

# NEW CRIMES AND OLD PROCEDURES

## Can the new Sexual Offences Bill deliver on its promises?

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In 1996 Dullah Omar, the then-Minister of Justice, established a project committee in the South African Law Reform Commission (SALRC) to investigate sexual offences against children. Eleven years later, having widened the scope of the legal reforms to include adults, the National Assembly finally passed the much-delayed Criminal Law (Sexual Offences and Related Matters) Amendment Bill (SO Bill 10 Nov 06 (SOBPC06)) on 23 May 2007. The Bill is ambitious, its objects being: 'To afford complainants of sexual offences the maximum and least traumatising protection that the law can provide, to introduce measures which seek to enable the relevant organs of state to give full effect to the provisions of this Act and to combat and, ultimately, eradicate the relatively high incidence of sexual offences committed in the Republic' (Sexual Offences Bill 2006: 9). This article briefly sets out some of the Bill's content and then examines whether or not the Bill, in its current form, does indeed meet the high aims set for itself.

A short Preamble introduces the Bill, which contains seven chapters. The first chapter sets out definitions of the various terms used in the Bill and the Bill's objects. The next three define a range of new sexual offences generally, as well as those specifically committed against children and people with mental disabilities. The fifth chapter sets out the provisions of post-exposure prophylaxis (PEP) to prevent HIV infection after rape and also outlines procedures allowing for court-mandated testing of alleged rapists for HIV. Chapter six allows for the establishment of a national register for sex offenders while the final chapter deals with a variety of general provisions, including national instructions, directives, regulations and the creation of a National Policy Framework.

This framework is intended to 'protect[ing] complainants of sexual offences and their families

from secondary victimisation and trauma by establishing a co-operative response between all government departments involved in implementing an effective, responsive and sensitive criminal justice system relating to sexual offences;' and 'promot[ing] the spirit of *batho pele* in respect of service delivery in the criminal justice system dealing with sexual offences' (Sexual Offences Bill 2006: 9). This chapter also contains transitional provisions relating to trafficking in persons for sexual purposes.

### **New sexual offences**

The new definition of rape contained in the Bill states that 'Any person (A) who unlawfully and intentionally commits an act of sexual penetration with a complainant (B), without the consent of B, is guilty of the offence of rape.' Rewritten in non-legalese, this revised definition recognises that men

and boys can be raped and also allows for women to be charged with rape. 'Sexual penetration' will include any act causing any penetration of the genital organs, or anus, or mouth of the victim with a penis, or any other body part or object (such as a stick or finger). Additionally, penetrating any of these orifices with an animal's body part(s) is also understood to constitute sexual penetration.

The current crime of 'indecent assault' will be replaced with that of 'sexual assault' and will cover different forms of sexual violation. Conduct defined as 'sexual violation' includes direct or indirect contact between the genital organs and anus of one person and any body parts of another person or animal, or any object resembling the genital organs or anus. It also covers contact between the mouth of one person and the genital organs, anus, or breasts of another.

Three new crimes recognising how people can be forced into performing sexual acts are also introduced: compelled rape, compelled self-sexual assault and compelling persons over the age of 18 to witness a sexual offence or act. While the last of these offences is self-explanatory, the first two are somewhat more complex.

'Compelled rape' criminalises the conduct of someone who forces another person to rape a third. A typical example of what this new crime is intended to address would be when a gang breaks into a home and forces the occupants to have sex with one another. 'Compelled self-sexual assault' is intended to address those situations where one person forces, or coerces, another to masturbate for them.

Controversially, the Bill criminalises those who buy sex from adults. For a fuller discussion of this clause, read Nicolé Fick's article on the topic in this issue.

### **New sexual offences against children**

'Sexual grooming of children' is another new crime established by the Bill and refers to the process through which offenders sexualise children over time. Grooming children for sex takes place gradually, often beginning with innocuous-enough affectionate behaviour between adult and child and progressing to increasingly more intimate touching

and fondling. It often also includes showing children pornography.

In terms of this provision those who manufacture, distribute or possess any article or publication that promotes sexual acts with children, or may be used in such acts, can be charged with sexual grooming of a child – as will those who show pornography to children, or masturbate in front of them. This provision is also intended to cover those situations where sex offenders make contact with children via the internet and then engage them in sexualised discussions, or persuade them to send photographs; or suggest they meet in order to have sex.

The new Bill also attempts to come down hard on child prostitution, or 'sexual exploitation of children'. Thus, anyone who engages the sexual services of a child under the age of 18, or offers those services to anyone else, will be guilty of sexually exploiting a child. Those who in any way live off the earnings of a child prostitute, or who allow their property or premises to be used for acts of child prostitution, will also be charged with the sexual exploitation of children. Lastly, this section of the Bill also creates the offence of 'promoting child sex tours'.

