

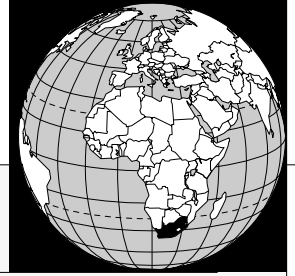


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6. South Africa



Statistics¹

GENERAL

Population

- The official 1995 mid-year estimate of the total South African population is 41.24 million.²
- In 1994, the racial composition of the population was 76.1% African, 12.8% white, 8.5% colored,³ and 2.6% Indian.⁴ In each racial group, slightly more than half the population is women.⁵
- The total national average annual population growth rate for 1991 to 1994 was 2.1%, which reflected a population growth rate of 2.5% for Africans, 0.7% for whites, and 1.5% for coloreds and Indians.⁶
- In 1994, the birth rate was 23.4 per 1,000, compared to the death rate of 9.4 per 1,000.⁷
- In 1994, 48.8% of the population lived in urban areas.⁸

Economy

- In 1993, South Africa's Gross National Product ("GNP") per capita was \$2,980.⁹ In 1991, the per capita income of whites was 12.3 times higher than the per capita income for Africans.¹⁰
- The 1996-97 health budget was U.S.\$3.62 billion (R 17.2 billion), which comprised 9.9% of total estimated government expenditure.¹¹

Employment

- Women comprise approximately 36% of the total work force in South Africa.¹² In 1994, African women constituted 18% of the labor force and 48% of the unemployed. In comparison, white men constituted 14% of the labor force and a mere 1% of the unemployed.¹³ A white man was 5,000 times as likely to be in top management as a black woman.¹⁴

WOMEN'S STATUS

- In 1990, overall life expectancy at birth is estimated to be 62 years for males and 68 years for females. By racial category, the respective life expectancies for males and females are: 60 and 67 among Africans, 69 and 76 among whites, 59 and 65 among coloreds, 64 and 70 among Indians.¹⁵
- In 1994, police statistics indicated that 32,107 cases of rape were reported.¹⁶ However, it is estimated that only one in 36 women reported being raped to the police.¹⁷ Less than one third of all reported cases are prosecuted; of the cases which are prosecuted, only half result in convictions.¹⁸
- Of the four racial categories, Africans marry youngest at an average of 18.9 years, while whites marry the latest at an average age of 20.9 years.¹⁹
- Women account for 53.4% of persons aged 16 to 24 who are not attending school and have not yet obtained the highest level of school (Standard 10).²⁰

ADOLESCENTS

- In 1995, children under the age of 15 years accounted for 37.1% of the population, while 4.5% of the population was 65 years and older.²¹
- In 1995, the teenage pregnancy rate was estimated to be 330 per 1,000 women under the age of 19 years.²²

MATERNAL HEALTH

- In 1995, the total fertility rate was estimated to be 4.1.²³
- The official national average maternal mortality rate is 32 deaths per 100,000 live births, including rates of 5, 8, 22 and 58 among Indians, whites, coloreds and Africans, respectively.²⁴

■ The 1995 infant mortality rate is estimated to be 46 per 1,000 live births.²⁵ Although information regarding racial differential is not available for 1995, it is known that, in 1992, the infant mortality rate for the entire South African population was estimated to be 48.9 deaths per 1,000 live births, including rates of 7.3, 9.9, 36.3 and 54.3 for whites, Indians, coloreds, and Africans respectively.²⁶

■ In 1994, in rural areas, 15.6% of people live within one kilometer (km) of a health facility, while 55.9% of people live five km or more from health facilities. The corresponding percentages for people in urban areas are 43.6% and 13.3%, respectively.²⁷

CONTRACEPTION AND ABORTION

■ In 1994, contraceptive prevalence rates among women were 66% for Africans, 74% for coloreds, 77% for Indians, and 80% for whites.²⁸

■ In 1995, the overall contraceptive prevalence rate was 53%, including 51.7% of the population using modern methods, and 1.3% using traditional methods.²⁹

■ Injectable contraceptives are the most common method of contraception among African women, while the oral pill is the method used most extensively among the other racial groups.³⁰

■ In 1992, condoms were used by between 10% and 25% of men.³¹

■ It is estimated that 200,000 unsafe abortions are performed in South Africa each year. Each year, approximately 45,000 women with spontaneous miscarriages or illegally induced abortions are admitted to South African hospitals, of whom about 400 die from septic abortions.³²

HIV/AIDS AND STDs

■ It is estimated that, in the beginning of 1995, between 1.8 and 2 million South Africans were infected with HIV, and that between 12,000 and 15,000 people had AIDS.³³

■ In 1995, at least 10% of the population had ulcerative infections caused primarily by syphilis and chancroid. The median prevalence rate of gonorrhoea and chlamydia is 8% and 11% respectively.³⁴

ENDNOTES

1. Because inefficient methods of data collection have been employed until recently and because many estimates have only recently taken account of the former "homelands," comparative chronological data on population-related issues in South Africa is often not entirely reliable. MINISTRY FOR WELFARE AND POPULATION DEVELOPMENT, A GREEN PAPER FOR PUBLIC DISCUSSION: POPULATION POLICY FOR SOUTH AFRICA (Apr. 1995) [hereinafter GREEN PAPER].

2. Central Statistical Services (visited Dec. 20, 1996), http://www.css.gov.za/releases/demograp/y91_95/p0302.html.

3. People of mixed race, who live predominantly in the Western Cape.

4. HEALTH SYSTEMS TRUST: DURBAN & HENRY J. KAISER FAMILY FOUNDATION, SOUTH AFRICAN HEALTH REVIEW 1995 5 (1995) [hereinafter HEALTH REVIEW].

5. *Id.*

6. *Id.*

7. GREEN PAPER, *supra* note 1, at 7.

8. HEALTH REVIEW, *supra* note 4, at 6.

9. THE WORLD BANK, WORLD DEVELOPMENT REPORT 1995: WORKERS IN AN INTEGRATING WORLD 163 (1995).

10. HEALTH REVIEW, *supra* note 4, at 230.

11. HEALTH SYSTEMS TRUST: DURBAN & HENRY J. KAISER FAMILY FOUNDATION, SOUTH AFRICAN HEALTH REVIEW 1996 76 (1996).

12. HUMAN RIGHTS WATCH WOMEN'S RIGHTS PROJECT, VIOLENCE AGAINST WOMEN IN SOUTH AFRICA: THE STATE RESPONSE TO DOMESTIC VIOLENCE AND RAPE 1 (1995) [hereinafter HUMAN RIGHTS WATCH].

13. DEPARTMENT OF LABOUR, GREEN PAPER POLICY PROPOSALS FOR A NEW EMPLOYMENT AND OCCUPATIONAL EQUITY STATUTE, General Notice No. 804, Table 1 in Appendix 2 (July 1, 1996).

14. *Id.* at ¶2.2.7.

15. HEALTH REVIEW, *supra* note 4, at 12.

16. HUMAN RIGHTS WATCH, *supra* note 12, at 51.

17. HEALTH REVIEW, *supra* note 4, at 181.

18. HUMAN RIGHTS WATCH, *supra* note 12, at 17.

19. HEALTH REVIEW, *supra* note 4, at 10.

20. GREEN PAPER, *supra* note 1, at 9.

21. *Id.* at 7.

22. *Id.*

23. *Id.*

24. These estimates exclude the former "independent homelands" — some of the most impoverished areas of the country — and it is believed that maternal mortality rates in these areas are considerably higher than the official statistics. HEALTH REVIEW, *supra* note 4, at 177-8.

25. GREEN PAPER, *supra* note 1, at 7.

26. HEALTH REVIEW, *supra* note 4, at 235.

27. GREEN PAPER, *supra* note 1, at 8.

28. HEALTH REVIEW, *supra* note 4, at 10.

29. GREEN PAPER, *supra* note 1, at 8.

30. HEALTH REVIEW, *supra* note 4, at 11.

31. *Id.* at 174.

32. *Id.* at 178.

33. *Id.* at 171.

34. *Id.* at 44.

South Africa was first populated by Khoisan people, in approximately 20,000 BC.¹ In approximately 500 AD, significant numbers of Bantu-speaking groups² migrated to the region from the north.³ In 1652, the first Dutch settlers arrived in the Cape — the southwest tip of the country — and gradually developed their own social identity and language, Afrikaans.⁴ In the early 1800's they were followed by English settlers and, in the late 1800's, by Indian traders and indentured Indian laborers who settled in Natal on the east coast.⁵ In 1910, the Union of South Africa was founded, marking the unification of four former colonies — Cape, Natal, Orange Free State, and Transvaal.

After 1948, when the National Party came to power, the South African government attempted to enforce apartheid — a system of complete geographical, social, and political segregation between white and black people.⁶ In 1960, South Africa withdrew from the British Commonwealth and became the Republic of South Africa.⁷ Apartheid officially ended in April 1994, when the African National Congress (“ANC”) won South Africa’s first completely multi-racial election, and Nelson Mandela became the first black president of South Africa.⁸ The ethnic makeup of the current South African population of 41.24 million⁹ is: African (76.1%); colored¹⁰ (8.5%); Indian (2.6%); and white (12.8%).¹¹ There are 11 official languages at the national level.¹² The major religions are Christianity, Hinduism, and Islam.¹³

Before 1994, South Africa was administratively divided into four provinces¹⁴ and 10 black “homelands,” including four “independent” states¹⁵ and six “self-governing territories.”¹⁶ In 1994, these administrative divisions were consolidated into nine provinces: Eastern Cape; Free State; Gauteng; KwaZulu-Natal; Mpumalanga; Northern Cape; Northern Province; North West; and Western Cape.¹⁷

I. Setting the Stage: The Legal and Political Framework

To understand the various laws and policies affecting reproductive rights in South Africa, it is necessary to consider the legal and political systems of the country. Without this background, it is difficult to determine the manner in which laws and policies are enacted, interpreted, modified, and challenged. The passage and enforcement of law in particular often involves specific formal procedures.

A. THE STRUCTURE OF GOVERNMENT

The Constitution of the Republic of South Africa 1996 (the “Constitution”)¹⁸ creates three “spheres of government” —

national, provincial, and local — which are “distinctive, interdependent and interrelated.”¹⁹ There are nine provinces in the country. Local level government consists of municipalities,²⁰ which have the right to govern the local government affairs of their communities, subject to national and provincial legislation.²¹

The Executive Branch

National executive power is vested in the president,²² who is elected by the National Assembly from among its members²³ as head of state and of the national executive.²⁴ The president exercises executive power together with the other members of the cabinet,²⁵ which consists of the president, as head of the cabinet, a deputy president, and ministers who are appointed by the president.²⁶ Members of the cabinet are collectively and individually accountable to the Parliament for the performance of their functions.²⁷

The executive authority of a province is vested in the premier of that province,²⁸ who is elected by the provincial legislature from among its members.²⁹ The premier exercises executive power together with the other members of the provincial Executive Council,³⁰ which is comprised of the premier, as head of the council, and between five and 10 members appointed by the premier from among the members of the provincial legislature.³¹ The provincial executive must act in accordance with the Constitution and, if a constitution has been passed for that province, the provincial constitution.³²

The executive authority of a municipality is vested in its Municipal Council,³³ which consists mainly of members elected in accordance with national legislation.³⁴ National and provincial government may not thwart the capacity of a municipality to exercise its powers or to perform its functions.³⁵

The Legislative Branch

National legislative authority is vested in the Parliament,³⁶ which consists of the National Assembly and the National Council of Provinces.³⁷ The National Assembly consists of between 350 and 400 members elected by popular vote³⁸ for a term of five years.³⁹ The National Assembly is elected to represent the people of the Republic of South Africa (the “Republic”) and to ensure government in accordance with the Constitution by selecting the president, providing a forum for public consideration of issues, enacting legislation, and overseeing executive action.⁴⁰ The National Council of Provinces has 90 members, comprised of 10 delegates from each of the nine provinces.⁴¹ It represents provincial interests in the national sphere of government by participating in the national legislative process and by providing a national forum for public consideration of matters affecting the provinces.⁴² The legislative authority of a province is vested in its provin-

cial legislature,⁴³ which consists of between 30 and 80 members⁴⁴ elected for a term of five years.⁴⁵ A provincial legislature may pass a constitution for its province⁴⁶ and may also pass legislation for its province with respect to any matter within a “functional area” listed in Schedule 4 or 5 of the Constitution, or any other matter expressly assigned to the provincial legislature by national legislation.⁴⁷

Schedule 4 of the Constitution provides Parliament concurrent jurisdiction with provincial legislatures to enact legislation regarding specified “functional areas,”⁴⁸ which include, *inter alia*: health services, population development, education at all levels except tertiary education, welfare services, and indigenous and customary law. Where national legislation and provincial legislation falling within a “functional area” listed in Schedule 4 are in conflict, national legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if it meets one of several specified criteria.⁴⁹ Schedule 5 lists the “functional areas,” such as provincial planning and ambulance services, in which Parliament may pass legislation for specified national interests only when such intervention is necessary.⁵⁰

The legislative authority of a municipality is vested in its Municipal Council.⁵¹ A municipality may adopt bylaws for the effective administration of the matters which it has the right to administer,⁵² provided that any bylaw that conflicts with national or provincial legislation is invalid.⁵³

The Judicial Branch

Courts both create and interpret law. The judicial system can have a significant impact on legislation, including legislation affecting reproductive rights, because courts are able to enforce the law and deal with complaints from individuals challenging the constitutionality of specific laws.

