

Sexual violence in prisons – Part 2: The Criminal Law (Sexual Offences and Related Matters) Amendment Act (32 of 2007) – its implications for male rape in prisons and the Department of Correctional Services

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ABSTRACT

The Criminal Law (Sexual Offences and Related Matters) Amendment Act (32 of 2007), referred to here as the Sexual Offences Act (SOA), established in law a gender-neutral definition of rape and this has important implications for male rape in South African prisons. In this article an analysis is presented of the SOA within the prison setting as well as the wider implications for the Department of Correctional Services. The different offences defined under the SOA are contextualised within the prison environment as this environment has implications for the detection and investigation of sexual offences committed there, as well as for the prosecution of perpetrators. Services to victims are also discussed as well as the Sex Offenders Register and the duties of the Department of Correctional Services in this regard. In order for the SOA to prevent and eradicate sexual victimisation in prisons, it will require a concerted effort by the Department of Correctional services to ensure that prisoners feel safe to report such instances and furthermore, to ensure that investigations are done thoroughly, promptly and with the necessary recognition and support for victims.

1. Introduction

While it is acknowledged that the provisions of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (hereafter the SOA) can only address some of the issues contributing to the prevalence of sexual violence in prisons, it nevertheless makes an important contribution towards the general acknowledgment and recognition of the status of male rape victims, and importantly, it renders the requisite legal weight to the problem of male rape. Part 1, of this two-part series, described the duty of the state to provide safe custody and highlighted that this duty should be interpreted to include the duty to prevent all forms of torture and other ill-treatment as required by the United Nations Convention against Torture and Other

Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT). Importantly, this duty extends to actions of non-state actors (i.e. other prisoners) and is not limited to officials of the Department of Correctional Services (DCS). Part 1 also provided a brief analysis, based on the available literature, of the nature of sexual violence in prisons in South Africa. While many questions remain as to the prevalence and exact nature of this phenomenon, it is accepted that it is a fairly common phenomenon which poses a grave danger to the dignity as well as physical and mental well-being of many prisoners on a daily basis.

It was indeed in response to a 'grave concern' about the levels of sexual violence in South Africa that the SOA was finally passed by Parliament in December 2007 after nearly a decade in the making.¹ The SOA had the protection of women and children as its primary goal during drafting.² In a general sense, despite the gender-neutral definition of rape adopted in the SOA, adult men did not emerge as a priority group in the drafting process requiring the protection of the legislation. Moreover, prisoners, as victims of sexual violence, were never even discussed in the drafting process, despite the fact that sexual violence is perceived to be common in South African prisons.³ Even though marginalised as a distinct group in the discourse on the SOA, Part 2 of this article explores the implications of the SOA for prisoners and their safety, and further the obligations created by the SOA for the DCS.

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¹ National Working Group on Sexual Offences Bill *Fact Sheet on the Sexual Offence Bill* (2006) 2-3.

² The Act's Preamble states that whereas the commission of sexual offences is of grave concern, it has a particularly disadvantageous impact on women and children as vulnerable persons. Preamble to the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. The South African Law Reform Commission (SALRC) was originally tasked with developing law around sexual offences against children but expanded its mandate to include adults. SALRC Discussion Paper 102 (Project 107) 'Sexual Offences' (2002) Executive Summary at 1, available at <http://www.justice.gov.za/salrc/dpapers/dp102-execsuum.pdf>, accessed on 6 May 2011.

³ Personal Interview with Ms. D Clark, Principal State Law Adviser for the SALRC, Cape Town July 31 2008. Ms D Clark was involved with the drafting of the Act since 1999.

2. The SOA and offences under the Act

The SOA has consolidated, modernised and clarified a body of legislation and jurisprudence that was first codified in 1927,⁴ and evolved through a series of amendments and emerging jurisprudence. By aligning the law of sexual offences more closely with international norms,⁵ the SOA reflects more acceptable perspectives on sexuality, equality and victimisation. Where some of the common law and former codified sexual offences gave unequal treatment to certain victims and offenders,⁶ the SOA now acknowledges all victims, male and female, and holds offenders accountable irrespective of gender. This equalization and streamlining of offences under the SOA should lead to sentences being imposed with greater uniformity and in accordance with legislated sentencing guidelines. This section will discuss the offences under the SOA that are likely to have direct implications for prisoners and victimisation in male prisons.

2.1 Rape and compelled rape under the SOA

The SOA introduces a new statutory offence of rape in place of the previous common-law definition, expanding the definition to include all forms of penetration without consent, irrespective of gender. Rape now entails the intentional and unlawful act of sexual penetration of another person, without the consent of that person.⁷ Sexual penetration is defined in the SOA to mean,

‘... penetration to any extent whatsoever by- (a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person; (b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of

⁴ The Immorality Act 5 of 1927 (Repealed). See also South African Law Commission (SALC) Issue Paper 19 (Project 107) ‘Sexual Offences: Adult Prostitution’ (2002) Chapter 6 at para [6.4], available at , accessed on 17 June 2011.

⁵ In a landmark case, the International Criminal Tribunal for Rwanda (ICTR) defined rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. *The Prosecutor v Jean-Paul Akayesu*, Case No, ICTR-96-4-T, 2 September 1998 at para [688], available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=40278fbb4&page=search>, accessed on 6 May 2011. See also National Working Group on Sexual Offences Bill Fact Sheet 4 at 14.

⁶ SALRC Discussion Paper 85 (Project 107) ‘Sexual Offences: The Substantive Law’ (1999) 111 at para [3.4.7.2], available at <http://www.justice.gov.za/salrc/dpapers/dp85.pdf>, accessed on 17 June 2011.

⁷ Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. Under the common law, rape was limited to sexual acts committed by men upon women and by a penis penetrating a vagina.

another person; or (c) the genital organs of an animal, into or beyond the mouth of another person'.⁸

Importantly, a gender-neutral definition of rape has been introduced and it is now possible under the law for a man to be raped. This will materially affect the situation of male prisoners as perpetrators may now be found guilty of rape instead of indecent assault (equal to assault with intent to do grievous bodily harm) or sodomy, which would normally have attracted a lighter sentence than that of rape.⁹ The SOA furthermore does not discriminate in respect of which body parts must penetrate, or be penetrated, for the offence to constitute rape.¹⁰

The new offence of compelled rape is also introduced and criminalises the conduct of compelling one person to rape another.¹¹ Under this provision, one who compels another to rape someone else (the victim) will be guilty of an offence.¹² This offence has particular significance in the prison setting as high-ranking gang members have been reported to conspire or incite lower-ranking members to carry out rapes in order to punish the victim or achieve an objective for the gang in an attempt to control the prison environment. Lower-ranking gang members who refuse such an order would themselves be pun-

⁸ 'Sexual penetration' (section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007).