The Bill also attempts to provide some guidance around dealing with the complexities of adolescent sexuality. The age of consent to sexual activity is set at 16 for both boys and girls and sex with a minor (commonly referred to as statutory rape) is defined as a 'consensual act of sexual penetration with a child' (between the ages of 12 and 16). When both parties are children in this age category, and their activities are consensual, their prosecution for 'consensual sexual penetration with a child' can only be instituted with the written permission of the National Director of Public Prosecutions. Should a prosecution be instituted, it must be against both parties.

### **New sexual offences against disabled persons**

This chapter creates four new crimes:

- Sexual exploitation of persons who are mentally disabled
- Sexual grooming of persons who are mentally disabled
- Exposure or display of or causing exposure or display of pornography or harmful materials to

- persons who are mentally disabled
- Using persons who are mentally disabled for pornographic purposes or benefiting from such activity

The essential elements of these offences are identical to those against children.

#### **National register of sex offenders**

The Bill also allows for the creation of a national register of sex offenders. In terms of this provision anyone who has been convicted of a sexual offence against either a child or person with a mental disability, whether before or after the new Bill is introduced, will not be allowed to work with children, supervise or care for children, or become a foster parent, adoptive parent or care-giver. Provision is also made to include on the register people who have been accused of sexual offences against children but were incapable of standing trial due to mental illness or cognitive impairments. Sex offenders' names must be listed on the register and employers are obliged to check that no potential or current employees are included therein.

Licensing authorities are also not permitted to provide a license to any entity, business concern or trade involving the supervision or care of children or the mentally disabled, unless they have first checked the applicant's details against the register.

#### **Services to rape survivors**

Chapter 5 of the Bill is entitled 'Services for victims of sexual offences and compulsory HIV testing of alleged sex offenders'. This heading is somewhat misleading given that only one service, post-exposure prophylaxis, or PEP, is provided for – which is, in any case, already available to rape survivors following a Cabinet decision taken in April 2002. Indeed, depending on how terms in the proposed Bill such as 'reports in the prescribed manner' and 'designated health establishment' are interpreted, rape survivors' access to PEP could even be narrowed in future as a result of the Bill.

It is also worth contrasting the meagreness of this provision with what was originally envisioned by the South African Law Reform Commission's discussion document on sexual offences. Section 22 of the SALRC's draft legislation, headlined 'The provision of treatment', stated:

- If a person has sustained physical or psychological injuries as the result of a sexual offence, such person shall, as soon as is practicable after the offence, receive the best possible medical care, treatment and counselling as may be required for such injuries
- The state shall bear these costs

The type of comprehensive response recommended by the SALRC above is essential in light of the serious health consequences of sexual violence and coercion. South African research has found that girls sexually assaulted as children are at increased risk of being subjected, as adults, to physical and/or sexual violence at the hands of an intimate partner (Dunkle et al 2004). Another study examining factors associated with teenage pregnancy in Cape Town found forced sexual initiation to be the third most strongly associated factor with such early pregnancies (WHO 2002). Substance abuse is also associated with experiences of sexual violence (WHO 2002).

Women who have been sexually assaulted by their intimate partners are at greater risk of attempting or committing suicide than women who have never experienced partner violence (WHO 2005). Indeed, women who experience sexual assault, whether as children or adults, are also more likely to attempt or commit suicide than women who have never experienced such assaults (WHO 2002:163). Other mental health problems associated with sexual violence include depression, generalised anxiety, reduced self-esteem, panic phobias and post-traumatic stress disorder (PTSD) (Astbury 2006). In comparison to non-victimised women, rape survivors are six times more likely to develop PTSD at some point in their lives and also constitute the single largest group suffering from PTSD (Astbury 2006).

Legislating the principle that government should provide access to comprehensive health services is important for a number of reasons – not least being the recognition that rape entails serious consequences deserving of attention. In addition to helping rape victims cope with their trauma, the research discussed earlier also suggests that mental

health interventions may play a role in preventing further victimisation. Finally, rape victims value counselling services. One study that investigated rape survivors' perspectives on what services they consider most necessary found that women respondents most valued the availability of HIV post-exposure prophylaxis (with an HIV test) and having a sensitive health care provider who could provide counselling (Christofides, Muirhead et al 2006).

### **Protection in court**

Many have described rape victims' experience of going to court and testifying as a kind of second rape during which the victim, rather than the accused, appears to be on trial. The profound distress evoked in rape survivors by the adversarial trial system makes the need for its reform particularly pressing. Here again, as with services, the Bill falls short.

