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JUSTICE AND CONSTITUTIONAL DEVELOPMENT PORTFOLIO COMMITTEE
19 September 2003
SUPERIOR COURTS BILL: PUBLIC HEARINGS

Chairperson: Adv J de Lange

Documents:
Superior Courts Bill [B52-2003]
Superior Courts Bill - working draft (document awaited)
Constitution of RSA Amendment Bill [B60-2003]
Supreme Court of Appeal submission
Circle of Limpopo Province submission
Law Society of Northern Province submission
Law Society of South Africa submission
Cape Bar Council submission
South African Council of Churches submission (see Appendix)

SUMMARY
Most submissions support the idea of establishing High Courts in all provinces. The central point of debate was whether there should be concurrent jurisdiction across provincial borders. Some presenters were in favour of the incorporation of parts of some provinces into the jurisdiction of courts in other provinces. They believed that this would improve access to justice.

Another central issue was the appointment of the second Deputy Judge President of the Supreme Court of Appeal. The Supreme Court of Appeal felt that there is no need for a second Deputy Judge President. A suggestion was made that such appointment might only be made in future if it proves necessary. Presenters supported the incorporation of the Labour Courts.

MINUTES
Supreme Court of Appeals
Mr Justice Howie said that the Labour Relations Act court system has broken down and those courts should become part of the Supreme Court of Appeal. He said that Clause 3 of the Constitutional Amendment Bill should be deleted. He was aware that the envisaged Deputy Judge President is Judge Zondo and he has no doubt that Judge Zondo is a suitable appointment to the Supreme Court of Appeal given his experience. However he said that the appointment of Judge Zondo as a Deputy Judge President would undermine judicial hierarchy. Justice Howie said that seniority engenders respect, authority and the effectiveness of the courts. If these were disadvantaged, the public would receive poor service form the courts. Traditionally a Deputy Judge President would be appointed from the juniors at the Supreme Court of Appeal. He felt that Judge Zondo should only be appointed to fulfil a management role and preside in respect of labour matters only. He pointed out that if Judge Zondo were to preside over judges who have been with the SCA for some time there might be problems. Members of the court feel that the introduction of Judge Zondo at such a high level would undermine job satisfaction.

Justice Howie continued that if there are two Deputies it should be clarified which one would be appointed to perform the function of the President of the SCA in the absence of the President. He recommended that the senior Deputy must be appointed.

Another Judge of the SCA felt that there is no need for two Deputy Judge Presidents. He recommended that for the time being there should be one deputy and that if the need arose, a second one could be appointed in the future.

The Chair observed that there seems to be a natural hierarchy in the judiciary in the sense that seniors in the Court are promoted. He noted that in the past, judges without experience have been promoted to different positions in the judiciary. Judge Zondo might be a junior but there is no reason why he cannot be appointed as Deputy Judge President.

The Chair said that there is a need to have a special arrangement for the constituency of the Labour Courts. They should be made to feel that although the labour courts have been assimilated, labour issues would still receive due attention. There is a strong political imperative to accommodate the constituency so as to avoid the risk of having the constituency fighting for the retention of the labour courts.

Justice Howie said that Clause 12 of the Superior Court Bill is objectionable and should be deleted. NEDLAC at some stage had wanted to be involved in the selection of judges to hear labour matters in the labour courts. This suggestion implied distrust for other judges. Justice Howie said that the exercise of any choice of a judge, or a panel of judges, made or affected from outside the ranks of the judiciary is inimical to judicial independence and therefore open to constitutional challenge.

The Chair noted that in terms of the law the SCA is the highest court of authority with regard to non-constitutional issues. He felt that the law should be amended to say that if the Constitutional Court does not want to hear a matter then the SCA would be the highest court of authority. He said that the SCA's status would remain largely unchanged. The Chair felt that every issue has constitutional bearing in a constitutional state like South Africa

Circle of Limpopo
Mr J Stemmet said that it is good news that Limpopo Province would have its own High Court. He pointed out that at the moment there is a High Court situated in Thohoyandou with limited jurisdiction in the former homeland of Venda. The people in Venda are happy whereas the rest of the province including the provincial government are unhappy that the new provincial High Court would be situated in Thohoyandou. He suggested that the High Court should be situated in Polokwane.

