BUREAUCRACY VERSUS DEMOCRATISATION

The promulgation of the Criminal Law (Sexual Offences and Related Matters) Amendment Bill

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CENTRE FOR THE STUDY OF VIOLENCE AND RECONCILIATION
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1. INTRODUCTION

The Criminal Law (Sexual Offences and Related Matters) Amendment Bill[1] was passed by the National Assembly on 22 May 2007. After almost 10 years in the drafting this means that, if passed by the National Council of Provinces (NCOP) and signed into law by the President of South Africa, the Bill will soon become a reality in South Africa, heralding a crucial step towards greater access to justice for the victims of sexual violence in South Africa.

The passing of this Bill is a significant milestone in the fight against sexual offences in South Africa, a country beset by sexual violence. Along the continuum, from sexual harassment through to rape–murder, all South Africans are potential victims of sexual offences. Women, children and men have all fallen prey to sexual assault. Despite the disturbing sexual offences statistics,[2] South Africa has for a long time laboured under archaic and outdated sexual offences legislation, wherein rape consists of a man having unlawful and intentional sexual intercourse with a woman without her consent. This narrow definition effectively means that men cannot be raped, women cannot rape, and if a female or male is penetrated anally, orally or with an object that is not a penis, they have been "indecently assaulted", a crime that generally is considered less seriously and carries no minimum sentence.

The intention in drafting new sexual offences legislation was, firstly, to codify, in a non-discriminatory and gender-neutral manner, all criminal sexual acts in South Africa in order to protect *all* the victims of sexual offences regardless of age or sex. Secondly, the Bill aimed to develop efficient and effective legal provisions for the reporting, management, investigation and prosecution of sexual offences, in order to protect the rights of victims as well as ensure the fair trial of persons (including children) suspected, accused and convicted of committing a sexual offence.

This paper aims to firstly contextualise the Sexual Offences Bill by describing the situation regarding sexual violence in South Africa during the formulation of the Bill, and the history of the Bill from inception to passing by the National Assembly. It then seeks to explain and analyse the key elements of the Bill as well as the process through which the Bill travelled in order to become law. Finally, this paper will look at the way forward once the Bill has become law and the implications of implementation for the victims of sexual offences.

2. THE CURRENT SITUATION IN SOUTH AFRICA

The South African government has not been wholly indifferent to the sexually violent reality that shapes the lives of so many females and males in this country. In 1998, comprehensive national policy guidelines for victims of sexual offences were rolled out for the departments of Health, Welfare, Justice and Constitutional Development, Correctional Services and the South African Police Service (SAPS). The SAPS also outlined a number of activities to address crimes against women and children in their *Strategic Plan for the South African Police Service 2002–2005*. By 2004, the Department of Justice and Constitutional Development had opened approximately 50 sexual offences courts nationally in an attempt to provide specialised services to victims of sexual violence and increase the conviction rate for sexual offences. The National Prosecuting Authority (NPA) has rolled out 10 one-stop Thuthuzela centres that house all the necessary services for the management of sexual offences under one roof. In May 2006 the government, in partnership with civil society, launched the "365 days of action to end gender violence", which sets out priority actions aimed at eradicating gender-based violence at all levels.

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[1] This legislation will be referred to as the Sexual Offences Bill, or Bill, throughout this paper as, at the time of writing, although passed by the National Assembly, the Bill has yet to be signed into law by President Thabo Mbeki.

[2] 9 805 indecent assault cases and 54 926 rape cases were reported to the South African Police Service in 2005–06 (www.saps.gov.za). But research conducted by the Medical Research Council estimates that due to gross under-reporting, the real figure is approximately nine times this number (R Jewkes and N Abrahams, "The epidemiology of rape and sexual coercion in South Africa: An overview", *Social Science & Medicine* 55(7) (2002: 1 231–1 244). If the real sexual assault figures in South Africa are closer to 582 579 per year, it would mean that someone is raped or indecently assaulted every minute in South Africa.

Despite these measures, the response of the criminal justice system to sexual offences has been severely curtailed by antiquated legislation and conservative attitudes, both elements of which are borne out by the paucity of convictions for sexual offence crimes. A report by the South African Law Reform Commission (SALRC) found that across South Africa in the year 2000, only 5% of adult rape cases and 9% of child rape cases reported to SAPS resulted in convictions (and these figures are significantly lower in some provinces). Respectively, 68% and 58% of cases reported to the police did not even make it to court. Fifteen percent and 18% of cases were withdrawn — withdrawals could be the result in cases where: the rape survivor is intimidated by the perpetrator, particularly when known to the survivor; if the rape survivor is afraid of the possible reaction of unsupportive partners or parents; because the complainant laid a false charge; or because the police persuade the complaint to withdraw the charges where the evidence is weak. Of those adult rape cases that went to trial, more resulted in acquittals than convictions.[3] Despite the fact that the SALRC figures are relatively old, it is unlikely that the situation regarding rape cases in the criminal justice system would have changed significantly over the last seven years; one exception would be that of the sexual offences courts, where the conviction rates are believed to be around 20% higher than normal courts because of the specialist prosecutorial teams and victim-friendly environment.[4] The SALRC report concluded that: "Crime pays. South African criminals, even violent criminals, tend to get away with their crimes."[5] These figures make it clear that a long-term, sustainable strategy to eradicate sexual violence will only become viable once both preventive and reactive measures regarding sexual violence are enhanced: the criminal justice system, as one facet of this holistic strategy, needs to be improved and legislation pertaining to sexual violence, in particular, needs strengthening.

