SOUTH AFRICAN LAW COMMISSION

REPORT

PROJECT 114

PUBLICATION OF DIVORCE PROCEEDINGS: SECTION 12 OF THE DIVORCE ACT (ACT 70 OF 1979)

August 2002

TO DR P M MADUNA, MP, MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT

I am honoured to submit to you in terms of section 7(1) of the South African Law Commission Act, 1973 (Act 19 of 1973), for your consideration, the Commission's report on the publication of divorce proceedings.

Y MOKGORO
CHAIRPERSON: SOUTH AFRICAN LAW COMMISSION
AUGUST 2002

INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

The members of the Commission are -

The Honourable Madam Justice Y Mokgoro (Chairperson)
The Honourable Madam Justice L Mailula (Vice-Chairperson)
Adv J J Gauntlett SC
Prof C E Hoexter (additional member)
The Honourable Mr Justice C T Howie
Prof I P Maithufi (full-time member)
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The project leader responsible for the investigation is Professor C E Hoexter. The researchers are Ms A M Louw and Ms P Matshelo-Busakwe.

SUMMARY OF RECOMMENDATIONS

The South African media are, in terms of sec 12 of the **Divorce Act** 70 of 1979, prohibited from publishing any particulars of a divorce action or any information which comes to light in the course of such an action other than the names of the parties to a divorce action, the fact that a divorce action between the parties is pending in a court of law and the judgment or order of the court. The prohibition does not apply to the publication of particulars or information for the purposes of the administration of justice, in a *bona fide* law report, or for the advancement of or use in a particular profession or science.

However, since the provision does not have extra-territorial operation, the foreign media who are allowed to attend proceedings in courts are unrestricted in their reportage of South African divorce proceedings. Since South African citizens have access to the foreign media and the foreign press, the initial purpose of the prohibition is defeated.

There are furthermore clear indications that at present the South African media are not complying with sec 12 of the **Divorce Act**. An important reason why the section is not adhered to is that it is seen as being unconstitutional. South Africa has a **Constitution** with a **Bill of Rights** which entrenches, *inter alia*, the right to freedom of speech, freedom of information and the rights to privacy and dignity. These rights are interactive and have to be balanced. Sec 28(2) of the **Constitution** furthermore specifically protects the rights of children. Sec 12 currently provides no discretion to the court to determine whether or in what respects the case should be held in camera or whether media disclosure should be permitted.

It seems undesirable that legitimate areas of non-disclosure (such as aspects involving the interests of minor children) should be endangered by the current non-compliance with the provision, and at the same time that Acts of Parliament should be viewed as unenforceable and accordingly safely to be flouted.

The Commission therefore recommends that sec 12 of the **Divorce Act,** 1979 be amended to allow a court the discretion to:

a) make an order to lift the general ban on publication and to grant leave to any party to publish such particulars of a divorce or such information or evidence which has come to light in the course of such an action, as the court may deem fit; and

b) close the court at any stage of the proceedings where there is a likelihood that harm may result to a child.

The amended section will also make it an offence to furnish particulars of a divorce action or any information or evidence which emerges during the course of such an action unlawfully to third parties.

The Commission's proposed amendment of section 12 of the **Divorce Act**, 1979 reads as follows:

BILL

To amend the Divorce Act, 1979 so as to make provision for a judicial discretion to lift the general statutory prohibition on the publication of divorce proceedings and to close the proceedings in specific circumstances

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows: -

Amendment of section 12 of Act 70 of 1979

Section 12 of the Divorce Act, 1979 is hereby amended by the substitution for section 12 of the following section:

"12. Limitation of publication of particulars of divorce action

(1) **[Except for making known or publishing the names of the parties to a divorce action, or that a divorce action between the parties is pending in a court of law, or the judgment or order of the court, no person shall make known in public or publish for the information of the public or any section of the public any particulars of a divorce action or any information which comes to light in the course of such an action.]**

(a) A person may not publish for the information of the public or any section of

the public any particulars of a divorce action or any information or evidence which emerges in the course of such an action, except with the leave of the court.

(b) Notwithstanding the provisions of paragraph (1)(a), any person may, unless the court orders otherwise, publish in relation to a divorce action the following particulars:

(i) The names of the parties to a divorce action;
(ii) That a divorce action between the parties is pending in a court of law; and
(iii) The order of the court.

(2) The provisions of subsection (1) shall not apply with reference to the publication of particulars or information-

(a) for the purposes of the administration of justice;
(b) in a *bona fide* law report which does not form part of any other publication than a series of reports of the proceedings in courts of law; or
(c) for the advancement of or use in a particular profession or science.

(3) If at any stage during the divorce proceedings it appears to the court that there is a likelihood that harm may result to a person under the age of eighteen as a result of the hearing of any evidence, the court may, of its own accord or on application by any interested party, make an order directing that the proceedings be held behind closed doors, and that no person be present unless his or her presence is necessary in connection with the court proceedings, or he or she is the legal representative of any person whose presence is necessary as aforesaid.

(4) The provisions of subsections (1),(2) and (3) shall *mutatis mutandis* apply with reference to proceedings relating to the enforcement or variation of any order made in terms of this Act as well as in relation to any enquiry by a Family Advocate in terms of the **Mediation in Certain Divorce Matters Act**, 1987.

(5) Any person who, in contravention of this section, publishes any particulars or information or evidence or unlawfully provides any such particulars or information or evidence to a third party shall be guilty of an offence and liable on conviction to a fine **[not exceeding one thousand rand]** or to imprisonment for a period not exceeding one year or both such fine and such imprisonment."

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CHAPTER 1

INTRODUCTION

a) Background

1.1 On 23 January 1998 the South African Law Commission considered and approved the inclusion in its programme of an investigation entitled "Publication of divorce proceedings (Sec 12 of the **Divorce Act** of 1979 (Act no 70 of 1979))". [1]

1.2 The purpose of the investigation was to review sec 12 of the **Divorce Act**,[2] especially in so far as its constitutionality is concerned,[3] in order to establish whether the section should be repealed or amended.

b) Exposition of the problem

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1 Sixty First Meeting of the Working Committee held on 23 January 1998. The Minister of Justice authorised the inclusion of the investigation on 30 January 1998.

2 Act 70 of 1979 (hereinafter referred to as "the **Divorce Act**").

3 See discussion in Chapter 3 below.

1.3 Sec 12 [4] prohibits publication of any particulars of a divorce action or any information which comes to light in the course of such an action other than the publication of the names of the parties to a divorce action, the fact that a divorce action between the parties is pending in a court of law, and the judgment or order of the court. The prohibition does not apply to the publication of particulars or information for the purposes of the administration of justice, in a *bona fide* law report, or for the advancement of or use in a particular profession or science.[5]

1.4 Since 1979, when this provision was enacted, many important developments in the media have taken place in South Africa and abroad which have had an impact on the effect of sec 12. The Internet, CNN and foreign newspapers have become freely available in South Africa, a fact which has ensured that the country is no longer isolated from the outside world.

1.5 The South African media are, in terms of sec 12, prohibited from disclosing any facet of divorce proceedings in this country, apart from the limited aspects referred to above. However, since the provision does not have extra-territorial operation, the foreign media who are allowed to attend the proceedings are unrestricted in their reportage of South African divorce proceedings. Since South African citizens have access to the foreign media and the press, the initial purpose of the prohibition is defeated.[6]

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4 For a full discussion of sec 12, see Chapter 2 below.

5 See further Burchell J **Personality Rights and Freedom of Expression: The Modern Actio Injuriarum** Juta & Co Ltd Kenwyn 1998 (hereinafter referred to as "Burchell") at 425.

6 See the excerpt from an editorial that appeared in **Beeld**, 20/3/96, as referred to in Neethling J "Die Reg op Privaatheid, die Pers en Artikel 12 van die Wet op Egskeiding 70 van 1979: National Media Limited v Jooste 1996 (3) SA 262 (A)" 1996 **THRHR** 528 (hereinafter referred to as "Neethling") at 532 (our translation from the Afrikaans):

"**Mandela case**

The **Divorce Act** provides that no information which is disclosed in the course of divorce proceedings may be published. We (Beeld) approached our media report on the Mandela divorce from that viewpoint and with the necessary legal advice attempted to provide our readers with the necessary information.

The majority of the South African media, however, decided to report extensively on the case and in some instances even reported verbally on the proceedings. The SABC - the public broadcaster - reported intimate details of the case to millions of people in its news bulletins.

As a result of modern technology South Africa is no longer excluded from the rest of the world.

1.6 There are furthermore clear indications that at present the South African media are not complying with sec 12 of the **Divorce Act**.

International radio and television networks, also broadcasting to South Africa, published the evidence in court through their news bulletins.

If the South African media had reported on the case in accordance with the provisions of the Act, the foreign media services such as BBC and CNN would have had an unfair advantage over their South African counterparts.

It is therefore possible for millions of people in other countries to know what transpires in a court in South Africa while South African citizens are kept in the dark by their own media services. This is an absurd situation in which it is difficult to reconcile the law with developing technology..."

1.7 An important reason why the section is not adhered to is that it is seen[7] as being unconstitutional. South Africa has a **Constitution** [8] with a **Bill of Rights** which entrenches, *inter alia*, the right to freedom of speech, freedom of information and the rights to privacy and dignity. These rights are interactive and have to be balanced. Since sec 12 is a pre-constitutional statutory provision, its constitutionality needs to be considered in terms of these rights.

1.8 An important point to note is that sec 12 gives no discretion to the court to determine whether or in what respects the case should be held *in camera* or whether media disclosure should be permitted or prohibited.

1.9 The question which arose was therefore whether, in regulating the publication of "particulars" of divorce proceedings in terms which appear sweeping and inflexible, sec 12 was constitutional; and if not, what reform should be undertaken.

1.10 The question was regarded as a pressing one. It seemed undesirable that legitimate areas of non-disclosure (such as aspects involving the interests of minor children) could be endangered by the current non-compliance with the provision, and at the same time that Acts of Parliament were being viewed as unenforceable and accordingly safely to be flouted.

c) Consultation process

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7 Philippa Garson "Mandela v Mandela" **Mail and Guardian** 22/3/96.

8 The **Constitution of the Republic of South Africa**, Act 108 of 1996 (hereinafter referred to as "the **Constitution**") which came into operation on 4 February 1997.

1.11 In accordance with the Commission's policy of consulting as widely as possible, every effort was made to publicise the investigation and to elicit responses from interested persons and organisations as well as from the members of the public.

1.12 On 8 May 2001 the Commission published a Discussion Paper [9] entitled "Publication of Divorce Proceedings: Section 12 of the Divorce Act (Act 70 of 1979)". In Discussion Paper 98 the present position regarding the publication of divorce proceedings in South Africa was discussed, the constitutionality of sec 12 of the **Divorce Act** was considered and the position in other foreign jurisdictions investigated. The paper set out four options proposing ways in which the abovementioned problems could be dealt with.[10]

1.13 Three hundred discussion papers were distributed to identified interested persons and bodies. The availability of the discussion paper was also publicised through a notice in the Government Gazette and by way of a media statement circulated to the public media. A copy of the discussion paper was also made available on the Commission's Internet site.

1.14 Nineteen persons and institutions acted on the Commission's invitation and submitted written comment to Discussion paper 98. [11] A number of publications and radio programmes covered the investigation, set out suggestions and drew attention to the fact that the public had been invited to comment on the proposals.[12]

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9 Discussion Paper 98.

10 For a discussion of the options see Chapter 5 below.

11 A list of respondents is enclosed as Annexure A.

12 As far as the Commission could ascertain the following articles appeared in the press: "Divorce details ban may be relaxed" **The Mercury** 8 May 2001; Koerante mag dalk gou oor egskeidings berig" **Die Burger** 10 May 2001; "Media mag dalk gou oor egskeidings skryf" **Volksblad** 10 May 2001; " Skeisake straks "oop". Verbod op mediadekking miskien gou uit wetboek" **Beeld** 10 May 2001; "Ban on publishing divorce proceedings could be lifted" **Sunday Times** 13 May 2001; "Let the media decide" Editorial **Sunday Times** 13 May 2001; "Press bashing all too familiar" **The Star** 17 May 2001; "Press law on divorce challenged" **The Star** 27 May 2001; "Divorces may be in the press again" **The Star**, 28 May 2001; "Covering divorces" Editorial **The Star** 5 June 2001; "Even vultures must eat" **Mail & Guardian** 15 to 21 June 2001.

1.15 On 16 July 2002 the researchers and project leader of the investigation had the opportunity to meet with six members of the legal fraternity[13] to discuss the practical implications of the different options.

1.16 Many of the submissions and discussions included constructive criticisms and helpful suggestions as to how the proposals of the Commission could be improved. The Commission duly considered each contribution and incorporated the ideas put forward where appropriate.

1.17 In this report the position as set out in the Discussion Paper will be stated, followed by an overview and evaluation of the submissions received and, in conclusion, the recommendations of the Commission.

13 The Honourable Madam Justice A de Vos, The Honourable Mr Justice E Jordaan, Adv Karin Foulkes-Jones SC, Mr Billy Guldenfinger, Mr Alex Costa and the Family Advocate, Mr Gerhard van Zyl. The Commission records its gratitude to the participants for their willingness to assist in the investigation and for their valuable advice.

CHAPTER 2

THE PRESENT POSITION IN SOUTH AFRICA

2.1 The general rule in South Africa is that the courts are open to the public [14] and that the public therefore has a general right of access to judicial proceedings.[15] At common law, this principle applies equally to matrimonial causes as to any other contest between the parties.[16] The

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14 Bell, Dewar and Hall Attorneys **Kelsey Stuart's The Newspaperman's Guide to the Law** 5th ed Butterworths Durban 1990 (hereinafter referred to as "Bell, Dewar and Hall") at 184. In **R v Maharaj** 1960 (4) SA 256 (N) Broome JP held that it is a principle of justice as administered in this country that trials must take place in open court and that judicial officers must decide them solely upon evidence heard in open court. See **Magquabi v Mafundityala** 1979 (4) SA 106 (E) at 110 for a reference to Lord Hewat in **R v Sussex Justices** (1924) 1 KB 256 at 299 where he stated: "Justice must not only be done, but must manifestly and undoubtedly be seen to be done". See **Transvaal Industrial Foods Ltd v BMM Process (Pty) Ltd** 1973 (1) SA 726 (A), where it was held that argument should be oral and in open court.

15 Ms Zelda Moletsane, Acting President: Central Divorce Court indicated in a letter dated 4/1/2000 that when the evidence of a minor child is required during divorce proceedings, it is usually heard in Chambers by the presiding judge (Evidence in Chambers is regarded as evidence given in open court).

16 **S v Leepile (1)** 1986 (2) SA 333 (W) at 337H, referring to the Lord Chancellor in **Scott v Scott** 1913 AC 417 at 438. See, however, the inroads made by legislation introduced since 1926 in this regard in all the common-law countries.

rule is furthermore extended so as to include the press (acting as surrogates of the public), which means that journalists are free to attend trials and to publish reports on the proceedings.[17]

17 Burns Y M **Freedom of the Press: A Comparative Legal Survey** Thesis submitted in accordance with the requirements for the degree of Doctor of Laws at the University of South Africa June 1984 (hereinafter referred to as "Burns") at 408. See **Kingswell v Robinson; Kingswell v Argus Co Ltd** 1913 WLD 129 and **Kavanagh v Argus Printing and Publishing Co** 1939 WLD 284 for the general right to publish judicial proceedings.

2.2 These rules are recognised by the statutes governing the courts. [18] The **Supreme Court Act** prescribes that all proceedings, ie both criminal and civil proceedings, must take place in open court unless the court orders otherwise.[19] The Act does not enumerate any special cases, and the matter is left to the discretion of the presiding officer. In **Financial Mail (Pty) Ltd v Registrar of Insurance** [20] the court held that

> [i]n civil matters the court must decide whether in the particular circumstances of a specific occasion such a 'special case' is constituted as to justify a departure from what has actually been the absolute rule in parts of the country for more than one and a half centuries and in none for less than a century, namely, that the civil court never closes its doors to the public.[21]

Sec 16 does, however, preserve all provisions regarding privacy appearing in other legislation.

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18 Sec 16 of the **Supreme Court Act** 59 of 1959 (hereinafter referred to as "the **Supreme Court Act**"). The **Magistrates' Courts Act** 32 of 1944 lays down that civil and criminal proceedings are to be held in open court (Sec 5 (1) of the **Act**, as amended, see also sec 152 of the **Criminal Procedure Act** 51 of 1977), but a magistrate may direct that a civil trial be held behind closed doors in the interest of good order and public morals (Burns at 409 (Sec 5 (2)). In criminal proceedings there are certain circumstances in which the judicial officer may direct that the public or media be excluded, or that the trial be held behind closed doors. The instances in which such an order is made by the presiding officer usually relate to the protection of the identity of a juvenile offender, the concealing of the identity of a complainant in cases of indecency or extortion, and the interest of the state in security or the administration of justice.

19 See also sec 34 of the **Constitution** which states:
Access to courts
34. Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

20 1966 (2) SA 219 (W) at 221.

21 See further Marais J at 220-221 where he sets out the history leading to sec 16 : Until 1813, in consonance with the then universal practice in Holland (Van der Linden, **Koopmans Handboek** III, 1806) judgments and orders of the Cape courts had to be pronounced in public, but evidence and argument in trial cases were heard *in camera*, with only the parties and their lawyers in attendance. In 1813 the British Governor of the Cape issued a proclamation requiring all judicial proceedings in future to be carried on with open doors as a matter of "essential utility, as well as the dignity of the administration of justice"; it would imprint on the minds of the inhabitants of the Colony the confidence that equal justice was administered to all in the most certain, most speedy and least burdensome manner. This rule was reaffirmed by sec 32 of the **Cape Charter of Justice** of 1832. The Judges had no discretion in the matter and the Cape Supreme Court so interpreted it. In the case of **W v W**, 7 S.C. 104, De Villiers CJ refused an application to have a divorce heard *in camera* on the ground that the evidence was of such a nature that publicity was to be avoided. This enactment remained in force in the Cape Colony and province until 1959. Much the same position obtained in the colony of Natal. The Transvaal and Free State conformed to this procedure in 1902. In 1959, by sec 16 of the **Supreme Court Act** 59 of 1959, Parliament restored the matter to the discretion of the presiding judge.

