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Legislation

Constitution of the Republic of South Africa Act 108 of 1996
Human Rights Commission Act 54 of 1996
Prevention of Family Violence Act 133 of 1993
Child Care Act 74 of 1983
Domestic Violence Act 116 of 1998
Sexual Offences Act 23 of 1957
Criminal Procedure Act 51 of 1977
Educators Employment Act 138 of 1994
Mediation in Certain Divorce Matters Act 24 of 1987
Dental, Medical and Supplementary Health Service Professions Act 56 of 1974

Cases

S v de Freitas 1997 (1) (SACR) 180 (C)
S v Jackson 1998 (1) SACR 470 (SCA)
S v D 1992 (1) SA 509 (NmHC)
S v M 1992 (2) SACR 188 (W)
S v M (2) SACR 682 (C)
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R v Abdoorham 1954 (3) SA 163 (N)
Borchers v Estate Naidoo 1955 (3) SA 78 (A)
S v Hlapenzula 1965 (4) SA 439
Nel v le Roux 1996 (1) SACR 572 (CC)
K v The Regional Magistrate NO & others 1996 (1) SACR 434 (E)

SUBMISSIONS RECEIVED

Child Abuse Action Group, presented by Ms Lucy Redivo and Mr Derek Harrison
RP Clinic, Presented by Drs Pieter du Plessis and Rene Potgieter
Child Protection Initiative, presented by Mr Trevor Mashigo
South African Human Rights Commission, presented by Ms Dinkie Dube, Mbongeni Shabangu and Lucky Rabotapi and Ms Matshidiso Rankoe
Child Protection Unit, presented by Captain Visagie, Inspector Ratsupa, Inspector Mazibuko and Supt Anneke Pienaar
A mother whose 7 years old daughter was sexually abused
Dr. Douglas Bellingham, medical doctor in Private Practice and part-time district surgeon
Women against Child Abuse, presented by Ms Beauty Ntuli

Gauteng Department of Health, presented by Dr Gwen Ramokgopa
 University of the Witwatersrand Community Paediatrics Division, presented by Ms Christie Mkhasibe
 Zamokuhle Child Care Centre, presented by Dr Mwanda
 Johannesburg Child Welfare Society, presented by Dr Jacky Loffel and Ms Aileen Langley
 Growing up in Cities Project, presented by Ms Jill Swart Kruger
 Ekupholeni Centre, presented by Ms Johanna Kitzner, Ms Rachel Naomi Dube and Ms Thandi Anna Mashinini
 A mother whose six year old daughter was sexually abused
 A mother whose fourteen year old daughter was sexually abuse
 A mother whose five/six year old daughter was sexually abused and indecently assaulted
 A mother whose nine year old daughter was sexually abused
 Alberton Town Council, presented by Ms Audrey Fihle
 South African Society of Social Workers in Private Practice, presented by Ms Elizabeth Norman
 Child Protection Unit Forensic Social Workers, presented by Ms Erica Scheepers
 Social Workers Association of South Africa, presented by Ms Marie Kruger
 Gauteng Government Social Cluster Cabinet Subcommittee, presented by Mr Vernon van Wyk, Dr. Goolay Ms Rowney and Ms Davids
 DENOSA, presented by Ms Busisiwe Kubheka, Ms Lorraine Dibakone and Ms Xoliswa Nozulu
 Teddy Bear Clinic, presented by Dr Lorna Jacklin
 South African Black Social Workers Association, presented by Ms Noluthando Joy Dlakavu
 Law Society of the Northern Provinces, presented by Mr Coetzee and Mr Bhayat
 Ms Carina Coetzee, Sexual Offences Court Prosecutor
 Mr Dosio, a Magistrate

Footnotes

¹ Constitution of the Republic of South Africa Act 108 of 1996.

² Act 54 of 1994.

³ Government Gazette No 21668 of 27 October 2000.

⁴ Mbongeni Shabangu, Dinkie Dube and Lucky Rabotapi of the Commission's Legal Department conducted these inspections. They also made oral submissions at the hearings

⁵ The CPUs were established in 1995 in response to the increase in criminal complaints relating to child abuse. To date 27 CPU branches have been established throughout the country to focus on child abuse cases. In areas where CPUs are not in existence, child abuse cases are handled by specialized police officers with expertise in child abuse, attached to the detective unit. Recently the role of CPUs was extended to include the investigation of family violence and all sexual offence cases, hence the new name, Child Protection, Family Violence and Sexual Offences Units. However, in this report, the Unit continues to be referred to as the CPU, as it is the name by which it remains popularly known.