Hand-in-hand with poor conviction rates is the secondary victimisation suffered by victims of sexual offences within the criminal justice system. Victims of sexual violence are likely to encounter some, if not all, of the following experiences: scepticism, insensitivity or outright dissuasion while laying a charge, no private waiting rooms or report-taking facilities, long waiting periods before being taken for medical examination and treatment, no information or explanation about police or court procedures or the progress of their case, the use of prejudiced criteria in deciding whether or not to prosecute or close cases, long delays between reporting a case and that case going to court, and being subjected to biased attitudes and degrading cross-examination in court from court officials as well as the accused and his defence counsel.[6] This treatment not only compounds the initial rape trauma, but may lead to women subsequently withdrawing charges and even dissuade women from laying charges in the first place.

While the problems outlined above are a combination of legal issues and service delivery challenges, the SALRC envisioned a Sexual Offences Bill that would deal with the substantive and procedural law as well as outline the best practice principles of sexual offence case management underlying the legislative reform. These principles would be a yardstick for all role players involved with sexual offences when dealing with victims, and would be incorporated into the legislation through: the preamble of the Act; as substantive legal provisions in the Act (that would make certain practices obligatory); reference, insofar as the Act would provide for the drafting of a memorandum or code of conduct; and in a separate charter for the management of victims.

However, having outlined some of the criminal justice response problems regarding sexual violence, it must be noted that violence against women in South Africa is primarily a social phenomenon with roots in the deep-seated patriarchy and systemic violence that afflicts South African society. As such, the impact of any legislation will be limited to dealing with the aftermath

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[3] Interestingly, rape conviction rates are not much better elsewhere in the world. The UK recorded a 5.6% conviction rate in 2001/2002 (see Liz Kelly, Jo Lovett and Linda Regan, 2005, *A Gap or a Chasm: Attrition in Reported Rape Cases*. Home Office Research Study 293), while New South Wales in Australia recorded a 5% conviction rate in 1996–7 (see Laura Russo, June 2000, *Date Rape: A Hidden Crime*, Australian Institute of Criminology, No. 157.

[4] Available at< http://www.gcis.gov.za/docs/publications/pocketguide05/justice05.pdf>.

[5] South African Law Reform Commission, 2000, *Research Paper 18: Conviction Rates and Other Outcomes of Crimes Reported in Eight South African Police Areas. Project 82: Sentencing (A new sentencing framework).*

[6] Danielle Motelow, Lisa Vetten and Hallee Ludsin, October 2004, *The Limits of Law Reform: A case study of the processing of rape, attempted rape and indecent assault matters during 2002 at Boksburg Regional Court,* CSVR: unpublished research report. See also: Lisa Vetten, 2001, *While women wait … (2): Can specialist sexual offences courts and centres reduce secondary victimisation?* In *Nedbank ISS Crime Index*, Vol. 5, No. 3, May–June.

of sexual violence for the victim and punishing those who perpetrate such offences. Despite its reactive nature, the effective management of sexual offences does need progressive legislation that enshrines the rights set forth in the South African Constitution and recognises the scope and depth of the problem of sexual violence in South Africa.

As a result of the long delay in the promulgation of the sexual offences legislation, and the clear legal restriction around the definition of rape, the judiciary itself has been struggling to ethically and constitutionally reconcile the decisions they have to make regarding sexual offences. This dilemma is evident in a case recently before the Constitutional Court, namely the *State* v. *Masiya*. When convicted of anally penetrating a nine-year old girl, a regional court magistrate extended the common law definition of rape by finding Masiya guilty of rape rather than indecent assault. The magistrate contended that:

> [I]n terms of the existing common law definitions of crime, the non-consensual anal penetration of a girl (or a boy) amounts only to the (lesser) common law crime of indecent assault, and not rape, because only non-consensual vaginal sexual intercourse is regarded as rape. One's initial feelings of righteousness would however immediately rebel against such thought. Why must the unconsensual sexual penetration of a girl (or a boy) *per anum* be regarded as less injurious, less humiliating and less serious than the unconsensual sexual penetration of a girl *per vaginam*? The distinction appears on face value to be irrational and totally senseless, because the anal orifice is no less private, no less subject to injury and abuse, and its sexual penetration no less humiliating than the vaginal orifice. It therefore appears that the common law definition of rape is not only archaic, but irrational and amounts to arbitrary discrimination with reference to which kind of sexual penetration is to be regarded as the most serious, and then only in respect of women.[7]

The high court confirmed this ruling and the case was referred to the Constitutional Court for a confirmation of a declaration of constitutional invalidity. On 10 May 2007, although the Constitutional Court upheld Masiya's appeal, they extended the common law definition of rape to include the "acts of non-consensual anal penetration of a penis into the anus of a female". The Court made no ruling with regard to male rape, as they felt that they could only deal with the facts before the court at the time (which was anal rape of a female child). The majority judgment, handed down by Justice Nkabinde, recognised that while non-consensual anal penetration of males is no less "degrading, humiliating and traumatic and, to borrow the phrase by Brownmiller, "a lesser violation of the personal private inner space, a lesser injury to mind, spirit and sense of self" than non-consensual anal penetration of females", the Court observed that "the Legislature and not the courts has the major responsibility for law reform and the delicate balance between courts' functions and powers on one hand and those of the Legislature on the other should be recognised and respected".[8] They thus decided that the issue of male rape was not their domain and would have to be dealt with by the Legislature "when the circumstances make it appropriate and necessary to do so".[9]

The Constitutional Court majority judgment revealed some frustration with the legislature in relation to the long-awaited Sexual Offences Bill and consequent denial of victims' rights by stating that:

> ... while not unmindful of the fact that the 2003 Bill is before Parliament, [the Constitutional Court] cannot delay, defer or refuse to deal with an extension of the definition when the facts before it demand such an extension and when it is clearly in the public interest to do so. Any further delay in or suspension of the extension of the current definition will constitute an injustice upon survivors of non-consensual anal penetration such as the nine-year-old complainant in this case.[10]

Despite this finding, the court was unable to apply this extended definition retrospectively to Masiya and his conviction was set aside and replaced with one of indecent assault. However, the court ruled that the new common law definition would apply to all acts occurring after the ruling.

