

CHAPTER 8

MISCELLANEOUS MATTERS

8.1 Introduction

In this chapter the Commission considers the following matters: prescription of sexual offences, extra-territorial jurisdiction, penalties and repeals of and amendments to existing legislation.

8.2 Prescription of sexual offences

8.2.1 Proposals in Discussion Paper 102

Discussion Paper 102 indicated that problems in relation to prescription could arise due to difficulties that victims of sexual abuse have in instituting legal proceedings many years after the events in question.¹ The Commission identified two aspects related to prescription as relevant. The first was the prescription of crimes which prevented the State from charging an accused after a period of time has elapsed. The second was prescription of a civil debt arising out of a sexual offence.

It found that prescription of the right to institute criminal prosecutions appeared not to be problematic, as very serious offences such as rape never prescribe. Section 18 of the Criminal Procedure Act provides that the right to institute a prosecution for the offences of murder, treason, aggravated robbery, child-stealing and rape does not prescribe. Further that all other offences prescribe after 20 years. Practical considerations such as the loss of evidence as a result of the delay in bringing a prosecution present great difficulties. The Commission noted that if its recommendation regarding the redefinition of 'rape' as proposed in the draft Bill contained in the Discussion Paper was accepted, it could be argued that it would be necessary to include the redefined offence of 'rape' under the exceptions listed in section 18 of the Criminal Procedure Act, 51 of 1977.

¹ See also JMT Labuschagne 'Die effek van tydsverloop op strafregtelike aanspreeklikheid' (1987) 50 **THRHR** 211, 'Tydsverloop, omstandigheidsverjaring en seksuele misbruik van kinders' (1996) 17 **Obiter** 328, 'Seksuele misbruik van kinders en die vraagstuk van verjaring van misdade' (1997) 22(1) **TRW** 98.

The Commission found that in the case of childhood sexual abuse it might not be prudent to rely too much on the outcome of a criminal trial. It was pointed out that despite various evidential barriers, some victims consciously choose not to follow the criminal route.

Victims of sexual abuse who choose not to follow the criminal route are still left with the option of a civil claim. In such proceedings the victim has far greater control over the conduct of the case (the victim is usually the claimant and a party to the case) and another standard of proof applies: while the State has to prove all the elements of the crime beyond a reasonable doubt, the burden of proof in civil matters is that of a balance of probabilities. The Commission explained that it is in this context that problems with prescription can and will arise.

In concluding the exposition in the Discussion Paper, the Commission opined that victims of sexual abuse should not be subject to the ordinary prescription rules, but to special rules. Accordingly it recommended amending section 12 of the Prescription Act, 68 of 1969 by inserting three subsections to provide (a) that the basic limitation period does not run while the person who has a claim is incapable of commencing the proceeding because of his or her physical, mental or psychological condition, (b) that the person who has the claim is presumed to have been incapable of commencing the proceeding earlier than it was in fact commenced with because of his or her dependence on or intimate relationship with the defendant, and (c) that the person who has a claim based on sexual abuse is presumed to have been incapable of commencing the proceeding earlier than it was commenced.

The proposal read as follows:

The amendment of section 12 of the Prescription Act (Act 68 of 1969) -

(a) by the substitution for subsection (1) of the following subsection:

(1) Subject to the provisions of subsections (2) **[and]** (3), (4), (5) and (6), prescription shall commence to run as soon as the debt is due;

(b) by the insertion after subsection (3) of the following subsections:

(4) Prescription shall not commence to run in respect of a debt based on sexual abuse during the time in which the creditor is unable to institute proceedings because of his or her physical, mental or psychological condition.

(5) Unless the contrary is proved, a creditor to whom a debt based on sexual abuse is due shall be presumed to have been unable to institute proceedings earlier than it was actually instituted if at the time of the abuse one of the parties to the abuse had an intimate relationship with the creditor or had been someone on whom the creditor was dependent, financially or otherwise.

(6) Unless the contrary is proved, a creditor to whom a debt based on sexual abuse is due shall be presumed to have been unable to institute proceedings earlier than it was actually instituted.