⁶ With the exception of prosecutors and magistrates who refused to speak under oath at the hearings, the Commission received oral submissions as evidence.

⁷ In terms of the Commission's rules of procedure, public hearings are presided over by 3 Human Rights Commissioners and two independent experts in the field forming the subject matter of the hearings. The panel comprised of comprised of (1) Adv. F P Tlakula (Chairperson of the panel and Commissioner, Human Rights Commissioner), (2) Ms C V McClain (Human Rights Commissioner), (3) Mr J Nkeli (Human Rights Commissioner), (4) Ms Matshidiso Maseko (Psychologist), and (5) Ms Margaret Sithole (Social worker). (Mes Maseko and Sithole served in the panel as independent experts).

⁸ *Ciet Africa, Beyond Victims and Villains: the Culture of Sexual Violence in South Johannesburg* (2000), reporting on the prevalence of sexual violence in the southern metropolitan area of Gauteng (hereinafter the Ciet Africa Report).

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

¹² Human Rights Watch (1995), *Violence against women in South Africa, State Response to Domestic Violence and Rape* ('hereafter, the 1995 Human Rights Watch Report')

¹³ Human Rights Watch (2001) *Sacred at School: Sexual Violence against Girls in South African Schools.*

¹⁴ See Ciet Africa Report, p15.

¹⁵ Nearly one half of these rape incidents happened in the respondent's or neighbour's house. Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ In the Ciet Africa study, in 2000, submitters reported having resorted to the following forums for help: the police 73%, clinic 7.6%, hospital 6%, civic 0.1%, friend 1.7%, family 3%, NGO 1%, school teacher 0.5%, street committee 0.8%, social welfare 3%, church 0.2%, private doctor 3%. Only 11% of all submitters report having used a help line.

¹⁹ See the Ciet Africa Report (2001) and Stanton, Lochrenburg and Mukasa, *Improved Justice for Survivors of Sexual Violence? Adult survivors' Experiences of the Wynberg Sexual Offences Court and Associated Services* (1997) ('Wynberg Sexual Offences Court Evaluation Report')

²⁰ Article 19. CRC

²¹ Article 34. CRC

²² Article 35. CRC

²³ Article 27. CRC

²⁴ Article 29. CRC

²⁵ See Chapter 2, Bill of Rights.

²⁶ A child is defined as any person under the age of 18 years. See section 28(3).

²⁷ Section 28 (1) (a).

²⁸ Section 28 (1) (b).

²⁹ Section 28 (1) (c).

³⁰ Section 28 (1) (d).

³¹ Section 28 (1) (d).

³² Section 28 (1) (h)

³³ Some of the pre-Constitution legislation i.e., the Child Care Act and the Sexual Offences Act are currently being revised to bring them in line with government's obligations in terms of the Constitution and international instruments to which the government is party.

³⁴ The Protocol was drafted as part of the GPAC to ensure implementation of the National Programmes of Action for Children at provincial and local levels.

³⁵ The National Policy Guidelines were developed by a multi-disciplinary team of experts convened by the Department of Justice in 1995. The Guidelines set out procedural standards for the police, prosecution services, medical personnel, welfare and correctional service officials when dealing with victims of sexual offences. In 1998, the National Police Commissioner, by virtue of authority vested in him by section 25 of the SAPS Act of 1995, issued the police section of the Guidelines as National Instructions (National Instruction 22/1998). This move elevated the police section of the National Policy Guidelines above sections applicable to other professionals because unlike ordinary policy guidelines, National Instructions are enforceable. Violation of National Instructions by police officials therefore attracts sanction for misconduct.

³⁶ Gauteng Multi Disciplinary Child Protection and Treatment Protocol 1999-2000 Pilot Project.

³⁷ Justice College, *Child Law Manual for Prosecutors* (2001).

³⁸ *How Children Tell: The Process of Disclosure in Child Sexual Abuse* (1991), published in *Child Abuse Research in South Africa*, a Journal of the South African Professional Society on Child Abuse and Neglect, (hereinafter referred to as "CARSA") Vol.1, No2, October 2000.

³⁹ Act 133 of 1993. Section 4 is one of the only 2 sections that remain operative in the Act. The other section is section 5, dealing with rape of a wife by her husband. Otherwise the rest of the Act has been repealed by the Domestic Violence Act 116 of 1998. Section 4 will be transferred (possibly in a reformed formulation) to

the revised Child Care Act. Section 5 will be transferred to the revised Sexual Offences Act. Both the Child Care Act and the Sexual Offences Act are currently being reviewed by the South African Law Commission.

⁴⁰Act 74 of 1983.