⁹ The common-law offence of sodomy criminalised the act of anal penetration between a man and a man, but not between a man and a woman, nor consensual sexual acts between two women (*National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) at para [13]). Sodomy was defined as the unlawful and intentional sexual intercourse per anum between men and consent did not deprive the act from being unlawful. Both parties would have committed the crime (*National Coalition for Gay and Lesbian Equality v Minister of Justice* supra at para [16]). In *S v H* 1995 (1) SA 120 (C) the court added that sodomy also entailed an element of consent in sexual intercourse between men. Where the anal sexual action was without consent, the act constituted the offence of sexual assault. For instance, in *S v M* 1979 (2) SA 167 (T) the court had set aside a conviction of two accused for the crime of sexual assault as it held that the assault cannot be said to be unlawful due to the presence of consent. The court further mentioned that the anal sex could not constitute a *malum in se* (an act wrong and evil in itself) as such acts could not be consented thereto. Penalties for sodomy varied depending on the circumstances of the case.

¹⁰ Penetration occurs when the genital organs, any other body part of a person, or any object penetrate into or beyond the genital organs, anus, or mouth of another person. (Section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007).

¹¹ Lisa Vetten 'New crimes and old procedures: Can the new Sexual Offences Bill deliver on its promises?' (2007) 22 *SA Crime Quarterly* 22, available at <http://www.iss.org.za/uploads/CQ22VETTEN PDF>, accessed on 13 May 2011.

¹² Section 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

ished by the gang.¹³ Under the SOA, where such an order is given, the one giving the order will have committed the offence of compelled rape. In the quasi-military structure of the prison gangs there would be little difference between the gang leader issuing an order to rape and the leader of a para-military rebel group issuing a similar order to his willing cadres. He does not even have to issue the order; he can merely fail to prevent the rape from taking place.

The state does however not escape culpability in the eyes of UNCAT in a case of compelled rape. The fact that these were private individuals, one instructing the other, does not matter; the state remains responsible for what happens in its institutions. General Comment No. 2 on the UNCAT provides further guidance in this regard as the Convention places obligations on states and not on individuals:¹⁴

‘Accordingly, each State party should prohibit, prevent and redress torture and ill-treatment in all contexts of custody or control, for example, in prisons, hospitals, schools, institutions that engage in the care of children, the aged, the mentally ill or disabled, in military service, and other institutions as well as contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm.’¹⁵

2.2 Sexual assault under the SOA

The SOA replaces the common-law offence of indecent assault with the statutory offence of sexual assault, to include all forms of sexual violations without consent. Where a person intentionally violates another in a sexual manner without consent, that person will be guilty of sexual assault.¹⁶

¹³ See in general Steinberg’s description of the number gangs’ disciplinary codes and procedures in J Steinberg *Nongoloza’s Children: Western Cape Prison Gangs during and After Apartheid* Monograph for CSVR (2004) 65.

¹⁴ Committee Against Torture, General Comment 2, CAT/C/GC/2, ‘Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ at para [15], available at <http://www.unhcr.org/ref/world/docid/47ac78e2.html>, accessed on 13 May 2011.

¹⁵ Ibid.

¹⁶ Section 5(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007: ‘Sexual violation’ under the Act entails any act that brings about contact, whether directly or indirectly, between the genital organs or anus of one person, and any part of the body of another person or animal or any object, including an object that resembles genital organs or an anus of a person or an animal. In the case of female, body parts include the breasts as well. ‘Sexual violation’ also refers to direct or indirect contact between the mouth of one person, and the genital organs or anus of another person. The term further includes contact between the mouth of one person and the mouth, genital organs, anus or female-breasts of another person. It also extends to contact between the mouth of one person and any other part of the body of another person (which is not the genital organs, anus or female-breasts of that

Where a person inspires the belief in another that he will be sexually violated, that person is guilty of an offence as well and therefore in terms of this provision the threat of sexual violation is equally deemed as sexual assault.¹⁷ Imprisoned gang members rely on fear, manipulation and intimidation with new admissions and physically weaker prisoners in order to submit them to sexual victimisation. By virtue of section 5(2) of the SOA however, a prisoner merely creating the impression that self-subjugation is a better option than being raped results in him committing an offence. This is welcomed as the 'fear of being raped' is a tool well-used in prison settings and the SOA now provides vulnerable prisoners with the legal protection that intimidation, the creation of a belief that a person will be raped, and manipulation are in themselves illegal acts under the SOA.

Section 5(2) also assists somewhat in untangling the complex issue of 'coercion and consent'. Consent is defined by the SOA as voluntary or uncoerced agreement. Coercive or involuntary circumstances include, but are not limited to, when a victim submits or is subjected to a sexual act as a result of the use of force or intimidation, a threat of harm or where abuse of power or authority by the perpetrator inhibits the victim from indicating his unwillingness or resistance to the sexual act. Some commonplace scenarios illustrate the difficulties of untangling consent and coercion in a prison setting. A prisoner may submit to subsequent rapes after sustaining serious injuries as a result of resisting a first attack. Similarly, perpetrators who trick or manipulate victims into accepting food, cigarettes or drugs, will later demand sex in return, which the victim must submit to or face a violent rape.¹⁸ In prisons where gangs control basic necessities, such as food and blankets, a victim may also submit to sex with gang members in order to survive. In all of these scenarios, an appearance of consent may be present despite the coercive means used to obtain submission. In short, coercion and the illusion of consent pose serious challenges with respect to prevention, response and prosecution of

person) which could be used in an act of sexual penetration, cause sexual arousal or be sexually stimulated. Acts where contact is made between the mouth of one person and any object resembling the genital organs, anus or female breasts of a person or animal could also constitute 'sexual violation'. The term further includes contact between the mouth of a victim and the genital organs or anus of an animal, the masturbation of one person by another person, or the insertion of any object resembling the genital organs of a person or animal, into or beyond the mouth of another person. Sexual violation does, however, not include acts of sexual penetration.

¹⁷ Section 5(2) of the of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

¹⁸ See in general S Gear and K Ngubeni *Daai Ding: Sex, Sexual Violence and Coercion in Men's Prisons*, Research paper written for the Centre for the Study of Violence and Reconciliation (2002).

sexual violence in prisons. This requires a nuanced understanding of sex and coercion in the prison setting.