The Constitution vests national judicial authority in the courts, which are “independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.”⁵⁴ The Constitution lists the courts to include: the Constitutional Court; the Supreme Court of Appeal; the High Courts, including any high court of appeal established by an act of Parliament to hear appeals from High Courts; the Magistrates’ Courts; and any other court established or recognized by an act of Parliament.⁵⁵ High Courts are structured in a series of provincial and regional (or “local”) divisions, while Magistrates’ Courts operate within magisterial districts, which do not necessarily coincide with local government areas.⁵⁶

Each court within the South African judicial system has a specific jurisdiction. The Constitutional Court is comprised of a president, a deputy president, and nine other judges.⁵⁷ The jurisdiction of the Constitutional Court is confined to issues

involving the interpretation, protection, or enforcement of the Constitution.⁵⁸ The Constitutional Court makes the final decision as to the constitutionality of a national or provincial statute or the conduct of the president of South Africa, and it must confirm any order of invalidity made by any court with jurisdiction to decide on constitutional matters before that order has any force.⁵⁹ The Supreme Court of Appeal is the highest court of appeal in all matters other than constitutional matters.⁶⁰ High Courts may decide on any matter not assigned to another court by statute, including any constitutional matter, except where that matter falls within the exclusive jurisdiction of the Constitutional Court or has been assigned to another court by an act of Parliament.⁶¹ Courts of a status lower than a High Court may not decide upon the constitutionality of any legislation or the president’s conduct.⁶² Magistrates’ Courts and other lower courts may decide on any other matter determined by an act of Parliament.⁶³

The Republic has a single national prosecuting authority, which is comprised of a national director of public prosecutions, other directors of public prosecutions, and prosecutors.⁶⁴ The prosecuting authority has the power to institute criminal proceedings for the state.⁶⁵

B. SOURCES OF LAW

Domestic Sources of Law

Laws that affect women’s legal status, including their reproductive rights, derive from a variety of sources. Domestic sources of law in South Africa include the Constitution, Roman-Dutch law, English law, legislation, judicial precedent, and African customary law.

The Constitution is the supreme law of the Republic;⁶⁶ laws or conduct inconsistent with its principles are invalid.⁶⁷ Chapter Two of the Constitution contains the Bill of Rights, which applies to all law and binds the legislature, the executive, the judiciary, and all “organs of state.”⁶⁸ These rights may be limited only by a “law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.”⁶⁹ A competent court may grant appropriate relief, including a declaration of rights, to any person who alleges that a right in the Bill of Rights has been infringed or threatened.⁷⁰ When interpreting the Bill of Rights, courts are required to consider international law and to “promote the values that underlie an open and democratic society based on human dignity, equality and freedom,” and they are permitted to consider foreign law.⁷¹ When interpreting legislation, and when developing the common law or customary law, courts must “promote the spirit, purport, and objects of the Bill of Rights.”⁷²

Several provisions of the Bill of Rights directly affect the status of women and reproductive rights. For example, the Bill of Rights provides that neither the state nor any other person may “unfairly discriminate directly or indirectly” against anyone on any of the grounds listed in that section, which include, *inter alia*, gender, sex, pregnancy, marital status, and sexual orientation.⁷³ The Bill of Rights further grants everyone the right to bodily and physical integrity, which includes the right “to make decisions concerning reproduction,”⁷⁴ and the right of access to health care services, including reproductive health care.⁷⁵

Another major source of South African law is Roman-Dutch law — the law that was applied and developed in Holland in the seventeenth and eighteenth centuries.⁷⁶ Roman-Dutch law in large measure still governs — or forms the basis for legislation governing — personal law, contracts, and tort law.⁷⁷ English law is applied only in very limited circumstances. For instance, it is applied with respect to certain areas of evidence, intellectual property, and bankruptcy law.⁷⁸

The application of African customary law, which is largely uncodified, is currently governed in South Africa by Section 1 of the Law of Evidence Amendment Act, 1988.⁷⁹ This section provides that any court may apply “indigenous law”⁸⁰ if it “can be ascertained readily and with sufficient certainty”⁸¹ and is not “opposed to the principles of public policy or natural justice.”⁸² While this section grants courts discretion to apply either customary or civil law, the overall choice of law must be guided by a determination of which legal system the parties “might reasonably have been expected to apply in the context of the case.”⁸³ In making such a determination of which legal system the parties would have expected to apply, courts may take into account a variety of factors including: express or implied agreement between the parties; the nature of prior transactions between the parties; the subject matter and environment of a transaction; the form of a transaction; and the lifestyle of the parties.⁸⁴ Customary law has only been codified in the former province of Natal, by the Natal Code of Zulu Law (the “Natal Code”),⁸⁵ and in the formerly self-governing territory KwaZulu by the KwaZulu Act on the Code of Zulu Law (the “KwaZulu Code”).⁸⁶ Pursuant to the Constitution, these codes continue to have the same territorial application as they had before the previous Constitution took effect on April 27, 1994, and they continue in force in these areas subject to amendment or repeal, and to consistency with the Constitution.⁸⁷ However, since the amalgamation of Natal and KwaZulu into the province of KwaZulu-Natal, there has not yet been any determination of how differences between the Natal and KwaZulu codes are to be reconciled.⁸⁸

The continued application of African customary law is ensured by the Constitution, which stipulates that when customary law applies to a case, courts must apply it, subject to the Constitution and any other legislation that specifically deals with customary law.⁸⁹ Traditional authorities, such as chiefs and headmen, who observe systems of customary law, may also function subject to any applicable legislation and customs.⁹⁰ To deal with matters of customary law and traditional leadership, the Constitution provides that national or provincial legislation may establish “houses of traditional leaders” and that national legislation may establish a “council of traditional leaders.”⁹¹ Furthermore, the clause of the Bill of Rights that guarantees the right to freedom of religion, belief, and opinion, states that the Constitution should not be construed to preclude legislation that recognizes systems of personal and family law under any tradition or marriages concluded under any tradition or system of religious, personal, or family law, provided that such recognition is consistent with the provisions of the Constitution.⁹²

International Sources of Law

Many international human rights treaties recognize and promote specific reproductive rights. Because they are legally binding on governments, these international instruments impose specific obligations to protect and advance these rights. International agreements become legally binding within the Republic once they are signed by the national executive⁹³ and approved by resolution in both the National Assembly and the National Council of Provinces.⁹⁴ In general, international agreements must be enacted into law by national legislation, but “self-executing” provisions of agreements that have been approved by Parliament become law unless they conflict with the Constitution or an act of Parliament.⁹⁵ In addition to international agreements, customary international law also constitutes law in the Republic of South Africa unless it conflicts with the Constitution or an act of Parliament.⁹⁶ The South African government has ratified certain human rights treaties,⁹⁷ including: the Convention on the Elimination of All Forms of Discrimination Against Women;⁹⁸ and the Convention on the Rights of the Child.⁹⁹ However, South Africa has neither signed nor ratified a number of significant human rights treaties,¹⁰⁰ such as: the International Covenant on Economic, Social and Cultural Rights;¹⁰¹ the International Covenant on Civil and Political Rights;¹⁰² the African Charter on Human and Peoples’ Rights;¹⁰³ and the Convention on the Elimination of All Forms of Racial Discrimination.¹⁰⁴

II. Examining Reproductive Health and Rights

Issues of women's health and reproductive rights are dealt with in South Africa in the context of the country's health and population policies. The Health Act, 1977 (No. 63 of 1977), which previously regulated health services in South Africa, is currently in the process of being substantially revised. The new act is likely to be comprehensive, encompassing matters such as the restructuring of the national health system, district health development, hospitals, medicines, and health information systems. In the meantime, the development of the health sector is being guided by numerous policy documents issued by the national and provincial health departments.¹⁰⁵ Thus, an understanding of reproductive rights in South Africa must be based upon an examination of those policies.

A. HEALTH LAWS AND POLICIES

Objectives of the Health Policy

The government is currently engaged in a "complete transformation" of the health care delivery system.¹⁰⁶ In 1994, when the ANC came to power, it inherited a public sector health system characterized by fragmentation, geographical maldistribution of resources, inefficiency, and an overemphasis on hospital-based care.¹⁰⁷ Furthermore, the private sector consumes a disproportionate share of resources in relation to the size of the population that the health system serves,¹⁰⁸ and the private sector is characterized by soaring expenditures.¹⁰⁹ Transformation of the health care delivery system is oriented towards the provision of primary health care services — an approach that emphasizes community participation, intersectoral collaboration, and cost-effective care, and in which preventive, promotive, curative, and rehabilitative services are integrated.¹¹⁰ Priorities in this restructuring process include: cost-containment in both the public and private sectors; improved access to care and better quality of services, especially at the primary care level; redistribution of public sector resources among the levels of care; and greater accessibility of private sector resources to a larger portion of the population.¹¹¹

Infrastructure of Health Services

The health system is being restructured around three levels of health authorities. At the national level, a unified Department of Health has been established. Its responsibilities include: providing overall leadership in the formulation of health policy and legislation; developing the capacity of provincial health departments to provide effective health services; and ensuring equity in the allocation of resources to the

provinces.¹¹² Pursuant to the Constitution, provincial health departments are responsible for providing and regulating health services in their respective provinces, within the framework of national policies and guidelines formulated by the national Department of Health.¹¹³ At the primary care level, the organization of provincial health systems is centered around health districts.¹¹⁴ Primary health care and hospital services in each health district will be administered by District Health Authorities — unified, integrated health management structures at the local level.¹¹⁵ All residents of each district will have access to district health services, provided by a team of staff specializing in various components of primary health care.¹¹⁶ District Health Authorities will be able to supplement the services provided to health system users by entering into contractual arrangements with private sector providers, thus making resources currently available within the private sector more accessible to the broader population.¹¹⁷ Services provided within the publicly funded primary health care system include family planning services, HIV/AIDS education and counseling, and maternal and child health services such as antenatal care, deliveries, postnatal, and neonatal care.¹¹⁸

Cost of Health Services

The government's 1996-97 health budget was U.S.\$4.2 billion (R 17.2 billion),¹¹⁹ comprising 9.9% of total estimated government expenditure.¹²⁰ The increasing emphasis on primary health care is reflected in the increased expenditure on primary health care from an estimated 29% of total public health expenditure in 1995-96 to a projected 36.5% in 2000-01.¹²¹ Government commitment to increasing access to primary health care is also evidenced by the expanding range of free health services provided by government. Until 1994, health services were subject to user charges, with few exceptions.¹²² Services exempt from user charges in the public sector included sterilization, general family planning services, and the examination of victims of rape and other assaults.¹²³ As of June 1, 1994, free health services were extended to children under 6 years of age and to all pregnant women, for the period from the diagnosis of pregnancy until 42 days after termination of pregnancy, or until any complications that have developed from the pregnancy are cured or stabilized.¹²⁴ From April 1, 1996, the free health care policy was extended to include all patients at the primary health care level.¹²⁵

Regulation of Health Providers

Before 1995, the conduct and practice of South African health professionals was regulated by a plethora of statutory bodies operating in the Republic and in the former "independent homelands."¹²⁶ In 1995, the laws pursuant to which these bodies were constituted were amended so as to consolidate them into four statutory councils: the Interim National

Medical and Dental Council of South Africa, the South African Interim Nursing Council, the Interim Pharmacy Council of South Africa, and the Chiropractors, Homeopaths and Allied Health Service Professions Interim Council.¹²⁷ These councils were created for a period of two years, during which time they are required to make recommendations to the Minister of Health concerning their reconstitution, and to advise the Minister of Health about amending the legislation pursuant to which they were established so as to place “greater emphasis on professional practice, democracy, transparency, equity, accessibility and community involvement.”¹²⁸

Traditional healers are not regulated within this framework of statutory councils. Nevertheless, the national Department of Health has recognized the importance of traditional practitioners and traditional birth attendants as being instrumental in promoting primary health care.¹²⁹ It has therefore recommended that provincial governments should consider the regulation and control of traditional healers, both to legally empower them and to ensure that adequate standards are observed in traditional medical practice.¹³⁰

Patients’ Rights

South African law provides users of the health system with certain safeguards against abuse by health care providers. For instance, the South African common law imposes a legal duty on medical practitioners to respect the confidentiality of their patients.¹³¹ A violation of this duty is likely to give rise to a tort action based on invasion of privacy.¹³² Similarly, medical practitioners are not permitted to treat patients without their consent. Violation of this rule could be regarded as a serious assault on the patient.¹³³ The patient’s consent may only be dispensed with in very limited circumstances, including where statutory authority exists for such intervention in the interests of public health, and where a patient requires emergency treatment but is temporarily unable to provide consent due to shock, unconsciousness, or intoxication.¹³⁴ More generally, the statutory councils described in the preceding section may investigate complaints of any improper or disgraceful conduct of health professionals, and may exercise disciplinary powers in respect of persons found guilty of such misconduct.¹³⁵

The rights of health service users are likely to receive considerably greater priority in the emerging National Health System. The government has stated that a fundamental principle of this system is that the needs and rights of users should be respected, and that individual users and communities should be empowered to participate in the governance of the health system.¹³⁶ In accordance with this principle, the national Department of Health has recommended the creation of a Charter of Community and Patients’ Rights, in consultation with health service providers and users.¹³⁷

B. POPULATION AND FAMILY PLANNING

Population and Family Planning Policy

In 1984, the former South African government established a Population and Development Programme (“PDP”), with the goal of achieving a lower population growth rate capable of being sustained by South Africa’s economic and natural resources.¹³⁸ The PDP was premised upon the notion that a lower population growth rate should be achieved through socioeconomic development, particularly in areas of education, primary health care, economic development, employment opportunities, and housing.¹³⁹ The agencies responsible for implementing the PDP included an Interdepartmental Committee and a Chief Directorate of Population Development (which is currently within the Department of Welfare).¹⁴⁰ The Chief Directorate of Population Development established “population units” in all the provinces. These population units were initially formed to support community development, but later shifted their priorities toward information, education, and communication (“IEC”) campaigns, particularly targeted to groups such as youth and women. The objective of these activities was to encourage smaller families.¹⁴¹

The new South African government’s socioeconomic development policies are articulated in the Reconstruction and Development Programme,¹⁴² which has effectively replaced the PDP.¹⁴³ Furthermore, pursuant to the Constitution, population development is now a legislative and executive responsibility of provincial government, although the national government has concurrent jurisdiction to enact laws on population development when national interests are at stake.¹⁴⁴ In light of these developments, the Department of Welfare is reassessing the role of the national population units.¹⁴⁵ The Ministry for Welfare and Population Development also recently released a discussion document inviting public comment on the possible content of a population policy for South Africa.¹⁴⁶ This “Green Paper on Population Policy” was intended to stimulate debate on the relationship between population issues and development in South Africa.¹⁴⁷ In this discussion document, it is acknowledged that a development and population policy should deal not only with population trends, but also with the environment, resources, production, and patterns of consumption.¹⁴⁸ The Green Paper on Population Policy raises a variety of issues requiring public comment, including, for example, whether or not South Africa should set specific goals in relation to the average number of children a woman or man should have,¹⁴⁹ and what mechanisms, if any, should be available for coordinating activities aimed at women’s empowerment.¹⁵⁰