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[7] The regional court magistrate as quoted in the Constitutional Court judgment, *Fanuel Sitakeni Masiya* v. *Director of Public Prosecutions and others, CCT 54/06*: 5–6.

[8] Ibid: 20.

[9] Ibid.

[10] Ibid: 29.

Chief Justice Langa and Justice Sachs were the dissenting judges in this case, who came to the "inescapable conclusion" that "the anal penetration of a male should be treated in the same manner as that of a female ... to do otherwise fails to give full effect to the constitutional values of dignity, equality and freedom: dignity through recognition of a violation; equality through equal recognition of that violation; and freedom as rape negates not only dignity, but bodily autonomy. All these concerns apply equally to men and women and necessitate a definition that is gender-neutral concerning victims."[11] The minority judgment, handed down by Chief Justice Langa, held that the Constitutional Court should extend the definition of rape to include the anal penetration of males for the following reasons: anal penetration is already criminalised in South African law, so the extension would not be creating a new crime but re-categorising it; the criminalisation of rape should be to protect all people, irrespective of sex or gender; there is no reason to believe that extending the definition will decrease the protection afforded to women; and the groups of men who are most often the survivors of rape, young boys, prisoners and homosexuals, are, like women, also vulnerable groups in our society and raped precisely because of the gendered nature of the crime. Chief Justice Langa also spoke to the issue of judicial restraint and the separation of powers, and dismissed the concerns of the majority judgment on this issue by pointing out that the case before them was not about the sex of the victim but about gender and understanding the nature of rape. He further pointed out that the Sexual Offences Bill before Parliament upheld the gender neutrality of the victim and thus any "infringement on the terrain of the Legislature is ... minimal".[12]

The Constitutional Court judgment in this case was a landmark decision in terms of widening the definition of rape, but went only part of the way to extending the protection of the law to all victims of sexual violence.

The act of rape is, firstly, a violation of a person's rights to freedom, security of the person and bodily integrity. However, the initial abuse is compounded by a series of subsequent rights violations, beginning with the inequitable legislation and complicated by an indifferent and discriminatory criminal justice system that denies victims their rights to equality, dignity, just administrative action and access to courts. While the South African government can be commended for those steps it has taken, there is clearly a disjuncture between intention and implementation (or enactment), which is prejudicial to rape complainants. The Sexual Offences Bill promised to be a panacea that would allow all victims of sexual offences the equal protection of the law and significantly improve the position of rape survivors in the criminal justice system once it was passed. As such, it generated much interest and input among stakeholders. Whether or not the Bill lives up to expectations and whether or not the process it underwent can be perceived as promoting the democratisation of the criminal justice system are the subjects of this paper.

3. BACKGROUND TO THE SEXUAL OFFENCES BILL

In 1998, the South African Law Reform Commission (SALRC) was requested to investigate sexual offences by and against children and make recommendations to the Minister of Justice and Constitutional Development for the reform of criminal law in these areas. In 1999, the SALRC's mandate was extended to include sexual offences committed against adults and the development of policy directives for the management of sexual offences. An expert project committee was established to draft a Sexual Offences Bill. The Committee consulted extensively with both government and civil society, in urban and rural areas in all provinces, among all sectors involved in the management of sexual offences and all groups affected by sexual offences. The comprehensive findings from the consultations, along with a review of law and best practice internationally, research and the SALRC's recommendations formed the basis of an extensive and thorough report on the reform of substantive and procedural law pertaining to sexual offences in South Africa. The report, published by the SALRC in December 2002, included a draft Bill that contained a range of progressive recommendations.[13] This report, with its draft legislation, was handed to the Minister of Justice and Constitutional Development in January 2003.

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[11] Ibid: 47.

[12] Ibid: 52.

[13] South African Law Reform Commission, 12 August 1999, *Project 107 Sexual Offences: Discussion Paper 85: Sexual Offences: the Substantive Law*.

By July 2003, the Minister of Justice and Constitutional Development and other members of Cabinet had considered the SALRC report and draft law and Bill 50-03 had been introduced to the National Assembly. The Bill was referred for further review to the Portfolio Committee on Justice and Constitutional Development of the National Assembly (Justice Committee). Between December 2003 and February 2004, the Justice Committee considered changes to Bill 50-03 but recessed for national elections before finalising their work. The Committee's proposed changes were contained in a working document. Nothing more was heard about the Bill until early May 2006, when the draft Bill once again appeared before Cabinet for approval and was sent to the Justice Committee for deliberation. In November 2006, the Bill came before the National Assembly only to be referred back to the Justice Committee because it dealt with issues that were within the competence of provincial health departments. Parliamentary legal advisers counselled that because of the health clauses in the Bill, it would have to be re-tagged and processed through a different procedure. The Bill lingered with the Parliamentary and Department of Justice law advisors for 6 months. In May 2007 it was decided not to retag the Bill and on Tuesday 22 May, the National Assembly passed the Sexual Offences Bill, possibly on the back of the Constitutional Court ruling.