Concerns regarding the absence of consent revolve around the burden placed on the prosecution to prove the absence of consent, and as a result the victim's conduct is inevitably focused upon.¹⁹ These concerns are no less relevant when turning to male rape in prisons where prisoners are subjected to a wide range of coercive and threatening behaviours. In cases of protracted sexual victimization, as with 'prison wives', misunderstandings about homosexuality and 'prison marriages' present difficulties in separating consent from coercion as has been described in Part 1 of this two-part series.²⁰ Consequently, identifying and preventing further abuse, as well as initiating criminal proceedings on behalf of the victim, presents several difficulties. Staff may, in ignorance, interpret a 'prison marriage' as the voluntarily engagement in a relationship between two prisoners and may use it to condone a broader range of sexual victimisation practices and shrug off complaints made by the victim. Refusing to admit that consent was withheld may in itself be an act of self-preservation to prevent further retaliation. It should also be borne in mind that under UNCAT Article 12, the state is obliged to promptly investigate 'wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.' This is interpreted to mean that it is not necessary for the victim to lay a complaint of sexual violation but if an official has reason to believe that it occurred, this is sufficient to commence with an investigation. The European Committee for the Prevention of Torture (ECPT) is also of the view that even if there has been no formal complaint, but 'credible information' has come to light regarding the ill-treatment of people deprived of their liberty, 'such authorities should be under legal obligation to undertake an investigation.'²¹

Section 56(1) also brings some assistance to the 'coercion or consent' issue, and 'prison wives' may possibly find recourse under this section. The section provides that a person accused of rape cannot rely on the defence that a marital or 'other relationship' existed between the accused and the complainant. This helps to clear a possible misconception amongst staff and prisoners that a 'prison wife' cannot be raped and it affirms that a consensual setting does not necessarily

¹⁹ SALRC Discussion Paper 85 (Project 107) 'Sexual Offences: The Substantive Law' (1999) 72 at paras [3.4.4.5.4], available at <http://www.justice.gov.za/salrc/dpapers/dp85.pdf>, accessed on 13 May 2011; National Working Group on the Sexual Offences Bill op cit (n1) 13.

²⁰ See L Muntingh and Z Satardien 'Sexual violence in Prisons – Part 1: The duty to provide safe custody and the nature of prison sex' (2011) 24(1) SACJ 1.

²¹ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT) *The ECPT Standards: Substantive sections of the ECPT's General Reports* (2004) 75.

translate into sexual consent. It further places a duty on prison staff to take a complaint of rape stemming from a prison marriage seriously, and clearly steers staff away from the misconception that ‘there can be no rape in a prison marriage’.

2.3 Other offences that may apply to prison settings

The SOA also makes provision for compelled sexual assault. By virtue of the Act, a prisoner who compels another prisoner to sexually assault the victim may be guilty of compelled sexual assault.²² Compelled self-sexual assault is also introduced and thus where a prisoner compels a victim to sexually violate or assault himself (the victim), that person may be found guilty of compelled self-sexual assault.²³ Similar provisions are provided for in instances where a prisoner compels another prisoner to witness the commission of a sexual offence or a sexual act, or compels self-masturbation.²⁴

The crime of compelled sexual assault raises similar issues to that of sexual assault discussed above in section 2.2. It is similarly conceivable that compelled sexual assault is more likely to happen within the context of the prison gangs. Whether the assailant (possibly a more junior gang member) committing the offence of sexual assault under instruction from a more senior member will be willing to disclose the person’s identity and testify in court is less than likely given the severe punishments imposed by gang members who testify against the gang.²⁵

The Act goes further and criminalises the unlawful and intentional exposure or display of the genital organs without the consent of the person witnessing such exposure.²⁶ Given that the majority of prisoners are accommodated in communal cells and share ablution facilities, often with little or no privacy, it seems unlikely that this provision in section 9 of the SOA will have any practical value and application in a prison setting.

2.4 Engaging in sexual services in a prison setting

The intentional engagement of sexual services for financial or other reward with another person is an offence. This is the case irrespective

²² Section 6 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

²³ Section 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

²⁴ Section 8 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

²⁵ Steinberg *op cit* (n13) 32-33.

²⁶ Section 9 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

of whether the sexual act elicited was actually performed or whether involvement in eliciting the services was of an indirect nature.²⁷ As a result, prisoners who engage in eliciting sexual services for reward (whether for money or other rewards) may be found guilty of 'engaging sexual services' under section 11 of the SOA and the section applies even if the solicited services had not yet taken place. Interpreting the section broadly, prisoners who engage in sex with others for rewards such as cigarettes, food or the commission of other favours, may be found guilty of an offence under the provision. Section 11 also has implications for 'prison marriages'. The implications present a dilemma in the sense that an individual may engage in eliciting sexual services in order to survive, literally, only then to find that this is a criminal offence. The Act therefore raises real complexities to be dealt with in the future by the DCS and the courts.

2.5 Sex trafficking in prison settings

From the Jali Commission's Report it is evident that sex trafficking is common in prison settings and is perpetrated by both warders and gang members, often in collusion. New and vulnerable prisoners are sold and traded between gangs or particular cells, or are sold by warders to other prisoners.²⁸ Some warders accept payment to ensure that particular individuals are allocated to specific cells. Young prisoners can be bought and sold for as little as R50.00 in some prisons.²⁹ Victims of 'prison sex trafficking', like trafficked women, usually suffer violence, threats of violence, rape, psychological coercion and serious health problems.³⁰ Trafficked victims are generally kept under tight control in order to deter them from reaching out to authorities. Within

²⁷ Section 11 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

²⁸ The Jali Commission of Inquiry Commission of Inquiry into alleged incidents of corruption, maladministration, violence or intimidation on the Department of Correctional Services (The Jali Commission) (2006) Chapter 4 at 159-160, available at <http://www.info.gov.za/otherdocs/2006/jali/index.html>, accessed on 17 May 2011.

²⁹ N Tolsi 'Siya, a 15-year-old prison commodity' 3 July 2008 Mail & Guardian, available at , accessed on 17 May 2011.