Government Delivery of Family Planning Services

Since 1974, family planning services have been provided

free of charge in government facilities.¹⁵¹ The distribution of services has, however, been inadequate and inequitable.¹⁵² For example, services in predominantly white areas were better than services in predominantly black areas.¹⁵³ Many women in rural areas and informal settlements only had access to injectable contraceptives, and rural clinics often lacked facilities for inserting intrauterine devices (“IUDs”).¹⁵⁴ Furthermore, barrier methods of contraception, such as condoms and diaphragms, were not widely promoted despite their potential to prevent sexually transmitted diseases (“STDs”).¹⁵⁵ Family planning services have now been identified as one of the services to be provided by District Health Authorities in community hospitals, clinics, and community health centers,¹⁵⁶ which should substantially increase the accessibility of these services. In some provinces, there are stand-alone family planning clinics. In 1995, in Kwazulu-Natal, for example, there were 25 family planning clinics. However, efforts are currently being made to integrate these clinics with facilities that provide a broader range of primary health care services.¹⁵⁷ In addition, a major component of the new Department of Health’s interventions against the human immunodeficiency virus (“HIV”) and acquired immune deficiency syndrome (“AIDS”) has been to increase condom distribution.¹⁵⁸ The Department of Health has also recently introduced the female condom, and has trained primary health care and family planning staff on its application.¹⁵⁹

C. CONTRACEPTION

In 1995, the overall contraceptive prevalence rate was 53%, with 51.7% of the population using modern methods and 1.3% using traditional methods.¹⁶⁰ African women most commonly use injectable contraceptives, while the oral pill is the method used most extensively among the other racial groups.¹⁶¹ Between 10% and 25% of men use condoms.¹⁶²

Legal Status of Contraceptives

The Medicines and Related Substances Control Act, 1965 (the “Medicines Act”),¹⁶³ provides for the registration and control of medicines and medical devices, including contraceptive drugs and devices. The Medicines Act categorizes medicines and certain medical devices in a series of schedules. The preconditions for the sale or supply of medicines or devices vary according to the schedule in which the particular medicine or device is located.

Oral contraceptives containing only progestogen are listed in the second schedule of the Medicines Act. Schedule 2 substances may be sold only by a pharmacist, or by a trainee pharmacist or pharmacist assistant under the personal supervision of a pharmacist. The pharmacist must record the particulars of every sale of a Schedule 2 substance in a book maintained for this purpose. These medicines may only be sold to a person

under the age of 16 years if the sale is made pursuant to a prescription issued by a medical practitioner or pursuant to a written order disclosing the purpose for which the substance will be used and signed by someone whom the seller knows to be over the age of 16 years.¹⁶⁴

Hormones intended for oral contraception, except oral contraceptives containing only progestogen, are listed in the third schedule of the Medicines Act. Schedule 3 medicines may also be sold only by a pharmacist, or by a trainee pharmacist or pharmacist assistant under the personal supervision of a pharmacist, and the details of such sales must be recorded in a book maintained for this purpose. Schedule 3 substances must be sold on the written prescription or oral instructions of a medical practitioner, regardless of the age of the purchaser.¹⁶⁵ Schedule 4 of the Medicines Act lists IUDs. The sale of Schedule 4 substances and devices is subject to the same requirements as the sale of Schedule 3 substances. However, if the sale is made on the oral instructions of a medical practitioner, these verbal instructions must be confirmed by a written prescription within seven days.¹⁶⁶

In addition, the Medicines Act prohibits the sale of any medicine or scheduled substance unless it bears a label stating particulars prescribed by regulation.¹⁶⁷ The Medicines Act further grants the Minister of Health extensive powers to make regulations on matters such as: packaging; the composition, therapeutic suitability, effect, purity, or other properties of medicines; and the importation, transportation, storage, or disposal of medicines and scheduled substances.¹⁶⁸

Regulation of Information on Contraception

The Medicines Act prohibits the publication or distribution of any false or misleading advertisement concerning any medicine, including contraceptives.¹⁶⁹ Contraceptive advertisements or educational publications that contain explicit sexual content may also, pursuant to the provisions of the Films and Publications Act, 1996 (the “Films Act”), potentially be subject to age restrictions or other restrictions relating to distribution.¹⁷⁰ The Films Act was enacted to replace the earlier Publications Act, 1974 (No. 42 of 1974), which had been challenged as unconstitutional.¹⁷¹ The Films Act is based on the principle that adults should enjoy the optimum amount of freedom, and that children should be protected against materials which are harmful or disturbing.¹⁷² The Films Act establishes a Film and Publications Board,¹⁷³ with powers to regulate the distribution of certain publications and films, primarily by means of classification, the imposition of age restrictions, and the rendering of consumer advice.¹⁷⁴ Persons aggrieved by a decision of the Film and Publications Board may appeal the decision to a Film and Publications Review Board.¹⁷⁵

D. ABORTION

Legal Status of Abortion

On November 12, 1996, South Africa enacted the Choice on Termination of Pregnancy Act, 1996 (the "Choice Act").¹⁷⁶ This act repealed the provisions related to abortion contained in the Abortion and Sterilization Act, 1975.¹⁷⁷ Section 2(1) of the Choice Act now defines the circumstances in which pregnancies may lawfully be terminated¹⁷⁸ to be:

- (a) upon request of a woman¹⁷⁹ during the first 12 weeks of the gestation period¹⁸⁰ of her pregnancy;
- (b) from the 13th week up to and including the 20th week of the gestation period if a medical practitioner, after consultation with the pregnant woman, is of the opinion that —
 - (i) the continued pregnancy would pose a risk of injury to the woman's physical or mental health; or
 - (ii) there exists a substantial risk that the fetus would suffer from a severe physical or mental abnormality; or
 - (iii) the pregnancy resulted from rape or incest; or
 - (iv) the continued pregnancy would significantly affect the social or economic circumstances of the woman; or
- (c) after the 20th week of the gestation period if a medical practitioner, after consultation with another medical practitioner or a registered midwife, is of the opinion that the continued pregnancy:
 - (i) would endanger the woman's life;
 - (ii) would result in severe malformation of the fetus; or
 - (iii) would pose a risk of injury to the fetus.

Requirements for Obtaining Legal Abortion

The Choice Act sets forth three major requirements for the performance of a legal abortion. First, the informed consent of the pregnant woman is required. Second, the law states that, depending upon the stage of pregnancy, the abortion must be performed either by a medical practitioner or a registered midwife. Finally, the Choice Act specifies the type of facilities in which such a procedure must occur.

The Choice Act requires the informed consent of the pregnant woman for the termination of her pregnancy.¹⁸¹ In almost all circumstances, no consent other than that of the pregnant woman is required.¹⁸² Where the pregnant woman is under 18 years of age, the Choice Act requires a medical practitioner or registered midwife to advise the woman to consult with her parents, guardian, family members, or friends prior to the procedure being performed. However, a woman may not be refused access to a termination of pregnancy because she chose not to consult with other individuals.¹⁸³ The only exceptions to the requirement of the pregnant woman's consent apply in the case of a woman who is either so severely mentally disabled that she is "completely incapable of understanding and appreciating the nature or conse-

quences of a termination of her pregnancy" or who is in a state of continuous unconsciousness with no reasonable prospect of regaining consciousness in time to request and to consent to the termination of her pregnancy.¹⁸⁴ If those conditions are met, the woman's guardian, spouse, or "curator" may request and consent to the termination of her pregnancy during the first 12 weeks of the gestation period, or from the 13th week up to and including the 20th week on the grounds set forth in Section 2(1)(b). However, the additional consent of two medical practitioners, or a medical practitioner and a registered midwife, is also required.¹⁸⁵ Alternatively, the pregnancy of such a woman may be terminated at the behest of two medical practitioners, or a medical practitioner and a registered midwife, in one of two circumstances. During the period up to and including the 20th week of the woman's gestation period, such practitioners may supply the necessary authorization if they are of the opinion that the continued pregnancy would pose a risk of injury to the woman's physical or mental health, or if there exists a substantial risk that the fetus would suffer from a severe physical or mental abnormality. After the 20th week of gestation, such practitioners may supply the requisite consent if they are of the opinion that the continued pregnancy would endanger the woman's life, result in a severe malformation of the fetus, or pose a risk of injury to the fetus.¹⁸⁶

The Choice Act also stipulates the persons able to perform a legal abortion and the facilities where such a procedure can occur. Abortions performed at the request of a woman during the first 12 weeks of the gestation period may be carried out either by a medical practitioner or by a registered midwife who has completed the prescribed training course.¹⁸⁷ All other pregnancy terminations may be performed only by a medical practitioner.¹⁸⁸ In addition, surgical abortions may only be performed at a facility designated by the Minister of Health for that purpose.¹⁸⁹ Persons in charge of such facilities are required to keep records of all abortion procedures performed in their facilities, and must forward this information, while maintaining confidentiality regarding the woman's identity, to the Director-General of Health.¹⁹⁰ The Choice Act provides that the identity of women who have requested or obtained a termination of pregnancy must remain confidential at all times.¹⁹¹

Penalties

Section 10 of the Choice Act prescribes penalties for persons who contravene the requirements of this law. Any person who performs an abortion procedure and does not meet the professional qualifications required by the Choice Act is guilty of an offense and is liable upon conviction to a fine or to imprisonment for a period up to 10 years.¹⁹² Persons who are

required to maintain and furnish records pursuant to the Choice Act but fail to do so are liable to be fined or to be imprisoned for a period not exceeding six months.¹⁹³ Furthermore, it is an offense for any person to prevent the lawful termination of a pregnancy or to obstruct access to a facility for the termination of a pregnancy. Any person found guilty of this offense is liable to a fine or to imprisonment for a period not exceeding 10 years.¹⁹⁴

Regulation of Abortion Information

When a woman requests a termination of pregnancy from a medical practitioner or registered midwife, the Choice Act requires that practitioner to inform the woman of her rights pursuant to this law.¹⁹⁵ The Choice Act also places an obligation on the state to “promote the provision of non-mandatory and non-directive counseling, before and after the termination of pregnancy.”¹⁹⁶

E. STERILIZATION

There are no specific laws in South Africa regarding the performance of sterilizations upon persons capable of consenting. Sterilization is predominantly governed by South African statutory law as well as by the common law that applies to the performance of general surgical procedures.¹⁹⁷ The Child Care Act, 1983,¹⁹⁸ provides that any person over the age of 18 years is competent to consent, without the assistance of her or his guardian, to the performance of any operation upon herself or himself.¹⁹⁹ Thus, a mentally competent, consenting adult may freely choose sterilization as her or his preferred method of contraception.²⁰⁰ Legal scholars in South Africa have differed on the issue of whether or not the sterilization of a married person requires the consent of that person’s spouse.²⁰¹ The argument for spousal consent is based on an alleged legally protected interest of a person in the reproductive capacity of her or his spouse.²⁰² Nevertheless, it may be argued that the provision in the Constitution which guarantees that everyone has the right to make decisions concerning reproduction and control over his or her body²⁰³ denies any right which persons may previously have had to refuse consent to the sterilization of their spouses.

The Abortion and Sterilization Act governs the sterilization of any person who for any reason is incapable of consenting, or who is legally incompetent to consent, to the operation.²⁰⁴ In these circumstances, a sterilization may only be performed once three requirements have been met. First, two medical practitioners must certify in writing that the person concerned is suffering from a hereditary condition which would cause her or his child to suffer from a serious physical or mental disability, or that the person concerned is unable, due to permanent physical or mental disability, to compre-

hend the consequences of, or bear parental responsibility for, “the fruit of coitus.”²⁰⁵ Secondly, a magistrate or the person who is normally entitled to consent to an operation upon the person concerned — for example, the parent or guardian of a minor, or the curator of a mentally ill person under curatorship²⁰⁶ — must consent to the operation.²⁰⁷ Thirdly, the Minister of Health, or a medical officer of the Department of Health so authorized by the Minister of Health, must grant written authority for the sterilization.²⁰⁸ Any person who performs a sterilization upon a person who was unable to consent, other than in accordance with the procedure described above, is guilty of a criminal offense punishable by a fine not exceeding U.S.\$1,220.00 (R 5000), or to imprisonment for a period not exceeding five years, or to both the fine and imprisonment.²⁰⁹

F. FEMALE GENITAL MUTILATION/ FEMALE CIRCUMCISION

Female genital mutilation (“FGM”) — also referred to as female circumcision — is not practiced to a significant extent in South Africa,²¹⁰ and there is no legislation that explicitly addresses this practice. A person who subjected another person to FGM would, however, in all likelihood be liable to be charged with the common law offense of assault, which is the unlawful and intentional application of force or threat of force against another person.²¹¹

G. HIV/AIDS AND SEXUALLY TRANSMITTED DISEASES

The HIV/AIDS epidemic has a significant impact on women’s health and gives rise to important issues pertaining to reproductive rights. A full evaluation of laws and policies affecting reproductive health and rights in South Africa must therefore examine issues of HIV/AIDS and sexually transmitted diseases (“STDs”). The Department of Health has estimated that, in the beginning of 1996, 1.8 million South Africans were infected with HIV.²¹² This number represents a tenfold increase over the past five years.²¹³ Overall, 10% of women attending antenatal clinics are HIV-positive,²¹⁴ although in some urban areas this figure is as high as 30%.²¹⁵ At present, the primary mode of HIV transmission in South Africa is heterosexual intercourse — a radical change from the earlier phase of the epidemic from 1982 to 1986 when HIV infection and AIDS were mainly restricted to gay men.²¹⁶ South Africa is also in the midst of an epidemic of STDs.²¹⁷ At least 10% of the population have ulcerative infections caused by syphilis and chancroid, while the median prevalence rates of chlamydia and gonorrhea are 11% and 8%, respectively.²¹⁸