4. KEY ELEMENTS OF THE SEXUAL OFFENCES BILL

The following sections look at the key elements of the Sexual Offences Bill.

4.1 Chapter 1: Objects

The Objects of the Sexual Offences Bill lay out the intentions of the Bill. The Objects state that the Bill will provide complainants with the maximum and least traumatising protection that the law can provide. In order to achieve this, the Bill will: introduce measures that seek to enable the relevant organs of state to combat the high incidence of rape; create new offences where necessary; protect complainants from secondary traumatisation; ensure a coordinated response from government departments; recognise the needs of victims through timeous, effective and non-discriminatory investigation and prosecution; entrench accountability of government officials; minimise disparities in the provision of services to victims; and establish a National Sex Offender Register.

The Objects are an encouraging indication of what the Bill hopes to achieve. They recognise a number of historical failings in the criminal justice system regarding the victims of sexual violence and use the converse approach as the premise from which to inaugurate the Bill. As such, the Objects denote a nuanced awareness of the problems hitherto experienced by victims of sexual assault in the criminal justice system, and provide a promising introduction to the Bill.

However, the Objects also provide an interesting insight into the ideal versus the reality: what the Bill could have achieved in an ideal world versus the compromises that had to be made in the actual drafting of the Bill. It could be argued that the model sexual offences legislation would be based on the *rights* of the victims, as enshrined in the Constitution: this would ensure that these rights would be entrenched through legislation. The intention of the Bill would then have been to allow victims of sexual offences a clarity and awareness of when their rights have been violated, from the occurrence of the offence through to the decision of the court (in other words, throughout their involvement in the criminal justice system). A rights-based approach would have empowered victims within the criminal justice system, and their needs would automatically be provided for under the umbrella of their rights. However, the Objects of the Sexual Offences Bill refer only to the *needs* of victims and their families, effectively disempowering them from demanding their rights in court. In its opening gambit, the Objects purport that the Bill will "afford complainants of sexual offences the maximum and least traumatising protection that the law can provide" while enabling "the relevant organs of state to give full effect to the provisions of [the] Act" with the aim of combating and ultimately eradicating "the relatively high incidence of sexual offences committed in the Republic".[14] However, that there are limitations

[14] Criminal Law (Sexual Offences and Related Matters) Amendment Bill: 9.

to this "maximum and least traumatising protection" are soon revealed through the qualification that the Bill will provide only "*certain* services to victims of sexual offences".[15] The Objects, then, indicate some of the compromises made in the drafting of this piece of legislation.

4.2 Chapter 2: Sexual offences

This chapter of the Bill lays out which sexual acts will be considered sexual offences and includes definitions of the crimes of: rape and compelled rape; sexual assault, compelled sexual assault and compelled self-sexual assault; compelling or causing persons 18 years or older to witness sexual offences, sexual acts or self-masturbation; exposure or display of or causing exposure or display of genital organs, anus or female breasts ("flashing"), and child pornography to persons 18 years or older; engaging sexual services of persons 18 years or older; incest; bestiality; and sexual acts with a corpse.

The definition of rape has been extended to include all acts of non-consensual penetration committed by one person on another. In other words, rape now includes the penetration of the vagina, mouth or anus with a penis, body part or any object (including an animal's body part or object resembling the genital organs of a person or animal).

This broadened definition of rape is arguably the single most important achievement of the Bill, as it makes the legislation equitable and brings South Africa into line with international best practice regarding sexual offence definitions. In essence, it means that men and boys can be raped, that the penetration of the vagina, mouth or anus with objects other than a penis will also constitute rape, and that women can be convicted of rape. That the definition is gender neutral is a crucial amendment in a country where the sexual abuse of boy children as well as male rape are not insignificant aspects of the sexual violence perpetrated in the country.[16] Equally, anal and oral penetration has been widely perpetrated on women and children in South Africa for a variety of reasons, including to avoid detection by the child's caretaker or in communities where regular virginity testing is practised, to avoid harsh punishment if apprehended (as it is widely known that anal penetration only constitutes indecent assault), and because children are often unable to resist oral penetration, a sex act that is often distasteful and avoidable for adults.

The inclusion of a broader range of sexual acts within the definition of rape also has implications for the punishment of the perpetrator. Whereas before a person charged with anal penetration could only be convicted of indecent assault for which there is no prescribed sentence (and often involves no more than a suspended sentence or fine), that person would now be liable for the minimum sentencing applicable to rape (10 years' imprisonment for a first offence). Following the Constitutional Court judgment of May 2007 (above) and until the Sexual Offences Bill is enacted, the anal penetration of women will now also be defined as rape and carry the appropriate sentencing.

New crimes have also been developed. "Compelled rape" criminalises the conduct of someone who forces another person to rape a third person. Sexual assault and violation replace the crime of "indecent assault". Under this offence, a person will be guilty of sexual assault if they commit an act of sexual violation. This includes a broad range of acts, such as: the direct or indirect contact between the genital organs and anus of one person and any body parts of another person or animal, contact between the mouth of one person and the genital organs, anus or breasts of another person, and the masturbation of one person by another person.

These sexual offences are therefore committed when one person unlawfully and intentionally commits an act of sexual penetration or violation with another person *without that person's consent*. Consent has been defined in the Bill as "voluntary and uncoerced agreement" and is lacking where there has been force or intimidation used against people or property; where there is

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[15] Ibid. My emphasis.

