape, based on the knowledge we do have on occupational exposure.²⁴

South Africa is a country of limited resources, and the provisions of PEP to rape victims has accordingly become a contentious issue. It is acknowledged that the cost implications of providing all rape complainants will PEP treatment would be extremely high. We believe that it is the responsibility of the state to provide the financial means to cover the cost of PEP for rape complainants as rape complainants have been exposed to a life threatening disease through no choice of their own.

4.2 The Constitutional Imperative

This section will briefly examine one aspect of the constitution-based argument in support of provision of PEP treatment to rape victims, viz the right to equality as set out in section 9(1) of the 1996 Constitution. However, we acknowledge that there may be additional rights supporting such an argument.

The current governmental policy is to provide state employees with PEP after occupational exposure at state expense. By contrast, there is an unwillingness on the part of the state to provide rape victims with similar treatment. We believe that this position constitutes a violation of the right to equality of rape victims, most notably the right in section 9(1) of the 1996 Constitution.

According to the test laid down by the Constitution Court in its judgment in *Harksen v Lane NO*,²⁵ an alleged violation of section 9(1) is determined firstly by asking whether the disputed provision implies that the state is differentiating between different persons or groups of persons. If the answer to this is yes, the second question is whether this differentiation serves any legitimate government purpose. If not, the provision constitutes a violation of section 9(1).

It is clear that the state is making a distinction between two groups of persons who were exposed to the risk of HIV through factors 'beyond their control'. In both cases, the state bears some responsibility towards these groups: in the case of occupational exposure this is based on the fact that the injuries occur in the employ of the state, and in the case of exposure due to rape, this responsibility arises from the state's specific duties towards rape victims as

set out in the Constitution and international human rights law.²⁶

It is therefore difficult to understand the differentiation between these groups. As set out above, this distinction is not to be found in the fact that PEP will likely be more effective in the case of occupational exposure. We submit that there is no legitimate government purpose to be served by this differentiation, and that section 9(1) is therefore violated by a policy of refusal of PEP treatment to rape victims.

4.3 HIV Testing of the Accused

Although many groups advocate testing of persons accused of rape for HIV/AIDS, we do not believe that this will address the problems facing rape victims and the possibility of their contracting HIV from the accused rapist. Compulsory testing of men accused of rape has various objectives.²⁷ One of the most frequently cited objectives is to protect the health of the victim. In order for PEP to be effective it must be taken as soon as possible after the rape and definitely within 72 hours. Very often the time it would take to establish whether the accused is HIV positive would be longer than 72 hours, rendering the test results an irrelevant factor for the rape victim in the decision on whether or not to take PEP.²⁸

Aside from this, even if one could immediately establish the HIV status of the accused by means of testing, it may accurately confirm that the accused was infected at the time of the rape but it cannot indicate with certainty that the accused was not infected at that time. In some cases the accused would test negative even though he is infected and infectious. This is called the 'window period' before the HIV antibodies are detectable. It is therefore evident that even if the accused tested HIV negative this would be of no real assurance to the victim as she may still have been infected.²⁹ We believe therefore that instead of advocating for the testing of accused rapists, we should concentrate on the health of the victim. In order to ensure that her health is protected, it must be assumed that the accused is HIV positive and the other factors listed above must be considered in order to determine whether PEP is recommended to the victim.

In terms of recent amendments to the law relating to bail, an accused who is charged with an

offence referred to in Schedule 6 of the Criminal Procedure Act, will be detained in custody (i.e. denied bail) unless he or she adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit the accused's release.³⁰ One of the offences referred to in Schedule 6 is 'rape when committed by a person knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus'.

Testing the accused in a rape matter at time of his arrest would not establish if he did in fact know that he was HIV positive at the time of the rape. At best, it would merely establish that he was HIV positive at the time of the rape. Without proof of knowledge of his HIV positive status, the accused could not be denied bail in terms of this section. It would be extremely difficult to establish this knowledge, short of the accused admitting that he had tested positive before the rape. This is a further argument against the testing of accused at the time of his arrest.

5. RECOMMENDATIONS

We recommend the enactment of legislation to provide that in rape cases -

- 1. The state should absorb all costs for treatment required by a rape victim as a result of the rape, including PEP.**
- 2. All rape complainants must be examined and assessed as to the risk of HIV infection by a district surgeon or medical practitioner within 2 hours of reporting rape to the police. Rape complainants who do not report the rape to the police but present at a medical facility must be examined and assessed by a medical practitioner within 2 hours of presenting.**
- 3. All victims who present at a medical facility (including those who are examined by a district surgeon) are informed of the risk of being HIV infected as a result of the rape.**

- 4. All rape victims are individually assessed as to the risk of HIV infection, taking into consideration -**

**Available information on the HIV status of the perpetrator;
The type of exposure;
The nature of the physical injuries; and
The number of times the victim was raped.**

- 5. All rape complainants are informed after assessment of the risk of HIV infection in their particular case and a recommendation is made to them whether PEP treatment is appropriate. Regardless of the recommendation of the medical practitioner the choice of whether to take PEP or not remains that of the rape complainant.**

- 6. All rape complainants are informed of -**

**The existence of PEP drugs;
The purpose of the drugs; and
The possible side effects of the drugs.**

- 7. PEP drugs are available at all medical facilities.**

- 8. Should the drugs not be available at the medical facility where the rape complainant presents, she must be assisted by the medical facility or attending practitioner in obtaining them.**

- 9. HIV-antibody testing and counselling is provided to all rape complainants at the cost of the state.**
-

ENDNOTES

1. Rick Sowadsky 'MSPH Post-Exposure Prophylaxis (PEP) For Sexual Exposures' (June 1998) Website: www.thebody.com/complainant/cgi/safeans.html
2. Centres for Disease Control and Prevention 'Update: provisional Public Health Service recommendations for chemoprophylaxis after occupational exposure to HIV' (1996) 45 *MMWR* at 468-472.
3. Personal communication with representative from Glaxco Welcome (23 April 1999).
4. Personal communication with Dr. Lynette Denny (Head of Department of Obstetrics and Gynaecology, University of Cape Town) on 26 April 1999. She added that triple therapy is not offered to rape victims because there is as yet no data to indicate that additional anti-retroviral drugs enhance the protective effect of AZT.
5. Personal communication with Joshua Bamberger (Department of Public Health; Department of Family and Community Medicine, University of California, San Francisco) on 24 April 1999.
6. *Ibid.*
7. Centres for Disease Control and Prevention 'Case-control study of HIV seroconversion in health-care workers after percutaneous exposure to HIV-infected blood' (1995) 44 *MMWR* at 929-933.
8. *Ibid.*
9. DM Cardo et al 'A case-control study of HIV seroconversion in health care workers after percutaneous exposure' (1997) *New England Journal of Medicine* 1485-1490.
10. Centres for Disease Control and Prevention *loc cit* note 2.
11. MH Katz & JL Gerberding 'Postexposure treatment of people exposed to human immunodeficiency virus through sexual contact or injection use' (1997) *New England Journal of Medicine* 1097-1100.
12. P Lurie et al 'Postexposure Prophylaxis After Nonoccupational HIV Exposure' (1998) 280 *Journal of the American Medical Association* 1769-1773.
13. IA Spira et al 'Cellular targets of infection and route of viral dissemination after an intravaginal inoculation of simian immunodeficiency virus into rhesus macaques' (1996) *J Exp Med* 215-225.

14. Lurie et al *op cit* note 12 at 1769.
15. Joshua Bamberger et al 'HIV Postexposure Prophylaxis Following Sexual Assault' (1999) *American Journal of Medicine*.
16. Lurie et al *op cit* note 12 at 1770.
17. A Van der Straten et al ' Couple communication, sexual coercion and HIV risk reduction in Kigali, Rwanda' (1995) *AIDS* 935 - 944.
18. Lurie et al *op cit* note 12 at 1771.
19. Bamberger et al *op cit* note 15.
20. Katz et al *op cit* note 11 at 1097-1100.
21. Lurie et al *op cit* note 12 at 1771.
22. LO Gostin et al 'Working Group HIV Testing, Counselling and Prophylaxis After Sexual Assault' (1994) *Journal of the American Medical Association* at 1436-1444.
23. Bamberger *op cit* note 5.
24. Helen Rees Communication on the Reproductive Health Discussion Group (6 October 1998) Website: repro_1@healthlink.org.za
25. *Harksen v Lane NO* 1998 1 SA 300 (CC).
26. See our discussion in Chapters 1 and 2 above.
27. Gostin et al *op cit* note 22 at 1436-1444.
28. R Jurgens et al *Are Compulsory HIV Testing and Disclosure of HIV Status Ever Justifiable? Ethical and Legal Analysis Using Sex Offenders, Health Care Providers, Patients as Examples* (Poster Presentation at the Third Annual Conference on HIV/AIDS Research, Montreal, 13-15 May 1993).
29. Gostin et al *loc cit* note 22.
30. Section 60(11) of the Criminal Procedure Act No 51 of 1977 (as amended).

CHAPTER 16: POSITIVE DUTIES OF STATE OFFICIALS TOWARDS RAPE VICTIMS

1. INTRODUCTION

In Chapters 2 and 3 above, we have argued that the Bill of Rights included in the 1996 Constitution and international human rights law impose certain duties on the South African state. These duties apply to the state in the general sense (for example, the obligations to enact appropriate legislation to address rape and to allocate sufficient state resources to ensure proper implementation of such legislation). In addition, we argue that the combined weight of the Constitution and international human rights law also imply that duties are imposed on individual state officials to perform certain functions when they encounter victims of rape.

This section will set out the specific duties to be fulfilled by members of the South African Police Service, public prosecutors and members of the Correctional Services Department in relation to rape victims, and will also examine how failure to comply with these duties should be addressed.

2. SPECIFIC DUTIES OF STATE OFFICIALS

2.1 South African Police Service

In reported cases of rape, it shall be the duty of **the police in the charge office** to:

1. Inform the complainant that she has the right to report the rape and/or request an investigation into the rape;

2. Inform the complainant, if she wishes to lay charges of rape, that she has the right to make a statement;
3. Take the statement of the complainant in a private room or area;
4. Open a docket and take a basic statement from the complainant before she is referred for a medical examination, in order to make an immediate arrest of an identified suspect if possible;
5. Provide assistance to the complainant so that she may make her statement in the language of her choice;

Contact an investigating officer as soon as the complainant reports the rape;

ensure the immediate arrival of an investigating officer so that the investigating officer can escort the complainant to the hospital and/or district surgeon or to assist the complainant in seeking medical assistance until the arrival of the investigating officer at the district surgeon.