⁴¹The procedure for reporting child abuse in terms of the Child Care Act is set out in regulations to the Act.

⁴²South African Law Commission, Focus Group Discussion Paper on the Revision of the Child Care Act.

⁴³Ibid.

⁴⁴Van Dokkum N, *The Statutory Obligation to Report Child Abuse and Neglect* 1996, Acta Juridica.

⁴⁵Ibid.

⁴⁶Published in CARSA Vol.1 No.1 January 2000.

⁴⁷Act 23 of 1957.

⁴⁸See Wynberg Sexual Offences Court Evaluation Report (1997)

⁴⁹*Sacred at School: Human Rights Watch Report on Sexual abuse in South African Schools* (2000). During the Ciet Africa study, when asked where they would go for help if sexually abused, no less than 64% submitters in 1998 and 80% in 2000, said they would go to the police¹⁶. This makes the nature of police response to incidents of sexual violence very critical.

⁵⁰See Ciet Africa Report (2000) p16 and Wynberg Sexual Offences Court Evaluation Report.

⁵¹Act 51 of 1977.

⁵²Own emphasis.

⁵³Own emphasis.

⁵⁴The CPUs were established in 1995 in response to the increase in criminal complaints relating to child abuse. To date 27 CPU branches have been established throughout the country to focus on child abuse cases. In areas where CPUs are not in existence, child abuse cases are handled by specialised police officers with expertise in child abuse, attached to the detective unit.

⁵⁵Virtually all sexual offences are schedule 1 offences.

⁵⁶National Prosecuting Authority Policy Manual B.8.

⁵⁷Section 6 (b) of the Criminal Procedure Act 51 of 1977.

⁵⁸National Prosecuting Authority Policy Manual B.9

⁵⁹Section 37(2) empowers any medical officer, district surgeon, registered nurse or medical professional to take such steps, including the taking of a blood sample as may be deemed necessary to ascertain whether the body of any person has any mark, characteristic or distinguishing features or shows any condition or appearance. Section 225 provides for the admissibility of evidence of such mark, characteristic, distinguishing feature, condition or appearance. Section 222(2) provides that such evidence will not be dismissed simply because it was obtained against the perpetrator's will or contrary to section 37(2).

⁶⁰The National Policy Guidelines define an AHCP as a medical officer, specialist or specially trained nurse with the necessary skills and knowledge gained through formal and/or informal training. Contrary to the duties of the District surgeon, the role of the AHCP is limited to examining and treating sexually abused children.

⁶¹Section 333B, Criminal Procedure Act.

⁶²In this report, reference to prosecutor shall include the state advocate.

⁶³Issued 1 October 1999.

⁶⁴NPA Policy Directives Part 4 A 3 and 4.

⁶⁵Diversion is normally considered where the perpetrator is a juvenile.

⁶⁶This factor is considered in terms of the *de minimis* principle. In terms of the principle trivial cases are normally not prosecuted.

⁶⁷Organisations such as Child Line, RP Clinic, Teddy Bear Clinic, Kidz Clinic, Women and Men against Child Abuse

⁶⁸Skills required by support providers to be able to deal appropriately and sensitively with children include child development and confidence to testify in court. Support providers also require proficiency in medico-legal language.

⁶⁹National Policy Guidelines, Department of Welfare p3.

⁷⁰NGOs are required to follow the same procedural guidelines as far as this is practically possible.

⁷¹The referring agency is required to keep in touch with the agency to which the case is referred until the case is satisfactorily dealt with.

⁷²See 7.2 below.