8.2.2 Evaluation of comment

General support can be deduced from the positive response² from some respondents and the overall absence of any criticism. Constructive criticism was received, with participants of the Gordon's Bay Expert Consultation opining that the proposed subclause (5) be deleted as it is tautologous and the participants of the CGE Workshop in Umtata requesting that no prescription runs in relation to sexual offences and that the draft Bill be applied retrospectively. Although the essence of subclause (5) is repeated in subclause (6), subclause (5) also defines specific circumstances which must exist for the exercise of the presumption. The inclusion of specific circumstances in subclause (5) could be interpreted to be overly restrictive.

In a joint submission the Children's Rights Project, Community Law Centre, University of the Western Cape; the Department of Forensics and Toxicology, University of Cape Town; the Gender, Law & Development Project, Institute of Criminology, University of Cape Town; the Gender Project, Community Law Centre, University of Western Cape, and the Women's Legal Centre endorse the proposed amendments made by the Commission. They argue that the proposal should apply in situations where a rape victim (who is not a victim of child abuse) has been prevented from instituting action by virtue of her physical, mental or psychological condition. They confirm that by providing for an extension to all victims of sexual offences, the issue of gang-related violence where a victim is too afraid to come forward as she fears for her life or her family's life in relation to threats received, is addressed. The provision would allow for situations

² Mollie Kemp, School Social Worker, Department of Education and Culture, KwaZulu-Natal; Lulama Nongogo & Teboho Maitse, Commission on Gender Equality; CGE Workshop in Umtata, Group 1.

whereby the victim may “after the fact” (when she has managed to overcome her fear or has moved out of that community) still proceed civilly.

In the above joint submission the Commission is requested to consider the issue of retrospectivity. They suggest that this aspect be dealt with specifically in order to allow for the exceptions created to be retrospective, in order to prevent an artificial time line being set to the effect that a complainant has only become equipped to commence proceedings once the amendment has come into effect. Pending the outcome of a specific investigation focussing on the Prescription Act the Commission reserves comment on this matter.

The Commission confirms its recommendation that the redefined offence of ‘rape’ be included under the exceptions listed in section 18 of the Criminal Procedure Act, 51 of 1977.

8.2.3 Recommendation

The Commission is in agreement that subclause 6 sufficiently covers the content of subclause 5 and therefore is of the opinion that subclause 5 should be omitted from the Bill.

It is recommended that section 12 of the Prescription Act be amended as follows:

The amendment of section 12 of the Prescription Act -

(a) by the substitution for subsection (1) of the following subsection:

“(1) Subject to the provisions of subsections (2), **[and] (3), (4) and (5)**, prescription shall commence to run as soon as the debt is due.” ; and

(b) by the addition of the following subsections:

“(4) Prescription shall not commence to run in respect of a debt based on sexual abuse during the time in which the creditor is unable to institute proceedings because of his or her physical, mental or psychological condition.

[(5) Unless the contrary is proved, a creditor to whom a debt based on sexual abuse is due shall be presumed to have been unable to institute proceedings earlier than it was actually instituted if at the time of the

abuse one of the parties to the abuse had an intimate relationship with the creditor or had been someone on whom the creditor was dependent, financially or otherwise.]

[(6)](5) Unless the contrary is proved, a creditor to whom a debt based on sexual abuse is due shall be presumed to have been unable to institute proceedings earlier than it was actually instituted.

It is also recommended that section 18 of the Criminal Procedure Act be amended as follows:

18 Prescription of right to institute prosecution

The right to institute a prosecution for any offence, other than the offences of –

- (a) murder;
- (b) treason committed when the Republic is in a state of war;
- (c) robbery, if aggravating circumstances were present;
- (d) kidnapping;
- (e) child-stealing; **[or]**
- (f) rape;
- (g) oral genital sexual violation; or
- (h) sexual violation

shall, unless some other period is expressly provided for by law, lapse after the expiration of a period of 20 years from the time when the offence was committed.

8.3 Extra-territorial jurisdiction

8.3.1 Current law

Jurisdiction is the extent of a court's power to entertain a matter or hand down a sentence. It may take many forms, for example geographical, over persons residing or being within the area of jurisdiction of the court, foreign judgements, immovable property or may relate to the nature of the cases the court may entertain or the limits of the

sentence it may impose. Jurisdiction is an important aspect of sovereignty. Sovereignty empowers a state to exercise the functions of a state within a particular territory to the exclusion of other states.³ Extra-territorial jurisdiction as a concept extends our courts' jurisdiction, in respect of South Africans, who commit a sexual offence (in terms of our law), in another country.