It shall be the duty of the **investigating officer** to:

6. Register the case docket;
7. Escort or to meet the complainant at the district surgeon;
8. Complete the SAP 308 form and to record precisely which samples are required from the district surgeon;
9. Ensure that rape victims are attended by a district surgeon or medical practitioner within 2 hours of the reported rape;
10. Make suitable arrangements to ensure the immediate safety of the complainant;
11. Take a full and detailed statement from the complainant once the complainant is ready to do

so;

12. Inform of and refer the complainant to an organisation for counselling if she so wishes;
13. Inform the complainant if there is an arrest of the accused;
14. Inform the complainant to attend an identification parade, if necessary, and to inform her that she does not have to touch the suspect in order to identify him;
15. Arrange an identification parade at a venue or police station where the facility of a one way mirror is available, if possible;
16. Inform the complainant of an application for bail by the accused;
17. Inform the complainant that she has the right to attend bail proceedings;
18. Obtain relevant information from the complainant in order to oppose a bail application and/or the imposing of conditions of the accused, should he be released on bail;
19. Where the complainant reports a breach of the bail conditions by the accused, to immediately -
 - (i) Take a statement from the complainant or other witnesses detailing the breach of the bail conditions;
 - (ii) Approach the prosecutor with the aim of an application to have the accused's bail revoked; and
 - (iii) Where necessary, take steps to ensure the safety of the complainant.
15. Inform the complainant of the bail conditions imposed on the accused should he be released on bail and of the procedure to be followed if the accused breaches the bail conditions;

16. Inform and assist the complainant in obtaining protection if necessary from the accused in terms of the *Witness Protection Act*, 1998 or any other law;
17. Keep the complainant informed about the progress of the investigation of the case at regular intervals;
18. Inform the complainant of the date of the trial at least two weeks in advance;
19. Arrange a pre-trial interview between the prosecutor and the complainant before the trial and to assist the complainant in getting to the court in order to attend the interview;
20. Assist the complainant in getting to court on the day of the trial;
21. Inform the complainant of the result of the trial; and
22. Inform the complainant, should the accused be found guilty and imprisoned, that if she wishes to know when the prisoner will be placed on parole or released she must give the investigating officer permission to write the complainant's name, address and identity number on form SAP 62 and to inform the complainant that it is her/his duty to keep the Commissioner of Correctional Services informed about any change of address;.

2.2 Public Prosecutors

It shall be the duty of the prosecutor, where the accused is charged with rape to:

20. Liaise with the investigating officer to ensure that a pre-trial interview takes place between the complainant and the prosecutor;
21. Conduct an interview with the complainant before the appearance of the accused in a bail application in order to obtain relevant information to question whether the accused should be released on bail and/or whether any conditions should be imposed on the

accused should he be released on bail;

22. Conduct an interview with the complainant before the trial to:
 - (i) explain the court proceedings including the evidentiary and procedural aspects of the trial
 - (ii) explain the role players in the trial and their duties
 - (iii) go through the complainant's statement with the complainant and ensure that it is consistent with her account of the events of the rape;
 - (iv) clarify why certain questions need to be asked in the trial by the prosecutor and explain questions that may be asked in cross – examination;
23. Keep written notes on the interview with the complainant
24. Familiarise the complainant with the court room;
25. Arrange a meeting between the complainant and an interpreter, if applicable, before the trial;
26. Ensure that an office or waiting room is made available to the complainant to avoid contact with the accused, his family or friends while waiting for the trial to proceed
27. Inform the complainant of sections 153, 158(3) and 170A of the Criminal Procedure Act and that an application may be made to the court in terms of these sections;
28. Inform the complainant that she/he may request to have another person in court for the purposes of providing support to the complainant;
29. Explain the purpose of a victim impact statement to the complainant and ensure that a victim impact statement is prepared and submitted to court for purposes of sentencing;
30. Ensure that the case has been fully investigated before the trial commences so that no unnecessary delays occur;

12. Ensure that the witness statement(s) made to the police are correct and contain all relevant information (where necessary, additional statements should be obtained);
13. Where medical evidence is relevant, consult thoroughly with the medical practitioner and ensure that he or she is familiar with all the medical terminology as well as the implications of the findings of the medical practitioner;
14. Inform the victim that she may participate as an ancillary prosecutor in the case against the accused once the state has instituted proceedings against the accused;
15. Consult with the police who investigated the case, particularly where they are likely to be called as witnesses;
16. When the merits and complexity of a matter before court demand expert witnesses, they should be called to testify;
17. Make use of expert witnesses to present evidence on sentencing;
18. For purposes of sentencing, place on record all aggravating circumstances, specifically in relation to the impact (physical, psychological or financial) the crime has had on the victim, if evidence pertaining to aggravating circumstances has not been placed on record during the trial.
19. Inform the victim of section 300 of the Criminal Procedure Act (which allows for the award of a compensation order under certain circumstances) and to obtain the required information from the victim where an application for such order is appropriate;
20. Inform the complainant of the outcome of the trial in a manner assisting him or her to understand the reasons for the judgement and the motivation for the sentence imposed in the case of conviction.

2.3 Correctional Services

It shall be the duty of the **Parole Board** to:

- ◆ Approach the trial court on its views regarding the possible placement on parole of a convicted rapist;
- ◆ Inform the complainant of the parole hearing and request input, either in writing or in person, on her/his views on the possible placement on parole of the convicted rapist;
- ◆ Take any written representation relevant to the case of any person, including the victim's, into consideration when placement on parole is considered;
- ◆ Consider the following factors in the case of rape:
 - (i) Physical injuries sustained by the victim, especially those which require hospitalisation or prolonged intensive medical treatment;
 - (ii) Emotional (psychological) harm suffered by the victim(s) such as when a victim was forced to take part in a sexual act in front of family or friends, lack of regard for the physical condition of the victim such as age, pregnancy, physical or mental illness, or if the crime was committed in such a manner that it may cause future harm to the mental condition of the victim;
 - (iii) Whether more than one offender committed the sexual act, such as gang/group rapes;
 - (iv) Whether weapons or any simulated weapon were used; and
 - (v) Whether the victim was forced to perform unnatural sexual acts, such as bestiality or sadism; and
- ◆ Inform the complainant of the prisoner's release

3. FAILURE TO COMPLY WITH POSITIVE DUTIES

It should be noted as a point of departure that we believe that the positive duties resting on state officials should be clearly set out in *legislation* (as opposed to regulations or ‘internal’ or departmental directives and guidelines). While this document does not allow an in-depth exploration of this issue, we argue that incorporation of such duties in legislation -

- ◆ Is not foreign to South African law (see, for example, section 2 of the Domestic Violence Act 116 of 1998);
- ◆ Ensures that the relevant provisions are accessible; and
- ◆ Carries the force of legislative injunction.

A further question is what the consequences of a failure to comply with these duties should be. We have identified the following options:

- A claim against the state based on delict¹ or on constitutional grounds;
- Imposition of criminal liability for individual officials who fail to comply with prescribed duties; or
- Institution of internal disciplinary proceedings against individual officials.

This document will not address the feasibility of claims based on delictual or constitutional grounds, since we believe that the position is fairly clear. We believe that these options should in any event remain available to a complainant, irrespective of any additional steps taken against the individual official.

4. CRIMINAL LIABILITY FOR FAILURE TO COMPLY WITH DUTIES

4.1 Precedent in South African Law

The imposition of statutory duties on members of certain professions is not unknown in South African law, and the attachment of criminal sanction for a failure to comply with these duties is also not without precedent. We will briefly examine a number of statutory provisions in this regard.

Companies Act 61 of 1973

According to section 249(1) read with section 441(e) of the Companies Act, the director of a company may incur criminal liability in respect of non-compliance with certain duties. The rationale for holding directors liable is that they are expected to carry out their duties with the requisite skill and diligence and that they should be criminally liable where they fail to do so.

The criminal liability attaching to directors not only relates to fraudulent conduct on the part of the directors but it also attaches in circumstances where a director, for example, fails to lodge the necessary documentation required by the Companies Act with the Registrar of Companies or fails to do so timeously. Here the failure does not relate to any fraudulent conduct, yet criminal liability also attaches.²

The Prevention of Family Violence Act 133 of 1993

Section 4 of this Act imposes criminal liability where persons examining or treating children under circumstances which ought to give rise to a suspicion that the child has been ill-treated, fail to report this to the appropriate official.

The Criminal Procedure Act 51 of 1977

The Criminal Procedure Act provides in Section 28 that -

(1) *A police official -*

(a) *who acts contrary to the authority of a search warrant issued under section 21 or a warrant issued under section 25(1); or*

(b) *who, without being authorised thereto under this Chapter -*

- (i) *searches any person or container or premises or seizes or detains any article;*
 - (ii) *perform any act contemplated in subpar (I), (ii), or (iii) of section 25(1)*
- shall be guilty of an offence...*

4.2 Discussion

In the case of *S v Klopper*³ the Appellate Division held that there was a heavy duty on a director or servant of the company relating to company operations. He or she had a duty to prevent prohibited conduct and carry out his or her duties in accordance with the statutory requirements of the Act. Where he or she failed to do so criminal liability should attach.

By analogy one can therefore argue that criminal liability should attach in situations where state officials such as police officials, who are charged with a even heavier duty in relation to law and order and maintaining societal interests in the proper administration of the criminal justice system, fail to comply with their duties.

In the case of *Kauesa v Minister of Home Affairs And Others*⁴ it was held with reference to the police functions and duties in newly established democracy (which is especially relevant in South Africa) that:

The Namibian Police has, especially since the date of independence, gone to great lengths and incurred substantial expenses to improve its image amongst members of the public generally. It has done so not only by urging police officers to execute their duties in a professional and effective manner. The Namibian Police has at all times placed a very high premium on its image and public co-operation in its war against crime and the realisation of its other functions. Given the history of this country prior to the date of independence, which I am advised is notorious and not necessary to re-iterate for purposes of this application, the Namibian Police requires its members to be absolutely loyal to the Namibian State, its Constitution and the Government of the day and, in order to enhance its co-operation with the public, also strive to make that loyalty perceptible.

We submit that these remarks apply *mutatis mutandis* to all state officials who come into contact with rape complainants.

It is interesting to note that the first drafts of the *Domestic Violence Bill* prescribed criminal liability for a failure on the part of state officials to comply with duties imposed in the Bill. However, this provision was heavily debated and the clause was eventually changed to its present form. The debate centred around a general fear that by imposing criminal liability one would in effect be ‘opening the floodgates’ resulting in police officials being held criminally responsible for every error, be it a mere failure to take down the name of a suspect. However, one should note that the ‘traditional’ common law offences, for example, private defence and emergency, will still be available to state officials who are prosecuted for failure to comply with statutory duties.

In this context, regard may also be had to the case of *Minister of Law and Order v Kadir*,⁵ where it was held that society would balk at holding police officials personally liable under civil law for damages arising out of a relatively insignificant dereliction of duty. Even though this case dealt with civil liability the principle can and should be extended to criminal liability. The remarks of Conrardie J are especially appropriate in this regard:⁶

The situation is not one fraught with an overwhelming potential liability. Trying to balance the individual interest of the claimant against the broader ones of the community I am unable to perceive that the imposition of liability in a case such as this is likely to prove socially calamitous.

We therefore propose that legislation should state clearly that a failure to comply with statutory duties constitutes a criminal offence. Research and experience indicate that the conduct and attitude of state officials contributes heavily to secondary victimisation of rape victims, and while it is not possible to ‘legislate’ for attitudinal changes, the imposition of criminal liability for failure to comply with duties may have a deterrent effect.