[16] See <http://www.news24.com/News24/South_Africa/News/0,,2-7-1442_2087003,00.html> for the story regarding the "indecent assault" of teenage boys in Germiston. See also Sasha Gear and Kindiza Ngubeni, 2002, *Daai Ding: Sex, sexual violence and coercion in men's prisons*, CSVR research report.

a threat of harm to people or property; where there is an abuse of a position of power or authority that inhibits the complainant from indicating his/her unwillingness; where consent has been obtained by fraudulent means; or where the complainant is incapable of giving consent (that is, sleeping, unconscious, in an altered state due to substance use, mentally disabled, or a child under 12 years of age).

The inclusion of the element of "consent" in the Bill is controversial as it was originally excluded from the definition of rape by the SALRC. The SALRC held that sexual penetration was prima facie unlawful when it occurred under coercive circumstances, which they defined as the application of force, threats, the abuse of power or authority, the use of drugs, etc. The SALRC explained their rationale in excluding the element of consent by stating:

> The new rape provision is built around the concept of 'unlawful sexual penetration' and does not require the State to prove absence of consent on the part of the victim ... In terms of the common law definition of rape, the State must prove beyond a reasonable doubt the fact that the woman did not consent to sexual intercourse. In the public perception, this creates the impression that the victims of rape are put on trial to prove their absence of consent to the sexual intercourse. As stated, absence of consent to sexual intercourse will no longer be an element of the offence. The accused can obviously still raise consent to sexual intercourse as justification for his or her unlawful conduct, but will carry the burden of proof in this regard. [17]

The SALRC regarded the use of the term "coercive circumstances" and the definition of sexual penetration to be the crucial elements of their proposed statutory offence of rape. The advantage of using the term "coercive circumstances" instead of "consent" was seen to be multiple: it bore recognition of the fact that perpetrators routinely employ different methods to ensure the submission or compliance of their chosen victim, ranging from using force and threats to less visible abuses of power such as emotional manipulation; it acknowledged that it is unacceptable in court for the actions and behaviours of the rape complainants to be interrogated to a greater extent than those of the accused; and it relieved the prosecution of some of the burden of proof regarding the victim's lack of consent. This fundamental shift in the recommended definition of rape was consistent with the international legal developments of some jurisdictions in recognising that the use of the element of consent ignores the social context of rape (including women's greater economic and social vulnerability) and skews the responsibility for the crime onto the victim during the trial.[18]

While excluding the element of consent in the definition of rape would not necessarily affect the experiences of the victim in the courtroom (because the accused would still be able to raise consent as a defence and therefore the issue of consent could still be used to humiliate and attack the dignity of the complainant and reinforce the notion that the complainant is responsible for the attack against her), the SALRC argued that it would signify an important symbolic shift in the law and denote an important transformation in attitude and principle, the spirit of which would hopefully begin to filter down through the criminal justice system.

On the other hand, the Justice Committee argued that the removal of the element of consent from the definition would create an entirely new offence in South Africa, and the courts would spend many years interpreting the new offence of rape in order to build jurisprudence. The Justice Committee pointed out that in the jurisdictions of Michigan and New Zealand, where consent had been removed, the courts gradually reverted back to the idea of consent anyway. For those reasons, the Justice Committee was opposed to creating such uncertainty, as well as with ultimately leaving it to the courts to decide the matter. The Committee thus decided to retain the element of consent but introduced and drew all the different circumstances which would not amount to consent into one single provision.[19]

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[17] South African Law Reform Commission, 12 August 1999, *Project 107 Sexual Offences: Discussion Paper 85: Sexual Offences: the Substantive Law*: 292–293, 301, 302.

[18] The States of Michigan and Illinois in the US and New South Wales in Australia have excluded consent from their definitions. For an overview of international law on the issue of consent see South African Law Reform Commission, 12 August 1999, *Project 107 Sexual Offences: Discussion Paper 85: Sexual Offences: the Substantive Law*: 92–110.

[19] Parliamentary Monitoring Group (PMG) minutes of the meeting of the Portfolio Committee on Justice and Constitutional Development, 26 January 2004.

Of particular interest and concern in this section of the Bill, in terms of both the implications of the Bill and for the democratisation process, was the very late and unadvised inclusion of clause 11: "Engaging sexual services of persons 18 years or older". This clause states that a person (A) who unlawfully and intentionally engages the services of a person 18 years or older (B), for financial or other reward, favour or compensation to B or to a third person (C) for the purpose of engaging in a sexual act with B, irrespective of whether the sexual act is committed or not; or by committing a sexual act with B, is guilty of engaging the sexual services of a person 18 years or older. In other words, this clause criminalises the clients of sex workers.