Policies Affecting HIV/AIDS and STDs

In November 1988, the former South African government established AIDS Training and Information Centres in

strategic locations around the country and set up an AIDS Unit and National AIDS Advisory Group within the Department of Health.²¹⁹ In 1992, the AIDS Unit was replaced by a more “community-sensitive” AIDS Programme, within the Primary Health Care Directorate of the Department of Health.²²⁰ Since 1994, the new Government has made AIDS a high priority within its programme of socioeconomic development.²²¹ The status of the AIDS Programme has been elevated to a Directorate within the Department of Health, and its sphere of operation has been expanded to include STDs.²²² The Department of Health has adopted five key approaches in a “medium term” strategy to combat the HIV and STD epidemics:

- life skills and responsible sex education programs in schools and youth centers;
- mass communication strategies to popularize methods of prevention;
- increased access to barrier methods of contraception, including male and female condoms;
- more effective and more appropriate management of STDs; and
- establishment of norms, standards, and guidelines for the care of patients suffering from AIDS.²²³

Laws Affecting HIV/AIDS

Although the South African Law Commission has recommended the passage of an “HIV and AIDS Act,” there is at present no comprehensive statute dealing with issues relating to HIV/AIDS in South Africa.²²⁴ Rather, South African law affecting AIDS currently derives from a variety of sources, including the common law, statutory law, and ethical guidelines and practice rules prepared by the South African Medical and Dental Council (“SAMDC”),²²⁵ which specify the acts or omissions that may give rise to disciplinary action by the SAMDC.²²⁶ It is also to be noted that all existing laws and policies are now subject to scrutiny in terms of the Bill of Rights enshrined in the Constitution, which binds not only the state, but also natural and juristic persons to the extent that particular provisions of the Bill of Rights are applicable.²²⁷

The most far-reaching protection that the Constitution provides to people with HIV or AIDS is contained in Section 9, which guarantees that everyone has the right to equal protection and benefit of the law, and which prohibits unfair discrimination by the state or any other person against anyone on various grounds, including disability.²²⁸ Other provisions that provide potentially important protections to people with HIV or AIDS include, *inter alia*: the right to have one’s dignity respected and protected;²²⁹ the right to bodily and psychological integrity;²³⁰ the right to privacy;²³¹ the right to freedom of movement;²³² the right to choose one’s trade,

occupation, or profession freely;²³³ the right to fair labor practices;²³⁴ the right to have access to health care services;²³⁵ the right to basic education;²³⁶ the right of access to information;²³⁷ and the right to administrative action that is lawful, reasonable, and procedurally fair.²³⁸

Laws to Control HIV Transmission

Neither HIV nor AIDS has been declared to be a “notifiable medical condition”²³⁹ such that health care workers are required to report cases to the local authorities. Rather, medical practitioners voluntarily supply information regarding all new cases of AIDS to the Department of Health while maintaining the anonymity of the person infected with HIV.²⁴⁰ However, AIDS is listed as a “communicable disease” for the purposes of the Communicable Disease Regulations, which set forth far-reaching measures to contain the spread of communicable diseases in the event that such diseases constitute a real danger to health.²⁴¹ These measures include: the closure of teaching institutions and public places of entertainment; quarantine of persons carrying communicable diseases or of persons who have come into contact with such carriers; and the compulsory medical examination of persons suspected of being carriers of communicable disease and who constitute a danger to the public health.²⁴² The inclusion of AIDS as a “communicable disease” for the purposes of these regulations has been widely criticized, and draft regulations have been published for comment which would exclude AIDS from the application of these provisions.²⁴³

Criminal law has not been used as a measure to combat HIV transmission in South Africa.²⁴⁴ However, it is possible that persons infected with HIV who knowingly or negligently engage in acts which could lead to the transmission of HIV to another person, may be liable to prosecution for crimes such as murder, attempted murder, culpable homicide, or assault.²⁴⁵

HIV/AIDS and Health Care

HIV-positive persons who seek medical treatment need special protection from health care providers who may not be sensitive to the special needs of these patients. The important question arises, for instance, of whether or not medical practitioners should be compelled to treat patients whom they know to be HIV-positive. In addition, it may be critical to ensure that a patient consents to HIV testing and that medical practitioners respect the confidentiality of their patients. South African law addresses several of these concerns.

The South African Medical and Dental Council Guidelines state that “[n]o health worker may ethically refuse to treat any patient solely on the grounds that the patient is, or may be, HIV seropositive.”²⁴⁶ The SAMDC Guidelines further state that “[n]o doctor may withhold normal standards of

treatment from any patient solely on the grounds that the patient is HIV seropositive, unless such variation of treatment is determined to be in the patient's interest."²⁴⁷ However, the duty to treat as set forth in the SAMDC Guidelines is merely an ethical duty, rather than a legal one.²⁴⁸ Under common law, a doctor in private practice may decide not to treat a patient for any reason — including the HIV status of the patient — except in an emergency or where the physician has already embarked on treatment of the patient.²⁴⁹ On the other hand, medical practitioners who are employed by hospitals or by the state are bound by their conditions of service, which generally oblige such medical practitioners to treat all patients referred to them in the course of their employment.²⁵⁰ In light of the constitutional prohibition of unfair discrimination²⁵¹ and its guarantee of a right of access to health care services,²⁵² it is likely that any refusal by a medical practitioner — whether in private or public sector practice — to provide care to HIV-positive persons could be challenged as a violation of the Constitution.

Testing the HIV-serostatus of a patient should only be performed with the informed consent of that patient.²⁵³ This principle derives from the South African common law,²⁵⁴ and has been confirmed by SAMDC Guidelines, which describe the types of information that must be given to patients.²⁵⁵ The consent of a patient to an HIV test must be expressly given, as tacit consent is not considered sufficient under these circumstances.²⁵⁶ The consent requirement may only be dispensed with in the event of an emergency.²⁵⁷ Furthermore, substitute consent — such as from a “curator,” guardian, or family member — may be obtained for HIV testing of mentally ill persons or persons below the age of 14 years.²⁵⁸

Medical practitioners have a duty to respect the confidentiality of their patients. This is a legal duty recognized by the common law, which has been reiterated in the rules of the SAMDC.²⁵⁹ In *Jansen Van Vuuren and Another NNO v. Kruger*,²⁶⁰ the court stated that the fact that “AIDS is a dangerous condition. . . on its own does not detract from the right of privacy of the afflicted person, especially if that right is founded in the doctor-patient relationship. A patient has the right to expect due compliance by the practitioner with his professional ethical standards.”²⁶¹ Disclosure of medical information is permissible only in limited circumstances, including: where the patient has consented to disclosure; where disclosure is required by law; or where disclosure is in the public interest.²⁶² However, disclosure of such information to sexual partners of the patient and to health care workers exposed to the blood or other bodily fluids of an HIV-infected patient may be justified as being in the public interest.²⁶³

In such circumstances, SAMDC Guidelines prescribe that the medical practitioner should first attempt to obtain the patient's consent before making such disclosure.²⁶⁴

SAMDC Guidelines place no obligation on medical practitioners to undergo testing for HIV, or to inform patients of their HIV status. However, the SAMDC Guidelines set forth detailed instructions on “universal precautions” which should be used by health care workers to prevent transmission of HIV from health care workers to patients and vice versa.²⁶⁵ Employers of health care workers have a legal duty to provide the necessary equipment and facilities for such universal precautions, pursuant to Section 8(1) of the Occupational Health and Safety Act,²⁶⁶ which provides that “[e]very employer shall provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of his employees.”

HIV/AIDS and Education

Measures for the control of communicable diseases in schools are set forth in Regulations Relating to Communicable Diseases and the Notification of Notifiable Medical Conditions²⁶⁷ (the “Communicable Disease Regulations”). AIDS, but not HIV, is listed as a communicable disease in Annexure I of these regulations. The Communicable Disease Regulations require a school principal who is aware or has reason to suspect that a pupil is suffering from a communicable disease or was in contact with such a person to notify the relevant health or local government authorities without delay.²⁶⁸ The principal may not allow a pupil suffering from AIDS to enter the school unless authorized thereto by a medical certificate to this effect.²⁶⁹ A parent who knows that her or his child is suffering from AIDS or was in contact with such a person must inform the principal of the school of this.²⁷⁰ The Communicable Disease Regulations have been widely criticized, and draft regulations that would expressly prohibit principals from refusing to allow students to attend schools on the basis that they are HIV-positive have been published for public comment.²⁷¹ In any event, the existing Communicable Disease Regulations may be in conflict with the Constitutional protection against unfair discrimination and the guarantee that everyone has the right to a basic education.²⁷²

HIV/AIDS and Employment

Under common law, employers have the right to freely decide whom they wish to employ and may therefore require prospective employees to undergo an HIV test prior to employment.²⁷³ However, the recently promulgated Labour Relations Act, 1995,²⁷⁴ contains a “transitional” provision protecting both employees and applicants for employment from unfair discrimination — direct or indirect — on any arbitrary ground, including disability.²⁷⁵ Pursuant to the

common law, employers may not require an employee to undergo HIV testing against his or her will, as this would amount to unilateral alteration of the employment contract.²⁷⁶ HIV-positive employees also have no legal duty to inform their employers of their HIV serostatus, unless that person poses a threat to the health of other employees or she or he becomes so ill as to be unable to properly fulfill the employment obligations.²⁷⁷ Dismissal solely on the grounds of HIV infection is likely to be regarded as automatically unfair. Section 187(1)(f) of the Labor Relations Act provides that a dismissal is “automatically unfair if... the reason for the dismissal is... that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to... disability.”

HIV/AIDS and Life Insurance

HIV testing for the purposes of life insurance is not regulated by South African law. Rather, the Life Offices Association (“LOA”) — an association of life assurance companies²⁷⁸ — has entered into an agreement (the “LOA Agreement”) that is binding on all its members and which sets forth minimum standards regarding the insurance of HIV-positive persons.²⁷⁹ Pursuant to this agreement, a negative HIV test result is a precondition for the issuance of life policies worth U.S.\$48,780 (R. 200,000) or more, or for disability policies of U.S.\$488 (R. 2,000) per month or more.²⁸⁰

Laws Affecting STDs

South African law does not specifically prescribe measures to be taken for the prevention and control of STDs. STDs have neither been declared “communicable diseases” for the purposes of the Communicable Disease Regulations²⁸¹ nor have they been declared “notifiable medical conditions” pursuant to the powers conferred on the Minister of Health by the Health Act, 1977.²⁸² The control of STDs does, however, fall within the broad powers conferred on local authorities by the Health Act to render services for the prevention of communicable diseases.²⁸³

H. ARTIFICIAL INSEMINATION

The Human Tissue Act, 1983,²⁸⁴ and detailed regulations issued thereunder,²⁸⁵ regulates the conditions in which persons may be artificially inseminated in South Africa. Artificial insemination may be performed only upon a married woman — including a woman married under customary law — and only with the written consent of her husband.²⁸⁶ A child born as a consequence of artificial insemination is regarded by law as the legitimate child of the woman giving birth and her husband.²⁸⁷ The South African Law Commission has also recently proposed a Bill on Surrogate Motherhood, which would regulate the artificial insemination of women acting as

surrogate mothers.²⁸⁸ The provisions of the bill, however, must be scrutinized for compliance with the Constitution before it can be enacted into law.²⁸⁹

III. Understanding the Exercise of Reproductive Rights: Women’s Legal Status

Women’s reproductive health and rights cannot be fully evaluated without investigating women’s legal status within society. Not only do laws relating to women’s legal status reflect societal attitudes that affect reproductive rights, but such laws often have a direct impact on women’s ability to exercise reproductive rights. The legal context of family life, a woman’s access to education, and laws and policies affecting her economic status can contribute to the promotion or the frustration of a woman’s access to reproductive health care and her ability to make voluntary and informed decisions about such care. Laws regarding age of first marriage can also have a significant impact on a young woman’s reproductive health. Furthermore, laws relating to rape, sexual assault, and domestic violence present significant rights issues and can have direct consequences for women’s health.

At the outset of this discussion, it is important to note that several structures have been established to ensure that issues of women’s health and gender equality are adequately addressed by the government. A national Maternal, Child and Women’s Health Directorate has been established within the Department of Health, and directorates or subdirectorates for Maternal, Child and Women’s Health have been set up in most of the provinces.²⁹⁰ Furthermore, the Constitution mandates the establishment of a Commission for Gender Equality to promote respect for gender equality and for the protection, development, and attainment of gender equality.²⁹¹ Pursuant to this Constitutional mandate, the Commission on Gender Equality Act, 1996,²⁹² was enacted to provide for the composition, powers, functions, and functioning of the Commission for Gender Equality.²⁹³ The functions of the Commission for Gender Equality are extensive and include, *inter alia*: monitoring and evaluating the policies of governmental or private bodies; making recommendations in respect of any law which may potentially affect gender equality or the status of women, or new legislation which would promote gender equality; investigating gender-related issues with a view to resolving disputes or rectifying acts or omissions; and monitoring compliance with international legal instruments related to the objects of the Commission.²⁹⁴ In exercising these functions,

members of the Commission have wide powers, including limited powers of entry, search, and seizure.²⁹⁵

A. RIGHTS WITHIN MARRIAGE

Marriage Law

In South African law, marriage is defined as “the legally recognized voluntary union of one man and one woman to the exclusion of all others while it lasts.”²⁹⁶ To enjoy full legal recognition, marriages must be solemnized by a duly authorized marriage officer²⁹⁷ in accordance with the provisions of the Marriage Act, 1961.²⁹⁸ Unless the parties to the marriage specified otherwise in an “antenuptial contract,” parties to civil marriages contracted before November 1, 1984, were married “in community of property,”²⁹⁹ and wives were subject to the “marital power” of their husbands such that a wife was unable to contractually bind the joint household without her husband’s consent. A husband, however, could even alienate the marital home without his wife’s consent.³⁰⁰ The Matrimonial Property Act, 1984,³⁰¹ abolished “marital power” in respect of all marriages entered into after November 1, 1984,³⁰² and, in the absence of an antenuptial contract specifying otherwise, made all marriages subject to community property principles with “accrual,” whereby husband and wife are joint administrators of the joint estate for the duration of the marriage and share equally in the profits accrued during the marriage on its dissolution.³⁰³ “Marital power” was finally abolished in all civil marriages by the General Law Fourth Amendment Act, 1993.³⁰⁴ The effect of the abolition of “marital power” in civil marriages is to eliminate the restrictions on a wife’s capacity to contract and to litigate.³⁰⁵ Hence, these reforms have given wives legal equality with their husbands.³⁰⁶

Marriages of men and women pursuant to African customary law do not constitute legally valid marriages because they are potentially polygamous and are not solemnized by designated marriage officers according to the formalities set forth in the Marriage Act.³⁰⁷ In several statutes, however, customary marriages are accorded the same legal consequences as legally valid marriages for certain specific purposes,³⁰⁸ including for the purposes of maintenance.³⁰⁹ The basic requirements for a customary marriage include:³¹⁰ payment of bridewealth by the prospective husband or his family to the family of the woman he intends to marry; consent of the bride and bridegroom; and consent of the bride’s guardian, although such consent may not be “unreasonably” withheld.³¹¹ The Black Administration Act, 1927,³¹² provides that black women who are partners in customary unions and living with their husbands are legally considered to be “minors” under the guardianship of their husbands.³¹³

The Marriage Act makes provision for Islamic and Hindu

religious leaders to be designated marriage officers for the purpose of solemnizing marriages according to “Mohammedan rites or the rites of any Indian religion.”³¹⁴ Hindu marriages are legally recognized as valid marriages only if solemnized by a duly designated marriage officer in accordance with the provisions of the Marriage Act.³¹⁵ Marriages performed according to Muslim law are not valid, however, because they are “potentially polygamous,”³¹⁶ although they are afforded some limited statutory recognition similar to those afforded to customary marriages.³¹⁷ For a discussion on marriage and adolescents, see the section on adolescents below.