In the context of rape, where the failure of state officials to comply with their prescribed duties may well expose the complainant to further violence by the accused, secondary victimisation or a denial of access to justice, it is clear that such a drastic sanction is more than justified. One may compare this situation with section 28 of the Criminal Procedure Act, where criminal liability is imposed on police officials for failure to comply with the conditions of a search warrant. (We submit that the rationale for this provision is to be found in the potentially drastic invasion of an individual’s privacy rights which unlimited police powers of search and seizure would imply.) Similarly, the societal

interest in the protection of the rights of rape victims justify the imposition of criminal liability.

5. RECOMMENDATION:

We propose the enactment of legislation which -

- 1. Clearly lists the duties of state officials in relation to rape victims;**
- 2. Provides that a failure to comply with these duties will be punishable as a criminal offence;**
- 3. Confirms that all defences available in law will be available to a state official so charged; and**
- 4. Prescribes penalties in the event of conviction of this offence.**

ENDNOTES

1. See, for example, *Minister of Police v Ewels* 1975 3 SA 590 (A).
2. Section 276(2)(3) and (5) of the Companies Act.
3. 1975 (4) SA 773 (A).
4. 1995 (1) SA 51 (Nm).
5. 1995 (1) SA 303 (A).
6. At 742I-743B.

CHAPTER 11: THE PRODUCTION OF PERSONAL RECORDS IN RAPE CASES

1. CURRENT POSITION IN SOUTH AFRICA

Documents are a form of evidence which may be tendered to the court to assist in the determination of the guilt or innocence of the accused:

The word ‘document’ is a very wide term and includes everything that contains the written or pictorial proof of something.¹

A party who wishes to rely upon statements contained in a document must ordinarily comply with three general rules:

- The contents of a document may be proved only by production of the original. (This rule is subject to various exceptions.)
- Evidence is normally required to satisfy the court of a document's authenticity.
- The document may have to be stamped in accordance with the provisions of the Stamp Duties Act, 1968.²

There are presently four situations in which a witness in a trial may refuse to disclose or permit others to disclose admissible evidence.³ These are:

- The privilege against self-incrimination;⁴
- Marital privilege;⁵
- Privilege against answering questions which tend to show that the witness has committed adultery or *stuprum*; and
- Legal professional privilege which is a privilege vested in the client, who may refuse to answer questions upon privileged matters him or herself and may also prevent his or her legal advisor or an agent of either of them from doing so.⁶

At present, South African law does not regard communication between, for example, medical doctors and their patients or rape counsellors and their clients as privileged for the purposes of judicial proceedings.⁷ This means that any document which contains information about the rape complainant and the rape incident is potentially admissible evidence and can be used as such, unless it falls into one of the above situations. This allows for the accused or the court to subpoena

documents in the possession of the rape complainant or a third party (for example a counsellor or psychologist) which may contain information about the complainant or the rape.⁸

2. CURRENT POSITION IN CANADA

In 1997, legislation was passed in Canada to specifically deal with the production of personal records of the complainant or other witnesses.⁹ These provisions require a person accused of a sexual offence seeking production of a record containing information about the complainant to bring an application before court setting out specific grounds showing that the record contains information that is relevant to the accused's defence. The trial judge determines whether the record should be produced, firstly to the judge for review, and secondly, after that review, to the accused. In determining whether and to what extent the record should be produced, the judge is required to consider the rights of the accused under the Canadian Charter of Rights and Freedoms and other specific factors set out in the legislation.

Sections 278.1 to 278.9 of the Canadian Criminal Code -

1. Provide that, in sexual offence proceedings, records or any part of a record shall not be produced to the accused unless the trial judge so determines, based on a two-stage application;¹⁰
2. Define 'records' broadly to include any form of record where there is a reasonable expectation of privacy and certain examples are specifically listed;¹¹
3. Provide that at the initial stage, the accused must establish:¹²
 - that the records exist and are held by a named record holder;
 - that the records contain information which is likely relevant to an issue at trial or to the competence of a witness to testify; and
 - the specific grounds upon which the accused relies to establish that the information is likely relevant.

4. Provide that assertions by the accused will not be sufficient to satisfy the requirement that the accused set out the grounds relied upon to establish the 'likely relevance' of the records. This provision makes it clear that speculation about why a record might or may be relevant will not provide the grounds for the application. An 'assertion' is simply a statement not supported by other information. An accused must offer a realistic explanation why the records sought will be likely relevant to an issue at trial or to the competence of a witness to testify.¹³

5. Specifically state that any one or more of the following assertions are not sufficient to establish that the record is likely relevant:¹³
 - that the record exists;

 - that the record relates to medical or psychiatric treatment, therapy or counselling that the complainant or witness has received or is receiving;

 - that the record relates to the incident that is the subject-matter of the proceedings;

 - that the record may disclose a prior inconsistent statement of the complainant or witness;

 - that the record may relate to the credibility of the complainant or witness;

 - that the record may relate to the reliability of the testimony of the complainant or witness merely because the complainant or witness has received or is receiving psychiatric treatment, therapy or counselling;

 - that the record may reveal allegations of sexual abuse of the complainant by a person other than the accused;

 - that the record relates to the sexual activity of the complainant with any person, including the accused;

 - that the record relates to the presence or absence of a recent complaint;

- that the record relates to the complainant's sexual reputation; or
- that the record was made close in time to a complaint or to the activity that forms the subject matter of the charge against the accused.

NOTE:

These are not impermissible grounds for production of records *per se*. Where the accused satisfies the trial judge that the records, for example, will contain an inconsistent statement that is likely relevant to issue at trial, the judge would not be prevented from reviewing the records.

6. Provide that in determining whether to order production of the record, or any part of the record, to the trial judge for review, the trial judge shall first:¹⁵
- consider the effects of ordering production of the records to the accused, having regard to the accused's ability to make full answer and defence, and the complainant's rights to privacy and equality; and
 - consider the following factors:
 - the extent to which the record is necessary for the accused to make full answer and defence;
 - the probative value of the record in question;
 - the nature and extent of the reasonable expectation to privacy vested in that record;
 - whether production of the record is based on discriminatory belief or bias;
 - the potential prejudice to the dignity, privacy or security of any person to

whom the record relates;

- society's interest in encouraging the reporting of sexual offences;
- society's interest in encouraging the obtaining of treatment by complainants of sexual offences; and
- the effect of the determination on the integrity of the trial process.

7. Provide that at the second stage, the trial judge would review the records in private and determine whether to order production to the accused; in making such determination the judge must consider the Charter rights of both the complainant and accused and the specific factors set out in the legislation (i.e. the same considerations that are taken into account at the first stage).¹⁶
8. Provide that if the judge is satisfied that the records are likely relevant to an issue at trial or the competence of a witness to testify and their production to the accused is necessary in the interests of justice, the judge may order production to the accused of only those parts of the record found to be likely relevant.¹⁷
9. Establish the procedures governing the determination of an application of production and provide additional safeguards for the complainant of witness's privacy including:
 - the application shall be made to the trial judge in writing, setting out the specific grounds upon which the accused is relying for production;¹⁸
 - a subpoena *duces tecum* in a new form shall be served on the witness in possession of the records together with the notice of motion;¹⁹
 - adequate notice (usually 7 days) of the application shall be provided to the record holder, Crown, complainant or witness, and any person to whom the record relates;²⁰
 - the determination of whether or not production should take place is conducted *in camera*;²¹

- the judge shall consider the imposition of appropriate conditions where production of records is ordered;²²
- the contents of the application, information provided at the hearing and the judge's determination shall not be published or broadcast;²³
- records produced to an accused shall not be used in any other proceedings,²⁴ and
- the records produced to the judge but not produced to the accused are retained by the court until the final appeal and are then returned to the original custodian.²⁵

3. DISCUSSION

Many rape complainants seek assistance, support and advice after being raped. This assistance is sought from a variety of people, including rape counsellors, traditional healers, religious leaders, psychologists and psychiatrists. During the counselling process rape complainants may speak about intensely private and intimate experiences (the rape as well as other traumatic experiences triggered by the rape), or may express doubts about reporting the rape or pursuing the rape case if it has been reported. The expression of doubt is not because complainants are lying about the rape, but may occur because they are afraid, they feel humiliated, and/ or they are in the process of recovering from trauma.

However, in the hands of the accused or his representative, statements about, for example, a reluctance to report the rape, may be given a different interpretation - one that is highly damaging to the complainant's credibility. If rape complainants know that their private thoughts, expressed to a professional therapist, counsellor or healer in a supportive environment, are going to become a matter for open debate in a public court of law, they may be deterred from reporting the offence to the police and may be discouraged from seeking the support they may need after the rape.

A further disadvantage of mandatory production of personal records is that the work of those who provide services and assistance to rape complainants may also be detrimentally affected. Service providers may avoid asking rape complainants certain questions or may avoid certain therapeutic processes, which may be of great use to the complainant, for fear of the information being

manipulated and used against the rape complainant at trial.

The Canadian legislation referred to above recognises the potentially damaging consequences of compelling the production of personal records in sexual offences cases. It recognises that while the production of personal information regarding any person (including the complainant) to the court and to the accused person may be necessary in order for an accused to make a full answer and defence, such production may breach the person's right to privacy and equality. Therefore the determination of whether to order the production of the information should be subject to careful scrutiny.

Due to the similarity between the South African and Canadian constitutions containing provisions protecting the rights of the accused to a fair trial, as well as the rights to privacy and equality of the complainant it is submitted that South Africa should adopt a similar approach to Canada in passing legislation which protects the confidentiality of documents in rape cases. This will encourage the reporting of incidents of rape and is based upon principles of fairness to rape complainants as well as the accused.

4. RECOMMENDATION

We recommend the inclusion of measures analogous to those set out in sections 278.1 to 278.9 of the Canadian Criminal Code in South African rape legislation.

ENDNOTES

1. *Secombe and Others v Attorney General and Others* 1919 TPD 270 at 277.
2. LH Hoffmann & D Zeffert *The South African Law of Evidence* 4th ed (1988) at 389.
3. *Idem* at 236.
4. Section 203 of the Criminal Procedure Act 51 of 1997.
5. Section 198 of the Criminal Procedure Act.
6. Section 201 of the Criminal Procedure Act.
7. Etienne du Toit et al *Commentary on the Criminal Procedure Act* (1993) at 23.39.
8. Section 179 of the Criminal Procedure Act.
9. Sections 278.1 - 278.9.
10. Section 278.1.
11. Subsection 278.3(3).
12. Subsection 278.3(4).
13. *Ibid.*
14. Section 278.5.
15. Sections 278.6 and 278.7.
16. Section 278.7.
17. Subsection 278.3(3).
18. Subsection 278.3(5).
19. Subsection 278.7(3).
20. Subsection 278.4(1).
21. Subsection 278.7(3).
22. Section 278.9.

23. Subsection 278.7(5).
24. Subsection 278.7(6).

CHAPTER 12: SENTENCING GUIDELINES

1. CURRENT POSITION IN SOUTH AFRICA

South African courts have a broad discretion to determine the appropriate sentence in a particular criminal matter. This discretion may not be exercised arbitrarily, and a court is expected to act within the limits prescribed by the legislature and in accordance with the guidelines laid down by higher courts.