Currently, the jurisdiction of our courts is limited to South African territory and does not extend to offences committed by South Africans in other jurisdictions. South African "territory", for purposes of criminal jurisdiction, includes South African territorial waters, air space, any offence committed on board a South African ship on the high seas or in a South African aircraft above the high seas or a foreign territory.⁴

Universal jurisdiction allows any nation to prosecute offenders of certain crimes even when the prosecuting state lacks a traditional nexus with the crime, the alleged offender, or the victim. However, "classical international law does not exclude a State's power in some cases to exercise its judicial jurisdiction over offences committed abroad".⁵

In the sexual offence field, extra-territorial jurisdiction is receiving renewed attention from lawmakers in an attempt to curb sex tourism, child pornography and trafficking of persons for purpose of commercial sexual exploitation. Twenty three countries currently have extraterritorial laws.⁶ In some of the countries the extra-territorial jurisdiction is confined to specific offences, while in others it covers all offences.

Extra-territoriality of laws must be distinguished from extradition of persons accused or convicted of the commission within the jurisdiction of the Republic or a foreign state of an extraditable offence in terms of the Extradition, Act 1962 (Act No. 67 of 1962). Extradition in terms of this Act is dependent upon the terms of the extradition agreement

³ J Dugard **International Law A South African Perspective** Juta & Co, 1994: Kenwyn at p 116.

⁴ Ibid, p. 118.

⁵ Per Judge President Guillaume **Democratic Republic of Congo v Belgium** International Court of Justice: Press Release 14 February 2002.

⁶ Australia, Austria, Belgium, Canada, China, Denmark, Finland, Germany, Iceland, Italy, Japan, Morocco, Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Taiwan, United Kingdom and United States of America. <http://www.thefuturegroup.org/youwillbecaught/laws.Html> .

and a request for extradition. Extra-territoriality will imbue South African courts with inherent jurisdiction.

8.3.2 Proposals in Discussion Paper 102

The Commission was of the view that children and adults are in need of increased protection as far as sexual offences are concerned - both locally and internationally. In addition, the Commission was of the view that South African citizens and residents who commit sexual offences in foreign countries should be liable for prosecution of those offences in South Africa. It was therefore recommended in Discussion Paper 102 that South African courts should have extra-territorial jurisdiction in the case of offences committed in terms of the Sexual Offences Act.

In order to reiterate the principle in our law that a person should not be penalised more than once for the same offence, a provision was incorporated to exempt a person from criminal liability in South Africa if that person has already been convicted in the destination country of the action which would have constituted an offence in South Africa. The proposed clause further requires the consent of the Director of Public Prosecutions (DPP) before a prosecution can be instituted and to make it clear which DPP and which court have jurisdiction. It was proposed that the court in South Africa that should have jurisdiction would be the court in the area where the alleged offender is ordinarily resident.

The following clause was proposed in Discussion Paper 102:

Extra-territorial jurisdiction

27. (1) Any person who, while being a citizen of or permanently residing in the Republic of South Africa, commits any act outside the Republic which would have constituted an offence under this Act or a sexual offence at common law against a person had it been committed inside the Republic, is guilty of the offence which would have been so constituted and is liable to the same penalty prescribed for such offence.

(2) A person may not be convicted of an offence contemplated in subsection (1) if such person has been convicted of the act that would have constituted an offence in terms of this Act in the country where the act was committed.

(3) No prosecution may be instituted under this section without the

written consent of the Director of Public Prosecutions who has jurisdiction in the area where the person contemplated in subsection (1) is ordinarily resident.

(4) If the consent of the Director of Public Prosecutions to institute prosecution has been obtained as referred to in subsection (3), prosecution may be instituted in any appropriate court within such Director's jurisdiction.

8.3.3 Evaluation of comment

This clause did not elicit much response from respondents. Those who did comment support the recommendation that any permanent resident or citizen of South Africa, who commits in another country what would have been an offence under the proposed legislation, be found guilty of that offence, as this provision will deter those sex offenders who travel to other jurisdictions to commit sexual offences.⁷

Customary international law permits every state to apply its jurisdiction against its own citizens even when they are situated outside its boundaries.⁸ However, as there is a presumption against the extra-territorial operation of criminal laws,⁹ the Commission has elected to retain the proposed clause on extra-territorial application of the proposed legislation and common law relating to sexual offences.