2.3 Provisions prohibiting the publication of proceedings are, for example, sec 8 of the **Child Care Act**,[22] sec 10(4) of the **Maintenance Act** [23] and secs 153 and 154 of the **Criminal Procedure Act.**[24] Another such example is that of sec 12 of the **Divorce Act**.

2.4 Sec 12 of the **Divorce Act** 70 of 1979 provides:

> (1) Except for making known or publishing the names of the parties to a divorce action, or that a divorce action between the parties is pending in a court of law, or the judgment or order of the court, no person shall make known in public or publish for the information of the public or any section of the public any particulars of a divorce action or any information which comes to light in the course of such an action.
>
> (2) The provisions of subsection (1) shall not apply with reference to the publication of particulars or information -
>
> (a) for the purposes of the administration of justice;
>
> (b) in a *bona fide* law report which does not form part of any other publication than a series of reports of the proceedings in courts of law; or
>
> (c) for the advancement of or use in a particular profession or science.
>
> (3) The provisions of subsections (1) and (2) shall *mutatis mutandis* apply with reference to proceedings relating to the enforcement or variation of any order made in terms of this Act as well as in relation to any enquiry instituted by a Family Advocate in terms of the **Mediation in Certain Divorce Matters Act**, 1987.

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22 Act 74 of 1983.

23 Act 99 of 1998. See also sec 36 of this Act regarding the publication of information in respect of children.

24 Act 51 of 1977.

(4) Any person who in contravention of this section publishes any particulars or information shall be guilty of an offence and liable on conviction to a fine not exceeding one thousand rand or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

2.5 This section does not restrict the right of access of members of the public to the courts. However, the right to make known or publish information about divorce proceedings[25] is curtailed.

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25 A ' divorce action' is defined in terms of sec 1(1) of the **Divorce Act** as:

"an action by which a decree of divorce or other relief in connection therewith is applied for, and includes–

(a) an application *pendente lite* for an interdict or for the interim custody of, or access to, a minor child of the marriage concerned or for the payment of maintenance; or

(b) an application for a contribution towards the costs of such action or to institute such action, or make such application, *informa pauperis,* or for the substituted service of a process in, or the edictal citation of a party to, such action or such application."

Sec 1(2) of the **Divorce Act** furthermore states:
"For the purposes of this Act a divorce action shall be deemed to be instituted on the date on which the

summons is issued or the notice of motion is filed or the notion is delivered in tersm of the rules of the court, as the case may be."

2.6 Facts that may not be published may include evidence placed on record by way of affidavit or evidence led *viva voce* in court during the divorce action, the contents of the pleadings filed, statements by counsel and informal observations by the judge. It should be borne in mind that settlement agreements may be attached to final orders of divorce and made part thereof. If this occurs, the terms of the settlement may be quoted in full.[26]

2.7 Bell, Dewar and Hall[27] have the following to say about the meaning of the word "public" in this context:

> Despite the fact that in the case of **S v Rossouw**[28] it was held that a single person is capable of being a member of the public, it is believed that an offence in terms of sec 12 of the **Divorce Act** will only be committed when publication has been made to a substantial portion of the community as an aggregate but not in its organised capacity. It is believed that, in their order context and interpreted *eiusdem generis*, the words "any section of the public" mean an identifiable group of reasonable size in relation to the public.

2.8 The penalty in terms of subsec (4) is a fine not exceeding one thousand rand or

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26 Bell, Dewar & Hall at 196. See also Rule 62(7) of the **Supreme Court Act** 59 of 1959 regarding access to court records: only completed matters may be accessed by the public.

27 Bell, Dewar and Hall at 196.

28 1971 (3) SA 222 (T).

imprisonment for a period not exceeding one year. [29]

2.9 The history of sec 12 can be traced back to a previous investigation conducted by the South African Law Commission in 1974 into the law of divorce and all matters incidental thereto.[30] This investigation was aimed at the improvement of divorce law in general, but also included a section on the publication of particulars concerning divorce proceedings.

2.10 The majority of those who forwarded comments to the Commission regarding publication of proceedings were in favour of a total ban on the publication of all particulars except the fact that divorce proceedings between the parties concerned had been instituted and that a decree of divorce

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29 Sec 1(2) of the **Adjustment of Fines Act** 101 of 1991 states *inter alia* that where a law provides for a fine of a prescribed amount or for a prescribed maximum period of imprisonment, this amount is calculated in accordance with the ratio mentioned in sec 1(1)(a) of this Act. Sec 1(1)(a) states that the amount of the maximum fine is the amount which in relation to the said period of imprisonment is in the same ratio as the ratio between the fine which the Minister of Justice may from time to time determine in terms of sec 92(1)(b) of the **Magistrates' Courts Act** 32 of 1944 and the period of imprisonment as determined in sec 92 (1) (a) of that Act where the court is not a court of a regional division. Currently the maximum fine so determined is R20 000 or 12 months' imprisonment (GN R3441 of 31 December 1992).

30 South African Law Commission **Report on the Law of Divorce and Matters Incidental Thereto** RP 57/1978 (Project 3 of 1974) (hereinafter referred to as "SALC Divorce Report").

had been granted. Representations were also made to the Commission to the effect that divorce proceedings (especially those in which children are involved) ought to be held *in camera*.

2.11 The reason given for the proposed exception, in the case of divorce proceedings, to the general rules of open courts and freely permitted publication, was that a prohibition on publication would eliminate sensational reporting of intimate, personal matters which could be prejudicial to the parties and particularly to the children of the marriage.[31]

2.12 It was argued that a divorce is a highly personal matter. The public has an interest in the matter only in so far as the status of the parties is concerned. The intimate relationship of the parties and the causes of their marriage breakdown do not concern the public. Such details are published merely to stimulate the public taste for sensation.

2.13 A report[32] on the law of divorce and matters incidental thereto was compiled by the Commission, together with a Bill incorporating the recommendations of the Commission. Clause 12 of the Bill dealt with the limitation of the publication of divorce proceedings.[33] The **Divorce Act** was

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31 This was also the reason stipulated by the Minister of Justice at the Second Reading of the Divorce Bill, **Hansard** Wednesday, 25 April 1979 para 4996.

32 SALC Divorce Report.

33 The clause initially made provision for divorce proceedings to be held *in camera*, but after representations made by the Press Council to the Minister of Justice a compromise was reached making provision for sec

passed and commenced operation on 1 July 1979. Clause 12 of the Bill became sec 12 of the Act.

12 as it reads today.

2.14 The enactment of sec 12 in 1979 was an attempt to reflect the *boni mores* prevalent in South Africa at the time. According to the South African Law Commission's report, the object which the Commission set itself was to recommend realistic rules for the law of divorce which were in keeping with present-day needs of society in general, and which did not lose sight of society's conception of what was reasonable and just. [34] The exception made in sec 12 was intended to protect both the spouses and their children against unwanted publicity. The interest which third parties have in knowing whether or not two particular persons are still married to each other, was also protected. [35]

2.15 During the 20-year period since its enactment, sec 12 has generally drawn favourable comment. [36] It has furthermore never been the subject of a court case in South Africa.[37]

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34 **Hansard** Wednesday 25 April 1979 column 4997.

35 Cronjé D S P **The South African Law of Persons and Family Law** 3rd ed Butterworths Durban 1994 (hereinafter referred to as "Cronjé") at 300.

36 Bell Dewar and Hall at 195 state in their discussion of sec 12 that "the right to make known or publish information about divorce proceedings is, rightly it is submitted, substantially curtailed (our underlining). Cronjé in discussing sec 12 states (at 300): "It is clear that spouses and children are being protected against publication of particulars of the history of the marriage that caused the divorce...Besides the fact that the publication of the particulars of a divorce action is an offence punishable by a fine or term of imprisonment in terms of sec 12(4), such publication would probably amount to an infringement of the privacy of the parties concerned, and should thus constitute a ground for instituting an action for satisfaction". Neethling J, Potgieter J M & Visser P J **Neethling's Law of Personality** Butterworths Durban 1997 (hereinafter referred to as "Neethling, Visser & Potgieter") at 275 n 241 refers to the comment above with approval; See also Neethling at 528.

37 The application for an interdict in the Spencercase being withdrawn at the last minute. See discussion below.

2.16 However, as stated in Chapter 1, there has been a general contravention of this section by the media and newspapers in recent years, as was evident during the former President Mandela's divorce action in 1996[38] and that of Earl and Countess Spencer in 1997.[39] The other recent example is that of the divorce action concerning Dr Naresh Denny Veeran and Mrs Veeran[40] heard in the Durban High Court.

2.17 These events gave rise to numerous reports, discussions and arguments in the newspapers.[41] Conflicting comments and views have been expressed in this regard:

(a) Prof Kobus van Rooyen, former chairperson of the Appeal Board on Publications and the SA Media Board is of the opinion that sec 12 is overly strict and the application of the criminal law inappropriate in this situation. [42] The media ought to be allowed to set their own standards and take responsibility for themselves.[43]

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38 The former President, Nelson Mandela, instituted a divorce action against his wife, Winnie Madikizela Mandela, in 1996. Particulars concerning the Mandela divorce were published by the media in South Africa in contravention of sec 12 of the **Divorce Act**.

39 Earl Spencer instituted a divorce action against his wife, Countess Spencer, in 1997 in the Cape High Court. Lady Spencer demanded a 3.75 million pound clean-break settlement but under the terms of the divorce settlement, financial details were not divulged. The parties settled and both withdrew allegations made against each other during the case, stating that their primary concern was the welfare of their children. They appealed for privacy. However, intimate details of the Spencer case, like that of the Mandelas, were published by the South African and foreign media.

40 In this case Mrs Veeran initially filed an intention to defend the divorce action but later withdrew it and the divorce was granted unopposed. Particulars concerning their divorce were however published.

41 Some examples are as follows: Philippa Garson “Mandela vs Mandela” **Mail and Guardian** 22/3/96; Estelle Ellis “Graaf Spencer se skeisaak begin” **Die Burger** 25/11/97 and 27/11/97; ”Spencer vra interdik teen pers” **Beeld** 27/11/97; Estelle Ellis “Skikking bereik in skeisaak” **Die Burger** 2/12/97; Eben Engelbrecht "Straf vir media oor egskeidingsberigte is ‘erg argais’” **Rapport** 30/11/1997; “From bouquets to brickbats” **The Sunday Times on the Web Plus** 11/1/98; “Lockwood eis nog geld na ‘skei-sirkus’” **Beeld** 6/10/98; Ken Vernon “Boesak and the Blond” **Sunday Times** 21/3/1999; Bonny Schoonakker “Heartbroken Barnard skips SA” **Sunday Times** 9/4/2000; Niyanta Singh and Buddy Naidu “Lotus FM Chief gets his divorce unopposed” **The Post** 7/6/2000.

42 Eben Engelbrecht "Straf vir media oor egskeidingsberigte is 'erg argaies'” **Rapport** 30/11/1997 at 6.

43 See also Phillippa Garson, who stated in the report "Mandela versus Mandela" in the **Mail and Guardian** on 22 March 1996 that "The flagrant contravention by the media this week of a section of the Divorce Act raised questions about whether that aspect of the legislation is unconstitutional.” and “A member of Mandela's legal team said: '...the team would not want to enforce a ban whose constitutionality was up for question ...' "

(b) Neethling,[44] in discussing an editorial in **Beeld** newspaper[45] which explained the position of the press, stated that whatever the merits of these arguments may be, it is a given fact that the mass media, including **Beeld**, not only participated wilfully in the unlawful transgression of the right to privacy, but also in the commission of an offence and thereby contributed to the culture of contempt of the law which is currently prevailing in South Africa. He stated that if publication of reports of this kind becomes accepted practice, South Africans will have to steel themselves against the onslaughts of the mass media.[46]

2.18 It is clear that there are different opinions. The Commission invited comment on the extent of the problem. See Chapter 6 for a discussion of the comments received.

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44 Neethling at 533.

45 See above at 2 n 6.

46 Constitutional expert Dennis Davis was quoted in **Mail and Guardian** article supra as saying: "..it could be argued that the provision was unconstitutional in that it infringed on the right to freedom of expression. However, he said he found it "unbelievable" that such a provision, no matter how controversial, was so brazenly breached. "Being President gives you a reduced right to privacy but it can't possibly destroy your privacy completely. He might be the most famous person in the world but he is not public property."

CHAPTER 3

CONSTITUTIONAL IMPLICATIONS OF SECTION 12 OF THE DIVORCE ACT 70 OF 1979

(a) Introduction

3.1 Sec 2 of the **Constitution** states that the **Constitution** is the supreme law of the Republic, that any law or conduct inconsistent with it is invalid, and that the obligations imposed by it must be fulfilled.

3.2 The purpose of this Chapter is thus to determine whether sec 12 of the **Divorce Act,** which predates the **Constitution**, is in conflict with the provisions of the **Bill of Rights** as set out in the **Constitution**.

3.3 The different competing constitutional rights relevant to this matter, as entrenched in the **Bill of Rights**, are the right to privacy (sec 14), the right to human dignity (sec 10) and the right to freedom of expression (sec 16). [47] These rights are interactive, and need to be balanced. Reference should also be made to sec 28(2) of the **Constitution**, which states that a child's best interests are

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47 See also sec 32 (1) of the **Constitution:**
Access to information
32. (1) Everyone has the right of access to (a) any information held by the state; and (b) any information that is held by another person and that is required for the exercise or protection of any rights.
It should be noted that sec 239(b)(ii) of the final **Constitution** expressly excludes from the ambit of "organ of state" courts and judicial officers. The right to privacy is furthermore likely to constitute an acceptable limitation on sec 32 in certain cases. See discussion of the right to privacy below. See also the **Promotion of Access to Information Act** 2 of 2000.

of paramount importance in every matter concerning the child.

3.4 The purpose of this chapter is therefore to determine:

(a) the content and scope of the right to freedom of expression set out in sec 16 of the **Constitution**;

(b) whether sec 12 of the **Divorce Act** infringes on the right to freedom of expression; and if so,

(c) whether the infringement can be justified in accordance with the criteria of sec 36 of the **Constitution** with special reference to the rights to privacy, dignity and the best interests of children.

(b) Content and scope of the right to freedom of expression

3.5 The rights entrenched in the Bill of Rights are formulated in general and abstract terms. The meaning of these provisions will therefore depend on the context in which they are used, and their application to particular situations will necessarily be a matter of argument and controversy.[48]

3.6 Sec 39 of the **Constitution** contains an interpretation clause which pertains to the Bill of Rights.[49] It states that when the Bill of Rights is interpreted a court must promote the values which

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48 De Waal J, Currie I & Erasmus G **The Bill of Rights Handbook** 3rd ed Juta & Co Kenwyn 2000 (hereinafter referred to as "De Waal et al") at 117.

49 Sec 39 of the **Constitution** reads as follows:

Interpretation of Bill of Rights

39. (1) When interpreting the Bill of Rights, a court, tribunal or forum -

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
(b) must consider international law; and
(c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

underlie an open and democratic society based on human dignity, freedom and equality. This means that an exercise is required analogous to that of ascertaining the *boni mores* or legal convictions of the community in the law of delict.

3.7 The section furthermore requires reference for purposes of interpretation to international human rights law in general. This is not confined to instruments that are binding on South Africa.[50] A person may also rely on rights conferred by legislation, the common law or customary law. Such rights may not, however, be inconsistent with the Bill of Rights.[51]

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50 Dugard in Van Wyk D et al (eds) **Rights and Constitutionalism: The New South African Legal Order** Juta & Co Ltd 1994 at 193 as referred to in **S v Makwanyane** 1995 (3) SA 391 (CC) (footnote 46 of the judgment) notes that a court may not only consider treaties to which South Africa is a party or customary rules that have been accepted by South African courts, but also international conventions, international custom, the general principles of law recognised by civilised nations, judicial decisions and teachings of the most highly qualified publicists of the various nations, etc.

51 De Waal et al at 131.

3.8 Although sec 39 provides a starting-point when trying to interpret the Bill of Rights, it requires interpretation itself. The Constitutional Court has therefore laid down guidelines as to how the **Constitution** in general and the **Bill of Rights** in particular should be interpreted.[52] It should be interpreted by first of all determining the literal meaning of the text itself [53] and identifying the purpose or underlying values of the right. [54] A generous interpretation should furthermore be given to the text, [55] and the history of South Africa and the desire not to repeat it should be taken into account.[56] Finally, the context of a constitutional provision should be considered, since the **Constitution** is to be read as a whole and not as if it consists of a series of individual provisions to be read in isolation.[57]

3.9 Sec 16 of the **Constitution** protects the right to freedom of expression.[58] It protects free

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52 Guidelines as to interpretation and references to court cases as per De Waal et al at 131 and further.

53 **S v Zuma** 1995 (2) SA 642 (CC) para 17. Constitutional disputes can, however, seldom be resolved with reference to the literal meaning of the provisions alone. The literal meaning should therefore not be regarded as conclusive.

54 **S v Makwanyane** supra at para 9. It therefore requires a value judgement to be made about which purposes are important and protected by the **Constitution** and which not. The scope of the right is increased by this value-based method of interpretation (Devenish at 269). While the values have to be objectively determined by reference to the aspirations, expectations and sensitivities of the people, they may not be equated with public opinion (**S v Makwanyane** supra).

55 **S v Mhlungu** 1995 (3) SA 867 (CC); **S v Makwanyane** supra; **S v Zuma** supra. However, the use of generous interpretation may sometimes result in a strained interpretation of the text. Where a conflict arises between a purposive interpretation and a generous interpretation, the court will always choose the purposive approach.