This is a controversial clause for a number of reasons. Firstly, the issue itself, the criminalisation of the clients of sex workers, is a highly contentious one. Secondly, the manner in which the clause was added, at a late stage without the preceding deliberation or public participation, seemed to flout regard for due process. And, finally, its inclusion pre-empts the findings and recommendations of the SALRC who are currently undertaking a thorough investigation into the complex and highly charged issue of adult sex work. In essence, the argument against the inclusion of such a clause maintains that the criminalisation of sex workers' clients removes the rights of women (and men) to choose how sexual transaction takes place between consenting adults. Sex work is about selling a service to make money and as such is an economic transaction. Sex workers will therefore actively seek out business from their clients; the criminalisation of their clients thus disempowers these women from making a living and means that their only source of income is denied them. The Sex Worker Education and Advocacy Taskforce (SWEAT) report that in Sweden, where the client was criminalised, research has documented that sex workers have described how the law actually endangers their safety and how they now have to protect their clients in order to retain them. To do this they have to take extra precautions to avoid police and so are forced to conduct their business in the most hidden underground areas and establishments, which renders their working conditions far more dangerous. This also makes it more difficult for safer sex organisations to reach the sex workers to deliver condoms and conduct workshops on safer sex, sexually transmitted infections and HIV/AIDS. SWEAT points out that, as in Sweden, it is inevitable that in South Africa if sex workers need to spend more time hiding from law enforcement officials, they will need to spend longer hours working to make money, and will have less time for themselves and their families. In South Africa, the biggest problem facing outdoor (street based) sex workers is not abuse from clients but police harassment, abuse and a continuous cycle of weekend arrests which disrupt the possibility to earn a consistent living wage. In Sweden, one of the unintended consequences of the criminalised client law is that sex workers are reluctant to call the police if they are abused by clients because they are then seen as informers and they lose other clients as a result.[20] Criminalising the client in Sweden, where unemployment rates are relatively low, did not result in women leaving the sex work profession, and so there is no reason to think that criminalising the client in South Africa would lead to a different outcome. When briefing the Justice Committee on the Bill, Jonny de Lange (chairperson of the Justice Committee in 2003 and current deputy minister of justice) noted that the Sexual Offences Bill did not deal with adult prostitution because the SALRC was working on a report on that issue. However, citing the Scandinavian example, he went on to request that the Justice Committee consider including in the legislation "criminalising the person who actually paid for the sexual act, because they were the real source of the problem". [21] It would seem that the Justice Committee ran with this idea: they included the clause with the rationale that they were somehow balancing the equation by criminalising not only the sex worker but those who paid for the sex act too. As a final point, the clause criminalising clients of sex workers can be seen as contrary to the National Strategic Plan on HIV, which commits stakeholders (including government) to building a supportive legal and policy environment for marginalised groups, including sex workers.

4.3 Chapters 3 and 4: Sexual offences against children, and sexual offences against persons who are mentally disabled

Chapter 3 provides for acts of consensual sexual penetration with certain children (that is, statutory rape) as well as for acts of consensual sexual violation with certain children. There are also new offences pertaining to children, which include: the sexual exploitation of children; the sexual grooming of children; exposure or display of or causing exposure or display of pornography

[20] SWEAT Submission to Parliament, 15 September 2006: 6–8.

[21] PMG minutes of the meeting of the Portfolio Committee on Justice and Constitutional Development, 7 August 2006.

to children; using children for or benefiting from child pornography; compelling or causing children to witness sexual offences, sexual acts or self-masturbation; and the exposure or display of or causing of exposure or display of genital organs, anus or female breasts to children ("flashing").

The sections on children and the mentally disabled are sound and comprehensive sections which will hopefully serve to more exhaustively protect the most vulnerable members of our society. The Bill introduces new offences to protect children, defined as individuals below the age of 18 years old, from paedophilic activity. In addition, the Bill attempts to protect children who engage in experimental and consensual sexual activities from criminal prosecution by providing that such a prosecution cannot be instituted without the written permission of the National Director of Public Prosecutions, if both parties were children at the time the offence was committed (that is, they were both between the ages of 12 and 16 years), and that if a prosecution is instituted, it must be against both parties.

In relation to persons who are mentally disabled, the offensive terminology such as "imbecile" and "idiot" that was contained in the repealed Sexual Offences Act has been removed. New offences, similar to those created for children, have also been provided for in the Bill.

These developments in the legislation regarding children and persons with mental disabilities, cataloguing a range of sexual crimes that can be committed against such individuals because of their innocence, ignorance or special vulnerabilities, are progressive legislative measures and their inclusion in the Bill is to be commended.

4.4 Chapter 5: Services for victims of sexual offences, and compulsory HIV testing of alleged sexual offenders

This chapter outlines the services that will be provided for victims of sexual offences: these are the provision of post-exposure prophylaxis (PEP) after the offence has been reported at a police station or designated health facility, and the compulsory HIV testing of alleged sex offenders.

Although the provision of PEP is an essential service to victims of rape, it can already be anticipated that there will be various problems with accessibility and implementation as the provision is currently set down in the Bill. Firstly, in order to access this emergency treatment, victims of rape have to report to a police station or designated health facility within 72 hours (the period within which the drug is effective). The Justice Committee justified the inclusion of the reporting element on the grounds that it was necessary to create some limitations to access in order to ensure that there was no abuse — that is, that all persons who suspected they were HIV positive did not claim that they had been raped in order to access the treatment. However, this is a misguided concern as PEP is not a treatment for HIV/AIDS but a precaution to reduce the risk of HIV transmission. In addition, the trauma of going through the reporting and medico-legal process in order to access the PEP would presumably discourage those who are trying to access it through a false rape claim. There are many barriers to reporting to the police for rape survivors, including location of police station, stigma surrounding the crime (especially if the perpetrator is known), and not least of which is the often dismissive attitude of the police themselves towards rape victims. Furthermore, the police are often slow with responding to the medical needs of victims and may not arrange for their transportation to the relevant designated health facility within the allotted 72 hours.

For the victim to be able to report at a designated health facility was a concession on the part of the Justice Committee but also presents certain problems. Firstly, it is currently unclear how and what facilities will be designated to provide PEP: the Bill only specifies that the cabinet member responsible for health must designate, in the Government Gazette, any public health establishment for the purposes of providing PEP to victims and may withdraw any designation by notice in the Gazette. The designation must be published within two months of the implementation of this section of the Act, and at least at intervals of six months thereafter. Secondly, if the Minister of Health is to designate only certain facilities to dispense PEP, this would limit access even further, especially if the designated facilities are far from the site of the rape or the police station at which the rape was reported.