None of the respondents objected to the lack of the double criminality principle inherent in the proposed clause. Double criminality requires that the offence in question be an offence in both the country where the offence was committed and in the home country. The Commission has elected to retain that aspect of the clause by reason of the fact that there may be other countries where the specific act complained of is not an offence, for example, a country where the age of consent is lower than in South Africa.

Some respondents raised the difficulty of double jeopardy arising if the accused person is acquitted in the country where the offence is committed. The Commission notes this difficulty and proposes to clarify the clause by amending subclause (2) by the addition of the words "acquitted or" before the word "convicted".

⁷ Lulama Nongogo & Teboho Maitse, Commission on Gender Equality.

⁸ Per Gubbay J in **S v Mharapara** 1986 (1) SA 556 (ZS) at 559E-G.

⁹ **S v Maseki** 1981 (4) SA 374 (T).

Advocates Meintjies and Henning, SC,¹⁰ suggest that it is necessary to go further than has been done in clause 27 by including an explicit provision conferring jurisdiction on the court. The Commission concurs with this view and adopts the formulation proposed by the respondents.

8.3.4 Recommendation

Extra-territorial provisions should not be the primary preventative measure to combat the commercial sexual exploitation of children or sexual offences in general in other countries. The country where the offence was committed has the primary responsibility for ensuring that offenders, including non-nationals, are prosecuted in that country. Where such prosecutions are not instituted in the country where the offence was committed, extra-territoriality provisions can enable the mother country of the alleged offender to prosecute for the same offence. This echoes the sentiments of organisations such as ECPAT that states “we will find you”. Care must be taken, however, to prevent extra-territorial prosecutions from usurping the legitimate role of the country in which the offence was committed to prosecute and punish, according to the laws of that country, the alleged offender. In this regard, the impression is gained that some countries prefer to use extra-territorial provisions to prosecute their nationals for offences committed in countries where the penalty is death or very severe.¹¹

It is also recognised that it is difficult and expensive to bring successful prosecutions under extra-territorial laws. Finding and tracing victims in the home country, language and cultural differences, different approaches to taking and leading evidence, different crime definitions and standards of proof, transcription and transmission of formal court records, problems with dual citizenship or lack of nationality, the potential for political meddling, etcetera are some of the factors which make it such a difficult and costly exercise. The effective enforcement of extra-territorial laws further requires the

¹⁰ Office of the Director of Public Prosecutions: Transvaal.

¹¹ In a well-known extra-territorial case of a Dutch national who was convicted for having sex with two Philippine girls aged 9 and 14 years respectively, the Dutch national was sentenced to 2 years imprisonment of which 8 months were suspended on the condition that he received psychiatric treatment. It is doubtful whether the accused would have received the same sentence had he been prosecuted in the Philippines.

dedicated services of highly skilled prosecutors and police officials *au fait* with all the international dimensions.

While recognising these difficulties and provided it is understood that extra-territorial laws are the measure of last and not first resort, the Commission still sees such provisions as a very useful preventative and safety-net measure: the knowledge that the laws of the country travels with you would certainly deter sex tourists from exploiting children. The Commission therefore recommends the incorporation of the following clause in the proposed Bill:

Extra-territorial jurisdiction

25. (1) Any person who, while being a citizen of or permanently residing in the Republic of South Africa, commits any act outside the Republic which would have constituted **[an offence under this Act or a sexual offence at common law against a person]** a sexual offence had it been committed inside the Republic, is guilty of the offence which would have been so constituted and is liable to the same penalty prescribed for such offence.

(2) A person may not be convicted of an offence contemplated in subsection (1) if such person has been acquitted or convicted, **[of the act that would have constituted an offence in terms of this Act]** in the country where the act was committed[.], of the act that would have constituted a sexual offence inside the Republic of South Africa.

(3) No prosecution may be instituted under this section without the written consent of the Director of Public Prosecutions who has jurisdiction in the area where the person contemplated in subsection (1) is ordinarily resident.

(4) If the consent of the Director of Public Prosecutions to institute prosecution has been obtained as referred to in subsection (3), prosecution may be instituted in any appropriate court **[within]** designated by such Director[’s jurisdiction] and such court shall have jurisdiction to try the matter as if the offence or offences had been committed within its jurisdiction.