56 **Brink v Kitshoff NO** 1996 (4) SA 197 (CC) para 40. Statements made by politicians during negotiations and the drafting process are of little value in the interpretation. This should, however, be distinguished from the preparatory work (called *travaux preparatoires* in the case of a treaty) to which some significance is attached, for example the reports of the various technical committees.

57 **S v Makwanyane** supra, **Ferreira v Levin NO** 1996 (1) SA 984 (CC) para 82. **Soobramoney v Minister of Health, KwaZulu-Natal** 1998 (1) SA 765 (CC) para 16. Contextual interpretation should be used with caution. It cannot be used to limit rights. The Bill of Rights envisages a two-stage approach: first interpretation, then limitation. The balancing of rights against each other or against the public interest must take place in terms of the criteria laid down in sec 36. In the first stage, context may only be used to establish the purpose or meaning of a provision. See **Bernstein v Bester NNO** 1996 (2) SA 751 (CC) at 128. Contextual interpretation may also not be used to identify and focus only on the most relevant right. In terms of constitutional supremacy, a court must test a challenged law against all possibly relevant provisions of the Bill of Rights, whether the applicant relies on them or not.

58 Sec 16 of the **Constitution** provides:

expression generally, but also specifically includes freedom of the press and the media.[59] Information on this subject in our common law is limited since it is only recently that the mass media have started to play a significant role. However, at common law the public has, in general, a right of access to judicial proceedings.[60]

3.10 Although the list of values that underpins freedom of expression is not closed, three main

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Freedom of expression

16. (1) Everyone has the right to freedom of expression, which includes -

(a) freedom of the press and other media;
(b) freedom to receive or impart information or ideas;
(c) freedom of artistic creativity; and
(d) academic freedom and freedom of scientific research.

59 See also sec 34 of the **Constitution**. Access to courts by the media and the public can be regarded as inherent in the freedom of expression.

60 **Rv Maharaj** supra. **Financial Mail (Pty) Ltd v Registrar of Insurance** supra at 221 (in general the civil court never closes its doors to the public).

justifications for freedom of expression have been advanced:[61]

61 Marcus G & Spitz D "Expression " in Chaskalson M, Kentridge J, Klaaren J, Marcus G, Spitz D & Woolman S **Constitutional Law of South Africa** Juta & Co Ltd Kenwyn 1996 (Revision Service 5 1999) (hereinafter referred to as "Chaskalson et al") at 20–6; Burchell 1-2. The three main justifications for freedom of expression can be subdivided further into two broad types -- those that stress that the freedom in question will produce desirable consequences for society (the instrumental, utilitarian or consequentialist theory) and those that stress responsibility, individual autonomy or human dignity rather than the consequences for society (the constitutive, intrinsic or non-consequentialist theory). A further subdivision can be made between those who regard freedom of expression as absolute and those who openly acknowledge that freedom of expression is relative, that is, who acknowledge that it must be balanced against the exercise of other rights.

(a) That the free exchange of ideas is the best way of attaining the truth (the marketplace of ideas theory); [62]

(b) Freedom of expression is a vital part of the democratic process; [63] and

(c) It is a manifestation of individual autonomy and self-fulfilment.

3.11 Although the usual rationale for the constitutional protection of press freedom is the important contribution made by the press to establishing and maintaining an open and democratic society[64] in a political sense, family law and its administration are also of major public and social importance. [65]

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62 **Gardener v Whitaker** 1995 (2) SA 672 (E) at 687 I-J; 1994 (5) BCLR 19(E) at 34A. See also **R v Keegstra** [1990] 3 SCR 697 at 729, 3 CRR (ZA) 193, where it was stated that freedom of expression extends to all expression, however unpopular, distasteful or contrary to the mainstream.

63 The democratic process is furthered by the formation of an informed citizenry.

64 De Waal et al at 284.

65 In **Edmonton Journal v Alberta (Attorney- General)** (1989) 64 DLR 4th 577 (SCC) (hereinafter referred to as "**Edmonton Journal** case") Wilson J explains the difference between the abstract and contextual approach to the Charter's application. He prefers the second approach. The values in conflict would therefore be the public interest in protecting the privacy of the litigants in matrimonial disputes against the public interest in protecting the right of the public to an open court process. This would be more appropriate than assessing the relative importance of the competing values in the abstract or at large.

The public accordingly has a legitimate interest in knowing what the law is and how the courts are applying it.[66] This is particularly true as regards the issue of child protection.[67]

3.12 It is the vital function of the media to inform the public about every aspect of public, political, social and economic activity and thus to contribute to the formation of public opinion.[68]

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66 McCall I W P The Honourable **Publicity in Family Law Cases**:**Proposals for Amendments to the Family Law Act sec 121** Report to the Attorney General for the Commonwealth of Australia April 1997 (hereinafter referred to as "McCall") at 48.

67 Wall The Honourable Mr Justice "Publicity in Children Cases - A Personal View" March [1995] **Fam Law** at 137 states that a wide and well-informed public perception of how the courts operate in the field of child protection is surely in the interests of the children we seek to protect.

68 **National Media Ltd v Bogoshi** 1998 (4) SA 1196 (SCA) at 1209H-J.

3.13 In so far as the courts are concerned, this interest is rooted in the need to maintain an effective evidentiary process and to ensure a judiciary that behaves fairly and that is sensitive to the values of society. It is also important to promote a shared sense that courts operate with integrity and dispense justice.[69]

3.14 The public does not resort to official law reports and legal journals to inform itself. Nor generally do members of the public attend court proceedings. They rely on the press to supply them with information. But for the newspapers, the public would have little or no knowledge of what transpires in the country's courts. In a sense this validates the media claim of functioning as surrogates for the public. Media reporting therefore "contributes to public understanding of the rule of law". [70]

3.15 In addition to the interest of the public at large, the interests of litigants should also be noted. They may feel vindicated by the public airing of injustice they feel they have suffered alone and without support from the community. For every litigant concerned about the adverse impact of publicity on his or her image in the community, there may be another equally concerned about public vindication and community support. [71]

3.16 The state is able, by virtue of its greater power, to lay down conditions restricting the rights and freedoms of its subordinates in the public intererest.[72] It stands to reason, especially in light of the entrenchment of freedom of speech in the **Constitution**, that the public interest in information should not be narrowly construed.[73] On the other hand this does not imply that the protection thereof

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69 In the **Edmonton Journal** case supra at 578 b & c it was noted that judges may disclose outmoded attitudes which may affect their decisions. The public should be assured that the judiciary is capable of overcoming its own social biases and that it reflects the values of the community.

70 Kriegler J in **Botha v Minister van Wet en Orde** 1990 (3) SA 937 (W) at 941, referring to **Richmond Newspapers Inc et al v Commonwealth of Virginia et al** (US Supreme Court Reports vol 65 Lawyers 2nd ed at 973). Ackermann J in **S v Leepile (4)** 1986 (3) SA 661 (W) at 664 refers to the same quote with approval.

71 **Edmonton Journal** case supra at 588-9.

72 Neethling, Potgieter & Visser at 266.

73 Neethling, Potgieter & Visser at 268. However, "public interest" was defined narrowly in **Financial Mail (Pty) Ltd v Sage Holdings Ltd** 1993 (2) SA 451 (A).

is unlimited. It is for instance limited by the right to privacy of persons.[74]

3.17 The question is therefore: To what extent is the publication of private facts concerning individuals justified in the public interest? Two virtually identical tests are being applied in the

74 For a discussion of the history of the right to free expression in South Africa and the question regarding defamation, see below para 3.42.

American and German law.[75] The public has a legitimate right to be informed of:

(a) newsworthy events and

(b) the activities or lives of personalities in the public eye.[76]

3.18 Public figures are persons who, by virtue of their status, office, occupation, conduct and crimes, grant the public a legitimate interest in information regarding not only their public life and activities, but also, to a certain extent, their private lives.[77] They include statesmen, sporting heroes, business magnates, artists, etc.[78]

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75 Neethling, Potgieter & Visser at 268 and the references made therein.

76 Burchell at 416.

77 Neethling states at 269 that the term "public figure" should be restricted to persons who have become known in public to such an extent that they arouse public interest without necessarily being connected to a newsworthy event. In other words these people are newsworthy in themselves. See also Bell, Dewar & Hall at 79.

78 Neethling , Potgieter & Visser at 269. Burchell at 416.

3.19 A distinction should be made between the public and private lives of these people.[79] It cannot simply be accepted that a legitimate interest in information exists also with regard to the private life of public figures and that only their most intimate life is protected against publicity.[80] In principle the private life of these persons should also be protected against publicity.[81] On the other hand it is quite conceivable that the public may in certain circumstances have a legitimate interest in information concerning even the sordid intimate life of, for example, a politician. [82] Thus it may be concluded that all the circumstances surrounding the publication of the statement invading the plaintiff's privacy must be considered in determining whether the statement is being made for the public benefit.

3.20 Even public figures who have voluntarily sought the public gaze and have, to some extent, forfeited their right to privacy, have a residual realm of solitude where they have a right to be let alone.[83] However, public figures, by the very nature of their public life and duty, often find it necessary to use the press to communicate on public issues.[84]

3.21 Where a person is not a public figure it seems that there is no good reason for disclosures to be made concerning his or her private way of life, standard of living, place of dwelling and the like.[85]

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79 As far as people holding public office are concerned, their private lives must reflect their fitness to hold such office. A person's behaviour at home can be a guide to his or her standard of morality in public life. **Hansard** Thursday, 3 May 1979 at 5587.

80 Neethling, Potgieter & Visser at 269. Burchell at 416.

81 Ibid.

82 One example was noted in a newspaper article by Ken Vernon, "Boesak and the Blond" **Sunday Times** 21 March 1999, where he states: "Ironically, one of the first people to blow the whistle on Boesak's extravagant lifestyle was Elna." Documents revealed in Boesak's fraud trial show that when she filed for divorce from Boesak in 1992, Elna gave a detailed explanation of Boesak's lifestyle and how money was spent. He was subsequently found guilty on fraud charges and is currently serving a jail sentence. The public furthermore has an interest in the fact that political figures should uphold high moral standards in accordance with their callings even where their conduct is not criminal.

83 Burchell at 416.

84 Mostert F "Public figures and privacy" **De Rebus** November 1997 (hereinafter referred to as "Mostert") at 726.

85 McQuoid-Mason D J **The Law of Privacy in South Africa** Juta & Company Ltd Johannesburg 1978 (hereinafter referred to as “McQuoid Mason”) at 177.

3.22 Disclosures concerning a person's family (eg his or her spouse or children) would seem *prima facie* to constitute an invasion of the privacy of members of the family directly concerned. Such disclosures, however, will not be actionable if they are in the public interest, and can be considered as being a valid news item.[86]

c) Limitation of the right to freedom of expression

86 McQuoid-Mason at 180.

3.23 The right to freedom of speech and expression, like the other fundamental rights and freedoms entrenched in the Bill of Rights, is not absolute.[87] Boundaries are set by the rights of others and by the legitimate needs of society. Sec 36 of the South African **Constitution** is a general limitation clause[88] and sets out specific criteria for the limitation of the fundamental rights in the Bill

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87 Chaskalson et al at 20-1.

88 Sec 36 of the **Constitution** provides:

Limitation of rights

36. (1) The rights in the Bill of Rights may be limited only in terms of 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, taking into account relevant factors, including -

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution,

of Rights.[89]

3.24 The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. There is, however, no absolute standard that can be laid down for determining reasonableness and necessity. Whether the purpose of the limitation is reasonable or necessary will depend on the circumstances in a case-by-case application.[90]

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no law may limit any right entrenched in the Bill of Rights.

87 De Waal et al at 132.

90 **S v Makwanyane** supra at 708.

3.25 Constitutional analysis under sec 36 is a two-stage approach:[91] First it must be determined whether the challenged law has in fact infringed the fundamental right. If the right has been infringed, the state or the person relying on the validity of the legislation may then demonstrate that the infringement of the right is nevertheless permissible in terms of the criteria for a legitimate limitation of rights laid down in sec 36.[92] The policy indulging the infringement must be reasonable and justifiable in a free and open democracy.[93]

3.26 Rights cannot be overridden simply on the basis that the general welfare will be served by the restriction. The reasons for limiting a right need to be exceptionally strong, as opposed to concerns that are trivial.[94] They should also be in harmony with the intrinsic values set out in the **Constitution**. [95]

3.27 In **S v Makwanyane** [96] the Constitutional Court set out its approach as follows:

> In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.

3.28 In the present investigation it is the delicate balance between freedom of the press and the

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91 **S v Zuma** supra; Chaskalson et al 12-3. Woolman S "Coetzee: The Limitations of Justice Sach's Concurrence" 1996 **SAJHR** Vol 12 Part 1 99. Chaskalson et al at 20-1. **S v Makwanyane** supra at para 100.

92 **S v Makwanyane** supra at para 102.

93 Devenish G E "The Limitation Clause Revisited - The Limitation of Rights in the 1996 Constitution" 1998 **Obiter** 256 (hereinafter referred to as "Devenish") at 261.

94 **Edmonton Journal** case supra at 612.

95 Devenish at 363.

96 Supra. This approach has been largely codified in sec 36 of the **Constitution**. See also **Qozeleni v Minister of Law and Order** 1994 (3) SA 625 (E) at 640; **S v Manamela** 2000 (5) BCLR 491 (CC) at 519G-520A. **National Coalition for Gay and Lesbian Equality v Minister of Justice** 1999 (1) SA 6 (CC). **Director of Public Prosecutions: Cape of Good Hope v Bathgate** 2000(2) SA 535(C); 2000 (2) BCLR 151 (C).

protection of individual privacy, reputation and dignity which has to be determined. In determining the current modes of thought and values of the community, the *boni mores* or convictions of the community regarding right and wrong are of particular importance. This is a test analogous to that of the unlawfulness inquiry under the common-law *actio iniuriarum*.[97]

i) Does sec 12 of the Divorce Act infringe the right to freedom of expression/press freedom ?

3.29 It may be argued that sec 12 infringes the right to freedom of expression in so far as its purpose and its effect are concerned.

97 Burchell at 416.

3.30 The following arguments are relevant in this regard: [98]

(a) The section prohibits a form of expressive activity. It restricts the freedom of the press and other media and the freedom to receive or impart information or ideas.

(b) It interferes with the well-established principle that the courts must be open to public scrutiny and its processes open to publicity.

(c) The prohibition is of a wide and undiscriminating ambit. It includes matters pertaining to custody of children, access to children, division of property and the payment of maintenance. It does so irrespective whether matters of public interest are raised or whether particular concerns (such as the interests of children) are in jeopardy. [99]

(d) The section does not make provision for the exercise of a judicial discretion in appropriate circumstances. It constitutes an absolute prohibition, subject to limited exceptions which make no provision for the freedom of the press and media or the right to receive or impart information or ideas. It applies to "any particulars of a divorce action or any information which comes to light in the course of such an

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98 In Canada in the **Edmonton Journal** case supra Cory J, Dickson C J C and Lamer J concurred that the provisions of secs 30(l) and (2) of the **Judicature Act,** 1980 (RSA) (which is comparable to sec 12 of the South African **Divorce Act**) contravene sec 2(b) of the **Canadian Charter of Rights and Freedoms**, and that the legislation is not a reasonable limitation under sec 1 of the Charter.

99 This argument was reiterated by Director General in the Office of the Premier, Northern Province who further stated that the section doesn't take into consideration the fact that it is possible for particulars of a divorce matter to be matters of public interest. It does not even provide the media with the platform to dispute that applied assumption.

action"[100] irrespective of the nature of the particulars or information concerned or the parties involved.

(e) The prohibition is of indefinite duration.

Taking into account the arguments set out above, it appears that the restriction of the publication of proceedings does infringe the right to freedom of expression.

ii) Can the infringement be justified in accordance with the criteria set out in sec 36 of the Constitution?

3.31 A law may legitimately limit a right in the Bill of Rights if it is :

(a) a law of general application that is

(b) reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

100 Sec 12 is to be contrasted with the flexible discretion to be found in sec 16 of the **Supreme Court Act** 59 of 1959.

3.32 Appropriate evidence must be led to justify a limitation of a right in accordance with the criteria laid down in sec 36. [101]

(aa) Is sec 12 a "law of general application"?

3.33 This requirement is the expression of the basic principle of the rule of law. It seems that all forms of legislation (delegated as well as original) would qualify as law, as would the common law and customary law.[102] Sec 12 is a law of general application.

(bb) Is the limitation in sec 12 a reasonable and justifiable limitation in an open and democratic society based on human dignity, equality and freedom?

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101 De Waal et al at 135 state that a court cannot determine in the abstract whether a limitation is reasonable or justifiable. This determination often requires evidence, such as sociological or statistical data, on the impact that the legislative restriction has on society.

102 De Waal et al at 135.

3.34 Any limitation of the constitutional right to freedom of the press in terms of sec 16 will have to be brought within the provisions of sec 36(1) of the **Constitution**.[103]

3.35 It should, however, be noted that the inquiry into the justification in a constitutional context is, in essence, the same as the inquiry into the justification under the common law. Both focus on the balancing of fundamental interests within a broad idea of reasonableness.

3.36 In the recent Supreme Court of Appeal judgment in **National Media v Bogoshi**[104] it has been acknowledged that the standard defences excluding unlawfulness do not necessarily cover all possible policy issues, and so the distinction between constitutional justification in terms of the limitation clause and common-law justifications, in terms of a broad reasonableness criterion, is becoming increasingly blurred.[105] The jurisprudence on the application of standards of reasonableness in the common law and jurisprudence in terms of the limitation clause under sec 36 of the **Constitution** will inform each other.[106]

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103 McQuoid Mason D J "Privacy" in Chaskalson et al at 18–18.