³⁰ South African Law Reform Commission (SALRC) Discussion Paper 111 (Project 131) 'Trafficking in Persons' (2006) Chapter 3 at 26-60, available at <http://www.justice.gov.za/salrc/dpapers/dp111.pdf>, accessed on 17 May 2011. According to figures presented by the DCS Deputy Commissioner for Development and Care, Ms. Subashini Moodley, the prevalence of HIV among sentenced offenders nationally is 19.8% as compared with the national average of 16.25%. See Department of Correctional Services HIV Prevalence Survey, Terminally Ill Inmates & Medical Parole Issues: Departmental Briefing, available at , accessed on 17 May 2011. See also, SAPA '76% rise of prisoners on ARV'S' News24.com 29 July 2008 Cape Times, available at <http://www.news24.com/SouthAfrica/News/76-rise-in-prisoners-on-ARVs-20080729>, accessed on 17 May 2011; Muntingh & Satardien op cit (n20) 5-7.

the prison setting this offence, and especially warder complicity in trafficking, must be regarded in an extremely serious light as it is the primary responsibility of officials to ensure safe custody and not to exploit the vulnerability of prisoners further. Both the Special Rapporteur on Torture (SRT),³¹ and the Committee against Torture,³² have remarked upon the intertwined relationship between trafficking and torture. The link between trafficking and torture places, according to the SRT, a particular obligation on the state:

‘Regarding State duties in this context, in the case of *Siliadin v. France*, the European Court of Human Rights found that the State failed to live up to the positive obligation to have in place a criminal law system to prevent, prosecute and punish non-State actors involved in domestic slavery. States may also be held accountable for failing to provide appropriate protection to victims of human trafficking. In many instances trafficked women are not recognized as victims, often owing to the existence of “contracts” between them

³¹ Special Rapporteur on Torture, A/HRC/7/3, ‘Promotion and protection of all human rights, civil, political, economic, social and culturally rights, including the right to development’ (15 January 2008) at paras [56]-[58], available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/101/61/PDF/G0810161.pdf?OpenElement>, accessed on 24 May 2011.

³² See concluding observations by the Committee against Torture, CAT/C/RUS/CO/4 ‘Consideration of the reports submitted by states parties under Article 19 of the Convention’ (6 February 2007), available at [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/8c5a7e4bad44e756c12572800053785f/\\$FILE/G0740338.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/8c5a7e4bad44e756c12572800053785f/$FILE/G0740338.pdf), accessed on 17 May 2011; Committee against Torture, CAT/C/TGO/CO/1, ‘Consideration of the reports submitted by States parties under Article 19 of the Convention’, available at [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4044c1256a450044f331/cae1c533bfe878a7c12571e10053fe8c/\\$FILE/G0643474.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4044c1256a450044f331/cae1c533bfe878a7c12571e10053fe8c/$FILE/G0643474.pdf), accessed on 17 May 2011 (Togo); Committee against Torture, CAT/C/QAT/CO/1, ‘Consideration of the reports submitted by states parties under Article 19 of the Convention’ (25 July 2006), available at [http://www.unhchr.ch.tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/4b6bc620e633dfd1c12571ee00286e5f/\\$FILE/G0643239.pdf](http://www.unhchr.ch.tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/4b6bc620e633dfd1c12571ee00286e5f/$FILE/G0643239.pdf), accessed on 17 May 2011 (Qatar); Committee against Torture, Republic, CAT/C/KOR/CO/2, ‘Consideration of the reports submitted by states parties under Article 19 of the Convention’ (25 July 2006), available at [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/4b6bc620e633dfd1c12571ee00286e5f/\\$FILE/G0643253.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/4b6bc620e633dfd1c12571ee00286e5f/$FILE/G0643253.pdf), accessed on 17 May 2011 (Republic of Korea); Committee against Torture, CAT/C/TJK/CO/1, ‘Consideration of the reports submitted by States parties under Article 19 of the Convention’ (6 December 2006), available at [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/39fa173e34b80b52c125728f004d9e4b/\\$FILE/G0740308.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/39fa173e34b80b52c125728f004d9e4b/$FILE/G0740308.pdf), accessed on 17 May 2011 (Tajikistan); Committee against Torture, CAT/C/ZAF/CO/1, ‘Consideration of the reports submitted by states parties under Article 19 of the Convention’ (7 December 2006), available at [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/9ff410d04620f0197c125729800544666/\\$FILE/G0740324.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/9ff410d04620f0197c125729800544666/$FILE/G0740324.pdf), accessed on 17 May 2011 (South Africa), CAT/C/ZAF/CO/1; Committee against Torture, CAT/C/AUT/CO/3, ‘Consideration of the reports submitted by states parties under Article 19 of the Convention’ (15 December 2005), available at [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/dd4fc0a26bf82f98c12570fc003abe88/\\$FILE/G0545521.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/dd4fc0a26bf82f98c12570fc003abe88/$FILE/G0545521.pdf), accessed on 17 May 2011 (Austria).

and their 'employers'. The Special Rapporteur stresses that any initial consent becomes meaningless, once the element of powerlessness is fulfilled. He also recalls that in the case of *Barar v. Sweden*, the European Court of Human Rights held that the expulsion of a person to a State where he/she would be subjected to slavery or forced labour might raise issues under the obligation to prohibit torture.³³

The SOA provides that the trafficking of persons for sexual purposes, any act aimed at encouraging or promoting such trafficking or any act encouraging another to traffic for sexual purposes, is an offence.³⁴ It should be noted that section 71 is adopted as a transitional provision until such time that South Africa adopts legislation in compliance with the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention against Trans-National Organised Crime.³⁵ Even though South Africa signed the Protocol in December 2000, the law of treaties requirement that South Africa must act in accordance with the Protocol and legislation manifestly in 'partial compliance' may thus be at risk of falling short of obligations arising from signing the Protocol.³⁶ At the time of writing, the Prevention and Combating of Trafficking in Persons Bill (Bill 7 of 2010) was before Parliament.

The SOA defines 'trafficking' as the supply or transportation of a person, *within* or across the borders of the Republic of South Africa, by means of threats of harm; threats or use of force; intimidation; abduction; fraud; deception or false pretence; the abuse of power or of a position of authority and receiving payment or compensation, for the purposes of exploitation, grooming or abuse of a sexual nature of the person so trafficked.³⁷ In interpreting the section, it is argued that the selling of prisoners by warders and moving them to other cells for sexual purposes would fall within the ambit of sections 70 and 71 and would thus constitute sex trafficking in terms of the Act. By using the words, 'within or across the borders of the Republic', section 70 intends that the definition of sexual trafficking apply irrespective of whether the trafficking in question initiates outside or happens within the country's borders. Therefore, as the International Organization for Immigration (IOM) has argued, as long as the person trafficked is relocated in order to gain control and facilitate exploitation of that

³³ Special Rapporteur on Torture op cit (n31) at para [57].