The chairperson of the Justice Committee in 2006, Fatima Chohan-Khota, commented that while the Department of Health had indicated that the availability of PEP at all healthcare facilities was desirable, there were currently capacity problems. This indicates that even among the health facilities designated, there could be problems relating to accreditation, legality, capacity, knowledge of the most effective sites, and so on. Furthermore, there is a convincing case for considering PEP to be an emergency medical treatment. If this is so, the clause would fly in the face of the National Health Act which provides for free access to emergency treatment at all health facilities,[22] and any bureaucratic requirements that limited access to PEP for rape victims would therefore be potentially unconstitutional. McQuoid-Mason et al. argue that, in the case of *Soobramoney* v. *Department of Health, KwaZulu-Natal*, the Constitutional Court understood "emergency medical treatment" to mean treatment arising from a "sudden catastrophe which called for immediate medical treatment", wherein remedial treatment that is necessary and available must be given immediately to avert harm. The authors contend that rape constitutes a "sudden catastrophe":

> Rape is usually sudden, unexpected and may have catastrophic consequences for the survivor. The essence of the crime is the lack of consent by the rape survivor, which makes it unexpected. The consequences may be severe both physically and psychologically and, when considering the high risk of HIV infection, may be catastrophic since the survivor may be confronted with the possibility of contracting a fatal illness. Given the high probability of HIV infection in South Africa, there is little doubt that a rape survivor qualifies for the constitutional right to emergency medical treatment as defined by the Constitutional Court.[23]

While it makes sense that the provision of PEP is subject to a time limit (as it becomes ineffectual after 72 hours), the above argument makes a compelling case that rape victims should be entitled to access to PEP at any and all health facilities at which they present following a rape.

Although the Department of Health's National Anti-Retroviral Treatment Guidelines[24] include the need for pre- and post-test counselling with the provision of PEP, the clause in the Bill is silent on the need for such counselling. It is felt by many service providers that to legislate the need for counselling would be an effective way of holding healthcare workers accountable for providing this service, which is so essential for the psychological well-being of the victim and the likelihood that the victim will adhere to the whole course of PEP that is crucial for the drug's efficacy.

The clauses pertaining to the provision of treatment and PEP for sexual assault victims may not be as comprehensive as they could be due to confusion between the jurisdictions of the Sexual Offences Bill and policies and legislation relevant to the Department of Health. Repeatedly during the Justice Committee's deliberations on the Bill, there was uncertainty over whether clauses should be included in the Sexual Offences Bill or whether the Department of Health should deal with it or already had policies in place to deal with it. The UCT Institute of Criminology submission called for the Bill to contain a clause relating to the medical management of rape survivors, the availability of medico-legal expertise and services, but De Lange felt that these proposals should be put into legislation by the Department of Health.[25] The CGE contended that although they fully supported the concept that government should provide care to victims and their families, they conceded that this Bill might not be the right forum to deal with treatment of victims because the Department of Health is responsible for treating victims and already has policies for this. The Western Cape Network on Violence against Women recommended that a treatment clause should be inserted in the Bill but, again, De Lange stated that the issue of treatment in this Bill was problematic because it should be the responsibility of the Department of Health to deal with such services.[26]

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[22] National Health Act, 2003, Chapter 2: Rights and uties of Users and Health Care Personnel Emergency Treatment, "A health care provider, health worker or health establishment may not refuse a person emergency medical treatment".

[23] David McQuoid-Mason, Ames Dhai and Jack Moodley, "Rape survivors and the right to emergency medical treatment to prevent HIV infection", *South African Medical Journal*, January 2003, Vol. 93, No. 1: 41–42.

[24] Available at <http://www.doh.gov.za/docs/policy-f.html>.

[25] PMG minutes of the meeting of the Portfolio Committee on Justice and Constitutional Development, 16 September 2003.

[26] PMG minutes of the meeting of the Portfolio Committee on Justice and Constitutional Development, 17 September 2003.

4.4.1 The compulsory HIV testing of alleged sexual offenders

The rest of Chapter 5 deals with what is ostensibly a service for victims but, on closer inspection, appears to have the potential to do more harm than good: the compulsory HIV testing of perpetrators. This provision states that a complainant, an interested person on behalf of the complainant, or the police can apply for the HIV testing of an accused within 90 days from the date of the offence. If the magistrate is satisfied that there is prima facie evidence, the order to test the accused will be granted and the test results will be made known to the person applying for the test and the alleged offender.