Mr Stemmet said that Polokwane is the appropriate seat of the court given that the main industries of the province are situated there. Most of the attorneys practising in the province are in that area. Polokwane has better infrastructure as compared to Thohoyandou. If the High Court does remain in Thohoyandou, he then suggested that Pretoria should serve Polokwane. Pretoria should have concurrent jurisdiction with the Limpopo High Court given the distance between some areas and Polokwane. Mr Stemmet also suggested that the Minister should consider creating a second seat for the Limpopo Division, alternatively a circuit court in Thohoyandou. He believed that in this way justice would really have been brought to the people.

The Chair commented that there would be no concurrent jurisdiction if the High Court is in Polokwane. He also said that one needed to have the views of the provincial government on the issue.

Law Society of Northern Provinces
Mr C Fourie said that the Law Society of the Northern Provinces is not in favour of the fragmentation of the High Court. Should the establishment of the Divisions of the High Court in the various provinces be inevitable, it was suggested that Mpumalanga, Limpopo and North West Divisions should have concurrent jurisdiction with the Northern Gauteng and /or Southern Gauteng Divisions. The Northern Gauteng and Southern Gauteng Divisions should have concurrent jurisdiction in Gauteng. He said that it would not be feasible to divide the jurisdiction in Gauteng between these two divisions

The Chair asked if Mr Fourie's suggestions emanated from concern for the public or if they meant to protect the interests of lawyers. He asked if the Society had had any meeting with the public to get their views.

Mr Fourie said that feedback from lawyers indicate that people do not in general find access to the

courts and justice easy.

The Chair observed that the Law Society's suggestion would promote forum shopping at the expense of capacity building. If the suggestion is approved, one would not know how to improve the infrastructure and staff requirements of the various courts.

Mr Fourie conceded that one might perhaps have concurrent jurisdiction in respect of some areas from a convenience point of view. He suggested looking at creating jurisdictions that are not confined to provincial borders.

The Chair said that Pretoria wanted concurrent jurisdiction whereas Johannesburg was strongly opposed to it. He wondered if the divisions have since found a meeting point. He was opposed to having Gauteng serving Limpopo Province as one needs to build the capacity of the Limpopo Province

Mr Fourie said that he had discussed the issue with the Judge President and representatives of the Johannesburg Bar Council and they are in favour of concurrent jurisdiction.

The Chair asked if the issue of concurrent jurisdiction stems from concerns for access to justice, given the fact that most cases are heard in lower courts.

Mr Fourie said that if the viability of a court has to be protected by reserving its jurisdiction, it raises the question of whether it is necessary to have the court in the first place. The High Court deals with issues like divorce and third party matters that involve ordinary matters. Hence it is important that there is easy access to the court.

The presenter noted that the Bill defines a plaintiff but not other possible litigants. He suggested that the definition should be removed or the other possible litigants should be defined too. Also 'head of the court' as used in Clause 7(1)(a) should also be defined.

Mr Fourie said that Clause 11(1)(b) is problematic in allowing a single judge of a division to, at any time, discontinue the hearing of any civil matter which is being heard before him or her and refer it for hearing to the full court of that division. The practical effect is that a case might have been in progress for some time and the judge decides, for certain reasons, that he does not want to hear the matter any more. There might be severe cost implications should this happen. The Chair agreed that this is problematic. He added that there is not even a criterion to guide the judge's decision.

Mr Fourie said that Clause 11(5) is also problematic in allowing the hearing of a case de novo should the court be unable to reach an agreement on the decision. He said that one should ensure that a court is able to reach a decision.

Mr Fourie also expressed concern with the fact that Clause 17(a) allows a court sitting as an appeal court to receive further evidence. He felt that if further evidence surfaced during the appeal the matter should be remitted to the court of first instance.

The Chair said that the clause does not present difficulties since it is standard practice for a court sitting as an appeal court to receive further evidence provided the necessary test is passed.

The presenter said that Clause 22 should not allow distance from the court to determine time allowed for entering an appearance to a civil summons - given the advanced technology that we have. He also said that there should be one period within which one should enter an appearance. The clause should refer to court days and not month and weeks.