³⁴ Section 71 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

³⁵ Section 70 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

³⁶ Articles 12 and 18 of The Vienna Convention of the Law of Treaties (1969), available at, accessed on 17 May 2011.

³⁷ Section 70(2)(b) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

person, the person relocated is being trafficked.³⁸ Noteworthy is also the recommendation by the South African Law Reform Commission (SALRC) that transportation is not a requirement for trafficking and this further supports the possibility of trafficking within the prison context.³⁹

Because trafficking includes the commission of any sexual offence with a trafficked person, there is overlap between the offence of trafficking and the sexual offences coupled with trafficking (such as sexual violation, assault or rape). The SOA does not clarify whether an offender can be charged for the sexual offence (sexual violation, assault or rape) as well as trafficking when such an overlap occurs or whether the larger charge of trafficking prevents an additional charge. The SALRC recommended, however, that all existing offences that are committed be charged in addition to the charge of trafficking. If this recommendation were followed, a perpetrator could be charged with the underlying offence of trafficking as well as individual charges of rape or other sexual offences committed against the trafficked person.⁴⁰

The issue of consent also emerges in respect of trafficking and this is relevant to the discussion on prisoners. The SOA provides that the trafficking must be *without* the consent of the person so trafficked in order for the 'person who trafficks' to be guilty of the listed offence. Therefore, under the SOA, the existence of consent results in the absence of an offence. Subsection (3) of section 71 of the SOA elaborates and defines consent to be 'voluntary or un-coerced agreement.'⁴¹ The SOA provides some assistance in clarifying consent and lists specific instances in which a person will not be deemed to have voluntarily consented to being trafficked or have acted uncoerced when agreeing to being trafficked.⁴² These instances include when the victim has been subjected to force, abduction and intimidation or where the person is incapable in law of appreciating the nature of the trafficking, such as being asleep, unconscious, in an altered state of consciousness or mentally disabled.⁴³

³⁸ SALRC op cit (n30) Chapter 3 at 37-38.

³⁹ SALRC op cit (n30) 47.

⁴⁰ SALRC op cit (n30) 50.

⁴¹ Section 71(3) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

⁴² Section 71(4) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

⁴³ Section 71(4) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

By including the requirement of consent, the SOA departs from the United Nations Trafficking Protocol,⁴⁴ and the SALRC's proposal on trafficking in a material way. The United Nations Trafficking Protocol and the SALRC's proposed definition both explicitly state that the consent of a victim to being trafficked should be irrelevant.⁴⁵ Article 3(b) of the Protocol expressly provides that the consent of a victim of trafficking shall be irrelevant in the case where coercion, abduction, fraud, deception or other means listed in subsection (a) of Article 3 have been used.⁴⁶ The SRT, as cited above, also notes that initial consent becomes meaningless once the element of powerlessness has been fulfilled.⁴⁷ The SOA however set similar standards but coupled *with* consent. Clause 4(3)(b) of the Prevention and Combating of Trafficking in Persons Bill is, however, aligned to the Convention and consent is no defence for the offence of trafficking.

3. Other matters related to the SOA

3.1 Services for Victims of Sexual Offences

Chapter 5 of the SOA places a duty on the state to render services to victims of sexual offences.⁴⁸ This provision applies equally to victims in prison. Therefore, where a victim in prison has been exposed to the risk of infection with HIV as a result of a sexual offence, that victim may receive Post-Exposure Prophylaxis (PEP) at state expense.⁴⁹ The victim may further be provided with free medical advice relating to the administering of the PEP and may be supplied with a prescribed list which contains contact details of accessible public health centres so created under section 29 of the Act. These health centres are to be established specifically for those purposes.

⁴⁴ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organised Crime (United Nations) (2000) (hereafter referred to as the 'Protocol'), available at http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf, accessed on 17 May 2011.

⁴⁵ Article 3(b) of the Protocol op cit (n44) and SALRC op cit (n30) 43.

⁴⁶ Article 3(a) of the Protocol op cit (n44) and SALRC op cit (n30) includes the means of the threat, use of force, or other forms of coercion, abduction, fraud, deception, the abuse of power or a position of vulnerability, or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person.

⁴⁷ Special Rapporteur on Torture, A/HRC/7/3, op cit (n31) at para [57].

⁴⁸ Section 27 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

⁴⁹ Section 28 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 mentions further that the treatment must be in accordance with the prevailing standards and protocols.

The SOA defines services for victims of sexual violations in a very narrow manner and restricts these services related to the possible transmission of HIV. While this is important, it is surely not sufficient. With due regard to the fact that a prisoner is in a confined setting and is unable to source or access services from elsewhere but the DCS, this places significant obligations on the DCS to render the appropriate victim support services. In a custodial setting there may indeed be further intervention required from the DCS in order to prevent re-victimisation or intimidation; for example that the victim and alleged perpetrator (and his accomplices, if applicable) are separated and that further intimidation is prevented.

Section 28(2) of the SOA places a significant limitation on access to PEP in the prison setting. The requirement that the offence must be reported within 72 hours to the South African Police Service (SAPS) may make it extremely difficult for prisoners to access PEP.⁵⁰ In the close confines of a prison, a victim may not be over-eager to report the crime as this may well lead to labelling and stigmatisation by other prisoners and officials alike. The victim is however, left no real alternative. Reporting the matter to the police also attracts attention and if the police commence with an investigation and interviews witnesses, this will draw further attention to the victim and expose him to possible retaliation from the perpetrator and his associates.

In the event that a victim chooses to ignore these risks and meet the requirements of section 28(2), a critical duty is placed on the DCS to ensure that the mechanism for reporting a sexual offence is accessible to prisoners and functions in a manner that prevents re-victimisation. Moreover, the reporting and response mechanisms need to function expeditiously as the delayed reporting of an incident could result in the denial of essential treatment for the victim.⁵¹ A possible solution for this problem may be to consider that when a sexual assault is reported to a correctional official,⁵² that this be deemed as to having been reported to a police official.

In addition to human resource capacity constraints in the DCS, it appears that staff attitudes present a further and significant hurdle *en route* to an effective response to sexual violence in prisons as the Jali Commission concluded. The Commission's investigation into the Karp

⁵⁰ Section 28(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

⁵¹ For example, if an incident happens on a Friday night at 6pm and Monday is a public holiday, it presents particular practical difficulties. During this period the prison will operate on skeleton staff and it may indeed be difficult for the victim to report the incident to a nurse or other suitable person. A period of 72 hours can easily lapse before the victim is able to report a case of sexual assault to the police.