104 Supra.

105 Burchell at 388. In **Bogoshi** supra at 1212G -1213C it was stated that the test for the reasonableness of the publication demands a high degree of circumspection on the part of editors. This test includes factors such as: (a) the time and manner of the publication; (b) the "status" or degree of public concern in the information; (c) its political importance; (d) the tone of the publication; (e) reliability of the source; (f) the steps taken to verify the information, whether the person referred to has been given an opportunity to verify, comment on or reply to the allegation. In Burchell J "Media Freedom of Expression Scores as Strict Liability Receives the Red Card: **National Media Ltd v Bogoshi**" 1999 **SALJ** 1 (hereinafter referred to as "Burchell **SALJ**") Burchell adds two further factors for determining the bounds of unlawfulness, namely (a) the nature of the publication; and (b) ethical responsibilities laid down for the media in codes of conduct assumed voluntarily or required by statute. On the other hand Neethling, Potgieter & Visser at 271-272 and Burchell at 416 hold that the common law recognises a number of limited exceptions to the general rule of privacy. Although one is dependent on the general legal convictions of the community *(boni mores*) in all cases, there are certain factors, especially apparent in foreign legal sources, which can assist in the application of this criterion: (a) the fact that the plaintiff is a public figure; (b) the fact that the plaintiff is involved in a newsworthy event; (c) the extent or intensity of the violating conduct; (d) the fact that the holder of the right exposes his or her privacy to the risk of violation; (e) the motive, disposition or purpose with which the defendant acts; (f) the fact that the private facts were obtained by a wrongful act of intrusion; (g) the importance of the person involved and his or her status in society; (h) the time-span between the occurrence of a newsworthy event and the publication thereof; (i) the degree of identifiability of the person whose privacy is disclosed; and (j) the fact that the publication of private facts was contrary to a court order or statutory provision. It is submitted that such a provision reflects the *boni mores* and is consequently in the public interest.

106 Burchell **SALJ** at 16 submits that it is clear that the common law of privacy in South Africa will still provide the lion's share. In **Bernstein v Bester NNO** supra, Ackermann J relied heavily on common-law interpretations of the scope of privacy in deciding whether secs 417 and 418 of the **Companies Act** 61 of 1973 infringed sec 13 of the **Constitution of the Republic of South Africa**, Act 200 of 1993 (hereinafter

referred to as "the **Interim Constitution**"), which protected the right to privacy and the right not to be subjected to the seizure of private possessions or the violation of private communications (as does sec 14 of the **Constitution**). McQuoid Mason states in Chaskalson at 18—2 that the courts will inevitably retain those existing common-law actions which are in harmony with the values of the **Constitution**.

3.37 However, in **Bernstein v Bester NO,**[107] in deciding whether secs 417 and 418 of the **Companies Act** [108] infringed sec 13 of the **Interim Constitution**, Ackermann J held that caution must be exercised when attempting to project common-law principles onto the interpretation of fundamental rights and their limitation.[109] He drew a distinction between the two-stage constitutional inquiry into whether a right has been infringed and whether the infringement is justified, and the single inquiry under the common law, as to whether an unlawful infringement of a right has taken place.

3.38 To satisfy the limitation test, it must be shown that the law in question serves a contitutionally acceptable purpose and that there is sufficient proportionality between the harm done by the law (the infringement of the right) and the benefits it is designed to achieve (the purpose of the law). As stated above, the standard reference used when the Constitutional Court considers the legitimacy of a limitation was set out in **S v Makwanyane**[110] and included in sec 36 of the **Constitution**. The following five factors identified as making up the proportionality enquiry in this case will be discussed:

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107 Supra. See also Chaskalson at 18 –1 and Burchell at 373.

108 Act 61 of 1973.

109 Burchell at 384, quoting **Bernstein v Bester** supra.

110 **Sv Makwanyane** supra para 104. See above at para 3.27.

(a) nature of the right
(b) the importance of the purpose of the limitation
(c) the nature and extent of the limitation
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

3.39 The factors mentioned are not exhaustive. They are key considerations, to be used in conjunction with any other relevant factors, in the overall determination whether a limitation is justifiable.[111] Once a court has examined each of the factors, it must then weigh up what the factors have revealed about the purpose, effects and importance of the infringing legislation on the one hand; and on the other, the nature and effect of the infringement caused by the legislation (a proportionality test) to determine its constitutionality. The court must engage in a balancing exercise and arrive at a global judgment on proportionality, and not adhere mechanically to a sequential check-list.[112]

(i) nature of the right (sec 36(1)(a))

3.40 Some rights may weigh more heavily than others. It will therefore be more difficult to justify an infringement of such rights than other, less weighty rights. A court must assess what the importance of a particular right is in the overall constitutional scheme.[113]

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111 **S v Manamela** supra at 508E and sec 36(1) of the **Constitution**.

112 **S v Makwanyane** supra at para 104. **S v Manamela** supra at 508B.

113 De Waal et al at 143.

3.41 There is no doubt that press freedom is of crucial importance in any society, and this reality has been acknowledged not only in the South African **Constitution**[114] but also for many years by the South African courts.[115]

114 The specific textual enumeration of the press and other media in sec 16 of the **Constitution** signals the importance which the guarantee ascribes to the role of these institutions in protecting and contributing to an open and democratic society. Chaskalson et al 20–20 and references therein to **Government of the Republic of South Africa v Sunday Times Newspaper** 1995 (2) SA 221 (T) at 227I-228A.

115 Burchell **SALJ** at 4.

3.42 However, this was not always the case. Burchell[116] discusses the fact that the general principle of media freedom was dealt damaging blows by both the legislature and the judiciary during the years of apartheid. [117] Recently, however, in **National Media Ltd v Bogoshi,**[118] the Supreme Court of Appeal reaffirmed its commitment to freedom of expression, including media freedom, holding that it was an essential foundation of a democratic society.[119] The right is furthermore

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116 Burchell **SALJ** at 1.

117 In **Pakendorf v De Flamingh** 1982 (3) SA 146 (A) the Appellate Division interpreted the common law to impose strict (no-fault) liability on the mass media for defamation, not including the individual in this strict regimen. A further judicial blow to freedom of expression was delivered when in **Neethling v Du Preez : Neethling v The Weekly Mail** 1994 (1) SA 708 (A) the Appellate Division saddled the defendant (including the media) with the burden of proving the set defences to a defamation action on a preponderance of probabilities.

118 Supra; It held that the approach in **Pakendorf** was clearly wrong and must be overruled. The strict liability rule for defamation was replaced with the rule that the crucial test was whether the publication was reasonable.

119 Burchell at 4; See especially Cameron J in **Holomisa v Argus Newspapers Ltd** 1996 (2) SA 588 (W); 1996 (6) BCLR 836 (W). Joffe J in **Government of the Republic of South Africa v Sunday Times Newspaper** supra at 227-8, cited with approval by Hefer JA in **National Media Ltd v Bogoshi** supra.

recognised in international and national instruments.[120]

3.43 An important point was, however, made by Wilson J in the **Edmonton case,**[121] where he stated that it might be that freedom of expression has greater value in a political context than it does in the context of disclosure of the details of a matrimonial dispute. This should be taken into account in finding a fair compromise between competing values.[122]

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120 For instance, art 19 of the **United Nations Universal Declaration of Human Rights**, 1948 stresses the right "to receive and impart information and ideas through any media...."; article 9 of the **African Charter on Human and People's Rights,** 1981 provides for the "right to receive information". See also art 9 of the **International Covenant on Civil and Political Rights**, 1966, art 13 of the **American Convention on Human Rights** and sec 16 (1)(b) of the **Constitution**. See also art 21(1)(a) of the **Constitution of the Republic of Ghana** 1992.

121 Supra at 584a.

122 See however the discussion above in para 3.11 regarding a citizen's interest in knowing how courts deal with matrimonial disputes.

3.44 In South Africa, in **Holomisa v Argus Newspapers,**[123] Cameron J recognised the special role of the press in a constitutional democracy but stated that this does not mean that the journalists must enjoy special constitutional immunity beyond that accorded to ordinary citizens.[124] Cameron J described the idea of "press exceptionalism" not only as unconvincing but also as dangerous. The right of the media to communicate information and comment, while obviously crucial in a modern democracy, should be no greater than that of an ordinary citizen to communicate.[125] Media freedom should therefore not constitute a plea for privileged status but rather a recognition of the right of the public to be informed. [126]

3.45 Freedom of expression is therefore also subject to reasonable and justifiable limits which, in turn, must also reflect the dictates of freedom, equality, democracy and dignity. The exercise of the right to freedom of expression may conflict with the protection of equality or privacy, and the appropriate balance between individual reputation, dignity and privacy and freedom of expression has to be found.[127]

3.46 Mostert argues that one could furthermore expect of the media themselves to live up to the standards of professional integrity which they rightly demand of others: sensationalist or ill-considered reporting has enormous potential to damage the administration of justice. It is in the interests of the media not to devalue a process in which they participate, but to play their part in ensuring that the fair administration of justice in open court does not itself become devalued.

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123 Supra.

124 Ibid 855-6. Cameron J referred to the following argument of Ronald Dworkin in a **Matter of Principle** 1985 386-7: "But if free speech is justified on principle, then it would be outrageous to suppose that journalists should have special protection not available to others, because that would claim that they are, as individuals, more important or worthier of more concern than others."

125 Burchell states at 17 that while freedom of expression is a vital component of both the democratic process and individual self-fulfilment, it is nevertheless merely a facet of human dignity. To elevate freedom of expression to an absolute right or even to a position of pre-eminence in a hierarchy of rights is to distract attention from the true origin of the right freely to express one's views or opinions through words or conduct. It is part of the dignity that is accorded to thinking and sentient human beings.

126 Chaskalson at 20—20; Burchell at 5 and the references made there. In **Neethling v Du Preez : Neethling v The Weekly Mail** supra at 777G-H Hoexter JA stated : "At common law there is no general "newspaper privilege". In **Argus Printing and Publishing Co Ltd v Inkatha Freedom Party** 1993 (3) SA 579 (A) Grosskopf JA notes that "...freedom of speech can never be an absolute". For the opposite view see Chaskalson at 20—20.

127 Burchell at 18.

Voyeuristic journalism, which profits from prurient interest in lurid details, is out of keeping with a society that honours common decency, civility and respect. [128]

ii) importance of the purpose of the limitation (sec 36(1)(b))

128 Mostert at 726.

3.47 To be reasonable, the limitation of a right must serve an important purpose. The purpose should be one that is worthwhile and one that all reasonable citizens would agree to be compellingly important in a constitutional democracy.[129]

3.48 Sec 12 of the **Divorce Act** constitutes a limitation of the right to a free press as set out in sec 16 of the **Constitution**. It should, however, be noted that sec 12 is at the same time a confirmation of the rights to dignity and privacy which are also enshrined in the **Constitution** in secs 10[130] and 14[131] respectively, as well as sec 28(2) of the **Constitution** dealing with the child's best interests.

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129 De Waal et al at 145.

130 Sec 10 of the **Constitution** provides

10. Human dignity

Everyone has inherent dignity and the right to have their dignity respected and protected.

131 Sec 14 of the **Constitution** provides:

14. Privacy

Although the **Constitution** was not yet in force in 1979 when the **Divorce Act** was enacted, it was indeed to protect the common-law rights of dignity and privacy of spouses and their children that this section was originally instituted.[132]

Everyone has the right to privacy, which includes the right not to have -

(a) their person or home searched;
(b) their property searched;
(c) their possession seized; or
(d) the privacy of their communications infringed.

132 See also sec 8 (3) of the **Child Care Act** 74 of 1983 which deals with the rights of children in children's courts. It reads as follows:

> No person shall publish in any manner whatever any information relating to proceedings in a children's court which reveals or may reveal the identity of any child who is or was concerned in those proceedings: Provided that the Minister or the commissioner who presides or presided at those proceedings may authorize the publication of so much of the said information as he may

deem fit if the publication thereof would in his opinion be just and equitable and in the interest of any particular person.

3.49 The right to dignity is one of the core constitutional rights. The Constitutional Court describes the right to dignity and the right to life as the most important human rights.[133] The court further points out that the right to dignity is intricately linked with other human rights and is therefore the foundation[134] and the source[135] of many of the other rights that are specifically entrenched in the Bill of Rights.[136] The right to dignity could perhaps be seen as a naturally all-embracing idea and as an important underpinning of any human-rights ideology.[137] The right to a good name or reputation forms part of the right to human dignity as entrenched in sec 10 of the **Constitution**.

3.50 In many cases the courts also seem to regard the invasion of a person's privacy as an impairment of *dignitas*, although it has been argued that the concept is much wider. The difficulties attendant upon defining the limits[138] of such a right to privacy have led some writers to suggest that a separate right to privacy is not warranted.[139] In certain instances privacy is equated with other personality interests.[140]

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133 **S v Makwanyane** supra at para 144.

134 In **S v Makwanyane** supra (para 328) O'Regan J holds that the recognition of a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right is therefore the foundation of many of the other rights that are specifically entrenched in the Bill of Rights.

135 In **S v Makwanyane** supra (para 144) Chaskalson P states that the rights to life and dignity are the most important rights, and the source of all other personal rights in the Bill of Rights. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others". See also Devenish at 369.

136 The then South African Appellate Division and the Constitutional Court have regarded privacy as a part of the individual's right to dignity or *dignitas*. See **Jansen van Vuuren NNO v Kruger** 1993 (4) SA 842 (A). Neethling, Potgieter & Visser at 37 holds a dissenting view that in the case of an infringement of privacy, the question whether someone's good name has been infringed is irrelevant. Burchell **SALJ** at 16 is of the opinion that the balance to be struck between one person's reputation or dignity and another's freedom of expression (or for that matter under the **Constitution** in South Africa) is a true balance between equally important facets of human dignity.

137 Burchell at 367.

138 Burchell, referring to Privacy Vol I and II edited by R Wacks in **The International Library of Essays in Law and Legal Theory** (1993), states at 365 that the vagueness of the concept has actually undermined the importance of the value of privacy and impeded its effective legal protection.

139 McQuoid-Mason at 11.

140 Neethling, Potgieter & Visser at 36. For instance:

Good name: The public disclosure of embarrassing private facts (which under American law falls within the sphere of privacy protection) will infringe someone's good name if the esteem with which he is held in

society is diminished. Privacy, on the other hand, is violated by the disclosure of facts contrary to the individual's determination and will for privacy. Such facts need not be defamatory in nature. In the case of an infringement of privacy, the question whether someone's good name has also been infringed is irrelevant.

Dignity: In South African case law privacy is often incorrectly identified with dignity. An infringement of dignity plays no role in deciding whether there has been a violation of privacy. The same act may, however, violate privacy as well as dignity. Reference is made to cases where the right to privacy has been acknowledged as an independent personality right: **Jansen van Vuuren NNO v Kruger** supra at 849; **Jooste v National Media Ltd** supra; **Financial Mail (Pty) Ltd v Sage Holdings Ltd** supra; **Motor Industry Fund Administrators (Pty) Ltd v Janit ,** supra (confirmed on appeal: 1995 (4) SA 293 (A)); **O'Keeffe v Argus Printing and Publishing Co Ltd** 1954 (3) SA 244 (C); **Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk** 1977 (4) SA 376 (T). *Dignitas* was restricted to dignity or honour as a personality interest and negated the independent existence of a right to privacy and that insult consequently forms an element of this *iniuria*. The equation of privacy and dignity should be rejected. It is not only unacceptable from a theoretical perspective, but is also contrary to both Roman and Roman-Dutch law.

3.51 The courts in South Africa, without specifically defining the concept,[141] have experienced little difficulty in recognizing the right to privacy as one of the rights of personality which they are prepared to protect.[142]

3.52 The right to privacy is protected in terms of both our common law[143] and the **Constitution**.[144]

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141 Neethling, Potgieter & Visser at 36 give the following definition: Privacy is an individual condition of life characterised by exclusion from publicity. This condition includes all those personal facts which the person himself at the relevant time determines to be excluded from the knowledge of outsiders and in respect of which he evidences a will for privacy.This definition was accepted by Olivier J in **Jooste v National Media Ltd** 1994 (2) SA 634 (K) at 645-F. See Neethling J & Potgieter JM “Aspekte van die Reg op Privaatheid: **Jooste v National Media** 1994 (2) SA 634 (C); **Motor Industry Fund Administrators (Pty) Ltd v Janit** 1994 (3) SA 56 (W)” 1994 **THRHR** 703 (hereinafter referred to as "Neethling & Potgieter") at 707.

142 **S v A** 1971 (2) SA 293 (T) at 297: '[T]here can be no doubt that a person's right to privacy is one of "...those real rights, those rights in related to personality, which every free man is entitled to enjoy".

143 In terms of the common law every person has personality rights such as the right to dignity, autonomy and bodily integrity (**Stoffberg v Elliot** 1923 CPD 148; **Lymbery v Jefferies** 1925 AD 235; **Lampert v Hefer** 1955 2 SA 507 (A); **Esterhuizen v Administrator, Transvaal** 1957 (3) SA 710 (T)). See also Neethling at 38. For a common-law action for invasion of privacy based on the *actio iniuriarium* to succeed, the plaintiff must prove the following essential elements: (i) wrongfulness (ii) intention (animus) and (iii) impairment of

The Constitutional Court in **Bernstein v Bester** emphasised the connection between the common law and constitutional rights to privacy.[145]

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the plaintiff's personality rights (in this instance, privacy). See Chaskalson at 18—2 and the references there. Marcus & Spitz in Chaskalson at 20—60 states that sec 8 puts it beyond doubt that fundamental rights may be invoked in disputes between private parties which depend for their determination on the rules of the common law.

144 Secs 14 (a), (b) and (c) seek to protect an individual from unlawful searches and seizures. It is only sec 14(d) which accommodates a broader protection of privacy approaching that covered by the common law *actio iniuriarum* in South African law.

145 See discussion above para 3.37.

3.53 The right to privacy is also dealt with in various international instruments, i.e. the **Universal Declaration of Human Rights**,[146] the **UN Convention on the Rights of the Child**[147] and the

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146 Article 12 of the **United Nations Universal Declaration of Human Rights**, 1948 provides:

> No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

According to Burchell at 371, the word 'arbitrary' points towards some acceptance that certain invasions of privacy may be regarded as reasonable and others as unreasonable. In fact, the **Universal Declaration** recognizes limits to the exercise of rights. These limits are defined as those 'determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society' (Article 29).