Law Society of South Africa

Mr J Stemmet said that the Law Society of SA deems it unnecessary to have more than one Deputy Judge President for a High Court in spite of the fact that any one Division of the High Court may have more than one seat. The Chair said that Clause 4(2)(b) caters primarily for Eastern Cape which has three High Courts.

Mr Stemmet said that Clause 4(4)(a) should be amended to provide for consultation with

representatives of the organised Legal Profession so as to determine the area under jurisdiction of any Division of the High Court.

The Chair felt that the jurisdictions of various divisions should be spelt out but still give the Minister power to alter them.

The presenter said that Clause 16(1) should apply only where an appeal has been lodged.

Mr Stemmet said that Clauses 10(2) and 11(5) have great cost implications in allowing for the hearing of case de novo in circumstances where there is no judgement. He proposed that the fact that there is no majority judgement must be regarded as a finding of absolution in civil matters and discharge in criminal matters.

Mr Stemmet suggested adding a proviso in Clause 22 saying that:
" provided that if the last day on which a party may enter an appearance to defend in terms of this section, falls on a Saturday, Sunday or a Public Holiday, the time allowed for entering an appearance will only expire on the first court day following such Saturday, Sunday, or public holiday." He also said that the clause should refer to court days and not month and weeks.

The presenter said that matters referred to in Clauses 32, 33, 34 and 42 should be provided for in the Rules and not in the Act itself.

Mr Stemmet said that the labour courts had experienced problems due to the fact that the sentiments embodied in the Labour Relations Act were largely ignored in the establishment of the courts and the appointment of judges and officers of the courts. He welcomed the integration of the courts but feared that the expertise of those courts might be lost in the process. He said that the practices of the courts should remain the same. He asked if there would be a separate registrar for labour issues.

The Chair said that a special registrar would be appointed in terms of Clause 7 read with Clause 50.

Mr Stemmet said that the Brits Attorneys Association wishes that Brits should be under the jurisdiction of Pretoria. Some of the reasons advanced include pure grounds of expediency, proximity and cost effectiveness. The Association says that a political map should not defeat the ends of justice. Mpumalanga is divided on whether Pretoria should have concurrent jurisdiction with Nelspruit.

The Chair said that jurisdiction would remain the same unless the Minister changes it. With regard to Mpumalanga, there would be concurrent jurisdiction at the beginning but once a court is established in Nelspruit, concurrent jurisdiction would cease.

Cape Bar Council
Labour Matters
Adv O Rogers SC said that it is wrong to have NEDLAC taking part in the selection of the panel of judges to preside in labour matters. He said that NEDLAC has been a litigant in labour matters and therefore should not take part in the selection of judges.

Clause 3(4)(a)(iii) should be supplemented to make provision for a procedural mechanism for consultation. The provision seems to ignore the significant logistical difficulties in an effective consultative process between two quite large and broadly constituted bodies.

Clause 14(1)(a) and (b) are also problematic. Adv Rogers could not understand why appeals against decisions in labour matters should be heard only by the SCA. A full bench in most divisions of the High Court can effectively hear appeals regarding labour matters. He asked why there is no provision for an appeal to a full court.

Appeals
Adv Rogers said that the use of the phrase "real prospect" seems to imply a change in legislative intent as to when an appeal may be granted. The phrase should be replaced by "reasonable prospect". He went on to say that the unnecessary reformulation of established concepts can cause uncertainty and unnecessary litigation.

Clause 15(1)(C) should make the balance of convenience applicable in deciding when leave to appeal may be given.

Adv Rogers felt that the powers reserved for the President of the SCA and the Judges President of the various Divisions of the High Court should also be extended to senior judges.

The presenter observed that Clause 15(5)(a) is too limited. Matters other than questions of law could render cases important enough to warrant the attention of the SCA.

Procedural
Clause 19(1) makes a court's jurisdiction to deal with matters referred to in sub-clauses (a)-(c) subject to the direction of the Judge President concerned. The presenter said that this qualification seems to be a dangerous fetter on the court's jurisdiction and may give rise to procedural point taking.

Clause 19(3) might be constitutionally unsustainable. This clause authorises the arrest of a natural person in order to "found or confirm jurisdiction". A provision like this is not necessary in modern days.