⁵² Section 21 of the Correctional Services Act 111 of 1998.

case exposed an inexcusable response by officials and management of the Pretoria Local Prison when a complaint of rape was lodged.⁵³ Karp, a transsexual presenting as a woman, was admitted as an awaiting-trial prisoner and placed amongst the all-male population at Pretoria Local Prison.⁵⁴

The SOA sets clear standards in respect of the information that must be provided to victims. Subsequent to a charge having been laid, the victim *must* be informed by a police official, medical practitioner or the nurse to whom the incident was reported; of the importance of obtaining the PEP within 72 hours; of the need to obtain medical advice regarding other sexually transmitted infections and of the services to be provided to him under the Act.⁵⁵ However, the Act does not set out the procedures for a prisoner to overcome the first requirement, namely to report the matter to the police. This is an issue that the DCS will need to address. Due to the operational attributes of prisons, there may indeed be considerable delays in taking a prisoner, after he has reported the possible exposure, to a designated health care centre where he can access PEP. Prison regimes do not, for security reasons, enable the quick and administratively unfettered release of prisoners to attend services outside of the prison.

⁵³ The Jali Commission Report op cit (n28) Chapter 8 at 405.

⁵⁴ In one incident, Karp was sold for sexual purposes, by a warder to four other prisoners, and consequently raped by them. Out of fear, Karp never reported the incident. In a later incident, Karp was forced to have oral sex with a warder in front of fellow inmates. In yet another incident, Karp was raped by another prisoner. He testified to the Jali Commission that he received no proper medical attention, no counselling or even HIV testing thereafter. Karp was only tested for HIV three weeks later after laying a formal complaint with an Independent Prison Visitor. The Head of the Prison placed Karp in solitary confinement but the perpetrators received no punishment. The nurse who examined Karp never took any swabs or ran any tests, '[she] never applied her mind to the fact that she was dealing with a rape victim, failed to offer support or assistance to Karp', and did not offer for Karp to stay in the hospital in order to have the psychological condition of Karp examined. The Jali Commission concluded that '[i]n short, she [the nurse] did absolutely nothing to assist Karp.' Furthermore, the doctor who examined Karp ignored that Karp might have been exposed to a potential HIV transmission, he was treated with insensitivity and contempt and the conduct of the officials, after the rape, was a far cry from the normal standards of a custodian. Most disturbing was that it was then Karp who was put in isolation instead of his perpetrators. A Van den Berg 'Summary and Comment on the Judicial Commission of Inquiry into Allegations of Corruption, Maladministration and Violence in the Department of Correctional Services – The Jali Commission' (2007) 404-408, available at <http://www.communitylawcentre.org.za/clc-projects/civil-society-prison-reform-initiative/publications-1/cspripublications/jali%20Summary%20-%20Commentary.pdf/>, accessed on 17 May 2011.

⁵⁵ Section 28(3) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

3.2 Compulsory HIV Testing

The Act also allows for a victim or a police official to apply to a magistrate for an order that the alleged offender be tested for HIV and that the results thereof be disclosed to the victim.⁵⁶ The victim must be informed of this procedure at the time that the complaint is laid.⁵⁷ An interested person may also apply on the victim's behalf, with his or her consent. Such consent is not required if the victim is under the age of 14 years, unconscious, mentally disabled, the magistrate is satisfied that such consent will not be obtained or the application is in respect of a person for whom a court has appointed a curator. A correctional official may submit the application on behalf of a prisoner and this would be done under the auspices of an 'interested person' as provided for in section 30(1)(b) of the SOA. The application must be given to the investigating officer who must submit it to a magistrate in the magisterial district where the crime is alleged to have been committed. The Act also sets out prescribed factors that a magistrate must consider when granting such an application.⁵⁸

Maintaining confidentiality of test results in a prison environment is an issue requiring attention. The close and intimate nature of prisons does not make for a context where confidentiality can be maintained easily, and there is a real possibility that the victim may not deal in a confidential manner with the HIV-status of the alleged offender when it is disclosed to him. There may in fact be such a level of resentment on the part of the victim towards the alleged offender that this information is deliberately not disclosed. Since the HIV-status of the alleged perpetrator can be disclosed to the victim prior to the alleged perpetrator being convicted, this raises important ethical questions, especially if the latter is later acquitted.

3.3 National register for sex offenders

Chapter Six of the SOA requires that a National Register for Sex Offenders (the Register), under section 42, be established within six months of the introduction of the chapter, while prescribing that the Register contain the particulars of such offenders. The particulars include the name, surnames, physical address, identity number, the passport number of the offender, the offence/s committed, the date

⁵⁶ Section 30 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

⁵⁷ Section 28(3)(b) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

⁵⁸ Section 31 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

of conviction, the sentence imposed, a prisoner identification number of the offender and any other relevant particulars prescribed.⁵⁹ The section applies with retrospective effect and thus by virtue of this provision even though a sexual offence was committed prior to or after the introduction of the section, or whether committed inside or outside the Republic, persons having committed sexual offences in the past, or subsequent to Chapter Six, must be listed on the Register.⁶⁰ Specifically, persons to be listed are offenders who have committed or are alleged to have committed sexual offences against children,⁶¹ or mentally disabled persons.⁶² Also to be added on the Register are persons serving imprisonment (or who have served imprisonment) as a result of a conviction for a sexual offence against a child or a mentally disabled person, a person who has a previous conviction for a sexual offence against a child or a mentally disabled person and a person who has committed either of such offences but has not served imprisonment for the commission thereof.⁶³ Complying with this requirement will place a considerable administrative burden on the DCS as it will be required to go through a large number of offender records to determine if they had been convicted of a sexual offence of a child or mentally disabled person.⁶⁴ Whether the DCS will use this information for its own purposes to do more accurate risk profiling and prevent sexual victimisation in prisons remain to be seen.

⁵⁹ Section 49 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

⁶⁰ Section 50 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

⁶¹ 'Child' and 'children' have a corresponding meaning and mean any person under the age of 18, or where referring to sections 15 and 16 of the of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, child means any person at the age of 12 or older, but under the age of 16. (Section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007).

⁶² Persons who are mentally disabled means, a person affected by mental disability, including any disorder or disability of the mind, to the extent that he or she, at the time of the alleged commission of the offence in question was: unable to appreciate the nature and reasonably foreseeable consequences of a sexual act; able to appreciate the nature and reasonably foreseeable consequences of such an act, but unable to act in accordance with that appreciation; unable to resist the commission of any such act; or unable to communicate his or her unwillingness to participate in any such act. (Section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007).