147 Article 16 of the **United Nations Convention on the Rights of the Child**, 1989 provides:

European Convention on Human Rights.[148]

3.54 The right to privacy is a valuable and advanced aspect of personality. Sociologists and psychologists agree that a person has a fundamental need for privacy.[149] An individual therefore has an interest in the protection of his privacy. In accordance with the principle that a legal subject personally determines the private nature of facts, he must also exhibit the will or desire that facts

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1. No child shall be subject to arbitrary or unlawful interference with his or her privacy, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

2. The child has the right to the protection of the law against such interference or attacks.

148 Article 8 of the **European Convention on Human Rights and Fundamental Freedoms** provides:

1. Everyone has the right to respect for privacy and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of this rights and freedoms of others.

See also the **International Covenant on Civil and Political Rights**, 1966 (art 17); the **European Convention for Human Rights and Fundamental Freedoms** (art 8), the **American Convention on Human Rights** (art 11), and the **American Declaration on the Rights and Duties of Man** (arts 5,9 and 10) as referred to by McQuoid Mason above.

149 Neethling , Potgieter & Visser at 33.

should be kept private.[150] If such a will for privacy is absent, then a person usually has no interest in legal protection of his privacy.

150 Neethling, Potgieter & Visser at 35.

3.55 The crucial question is how to determine which facts are private in nature. In the case of an infringement of privacy, the question whether someone's good name has also been infringed is not necessarily relevant.[151]

3.56 For convenience the right to privacy can be divided into two categories:[152]

(a) privacy rights protecting personal autonomy (preventing intrusions into one's private life);

(b) privacy rights protecting information (preventing disclosures and access to information).[153]

3.57 It is the second category that is of interest in this investigation. Privacy rights protecting information generally limit the ability of people to gain, publish, disclose or use information about others without their consent.[154] Individuals have control not only over who communicates with them

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151 Neethling, Potgieter & Visser at 37.

152 Prosser (as referred to by Burchell at 395) identifies four categories, which are not necessarily watertight or exhaustive, as appropriate for American law: (1) unreasonable intrusion into the private sphere; (ii) public disclosure of private facts; (iii) appropriation of name or likeness; and (iv) false light cases.

153 **Financial Mail (Pty) Ltd v Sage Holdings Ltd** supra at 462F. Myburg J in **Motor Industry Fund Administrators (Pty) Ltd v Janit** supra at 60H held that an invasion of the right to privacy may take two forms: (i) the unlawful intrusion upon the privacy of another; and (ii) the unlawful publication of private facts about a person. See also **Bernstein v Bester NO** supra at 789; McQuoid-Mason at 99; Chaskalson, at 18—1and Chaskalson at 18—8.

154 Chaskalson at 18—11.

but also who has access to the flow of information about them.[155]

155 McQuoid-Mason at 99. Neethling, Potgieter & Visser at 333: "Accordingly, privacy may only be infringed by unauthorized acquaintance by outsiders with the individual or his personal affairs".

3.58 In privacy cases the plaintiff is being compensated for the hurt and humiliation suffered by him or her as a result of having his or her private life made public.[156] The rationale behind the right is that the state and other people should have nothing to do with an individual's intimate affairs.[157] Sec 12 affords protection against the embarrassment that may flow from such publicity.[158] The question is whether this is a legitimate cause.[159]

3.59 A person's sexual relationship with another is probably the most intimate of all human relationships, particularly when such relationship is consecrated by marriage, and any invasion of sexual privacy must be one of the most flagrant invasions of privacy imaginable.[160] Marriage has been described as the most intimate of human relationships. Even in English law, where invasion of privacy is not recognised as a common-law tort, the courts have recognised that any disclosures concerning what passed between a husband and wife during the marriage may be construed as an actionable breach of confidence.[161]

3.60 If evidence has to be given in open court, it may be difficult for the parties and witnesses to speak fully and frankly on sensitive matters or where questions are potentially self-incriminatory. Whereas the result of a particular case could be made public, there may be a need for evidence to

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156 Mc Quoid-Mason at 170. See also the categories of invasions arising from publication of private facts identified by Prosser as referred to by McQuoid Mason at 170: (i) the contents of private correspondence; (ii) debts; (iii) physical deformities and health; (iv) life-style; (v) childhood background; (vi) family life; (vii) past activities; (viii) embarrassing facts; (ix) confidential information; and (x) information stored in data banks.

157 **Case v Minister of Safety and Security ; Curtis v Minister of Safety and Security** 1996 (3) SA 617(CC) at para 91.

158 **Edmonton Journal** case at 590.

159 In the **Edmonton Journal** case the court discussed the possible objectives of this type of legislation. It states that the aim of safeguarding public morals has not remained pertinent in today's society. Publication of proceedings would furthermore have no effect on access to the courts since the departure from the fault-based divorce has in large measure eliminated the legal stigma attached to marriage breakdown. It is only the third objective, namely the protection of the privacy of individuals, which indeed relates to a pressing and substantial concern in a democratic society.

160 McKerron R G **The Law of Delict** 7th ed Juta & Co Ltd Cape Town 1971 at 55, as referred to by McQuoid-Mason at 183.

161 **Argyle v Argyle** [1965] 1 All ER 611, 620 at 623 as referred to by Mc Quoid-Mason at 183. See however the **Younger Report** (Cmnd 5012), July 1972 para 113: "Privacy can be used as a cloak to conceal undesirable activities: it may be easier to hide physical and sexual abuse which takes place out of sight in the home, than crimes of violence in public".

be given in private.[162]

162 Wall at 137.

3.61 One should also take note of the capacity of the media, and in particular the tabloid press, to sensationalise [163] and to trivialise sensitive issues and matters of great emotional importance to the individual concerned.[164]

3.62 The best interests of the child should always be paramount and rank higher in status than press freedom generally, or the public's right to information. The potential trauma to the child increases with the amount of information that is divulged.

3.63 Like other rights, privacy is, however, not absolute and has to be weighed against the equally important right of others to express themselves freely. The boundaries of press intrusion into lives and conduct of private individuals and public figures alike highlights the tension between this right and the right of public to be informed. The appropriate balance between freedom of expression and privacy has to be struck within the general requirement of unlawfulness (unreasonableness). [165]

3.64 According to the Constitutional Court[166] the truism that no right is to be considered absolute implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen. In the context of privacy this would mean that it is only the inner sanctum of a person, such as his or her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. Privacy is acknowledged in the truly

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163 Mr G J Van Zyl on behalf of the Head of the Office of the Family Advocate, Pretoria in a letter to the Commission dated 20 December 1999. See also letter received from Mr L C R De Welzim, Magistrate Carolina dated 17/12/1999, in which he states that sec 12 could cause intense harm and injury to children if all the dirty laundry of a divorce action were made public.

164 Wall at 137.

165 Burchell at 394. Chaskalson at 18—1. Neethling & Potgieter at 707.

166 **Bernstein v Bester** supra .

personal realm, but as a person moves into communal relations and activities, such as business and social interaction, the scope of personal space shrinks accordingly.

3.65 From the above it appears that the protection of the privacy and dignity of the individual is a legitimate and important government objective. The limitation imposed by sec 12 of the **Divorce Act** on the constitutional right to freedom of expression therefore serves an important purpose.

(iii) the nature and extent of the limitation (sec 36(1)(c))

3.66 One has to assess the way in which the limitation affects the right concerned. In general the more serious the impact of the measure on the right, the more persuasive the justification must be.[167] This assessment is a necessary part of the proportionality enquiry because proportionality means that the infringement of rights should not be more extensive than is reasonably warranted by the purpose that the limitation seeks to achieve. Determining whether the limitation does more damage to rights than is reasonable for achieving its purpose first requires an assessment of how extensive the infringement is.

3.67 The following arguments are pertinent:

(a) Sec 12 may be regarded as a blanket prohibition preventing the media from reporting on the particulars of any divorce action, and it prevents the public from obtaining information containing such particulars. Consequently it significantly reduces the openness of the courts and the ability of the press and the public to obtain information about judicial proceedings.

(b) It precludes the exercise of a judicial discretion concerning the circumstances in which a prohibition of this nature may be justified:

(i) It applies irrespective of the identity of the parties to the action.
(ii) It applies irrespective of the content of the material falling within its terms.

(c) The prohibition is of unlimited duration.

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167 De Waal et al at 147; **S v Manamela** supra at 508B.

3.68 It therefore seems that the restriction results in a very substantial infringement of the right to press freedom.[168]

(iv) the relation between the limitation and its purpose (sec 36(1)(d))

168 The Director-General of the Office of the Premier, Northern Province stressed the fact that section 12 denies anyone who might feel that it is in the public interest for the information to be known, to challenge the absolute nature of the provision and to prove public interest. There is also no time limit within which the bar remains operative. There is no platform where the facts in issue in the divorce proceedings can be made a subject of a lawful debate.

3.69 There should be proportionality between the harm done by the infringement and the beneficial purpose that the law is meant to achieve. Sec 36 does not permit a sledgehammer to be used to crack a nut. [169] There must therefore be a causal connection between the law and its purpose.

3.70 The first question to be answered is whether the law serves the purpose it is designed to serve at all. If not, it cannot be a reasonable limitation of the right. If the law contributes only marginally to achieving its purpose, the latter cannot be an adequate justification for an infringement of fundamental rights.

3.71 The duty of the court is furthermore to determine whether the legislature has overreached itself in responding, as it must, to matters of great social concern. [170]

3.72 Sec 12 addresses a concern about personal anguish and loss of dignity that may result from having embarrassing details of one's private life printed in the newspapers. However, as was stated in Chapters 1 and 2 above, sec 12 does not seem to be effective in achieving its purpose.

3.73 It is furthermore clear that while the object of sec 12 may be to protect the privacy of the parties concerned, the means chosen to further this object are not proportional to that object. The publication of evidence in matrimonial proceedings may, on occasion, cause emotional and psychological trauma or public humiliation that warrants a prohibition on publication. Sec 12 of the

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169 **S v Manamela** supra at 508G; De Waal et al at 148.

170 **S v Manamela** supra at 508G.

Divorce Act is, however, not restricted to such cases. It encompasses all divorce proceedings, presumably on the assumption that they are inevitably attended by such consequences. This is an unrealistic assumption to make.[171]

171 See the comparable **Edmonton Journal** case at 593.

3.74 By contrast, comparable statutory provisions may be upheld precisely because they afford to courts a judicial discretion which may be exercised so as to strike the appropriate balance between competing rights in particular circumstances and thus to preserve, as far as reasonably possible, the freedom of expression.[172]

3.75 The right to freedom of expression is therefore infringed more than is reasonably necessary to achieve its object. Although sec 12 is rationally connected to its purpose, it suffers from the constitutional defect of over-breadth.[173]

(v) less restrictive means to achieve the purpose (sec 36(1)(e))

3.76 A limitation must achieve benefits that are in proportion to the costs of the limitation. The question whether there are less restrictive means to achieve the government's purpose is an important part of the limitation analysis. However, it is important to realise that this is only one of the considerations. It cannot be the only consideration.[174]

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172 See eg **Dagenais v Canadian Broadcasting Corporation** (1994) 120 DLR 4th 12 (SCC). See also **Richmond Newspapers Inc et al v Commonwealth of Virginia et al 448US 555, 65 L Ed 2d 973, 100 S Ct 2814 (1980),** a decision that has been referred to with approval in our law (**S v Leepile (4)** supra) and **Botha v Minister van Wet en Orde** supra at 941B-H).

173 For a discussion of this principle see **Case v Minister of Safety and Security**; **Curtis v Minister of Safety and Security** supra. See also **Coetsee v Government of the Republic of South Africa; Matiso v Commanding Officer, Port Elizabeth Prison** 1995 (4) SA 631 (CC), 1995 (10) BCLR 1382 (CC) at 643C.

174 **S v Manamela** supra at 528H; De Waal et al at 149.

3.77 The limitation will not be proportionate if other means could be employed to achieve the same ends and will either not restrict rights at all, or will restrict them to the same extent. If a less restrictive (but equally effective) alternative method exists to achieve the purpose of the limitation, then that less restrictive method must be preferred.[175]

3.78 The following arguments are pertinent:

175 In **S v Manamela** supra at 529 it was noted that in assessing the effectiveness of alternative methods a margin of discretion is given to the state. The role of the court is not to second-guess the wisdom of policy choices made by legislators. It should take care not to dictate to the legislature unless it is satisfied that the mechanism chosen by the legislature is incompatible with the **Constitution**.

(a) The object of protecting privacy may be achieved by existing legislation. Sec 16 of the **Supreme Court Act** 59 of 1959 already permits the exercise of a judicial discretion to close proceedings in appropriate circumstances.[176]

(b) Self-regulation by the media seems to be playing an increasingly important role.[177]

(c) Comparable statutory provisions do not impose a mandatory statutory prohibition on publication. They include provision for the exercise of a judicial discretion.[178]

(i) Sec 8(3)of the **Child Care Act** [179] provides that

"No person shall publish in any manner whatever any information relating to proceedings in a children's court which reveals or may reveal the identity of any child who is or was concerned in those proceedings: Provided that the Minister or the commissioner who presides or presided at those proceedings may authorize the publication of so much of the said information as he may deem fit if the publication thereof would in his opinion be just and equitable and in the interest of any particular person."

(ii) Sec 10(4) of the **Maintenance Act** [180] provides that

"No person whose presence is not necessary shall be present at the enquiry, except with the permission of the maintenance court."

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176 See discussion of sec 16 in para 5.3 below.

177 See discussion in para 5.11 below.

178 The **Sexual Offences Act 23 of 1957** prohibits certain sexual offences. A criminal trial for such an offence is likely to involve the leading of sensitive evidence. However, the **Sexual Offences Act** does not make provision for a prohibition on publication.

179 Act 74 of 1983.

180 Act 99 of 1998.

3.79 Matters comparable to those which may arise in divorce proceedings may characterise disputes arising in intimate relationships which have comparable attributes. Nevertheless, our law provides no statutory protection against publication of those disputes other than the ordinary discretionary powers of courts to hold *in camera* proceedings.

3.80 A judicial discretion exercised in appropriate circumstances may provide an appropriate mechanism to further the objective of privacy while not unnecessarily limiting the freedom of expression.

3.81 The protection of the privacy of witnesses or children may therefore be accomplished by less sweeping measures, for instance by the exercise of discretion by the judge to prohibit publication or to hold *in camera* hearings in those few circumstances where it would be necessary to do this.

d) Conclusion

3.82 It is clear that the right to freedom of the press and the principle of open courts are firmly rooted in both our common law and statute. Pitted against these are the rights to privacy and dignity, likewise important rights entrenched in the Bill of Rights. They are all guaranteed but not unqualified rights regarded as fundamental to a free society.

3.83 It would be difficult in principle to choose one right over the other. Furthermore although sec 12 is a serious infringement of the right to press freedom, some leeway is allowed in that provision is made for exceptions to the general rule.

3.84 However, when one evaluates the effectiveness of the legislation and the question as to whether less restrictive means could have been used to the same effect, the constitutionality of sec 12 becomes uncertain. When the scope of the infringement of the right to press freedom is weighed against the purpose, importance and effect of sec 12 it would appear that sec 12 is overly broad.

3.85 For similar reasons to those set out above, the Canadian Supreme Court has invalidated a comparable provision of the Canadian Judicature as an unconstitutional limitation of the freedom of

expression.[181]

3.86 Sec 12 can therefore be regarded as an unjustifiable violation of the right to freedom of expression and should be amended or repealed.

CHAPTER 4

POSITION IN FOREIGN JURISDICTIONS

(a) United Kingdom

181 See discussion in Chapter 4 for the position in Canada.

4.1 The general rule in the United Kingdom is that a hearing is to be public. Early this century Lord Haldane established in **Scott v Scott**[182] that the right of public access to the courts was "one of principle ... turning, not on convenience, but on necessity". The freedom of the press to report on proceedings is a logical consequence of this rule. Provision is, however, made for specific exceptions.[183]

182 Supra at 438 as referred to by Lord Irvine of Lairg, The Lord Chancellor **Reporting the Courts: The Media's Rights and Responsibilities** 4th RTE/UCD Lecture University College of Dublin 14 April 1999.

183 Rule 39.2 of the new **Civil Procedure Rules in England and Wales.**

4.2 The right to privacy, which is recognised in South Africa, has not yet received recognition as a general right in English law.[184] The protection afforded to privacy by English law is piecemeal, incomplete and indirect. Concern about the adequacy of the protection of privacy has long been voiced[185] and has been the subject of three reports[186] in recent years, as well as several private members' Bills.[187]

4.3 The government's response to the various reports has been that it attaches great importance to the safeguarding of the freedom of the press, that it regards self-regulation by the media as the most practical way forward and that it does not support any other major legal reform.[188]

4.4 A Press Complaints Commission (PCC)[189] was established in January 1991 in place of the then existing Press Council. It is a non-statutory body which has been set up by the newspaper industry for purposes of self-regulation.

4.5 With the incorporation of the **European Convention on Human Rights (ECHR)** into the United Kingdom law by the **Human Rights Act** 1998,[190] the protection of privacy of the individual

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184 Glidewell LJ in **Kaye v Robertson** [1991] FSR 62: "There is no law of privacy, as such, in England and Wales." However, the results of a Guardian/ICM opinion poll in **The Guardian** on 12/11 97 revealed that almost 90% of respondents were in favour of a privacy law. Fiddick J **The Human Rights Bill [HL], Bill 119 of 1997-98: Privacy and the Press** Research paper 98/25 Home Affairs Section House of Commons Library 13 February 1998 (hereinafter referred to as "Fiddick").