8.4 Penalties

8.4.1 Proposals in Discussion Papers 85 and 102

The draft Bill accompanying Discussion Paper 85 contained a provision that made it possible to prescribe different penalties for the contravention of specific clauses of the Bill. In an explanatory memorandum contained in Discussion Paper 102 it was explained that apart from listing fines and imprisonment as the only sentencing options, no suggestions were made as to the number of years of imprisonment that may be imposed.

One submission to Discussion Paper 85 pointed out that the Criminal Law Amendment Act, 105 of 1997 may have an impact on the penalties clause as originally drafted.¹² This Act, in sections 51 and 52, prescribes mandatory minimum sentences for certain serious offences such as rape. The aim is to ensure that some serious offences are punished more severely and also to establish a measure of uniformity in the sentencing process. In Discussion Paper 102 the Commission stated that section 53 of the Act, however, makes it clear that the mandatory minimum sentencing provisions are only temporary as it provides that they will cease to have effect after the expiry of two years from the date of commencement of the Act (the 1st of May 1998), with the proviso that they may be extended by the President with the concurrence of Parliament for one year at a time.

In Discussion Paper 102 the Commission referred to the Commission's investigation on sentencing (Project 82), where it had recommended that Parliament should adopt an entirely new sentencing framework. The Commission stated that recommendations, embodied in its proposed draft *Sentencing Framework Bill*, had been handed to the Minister for Justice and Constitutional Development towards the end of 2000 and was at that stage under consideration by the Department of Justice and Constitutional Development. Further that importantly, the Bill repeals sections 51 to 53 of the Criminal Law Amendment Act referred to above. It was explained in Discussion Paper 102 that the Bill, which establishes an independent Sentencing Council which will be responsible for supplementing the sentencing principles already articulated in the legislation by developing sentencing guidelines, also encourages the different arms of government to

¹² By Advocates Meintjes and Henning SC.

enter into a partnership. It also requires a new partnership between the State and the public in general and victims of crime in particular. The key to this partnership is improved provision for victim involvement in the sentencing process and recognition of victim concerns in the type of substantive sentences that are handed down. Chapter 3 of the draft Bill lists the proposed sentencing options as follows: imprisonment, fines, community penalties, reparation and caution and discharge. Community penalties are expanded by further provision for correctional supervision and community service. The conditions that may be attached to such sentences are spelt out and the procedures for imposing them simplified. More emphasis is placed on restitution and compensation for victims of crime. The new proposed sentence of reparation includes elements of both restitution and reparation. There is also provision for victim impact statements to be presented to the courts so that they may learn what impact the crime had in practice.

The Commission recommended in Discussion Paper 102 that when imposing sentences for sexual offences, courts should have regard to the provisions of the Sentencing Framework Bill as proposed by the Commission, which it envisaged would, by the time that the Sexual Offences Bill is adopted, already have been enacted. Clause 28 of the revised Bill therefore contains a reference to the Sentencing Framework Act. Further that if it transpires that such an Act has not been adopted by the time that legislation on sexual offences is enacted, or if it is adopted under a different title, the Department of Justice's legislative drafters will make appropriate amendments to the clause as it was formulated.

Clause 28 read as follows:

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

8.4.2 Evaluation of comment

The Commission received a useful, albeit solitary, submission on the issue of penalties. Advocates Meintjes and Henning SC submit that explicit sentences should be prescribed for reasons which they enumerate, namely: the Bill cannot be implemented in the absence of a provision dealing with sentence and, should the Sentencing Framework

Act be delayed for any reason, it will automatically delay the implementation of this Bill. Furthermore, explicit sentences give an indication of the seriousness with which the lawmaker regards the offences and this always serves as an excellent sentencing guideline. They opine that it would address some other concerns if it is explicitly stated that the sentence for a crime of rape in terms of this Bill is to be the same as that which can be imposed for common law rape. They reason that this will immediately alert all that all acts embraced in this Bill under rape are to be regarded as equally serious and the need to address the minimum sentences provisions might simultaneously fall away. They suggest that a similar provision should be enacted with reference to crimes created by section 4, equating them with the common law offence of indecent assault. It is further proposed that offences in terms of clauses 6 to 8 should be punishable with up to 10 years imprisonment and offences in terms of clause 9 should be punishable with up to 20 years imprisonment. Advocates Meintjes and Henning SC state that this is in line with present sentencing provisions in the current Sexual Offences Act, where a maximum of 6 years can be imposed for section 14 offences and even life imprisonment in the case of parents prostituting their child of below the age of 12 years. They conclude that such broad sentencing provisions will also be easy to deal with.