According to Du Toit,¹ the existence of a sentencing discretion is a pillar of our law which should be guarded jealously by everybody involved. In cases such as *S v Tom; Bruce*² the Appellate Division expressed the view that it did not take kindly to a restriction of its sentencing powers by the legislature.³ The main advantage of a broad discretion is that courts can adapt sentences to provide for the slightest differences between cases. (However, we argue that in the context of rape cases, the exercise of the sentencing discretion inevitably depends on the personal views and biases of the judge or magistrate and his or her perceptions regarding rape and its consequences.)

The generally accepted standard applied by our courts was laid down in the case of *S v Rabie*⁴ in the following terms:

Punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances.⁵

Furthermore, our courts have time and again emphasised the importance of the main purposes of punishment: retribution, deterrence, prevention and rehabilitation.⁶

As highlighted by the South African Law Commission,⁷ sentencing has recently been the focus of much attention in the media with an outcry from the community; both for more stringent punishment and that offenders should serve a more realistic portion of the sentences imposed by our courts.

In this regard the comments by Mahomed CJ in the matter of *S v Chapman*⁸ should serve as a guide:

The courts have a duty to send a clear message to the accused and to other potential rapists and to the

community that the courts are determined to protect the equality, dignity and freedom of all women and show no mercy to those who invade those rights.

In respect of rape, recent amendments set out in 51 of the Criminal Law Amendment Act 105 of 1997 provide that the High Court shall, if it has convicted a person of rape committed under certain circumstances, sentence the person to imprisonment for life. These circumstances include incidents of rape where the victim was raped -

- More than once, whether by the accused or by any co-perpetrator or accomplice;
- By more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;
- By a person who has been convicted of two or more offences of rape, but has not yet been sentenced in respect of such convictions;
- By a person knowing that he has the Acquired Immune Deficiency Syndrome or the Human Immunodeficiency Virus; or
- under circumstances involving the infliction of grievous bodily harm.⁹

In addition, this provision also applies where the victim -

- Is a girl under the age under 16 years;
- Is a physically disabled woman who, due to her physical disability, is rendered particularly vulnerable; or
- Is a mentally ill woman as contemplated in section 1 of the Mental Health Act 18 of 1973.¹⁰

Where the High Court has convicted a person of rape in circumstances other than those referred to above, the Court shall sentence the person -

- In the case of a first offender, to imprisonment for a period not less than ten years;
- In the case of a second offender, to imprisonment for a period not less than fifteen years;
- In the case of a third or subsequent offender, to imprisonment for a period not less than twenty years.¹¹

However, if the court is satisfied that '*substantial and compelling*' circumstances exist which justify the imposition of a lesser sentence than the prescribed sentence, it shall enter those circumstances on the record of the proceedings and may impose such lesser sentence.¹²

2. CURRENT POSITION IN UNITED STATES

3. DISCUSSION

an in-depth study of the current interpretation of section 51(3)(a) by the courts in rape matters; and

•based on the results of this study, the development of legislative guidelines to inform the implementation of the provisions on minimum sentences in rape matters.

ENDNOTES

1. *Du Toit Straf in Suid-Afrika* (1980) 127.
2. 1990 (2) SA 802 (A).
3. At 822C-D.
4. 1975 (4) SA 855 (A).
5. At 862G.
6. *S v Whitehead* 1970 (4) SA 424 (A) at 436E-F.
7. South African Law Commission *Sentencing Mandatory Minimum Sentences* Issue Paper 11 Project 82.
8. 1997 (3) SA 341 (SCA).
9. Section 51(1).
10. *Ibid.*
11. Section 51(2)(b).
12. Section 51(3)(a).
13. Geldenhuys & Joubert *Criminal Procedure Handbook* (1994) at 221; see also Dianne Hubbard 'Should a minimum sentence for rape be imposed in Namibia?' in Christina Murray (ed) *Gender and the New South African Legal Order* (1994) at 233.
14. MA Adams 'The Federal Sentencing Guidelines as Legal Process Jurisprudence' (Vol 31) *American Law Review* at 259.
15. *Idem* at 262.

16. The provisions of section 60(11) of the Criminal Procedure Act 51 of 1977, which require an accused charged with an offence listed in Schedule 6 to adduce evidence to satisfy the court that ‘*exceptional circumstances*’ exist permit his release, are analogous to the formulation in section 51(3)(a).

CHAPTER 13: INTRODUCING ‘VICTIM IMPACT STATEMENTS’ FOR PURPOSES OF SENTENCING

Rape is an experience so devastating in its consequences that it is rightly perceived as striking at the very fundament of human, particularly, female privacy, dignity and personhood. Yet, I acknowledge that the ability of a judicial officer such as myself to fully comprehend the kaleidoscope of emotion and experience, of both rapist and rape survivor, is extremely limited.'

GENERAL

The South African Law Commission has defined a victim impact statement as follows:¹

The Victim Impact Statement is a statement made by the victim and addressed to the presiding officer in the sentencing decisions. The Victim Impact Statement consists of a description of the harm, in terms of the physical, psychological, social and economical effect that the crime had, and will have in future, on the victim. Sometimes this statement may include the victim's statement of opinion on his (*sic*) feelings about the crime, the offender and the sentence that he feels is appropriate.

The use of victim impact statements can be seen as a measure to give victims an opportunity 'to voice their opinion about the case'.² Although a victim impact statement usually takes the form of a written statement that is presented to the court as part of the pre-sentence proceedings, it can also be submitted in the form of an oral statement made

in court by the victim prior to sentencing.³

At present, legislation allowing for some form of 'victim participation' is in force in the United States (in 48 states), Canada, New Zealand and Australia.⁴ The form, contents and means of implementation of victim impact statements vary greatly between different jurisdictions. Responsibility for the preparation of the Victim Impact Statement can rest with criminal justice personnel, like the prosecutor, police or probation officer, or it can rest with an independent outside organisation, such as an NGO providing services to victims.⁵

CURRENT POSITION IN SOUTH AFRICA

South African law does not, at present, contain any express provisions on the use of victim impact statements. Although there are no legal rules precluding the acceptance of a statement by the victim on the impact of the sexual assault, there are also no measures that require the preparation and submission to the court of such statements as a matter of course. According to section 274(1) of the Criminal Procedure Act 51 of 1977, the court may hear such evidence as it deems appropriate in order to inform itself as to the proper sentence to be passed.

The factors that should be taken into consideration by South African courts when imposing sentence are well known. The court has to examine -

- The nature and seriousness of the offence;
- The interests of the community; and
- The personal circumstances of the accused.⁶

It has been argued (convincingly) that this traditional 'triad' fails to consider the interests of the victims of crime.⁷ This is especially true in cases of rape. In order to adequately gauge the seriousness of the offence (as well as, we submit, the impact on the interests of

the community) it is crucial for the presiding officer to have sufficient information about how the rape affected the victim.

While it is strictly speaking ideal for facts in mitigation or aggravation of sentence to be placed before the court by presenting the evidence of a witness under oath, such facts may also be placed before the court by handing in sworn statements, without the witness testifying in court, or by means of an address to the court by the representatives for the prosecution and defence respectively.⁸ Information conveyed in the last way will not bear much weight, unless the other party admits to it. If the other party does agree to the admission of such statements, they will carry the same weight with the court as accepted evidence under oath.⁹

Despite the general rule that the rules of evidence applying to the merits of the case will also apply to sentencing proceedings, a somewhat more liberal attitude is adopted as far as evidence on sentence is concerned.¹⁰

This does not imply that all the rules of evidence are to be ignored during the stage of sentencing, but that in suitable cases, a strict and technical application of these rules should not be adhered to, since this may result in the exclusion of information which is relevant and helpful in deciding on a suitable sentence. The hearsay rule, for example, may occasionally be relaxed for purposes of sentence proceedings.¹¹

CURRENT POSITION IN OTHER JURISDICTIONS

3.1 Canada

Section 772 of the Canadian Criminal Code requires a court to consider ‘any statement of a victim of the offence describing the harm done to, or loss suffered by, the victim arising from the commission of the offence’ for the purpose of determining sentence. Such statement must be prepared in writing. The fact that a victim impact statement has been

prepared does not prevent the court from considering any other evidence concerning the victim of the offence for purposes of sentencing.

For the purposes of this section, the term ‘victim’ includes not only the person to whom harm was done or who suffered physical or emotional loss as a result of the commission of the offence, but could also (where the victim is dead, ill or otherwise incapable of making a statement) include, amongst others, the spouse or a relative of the victim.

3.2 Australia

Certain Australian jurisdictions have enacted legislation requiring courts to consider victim impact statements before sentencing. Sec 429AB of the Crimes Act 1900 of the Australian Capital Territories, for example, requires a court to have regard to a victim impact statement, and prohibits the drawing of any inference about the harm suffered by a victim from the fact that a victim impact statement is not tendered in respect of the offence. The victim must consent in writing to the submission of a victim impact statement by the prosecutor.

The term ‘harm’ is defined to include:

- Physical injury;
- Mental injury or emotional suffering, including grief;
- Pregnancy;
- Economic loss; and
- Substantial impairment of rights accorded by law.

DISCUSSION

4.1 The Duty to Consider Victim Impact Statements

In its Issue Paper on Restorative Justice, The South African Law Commission proposes that victim impact statements ought to be generally admissible at sentencing hearings. The purpose of such statements should be to provide a measure of the seriousness of the offence.¹²

As explained above, we believe that the current legal position already allows for ‘victim impact statements’ to be admissible for purposes of sentencing, even though there are no express provisions to this effect. The real question is whether there is any obligation on the part of the presiding officer to consider a complainant’s statement on the effects of the rape.

In practice, the complainant’s evidence on the impact of the sexual assault is often led during the course of presentation of evidence during the ‘main trial phase’ aimed at determining the guilt or innocence of the accused.¹³ However, it may occur that the information is not made available to the court by the prosecution, for example, where the evidence was not led during the main trial, or where the court ruled that it was not admissible for purpose of determining whether or not the accused should be convicted, and the prosecutor then fails to present the information during sentencing proceedings.

Apart from the fact that such omission potentially denies the presiding officer a comprehensive understanding of the impact of the rape on the complainant, it also allows room for inappropriate assumptions about the effects of the rape. Hansson recounts the example of a rape trial where the victim had been abducted, raped and then held captive overnight in a deserted building by the accused. In sentencing, the regional court magistrate commented that this complainant was unlikely to have suffered psychological damage, because of the fact that she was not a virgin at the time.¹⁴

In the light of the significance that information on the impact of the rape *should* have in the determination of an appropriate sentence and the fact that, in practice, it may occur that this evidence is neither produced by the prosecution nor requested by the court, we

recommend the introduction of a legislative provision that *directs* the consideration of such information by the court for sentencing purposes, rather than allowing the court to use its discretion about whether or not to consider the information. This would be in line with similar provisions in other jurisdictions.

It is important that vocal evidence, as well as written statements, should be permitted. It seldom happens that the proceedings on the merits and the sentencing phase are finalised on the same court day. If evidence of the impact of the rape on the complainant is not heard during the 'main' trial, the presentation of this information will require that she returns to court for a second time to testify. This not only implies additional expense to the State and additional inconvenience to the complainant, but may significantly contribute to secondary victimisation caused by being confronted with the accused, and possibly being cross-examined by the defence, a second time.