185 Mostert at 726, referring to **Winfield** (1931) 47 LQR 23.

186 Justice Report **Privacy and the Law** 1970, **Younger Committee Report** Cmnd 5012 July 1972 and the **Report of the Committee on Privacy and Related Matters** Cmnd 1102 (1990) (Calcutt Committee Report). The Lord Chancellor furthermore published a Consultation Paper entitled "Infringement of Privacy", which invited comments on the proposal that the right to privacy should now be recognised as a matter of principle in the English and Scots law. The House of Commons National Heritage Select Committee published a report **Privacy and Media Intrusion** Fourth Report HC 291-1, 1993 in which the enactment is proposed of a Protection of Privacy Act that would contain civil and criminal remedies for invasion of privacy and that would not only apply to the press.

187 Burchell at 368.

188 Fiddick at 30.

189 The PCC is charged with the enforcement of a Code of Practice that was drafted by the newspaper industry's Code Committee and approved by the PCC in June 1993. The Code of Practice includes *inter alia* provisions in relation to privacy (clause 4) and certain public interest exceptions (clause 18). Members of the press have a duty to maintain the highest professional and ethical standards in accordance with the Code. A tightening up of the privacy code has resulted in a new code ratified in November 1997.

190 Although the Convention has been incorporated officially into law only recently, the UK ratified the ECHR in

has again become a hotly debated topic.[191] Once again the government has stated its policy to be to accord precedence to the freedom of the press and the media over the right to privacy of the individual,[192] but requiring the press to develop privacy codes and leaving the judges to develop a common-law protection for personal privacy.[193]

1951 and has been implementing the Convention in the UK for nearly fifty years.

191 Both the right to freedom of expression (art 10) and the right to personal privacy (art 8) are set out in the Convention.

192 Sec 12 of the **Human Rights Act** put a gloss on the protection of the right to freedom of expression in the Convention.

193 Samuels A "The Rights of Privacy and Freedom of Expression: The Drafting Challenge" 1999 **Statute Law Review,** Vol 20 66 at 71.

4.6 Despite this strong leaning towards press freedom, provision has been made, in exceptional circumstances, for restrictions to be imposed on the publication of information relating to cases heard in the Family Jurisdiction.[194] These restrictions are dealt with in a number of statutes, namely:

(i) **Judicial Proceedings (Regulation of Reports) Act, 1926**;

(ii) **Childrens Act, 1989**; and

(iii) **Administration of Justice Act, 1960;**[195]

and more recently in the new **Civil Procedure Rules**.[196]

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194 Description of position in United Kingdom as set out in McCall at 37-42.

195 See also in general the **Contempt of Court Act**, 1981, the **Defamation Act,** 1996, the **Protection from Harassment Act,** 1997 and the **Broadcasting Act,** 1996.

196 Rule 39.2 of the **Civil Procedure Rules** provides as follows:

(1) The general rule is that a hearing is to be in public....
(3) A hearing, or any part of it, may be in private if -

.....

c. it includes confidential information(including information relating to personal financial matters) and publicity would damage confidentiality;

d. a private hearing is necessary to protect the interests of any child or patient;.....

This rule adapts the **Scott v Scott** exceptions referring to wards and lunatics.

4.7 A clear distinction is drawn in the United Kingdom between cases concerning children and other cases. [197]The overall effect of the provisions set out in these statutes is that there are strict rules whereby firstly, the courts that hear cases concerning children sit in private; and secondly, the publication of proceedings concerning children is prohibited.[198]

4.8 With respect to applications for principal relief, namely divorce, nullity, etc, the court is open and publicity is permitted, but not a detailed account of the evidence being given.[199] With regard to

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197 The position in England about publication and permission to publish as interpreted by the courts is complex. In **Re Z (a Minor) (Freedom of Publication)** [1996] 1 FLR 191 Ward J set out the principles involved. These relate to what are referred to in England as public law proceedings.

(a) In the first place there are areas in which the court's inherent jurisdiction is invoked which fall outside the prohibition of publication because the material to be published is not directed to the manner of the child's upbringing. Where this is the case freedom of publication may well override the welfare of the child. The child may be harmed and his or her self-esteem may be damaged but as Ward L J said, all that has to be accepted as "part of the slings and arrows of misfortunes of life". In such cases freedom of press is so fundamental that it must triumph over welfare.

(b) Secondly, the child's welfare is the court's paramount consideration when the court is dealing with a question relating to the upbringing of a child (see Sec l (1) Children's Act 1989).

What is meant by questions relating to upbringing of the child is not always easy to determine. As Ward L J pointed out:

[I]t is not being determined when the welfare of the child is being weighed in the scales in determining whether or not to make an 'ouster order' under the **Matrimonial Homes Act** l983 (**Richards v Richards** [19841 AC 174, [19841 FRIL 11); or when blood testing is in issue (**S v McC**); or when seeking leave to apply for an order under sec 8 of the **Children Act**. **Re A (Minors) (Residence orders: Leave to apply**) [1992 1 **Fam** 182, sub nom **Re A and W (Minors) (Residence Order. Leave to Apply**) [1992 1 **FRIL** 154). In the **Re W** category of case on publicity it is now firmly established, as Neill L J stated in his fourth guide-line, that ' in this situation the welfare of the child is not the paramount consideration'.

198 With respect to proceedings relating to children under the **Children Act**, unless the court otherwise directs, the hearing is to be in Chambers. (See **Family Proceedings Rules** 1991 r.4.16 (7).) Proceedings in respect of children (other than under the **Children Act**) and proceedings for ancillary relief are heard in Chambers (See ***Family Proceedings Rules*** 1991 r.2.33 and 2.66).

199 Sec 1 (b) of the **Judicial Proceedings (Regulation of Reports)Act,** 1926 deals with judicial proceedings for divorce, nullity, separation, or restitution of conjugal rights. According to this Act it is not lawful to print or publish any particulars relating to the case except for the following:

(i) the names, addresses and occupation of the parties and witnesses;
(ii) a concise statement of the charges, defences and counter-charges in support of which evidence has been given;
(iii) submissions on any point of law arising in the course of the proceedings, and the decision of the court hereon;
(iv) summing up of the judge and the findings of the jury (if any) and the judgment of the court and observations made by the judge in giving judgment.

The English provision originated from the recommendations of a Royal Commission on Divorce and Matrimonial Causes set up to consider concerns that had arisen out of extensive and sensational press coverage of divorce trials. This was followed by a report by a Select Committee on Matrimonial Causes in

publication of ancillary relief, the court sits in Chambers unless otherwise ordered. Ancillary relief includes orders for financial provision, maintenance pending suit, property adjustment orders and variation orders.[200]

1923 which adapted the provisions set out in **Scott v Scott** above.

200 See **Family Proceedings Rules** 1996 p.1305.

4.9 Where a court is sitting in private,[201] limited publicity is permitted.[202] Because the Family Division Court sits in private, no members of the public or media are permitted in the court room and no publication of information relating to the proceedings before the court is permitted.[203]

4.10 The Lord Chancellor[204] has indicated that holding divorce proceedings in private would not be a breach of the ECHR[205] and that in his view it is justifiable to distinguish between family proceedings and other civil proceedings in so far as public access is concerned.

4.11 The secrecy of proceedings relating to children and the non-publication concerning the proceedings has been the subject of comment. In an address to a conference in 1994, Mr Justice Wall advocated more open courts and greater publicity with, however, the caveat that identification of children should be prohibited.[206]

4.12 The court in its inherent jurisdiction also has the power to grant injunctions restraining publication. Two examples of such an injunction are to be seen in **Oxfordshire County Council v L & F.**[207]

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201 See generally Nicholls M "In Practice: Publicity and Children's Cases" 1993 **Fam Law** 108 (hereinafter referred to as "Nicholls").

202 The **Administration of Justice Act,** 1960 provides for the consequences of the court sitting in private. Sec 12 of the Act states that the publication of information relating to proceedings before any court sitting in private is not of itself a contempt, except in the following cases:
(a) where the proceedings-
(i) relate to the exercise of the inherent jurisdiction of the High Court with respect to minors;
(ii) are brought under the **Children Act,** 1989; or
(iii) otherwise relate wholly or mainly to the maintenance or upbringing of a minor.
The English courts have construed the section as giving to the court a discretion to give leave in proper cases to publish information relating to wardship and adoption proceedings heard in private.

203 Proceedings under the **Children Act** brought in the magistrates' courts are subject to a ban on publicity pursuant to Sec 97(2). By that section, it is an offence for a person to publish material likely to identify a child involved in any such proceedings or the address or school of such a child.

204 Lord Irvine speech, see 39 n 178 above.

205 **X v UK** No. 7366/76 2 Digest 452(1977) as referred to in The Lord Chancellor's speech above.

206 See Wall at 137. See also Hoyal J "Secrecy in Children Cases" 1996 **Fam Law** 286.

207 [1977] 1 FLR 235 at 247.

4.13 The following guidelines [208] for granting an order have been extracted from the cases.[209]

(1) The court will attach great importance to safeguarding the freedom of the press.

(2) The court will take into account Art 10 (freedom of expression) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

(3) The above freedoms are subject to exceptions which include restrictions upon the publication of information imposed for the protection of children.

(4) When considering whether to impose a restriction on publication to protect a child, the court must carry out a balancing exercise in which [in specific circumstances] the welfare of the child may not always be the first and paramount consideration.

(5) In carrying out the balancing exercise, the court will weigh the need to protect the child from harm against the right to publish or comment. An important factor will be the nature and extent of the public interest in the matter. A distinction can be drawn between cases of mere curiosity and those involving information or comment about a subject of genuine public interest.

(6) In almost every case the public interest in favour of publication can be satisfied without identification of the child to persons other than those who already know the facts. However, the risk of some wider identification may have to be accepted on occasion if the story is to be told in a manner which will engage the attention of the public.

(7) Any restraint on publication which may be imposed is intended to protect the child and those who care for him or her from the risk of harassment (or to protect some

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208 Nicholls at 108.

209 **Re X (A Minor)**[1975]Fam 47. **Re C (A Minor) (No2) (Wardship: Publication of Information)** [1990] 1 FLR 263. **Re M and N (Wards) (Publication of Information)** [1990] 1 FLR 149.

legal right or interest of the child). The restraint must therefore be in clear terms and be no wider than necessary to achieve the purpose for which it was imposed. Save in an exceptional case, the child cannot be protected from any distress which may be caused by reading about himself.

(8) In addition to protecting the welfare of the child, an injunction may also be granted to protect a child's legal rights or interests, including a right to confidentiality, and to protect the administration of justice. Note that parents and care-givers owe a duty of confidentiality to a child.[210]

(b) New Zealand

210 Nicholls at 108.

4.14 Virtually all divorce proceedings in New Zealand are held in private and no publicity is permitted except with leave of the court. [211]

4.15 The New Zealand Family Court has jurisdiction to hear applications relating to divorce, nullity, spousal maintenance and paternity proceedings under the **Family Proceedings Act** 1980. Sec 169 of the same Act contains a general restriction on the publication of Family Court proceedings. No persons are permitted to be present during the course of the proceedings except officers of the court, parties and their legal advisers, witnesses and any other person whom the judge permits to be present.

4.16 Except in the case of applications relating to divorce and nullity, no person is permitted to publish any report of proceedings under the Act except with leave of the court. In cases relating to divorce and nullity, the following particulars may be published: (a) the name and address of the parties; (b) the name of the presiding judge (c) the order made by the court. [212]

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211 Position in New Zealand as set out in McCall at 43.

212 Sec 169 of the **Family Proceedings Act,** 1980 provides as follows:

169. Restriction of publication of reports of proceedings

(1) Subject to subsection (2) of this section, no person shall publish any report of proceedings under this Act (other than criminal proceedings or proceedings under section 130 of the Act) except with the leave of the court which heard the proceedings.

(2) Notwithstanding subsection (1) of this section, any person may, unless the court otherwise orders, publish, in relation to proceedings under Part IV of this Act, the following particulars:

(a) The names and addresses of the parties;
(b) The name of the presiding Judge;
(c) The order made by the court.

(3) Every person who contravenes subsection (1) of this section commits an offence against this Act and is liable on summary conviction-

(a) In the case of an individual, to imprisonment for a term not exceeding 3 months or to a fine not exceeding $500;
(b) In the case of a body corporate, to a fine not exceeding $2,500.

(4) Nothing in this section shall be construed to limit-

(a) The provisions of any other enactment relating to the prohibition or regulation of the publication of reports or particulars relating to judicial proceedings; or
(b) The power of any court to punish any contempt of court.

(5) Nothing in this section shall apply to the publication of any report in any publication that-

(a) Is of a bona fide professional or technical nature; and

(b) Is intended for circulation among members of the legal or medical professions, officers of the Public Service, psychologists, advisers in the sphere of marriage counseling, or social welfare workers.

4.17 In a letter to the Commission Hellen Colebrook, a researcher at the New Zealand Law Commission, stated that in New Zealand the media very rarely attempt to publish cases relating to dissolution of marriage or applications to declare a marriage void. Furthermore, where a judge thinks that it is likely that there will be public interest in a case (for example where there are particularly salacious details), he or she will usually make an order to prevent the publication of any details that might lead to the identification of the parties.

4.18 Cases concerning guardianship, custody and access are brought pursuant to the **Guardianship Act,** 1968. By that Act no persons are permitted to be present during the proceedings except as permitted under the **Family Proceedings Act.** Again there is an absolute prohibition on publication of reports of proceedings under the **Guardianship Act** without the leave of the court. [213]

4.19 Cases relating to settlement of property are brought pursuant to the **Matrimonial Property Act,** 1976. These proceedings can be commenced either in the Family Court or in the High Court. Sec 35 of that Act states that any application or an appeal should be heard in private if the husband or the wife so desire it. Sec 35A makes it an offence for a person to publish any report of the proceedings under the Act except with the leave of the court.

4.20 In 1995 the principal Family Court judge in New Zealand established a Public Affairs Committee to consider *inter alia* whether the present family law should be amended to permit wider attendance at and reporting of Family Court proceedings.

4.21 This Committee consulted widely in New Zealand and published its report in April 1995. As the Committee noted, commentators recognised that a balance needs to be drawn between the need of the community in general to know and understand what happens in Family Courts and the need for the personal and family problems of individuals to remain private, especially where the

213 Sec 27A.

interests of children are involved. The majority view was that there should be no change to the present rules. The minority view argued for the admission of the public or the media to proceedings. However, the Committee stated that two essential limitations should remain. These were that the judges retain the right to exclude members of the public and media and that there be a prohibition on publication of names or identifying information concerning the parties or their children.

4.22 The final recommendations were that a standing public affairs committee should consider guidelines for wider admission to the court by those with a genuine interest. However, it saw no need to change the current legislation, and recommended that the media should continue to be excluded from these proceedings where this is currently the case.

4.23 The New Zealand Family Court sits in small towns, resulting in a high risk of parties being identified. The informality which permits the court to receive evidence which would otherwise be inadmissible, coupled with stringent rules of privacy, results in the parties being more forthcoming with information of a sensitive nature. This would not be the case if access by the public or the press were permitted.

(c) Australia

4.24 There is no general right of privacy in Australia.[214] Nevertheless, many aspects of privacy are given incidental protection by laws primarily aimed at other objects.

4.25 Under the Australian Constitution, family law matters are dealt with by federal legislation. The provision relating to publication of proceedings in the Family Court is sec 121 of the **Family Law Act** 1975 (Cth). [215]

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214 This principle was confirmed in the 1937 **Victoria Park Racing** case as referred to in Armstrong M, Lindsay D & Watterson R **Media Law in Australia** 3rd ed Oxford University Press Melbourne 1995 at 203.

215 **Family Law Act** 53 of 1975.

4.26 Sec 121 of the **Family Law Act**[216] prohibits publication in the media of any account of

proceedings which identifies any or all of the persons involved. Family law proceedings are held in open court, unless otherwise ordered by the judge.[217]

4.27 The current state of affairs is more open than the situation when the Family Law Act first came into operation in 1975. At that time all proceedings were held *in camera*, and there was a prohibition on any reporting of proceedings. As a result of recommendations of parliamentary committees, the Act was changed in 1983. However, the media have complained that the continuing prohibition upon reporting of identifying factors has in essence stopped all reporting of family law cases.

4.28 There are a number of exceptions to the publication restrictions. [218] One exception is that family law proceedings may be reported in case reports provided for the profession. Law reports of family law cases can, and do, contain identifying features. This is now seen to be an inadequate protection given that many parties appearing in family law matters represent themselves, and therefore read the law reports. Furthermore, family law cases are reported on-line and on the Internet, with identifying features.[219]

4.29 In practice, the protocol has been adopted that where the case involves a parenting order, a child maintenance order, or an order regarding the welfare of a child, the report contains non-identifying information. Reports of other family law cases contain identifying information.

4.30 This issue has been considered on a number of occasions by parliamentary committees. In 1997 a report was made to the Department of the Federal Attorney-General. [220]

4.31 In the report it was argued that the ban on publicising Family Court cases should be greatly relaxed on the grounds that it was no different from other courts regarding the legitimate role of the media in reporting its work. Without media reporting the public had to rely on hearsay, which was often distorted. Fears of sensational and salacious reporting could be overcome by banning the publication of daily accounts of evidence.

4.32 The following recommendations were made, *inter alia*:

(a) That in child cases, where a parenting order, a child maintenance order or an order in the welfare jurisdiction is sought, non-identifying information relating to the case ought to be permitted.

(b) That in all other cases publicity be permitted, including the names, addresses and occupation of the parties and witnesses, a concise statement as to the nature of the application, submissions on the law and the decisions thereon, the orders made and reasons given, the name of the judicial officer and legal representatives. What would not be permitted would be a daily account of the evidence.

(c) That the court be given an overriding power to withhold publication in whole or in part or to permit publication in any particular case.

4.33 However, the Law Council of Australia and others raised concerns, including the need to protect the interests of children.[221]

4.34 To date there has been no amendment of sec 121 of the **Family Law Act** as a result of the report. There is currently a Bill before the Federal Parliament which, if passed, will *inter alia* extend the definition of publication under sec 121 to include publication by electronic means. However, many of the issues raised in the above report have not been dealt with.