The concern regarding the consequences to the proposed Sexual Offences Bill should the Sentencing Framework Bill be delayed for any reason, has proved to be valid. On 12th February 2002 the Department of Justice and Constitutional Affairs tabled its extended legislative programme before the Justice Portfolio Committee.¹³ At this meeting it was decided that the Sexual Offences Bill should resort under "Bills to be introduced into parliament during the last 6 months of 2002" whereas the Sentencing Bill resorted under "Other Bills to be introduced into parliament as soon as circumstances permit, either during 2002 or later". Given this turn of events, the recommendation contained in the Discussion Paper that if the Sentencing Framework Bill has not been adopted by the time that legislation on sexual offences is enacted, or if it is adopted under a different title, the Department of Justice's legislative drafters will make appropriate amendments to the clause as was formulated, will clearly be inadequate.

Recommendations relating to various offences and the penalty clause were based on the premise that the Sentencing Framework Bill, which proposes to repeal the minimum

¹³ [Http://www.pmg.org.za/docs/2002/viewminute.php?id=1321](http://www.pmg.org.za/docs/2002/viewminute.php?id=1321).

sentencing provisions found in the Criminal Amendment Act, 105 of 1997, would be passed by the time that the Sexual Offences Bill would be considered by Parliament. The Commission is therefore bound by the provisions of the Criminal Amendment Act, 105 of 1997 and have had to adapt the recommendations relating to the proposed offences and penalties accordingly. Subsequently, as stated earlier, the Commission has decided that it should differentiate between certain degrees of sexual penetration for purposes of sentencing in terms of the currently applicable provisions on minimum sentences. However, as the Criminal Amendment Act is not applicable to all the offences contained in the Sexual Offences Bill the Commission is necessitated to list specific penalties for such offences in the Bill itself. In determining the minimum penalties as set out below, the Commission has had regard to the penalties contained in the Sexual Offence Act of 1957 and the proposed amendments to the Criminal Amendment Act of 1997 as discussed earlier.

8.4.3 Recommendation

The Commission deems it expedient to include specific penalties in the clause to which it relates in the Bill. Clause 28 will therefore be omitted. Where the minimum sentencing provisions are applicable the relevant penalties are contained in the Criminal Law Amendment Act, 105 of 1997. For the sake of clarity the last mentioned offences and the relevant penalties contained in the Criminal Law Amendment Act are reflected below:

Life imprisonment for the following offences:

- * Rape
 - resulting in death of victim;
 - by more than one person or more than once;
 - by person with two or more convictions or rape;
 - by person who knowingly has AIDS;
 - if victim is a *girl*¹⁴ below 16 years of age;
 - if victim is physically disabled;

¹⁴ Should the Commission's recommendation regarding the redefinition of rape be accepted, the word 'girl' should be replaced by the word 'person'.

- if victim is mentally impaired;
 - involving infliction of grievous harm.
- * Oral genital sexual violation of a person under the age of 16 years.
- * Sexual violation of a person involving the infliction of grievous harm.

A minimum sentence of 10 years imprisonment for a first offender, 15 years imprisonment for a second offender, and 20 years imprisonment for a third or subsequent offender for:

- * sexual violation.
- * oral genital sexual violation where the victim was 16 years of age or older.

8.5 Repeal and amendment of laws

8.5.1 Proposals in Discussion Papers 85 and 102

In Discussion Paper 102 the Commission explained that one of the goals of Discussion Paper 85 on Substantive Law, published in August 1999, was to assess whether a single Sexual Offences Act was necessary or whether *ad hoc* amendments should be proposed. It pointed out, however, that this was not consistently reflected in Discussion Paper 85. It concluded that the intention of the project committee was ultimately not to recommend the repeal of all common law sexual offences, but to recommend statutory intervention, by way of a single Sexual Offences Act, to address problems in the common law and existing law.

Although the previous draft Bill purported to repeal the Sexual Offences Act, 23 of 1957 in its entirety, the Commission acknowledged that it did not deal with all the provisions in that legislation, namely male party offences, the management and the position of brothels and adult prostitution. The Commission also explained that only three common law offences would be affected by the provisions of both the previous and the revised Bills. They are rape (which it proposed to codify), incest (which it proposed should be amended to incorporate the codified definition of sexual penetration) and sodomy (which

it suggested would amount to rape if non-consensual penetration takes place between males).