For this reason, we believe that legislation should also clearly provide for the presentation of such evidence by affidavit. In keeping with the general rules set out above, this affidavit will only be regarded as accepted evidence under oath if the other party admits to the contents of the statement. If the other party does not agree with the contents, the complainant will have to testify in person, and may be cross-examined.

4.2 Definition of 'Victim' and 'Harm'

The Canadian legislation defines the term 'victim', for purposes of victim impact statements, as broader than the conventional understanding of the term victim. The South African Law Commission also suggests that the term 'victim' should be defined broadly as:¹⁵

the person against whom the offence was committed or who was a witness to the act of actual or threatened violence and who suffers injury as a result of the offence.

We support the extension of the notion of ‘victim’. We also believe that it is essential to define ‘harm’ in order to adequately reflect the wide-ranging consequences of rape. The Australian provisions, while limited, are useful in this regard, and should be expanded for purposes of South African legislation.

4.3 Should the Statement Include the Victim’s Opinion on Sentence?

While we acknowledge the broad discretion which the courts have in determining an appropriate sentence, we believe that complainants should be allowed an opportunity to express their opinion in the victim statement on the question of an appropriate sentence, as is permitted in certain other jurisdictions.¹⁶ However, the South African Law Commission has suggested that victim impact statements should be limited to the harm suffered by the complainant, and should not address the question of an appropriate sentence.

4.4 Duty to Prepare A Victim Impact Statement

In terms of responsibility for the preparation of the victim impact statement, we propose that the prosecution should have the ultimate duty to ensure that such evidence or statement is available for submission in court. As a matter of policy, prosecutors should be directed to enlist the assistance of NGOs providing specialised services to victims of sexual assault in the preparation of such statements.

In conclusion, it should be recognised that the introduction of victim impact statements should not be regarded as the only measure to enhance victim satisfaction with the criminal justice system. Research in other jurisdictions indicates that dissatisfaction with the courts and prosecution stems from the failure of the authorities 'to show any interest in the victim as an individual'.¹⁷ The proper use of evidence on the impact of rape may go some way towards addressing this problem, and will also serve to lay a basis for an appropriate order for compensation.

5. RECOMMENDATION

We recommend that:

- 1. Legislation should be enacted to direct the court in a rape matter to consider evidence on the consequences of the rape given in person, or in the form of an affidavit, by the rape victim.**

- 2. The term ‘victim should be defined -**
 - to include the person who suffered harm or loss as a result of the rape;**
 - where such person is dead, ill or otherwise incapable of making a statement, to include -**
 - the spouse or a relative of the person;**
 - anyone who has in law or in fact custody of that person or is responsible for the care or support of that person;**
 - any dependant of that person;**

 - to include the person who was a witness to the rape and who suffered harm or loss as a result of the rape.**

- 3. The term ‘harm or loss’ should be defined to at least include -**
 - physical injury;**
 - mental injury or emotional suffering;**
 - pregnancy;**
 - sustaining HIV/AIDS or any other sexually transmitted disease;**
 - economic loss; or**
 - a substantial impairment of right accorded by law.**

ENDNOTES

1. South African Law Commission *Sentencing Restorative Justice* (Issue Paper 7 Project 28) at Par 2.30.
2. Lirieka Meintjies-Van der Walt 'Towards victims' empowerment in the criminal justice system' (1998) *SACJ* at 166.
3. South African Law Commission *op cit* note 1 at Par 2.31.
4. Meintjies-Van der Walt *loc cit* note 2.
5. South African Law Commission *op cit* note 1 at Par 2.32.
6. *S v Zinn* 1969 2 SA 547 (A).
7. Meintjies-Van der Walt *op cit* note 2 at 169.
8. See generally Etienne du Toit et al *Commentary on the Criminal Procedure Act* (1993) 28.2-28.3.
9. *Ibid.*
10. Du Toit et al *op cit* note 8 at 28.4.
11. See *S v Qgabi* 1964 1 SA 261 (T).
12. South African Law Commission *op cit* note 1 at Par 4.7.
13. Meintjies-Van der Walt *op cit* note 2 at 167.
14. Desiree Hansson 'Interim reflections on the Cape attorney general's task group on rape' in Saras Jagwanth et al (eds) *Women and the Law* (1994) at 413.
15. South African Law Commission *loc cit* note 12.
16. See Meintjies-Van der Walt *op cit* note 2 at 166.
17. Meintjies-Van der Walt *op cit* note 2 at 167

CHAPTER 14: COMPENSATION AND RESTITUTION

1. GENERAL

Internationally, compensation and restitution to victims of violent crimes have been established in two ways - through state compensation schemes or through the offenders themselves. Where state compensation schemes do not exist, the offenders may be required to make the compensation or restitution. This can be done in one of the following ways:¹

- The victim must bring a civil claim against the offender;
- The state must make a diversion agreement, that is, an appropriate order that may not necessarily involve monetary compensation; or
- The court must make a compensation order that forms part of the sentence of the offender.

The issue of compensation is contained in Sections 12 and 13 of the *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1992), to which South Africa is a signatory. It provides that:

12 When compensation is not fully available from the offender or other sources, States should endeavor to provide financial compensation to:

- Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;*
- The family, in particular dependents, of persons who have died or become physically or mentally incapacitated as a result of such victimization.*

13 The establishing, strengthening and expansion of national funds or compensation to

victims should be encouraged. Where appropriate, other funds may also be established for this purpose, including in those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm.

2. CURRENT POSITION IN SOUTH AFRICA

2.1 Compensation by the Accused

In South Africa, section 300 of the Criminal Procedure Act 51 of 1977 makes provision for the payment of compensation to victims of crime at the request of the prosecutor, provided he or she is instructed to do so by the complainant in the case. The Act specifically provides that the court may award compensation where an offence causes ‘damage to or loss of property’.

Presently, the award of compensation to an individual applies in situations where -

- There has been a conviction;²
- The conviction relates to an offence that caused damage to or the loss of property, including money;³
- It is established that the loss or damage was caused as a direct result of the commission of the offence of which the accused was convicted;⁴
- There is an application after the conviction by the complainant;⁵ and
- All relevant facts have to be obtained and in this regard the accused is entitled to lead evidence and to address the court.⁶

The Act, however, does not make provision for compensation to victims who have suffered losses or injuries, other than damage or loss of property, as a result of a crime.

2.2 State Compensation Scheme

There is at present no state-funded compensation scheme for victims of violence crime in operation in South Africa.

3. CURRENT POSITION IN OTHER JURISDICTIONS - CANADA

In Canada, the courts have increasingly made use of compensation orders as a sentencing option. The courts are now required to consider restitution in all cases involving either harm to property, or expenses arising from bodily injuries. In granting restitution, the court may consider a victim impact statement, and must take into consideration the offender's ability to provide restitution. If monetary compensation is ordered, payments can be spread over a period of time. Restitution can also be made in the form of work. The penalty for ignoring a court order granting restitution is imprisonment.

4. DISCUSSION

Meintjies-van der Walt submits that, aside from the fact that the Criminal Procedure Act does not make provision for victims of personal crime, there are also other problems with the application of this Act.⁷ She sets these out as follows -

- The determination of compensation may be difficult for presiding officers because the present judicial mind-set appears to have difficulty reconciling what they see as an essentially civil procedure with criminal sentencing. She cites the judgement in *S v Lombaard*⁸ as an example of this problem. In this matter the court held that the determination of compensation was a complicated civil matter which could only be decided if all the points in issue were defined in pleadings, and evidence was led.
- The question of what should happen if an offender fails to comply with a compensation order is problematic. Meintjies-Van der Walt refers to a review of the judgement of *S v Medell*⁹ in which the court held that an order for compensation that was not carried out, could not result in imprisonment, because the incarceration of an offender for the failure to abide by a compensation order amounted to civil imprisonment for debt, which has been judged unconstitutional.

In response to public dissatisfaction with the criminal justice system and the emerging victim's rights movement in South Africa, the South African Law Commission has published an issue paper on Restorative Justice, which addresses the issue of victim compensation. The Law Commission argues that the introduction of a central compensation scheme for victims of crime in South Africa is a matter of urgency. They believe that this will restore

confidence in the administration of justice.

They recommend that a compensation scheme be established that should be known as the ‘Criminal Injuries Compensation Scheme’, and they set out the following:

1. The scheme should be funded by some or more of the following -
 - 20% of all fines that are imposed by the courts;
 - A surcharge of R50 for every conviction in court, to be paid by the accused;
 - The proceeds of crime;
 - An allocation within the annual state budget.

2. The definition of a ‘victim’ and special reference to rape victims. They define ‘victims’ as: ‘persons who, individually or collectively have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws’.

The term therefore includes direct victims (the person who was directly prejudiced by the commission of the crime) as well as indirect victims (persons who were not directly involved in the crime, but who were directly prejudiced as a result thereof, for example the family of a victim of murder).

3. Which victims can be awarded compensation.

4. The requirements for securing victim compensation.

The scope of this discussion document does not allow an analysis of the content or merits of the Law Commission Issue Paper. We do however, in principle, support the development of such a compensation scheme.

Like the Law Commission, we recognise the enormous financial burden that a scheme of this nature may have on the state. We also know that the physical, emotional and psychological damage to a rape victim is unquantifiable and cannot really be measured in monetary terms.

Moreover, we are concerned about the ramifications of monetary compensation in relation to rape. Our experience of rape trials has repeatedly confirmed our idea that rape complainants have to fight a battle to be believed in a court of law, to be regarded as credible witnesses and to be treated with dignity and respect. We are sensitive to the fact that any form of monetary compensation for rape may in fact result in counsel for the defense casting the aspersion on complainants that they are only claiming to have been raped because they are aware that they might, if the court finds the accused guilty, receive monetary compensation. Rather than assisting in the recovery of the rape survivor, monetary compensation may become a further source of 'secondary victimisation'.

5. RECOMMENDATION

We in principle support the development of a state compensation scheme for rape victims. We recommend, however that:

- ◆ **Until a compensation scheme is operational and is proved to serve more than a mere symbolic gesture to victims of crime, in the case of rape, the state bears the cost of any medical and/or psychological treatment incurred by the victim/survivor;**
 - ◆ **Section 300 of the Criminal Procedure Act be extended to include compensation for loss or injury beyond damage or loss of property.**
-

ENDNOTES

1. Lirieka Meintjies-Van der Walt 'Towards victims' empowerment strategies in the criminal justice process' (1998) 11 *SACJ* at 162.
2. Subsection 300 5(b)(1).
3. Subsection 300 5(b)(2).
4. *Idem.*
5. Subsection 300 5(b)(4).
6. Subsection 300 5(b)(7).
7. Meintjies-Van der Walt *loc cit* note 1.
8. 1997 (1) SACR 80 (T).
9. 1997 (1) SACR 682 (C) at 686B-C.
10. South African Law Commission *Sentencing Restorative Justice* (Issue Paper 7 Project 28).