- ⁷³See generally, Wynberg Sexual Offences Court Evaluation Report.
- ⁷⁴Ibid.
- ⁷⁵Ibid.
- ⁷⁶Ibid.
- ⁷⁷This is a professional Social Worker in service with the Department of Welfare. His/her role is to counsel and refer the child to other appropriate services.
- ⁷⁸Ibid.
- ⁷⁹For other recommendations, see the Wynberg Sexual Offences Court Evaluation Report, 157-164.
- ⁸⁰See section 152 Criminal Procedure Act, Section 35(3)(c) Constitution of the Republic of South Africa Act, 108 of 1996.
- ⁸¹1996 1 SACR 572 (CC)
- ⁸²By the Minister of Justice acting in terms of powers vested in him by section 170(A) of the Criminal Procedure Act. The first notice issued in this regard is GN R1374 of 30 July 1993 as amended by R7101 in Government Gazette 22435 of 2 July 2001. See Du Toit, Skeen, Paizes, De Jager and van Der Merwe, Commentary on the Criminal Procedure Act (2000)
- ⁸³Registered as such in terms of the Dental, Medical and Supplementary Health Service Professions Act 56 of 1974 as amended.
- ⁸⁴Registered as such in terms of the Dental, Medical and Supplementary Health Service Professions Act 56 of 1974 as amended.
- ⁸⁵Act 24 of 1987.
- ⁸⁶Who have successfully completed a two year training course offered by the National Association of Child Care Workers coupled with 4 years working experience.
- ⁸⁷With 4 years experience and registered in terms of the Educators Employment Act 138 of 1994, provided that they have not, for any reason been suspended from service.
- ⁸⁸Registered as such in terms of section 17 of the Social Work Act of 1978 with minimum two years experience in social work.
- ⁸⁹1996 1 SACR 434 (E).
- ⁹⁰See Hoffmann and Zeffert, *The South African Law of Evidence* (4th Ed) 1988 572-582 and Schwikkard and others, *Principles of Evidence* (1997) 388-492.
- ⁹¹Ibid.
- ⁹²Hoffmann and Zeffert at 572.
- ⁹³See S v D 1992 1 SA 509 (NmHC); S v M 1992 (2) SACR 188 (W); S v M 1997 (2) SACR 682 (C).
- ⁹⁴1998 (1) SACR 470 (SCA).
- ⁹⁵See Pithy, Combrink, Artz and Naylor, *Legal Aspects of Rape in South Africa* (1999) p72.
- ⁹⁶See S v S 1995 (1)SACR 50 ZH.
- ⁹⁷See Mentjies R, *A Call for A Cautionary to Common Sense*, CARSA Vol. 1 No.1 January 2000. See also R v J
- ⁹⁸See Mentjies op cit 113 at p43.
- ⁹⁹See South Africa (1997), *Initial Country Report-Convention on the Rights of the Child* <http://www.Unhchr.ch/tbs/doc.nsf.../d2c94c67c4df8870802567ef0035d7c8?OpenDocument>.
- ¹⁰⁰Fagan A, *Dignity and unfair discrimination: a value misplaced and a right misunderstood*. SAHRJ 2000 14: 220.
- ¹⁰¹See Hoffman and Zeffert at 573. See also Du Toit and others (2000) op cit <<< at 24-1
- ¹⁰²See also S v Hlapezula 1965 (4) SA 439 (A); Borchers v Estate Naidoo 1955 (3) SA 78 (A); R v Abdoorham 1954 (3) SA 163 (N); R v Mokoena 1932 OPD 79 and R v Mokoena 1956 (3) SA 81 (A) 85; S v T 1958 (2) SA 676 (A) 678; S v Sauls & others 1981 (3) SA 172 (A) 180
- ¹⁰³At 574.
- ¹⁰⁴See also Mentjies op cit 113 at 44.
- ¹⁰⁵See Potgieter R, *The Internal Trauma of the Sexually Abused Child*, CARSA Vol.1 No.1 January 2000.
- ¹⁰⁶Ibid.
- ¹⁰⁷Ibid
- ¹⁰⁸Ibid
- ¹⁰⁹Ibid.