In Discussion Paper 102 the Commission emphasised that its vision is ultimately to repeal the entire Sexual Offences Act (and other statutory provisions governing sexual offences) and to replace it with one comprehensive piece of legislation that regulates all statutory sexual offences, including provisions on practice and procedure. It submitted that it would be premature to include a provision on the repeal of the whole of the Sexual Offences Act in the revised Bill on substantive law if there is no clarity yet as to the Commission's recommendations on adult prostitution, which is the subject of a different Paper. The Commission stated that repeal of laws should only be considered once the entire investigation into sexual offences was completed, including the aspects on practice and procedure, adult prostitution and pornography. The Commission explained that a provision had therefore been inserted in the revised Bill which refers to a schedule that will reflect which laws are to be repealed. Further that the full schedule would only be devised upon completion of the investigation.

As far as male party offences are concerned, the Commission pointed out that section 20A of the Sexual Offences Act was declared unconstitutional by the Constitutional Court.¹⁵ No counterpart to section 20A was provided for in the revised Bill. The revised Bill, as contained in Discussion Paper 102 without incorporating provisions on adult prostitution, effectively replaced the following provisions of the Sexual Offences Act:

- * Section 9 (parent or guardian procuring defilement of child or ward) is replaced by clause 9 (child prostitution).
- * Section 10 (procuration) is replaced by clause 9 (child prostitution) insofar as it relates to children, and clause 4 (inducement to commit indecent act).
- * Section 11 (conspiracy to defile) is partly replaced by clause 4 (inducement to commit indecent act) and will be covered by the offence of conspiracy as contained in the Riotous Assemblies Act.

¹⁵ In **National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others** 1998 BCLR 1517 (CC).

- * Sections 12 (detention for purposes of unlawful carnal intercourse) and 12A (assistance for purposes of unlawful carnal intercourse) is replaced by clause 9 (child prostitution) insofar as it relates to children.
- * Section 14 (sexual offences with youths) is replaced by clause 6 (acts of sexual penetration or indecent acts with consenting minors).
- * Section 15 (sexual offences with idiots or imbeciles) is replaced by clause 7 (indecent acts or acts of sexual penetration with mentally impaired persons).
- * Section 17 (owner or occupier permitting on his premises the defilement of a female or any offence against this Act) is replaced by clause 9 (child prostitution) insofar as it relates to children.
- * Section 18 (use of drugs, etcetera, for purposes of defilement of females) is replaced by clauses 3 (rape) and 4 (inducement to commit indecent act).
- * Section 20 (persons living on earnings of prostitution or committing or assisting in commission of indecent acts) is replaced by clause 9 (child prostitution) insofar as it relates to children.

The following offences in the Sexual Offences Act which related neither to brothels nor to adult prostitution or male party offences were not addressed in the revised Bill:

- * section 13 (abduction);
- * section 18A (manufacture, sale or supply of article which is intended to be used to perform an unnatural sexual act);
- * section 19 (enticing to commission of immoral acts); and
- * section 21 (presumptions).

As far as section 13 was concerned, the Commission held that it was debatable whether the provision should be retained. Although it was submitted that the revised Bill adequately provided for the combating of the sexual exploitation of children, comment was invited on the question whether abduction as provided for in the Sexual Offences Act or a similar provision should be incorporated in the draft Bill.

Discussion Paper 85 contained a recommendation that section 18A be excluded from the proposed legislation. Respondents did not object to the exclusion of this section in

Discussion Paper 85 and the provision was therefore omitted in the Bill accompanying Discussion Paper 102.

The Commission opined in Discussion Paper 102 that section 19 did not draw a distinction between children and adults and that the adult aspect would be dealt with in a separate Paper on adult prostitution. Regarding the enticement or solicitation by children for immoral purposes, the revised Bill did not criminalise such actions, but criminalised the actions of clients who make use of the services of child prostitutes. Comment was invited on the question whether children should be penalised as contemplated in the Sexual Offences Act.¹⁶ The Commission noted that the second part of section 19 related to indecent public exposure. It submitted that the offence was adequately covered by the common law offence of public indecency. It explained that the offence, at common law, is defined as unlawfully, intentionally and publicly committing an act which tends to deprave the morals of others or which outrages the public's sense of decency and propriety. The offence would also be dealt with in the Discussion Paper on adult prostitution (e.g. prostitutes loitering on street corners, etcetera).