CHAPTER 15: HIV POST-EXPOSURE PROPHYLAXIS FOLLOWING RAPE

'It's like an epidemic, you know. A lot of people have it and this man that I don't even know probably could have it. And I do fear.'

Interview with Complainant E1: Stanton et al *Improved Justice for Survivors of Sexual Violence?* (1997) at 97.

1. INTRODUCTION

'Post Exposure Prophylaxis' [PEP] is a type of preventive antiviral therapy for human immunodeficiency virus (HIV) that is designed to reduce (but not eliminate) the possibility of infection with the virus after a known exposure.¹ The treatment is comprised of -

- AZT (also known as Retrovir and Zidovudine),
- 3TC (also known as Lamivudine); and
- Crixivan (also known as Indinavir).

The addition of 3TC and Crixivan to AZT is recommended in high risk exposures. This is known as 'triple therapy'.

In order for the PEP treatment to be effective the drugs must be taken for 28 days after exposure to HIV. Studies have shown that PEP may not be effective after 24 to 36 hours, and the Centres for Disease Control and Prevention in the United States therefore recommends starting PEP within 2 hours of exposure. However, this agency also recommends PEP for some individuals presenting 36 hours or more after exposure.²

2. CURRENT POSITION IN SOUTH AFRICA

The drugs required for PEP treatment are available in South Africa, but are not readily accessible to most people. Although the drugs are available at most state hospitals, few district surgeons and even fewer private medical practitioners have them.

The health care of rape victims is generally problematic in South Africa. The practice of district surgeons and other medical personnel is inconsistent and therefore unreliable in relation to medical examination and treatment of the rape victim. District surgeons are required to collect forensic evidence from the rape victim. They are under no obligation to provide rape victims with-

- Prophylactic treatment for sexually transmitted diseases [STD's];
- The 'morning after pill' to prevent possible pregnancy; or
- Medical treatment of injuries sustained as a result of the rape

Moreover they often fail to inform rape victims of the possibility of STD infection (including HIV) and pregnancy (which would have enabled these victims to seek further medical assistance and advice.) Although some district surgeons do provide these services, the majority do not. In addition to this, many women who have been raped have to wait long periods of time (sometimes up to 36 hours) before a district surgeon will examine them.

The result of this is that many rape complainants who are at risk of HIV infection are not informed:

- Of the possibility of HIV infection after the rape;
- About the existence of PEP treatment; or
- How and where to access the drugs should they choose to take them.

Should a rape complainant be aware of the risk of HIV infection and wish to take PEP treatment she has to find and pay for the drugs herself. The present cost of the drugs is -

- R663,68 for AZT;

- R912,00 for 3TC; and
- R2 195,00 for Crixivan.³

It is standard practice for the state to provide PEP to state employees who incur occupational injuries and are exposed to HIV in the course of their professional duties, for example, a medical doctor who incurs a needle stick injury while operating on a known HIV positive patient. This treatment is at the state's expense.

The *Rape Management Protocol* which has been operational for one year at Grootte Schuur Hospital in Cape Town provides for the following:⁴

- Women who have been raped and who present within 48 - 72 hours of being raped are provided with *AZT*.
- Grootte Schuur Hospital (which is a state hospital) bears the cost of the *AZT* treatment should the woman not be able to afford it.
- Each woman is informed of the risks of HIV transmission and is offered an HIV test.
- AZT* is given for one month after the rape.
- In addition to receiving PEP, women are routinely treated for other STDs (eg syphilis, chlamydia, gonorrhoea) and are given 'the morning after pill' where appropriate.
- Women are followed up in the outpatient division to monitor side-effects to medication, including *AZT*.
- Each rape victim is assessed individually by a gynaecology registrar and her case is discussed with the hospital HIV expert, who authorises the use of *AZT*.
- AZT* is available 24 hours a day to ensure that treatment is started immediately.

3. CURRENT POSITION IN OTHER JURISDICTIONS

3.1 United States

In the United States the health care system is restricted from charging rape complainants for services necessitated as a result of the rape. Therefore, if PEP is offered and taken by the rape complainant, the local health care system must bear the costs of the medication. In San Francisco the local health department pays for the medications, while in New York the State AIDS Office has mandated the local health department to pay for the medication.⁵

3.2 France

The state-funded health care system pays for the cost of PEP medication for either rape or consensual sexual exposure.⁶

4. DISCUSSION

4.1 The Medical Imperative for Provision of PEP

Currently PEP is used primarily for the prevention of infection in cases where there has been a known high risk occupational exposure. This practice is based on evidence that antiretroviral treatment prevents HIV infection after occupational exposure, for example, in the case of needle stick injuries incurred by health care workers.⁷ Evidence of the efficacy of PEP in occupational settings is based on a multicentre case-control study of health care workers.⁸ This study showed that there was a 79% reduction in the odds of infection for those workers who had received PEP.

More recently Cardo et al published the results of a second retrospective case control study that showed an 81% reduction in odds of seroconversion for health care workers who took

AZT following occupational exposures compared to those who did not.⁹ Based on the first study referred to above, the Centres for Disease Control and Prevention [CDC] produced its current guidelines for occupational PEP.¹⁰

It has been argued that if the risk of HIV transmission and thus infection through certain sexual practices is of the same order of magnitude as those occupational exposures, PEP would seem to be appropriate for people after sexual exposures.¹¹ There is presently no direct evidence showing that PEP treatment prevents infection after sexual exposure, and it is unlikely that this evidence will become available. This is largely due to the ethical objections to a placebo-controlled trial, and also to the fact that in order to conduct this research, large sample sizes would be required.¹²

However, many experts maintain that PEP treatment preventing infection after sexual exposure is biologically plausible, given the efficacy of treatment after transcutaneous occupational exposure and the similarities between immune responses to transcutaneous and transmucosal exposures.¹³ (By *transcutaneous* we mean ‘through the skin’ and by *transmucosal* we mean ‘through a mucus membrane’, for example, the mucus membrane of the vagina.)

In addition to this, researchers from a number of centres maintain that by using the best available epidemiologic information, clinicians can estimate the risk (probability) of HIV transmission for any given exposure and compare it with risks for which the CDC recommends occupation-related PEP.¹⁴ More recently PEP following sexual and drug exposures has also been recommended by researchers from the Department of Public Health, San Francisco, the Department of Medicine, University of California, UCSF/SFGH Epidemiology and Prevention Interventions and the San Francisco General Hospital, University of California, San Francisco.¹⁵

Lurie et al state that establishing the probability of HIV transmission is dependent on three factors:¹⁶

- The frequency of exposure;
- The probability that the source is HIV positive; and
- The probability of transmission if the source is infected.

They base their recommendations for PEP after sexual exposure on the CDC's recommendations from extrapolated data on the benefits of PEP after occupational exposure.

Based on the above arguments that the information on the effectiveness of PEP in occupational settings should be extended to sexual exposure, this would obviously include rape. It is well documented that male to female transmission of HIV is very efficient in consensual sex,¹⁷ although the risk of transmission is highly variable, with some individuals becoming infected after one sexual exposure and other remaining uninfected after multiple sexual exposures.

A number of factors indicate that the risk or probability of transmission of HIV in a rape is even higher than in consensual sex. These factors may include -

- The number of times a woman is raped (either by multiple perpetrators or by one perpetrator raping her repeatedly);
- The fact that the woman's vagina may not lubricate making penetration likely to cause injury; and
- The fact that force may have been used in the rape which may cause injury.

Lurie et al acknowledge that the risk of HIV transmission in rape may be greater than from consensual sex because of genital and rectal trauma and bleeding, exposure to multiple assailants, or exposure through multiple receptive sites.¹⁸ They accordingly recommend PEP to all victims of rape. Bamberger et al also state that rape may increase the risk of HIV infection compared to consensual sex for two reasons.¹⁹ Firstly, trauma is more likely in the case of rape, and secondly STD's causing genital lesions may be more prevalent.

As has been stated earlier, immediate PEP treatment is vital for it to be effective. Katz and Gerberding²⁰ as well as Lurie et al²¹ recommend that PEP treatment should be initiated within a few hours of exposure, with a cut off point at 72 hours.

In May 1994 the Working Group on HIV Testing, Counselling and Prophylaxis after Sexual

Assault in the United States published proposals for the development of policies and principles of clinical intervention in the care of rape victims.²² They believe that the decision to take PEP after a rape should be based on a risk assessment of the exposure. This assessment should consider:

- Available information of the HIV status of the accused rapist;
- Type of exposure (anal, vaginal or oral penetration and ejaculation);
- Nature of the physical injuries; and
- The number of times the victim was raped.

It should be noted that in the majority of cases, information about the HIV status of the accused is unavailable. This is because at the time when a victim may present for medical care the perpetrator will not have been apprehended. Therefore each case must be assessed by considering the other three factors.

While it is useful to draw on international protocols (mainly in the United States and Canada) in deciding whether PEP is appropriate in a specific case, one should be mindful that the HIV/AIDS situation in South Africa is very different to that in many developed countries. In the United States, for example, the prevalence of HIV in the general population is about 1% and therefore presumably the same in rapists.²³

This is very different in South Africa. According to Dr Helen Rees (Director, Reproductive Health Research Unit, Department of Obstetrics and Gynaecology, Chris Hani Baragwanath Hospital), we can assume that 20% of male rapists are HIV positive using adult rates of infection. She holds the same opinion as Lurie et al, saying that rape is more likely to result in trauma than consensual sex and this predisposes the victim to HIV infection. She adds that South Africa has very high rates of STD's in sexually active populations. STD's predispose to HIV infection and are therefore another risk factor for seroconversion after rape.

Dr Rees believes that noting all these factors women in South Africa are at greater risk of becoming infected with HIV than, for example, women in the United States. Even though she concedes that we cannot presently quantify that risk and that there is no clear evidence that PEP treatment given to health care providers after needle stick injury would apply to women who have been raped, she recommends triple therapy (*AZT*, *3TC* and *Crixivan*) for one

month after the rape, based on the knowledge we do have on occupational exposure.²⁴

South Africa is a country of limited resources, and the provisions of PEP to rape victims has accordingly become a contentious issue. It is acknowledged that the cost implications of providing all rape complainants will PEP treatment would be extremely high. We believe that it is the responsibility of the state to provide the financial means to cover the cost of PEP for rape complainants as rape complainants have been exposed to a life threatening disease through no choice of their own.

4.2 The Constitutional Imperative

This section will briefly examine one aspect of the constitution-based argument in support of provision of PEP treatment to rape victims, viz the right to equality as set out in section 9(1) of the 1996 Constitution. However, we acknowledge that there may be additional rights supporting such an argument.

The current governmental policy is to provide state employees with PEP after occupational exposure at state expense. By contrast, there is an unwillingness on the part of the state to provide rape victims with similar treatment. We believe that this position constitutes a violation of the right to equality of rape victims, most notably the right in section 9(1) of the 1996 Constitution.

According to the test laid down by the Constitution Court in its judgment in *Harksen v Lane NO*,²⁵ an alleged violation of section 9(1) is determined firstly by asking whether the disputed provision implies that the state is differentiating between different persons or groups of persons. If the answer to this is yes, the second question is whether this differentiation serves any legitimate government purpose. If not, the provision constitutes a violation of section 9(1).