4.35 With the absence of a Bill of Rights in Australia, the balance between the right to privacy and the right to freedom of information often sways, depending upon the prevalent political climate. Issues of privacy are being strongly debated at present in Australia, with pressure to introduce privacy legislation that applies to the private as well as to the public sector. There is freedom of information in each state, territory and federal jurisdiction, with the exception of the Northern Territory. Freedom of information legislation contains a number of exceptions, one relating to personal privacy concerns. The trend in the past ten years has been to promote the right to privacy over the right to information, although not to the total exclusion of the right to information.[222]

(d) Canada

4.36 Canada has a federal system of government, and each province has its own jurisdiction. Divorce is under federal jurisdiction. Alberta is one province which limited the publication of

information arising out of court proceedings in matrimonial disputes. Secs 30 and 31 [223] of the **Judicature Act, 1980** of the Revised Statutes of Alberta[224] are similar to our sec 12 of the **Divorce Act 70 of 1979.**

4.37 In 1989, in the case of **Edmonton Journal v Alberta (Attorney-General)**,[225] the Canadian Supreme Court invalidated the above sec 30 of the **Alberta Judicature Act**. Four of the seven judges agreed that sec 30(1)[226] contravened sec 2(b),[227] the guarantee of freedom of expression of the **Canadian Charter of Rights and Freedoms** and that the legislation was not a reasonable limitation under sec 1.[228] The **Canadian Charter of Rights and Freedoms** does not specifically provide for the protection of personal privacy.

4.38 The majority held that freedom of expression is of fundamental importance to a democratic society and that it is essential for a democracy and crucial to the rule of law that the courts are seen to function openly. Sec 30(1) could not be justified as legislation necessary to safeguard public morals, nor was there evidence to show that the provision was needed to ensure access to the courts by people who wished to litigate matrimonial matters. It was acknowledged that sec 30(1) was aimed at protecting the privacy of individuals, which is a pressing and substantial concern in a free and democratic society. However, the section did not reflect the required proportionality between the effect of the impugned measure on the protected right and the attainment of the objective. It constituted a very substantial interference with freedom of expression and significantly reduced the openness of the courts. The necessity of assessing the importance and purpose of a right in context, rather than in the abstract, was stressed.

4.39 The three dissenting judges held that the interference with freedom and expression by sec 30(1) was narrowly defined, since the general information about the case could be published by the media. The prohibition set out in the section was limited to the details and particularities of the case that dealt with personal and family matters, often of a private and intimate nature. Privacy interests ranked high in the hierarchy of values meriting protection in a free and democratic society. The protection from intrusion into the privacy of the individual, the family and witnesses afforded a sufficiently compelling objective to warrant some curtailment of freedom of the press in the present context. The provision was also intended to prevent obstacles to access to the courts. The minority judgement was that given the very limited character of the restriction as compared to the serious deleterious effects on the important values sought to be protected by the legislation, it met the test of

proportionality. It was a reasonable limitation on the freedom of the media since it restr icted that freedom as little as possible.

4.40 Part 5 (which consists of secs 30 and 31) of the **Judicature Act** was repealed in 1991 by sec 15 of chapter 21 of the **Miscellaneous Statutes Act,** 1991.

CHAPTER 5

OPTIONS FOR REFORM

d) Introduction

5.1 The Commission's investigation revealed four possible options for reform and these were set out for comment in Discussion Paper 98. The Commission noted that if one took into account the points raised in Chapters 2 and 3, one could argue that sec 12 is indeed unconstitutional and in some instances ineffectual. Sec 12 infringes the right to freedom of expression as set out in sec 16 of the **Bill of Rights**. At the same time, however, the section embodies the laudable principle of the protection of men, women and children against unwarranted invasion of their privacy. This right to privacy is upheld in sec 14 of the **Constitution**.

5.2 In an attempt to find a balance between these two very important rights, the Commission, in Discussion Paper 98, therefore offered four possible options for reform. It was cautioned, however, that the effectiveness of some of these options would depend on the extent to which the foreign media do in fact publicise South African divorce proceedings.

e) Options set out in Discussion Paper 98

i) First Option: Repeal of sec 12

5.3 Option 1 makes provision for the repeal of sec 12 of the **Divorce Act** 70 of 1979. One would thus revert to the position prior to the 1979 Act, where there would therefore be no general prohibition on the publication of divorce proceedings. Any person wanting to prevent the publication of divorce proceedings would have to request the court to close the proceedings in terms of sec 16 of the **Supreme Court Act** 59 of 1959.[229] This raises the question not only of press

freedom, but also that of access to open courts.

5.4 Sec 16 provides that judicial proceedings[230] should be carried out in open court except in special circumstances. The section also preserves all provisions for privacy made in other legislation.[231]

5.5 The court must in each case decide whether any special circumstances exist so as to justify the closure [232] of the proceedings.[233]

5.6 Although each case will be different,[234] the following arguments have been advanced by the courts in this regard:

(a) In **Du Preez v Du Preez: Standard Bank of SA Intervening**[235] Hiemstra J stated that a case would qualify as "special" where the administration of justice would be rendered impracticable by the presence of the public.[236] In interpreting this guideline he stated furthermore that special cases should involve the public interest and would seldom be cases between subjects concerning private interests.[237]

(b) Coetzee J followed **Du Preez** in **Economic Data Processing (Pty) Ltd v Pentreath**[238] in refusing to hear an Anton Piller application *in camera*, stating that a case would not qualify as "special" unless the public interest demanded it and that a private matter between subjects concerning private rights was not such a case.

(c) However, in **W v W** [239] Nestadt J considered to be a special circumstance the fact that a plaintiff in a divorce case would be seriously prejudiced and embarrassed if certain evidence led in the case were published, especially since the interests of the community did not demand that the normal rule apply.

(d) Van Dijkhorst J concluded in **Cerebos Food Corporation Ltd v Diverse Foods SA**

(Pty) Ltd [240] that special cases would include both circumstances where private rights only are involved and others where the public has an interest. The emphasis should not, on the one hand, fall on the right of the public to know or, on the other hand, on the right of the private individual not to be embarrassed, but rather on the proper administration of justice. Should the administration of justice be rendered impracticable or materially hampered by the presence of the public, that would constitute a special case as envisaged by the statute.[241]

(e) In **A v R Kinder- en Kindersorgvereniging** [242] in an application for proceedings to be held *in camera,* Southwood J reiterated that proceedings will only be held behind closed doors in highly exceptional circumstances. He referred to the abovementioned cases, quoting **Botha**[243] and **Cerebos**[244] with approval. The court, however, distinguished **W v W**[245] from the present case since there were no questions of principle involved in that case. Because questions of principle were at stake in the present case,[246] he ordered the case to be heard in open court. [247]

(f) In **S v Sexwale**[248] it was found that a witness's fear of reprisals was not in itself a ground for ordering a hearing *in camera*. As stated In **Botha v Minister of Wet en Orde,**[249] nor was the fact that the hearing of a case in open court would lead to great public debate and speculation. In fact, it is desirable in such cases that the public sees how the courts deal with controversial and sensitive matters.

(g) The Appellate Division has not ruled on this matter except for deciding that argument should be oral and in open court. [250]

5.7 It would seem that the decision as to whether a case is special is at this stage in the discretion of the presiding judge, who will bear in mind that the general rule that all cases must be heard in open court should not lightly be departed from.[251]

5.8 On a practical note, counsel is required to furnish a certificate stating that in his or her personal opinion the matter is one in which special circumstances exist, rendering it such that it should be heard *in camera*, and giving reasons for that view.[252] In furnishing such certificate, counsel expresses a professional opinion and is not merely making a submission on behalf of his or her client.[253]

5.9 The practical value of granting or withholding the order has to be considered as well.[254]

5.10 In choosing this option the fact that there would be no general restriction on publication and that the proceedings would only occasionally be closed to the public to take account of the privacy/dignity of the parties might have a positive effect as far as the right to freedom of speech is concerned. This procedure would also be more effective in protecting the privacy of the parties than the current sec 12. *Ad hoc* decisions are, however, not conducive to legal certainty.

5.11 If this option is chosen, the importance of self-regulation by the media should furthermore be stressed.[255] Ethical responsibilities already laid down[256] for the media in codes of conduct assumed voluntarily[257] or required under statute[258] could be developed or expanded upon. The law could, in protecting the privacy of individuals, aim to incorporate what journalists, editors and other media personnel themselves regard as high standards of reporting in order to re-establish respect for legal principles.

(ii) Second Option: Amendment of sec 12 to give courts the discretion to make an order to prevent publication

5.12 In terms of this option sec 12 may be amended to allow a court the discretion to make an order preventing any person from publishing any particulars of a divorce action or any information or evidence which comes to light in the course of such an action. Such order would not apply for the purposes of the administration of justice, to a *bona fide* law report which does not form part of any other publication than a series of reports of the proceedings in courts of law, or to the publication of information for the advancement of or use in a particular profession or science.

5.13 The proposed amendment of sec 12 under option two could possibly read as follows:

12. Power of the court to make an order preventing publication of any particulars of divorce action

(1) The court may make an order preventing any person from making known in public or publishing for the information of the public or any section of the public any particulars of a divorce action or any information or evidence which comes to light in the course of such an action.

(2) An order made under subsection (1) shall not apply with reference to the publication of particulars or information or evidence-

(a) for the purposes of the administration of justice;
(b) in a bona fide law report which does not form part of any other publication than a series of reports of the proceedings in courts of law; or
(c) for the advancement of or use in a particular profession or science.

(3) The provisions of subsections (1) and (2) shall mutatis mutandis apply with reference to proceedings relating to the enforcement or variation of any order made in terms of this Act as well as in relation to any enquiry instituted by a Family Advocate in terms of the Mediation in Certain Divorce Matters Act, 1987.

(4) Any person who, in contravention of this section, publishes any particulars or information or evidence after such an order was made by the court shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year or both such fine and such imprisonment.

5.14 In this option there is no general prohibition on the publication of divorce proceedings. However, the court is allowed to impose a restriction where appropriate. It differs from option one and three in that it is only publication of information that is prohibited, and that the proceedings themselves are not closed. Sec 16 of the Supreme Court Act is of course still available as is the case in option 1.

(iii) Third Option: Amendment of sec 12 to give courts the discretion to lift the restriction

5.15 The third option states that sec 12 of the **Divorce Act** 70 of 1979 may be amended to allow a court the discretion to make an order granting leave to any party to publish any particulars of a divorce or any information or evidence which comes to light in the course of such an action. The

court will, in exercising its discretion, take into consideration the provisions of sec 28(2) of the **Constitution**, which specifically protect the rights of children.

5.16 There will still be a general prohibition on divorce proceedings, but the court can be expected to lift the prohibition in particular cases.

5.17 Any person should be allowed to publish names of the parties, the date on which a divorce action is pending in a court of law and the judgment or order of the court, unless the court orders otherwise. If the court is of the opinion that it would not be in the interests of the child or spouses to publish the abovementioned, it may prohibit publication. The court which hears the matter will have a discretion to prohibit or allow publication.

5.18 The proposed amendment of sec 12 under option three is as follows:

12 Limitation of publication of particulars of divorce action

(1). (a) Subject to the provisions of subparagraph (b), no person shall publish for the information of the public or any section of the public any particulars of a divorce action or any information or evidence which comes to light in the course of such an action, except with the leave of the court which heard the proceedings.

(b) Notwithstanding the provisions of subparagraph (a), any person may, unless the court orders otherwise, publish in relation to a divorce action the following particulars:

(i) The names of the parties to a divorce action;
(ii) That a divorce action between the parties is pending in a court of law; and
(iii) The judgment or order of the court.

(2) The provisions of subsection (1) shall not apply with reference to the publication of particulars or information-

(a) for the purposes of the administration of justice;
(b) in a bona fide law report which does not form part of any other publication than a

series of reports of the proceedings in courts of law; or

(c) for the advancement of or use in a particular profession or science.

(3) The provisions of subsections (1) and (2) shall mutatis mutandis apply with reference to proceedings relating to the enforcement or variation of any order made in terms of this Act as well as in relation to any enquiry by a Family Advocate in terms of the Mediation in Certain Divorce Matters Act, 1987.

(4) Any person who in contravention of this section publishes any particulars or information or evidence shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year or both such fine and such imprisonment.

5.19 In this respect the general rule will be that there is a prohibition on publication. If someone wants to publicise divorce proceedings then such person has to ask the court for permission. This means that the court can be asked to lift the prohibition in particular cases.

(iv) Fourth option: Amendment of sec 12 to ensure the anonymity of parties

5.20 The Commission received a proposal that divorce proceedings should be publicised without divulging the identity of the parties, especially where minor children are involved.[259] The facts of the case and court decisions would therefore be published without mentioning the names of the parties, their residential or business addresses, the suburb, town, township or village and any other information which would make it easy to identify the parties. The name of the presiding officer and the court where the case was held would, however, be allowed to be publicised. This proposal is in accordance with the position in Australia.[260]

5.21 In **S v Citizen Newspapers (Pty) Ltd , S v Perkorpoasie van SA Bpk** [261] the Appellate Division found that sec 154(3) of Act 51 of 1977, which prohibits the identification of a child, envisaged both direct identification and identification by inference, provided the inference is clear. The court found that the compilers of the report in this case had unequivocally associated the schoolboy accused with one H, the son of a South African ambassador who had been abducted, and that the conclusion which would be drawn was a simple step in a logical inference.[262]

5.22 There will of course be cases in which the notoriety of the parties is such that anonymity will be impossible. Such cases in the field of child protection will, however, be very rare and should not detract from the general principle. In extreme cases the judge may then order that the proceedings be held in private.[263] It could also be argued that the public has an interest in so far as the status of the parties is concerned, and should therefore be informed accordingly.

5.23 The proposed amendment of sec 12 under option four will be as follows:

12. Restriction on publication of court proceedings

(1) A person who publishes in a newspaper or periodical publication or by radio broadcast or television, or otherwise disseminates to the public or to a section of the public by any means, any account of any proceedings, or of any part of any proceedings, under this Act that identifies:

(a) a party to the proceedings;

(b) a person who is related to, or associated with, a party to the proceedings or is, or is alleged to be, in any other way concerned in the matter to which the proceedings relate; or

(c) a witness in the proceedings;

is guilty of an offence punishable, upon conviction, by imprisonment for a period not exceeding one year.

(2) Without limiting the generality of subsection (1), an account of proceedings, or of any part of proceedings, referred to in that subsection shall be taken to identify a person if:

(a) it contains any particulars of:

(i) the name, title, pseudonym or alias of the person;

(ii) the address of any premises at which the person resides or works, or the locality in which any such premises are situated;

(iii) the physical description or the style of dress of the person;

(iv) any employment or occupation engaged in, profession practised or

calling pursued by the person, or any official or honorary position held by the person;

(v) the relationship of the person to identified relatives of the person or the association of the person with identified friends or identified business, official or professional acquaintances of the person;

(vi) the recreational interests or the political, philosophical or religious beliefs or interests of the person; or

(vii) any real or personal property in which the person has an interest or with which the person is otherwise associated;

being particulars that are sufficient to identify that person to a member of the public, or to a member of the section of the public to which the account is disseminated, as the case requires.

(b) in the case of a broadcast or televised account, it is accompanied by a picture of the person; or

(c) in the case of a broadcast or televised account, it is spoken in whole or in part by the person and the person's voice is sufficient to identify that person to a member of the public, or to a member of the section of the public to which the account is disseminated, as the case requires.