Adv Rogers asked if Clause 20 is necessary. This clause deals with grounds of review of proceedings of lower courts.

Clause 3(3)(a) empowers the President to determine the number of judges of the SCA. Adv Rogers said that such number should be determined in the Bill and not by the President as required in terms of Section 168(1) of the Constitution.

Mr J de Lange (Department legal drafter) pointed out that the Constitution has been amended to say in terms of an Act of Parliament and not by Act of Parliament.

Adv Rogers said that it is not apparent why Clause 6(2) authorises an indefinite appointment of a Deputy Judge President of a Division. It is undesirable that the tenure of a Deputy Judge President should be determinable by the President.

Clause 7(2) authorises the appointment of research assistants for the Constitutional Court and the SCA. Adv Rogers asked why there is no provision for such appointments to the High Court. The Cape High Court currently has five research assistants who are fulfilling a valuable role and that it would be unfortunate if their posts were to fall away by reason of the absence of an express provision for them.

He was concerned that Eastern Cape Courts could still have concurrent jurisdiction. This would encourage forum shopping to the detriment of litigants.

The Chair said that there would exclusive jurisdiction for each court determined in terms of Clause 45 (1) read with Clause 4(4).

Adv H Schmidt (DA) asked if the presenter prefers separate or concurrent jurisdiction.

Adv Rogers said that it would be preferable to have separate jurisdiction when a court sits as a court of first instance. In cases of an appeal the main division should hear the appeal. The issue as to where the appeal court would sit is just a matter of convenience.

The Chair asked if the presenter has any objections to the issue of the panel of judges.

Adv Rogers replied that he had no objection to the panel. His problem is the involvement of NEDLAC in the selection of the panel.

Adv Schmidt asked for the presenter's opinion on the hierarchy of the Constitutional Court and the SCA.

Adv Rogers replied that one should not allow a civil matter or a criminal matter not raising constitutional issues to go to the Constitutional Court. The structure and composition of the

Constitutional Court is very important given the fact that most the time the court deals with constitutional issues. He did not think it desirable to have them deal with, for instance, delictual matters. He had difficulty understanding how a case involving negligence would raise constitutional issues.

The Chair said that one can access the Constitutional Court by alleging that one's rights are being violated.

Black Lawyers Association (BLA)
Mr Fourie said that the BLA had given him a letter to give to the Committee. The Chair asked him to read the letter to the Committee. In the letter the BLA says it supports the establishment of the Divisions of the High Court in all provinces. Reasons for this are that this would enhance access to justice and would enable provinces that had never had courts, to participate fully in the justice system. The Association also supports concurrent jurisdiction in provinces with more that one Court.

The BLA says that there should be no concurrent jurisdiction between provinces. The letter says that the argument against concurrent jurisdiction across borders is to avoid litigants overlooking a Court in the province in favour of a Court in another province. The letter goes on to say that the disadvantage is that the Courts in marginalized areas would not be able to develop in size and jurisprudence as the Courts in major centres. The Association feels that concurrent jurisdiction across borders would undermine the very essence of establishing Courts in all provinces. However, the BLA says it favours the incorporation of certain areas within the jurisdiction of other provinces for the purposes of convenience or because of the long distances between courts.

South African Council of Churches
Mr D Tilton said that the SACC is concerned about certain aspects of the Bill which seem to impair its potential effectiveness in achieving its stated objectives.

Failure to disclose life threatening STDs
Clause 2 of the Bill replaces the common law definition of rape with a new definition. The definition includes situations where a person intentionally fails to disclose that he or she is infected by a life threatening sexually transmitted infection. Mr Tilton said that this clause would criminalise acts which are consensual.

The Chair felt that failure to disclose such infection should amount to a separate crime and not rape. There is need to distinguish between HIV and other STIs. One also needs a mechanism to ensure that people are not prosecuted without a certificate from the NDDP. This is necessary to cover the circumstances under which the failure to disclose took place due to other reasons. In making its decision the NDPP would have to consider if the person was reckless in not disclosing the infection. He said that the relationship between the parties is also important.

The Chair said that the real issue is whether the person would have consented to sex had he or she known the status of the other person.