It is clear that the state is making a distinction between two groups of persons who were exposed to the risk of HIV through factors ‘beyond their control’. In both cases, the state bears some responsibility towards these groups: in the case of occupational exposure this is based on the fact that the injuries occur in the employ of the state, and in the case of exposure due to rape, this responsibility arises from the state’s specific duties towards rape victims as

set out in the Constitution and international human rights law.²⁶

It is therefore difficult to understand the differentiation between these groups. As set out above, this distinction is not to be found in the fact that PEP will likely be more effective in the case of occupational exposure. We submit that there is no legitimate government purpose to be served by this differentiation, and that section 9(1) is therefore violated by a policy of refusal of PEP treatment to rape victims.

4.3 HIV Testing of the Accused

Although many groups advocate testing of persons accused of rape for HIV/AIDS, we do not believe that this will address the problems facing rape victims and the possibility of their contracting HIV from the accused rapist. Compulsory testing of men accused of rape has various objectives.²⁷ One of the most frequently cited objectives is to protect the health of the victim. In order for PEP to be effective it must be taken as soon as possible after the rape and definitely within 72 hours. Very often the time it would take to establish whether the accused is HIV positive would be longer than 72 hours, rendering the test results an irrelevant factor for the rape victim in the decision on whether or not to take PEP.²⁸

Aside from this, even if one could immediately establish the HIV status of the accused by means of testing, it may accurately confirm that the accused was infected at the time of the rape but it cannot indicate with certainty that the accused was not infected at that time. In some cases the accused would test negative even though he is infected and infectious. This is called the 'window period' before the HIV antibodies are detectable. It is therefore evident that even if the accused tested HIV negative this would be of no real assurance to the victim as she may still have been infected.²⁹ We believe therefore that instead of advocating for the testing of accused rapists, we should concentrate on the health of the victim. In order to ensure that her health is protected, it must be assumed that the accused is HIV positive and the other factors listed above must be considered in order to determine whether PEP is recommended to the victim.

In terms of recent amendments to the law relating to bail, an accused who is charged with an

offence referred to in Schedule 6 of the Criminal Procedure Act, will be detained in custody (i.e. denied bail) unless he or she adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit the accused's release.³⁰ One of the offences referred to in Schedule 6 is 'rape when committed by a person knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus'.

Testing the accused in a rape matter at time of his arrest would not establish if he did in fact know that he was HIV positive at the time of the rape. At best, it would merely establish that he was HIV positive at the time of the rape. Without proof of knowledge of his HIV positive status, the accused could not be denied bail in terms of this section. It would be extremely difficult to establish this knowledge, short of the accused admitting that he had tested positive before the rape. This is a further argument against the testing of accused at the time of his arrest.

5. RECOMMENDATIONS

We recommend the enactment of legislation to provide that in rape cases -

- 1. The state should absorb all costs for treatment required by a rape victim as a result of the rape, including PEP.**
- 2. All rape complainants must be examined and assessed as to the risk of HIV infection by a district surgeon or medical practitioner within 2 hours of reporting rape to the police. Rape complainants who do not report the rape to the police but present at a medical facility must be examined and assessed by a medical practitioner within 2 hours of presenting.**
- 3. All victims who present at a medical facility (including those who are examined by a district surgeon) are informed of the risk of being HIV infected as a result of the rape.**

- 4. All rape victims are individually assessed as to the risk of HIV infection, taking into consideration -**

**Available information on the HIV status of the perpetrator;
The type of exposure;
The nature of the physical injuries; and
The number of times the victim was raped.**

- 5. All rape complainants are informed after assessment of the risk of HIV infection in their particular case and a recommendation is made to them whether PEP treatment is appropriate. Regardless of the recommendation of the medical practitioner the choice of whether to take PEP or not remains that of the rape complainant.**

- 6. All rape complainants are informed of -**

**The existence of PEP drugs;
The purpose of the drugs; and
The possible side effects of the drugs.**

- 7. PEP drugs are available at all medical facilities.**

- 8. Should the drugs not be available at the medical facility where the rape complainant presents, she must be assisted by the medical facility or attending practitioner in obtaining them.**

- 9. HIV-antibody testing and counselling is provided to all rape complainants at the cost of the state.**
-

ENDNOTES

1. Rick Sowadsky 'MSPH Post-Exposure Prophylaxis (PEP) For Sexual Exposures' (June 1998) Website: www.thebody.com/complainant/cgi/safeans.html
2. Centres for Disease Control and Prevention 'Update: provisional Public Health Service recommendations for chemoprophylaxis after occupational exposure to HIV'(1996) 45 *MMWR* at 468-472.
3. Personal communication with representative from Glaxco Welcome (23 April 1999).
4. Personal communication with Dr. Lynette Denny (Head of Department of Obstetrics and Gynaecology, University of Cape Town) on 26 April 1999. She added that triple therapy is not offered to rape victims because there is as yet no data to indicate that additional anti-retroviral drugs enhance the protective effect of AZT.
5. Personal communication with Joshua Bamberger (Department of Public Health; Department of Family and Community Medicine , University of California, San Francisco) on 24 April 1999.
6. *Ibid.*
7. Centres for Disease Control and Prevention 'Case-control study of HIV seroconversion in health-care workers after percutaneous exposure to HIV-infected blood' (1995) 44 *MMWR* at 929-933.
8. *Ibid.*
9. DM Cardo et al 'A case-control study of HIV seroconversion in health care workers after percutaneous exposure' (1997) *New England Journal of Medicine* 1485-1490.
10. Centres for Disease Control and Prevention *loc cit* note 2.
11. MH Katz & JL Gerberding 'Postexposure treatment of people exposed to human immunodeficiency virus through sexual contact or injection use' (1997) *New England Journal of Medicine* 1097-1100.
12. P Lurie et al 'Postexposure Prophylaxis After Nonoccupational HIV Exposure' (1998) 280 *Journal of the American Medical Association* 1769-1773.
13. IA Spira et al 'Cellular targets of infection and route of viral dissemination after an intravaginal inoculation of simian immunodeficiency virus into rhesus macaques' (1996) *J Exp Med* 215-225.

14. Lurie et al *op cit* note 12 at 1769.
15. Joshua Bamberger et al 'HIV Postexposure Prophylaxis Following Sexual Assault' (1999) *American Journal of Medicine*.
16. Lurie et al *op cit* note 12 at 1770.
17. A Van der Straten et al ' Couple communication, sexual coercion and HIV risk reduction in Kigali, Rwanda' (1995) *AIDS* 935 - 944.
18. Lurie et al *op cit* note 12 at 1771.
19. Bamberger et al *op cit* note 15.
20. Katz et al *op cit* note 11 at 1097-1100.
21. Lurie et al *op cit* note 12 at 1771.
22. LO Gostin et al 'Working Group HIV Testing, Counselling and Prophylaxis After Sexual Assault' (1994) *Journal of the American Medical Association* at 1436-1444.
23. Bamberger *op cit* note 5.
24. Helen Rees Communication on the Reproductive Health Discussion Group (6 October 1998) Website: repro_1@healthlink.org.za
25. *Harksen v Lane NO* 1998 1 SA 300 (CC).
26. See our discussion in Chapters 1 and 2 above.
27. Gostin et al *op cit* note 22 at 1436-1444.
28. R Jurgens et al *Are Compulsory HIV Testing and Disclosure of HIV Status Ever Justifiable? Ethical and Legal Analysis Using Sex Offenders, Health Care Providers, Patients as Examples* (Poster Presentation at the Third Annual Conference on HIV/AIDS Research, Montreal, 13-15 May 1993).
29. Gostin et al *loc cit* note 22.
30. Section 60(11) of the Criminal Procedure Act No 51 of 1977 (as amended).

CHAPTER 16: POSITIVE DUTIES OF STATE OFFICIALS TOWARDS RAPE VICTIMS

1. INTRODUCTION

In Chapters 2 and 3 above, we have argued that the Bill of Rights included in the 1996 Constitution and international human rights law impose certain duties on the South African state. These duties apply to the state in the general sense (for example, the obligations to enact appropriate legislation to address rape and to allocate sufficient state resources to ensure proper implementation of such legislation). In addition, we argue that the combined weight of the Constitution and international human rights law also imply that duties are imposed on individual state officials to perform certain functions when they encounter victims of rape.

This section will set out the specific duties to be fulfilled by members of the South African Police Service, public prosecutors and members of the Correctional Services Department in relation to rape victims, and will also examine how failure to comply with these duties should be addressed.

2. SPECIFIC DUTIES OF STATE OFFICIALS

2.1 South African Police Service

In reported cases of rape, it shall be the duty of **the police in the charge office** to:

6. Inform the complainant that she has the right to report the rape and/or request an investigation into the rape;

7. Inform the complainant, if she wishes to lay charges of rape, that she has the right to make a statement;
8. Take the statement of the complainant in a private room or area;
9. Open a docket and take a basic statement from the complainant before she is referred for a medical examination, in order to make an immediate arrest of an identified suspect if possible;
10. Provide assistance to the complainant so that she may make her statement in the language of her choice;

Contact an investigating officer as soon as the complainant reports the rape;

ensure the immediate arrival of an investigating officer so that the investigating officer can escort the complainant to the hospital and/or district surgeon or to assist the complainant in seeking medical assistance until the arrival of the investigating officer at the district surgeon.

It shall be the duty of the **investigating officer** to:

31. Register the case docket;
32. Escort or to meet the complainant at the district surgeon;
33. Complete the SAP 308 form and to record precisely which samples are required from the district surgeon;
34. Ensure that rape victims are attended by a district surgeon or medical practitioner within 2 hours of the reported rape;
35. Make suitable arrangements to ensure the immediate safety of the complainant;
36. Take a full and detailed statement from the complainant once the complainant is ready to do

so;

37. Inform of and refer the complainant to an organisation for counselling if she so wishes;
38. Inform the complainant if there is an arrest of the accused;
39. Inform the complainant to attend an identification parade, if necessary, and to inform her that she does not have to touch the suspect in order to identify him;
40. Arrange an identification parade at a venue or police station where the facility of a one way mirror is available, if possible;
41. Inform the complainant of an application for bail by the accused;
42. Inform the complainant that she has the right to attend bail proceedings;
43. Obtain relevant information from the complainant in order to oppose a bail application and/or the imposing of conditions of the accused, should he be released on bail;
44. Where the complainant reports a breach of the bail conditions by the accused, to immediately -
 - (i) Take a statement from the complainant or other witnesses detailing the breach of the bail conditions;
 - (ii) Approach the prosecutor with the aim of an application to have the accused's bail revoked; and
 - (iii) Where necessary, take steps to ensure the safety of the complainant.
15. Inform the complainant of the bail conditions imposed on the accused should he be released on bail and of the procedure to be followed if the accused breaches the bail conditions;

16. Inform and assist the complainant in obtaining protection if necessary from the accused in terms of the *Witness Protection Act*, 1998 or any other law;
17. Keep the complainant informed about the progress of the investigation of the case at regular intervals;
18. Inform the complainant of the date of the trial at least two weeks in advance;
19. Arrange a pre-trial interview between the prosecutor and the complainant before the trial and to assist the complainant in getting to the court in order to attend the interview;
20. Assist the complainant in getting to court on the day of the trial;
21. Inform the complainant of the result of the trial; and
22. Inform the complainant, should the accused be found guilty and imprisoned, that if she wishes to know when the prisoner will be placed on parole or released she must give the investigating officer permission to write the complainant's name, address and identity number on form SAP 62 and to inform the complainant that it is her/his duty to keep the Commissioner of Correctional Services informed about any change of address;.