Divorce and Custody Law

The Divorce Act, 1979,³¹⁸ provides that a court may grant a divorce on one of two grounds — the “irretrievable breakdown of marriage” and the mental illness or continuous unconsciousness of a party to the marriage.³¹⁹ “Irretrievable breakdown of marriage” refers to a marriage that “has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship.”³²⁰ There are no restrictions on the types of facts or circumstances which may be indicative of an irretrievable breakdown of marriage,³²¹ and the blameworthiness of the spouses’ conduct is irrelevant to granting a divorce.³²² The court may, however, postpone the divorce proceedings to enable the parties to attempt reconciliation, if it is of the opinion that the spouses may be reconciled.³²³

When granting a divorce, a court may make an order regarding the custody of any children of the marriage.³²⁴ In making such an order, courts must be guided primarily by the best interests of the child, taking account of all relevant circumstances.³²⁵ Ultimately the court must decide which of the parents will better fulfill the child’s multiple needs.³²⁶ In general, custody of young children and daughters of any age is awarded to the mother,³²⁷ while custody of older boys is awarded to the father.³²⁸ Where the court grants custody to one parent, the other parent retains a right of reasonable access to the children.³²⁹ The Divorce Act further provides that a court may make an order regarding the guardianship³³⁰ of the child, including an order granting sole guardianship to either of the parents.³³¹ The Guardianship Act, 1993,³³² grants guardianship of minor children born of a marriage to the mother, in the absence of a court order to the contrary.³³³ Furthermore, a court granting a decree of divorce may make any order which it considers appropriate with regard to the maintenance of a dependent child of the marriage.³³⁴ Courts may order one spouse to pay maintenance to the other in accordance with a written agreement between them.³³⁵ Maintenance orders are enforced by maintenance courts, pursuant to the provisions of the Maintenance Act, 1963.³³⁶

In customary law marriages, the failure of either spouse to perform her or his duties in marriage may be sufficient reason for divorce.³³⁷ Wives generally have sufficient reason for divorce if their husbands failed to support them or if their husbands exceeded the “right of moderate chastisement.”³³⁸ Grounds for dissolution of customary marriages in KwaZulu-Natal are enumerated by the Natal and KwaZulu Codes. These codes provide that either partner to a customary marriage may bring an action for divorce on any of the following grounds: adultery; continued refusal of the other party to engage in sexual intercourse; desertion; “continued gross misconduct”; imprisonment of the partner for a period not less than five years; or the existence of conditions which “render the continuous living together of the partners insupportable or dangerous.”³³⁹ In addition, wives may bring an action for divorce by reason of “gross cruelty” or ill-treatment by the husband, or accusations of witchcraft or other “serious allegations” made against them by their husbands.³⁴⁰

In the absence of agreement to the contrary between the spouses’ families, customary law entitles the husband and his family to full parental rights in respect of children born of a marriage, if bridewealth has been paid.³⁴¹ However, despite this rule of customary law, courts apply common law principles to custody insofar as they award custody to the parent who is better able to serve the best interests of the child.³⁴² In customary law, the closest analogy to maintenance is *isondlo*, which is a onetime payment that may be claimed by any person who has raised a child, if the parent claims custody of that child.³⁴³ In fact, statutory law is now typically applied to maintenance claims.³⁴⁴ The Natal and KwaZulu Codes provide that, upon the dissolution of a customary marriage, courts may make any order regarding maintenance of minor children that it considers “just and expedient.”³⁴⁵

B. ECONOMIC AND SOCIAL RIGHTS

Property Rights

While customary law places restrictions on women’s entitlement to land ownership,³⁴⁶ women gain access to land through the general duty of support owed to them by the male head of the family. Pursuant to this duty, the family head allots to wives pieces of land on which to support themselves and their children.³⁴⁷ The discriminatory effects of customary law in this regard are compounded by Section 11(3)(b) of the Black Administration Act,³⁴⁸ whereby women in customary unions are considered minors and are subject to the guardianship of their husbands. Hence, husbands in customary marriages are given legal control of everything owned or acquired by their wives.³⁴⁹ Some of the harsher effects of this law have been mitigated to some extent by Section 11A of the Black

Administration Act, which exempts black women from black law and custom insofar as it affects the acquisition or disposal of a “right of leasehold, sectional leasehold or ownership,” or the borrowing of money on the strength of that right, or the defense of that right in a court of law.³⁵⁰ While Section 11A has been lauded as a “victory for African women,”³⁵¹ it has also been criticized for providing “limited formal equality” which “does not reflect social reality.”³⁵²

Customary laws that restrict women’s access to property appear to be in violation of Section 9 of the Constitution, which provides that everyone is equal before the law and prohibits unfair discrimination on the basis of gender or sex.³⁵³ These laws also appear to be in direct violation of Section 25(1) of the Constitution, which provides that “no law may permit arbitrary deprivation of property.”³⁵⁴ The Ministry of Land Affairs has recognized the unconstitutionality of laws that prejudice the ability of women to own land and has articulated its commitment to eradicate gender discrimination in land allocation and ownership.³⁵⁵ In pursuing this objective, the government has identified the need to remove all legal restrictions on women’s access to land and to ensure that land assets are registered in the names of beneficiary members of a household, rather than solely in the name of the head of the household.³⁵⁶

Labor Rights

The South African government has articulated its commitment to ensuring that all workers have equal rights.³⁵⁷ The government has already made significant strides toward protecting the rights of women employees by passing the Labour Relations Act, 1995.³⁵⁸ The Labour Relations Act provides that every employee has the right not to be unfairly dismissed.³⁵⁹ Dismissals are “automatically unfair” in certain circumstances, such as where the reason for the dismissal is the employee’s pregnancy, intended pregnancy, or any related reason, or where the dismissal occurred because the employer “unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground,” including, *inter alia*: gender, sexual orientation, marital status, or “family responsibility.”³⁶⁰

The Minister of Labour has commissioned the drafting of a new employment standards law.³⁶¹ The Department of Labour subsequently published for public comment a set of preliminary policy proposals concerning the possible content of the new statute (the “Employment Standards Policy”).³⁶² The Employment Standards Policy takes note of certain areas of South African employment law that need to be revised in the new employment standards law because they provide inadequate protection to women workers. First, farm workers, domestic workers, and part-time workers — a high proportion of whom are women³⁶³ — are excluded from certain

protections, including minimum wages, the right to unpaid leave, and sick pay, all available to other workers.³⁶⁴ The Employment Standards Policy proposes that such workers be given the protection of the new employment standards law.³⁶⁵ Secondly, the Employment Standards Policy recognizes the need for reconsidering the existing regulation of maternity leave and maternity pay, and the need for legislation to provide for a short period of paid paternity leave.³⁶⁶ Currently, the Basic Conditions of Employment Act prohibits women from working for four weeks before and eight weeks after childbirth, unless they are granted a special exemption.³⁶⁷ Employees have no general entitlement to maternity pay, although the Unemployment Insurance Act allows contributors to the Unemployment Insurance Fund to receive 45% of their wages for up to six months.³⁶⁸ The Unemployment Insurance Act, 1966,³⁶⁹ however, entitles women who adopt a child under two years of age to maternity leave.³⁷⁰ Thirdly, the Employment Standards Policy proposes that special protection should be given to pregnant employees engaged in night work, and that pregnant women and nursing mothers who normally engage in work that might place their health at risk should be offered suitable alternative work without loss of salary.³⁷¹

The Ministry of Labor has also published policy proposals for a new Employment and Occupational Equity Statute.³⁷² This law will implement measures to eradicate discrimination in employment practices, prevent harassment in the workplace (including sexual harassment), and enable the Department of Labour to require companies to develop employment equity plans.³⁷³ Other measures to ensure equal treatment of employees will be implemented through codes of practice and subsidiary legislation.³⁷⁴

Access to Credit

Gender equality is a major objective of the current government's economic policy.³⁷⁵ Within this policy, the government has identified the need to address the problem of credit constraints for women with limited collateral through, for example, increasing training opportunities for women, improving credit subsidies, and encouraging innovative credit schemes.³⁷⁶

Access to Education

The educational system in South Africa is characterized by significant disparities in educational levels on the basis of both race and gender. The new South African government has articulated policy and implemented structures specifically to eradicate these disparities and to ensure equal access to education for all. For a discussion of these measures, see the section on adolescents below.

C. RIGHT TO PHYSICAL INTEGRITY

Rape

Rape is defined as "intentional, unlawful sexual intercourse with a woman without her consent."³⁷⁷ The offense of rape requires penetration of the penis into the vagina. Non-consensual oral sex, anal sex, or insertion of foreign objects into the vagina constitute the offense of "indecent assault" rather than rape.³⁷⁸ In 1993, the Prevention of Family Violence Act³⁷⁹ was enacted, which provides that a husband may be convicted of the rape of his wife.³⁸⁰ Sexual intercourse with a girl under 16 years of age, regardless of her consent, constitutes statutory rape.³⁸¹ For a further discussion of statutory rape and other sexual offenses against minors, see the section on adolescents below.

Prosecution in rape cases is complicated by certain rules of evidence that favor the defendant. In rape cases, South African courts are guided by a "cautionary rule" of evidence, which requires additional care to be taken when accepting the uncorroborated testimony of women who have been raped.³⁸² In effect, the cautionary rule results in an additional burden of proof for the prosecution beyond the ordinary standard of proof beyond a reasonable doubt applied to other assault crimes.³⁸³ Furthermore, the rule of evidence barring introduction of a victim's earlier sexual history during a rape trial is waived if the complainant previously had a relationship with the defendant.³⁸⁴ While the judicial process is often a harrowing experience for rape survivors,³⁸⁵ the creation of a Sexual Offences Court in Wynberg, Western Cape, represents a promising initiative to address this problem, albeit on a limited scale. The Wynberg Sexual Offences Court, established in 1992, employs women assessors and specially trained prosecutors with lighter caseloads to better prepare for cases. Separate waiting rooms are provided for the plaintiffs and defendants. Furthermore, police officers from each of the Criminal Investigation Units in the surrounding areas have been trained as police rape specialists.³⁸⁶

Domestic Violence

South African criminal law does not recognize domestic violence as a specific crime, although women may charge abusive husbands or partners with the common law offense of assault.³⁸⁷ The principal civil law remedy available to victims of domestic violence is an interdict issued pursuant to the Prevention of Family Violence Act.³⁸⁸ The remedy is available between "a man and a woman who are or were married to each other according to any law or custom and also a man and a woman who ordinarily live or lived together as husband and wife, although not married to each other."³⁸⁹ In the interdict, a judge or magistrate may enjoin the alleged abuser from

committing any act including, but not limited to: assaulting or threatening the complainant or a child living with one or both of the parties; entering the matrimonial home or other place where the complainant resides; or preventing the complainant or a child who ordinarily lives in the matrimonial home from entering that home.³⁹⁰ The interdict is accompanied by a warrant for the arrest of the alleged abuser, which is suspended subject to compliance with the interdict.³⁹¹ A partner arrested for noncompliance with such an interdict must be brought before a judge or magistrate within 24 hours of the arrest.³⁹² The penalty for failure to comply with an interdict issued pursuant to this act is a fine or imprisonment for a period not exceeding 12 months, or both the fine and imprisonment.³⁹³

Sexual Harassment

South Africa has no legislation which specifically addresses sexual harassment. Nevertheless, the problem of sexual harassment in the workplace is receiving increasing attention by the courts and by the Ministry of Labour. In 1989, a sexual harassment suit was brought before a South African court for the first time.³⁹⁴ In this case, the court found a senior executive guilty of touching a woman co-worker inappropriately, and held that employers had a duty to ensure that their employees were not subjected to sexual harassment in the workplace.³⁹⁵ In 1995, the Minister of Labour, Tito Mboweni, issued a statement expressing the Ministry's concern regarding the extent of sexual harassment in South African workplaces and pledging the full support and cooperation of the Ministry and Department of Labour for initiatives aimed at eliminating sexual harassment.³⁹⁶ The Minister of Labour indicated that the Directorate for Equal Opportunities, established within the Department of Labour, would address issues of sexual harassment in the workplace.³⁹⁷ In addition, the recently promulgated Labour Relations Act, 1995,³⁹⁸ established a Commission for Conciliation, Mediation and Arbitration.³⁹⁹ One of the functions of this Commission is to provide employees, employers, and employees' or employers' organizations with advice or training concerning the prevention of sexual harassment in the workplace.⁴⁰⁰

iv. Focusing on the Rights of a Special Group: Adolescents

The needs of adolescents are often unrecognized or neglected. Given that 37.1% of the South African population is under the age of 15,⁴⁰¹ it is particularly important to meet the reproductive health needs of this group. The effort to address issues of adolescent rights, including those related to reproductive

health, are important for women's right to self-determination as well as for their health.