The Commission concluded that as the provisions of section 20 deal with presumptions related to prostitution the desirability of retaining them would be dealt with in the Discussion Paper on adult prostitution.

The repeal clause read as follows:

Repeal and amendment of laws

The Acts specified in the Schedule are hereby repealed or amended to the extent set out in the third column of the Schedule.

8.5.2 Evaluation of comment and recommendation

As no comment was received in this regard, the Commission abides with the above recommendations contained in Discussion Paper 102. However, as a question

¹⁶ HW Moldenhauer (Chief Magistrate, Pretoria) contended that a child used for child prostitution should not be made a criminal but is a child in need of care and must therefore be dealt with in terms of the Child Care Act, 1983.

regarding the necessity of retaining section 13 of the Sexual Offences Act was posed in the Discussion Paper the Commission deems it apt to include a brief exposition of the rationale behind the recommendation to repeal this section. In the Discussion Paper the Commission merely stated that the revised Bill adequately provided for the combating of the sexual exploitation of children. According to Milton¹⁷ the enactment of statutory abduction as provided for in section 13 of the Sexual Offences Act did not repeal the common law offence of abduction. Milton makes the point that where the accused intends taking the complainant away for the purpose of sexual intercourse the offence constitutes common law and statutory abduction. He explains that abduction has its origins in a time and society in which women were considered to be an economic asset to the family. Milton opines that it is unclear what useful social purpose the crime of abduction serves today. It does not prevent the sexual seduction of young women, and the crime of kidnapping is available to punish men who take and detain young girls for immoral or other purposes. Milton concludes that at most the crime protects a parent's power to consent to the marriage of a child. The Commission therefore recommends that section 13 of the Sexual Offences Act be repealed.

Concerning the Commission's recommendation that section 18A should be repealed, the Commission has given due regard to the Constitutional Court judgements in **Case and Another v Minister of Safety and Security and others; Curtis v Minister of Safety and Security and others**¹⁸ and the **National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others**.¹⁹ In the former case the Court found that the statutory prohibition of possession of sexually explicit material which extends to prohibiting the possession of such material in a person's own home and for his or her own personal use invades the right to privacy contained in section 13 of the Interim Constitution. In this case it is also noted that the courts had struggled for decades with the meaning of the phrase *indecent or obscene* as the proscription took the form of an open-ended nonexclusive listing, without clear outer parameters. It is contended that although section 18 A does not proscribe possession of articles which are intended to be used to perform an unnatural sexual act, the reference in section 18 A to "unnatural

¹⁷ JRL Milton **South African Criminal Law and Procedure Volume II Common-law Crimes** Juta 1996 (third edition).

¹⁸ 1996 (5) BCLR 609 (CC).

¹⁹ 1998 (12) BCLR 1517 (CC).

sexual act” is obscure. This is confirmed by the fact that very little has been written about this provision by commentators on the criminal law and that our case law contains scant information from which to infer what the law should regard as an ‘unnatural sexual act’.

However, whilst not wanting to enter the arena of adult access to sex articles the Commission is of the opinion that children deserve legislative protection in this regard. The Commission’s attention has been drawn to the practice used by certain sex offenders of grooming a child prior to committing a sexual offence with the said child. The process of grooming may include the provision of or display of such articles to children. So as to extend further protection to children, the Commission recommends that a substantive clause therefore be introduced into the Bill which should *inter alia* proscribe the manufacturing and display of such articles to children. The wording ‘display to and towards’ a child would for example exclude the discovery of an article used for a sexual act negligently left in a parent’s bedroom. Such clause should read:

Promotion of a sexual offence with a child

11. Any person who manufactures or distributes an article that promotes or is intended to promote a sexual offence with a child, or who sells, supplies or displays to and towards a child an article which is intended to perform a sexual act, is guilty of the offence of promoting a sexual offence with a child and liable, upon conviction, to a fine or to imprisonment for a period not exceeding six years or to both such fine and such imprisonment.

The Commission also confirms its recommendation to repeal sections 9, 11, 14, 15, 18, 18A, and 20A of the Sexual Offences Act, 1957, for the reasons stated in the discussion papers.²⁰

²⁰ See the Schedule to the draft Bill in Annexure A below.