⁶³ Section 50 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

⁶⁴ Practically it would mean that the DCS would have to find the case files of current and former prisoners convicted of sexual offences and verify by means of the SAP 62 (Description of the crime) whether the offence was committed against a child or mentally disabled person. Informal interview with Mr. L. Mthethwa (Director: Correction Administration), Department of Correctional services, 27 May 2011, Pretoria.

Moreover, persons who have been alleged to have committed, or have been convicted of ‘equivalent’ offences in foreign jurisdictions, or who have been listed for an ‘equivalent’ offence on an official register in a foreign jurisdiction, must also be listed on the Register.⁶⁵

The Register is aimed at protecting children and mentally disabled persons from sexual predators. Therefore, those listed on the Register are prohibited from taking up certain types of employment and may not be employed to work with a child or mentally disabled person under any circumstances, or be permitted to hold a position which places them in a position of control, supervision or care of a child or mentally disabled person and they may furthermore not hold a position where they have access to a child or mentally disabled person, or places where children or mentally disabled people congregate.⁶⁶ Persons listed may also not operate an entity or business where children or mentally disabled people will be supervised or will congregate and they may not become the foster parent, adoptive parent, kinship care-giver or temporary safe care-giver of a child or the curator of a mentally disabled person.⁶⁷

An employer, as defined in the SOA, who intends employing a person, must apply to the Registrar to determine whether the particulars of the potential employee are listed on the Register.⁶⁸ If the particulars of a potential employee are listed in the Register, the employer must not employ that person, or where it is a current employee, the employer must first take reasonable steps to prevent the employee from gaining access to children or mentally disabled people in the course of the employee’s employment. Where this is not possible, the employer must terminate the employment. Failure to do so will result in an offence.⁶⁹ Those convicted of sexual offences against children or mentally disabled persons also have a duty to disclose the conviction to their employer, irrespective of whether the offence was committed during the course of employment under the current employer. Failure to disclose such information results in an offence.⁷⁰

⁶⁵ Section 50(1)(b) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

⁶⁶ Section 41(1)(a) and (b) and section 41(2)(a) and (b) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

⁶⁷ Section 41(1)(c) and (d) and section 41(2)(c) and (d) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

⁶⁸ ‘Registrar’ means the Registrar of the National Register for Sex Offenders contemplated in section 42(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

⁶⁹ Section 45 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

⁷⁰ Section 46 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

As a result of the above, prisoners and former prisoners who fall into the category of being listed on the Register will be precluded from employment opportunities where they may have access to children and/or mentally disabled persons. Also by virtue of the SOA and applying the section to prison settings, any adult prisoner who is convicted of a sexual offence against a child prisoner or a mentally disabled prisoner, must also be listed on the Register.

It should be noted that by virtue of sections 45 and 46 of the SOA, obligations are imposed both upon an employer as well as an employee. However, the SOA also gives an employer an option. Firstly, section 45(a) notes that as from the commencement of the Chapter, an employer who has employees in his/her employment, *may* ascertain by applying to the Registrar, whether or not any of his/her employees are listed on the Register. Thereafter, if any employee is so listed, the employer must follow the steps and process set out in section 45, as discussed above. However, an obligation also rests upon an employer under section 45(b). The section notes that when an employer *intends to employ* an employee as from the date of establishment of the Register, he/she *must* apply to the Registrar for a certificate indicating whether the particulars of the employee in question are listed on the Register.⁷¹

Secondly, an obligation rests upon an employee after commencement of Chapter 6, to disclose without delay, a sexual offence committed or alleged to have been committed by him/her against a child or mentally disabled person. Disclosure must also occur where the person is applying for new employment.

The preclusion from certain situations of employment has implications for community service orders,⁷² parole,⁷³ and correctional supervision.⁷⁴ Parolees and probationers are frequently required to perform community service and care should therefore be taken that offenders convicted of sexual offences against children and mentally disabled persons are not placed to perform community service at a placement where he/she would have access to such persons. Section 52 of the Correctional Services Act provides that a Correctional Supervision and Parole Board (CSPB) may stipulate that a person may seek employment, but is subject to the conditions for placement under community corrections. Persons subject to community corrections must be supervised and this brings to the fore the question of informing

⁷¹ Section 45(b) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

⁷² Section 297(1)(a)(i)(cc) of the Criminal Procedure Act 51 of 1977.

⁷³ Section 51 of the Correctional Services Act 111 of 1998.

⁷⁴ Section 297(1)(a)(i)(ccA) of the Criminal Procedure Act 51 of 1977.

the parolee or probationer's employer of prior offences covered by the SOA.

More specifically, it should be asked if the DCS has a duty to inform the parolee's (potential) employer of offences committed against children and/mentally disabled persons. The objective of community corrections is to enable offenders to lead socially responsible lives and not to commit future offences. Non-compliance with community correction conditions may result in revocation of the placement under community corrections. It therefore seems that a failure to inform an 'employer' of a previous sex offence against a child or a mentally disabled person would result in a breach of community correction conditions and would thus terminate the period of community corrections. Section 46 of the SOA therefore brings new implications for parolees and probationers and introduces a new factor regarding the violation of community corrections conditions and the obligations of supervising officials to inquire as to the employment situation of parolees and probationers. This would then also extend to community service placements where there is no employer-employee relationship.

3.4 Law enforcement and punishment

The deterrent effect of any punishment, especially imprisonment, has been called into question by scholars.⁷⁵ Whether such deterrence is intended to be specific or general,⁷⁶ it matters little to the prisoner who is already serving long-term imprisonment or even life imprisonment. For prisoners who have decided that they will have a 'career' in the prison gangs, the deterrence effect has been lost.

While the prosecution of sexual offences is a mechanism to ensure compliance and deter potential offenders, it is the most difficult to achieve in a prison setting due to the nature of the prison subculture.⁷⁷ The perpetrator would have to face both institutional disciplinary proceedings and criminal prosecution, and both procedures require the participation of the victim. Herein lies an inherent difficulty and the

⁷⁵ It has been concluded that 'Prisons should not be used with the expectation of reducing future criminal activity ... therefore the primary justification for the use of prisons is incapacitation and retribution, both of which come with a 'price', if prisons are used injudiciously.' P Gendreau, C Goggin & FT Cullen *The Effects of Prison Sentences on Recidivism* (1999) 20 and 21. See also M Tonry 'Keynote Address' *Sentencing in South Africa: Conference Report* (2007) at 6, available at http://www.osf.org.za/File_Uploads/docs/SEN_TENCINGREPORT1ConferenceReport.pdf, accessed on 19 May 2011.