A. REPRODUCTIVE HEALTH AND ADOLESCENTS

Issues of adolescent health, including reproductive health, fall within the responsibilities of the Maternal, Child and Women's Health Directorate of the Department of Health.⁴⁰² Until now, adolescents have typically not been provided with access to the full range of reproductive health services, such as education and counseling about sexuality and adolescent health. Few centers have existed that specialize in adolescent health, and these have largely been confined to the main cities.⁴⁰³ Furthermore, the Child Care Act, 1983 (Act No. 74 of 1983), provides that persons of 14 years or younger require the assistance of their parent or guardian to obtain medical treatment.⁴⁰⁴ In effect, this means that children under the age of 15 years cannot legally have access to contraceptive measures without the consent of their parent or guardian.⁴⁰⁵ The Department of Health has set the goal of providing all health workers with training in the field of adolescence by the year 1998.⁴⁰⁶

B. FEMALE GENITAL MUTILATION AND ADOLESCENTS

As mentioned above, FGM is not practiced to any significant extent in South Africa.⁴⁰⁷

C. MARRIAGE AND ADOLESCENTS

The Marriage Act requires minors — persons under the age of 21⁴⁰⁸ — who have not previously contracted a valid marriage to obtain the consent of their parents or guardians as a prerequisite for marriage.⁴⁰⁹ However, boys under the age of 18 years and girls under the age of 15 years may not enter a valid marriage except with the permission of the Minister of Home Affairs or other authorized officer.⁴¹⁰ Customary law regimes do not specify a minimum age for first marriage, but rather require only that the spouses have reached puberty, the age of which varies from person to person.⁴¹¹

D. EDUCATION AND ADOLESCENTS

The South African educational system is characterized by significant disparities in educational levels between men and women, and among the various racial groups. In 1993, 99% of white South Africans were literate, as compared to 84% of Indians, 66% of coloreds, and 54% of Africans.⁴¹² Women account for 53.4% of persons aged 16 to 24 who are not attending school and have not yet obtained Standard 10 (the highest level of schooling).⁴¹³ Black women were doubly disadvantaged by apartheid policies of the former South African government, which sought to exclude black children from

educational opportunities that would allow them to engage in higher education and higher-skilled careers, and by socioeconomic pressures which resulted in many girls having to leave school prematurely.⁴¹⁴

The new South African government has demonstrated a firm commitment to eradicating these disparities in access to education. The National Education Policy Act, 1996,⁴¹⁵ provides that national education policy must advance the right of every person to basic education and equal access to education institutions,⁴¹⁶ and must be directed toward “achieving equitable education opportunities and the redress of past inequality in education provision, including the promotion of gender equality and the advancement of the status of women.”⁴¹⁷ The government has already announced its intention to provide free and compulsory education for all children from a “reception year” up to grade nine.⁴¹⁸ On January 1, 1995, the government commenced implementation of the “ten years free and compulsory education” policy by enrolling all six-year-olds in Grade One.⁴¹⁹ The policy is expected to be phased in over several years.⁴²⁰

The Ministry of Education has also announced its intention to establish a fulltime Gender Equity Commissioner and a permanent Gender Equity Unit within the Department of Education.⁴²¹ The functions of the Gender Equity Unit will be to advise the Director-General of Education on all aspects of gender equity in the education system, including, for example: possible mechanisms to correct gender imbalances in enrollment, subject choice, career paths, and employment; responses to sexism in curricula, textbooks, teaching, and guidance; and strategies to eliminate sexism, sexual harassment, and violence throughout the educational system.⁴²²

E. SEX EDUCATION FOR ADOLESCENTS

Education of adolescents on issues of STDs and HIV/AIDS is one of the key strategies of the Department of Health's HIV/AIDS and STD Programme.⁴²³ Education on these issues will form part of a broader program that will encompass matters such as nutrition, substance abuse, and environmental awareness.⁴²⁴ In 1997, a comprehensive package on health, including sexual health, will be incorporated into school curricula for the first time.⁴²⁵

F. SEXUAL OFFENSES AGAINST MINORS

Section 14(1) of the Sexual Offenses Act, 1957,⁴²⁶ makes it an offense for any man to have or attempt to have sexual intercourse with a girl under 16 years of age, or to commit or attempt to commit an “immoral or indecent act” with a boy or girl under the age of 19 years, or to solicit such an act.⁴²⁷ The Sexual Offenses Act specifies two defenses which may be raised to charges pursuant to this section.⁴²⁸ The first such

defense incorporates three components, each of which must be present for the defense to succeed, namely: at the time of the offense, the girl was a prostitute; the accused was under the age of 21 years at the time of the offense; and the accused had not previously been charged with a similar offense.⁴²⁹ The second defense is that the girl, or the person in whose charge she was, deceived the accused into believing that she was over the age of 16 years at the time of the offense.⁴³⁰ The consent of the minor is not a defense to a charge pursuant to this section.

ENDNOTES

1. The S. Afr. Found., *South Africa: The Land and its People* (visited Feb. 12, 1997) <http://www.satcis.co.za/002.saoverview/001.safhtml/001.info_on_sa/003.landand-people.html>.
2. The Nguni (Xhosa, Zulu, Swazi, Ndebele), Sotho (North, South and Tswana), Venda, Lemba and Shangaan-Tsonga.
3. The S. Afr. Found., *supra* note 1.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Central Statistical Services* (visited Feb. 19, 1997) <http://www.css.gov.za/releases/demograp/y91_95/p0302.htm>.
10. People of mixed race who live predominantly in the Western Cape.
11. SOUTH AFRICAN HEALTH REVIEW 1995, at 5 (Health Sys. Trust [Durban] & Henry J. Kaiser Family Found. 1995).
12. Afrikaans, English, isiNdebele, Sesotho sa Leboa, Sesotho, siSwati, Xitsonga, Setswana, Tshivenda, isiXhosa, and isiZulu. S. AFR. CONST. § 3(1).
13. The S. Afr. Found., *South Africa: Briefly* (visited Feb. 19, 1997) <http://www.satcis.co.za/002.saoverview/002.sa_briefly/rsa_info.html>.
14. Cape, Natal, Orange Free State, and Transvaal.
15. The so-called TBVC states: Transkei, Bophutatswana, Venda, and Ciskei.
16. Gazankulu, Kangwane, KwaNdebele, KwaZulu, Lebowa, and QwaQwa.
17. S. AFR. CONST. § 103(1).
18. The negotiations process which commenced in February 1990 between the former South African government and liberation movements culminated in an agreement on a two-stage transition of governmental power. Initially, the country would be governed by an interim government comprising a coalition of the major political parties. The interim government would be established under an interim constitution agreed to by the negotiating parties, while a transitional national legislature, elected by universal adult suffrage, would be responsible for drafting a new Constitution. CONSTITUTIONAL COURT OF SOUTH AFRICA, CERTIFICATION OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996, Case CCT 23/96; *decided* on September 6, 1996, ¶ 12. In accordance with this agreement, the Constitution of the Republic of South Africa Act No. 200 of 1993 (the “Interim Constitution”) became effective on April 27, 1994. On December 10, 1996, the final Constitution was signed into law. This act is entitled the CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA ACT, 1996.
19. S. AFR. CONST. § 40(1).
20. *Id.* § 151(1).
21. *Id.* § 151(3).
22. *Id.* § 85(1).
23. *Id.* § 86(1).
24. *Id.* § 84(1).
25. *Id.* § 85(2).
26. *Id.* § 91(2).
27. *Id.* § 92(2).
28. *Id.* § 125(1).
29. *Id.* § 128(1).
30. *Id.* § 125(2).
31. *Id.* § 132.
32. *Id.* § 125(6).
33. *Id.* § 151(2).

34. *Id.* § 157.
35. *Id.* § 151(4).
36. *Id.* § 43.
37. *Id.* § 42(1).
38. *Id.* § 46(1).
39. *Id.* § 49(1).
40. *Id.* § 42(3).
41. *Id.* § 60(1).
42. *Id.* § 42(4).
43. *Id.* § 104(1).
44. *Id.* § 105(2).
45. *Id.* § 108(1).
46. *Id.* § 104(1). Section 143 of the Constitution provides that a provincial constitution must not be inconsistent with the Constitution, and may provide for provincial legislative or executive structures and procedures, and also for the institution, role, authority and status of a traditional monarch. Furthermore, provincial constitutions must comply with principles of cooperative government and may not confer on provincial government powers beyond those provided for by the Constitution.
47. S.AFR. CONST. § 104(1).
48. *Id.* § 44(1).
49. *Id.* § 146(2). The criteria include, *inter alia*: the national legislation deals with a matter that cannot be regulated effectively by provincial legislation; national interests require uniformity provided by legislation which establishes norms and standards, frameworks or national policies; or the national legislation is necessary for the maintenance of national security, the maintenance of economic unity, the promotion of equal opportunity or equal access to government services, or the protection of the environment. In addition, § 146(3) of the Constitution states that national legislation pertaining to a matter listed in Schedule 4 prevails over provincial legislation if the national legislation aims to prevent unreasonable provincial action that prejudices the economic, health or security interest of another province or the whole country, or which obstructs the implementation of national economic policy.
50. Such intervention is permissible to maintain national security, economic unity, or essential national standards, to establish minimum standards required for the rendering of services, or to prevent unreasonable provincial action which is prejudicial to the interest of another province, or to the whole country. S.AFR. CONST. § 44(2).
51. *Id.* § 151(2).
52. *Id.* § 156(2). A municipality has the right to administer any matter assigned or delegated to it by national or provincial legislation, as well as matters listed in Part B of Schedule 4 (including, *inter alia*, child care facilities and municipal health services) and in Part B of Schedule 5 (including, *inter alia*, local amenities and control of public nuisances).
53. S.AFR. CONST. § 156(3).
54. *Id.* § 165.
55. *Id.* § 166.
56. Telephone interview with Michael Jennings, Attorney of the Supreme Court of South Africa (Jan. 31, 1997).
57. S.AFR. CONST. § 167(1).
58. *Id.* §§ 167(3), 167(7).
59. *Id.* § 167(5).
60. *Id.* § 168(3).
61. *Id.* § 169.
62. *Id.* § 170.
63. *Id.*
64. *Id.* § 179(1).
65. *Id.* § 179(2).
66. *Id.* § 2.
67. *Id.*
68. *Id.* § 8(1).
69. *Id.* § 36(1).
70. *Id.* § 38. This section provides that persons who may approach the court for such relief are: anyone acting in her or his own interest; anyone acting on behalf of another person who cannot act in his or her own name; anyone acting as a member of, or in the interest of, a group or a class of persons; anyone acting in the public interest; and an association acting in the interest of its members.
71. S.AFR. CONST. § 39(1).
72. *Id.* § 39(2).
73. *Id.* § 9.
74. *Id.* § 12(2).
75. *Id.* § 27(1). Section 27(2) provides that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.
76. 3 THOMAS H. REYNOLDS & ARTURO A. FLORES, FOREIGN LAW: CURRENT SOURCES OF CODES AND LEGISLATION IN JURISDICTIONS OF THE WORLD SA 3 (1993).
77. *Id.* at SA 5.
78. *Id.*
79. LAW OF EVIDENCE AMENDMENT ACT 45 of 1988.
80. "Indigenous law" is defined in subsection (4) to mean "the black law or customs as applied by the black tribes in the Republic or in territories which formerly formed part of the Republic."
81. Subsection (2) allows parties to a suit to adduce evidence of the substance of customary laws.
82. Subsection (1) includes a proviso that it shall not be lawful to declare that the custom of bridewealth is repugnant to principles of public policy or natural justice.
83. T. W. BENNETT, A SOURCEBOOK OF AFRICAN CUSTOMARY LAW FOR SOUTHERN AFRICA 53 (1991).
84. *Id.* at 124-28.
85. THE NATAL CODE OF ZULU LAW P151 of 1987.
86. KWAZULU ACT ON THE CODE OF ZULU LAW, ACT 16 OF 1985.
87. S.AFR. CONST. art. 2, sched. 6.
88. T.W. BENNETT, HUMAN RIGHTS AND AFRICAN CUSTOMARY LAW UNDER THE SOUTH AFRICAN CONSTITUTION 58 (1995).
89. S.AFR. CONST. § 211(3).
90. *Id.* § 211(2).
91. *Id.* § 212(2).
92. *Id.* § 15(3).
93. *Id.* § 231(1).
94. *Id.* § 231(2). International agreements signed by the national executive which are of a technical, administrative or executive nature, or which otherwise do not require ratification or accession, are legally binding without approval by the National Assembly and the National Council of Provinces, but must be tabled in both houses of Parliament within a reasonable time. S.AFR. CONST. § 231(3).
95. *Id.* § 231(4).
96. *Id.* § 232.
97. I. Currie, *List of Human Rights Treaties Acceded to or Ratified by South Africa* (visited Feb. 19, 1997) <<http://pc72.law.wits.ac.za/docs/ratlist.html>>.
98. Convention on the Elimination of All Forms of Discrimination against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 14 (*entry into force* Sept. 3, 1981) (signed by South Africa on Jan. 29, 1993 and ratified in 1995).
99. Convention on the Rights of the Child, G.A. Res. 640 (VII), 7 U.N. GAOR, Supp. (No. 20) at 27, U.N. Doc. A/2361 (1952) (*entry into force* July 7, 1954) (signed by South Africa on Jan. 29, 1993 and ratified in 1995).
100. CURRIE, *supra* note 97.
101. International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3 (*entry into force* Sept. 3, 1976).
102. International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, 999 U.N.T.S. 171 (*entry into force* March 23, 1976).
103. African Charter on Human and Peoples' Rights, *adopted* June 26, 1981, OAU Doc. CAB/LEG/67/3/Rev. 5 (1981) *reprinted* in 21 I.L.M. 58 (1982) (*entry into force* Oct. 21, 1986).
104. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 (*entry into force* Jan. 4, 1969).
105. SOUTH AFRICAN HEALTH REVIEW 1996, at 197 (Health Sys. Trust [Durban] & Henry J. Kaiser Family Found. 1996).
106. AFR. NAT'L CONGRESS, THE RECONSTRUCTION AND DEVELOPMENT PROGRAMME ¶ 2.12.5.2 (1994) [hereinafter RECONSTRUCTION AND DEVELOPMENT PROGRAMME 1994].
107. *Id.* ¶ 2.12.1; *see also* Dep't of Health, *Restructuring of the National Health System for Universal Primary Health Care* ¶ 2 (1996) (visited Feb. 19, 1997) <<http://www.aztec.co.za/biz/dgreen/nhpart1.htm>> [hereinafter *Restructuring of the National Health System*].
108. Private sector employment accounts for 59% of physicians, 93% of dentists, 89% of pharmacists, and 60% of supplementary health personnel. However, only an estimated 23% of South Africans have regular access to private sector health care. *Restructuring of the National Health System*, *supra* note 107, ¶ 2.2.
109. *Id.* ¶ 2.4.
110. RECONSTRUCTION AND DEVELOPMENT PROGRAMME 1994, *supra* note 106, ¶ 2.12.5.8.