Currently, the Criminal Procedure Act (No 51 of 1977) (CPA) allows for certain measures mitigating some of the harsher aspects of trial processes. These include allowing for in-camera hearings; the Closed Circuit Television (CCTV) system; and the 'intermediary system' for complainants under the age of 18. However, a court must first decide that the complainant will suffer undue trauma if s/he testifies in open court before the latter two measures may be used. This requirement may lead to a 'trial within a trial' and necessitate an expert assessment by a helping professional. Problems also exist with the implementation of all these provisions. Some are utilised routinely by certain courts but not by others, while many complainants have no access to these measures at all.

The SALRC sought to address the many negative aspects of court procedure with the notion of 'the vulnerable witness'. When either child or adult victims are declared 'vulnerable witnesses' the prosecutor would have been obliged to inform such witnesses of the protective measures available, with the court required to use at least one of four protective measures. This provision was removed from the Bill. The SALRC also recommended that the CCTV system (which is currently under-utilised) be made more accessible to those adult

complainants whose testimony would benefit from the use of this protective measure. This too was removed from the Bill, as was the recommendation that all child witnesses should, by right, automatically qualify for the intermediary system. More positively, however, section 170 of the CPA has been amended to allow witnesses over the age of 18 but who have a mental and/or emotional age of under 18, access to this system.

Provision was also made by the SALRC for witnesses to have support persons in court with them. The purpose of the support person was to lessen the emotional trauma to the witness of testifying in court (for example, a young child could be seated on her/his mother's lap or a counsellor could be seated next to the complainant). This clause was removed due to fears that it would increase costs because witness fees would need to be paid to support persons. However, these fees are already paid to parents and caretakers who bring their children to court to testify.

### **Rules of evidence**

Some improvements have been made to the rules of evidence applicable to the testimony of rape survivors.

Currently, delays in reporting the rape arouse great suspicion and almost guarantee the charge being seen as false. The Bill provides that courts may not use a delay in reporting to cast doubt on a rape survivor's credibility. The Bill also attempts to further limit questioning around a victim's previous sexual history by detailing the circumstances in which this evidence can be raised. This offers more protection to complainants than before. However, because it continues to allow such evidence when 'relevant', a term which can be highly subjective, this provision does still leave the door open to the defence to lead unnecessary, prejudicial and intrusive questions.

Certain witnesses' testimony is considered unreliable and requires the courts to exercise caution when considering the evidence of single witnesses, children and sexual offence complainants. In 1998 the Supreme Court of Appeal in *S v Jackson* acknowledged that the

cautionary rule applicable to sexual offences discriminates against sexual offence victims and limited its use. Less helpfully, while stating that the rule may not be applied in a blanket, indiscriminate fashion, they still allowed for a cautionary approach to be used in some cases at the judge's discretion. The Bill abolishes both cautionary rules and approaches. However, the cautionary rule applicable to children's evidence remains in force, despite the SALRC's recommendation that it be discontinued.

Because legal adjudicators have believed children unable to understand the concept of truthfulness, their testimony is sometimes excluded. The SALRC recommended an amendment to section 192A of the Criminal Procedure Act, which said that all children would be presumed competent to testify. An amendment is also proposed to section 154 of the CPA, which says that any person who does not understand the oath may testify if they have been told by the magistrate or judge to tell the truth. Again, neither recommendation was adopted by the Bill.

### Conclusions

As is evident from this snapshot summary, much of the emphasis of the new Bill is on the creation of new statutory offences, or the substantive law. With the notable exception of the clause criminalising the purchase of sex, these reforms are long overdue and necessary. They will however present interesting challenges of interpretation, the new definitions being both broad as well as written in a fashion that is both technical and confusing.

The Bill pays considerably less attention to reforming legal procedures applicable to the investigation and prosecution of sexual offences. Indeed, the limited nature of protections in court offered by the Bill, as well as its attenuated approach to psycho-social support for rape victims, ensure that the Bill falls well short of providing 'the maximum' and 'least traumatising' protection of the law. It is also unlikely that the Bill, in and of itself, is capable of 'eradicating' rape in South Africa, given that preventive measures such as psycho-social support, as well as the management and treatment of offenders recommended by the SALRC,

are excluded from the Bill. Thus, from the outset, the Bill's ability to advance the rights of victims of sexual violence is already constrained.

Engaging in successful law reform will not, however, address all the challenges rape survivors experience in the criminal justice system. Challenging the everyday interpretation and practice of the law often requires much more than law reform alone. Even with a considerably improved Sexual Offences Bill in place, organisations will still need to remain vigilant with regard to all the myriad subtle ways in which law is able to disqualify and exclude so many women, children and men's accounts of sexual violence.

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