⁷⁶ J Mujuzi 'Punishment in the Eyes of the Constitutional Court of South Africa: Giving the Theories of Punishment a Constitutional Flavour' *CSPRI Research Report* (2008) 4.

⁷⁷ RW Dumond 'The sexual assault of male inmates in incarcerated settings' (1992) 20 *International Journal of the Sociology of Law* 151.

victim is subsequently susceptible to further victimization, since exposing a possibly high-ranking gang member places him at grave risk.⁷⁸ Furthermore, inmates who complain about rapes are susceptible to future abuse and retaliation.⁷⁹ When the rapist does receive some form of institutional discipline, he is released back into the general prison population once his punishment expires and the complainant easily becomes the victim of revenge, especially if officials do nothing to protect him and in some instances they may even penalise him.⁸⁰

If it is accepted that prosecutions will have little deterrent effect on perpetrators who serve lengthy sentences, then the question arises as to how to punish those who perpetrate and/or orchestrate sexual violence and trafficking and already face lengthy sentences. Isolating prisoners for any prolonged period attacks human dignity and negates the rehabilitative purpose of imprisonment.⁸¹ Single cells for all prisoners with lengthy sentences is an idea equally impractical particularly as that segment of the prison population has increased at an alarming rate, contributing to current overcrowding levels and its associated problems.⁸² Prosecuting an offender thus presents the DCS with practical challenges for which there are no clear answers. This should, however, not mean that the prosecution of sexual offences committed in prisons should be abandoned.

4. Conclusion

International law, the Constitution of the Republic of South Africa, 1996 and the CSA places an obligation on the state to provide for the safe custody of prisoners and to take effective measures to prevent torture and ill treatment. International jurisprudence has established that this duty extends to preventing violence and sexual violence between non-state actors in custodial settings. This extends to inter-prisoner abuse.

⁷⁸ Ibid.

⁷⁹ JP Cronan 'Forecasting sexual abuse in prison: The prison subculture of masculinity as a backdrop for "Deliberate Indifference"' (2001-2002) 92 *Journal of Criminal Law and Criminology* 181.

⁸⁰ Ibid.

⁸¹ The Report of the Special Rapporteur 'Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa: Mission to the Republic of South Africa' (2004) 37, available at http://www.achpr.org/english/Mission_reports/Special%20Rap_Prisons_South%20Africa.pdf, accessed on 19 May 2011.

⁸² The proportion of prison places taken up by prisoners serving sentences of longer than seven years is projected to increase from 61% in 2006 to 88% in 2015. In 1995, this sentence category took up 26% of available prison capacity. C Giffard & L Muntingh *The Effect of Sentencing on the Size of the South African Prison Population* (2006) 42, available at http://www.osf.org.za/File_Uploads/docs/SENTENCINGREPORT3_SizeofPrisonPopulation.pdf, accessed on 19 May 2011.

The SOA has consolidated all sexual offences under one statute and even though not originally drafted with adult men and male prisoners in mind, it does affect the DCS, the prison system and prisoners substantially. New offences have been defined which can equally be applied to prison settings to help marginalised prisoners and to protect them from sexual offences. Some of the broader categories of sexual offences, such as those where an offender compels another to commit a sexual offence or those which cause a person to witness a sexual offence, are particularly relevant to prisoners who live in violent and communal conditions of confinement. The SOA can be used to combat sexual violence and abuse in prison settings as it creates a wide reach, covering key players in the prison system, such as officials and gang leaders. Despite its shortcomings, as outlined, it provides a platform for recognition of sexual violence and enables prosecutions in a prison setting. Male victims are given recognition in law; more appropriate redress is provided for; suffering and trauma are acknowledged and increased awareness should result in improved protection.

A specific focus should be on the efficacy of channels for lodging complaints, on expediting complaints and obtaining satisfactory levels for collection of evidence of the assault in question.⁸³ Further the focus should be on eradicating staff interference, coercion and intimidation of victims and witnesses when matters are investigated and focus should be on appropriately protecting victims and witnesses who report corruption and sexual violence.⁸⁴ Responses to prisoner rape must under no circumstances be indifferent, and effective responses require the consideration of more effective alternatives as current solutions often deter other victims from coming forward. It would also be important for prisoners to have access to reporting mechanisms outside DCS mechanisms and to report a rape or other sexual offences directly to the SAPS. Interference by DCS officials to frustrate SAPS' investigations must be minimised in order to eradicate an environment where victims feel helpless in reporting a crime or where they legitimately fear that reporting the offence will only aggravate their situation.⁸⁵

Furthermore, newly-admitted prisoners, first-time prisoners, weaker, younger and more vulnerable offenders, including homosexual prisoners, should be screened and initially isolated from more experienced

⁸³ P Mashabela 'Victims of Rape and Other Forms of Sexual Violence in Prisons' Paper Submitted for XIth International Symposium on Victimology South Africa (2003) 12.

⁸⁴ The Jali Commission Report op cit (n28) 425.

⁸⁵ The Jali Commission Report cited intimidation of witnesses in DCS custody and a low rate of successful prosecutions due to charges being withdrawn and the prisoner not being brought to trial by the DCS, as contributing to and frustrating successful investigations and prosecutions. (op cit (n28) 423-429).

prisoners. This would enable personnel to inform these categories of prisoners of prison culture, certain activities, behaviours, practices or situations to be avoided or to be aware of in the prison environment.⁸⁶ Perpetrators of sexual violence should receive appropriate discipline, including rehabilitation programmes that address both the direct and indirect factors leading to their sexually violating conduct.⁸⁷ Importantly, officials who fail prisoners at various stages of the criminal justice process should be held accountable for their involvement in the commission of sexual offences, including their political heads.⁸⁸

⁸⁶ The Jali Commission Report op cit (n28) 449.

⁸⁷ The Jali Commission Report op cit (n28) 451.

⁸⁸ N Mcetywa 'Boy, 15, "sold" for jail rape' *IOL News* 18 May 2008, available at <http://www.iol.co.za/news/south-africa/boy-15-sold-for-jail-rape-1.400901>, accessed on 25th July 2011. The Centre for Child Law, which is at the forefront of launching the civil claim, said the constitution required children to be detained separately from adults. 'This matter gives the impression of an uncaring system. The officials who dealt with this child at various stages of the criminal justice process failed him at every turn. "It is time that officials were held accountable, as well as their political heads' said Centre for Child Law co-ordinator Ann Skelton". Comment made by A Skelton in the above article.