111. *Restructuring of the National Health System*, *supra* note 107, ¶ 2.5.
112. DEP'T OF HEALTH [S. AFR.], TOWARDS A NATIONAL HEALTH SYSTEM 7-10 (1995) [hereinafter TOWARDS A NATIONAL HEALTH SYSTEM].
113. S. AFR. CONST. §§ 104(1), 125(2), read with S. AFR. CONST. sched. 4; TOWARDS A NATIONAL HEALTH SYSTEM, *supra* note 112, at 15.
114. TOWARDS A NATIONAL HEALTH SYSTEM, *supra* note 112, at 15.
115. *Restructuring of the National Health System*, *supra* note 107, ¶ 4.3.2.
116. *Id.* ¶ 4.3.5.1.
117. *Id.* ¶ 4.3.4.
118. *Id.* ¶ 4.2.1.
119. One U.S. dollar is worth approximately 4.10 South African Rands. Thomas Cook Foreign Exchange (Feb. 24, 1997).
120. SOUTH AFRICAN HEALTH REVIEW 1996, *supra* note 105, at 76.
121. *Restructuring of the National Health System*, *supra* note 107, ¶ 5.
122. SOUTH AFRICAN HEALTH REVIEW 1995, *supra* note 11, at 165.
123. *Id.* at 194.
124. Services provided to pregnant women pursuant to this policy include all available health services, and are not limited to services for conditions related to the pregnancy. GOVERNMENT GAZETTE NOTICE 657(1994), as reproduced in SOUTH AFRICAN HEALTH REVIEW 1996, *supra* note 105.
125. *Id.* at 162.
126. SOUTH AFRICAN HEALTH REVIEW 1995, *supra* note 11, at 195.
127. These amendments were effected by: the MEDICAL, DENTAL AND SUPPLEMENTARY HEALTH SERVICE PROFESSIONS AMENDMENT ACT No. 18 OF 1995; NURSING AMENDMENT ACT No. 5 OF 1995; PHARMACY AMENDMENT ACT No. 6 OF 1995; and the CHIROPRACTORS, HOMEOPATHS AND ALLIED HEALTH SERVICE PROFESSIONS AMENDMENT ACT No. 40 OF 1995.
128. MEDICAL, DENTAL AND SUPPLEMENTARY HEALTH SERVICE PROFESSIONS AMENDMENT ACT No. 18 OF 1995, § 4; NURSING AMENDMENT ACT No. 5 OF 1995, § 4; PHARMACY AMENDMENT ACT No. 6 OF 1995, § 4; and CHIROPRACTORS, HOMEOPATHS AND ALLIED HEALTH SERVICE PROFESSIONS AMENDMENT ACT No. 40 OF 1995, § 4.
129. TOWARDS A NATIONAL HEALTH SYSTEM, *supra* note 112, at 40.
130. *Id.*
131. STEPHEN HARRISON, REVIEW AND REFORM OF SOUTH AFRICAN HEALTH LEGISLATION 116 (1995) (unpublished L.L.M. dissertation, University of Cape Town).
132. *Id.*
133. *Id.* at 118.
134. *Id.*
135. See, e.g., §§ 41 and 42 of the Medical, Dental and Supplementary Health Service Professions Act No. 56 of 1974.
136. *Restructuring of the National Health System*, *supra* note 107, ¶ 4.1, § 8.
137. TOWARDS A NATIONAL HEALTH SYSTEM, *supra* note 112, at 46.
138. MINISTRY FOR WELFARE & POPULATION DEV., A GREEN PAPER FOR PUBLIC DISCUSSION: POPULATION POLICY FOR SOUTH AFRICA 14 (1995) [hereinafter GREEN PAPER ON POPULATION POLICY].
139. *Id.*
140. *Id.*
141. *Id.* at 14-15.
142. RECONSTRUCTION AND DEVELOPMENT PROGRAMME 1994, *supra* note 106.
143. GREEN PAPER ON POPULATION POLICY, *supra* note 138, at 15.
144. S. AFR. CONST. §§ 104(1), 125(2), read with S. AFR. CONST. sched. 4. See *infra* discussion of Setting the Stage: the Legal and Policy Framework.
145. GREEN PAPER ON POPULATION POLICY, *supra* note 138, at 15.
146. *Id.* at 5.
147. *Id.*
148. *Id.* at 18.
149. *Id.* at 27.
150. *Id.* at 32.
151. Women's Health Project, *Women's Health Conference Policy on Contraception* (1994).
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. TOWARDS A NATIONAL HEALTH SYSTEM, *supra* note 112, at 18-19.
157. Telephone interview with Dr. David Harrison, Health Systems Trust, Durban (Feb. 2, 1997).
158. SOUTH AFRICAN HEALTH REVIEW 1996, *supra* note 105, at 169.
159. *Id.* at 169.
160. GREEN PAPER ON POPULATION POLICY, *supra* note 138, at 7-8.
161. SOUTH AFRICAN HEALTH REVIEW 1995, *supra* note 11, at 11.
162. *Id.* at 174.
163. MEDICINES AND RELATED SUBSTANCES CONTROL ACT No. 101 of 1965.
164. *Id.* § 22A(4).
165. *Id.* § 22A(5).
166. *Id.* § 22A(6).
167. *Id.* § 18(1).
168. *Id.* § 35(1).
169. *Id.* § 20.
170. FILMS AND PUBLICATIONS ACT No. 65 of 1996.
171. Republic of S. Afr., *Report of the Task Group: Film and Publication Control*, presented to Dr. M.G. Buthelezi (Minister of Home Affairs), Dec. 1, 1994, at 1.
172. *Id.* p. 20.
173. FILMS AND PUBLICATIONS ACT No. 65 of 1996, § 3.
174. *Id.* § 2.
175. *Id.* § 20(1).
176. REPUBLIC OF S. AFR., CHOICE ON TERMINATION OF PREGNANCY ACT No. 92 of 1996 [hereinafter CHOICE ACT].
177. *Id.* The Abortion and Sterilization Act, 1975, severely restricted access to abortions by prescribing detailed procedural requirements which had to be met before abortions could be performed, and by limiting the grounds for legal abortions to situations where pregnancy: endangered the life of the pregnant woman or constituted a serious threat to her physical health; constituted a serious threat to the woman's mental health; posed a serious risk that the child to be born would be seriously disabled; or was the result of "illegitimate carnal intercourse" with a woman with permanent mental disability. ABORTION AND STERILIZATION ACT No. 2 of 1975, § 3.
178. "Termination of pregnancy" is defined in § 1 of the Choice Act to mean "the separation and expulsion, by medical or surgical means, of the contents of the uterus of a pregnant woman."
179. "Woman" is defined in § 1 of the Choice Act to mean "any female person of any age."
180. "Gestation period" is defined in § 1 of the Choice Act to mean "the period of pregnancy of a woman calculated from the first day of the menstrual period which in relation to the pregnancy is the last."
181. CHOICE ACT, *supra* note 176, § 5(1).
182. *Id.* § 5(2).
183. *Id.* § 5(3).
184. *Id.* § 5(4).
185. *Id.*
186. *Id.* § 5(5).
187. *Id.* § 2(2).
188. *Id.*
189. *Id.* § 3.
190. *Id.* § 7(3).
191. *Id.* § 7(5).
192. *Id.* § 10(1).
193. *Id.* § 10(2).
194. *Id.* § 10(1)(c).
195. *Id.* § 6.
196. *Id.* § 4.
197. HARRISON, *supra* note 131, at 140.
198. CHILD CARE ACT No. 74 of 1983.
199. *Id.* § 39(4)(a).
200. HARRISON, *supra* note 131, at 140.
201. J. C. Sonnekus, *Sterilisasie — toestemming deur nie-pasiënt-gade?*, De Rebus 369, 373 (Aug. 1986).
202. *Id.* at 371.
203. S. AFR. CONST. § 12(2).
204. ABORTION AND STERILIZATION ACT No. 2 of 1975, § 4(1).
205. *Id.* § 4(1)(a).
206. Sonnekus, *supra* note 201, at 369.
207. ABORTION AND STERILIZATION ACT, No. 2 OF 1975, § 4(1)(b).
208. *Id.* § 4(1)(c).
209. *Id.* § 10(1).
210. NAHID TOUBIA, FEMALE GENITAL MUTILATION: A CALL FOR GLOBAL ACTION (Rainbø, 1995).

211. Telephone interview with Michael Jennings, *supra* note 56.
212. SOUTH AFRICAN HEALTH REVIEW 1996, *supra* note 105, at 165.
213. *Id.* at 27.
214. *Id.*
215. *Id.* at 166.
216. ASPECTS OF THE LAW RELATED TO AIDS 13 (S. Afr. L. Comm'n Working Paper No. 58, Project 85, 1995).
217. SOUTH AFRICAN HEALTH REVIEW 1995, *supra* note 11, at 44.
218. *Id.*
219. *Id.* at 174.
220. *Id.*
221. *Id.* at 175.
222. *Id.*
223. SOUTH AFRICAN HEALTH REVIEW 1996, *supra* note 105, at 169-70.
224. ASPECTS OF THE LAW RELATED TO AIDS, *supra* note 216, annex. A.
225. The SAMDC was the predecessor to the Interim National Medical and Dental Council of South Africa, discussed above.
226. ASPECTS OF THE LAW RELATED TO AIDS, *supra* note 216, at 33.
227. S. AFR. CONST. § 8.
228. *Id.* § 9. It is still unclear whether HIV-infection would constitute disability for the purposes of this provision. *Id.* § 25.
229. *Id.* § 10.
230. *Id.* § 12.
231. *Id.* § 14.
232. *Id.* § 21.
233. *Id.* § 22.
234. *Id.* § 23.
235. *Id.* § 27.
236. *Id.* § 29.
237. *Id.* § 32.
238. *Id.* § 33.
239. ASPECTS OF THE LAW RELATED TO AIDS, *supra* note 216, at 150.
240. *Id.*
241. REGULATIONS RELATING TO COMMUNICABLE DISEASES AND THE NOTIFICATION OF NOTIFIABLE MEDICAL CONDITIONS, No. R. 2438 annex. 1 (1987).
242. *Id.* regs. 2, 14.
243. ASPECTS OF THE LAW RELATED TO AIDS, *supra* note 216, at 144.
244. *Id.* at 162.
245. ANN STRODE, AIDS AND THE LAW: MAINTAINING THE BALANCE (A PARALEGAL MANUAL) 85-86 (1995); ASPECTS OF THE LAW RELATED TO AIDS, *supra* note 216, at 162.
246. SAMDC GUIDELINES 2, as cited in ASPECTS OF THE LAW RELATED TO AIDS, *supra* note 216, at 39.
247. *Id.*
248. ASPECTS OF THE LAW RELATED TO AIDS, *supra* note 216, at 39.
249. *Id.* at 38.
250. *Id.*
251. S. AFR. CONST. § 9(3).
252. *Id.* § 27(1).
253. STRODE, *supra* note 245, at 14.
254. *Id.* at 14.
255. SAMDC GUIDELINES 4-5, as cited in ASPECTS OF THE LAW RELATED TO AIDS, *supra* note 216, at 43.
256. STRODE, *supra* note 245, at 14.
257. *Id.* at 17.
258. *Id.* at 18-19.
259. Jansen van Vuuren and Another NNO v. Kruger 1993 (4) SA 842, 850.
260. 1993 (4) SA 842.
261. 1993 (4) SA at 856.
262. ASPECTS OF THE LAW RELATED TO AIDS, *supra* note 216, at 52.
263. *Id.*
264. SAMDC GUIDELINES 4, 5 & 6, as cited in ASPECTS OF THE LAW RELATED TO AIDS, *supra* note 216, at 54-55.
265. SAMDC GUIDELINES 3 & 6, as cited in ASPECTS OF THE LAW RELATED TO AIDS, *supra* note 216, at 63-64.
266. OCCUPATIONAL HEALTH AND SAFETY ACT No. 85 of 1993.
267. REGULATIONS RELATING TO COMMUNICABLE DISEASES AND THE NOTIFICATION OF NOTIFIABLE MEDICAL CONDITIONS, No. R. 2438, reprinted in GOVERNMENT GAZETTE No. 11014 of October 30, 1987 [hereinafter REGULATIONS RELATING TO COMMUNICABLE DISEASES 1987].
268. *Id.* reg. 7(1)(a).
269. *Id.* reg. 7(1)(b).
270. *Id.* reg. 7(2).
271. DRAFT REGULATIONS RELATING TO COMMUNICABLE DISEASES AND THE NOTIFICATION OF NOTIFIABLE MEDICAL CONDITIONS, NOTICE No. 703 of 1993 § 67, reprinted in GOVERNMENT GAZETTE No. 15011 of July 30, 1993.
272. S. AFR. CONST. §§ 9, 29.
273. ASPECTS OF THE LAW RELATED TO AIDS, *supra* note 216, at 131-32. This law may be subject to challenge pursuant to the prohibition against unfair discrimination in the Constitution. S. AFR. CONST. § 9.
274. LABOUR RELATIONS ACT No. 66 of 1995.
275. *Id.* sched. 7 (§§ 2(1), 2(2)). This transitional protection of applicants for employment is likely to be replaced by comprehensive legislation in the near future. ASPECTS OF THE LAW RELATED TO AIDS, *supra* note 216, at 139.
276. *Id.* at 132.
277. *Id.* at 133.
278. STRODE, *supra* note 245, at 99.
279. ASPECTS OF THE LAW RELATED TO AIDS, *supra* note 216, at 120.
280. *Id.* at 121.
281. REGULATIONS RELATING TO COMMUNICABLE DISEASES 1987, *supra* note 267, annex. 1.
282. HEALTH ACT No. 63 OF 1977. See 21 JOUBERT (ed.), LAWS OF SOUTH AFRICA (LAWSA), ¶ 288.
283. HEALTH ACT No. 63 OF 1977, § 20(1)(d).
284. HUMAN TISSUE ACT No. 65 OF 1983.
285. REGULATIONS REGARDING THE ARTIFICIAL INSEMINATION OF PERSONS, AND RELATED MATTERS No. R. 1182, reprinted in GOVERNMENT GAZETTE No. 10283 of June 20, 1986.
286. *Id.* reg. 8(1).
287. CHILDREN'S STATUS ACT No. 82 OF 1987, § 5.
288. DRAFT BILL ON SURROGATE MOTHERHOOD proposed by SOUTH AFRICAN LAW COMMISSION, GENERAL NOTICE 512 of 1995 reprinted in GOVERNMENT GAZETTE No. 16479 of June 14, 1995.
289. R. Pretorius *Surrogate Motherhood: A Detailed Commentary on the Draft Bill*, DE REBUS 114 (Feb. 1996).
290. SOUTH AFRICAN HEALTH REVIEW 1996, *supra* note 105, at 182.
291. S. AFR. CONST. §§ 181(1), 187.
292. COMMISSION ON GENDER EQUALITY ACT No. 39 OF 1996.
293. *Id.*
294. *Id.* § 11
295. *Id.* § 13.
296. JOUBERT, *supra* note 282, at 16.
297. MARRIAGE ACT No. 25 of 1961, § 11(1).
298. MARRIAGE ACT No. 25 of 1961.
299. A property regime whereby the estates of the husband and wife were merged into a joint estate, administered by the husband.
300. HUMAN RIGHTS WATCH WOMEN'S RIGHTS PROJECT, VIOLENCE AGAINST WOMEN IN SOUTH AFRICA: THE STATE RESPONSE TO DOMESTIC VIOLENCE AND RAPE 28 (1995). A somewhat different property regime applied in respect to civil marriages entered into between Africans, which were governed by the Black Administration Act 38 of 1927. These marriages excluded community of property, but wives were still subject to their husbands' marital power. However, the Matrimonial Property Law Amendment Act No. 3 of 1988 resulted in African marriages contracted after December 2, 1988, being subject to "community of property" and excluding marital power.
301. MATRIMONIAL PROPERTY ACT No. 88 of 1984.
302. *Id.* § 11.
303. HUMAN RIGHTS WATCH WOMEN'S RIGHTS PROJECT, *supra* note 300, at 28; JOUBERT, *supra* note 282, at 83.
304. GENERAL LAW FOURTH AMENDMENT ACT No. 132 OF 1993, § 29.
305. MATRIMONIAL PROPERTY ACT No. 88 OF 1984, § 12.
306. JOUBERT, *supra* note 282, at 121.
307. *Id.* at 18.
308. *Id.*
309. MAINTENANCE ACT No. 23 of 1963, § 5(6). Other examples of such limited recognition of customary unions may be found in: BLACK LAWS AMENDMENT ACT 76 OF 1963, § 31; INCOME TAX ACT 58 OF 1962 § 1; and INSOLVENCY ACT 24 OF 1936, § 21(13).