Mr Tilton agreed that if you knows that you are infected with HIV and have sex with another person with the intention of infecting that person, you should be punished. The real issue is whether the HIV positive person took steps to protect the sexual partner.

The Chair felt that the HIV negative person has a right to be told so that he or she could make an informed decision.

Mr Tilton said that it is unclear if the phrase "the person in respect of whom an act which causes penetration is committed" applies equally to both sexual partners. The term "life threatening sexually transmitted infection" is not defined. He agreed that the term would apply to HIV/AIDS but asked if other STIs are covered. He also asked if sexual partners would still be obliged to tell each other if they are infected with HIV should AIDS treatment become more effective.

Adv Masutha (ANC) asked if the presenter's concern about infections covered would be sufficiently addressed if the Bill contains a list of infections that need to be disclosed.

Mr Tilton observed that there is also no definition of "significant risk". He asked if the obligation applies even in cases where an HIV infected person uses a condom.

Mr Tilton said that another problem is that intention is associated with disclosure and not with infection. One should bear in mind the stigma attached to those identified as HIV positive. The current formulation of the clause does not distinguish between those who hide their status due to fear of rejection and those who do so in an intentional and reckless effort to infect others.

Definition of indecent act
The Bill defines an indecent act to include any "exposure or display of the genital organs of one person to another person". The presenter said that the clause lacks precision and presumes that the exposure of the genitals is inherently sexual whereas this is not always the case.

The Chair said that the clause would change.

Defence against charge of committing an indecent act with a child
Section 9(5)(a) limits the liability of a person under the age of 16 who commits an indecent act with another child who is also under 16 but less that three years his or her junior. The presenter said that the problem with this clause is that it provides a defence to an act committed by a child of 15 years with a child aged 12, but it does not provide the same defence to a child who, on his or her 16 birthday committed an indecent act with a child a day younger. He proposed that the clause should be amended to read:
"It is a defence to a charge under subsection (4) if the age of the accused does not exceed the age of such child by more than three years."

Age of consent
Clause 9 lowers the age of sexual consent to 16 with regard to homosexuals. Mr Tilton said that the SACC supports a uniform age of consent. The SACC believes that the age should be set at 18. Lowering the age of consent would exacerbate the vulnerability to sexual overtures from older people.

Treatment for survivors of rape and sexual assault
The presenter said that the SACC appeals to the government to ensure that survivors of rape and sexual assault have a statutory right to counselling and medical treatment through the public health system.

The Chair asked if the SACC wants an absolute right as opposed to a progressive right created in the Bill.

Mr Tilton said that all that is needed is a concrete commitment in law given the limited resources that the government has.

The meeting was adjourned.

Appendix : South African Council of Churches Submission

South African Council of Churches

Criminal Law (Sexual Offences) Amendment Bill [B50-2003]

Submission to the Portfolio Committee on Justice and Constitutional Development

15 September 2003

Introduction
1. The South African Council of Churches (SACC) is the facilitating body for a fellowship of 23 Christian churches, together with one observer-member and associated para-church organisations.

Founded in 1968, the SACC includes among its members Protestant, Catholic, African Independent, and Pentecostal churches, representing the majority of Christians in South Africa. SACC members are committed to expressing jointly, through proclamation and programmes, the united witness of the church in South Africa, especially in matters of national debate.

2. The SACC welcomes the tabling of the Criminal Law (Sexual Offences) Amendment Bill [B50-2003] (hereafter, "the Bill") and appreciates the opportunity to comment on the proposed legislation. Sexuality and human intimacy are gifts from God. Sadly, they are often abused by human beings as instruments of power and oppression. Consequently, there is an undoubted need for legislation to regulate sexual relations in our society, even though the criminal justice system is not always best equipped to deal with sexual offences in a healing and restorative manner.

3. Recognising that common law definitions of sexual offences have often failed to keep pace with our current commitment to sexual equality and equal protection for all before the law, we support, in general, the objects of the Bill, as set out in the accompanying memo.

4. At the same time, we raise concerns here about a number of technical aspects of the Bill, which seem to impair its potential effectiveness in achieving its stated objectives. In particular, we highlight issues related to:

- Failure to disclose life-threatening sexually transmissible diseases;
- The breadth of the definition of "indecent act";
- Defence against a charge of committing an indecent act with a child;
- Age of consent; and
- Treatment for survivors of rape and sexual assault.