2.2 Public Prosecutors

It shall be the duty of the prosecutor, where the accused is charged with rape to:

45. Liaise with the investigating officer to ensure that a pre-trial interview takes place between the complainant and the prosecutor;
46. Conduct an interview with the complainant before the appearance of the accused in a bail application in order to obtain relevant information to question whether the accused should be released on bail and/or whether any conditions should be imposed on the

accused should he be released on bail;

47. Conduct an interview with the complainant before the trial to:
 - (i) explain the court proceedings including the evidentiary and procedural aspects of the trial
 - (ii) explain the role players in the trial and their duties
 - (iii) go through the complainant's statement with the complainant and ensure that it is consistent with her account of the events of the rape;
 - (iv) clarify why certain questions need to be asked in the trial by the prosecutor and explain questions that may be asked in cross – examination;
48. Keep written notes on the interview with the complainant
49. Familiarise the complainant with the court room;
50. Arrange a meeting between the complainant and an interpreter, if applicable, before the trial;
51. Ensure that an office or waiting room is made available to the complainant to avoid contact with the accused, his family or friends while waiting for the trial to proceed
52. Inform the complainant of sections 153, 158(3) and 170A of the Criminal Procedure Act and that an application may be made to the court in terms of these sections;
53. Inform the complainant that she/he may request to have another person in court for the purposes of providing support to the complainant;
54. Explain the purpose of a victim impact statement to the complainant and ensure that a victim impact statement is prepared and submitted to court for purposes of sentencing;
55. Ensure that the case has been fully investigated before the trial commences so that no unnecessary delays occur;

12. Ensure that the witness statement(s) made to the police are correct and contain all relevant information (where necessary, additional statements should be obtained);
13. Where medical evidence is relevant, consult thoroughly with the medical practitioner and ensure that he or she is familiar with all the medical terminology as well as the implications of the findings of the medical practitioner;
14. Inform the victim that she may participate as an ancillary prosecutor in the case against the accused once the state has instituted proceedings against the accused;
15. Consult with the police who investigated the case, particularly where they are likely to be called as witnesses;
16. When the merits and complexity of a matter before court demand expert witnesses, they should be called to testify;
17. Make use of expert witnesses to present evidence on sentencing;
18. For purposes of sentencing, place on record all aggravating circumstances, specifically in relation to the impact (physical, psychological or financial) the crime has had on the victim, if evidence pertaining to aggravating circumstances has not been placed on record during the trial.
19. Inform the victim of section 300 of the Criminal Procedure Act (which allows for the award of a compensation order under certain circumstances) and to obtain the required information from the victim where an application for such order is appropriate;
20. Inform the complainant of the outcome of the trial in a manner assisting him or her to understand the reasons for the judgement and the motivation for the sentence imposed in the case of conviction.

2.3 Correctional Services

It shall be the duty of the **Parole Board** to:

- ◆ Approach the trial court on its views regarding the possible placement on parole of a convicted rapist;
- ◆ Inform the complainant of the parole hearing and request input, either in writing or in person, on her/his views on the possible placement on parole of the convicted rapist;
- ◆ Take any written representation relevant to the case of any person, including the victim's, into consideration when placement on parole is considered;
- ◆ Consider the following factors in the case of rape:
 - (i) Physical injuries sustained by the victim, especially those which require hospitalisation or prolonged intensive medical treatment;
 - (ii) Emotional (psychological) harm suffered by the victim(s) such as when a victim was forced to take part in a sexual act in front of family or friends, lack of regard for the physical condition of the victim such as age, pregnancy, physical or mental illness, or if the crime was committed in such a manner that it may cause future harm to the mental condition of the victim;
 - (iii) Whether more than one offender committed the sexual act, such as gang/group rapes;
 - (iv) Whether weapons or any simulated weapon were used; and
 - (v) Whether the victim was forced to perform unnatural sexual acts, such as bestiality or sadism; and
- ◆ Inform the complainant of the prisoner's release

3. FAILURE TO COMPLY WITH POSITIVE DUTIES

It should be noted as a point of departure that we believe that the positive duties resting on state officials should be clearly set out in *legislation* (as opposed to regulations or ‘internal’ or departmental directives and guidelines). While this document does not allow an in-depth exploration of this issue, we argue that incorporation of such duties in legislation -

- ◆ Is not foreign to South African law (see, for example, section 2 of the Domestic Violence Act 116 of 1998);
- ◆ Ensures that the relevant provisions are accessible; and
- ◆ Carries the force of legislative injunction.

A further question is what the consequences of a failure to comply with these duties should be. We have identified the following options:

- A claim against the state based on delict¹ or on constitutional grounds;
- Imposition of criminal liability for individual officials who fail to comply with prescribed duties; or
- Institution of internal disciplinary proceedings against individual officials.

This document will not address the feasibility of claims based on delictual or constitutional grounds, since we believe that the position is fairly clear. We believe that these options should in any event remain available to a complainant, irrespective of any additional steps taken against the individual official.

4. CRIMINAL LIABILITY FOR FAILURE TO COMPLY WITH DUTIES

4.1 Precedent in South African Law

The imposition of statutory duties on members of certain professions is not unknown in South African law, and the attachment of criminal sanction for a failure to comply with these duties is also not without precedent. We will briefly examine a number of statutory provisions in this regard.

Companies Act 61 of 1973

According to section 249(1) read with section 441(e) of the Companies Act, the director of a company may incur criminal liability in respect of non-compliance with certain duties. The rationale for holding directors liable is that they are expected to carry out their duties with the requisite skill and diligence and that they should be criminally liable where they fail to do so.

The criminal liability attaching to directors not only relates to fraudulent conduct on the part of the directors but it also attaches in circumstances where a director, for example, fails to lodge the necessary documentation required by the Companies Act with the Registrar of Companies or fails to do so timeously. Here the failure does not relate to any fraudulent conduct, yet criminal liability also attaches.²

The Prevention of Family Violence Act 133 of 1993

Section 4 of this Act imposes criminal liability where persons examining or treating children under circumstances which ought to give rise to a suspicion that the child has been ill-treated, fail to report this to the appropriate official.

The Criminal Procedure Act 51 of 1977

The Criminal Procedure Act provides in Section 28 that -

(1) *A police official -*

(a) *who acts contrary to the authority of a search warrant issued under section 21 or a warrant issued under section 25(1); or*

(b) *who, without being authorised thereto under this Chapter -*

- (i) *searches any person or container or premises or seizes or detains any article;*
 - (ii) *perform any act contemplated in subpar (I), (ii), or (iii) of section 25(1)*
- shall be guilty of an offence...*

4.2 Discussion

In the case of *S v Klopper*³ the Appellate Division held that there was a heavy duty on a director or servant of the company relating to company operations. He or she had a duty to prevent prohibited conduct and carry out his or her duties in accordance with the statutory requirements of the Act. Where he or she failed to do so criminal liability should attach.

By analogy one can therefore argue that criminal liability should attach in situations where state officials such as police officials, who are charged with a even heavier duty in relation to law and order and maintaining societal interests in the proper administration of the criminal justice system, fail to comply with their duties.

In the case of *Kauesa v Minister of Home Affairs And Others*⁴ it was held with reference to the police functions and duties in newly established democracy (which is especially relevant in South Africa) that:

The Namibian Police has, especially since the date of independence, gone to great lengths and incurred substantial expenses to improve its image amongst members of the public generally. It has done so not only by urging police officers to execute their duties in a professional and effective manner. The Namibian Police has at all times placed a very high premium on its image and public co-operation in its war against crime and the realisation of its other functions. Given the history of this country prior to the date of independence, which I am advised is notorious and not necessary to re-iterate for purposes of this application, the Namibian Police requires its members to be absolutely loyal to the Namibian State, its Constitution and the Government of the day and, in order to enhance its co-operation with the public, also strive to make that loyalty perceptible.

We submit that these remarks apply *mutatis mutandis* to all state officials who come into contact with rape complainants.

It is interesting to note that the first drafts of the *Domestic Violence Bill* prescribed criminal liability for a failure on the part of state officials to comply with duties imposed in the Bill. However, this provision was heavily debated and the clause was eventually changed to its present form. The debate centred around a general fear that by imposing criminal liability one would in effect be ‘opening the floodgates’ resulting in police officials being held criminally responsible for every error, be it a mere failure to take down the name of a suspect. However, one should note that the ‘traditional’ common law offences, for example, private defence and emergency, will still be available to state officials who are prosecuted for failure to comply with statutory duties.

In this context, regard may also be had to the case of *Minister of Law and Order v Kadir*,⁵ where it was held that society would balk at holding police officials personally liable under civil law for damages arising out of a relatively insignificant dereliction of duty. Even though this case dealt with civil liability the principle can and should be extended to criminal liability. The remarks of Conrardie J are especially appropriate in this regard:⁶

The situation is not one fraught with an overwhelming potential liability. Trying to balance the individual interest of the claimant against the broader ones of the community I am unable to perceive that the imposition of liability in a case such as this is likely to prove socially calamitous.

We therefore propose that legislation should state clearly that a failure to comply with statutory duties constitutes a criminal offence. Research and experience indicate that the conduct and attitude of state officials contributes heavily to secondary victimisation of rape victims, and while it is not possible to ‘legislate’ for attitudinal changes, the imposition of criminal liability for failure to comply with duties may have a deterrent effect.

In the context of rape, where the failure of state officials to comply with their prescribed duties may well expose the complainant to further violence by the accused, secondary victimisation or a denial of access to justice, it is clear that such a drastic sanction is more than justified. One may compare this situation with section 28 of the Criminal Procedure Act, where criminal liability is imposed on police officials for failure to comply with the conditions of a search warrant. (We submit that the rationale for this provision is to be found in the potentially drastic invasion of an individual’s privacy rights which unlimited police powers of search and seizure would imply.) Similarly, the societal interest in the protection of the rights of rape victims justify the imposition of criminal liability.

5. RECOMMENDATION:

We propose the enactment of legislation which -

- 1. Clearly lists the duties of state officials in relation to rape victims;**
- 2. Provides that a failure to comply with these duties will be punishable as a criminal offence;**
- 3. Confirms that all defences available in law will be available to a state official so charged; and**
- 4. Prescribes penalties in the event of conviction of this offence.**

ENDNOTES

1. See, for example, *Minister of Police v Ewels* 1975 3 SA 590 (A).
2. Section 276(2)(3) and (5) of the Companies Act.
3. 1975 (4) SA 773 (A).
4. 1995 (1) SA 51 (Nm).
5. 1995 (1) SA 303 (A).
6. At 742I-743B.