310. LEGAL RESOURCES CENTRE, HANDBOOK OF PUBLIC INTEREST LAW 177 (year not available).
311. Section 38(2) of both the KwaZulu Code and the Natal Code, however, require a guardian's consent only if either party is under 21 years of age.
312. BLACK ADMINISTRATION ACT No. 38 of 1927.
313. BLACK ADMINISTRATION ACT No. 38 of 1927, § 11(3)(b), reproduced in K. Robinson *The Minority and Subordinate Status of African Women under Customary Law* 11(3) 457 SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS 461 (1995).
314. MARRIAGE ACT No. 25 of 1961, § 3(1).
315. HUMAN RIGHTS WATCH WOMEN'S RIGHTS PROJECT, *supra* note 300, at 30.
316. *Id.* at 30.
317. *Id.*
318. DIVORCE ACT No. 70 OF 1979.
319. *Id.* § 3.
320. *Id.* § 4(1).
321. Section 4(2) of the Divorce Act does, however, describe certain types of circumstances which may be considered as evidence of the "irretrievable break-down of marriage" including: the parties have not lived together as husband and wife for a continuous period of one year immediately preceding the institution of the divorce action; adultery by the defendant which the spouse finds irreconcilable with a continued marital relationship; and the defendant has been sentenced as an "habitual criminal" and is undergoing imprisonment as a result of that sentence.
322. JOUBERT, *supra* note 282, at 208.
323. DIVORCE ACT No. 70 of 1979, § 4(3).
324. *Id.* § 6(3).
325. JOUBERT, *supra* note 282, at 198.
326. *Id.* at 198.
327. *Id.* at 221.
328. *Id.* at 198.
329. *Id.* at 222.
330. Whereas custody involves the care and control of the child's person — including the duty to supply the child with sufficient accommodation, food, education, clothing and health care — guardianship entails the right to administer the child's property and affairs. *Id.* at 189.
331. DIVORCE ACT No. 70 OF 1979, § 6(3).
332. GUARDIANSHIP ACT No. 192 OF 1993.
333. *Id.* § 1(1).
334. DIVORCE ACT No. 70 OF 1979, § 6(3).
335. *Id.* § 7(1).
336. MAINTENANCE ACT No. 23 OF 1963. Section 2 of this act provides that every magistrates' court shall be a maintenance court for the purposes of this section.
337. BENNETT, *supra* note 83, at 248.
338. *Id.* at 247.
339. NATAL AND KWAZULU CODES § 48.
340. *Id.* § 48(2).
341. BENNETT, *supra* note 83, at 289.
342. *Id.* at 292.
343. *Id.* at 278.
344. *Id.* at 282. Section 5(6) of the Maintenance Act states that "[f]or the purposes of determining whether a black... is legally liable to maintain any person, he shall be deemed to be the husband of any woman associated with him in a customary union."
345. NATAL AND KWAZULU CODES §§ 53, 54.
346. BENNETT, *supra* note 88, at 137.
347. *Id.*
348. Robinson, *supra* note 313.
349. *Id.*
350. BLACK ADMINISTRATION ACT, § 11A, reprinted in 14 ANN. REV. OF POPULATION L., 1987, at 152 (Reed Boland & Jan Stepan eds., 1990).
351. Robinson, *supra* note 313, at 462.
352. *Id.* For example, it has been observed that while this section allows women in customary marriages to enter into property ownership agreements, they are unable to independently use and enjoy that property because it becomes "house property" subject to their husbands' control.
353. S. AFR. CONST. § 9.
354. *Id.* § 25(1).
355. Ministry of Land Affairs, Republic of S. Afr., *Green Paper on Land* (visited on Feb. 19, 1997) <<http://wn.apc.org/dla/4execsum.htm>>.
356. *Id.*
357. RECONSTRUCTION AND DEVELOPMENT PROGRAMME 1994, *supra* note 106, ¶ 482.
358. LABOUR RELATIONS ACT No. 66 OF 1995.
359. *Id.* § 185.
360. LABOUR RELATIONS ACT No. 66 OF 1995, § 187(1).
361. MINISTRY OF LABOR, *Employment Standards Statute: Policy PROPOSALS*, GENERAL NOTICE No. 156 of 1996, reprinted in GOVERNMENT GAZETTE No. 17002 OF 1996, Feb. 23, 1996, art 1 [hereinafter MINISTRY OF LABOR GENERAL NOTICE No. 156].
362. The Employment Standards Policy has, however, not been endorsed by the Cabinet, and so does not represent official government policy. *Id.* at 15.
363. *Id.* at 25. Women constitute 89% of domestic workers: HUMAN RIGHTS WATCH WOMEN'S RIGHTS PROJECT, *supra* note 300, at 17.
364. See WAGE ACT No. 5 of 1957; MINISTRY OF LABOR GENERAL NOTICE No. 156, *supra* note 361, at 16; THE BASIC CONDITIONS OF EMPLOYMENT ACT No. 3 OF 1983; MINISTRY OF LABOR GENERAL NOTICE No. 156, *supra* note 361, at 26.
365. *Id.* at 23, 26.
366. MINISTRY OF LABOR GENERAL NOTICE No. 156, *supra* note 361, chp. G.
367. *Id.* at 59.
368. These benefits are not available to domestic workers or to employees earning above a certain income level. *Id.* at 60.
369. UNEMPLOYMENT INSURANCE ACT No. 30 OF 1966.
370. MINISTRY OF LABOR GENERAL NOTICE No. 156, *supra* note 361, at 61.
371. *Id.* at 54, 61.
372. DEPARTMENT OF LABOUR, *Green Paper: Policy Proposals for a New Employment and Occupational Equity Statute* GENERAL NOTICE No. 804 of 1996, July 1, 1996.
373. *Id.* ¶¶ 4.3.2 and 4.4.1.
374. *Id.* ¶ 4.3.1.
375. REPUBLIC OF SOUTH AFRICA, WHITE PAPER ON RECONSTRUCTION AND DEVELOPMENT: GOVERNMENT'S STRATEGY FOR FUNDAMENTAL TRANSFORMATION ¶ 3.2.8 (1994) [hereinafter WHITE PAPER ON RECONSTRUCTION AND DEVELOPMENT].
376. *Id.* ¶ 3.2.8.
377. HUMAN RIGHTS WATCH WOMEN'S RIGHTS PROJECT, *supra* note 300, at 89.
378. *Id.*
379. PREVENTION OF FAMILY VIOLENCE ACT No. 133 OF 1993.
380. *Id.* § 5.
381. SEXUAL OFFENSES ACT No. 23 OF 1957, § 14(1).
382. HUMAN RIGHTS WATCH WOMEN'S RIGHTS PROJECT, *supra* note 300, at 101.
383. *Id.* at 102.
384. *Id.* at 106.
385. *Id.* at 103-07.
386. *Id.* at 119.
387. *Id.* at 62.
388. PREVENTION OF FAMILY VIOLENCE ACT No. 133 OF 1993.
389. *Id.* § 1(2). Victims of abuse by relatives or by homosexual partners must still rely on the more expensive and complex High Court interdicts. HUMAN RIGHTS WATCH WOMEN'S RIGHTS PROJECT, *supra* note 300, at 69.
390. PREVENTION OF FAMILY VIOLENCE ACT No. 133 OF 1993, § 2(1).
391. *Id.* § 2(2).
392. *Id.* § 3(2).
393. *Id.* § 6.
394. J v. M Ltd., 10 I.L.J. 755 (1989), discussed in A. K. WING AND E.P. DE CARVALHO, *Black South African Women: Toward Equal Rights*, 8 HARVARD HUMAN RIGHTS JOURNAL 57, 69 (Spring 1995).
395. *Id.* at 69.
396. Tito Mboweni, Minister of Labour, *Sexual Harassment in the Workplace*, Statement to the Imago Conference (May 16, 1995) (visited on Feb. 12, 1997) <gopher://gopher.anc.org.za:70/00/govdocs/pr/1995/harass.mol>.
397. *Id.*
398. LABOUR RELATIONS ACT No. 66 OF 1995.
399. *Id.* § 112.
400. *Id.* § 115(3)(i), as amended by LABOUR RELATIONS AMENDMENT ACT No. 42 of 1996, § 31(b)(i).
401. GREEN PAPER ON POPULATION POLICY, *supra* note 138, at 7.
402. SOUTH AFRICAN HEALTH REVIEW 1995, *supra* note 11, at 182.
403. Telephone interview with Dr. David Harrison, *supra* note 157.
404. CHILD CARE ACT No. 74 OF 1983, § 39(4).
405. HARRISON, *supra* note 131, at 141.

406. SOUTH AFRICAN HEALTH REVIEW 1995, *supra* note 11, at 183.
407. TOUBIA, *supra* note 210.
408. AGE OF MAJORITY ACT 57 OF 1972, § 1.
409. MARRIAGE ACT NO. 25 OF 1961, § 24(1); JOUBERT, *supra* note 282, at 32. If a minor has no parent or guardian or is for any good reason unable to obtain the consent of a parent or guardian to marry, a commissioner of child welfare may grant consent to the marriage. If a parent, guardian or commissioner of child welfare refuses to consent to the marriage, a High Court may supply the requisite consent to the marriage if it is of the opinion that the refusal of consent was without adequate reason and was not in the interests of the minor. MARRIAGE ACT NO. 25 OF 1961, § 25.
410. *Id.* § 26(1).
411. BENNETT, *supra* note 83, at 174.
412. SOUTH AFRICAN HEALTH REVIEW 1995, *supra* note 11, at 234.
413. GREEN PAPER ON POPULATION POLICY, *supra* note 138, at 9.
414. WING and CARVALHO, *supra* note 394, at 70-72.
415. NATIONAL EDUCATION POLICY ACT NO. 27 OF 1996.
416. *Id.* § 4(a)(ii).
417. *Id.* § 4(c).
418. WHITE PAPER ON RECONSTRUCTION AND DEVELOPMENT, *supra* note 375, ¶ 2.
419. *Id.* ¶ 45.
420. *Id.*
421. *Id.* ¶ 66.
422. *Id.*
423. DEP'T OF HEALTH, THE SOUTH AFRICAN GOVERNMENT'S HIV/AIDS AND STD PROGRAMME: STRATEGY, BUSINESS AND STRUCTURE PLANS 1995-1996, at 4.
424. *Id.* at 4.
425. HEALTH SYSTEMS TRUST, HST UPDATE, Issue 16, at 15 (1996).
426. SEXUAL OFFENSES ACT NO. 23 OF 1957.
427. *Id.* § 14(1). Similarly, § 14(3) of this act makes it is an offense for any woman to have or attempt to have sexual intercourse with a boy under 16 years of age, or to commit or attempt to commit an immoral or indecent act with a boy or girl under the age of 19 years, or to solicit such an act.
428. SEXUAL OFFENSES ACT NO. 23 OF 1957, § 14(2).
429. *Id.* § 14(2)(a).
430. *Id.* § 14(2)(c).