Failure to disclose life-threatening sexually transmissible diseases
5. Sec. 2 of the Bill would replace the common law definition of rape with a new definition that is more consistent with the non-discrimination clauses of the South African Constitution. In terms of the new definition, any unlawful and intentional act of sexual penetration would constitute rape. An act of penetration is presumed to be unlawful if it is committed through coercion, under false pretences, or in respect of a person who is incapable of appreciating the nature of the act. The section goes on to define each of these three unlawful conditions in greater detail.

6. One of the potential grounds for finding an act of penetration to have been committed under false pretences is a situation where a person "intentionally fails to disclose to the person in respect of whom an act which causes penetration is being committed, that he or she is infected by a life-threatening sexually transmissible infection in circumstances in which there is a significant risk of transmission of such infection to that person." Thus, a person who knows him or herself to be infected by a life-threatening sexually transmissible infection (STI) but does not disclose this fact to his or her partner prior to an act of sexual penetration would be guilty of rape, even if that act was otherwise consensual.

7. The SACC appreciates the principle behind this provision: that people living with life-threatening sexually transmissible infections have an obligation to behave responsibly, not recklessly, toward prospective sexual partners. However, the current formulation goes beyond the recommendation made by the South African Law Commission Project Committee in its Discussion Paper on Sexual Offences. That body proposed that "criminal [i.e., non-consensual] sexual activity compounded by deliberate or reckless exposure to HIV/AIDS should be subject to criminal sanction" (para. 44.4.7). The overly broad language of the Bill, which also embraces otherwise consensual acts, creates a number of potential problems.

8. First, the language is obscure. It is not clear if the phrase, "the person in respect of whom an act which causes penetration is being committed", applies equally to both sexual partners. In other words, in a consensual relationship, is there an equal obligation on both the partners to disclose their STI or HIV/AIDS status? Although clinical evidence suggests that the person being penetrated is placed at much greater risk of infection than the penetrator, the risk to the penetrator is apparently non-negligible. If there is to be a duty to disclose, this must be a shared responsibility - and the wording of the act must make this clear.

9. Second, the term "life-threatening sexually transmissible infection" is not defined. Undoubtedly, the HI virus would qualify in the present context, where no cure for the disease is known. But what about other sexually transmitted diseases? Though most STIs are now treatable, they can be just as dangerous as they were in earlier times if left untreated. If AIDS treatments become more effective, will sexual partners continue to be legally obliged to tell each other if they were infected with HIV? Will it matter how affordable and accessible such treatment is? What criteria must courts use in applying this provision?

10. Third, what constitutes a "significant risk of transmission"? If a man who knows that he is infected with HIV fails to disclose this to his partner but also makes careful use of a condom during sexual intercourse, has he reduced the risk of transmission sufficiently that he is no longer bound by a legal duty to disclose his status? Once again, what criteria must the courts apply in determining the significance of the risk to which his partner has been exposed?

11. Fourth, intentionality is associated with *disclosure* ("intentionally fails to disclose") not with *infection*. Given the enormous social stigma that is still attached to being identified as HIV+, a person might be reluctant to disclose his or her HIV status to a partner. The current formulation does not distinguish between those who hide their status due to a fear of rejection and those who do so in an intentional and reckless effort to infect others.

12. Finally, and most important, the criminalisation of concealment in otherwise consensual relationships may create a perverse incentive, particularly in the context of the AIDS pandemic. With the significant improvement in our capacity to manage the effects of HIV infection, most medical practitioners now encourage people to undergo testing so that they know their HIV status. The law should reinforce this message. But a person who suspects that he or she is HIV+ might be dissuaded from being tested if a positive result imposes a legal obligation to disclose one's status to all future sexual partners. In short, those who remain ignorant of their status - either wilfully or due to of lack of access to affordable testing - cannot be penalised under this provision, while those who seek to establish their status may open themselves to legal sanctions even if they take steps to minimise their partners' risk of infection. Similarly, a legal obligation to disclose might actually increase the risk of infection by an irresponsible partner if it creates a false sense of security or further undermines the capacity of vulnerable groups (such as women) to insist that their sexual partners use condoms or other preventative measures at all times.