CHAPTER 6

EVALUATION OF COMMENTS AND RECOMMENDATIONS

a) Overview and evaluation of comments received

Option 1

6.1 The Commission received a mixed response to its proposals. The media were mostly in favour of option 1.[264] Respondents contended that this option was the only one consistent with the overall intention of our Constitution.[265] They acknowledged that the media would have to use good judgement and sensitivity,[266] but held that this would be a challenge that the newspapers would be pleased to meet.[267] The media would constantly have to make delicate decisions about what and how to publish, but in a maturing constitutional democracy it would be reasonable to expect responsible

decision-making from the media.[268] It was also suggested that the development of an internal code of conduct for the media and the further development of existing codes should receive attention.[269]

6.2 It was argued that the general rule should be that most divorce proceedings would continue to take place unpublicised since this is a highly personal area of anyone's life. Exceptions should exist, firstly, where the people involved are already in the public eye, as with the Mandela divorce; secondly, where divorce discloses that people holding themselves out as paragons of virtue have, in fact, been the opposite; and thirdly, regardless of whether the couple is well-known, when the issues raised by the divorce are matters of public importance - for example, when the divorce is taking place because a husband has been abusing his wife or where one partner seeks a divorce because the other has HIV/AIDS. Both of these are undoubtedly issues of public interest. [270]

6.3 Most respondents, however, expressed their opposition to option 1.[271] They argued that the repeal of sec 12 would be tantamount to government abdicating its responsibility for the protection of its people.[272] The repeal would seem to imply that the public have a right to know every intimate detail of a person's private relationships.[273] The parties and their children would be at the mercy of the press. [274] The best interests of children would not be served by having details of a divorce published in the media. [275] Making all or some of these confidential matters public would be contrary to the boni mores of society. [276] Parties to a divorce would be reluctant to present facts openly and honestly for fear of publication.[277] This option would give much greater weight to freedom of expression and the rights of the free media than to the right to dignity and privacy.[278]

6.4 Opponents to option 1 furthermore cast doubt on the idea of self-regulation by the media. They argued that there is no guarantee that the media will all embrace the responsibility of self-regulation wholeheartedly should sec 12 simply be repealed.[279] It is the very nature of the media in modern society to be intrusive. Very few aspects of people's lives are deemed private these days. In fact, such is the pressure for information that the general practice is simply to report on the details and deal with the consequences later. [280] Past experience has been that the press exploits matters for the sake of sensational reading, to increase the popularity and sales of the paper or magazine in

question.[281]

6.5 It was argued that the lifting of the ban would unleash a whole new avenue of reportage currently being prevented. Local newspapers, magazines, "yellow press" pages *et al* would thrive on the details of messy divorce cases with little or no regard to the impact on the parties involved. Journalists would set up specific coverage activities, including "divorce reporters" and "divorce columns" to ensure maximum reach in divorce hearings. Parties (ordinary citizens) would not necessarily have the resources to deal with the consequences of such coverage.[282] Another view, however, was that it would be unlikely for the media to expend resources by sitting endlessly in divorce courts unless there were high-profile people involved, the affairs of whom the media believed to be of public interest.[283]

6.6 Respondents voiced their concerns that a lifting of the ban on media coverage would remove protection from ordinary divorce cases as well as those of particular interest to the public. The average divorce case does not attract international coverage, and nor will such cases be affected by the restricted coverage afforded by the Internet. [284] To support general coverage because of international media coverage would be the same as saying the dam wall should be broken down because it has a small hole in it.[285] Protection by the Act is currently still effective in most cases.[286]The quantum of matters that would be of interest extra-territorially would be minimal.[287]

6.7 Finally it was held that there would be problems in deciding what amount to "special cases" for the purposes of sec 16 of the Supreme Court Act. [288] It was submitted that the discretion referred to in sec 16 would only be exercised in exceptional circumstances and might not go far enough to protect the right to privacy, especially that of the children involved in divorce.[289] It would be up to the parties to ask the court to close the proceedings, thus possibly causing unnecessary financial and emotional hardship to such parties. [290] Furthermore, ad hoc decisions taken under sec 16 might not be conducive to legal certainty.[291]

Option 2

6.8 Option 2 did not attract much comment. Respondents were, however, of the opinion that this amendment would pass constitutional scrutiny because it involved no blanket prohibition. Rather, the courts would be able to impose a restriction on publication where appropriate.[292] The media regarded option 2 as a considerable improvement on the present situation.[293]

6.9 It was argued that publication of proceedings in specific circumstances would elevate the status of the court, increase accountability and predictability, and allow professionals to render a more expert service.[294]

6.10 Opponents felt that option 2 would encourage uncertainty and ad hoc legal decision making. The question was posed as to how the court would define what particulars might be sensitive and potentially humiliating in nature. South Africa is not a homogenous society; what offends one section of the public may be perfectly acceptable to another.[295] The question was posed whether courts can be relied upon consistently to enquire into the special circumstances for the order preventing publication. One commentator wondered what would constitute a proper exercise of this discretion. [296] A wide discretion could have frustrating results. [297] The fact that the presiding officer would have to consider each matter on its own merits could furthermore draw out the legal proceedings and it could become costly in matters where the parties could ill afford to incur extra costs.[298]Just as in option 1, it would be up to the parties to ask for closure of the court.[299]

6.11 It was also suggested that media pressure might be so influential that a judge could be swayed by it. Under a general lifting of the ban, most judges would avoid the possibility of being accused of impeding freedom of speech rather than protecting the interests of particular parties. There would furthermore be no guarantee of consistency and the parties would be subjected to a form of Russian roulette.[300]

Option 3

6.12 There was considerable support for option 3.[301] Respondents felt that it would give effect to the right to privacy while at the same time providing the discretion necessary to challenge its weight in a specific case.[302] This option was seen as addressing the absolute and unreasonable nature of the current provision[303] by striking a balance between the right to privacy and the right to freedom of expression.[304] Social workers, too, tended to be in favour of this option on the basis that it would offer the best protection for the rights and interests of all parties, and especially of children.[305]

6.13 It was argued that the media are in a better position, financially speaking, than ordinary members of the public to ask for the restriction to be lifted.[306] Some newspapers, however, noted that experience has shown that permission is rarely granted by the courts under such conditions.[307]

6.14 Concern was furthermore expressed that in a divorce matter where, inter alia, allegations are made of domestic violence or physical abuse, a person may be tried and convicted by the public, before institution of criminal proceedings, should the facts of a divorce be published in the media and the "accused" not be afforded the opportunity to raise his/her defence. The danger lies therein that the outcome of the divorce proceedings (or possible criminal trial) is not invariably published, so that the reputation which is tarnished by the media is unlikely to be afforded an opportunity of recovery. [308]

6.15 Respondents, however, acknowledged that two challenges remain: the electronic publication of law reports and the fact that South African legislation does not have extra-territorial application.[309] As with option 2, ad hoc decision-making by the courts also poses a problem. The court could be placed in an invidious position since no basis is indicated in terms of which the court should make its decision for or against publication. [310]

Option 4:

6.16 Respondents seemed to feel that option 4 allowed a good balance between competing rights without introducing too great a limitation on any one right.[311] In terms of this option the proceedings would be open, which would ensure the right of the public and media to an open court process. The media would be able to report or publish on the proceedings, but the parties would retain a measure of privacy and anonymity.[312] The public would have some understanding of divorce proceedings in court, while the courts would be seen to be acting with integrity and dispensing justice.[313]

6.17 Respondents felt that it would not be in the public interest to know the intimate details of the personal trauma and tragedy that has befallen another family. It would only be in the public interest if matters of legal principle were at stake.[314]

6.18 Opponents of option 4, however, felt that the effect of anonymous publication may be to cause social problems by creating curiosity on the part of the public. This may lead to speculation as to the identity of the parties and the private lives of many unsuspecting personalities may come under scrutiny, which would in turn create a further loss of privacy.[315]

6.19 Respondents acknowledged that there is a debate as to whether this option has a realistic chance of maintaining the anonymity of those involved. It was also argued that this option is unworkable in practice since it is impossible to predict whether a detail in a story will enable someone to work out a person's identity.[316] Chances are that this option would probably have very limited value for the parties involved in a high-profile case. Unfortunately, the chances of preventing such information from leaking into the public arena in such a case would be slight anyway, irrespective of the continued existence of s12.[317]

b) Recommendations of the Commission

6.20 During its deliberations the Commission found unanimous support for its provisional view that sec 12, as it stands, is unlikely to survive constitutional scrutiny.[318] Since the section is also

largely ineffectual for various reasons,[319] it was clear that the section had to be either amended or repealed.

6.21 The Commission agreed with the feelings of most commentators that the privacy of parties to a divorce should be respected as far as possible; that it would be appropriate for the press to have to make out a case for publication; and that children involved in divorce cases stand in need of special protection. The protection of the anonymity of the parties was furthermore regarded as a worthwhile goal, but since it would be very difficult to assure the anonymity of the parties in practice, the Commission felt unable to support this proposal as the sole solution to the problem. The Commission also noted that as far as self-regulation by the media is concerned, people did not seem to trust the media to play their part in this.

6.22 In evaluating the submissions it therefore seemed that option 3 was the preferred option. In terms of this amendment of sec 12 a court would have the discretion to make an order granting leave to any party to publish any particulars of a divorce or any information or evidence which comes to light in the course of such an action, or such particulars, information and evidence as the court may deem fit. There would therefore still be a general ban on the publication of divorce proceedings, but the court could be expected to lift the ban in appropriate cases.

6.23 The Commission accepted option 3 as the basis for its final proposal. However, option 3 was in turn amended in order to take account of all the submissions and comments received. The final proposal for the regulation of the publication of divorce proceedings is set out in **Annexure B**. This proposal not only makes provision for the discretion of the court as stated above but includes a further provision intended for the better protection of children, and also provides for practical considerations not previously considered. The final recommendations of the Commission for the amendment of sec 12 of the **Divorce Act**, 1979 are discussed below.

Sec 12(1)(a)

6.24 Sec 12 (1)(a) makes provision for a discretion to enable the court to lift the ban on the

publication of divorce proceedings. The Commission is of the opinion that in granting this discretion to the court the unconstitutionality of the section is rectified. The current sec 12 suffers from the constitutional defect of over-breadth.[320] A judicial discretion exercised in appropriate circumstances will provide a mechanism to further the objective of the privacy of the parties while not limiting the freedom of expression of the press unnecessarily.[321]

6.25 It should be noted that the court will be able to lift the ban in terms of sec 12 (1)(a) on such terms as it may decide. The court will therefore not only be able to lift the ban but also to specify what is publishable. The court may therefore allow publication of as much of the information as it deems fit. Although it will most probably be the press that brings an application to court to be allowed to publish the proceedings, any party may bring the application.

Sec 12(1)(b)

6.26 In terms of sec 12(1)(b) the court's discretion is extended even further. The section states that any person would be allowed to publish the names of the parties, the date on which a divorce action is pending in a court of law and the order of the court, *unless the court orders otherwise*. The court may therefore, in specific circumstances, prohibit publication of proceedings completely; or a situation may arise where publication of the divorce proceedings is permitted in terms of subsec 12(1)(a), but where the anonymity of the parties is protected in terms of subsec 12(1)(b) - as far as this may be possible in practice.

6.27 In the submissions and during meetings with respondents a lot of the discussion centred on the possibility of relaxing sec 12(1)(b) to make provision for the publication of more information. Suggestions in this regard were, for instance, that the publication of a concise statement of the pleadings in support of which evidence has been given in open court or submissions on any point of law arising in the course of the divorce action, and the decision of the court hereon, should be allowed.

6.28 Respondents felt that family law should be accessible and that it was in the public interest that people should know how family law works. It was furthermore argued that such an insertion would strengthen the constitutionality of the section.

6.29 After thorough consideration, however, the Commission feels that it would be impossible to argue a point of law without publishing the facts of the case. Since the names of the parties may be published anyway, the whole reason for the section, namely the protection of the privacy of the parties, would fall away completely. Granting the exception could also result in the publication of untested evidence. The Commission concluded that a person could always apply to court for permission to publish the proceedings on the grounds that in this particular case a very interesting point in law was being argued.

Sec 12(3)

6.30 Through its deliberations the Commission came to realise that the only way that parties in a divorce action (and especially children) could really be protected against unwanted publicity would be by holding the proceedings *in camera*. Although sec 16 of the Supreme Court Act makes provision for the closure of the court in special cases, the section was found to be brief, enigmatic and difficult to implement. [322] It thus seemed desirable to look into the possibility of making provision for the closure of the court in specific instances in the **Divorce Act**, 1979.

6.31 The Commission realises that closure of the court would be a drastic step. However, specific provisions in this regard are by no means unknown, especially where children are concerned. Apart from provisions in the **Criminal Procedure Act** 51 of 1977 (sec 153(1) and (2)) and the **Magistrates' Courts Act** 32 of 1944 (sec 5), there are also several provisions allowing for closure of the court where children specifically are involved. Sec 10(4) of the **Maintenance Act** 99 of 1998 stipulates that 'no person whose presence is not necessary shall be present at [an] enquiry, except

with the permission of the maintenance court'. Sec 8(2) of the **Child Care Act** 74 of 1983 states that 'at any sitting of a children's court no person shall be present unless his presence is necessary . . . unless the commissioner presiding . . . has granted him permission to be present'. The **Criminal Procedure Act** has similar provisions where the accused (sec 153(4)) or a witness (sec 153(5)) is a child. The Commission noted the anomaly that the maintenance courts were in principle closed to the public in terms of the Maintenance Act, but that the High Court was open to the public when dealing with maintenance issues.

6.32 Divorce or separation is invariably traumatic for all concerned, but especially for the children of the marriage or relationship.[323] The White Paper for Social Welfare[324] identifies children of divorced and divorcing parents as a vulnerable group that requires special attention. Sec 28(2) of the **Constitution** furthermore states that a child's best interests are of paramount importance in every matter concerning the child. Providing special protection to a child will therefore only entrench this position.

6.33 Sec 12 (3) should not merely be seen as a duplication of sec 16 of the **Supreme Court Act**. The Commission considered the problem that sec 12(3) does not state what factors the court must take into account in exercising its discretion. Respondents however argued that the context will define the factors to be considered. Sec 12(3) must be read within the context of divorce proceedings whereas with sec 16 of the **Supreme Court Act** there is no context to draw on. Factors to be considered in this application should furthermore not be set out in legislation, but should rather be gathered from the common law and previous judgments. This will enable the court to take account of and include such factors as it deems fit and to adapt to new ideas as time goes by and views change. Examples of harm that may come to a child include situations where he or she has to give evidence; where there is a chance that the foreign media would disregard sec 12; and where child abuse is alleged.

6.34 The Commission therefore recommends that sec 12 be amended to include a provision to enable the court to close the proceedings, at its discretion, at any stage of the proceedings, where

there is a likelihood that harm may result to a child.

Sec 12(5)

6.35 Respondents stressed the fact that the protection against publication of proceedings needs to commence at the outset of proceedings, since the divorce application will be brought before the court proceedings commence. Parties should be protected against allegations which have not been tested in court and which are sometimes made in divorce summonses. Parties to a divorce have been known to make false claims of abuse and violence in an effort to secure an advantage in parenting and property disputes. [325]

6.36 In this regard, it can be noted that sec 1(2) of the **Divorce Act** ,1979 states that, for the purposes of the Act, a divorce action shall be deemed to be instituted on the date on which the summons is issued or the notice of motion is filed or the notion is delivered in terms of the rules of the court, as the case may be. [326] Sec 12(1) (a) will therefore be applicable right from the outset of proceedings and the information in the summons may therefore not be published in terms of sec 12(1)(a).

6.37 Problems are, however, encountered in practice in that registrars or clerks may tip off newspapers that a specific divorce is pending. In a telephone conversation with Mr G T M Prinsloo, Head Registrar of the High Court in Pretoria, he indicated that a summons can only be made public after finalisation of the case, but not while the case is still pending.[327] Journalists get hold of these summonses unlawfully (since the summonses are not open, public documents) and, especially if the case has an international angle are able to publish the information found there irrespective of the provisions of sec 12 .

6.38 In **Romero v Gauteng Newspapers Ltd** [328] Wunsh J stated that where a reference does not reflect adversely on a party there is no general principle that sub judice information may not be published without the party's consent. He added, however, that publication of the contents of a document before it is the subject of open court proceedings may be illegal if the document was procured unlawfully, for example by being removed from a party's possession without its consent or

by being copied from the original in the court file without the requisite leave in terms of Rule 62(7).

6.39 The Commission therefore recommends that the penalty clause in sec 12 be amended to add an additional offence. In terms of this amendment it will be an offence to furnish particulars of a divorce action, or any information or evidence which emerges during the course of such an action, unlawfully to third parties.

6.40 A person will of course also be in contempt of court if he or she goes ahead with publication after failing to obtain the court's permission to publish. In this case the court may *mero motu* call on the editor of the newspaper to explain his or her actions.

ANNEXURE A

LIST OF RESPONDENTS

1. ACVV Head Office
2. Association of Family Lawyers
3. Basson Judge D
4. Bezuidenhout & Milton Earle Inc.
5. Davis, Judge DM & Van Heerden, Judge BJ
6. Ennis, Father Hyacinth
7. Lawyers for Human Rights
8. Moletsane, Z
9. National Council of Women of South Africa
10. NG Kerk
11. Northern Province : Office of the Premier : Director General
12. SAVF (Suid Afrikaanse Vrouefederasie)
13. Schuitema, J
14. Social Workers Association of South Africa.
15. Sunday Times.
16. The Law Society of the Cape of Good Hope.
17. The Star
18. Tshabalala, Judge President VEM
19. Tshwaranang Legal Advocacy Centre.

ANNEXURE B

REPUBLIC OF SOUTH AFRICA

DIVORCE AMENDMENT BILL

(As introduced in the National Assembly)

(MINISTER OF JUSTICE)

[B -01]

GENERAL EXPLANATORY NOTE:

[ ] Words in bold type in square brackets indicate omissions from the existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Divorce Act, 1979 so as to make provision for a judicial discretion to lift the general statutory prohibition on the publication of divorce proceedings and to close the proceedings in specific circumstances

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows: -

Amendment of section 12 of Act 70 of 1979

Section 12 of the Divorce Act, 1979 is hereby amended by the substitution for section 12 of the following section:

"12. Limitation of publication of particulars of divorce action

(1) **[Except for making known or publishing the names of the parties to a divorce action, or that a divorce action between the parties is pending in a court of law, or the judgment or order of the court, no person shall make known in public or publish for the information of the public or any section of the public any particulars of a divorce action or any information which comes to light in the course of such an action.]**

(a) A person may not publish for the information of the public or any section of the public any particulars of a divorce action or any information or evidence which emerges in the course of such an action, except with the leave of the court.

(b) Notwithstanding the provisions of paragraph (1)(a), any person may, unless the court orders otherwise, publish in relation to a divorce action the following particulars:

(i) The names of the parties to a divorce action;
(ii) That a divorce action between the parties is pending in a court of law; and

(iii) The order of the court.

(2) The provisions of subsection (1) shall not apply with reference to the publication of particulars or information-

(a) for the purposes of the administration of justice;
(b) in a *bona fide* law report which does not form part of any other publication than a series of reports of the proceedings in courts of law; or
(c) for the advancement of or use in a particular profession or science.

(3) If at any stage during the divorce proceedings it appears to the court that there is a likelihood that harm may result to a person under the age of eighteen as a result of the hearing of any evidence, the court may, of its own accord or on application by any interested party, make an order directing that the proceedings be held behind closed doors, and that no person be present unless his or her presence is necessary in connection with the court proceedings, or he or she is the legal representative of any person whose presence is necessary as aforesaid.

(4) The provisions of subsections (1),(2) and (3) shall *mutatis mutandis* apply with reference to proceedings relating to the enforcement or variation of any order made in terms of this Act as well as in relation to any enquiry by a Family Advocate in terms of the **Mediation in Certain Divorce Matters Act**, 1987.

(5) Any person who, in contravention of this section, publishes any particulars or information or evidence or unlawfully provides any such particulars or information or evidence to a third party shall be guilty of an offence and liable on conviction to a fine **[not exceeding one thousand rand]** or to imprisonment for a period not exceeding one year or both such fine and such imprisonment."