- 110 See Multi-Disciplinary Protocol, p90.
- 111 Ibid.
- 112 These are guiding principles for the termination of child protection and treatment services. See Multi-disciplinary Child Protection Protocol 1999-2000 Pilot Project at p.98.
- 113 See section 14(4).
- 114 Section 14(2).
- 115 Section 15(1).
- 116 Section 16(1)
- 117 Section 16(2).
- 118 At the first set of hearings, held 23 and 24 April 2001 at the Zithobile Community Hall, Bronkhorstspuit, Mr Kruger (Chief Magistrate) , Mr Skhosana (Magistrate), Ms Schoeman (Control Prosecutor) and Mr Poee, (Prosecutor)all of the Bronkhorstspuit Magistrate Courts attended the hearings but were not willing to take an oath or affirmations.
- 119 Mr. Moodliar, Head of the Commission's Legal Department conveyed their reasons to the panel.
- 120 At the meeting, the Magistrates Commission was represented by Prof. Loots.
- 121 See letter addressed to Commissioner Shirley Mabusela by Prof. Cheryl Loots dated 16 August 2001
- 122 At the hearings held on 5 November 2001 in Johannesburg, a Johannesburg-based magistrate Mr Dosio, preferred not to take an oath on the basis that magistrates are not obliged to take an oath or affirmation. He based his objection on a 19th century court decision that judicial officers are not obliged to take an oath. He however, addressed the panel on systemic shortcomings he has encountered when dealing with sexual offences.
- 123 Ms Dube alluded to the prevalence of this practice in Kathorus.
- 124 See submissions by RP Clinic and Forensic Social Workers.
- 125 Submissions by SASSWIP and SABSWA
- 126 Submissions by Ms Johanna Kirsner of the Ekupholeni Mental Health Centre, Ms Lucy Redivo of the Child Abuse Action Group, Ms A Fihla, Health Service Department, Dr. Jacky Loffel, Johannesburg Child Welfare Society.
- 127 Submission by Derek Harrison of the Child Abuse Action Group.
- 128 Dr. Potgieter is the founder and director of the Pretoria based RP Clinic.
- 129 The Commission heard that because police stations are male dominated and have a very patriarchal environment, female officers treat victims insensitively to try and fit into the male culture.
- 130 Submission by SABSWA. The Commission heard that in Kathorus, there are only nine CPU members covering six large areas. It was also pointed out to the Commission that the shortage of CPUs creates further delays in the finalization of cases as there is often a long period between reporting a case and referring it to the CPU.
- 131 Submissions by Ms Lucy Redivo, Dinkie Dube, Dr. du Plessis, Captain Visagie.
- 132 Captain Visagie.
- 133 Submission by Ms Lucy Redivo,
- 134 Submission by Captain Visagie.
- 135 Submission by Dinkie Dube.
- 136 Submissions by Ms Lucy Redivo, Johanna Kirsner, Ms A Fihle and Inspector Ratsupa.
- 137 Senior Superintendent Anneke Pienaar, National Commander of the Child Protection Units
- 138 Submission by Ms Lucy Redivo.
- 139 The parent testified at the Bronkhorstspuit hearings. Her name is not revealed in order to protect the identity of the child.
- 140 When he made a submission, Dr. Bellingham of the Kids Clinic, told the Commission that he is a part time district surgeons.
- 141 Submission by Teddy Bear Clinic.
- 142 Submissions by Drs du Plessis and Potgieter of the RP Clinic, Ms Mkhasibe a Community Worker employed by the Community Paediatrics Division at Wits University, Dr. Mwanda and Dr. Potgieter.
- 143 Submission by Ms Mkhasibe.
- 144 Ibid.
- 145 Submission by Ms Kirsner.

- 146 For example, where the child has disabilities.
- 147 Submission by Karina Coetzee
- 148 Submissions by Ms Redivo, Ms Kiugerr and Dr. Loffel.
- 149 Submission by Ms Fihle
- 150 Submission by Ms Kirsner and Dr Loffel.
- 151 Submission by Forensic Social Workers.
- 152 Submission by Ms Redivo.
- 153 Submission by Marie Elizabeth Kruger of the Social Workers Association of South Africa.
- 154 Submission by Ms Kruger.
- 155 Submission by Ms Kruger.
- 156 Ms Gwen Ramokgopa, Mr Ignatius Jacobs, Mrs Angie Motshekga and Ms Nomvula Mokwenyane. For ease of reference, they will be referred to as MECs' unless specific reference is made to any one of them in which case the relevant MEC will be specified.
- 157 An oral submission was made on their behalf by Mr. Vernon van Wyk of the Gauteng Department of Social Services and Population Development.
- 158 GPAC represents the Gauteng government's commitment to the National Programme of Action for Children adopted by national government in the same year.
- 159 Training offered by the regional subcommittees includes training on legislation relevant to child protection, child abuse prevention, community intervention, child abuse and neglect, risk assessment and development assessment.
- 160 Presently 48 social workers render intermediary services to 43 magistrates' courts in Gauteng.
- 161 Submission by the South African Society of Social Workers in Private Practice (SWASSIP) presented by Elizabeth Anne Norman.
- 162 Submission by SASSWIP.
- 163 Courts have been opened at Khayalitsha, Wynberg and Johannesburg
- 164 Submission by SWASSIP.
- 165 See submission by Mr Dosio
- 166 According to SWASSIP this is by virtue of the authority delegated to these social workers by the Commissioner of Child Welfare.
- 167 The submission was delivered by Ms. Erica Scheepers.
- 168 Submission by SABSWA.
- 169 The submission was made by Mr Coetzee and Bhayat. Penalty for unprofessional conduct ranges from suspension from practice for a defined term, a fine of up to R10 000 and striking an attorney off the roll of practicing attorneys.
- 170 Unlike the SAPS Act, the National Prosecuting Authority Act does not empower the National Director of Public Prosecutions to issue enforceable directives such as the National Instructions issued for the Police service in terms of section 25 of the SAPS Act. He may only issue policy directives. Transgression of these does not attract sanction.

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