13. Trust and openness should be hallmarks of all intimate relationships. Clearly, there is a moral obligation on those infected with any STD to reveal this fact to their sexual partners. The ultimate question is: Is the criminal justice system the most effective and desirable mechanism to use to enforce this moral obligation? At the same time, society has an ethical duty to combat the stigmatisation of people living with HIV and to respond humanely to those who have taken the step of determining their HIV status.

Definition of indecent act

14. The Bill defines an indecent act to include any "exposure or display of the genital organs of one person to another person". A person who unlawfully and intentionally causes another person to engage in such an indecent act would be guilty of an offence under certain circumstances, including where that other person is incapable of appreciating the nature of the indecent act. A person below the age of 12 year is presumed to be incapable of appreciating the nature of such an act.

15. Once again, the SACC supports the intent of this provision, but has technical concerns about its lack of precision. In particular, it assumes that the exposure of the genitals is inherently sexual (and, hence, indecent) in intent. But this is not always the case. Consider, for instance, a public changing room, such as might be found at a beach or a swimming bath or even a public toilet or other types of shared ablution facilities. A father who takes his ten-year-old son with him into such a venue might well expect that the child might be exposed to the genitals of others using these facilities. Given the child's age and, therefore, his incapacity to appreciate the nature of such "indecent" exposure, the father would technically be in violation of section 6 of the Bill. Confusingly, he would also be in breach of section 9(4) of the Bill, which imposes a slightly lower penalty (up to four years imprisonment, as opposed to the five-year penalty in section 6). Section 9(5), which sets out possible defences to charges in terms of section 9(4), would offer him no relief.

Age of consent
16. Section 9 effectively lowers the age of sexual consent to 16. Although we support the notion of a uniform age of consent, we believe that this should be set at 18. We are increasingly and painfully aware of teenagers' vulnerability to sexual overtures from older people, including teachers, taxi drivers - even religious officials. Lowering the age of consent to 16 would exacerbate this problem, as older adults would no longer face the threat of statutory rape charges for pursuing 16 or 17 year old children. Furthermore, since the constitution defines a person under the age of 18 as a child and the pending Children's Bill proposes to set 18 as the age of majority, there is compelling logic to establishing 18 as the age of sexual consent. We therefore recommend that "16" be replaced with "18" throughout sections 8 and 9, with the exception of section 9(5)(a), which is discussed further below.

Defence against a charge of committing an indecent act with a child
17. Section 9(5)(a) limits the liability of a person under the age of 16 who commits an indecent act with another child who is also under the age of 16 but no less than three years his or her junior. This provision has reportedly been included to ensure that youthful sexual experimentation is not inappropriately criminalized. Note that it does not cover acts of penetration nor does it condone such experimentation; rather, it acknowledges that the criminal justice system is not necessarily best equipped to deal with such acts.

18. Whilst we accept the principle underlying this provision - provided the age of consent is adjusted to 18 - we have technical concerns about the way it has been expressed. The current wording would, for instance, provide a defence for an indecent act committed by a child of 15 with a child aged 12, but it would provide no defence to a child who, on his or her 16th birthday committed an indecent act with another child a day younger.

19. This problem cannot be remedied simply by adjusting the reference in 9(5)(a)(i) to a person below the age of 18 years. Instead, we propose that the 9(5)(a) be amended to read:

(5) (a) It is a defence to a charge under subsection (4) if the age of the accused does not exceed the age of such child by more than three years; or

This would decriminalise some forms of consensual sexual contact between children aged 12 to 18, provided there is no more than a three year age gap between the two. It also avoids the anomaly cited above (where two people quite close in age can still violate the law because they fall on either side of the age of consent divide). Obviously, once a child reaches adulthood, this section no longer applies.

Treatment for survivors of rape and sexual assault
20. Section 19 of the Bill provides for a court to order drug or alcohol abuse treatment for sexual offenders who would benefit from such treatment. Whilst we fully support such rehabilitative efforts, the SACC has an equal concern for the survivors of rape and sexual assault. We would therefore appeal to the government to ensure that survivors of rape and sexual assault have a statutory right to counselling and medical treatment through the public health system, including access to post-exposure prophylaxis where clinically indicated.

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