The minutes of the Justice Committee's meeting of 19 June 2006 note that "Chapter 5 was thus the direct result of the Committee's proposal to include the Compulsory Testing Bill into this Sexual Offences Bill".[27] The Justice Committee felt that there was a need for legislative intervention to provide for compulsory HIV testing of alleged offenders in sexual offence cases at the instance of the victim because one of the conditions under which HIV testing can be conducted without informed consent is "where statutory provision or other legal authorisation exists for testing without informed consent".[28] The intervention was found to be necessary in the light of women and children's undoubted vulnerability in South Africa as a result of widespread sexual violence amidst the increasing prevalence of a nationwide epidemic of HIV. The Justice Committee's aim in including this clause was "to empower the victim and allow him/her to make certain vital decisions relating to lifestyle, such as whether a woman complainant should breastfeed, etc." They felt that the provision ensured that the test results would be used to inform the victim and allow her to make informed personal decisions, as well as use the test results as evidence in separate civil proceedings against the offender, seeking compensation in the form of damages.[29]

However, this provision was challenged by several arguments. Firstly, it was argued, the provision should not be included under the chapter dealing with services for victims: this juxtaposition could reinforce the belief that the HIV status of the accused impacts on the complainant's decision whether or not to access PEP, which should be made independently of any HIV test. Secondly, and probably most importantly, the provision has serious consequences for the complainant. The fact that a magistrate has to make a decision based on the evidence of the case means that the complainant would have to endure a mini-trial and relive the experience just days after the traumatic incident, possibly without adequate preparation. The process is cumbersome and has the potential to further exacerbate the abuse a victim endures within the criminal justice system. In addition, the window period within which HIV is not detected reduces the reliability of the test.

Thirdly, in relation to the perpetrator, the AIDS Legal Network argued that any form of compulsory HIV testing is a human rights violation as it constitutes an abuse of one's right to bodily autonomy and privacy, and one's right to make informed decisions about medical procedures.[30] In addition, as and until an alleged offender is convicted in a court of law he remains an "alleged offender" and every accused person has the right to be presumed innocent — as the testing is carried out before the trial is conducted, it may have implications for the rights of the accused. However, there is provision in the Constitution for the limitation of rights and, as explained above, there is legal justification for allowing the HIV testing of alleged perpetrators without their informed consent. Furthermore, there are safeguards for the alleged perpetrator: s/he is allowed to give evidence to the magistrate if to do so would not give rise to any substantial delay; the confidentiality of the outcome of the application and the test results are ensured; and, before the application is granted, the magistrate hearing the application must be satisfied that there is prima facie evidence that a sexual offence has been committed against the victim by the alleged offender, that the victim may have been exposed to the body fluids of the alleged offender, and that no more than 90 calendar days have lapsed from the date on which it is alleged that the offence in question took place.

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[27] PMG minutes of the meeting of the Portfolio Committee on Justice and Constitutional Development, 19 June 2006.

[28] Available at <http://www.doh.gov.za/aids/docs/policy.html>.

[29] PMG minutes of the meeting of the Portfolio Committee on Justice and Constitutional Development, 15 August 2006.

[30] AIDS Legal Network, June 2006, *Submission to the Portfolio Committee on Justice and Constitutional Development on the Criminal Law (Sexual Offences and Related Matters) Amendment Bill (2006)*: 3.

There are also clauses within this provision allowing for criminal charges to be brought against those who lay a charge and make an application for the compulsory HIV testing of the alleged offender purely with the intention of ascertaining the HIV status of that person with malicious intent. Criminal charges can also be brought against a person who, with malicious intent or through gross negligence, discloses the results of the HIV test to persons other than the interested parties. These clauses have been included to further protect the alleged offender from false allegations of rape that may lead to a compulsory HIV test for the alleged offender. However, although false allegations are occasionally laid by complainants, it seems hard to believe that s/he would go through the traumatic and often humiliating processes of reporting, medico-legal examination and HIV testing application merely to maliciously ascertain someone's HIV status. Furthermore, the "malicious intent" offence is open to serious misuse: in situations where a charge is dropped, withdrawn or there is an acquittal, a charge of malicious intent could be brought against the victim. This may further discourage women from laying a charge of rape.

And lastly, this provision will channel much-needed resources away from the victims — rather than pouring energy and funding into the implementation of this burdensome compulsory testing, the State and the victims of rape would be better served to focus on the provision of comprehensive and accessible services for victims of sexual offences.

4.5 Chapter 6: National register for sex offenders

The National Sex Offenders Register provides that a person who has been convicted of a sexual offence or is alleged to have committed a sexual offence against a child or mentally disabled person, whether committed before or after the commencement of this Chapter and whether committed in or outside South Africa, will be included in the Register. Such a person may not: be employed to work with a child or mentally disabled person in any circumstances; hold any position, related to his or her employment, or for any commercial benefit which in any manner places him or her in any position of authority, supervision or care of a child or mentally disabled person; be granted a license or be given approval to manage or operate any entity, business concern or trade in relation to the supervision over or care of a child or mentally disabled person; and become the foster parent, kinship care-giver, temporary safe care-giver or adoptive parent of a child or mentally disabled person.

The provision of a National Register for Sex Offenders was introduced at the behest of Jonny de Lange, as chairperson in 2003. De Lange wanted to see a black-list or register of paedophiles in South Africa and did not agree with the argument, proposed by the SALRC, that a register created a false sense of security. In the Justice Committee meeting, De Lange directed the Department of Justice's legal drafter to explore the issue of introducing a register. [31]

However, this provision is a problematic clause in the Bill. The issue of the Register has been challenged on two matters of principle. Firstly, it is a duplication of the register provided for in the Children's Bill and therefore it is inappropriate to duplicate such an expensive provision, especially given the constant reminders of resource constraints in the provision of services to victims. Not only is the register a duplication, but it is not as adequate or comprehensive as that contained in the Part B of the Child Protection Register of the Children's Bill (Section 75). Secondly, it should also be noted that research into the effectiveness of registers with regard to the protection of children from sexual exploitation is inconclusive at best.[32]

In relation to the implementation of a register, there are also a number of concerns. The powers of the registrar with regard to removing names from the register are not sufficiently conditional on training, expertise and expert advice from those involved in the management of sexual offenders. The Chapter is silent on the inclusion or exclusion in the register of children who commit sexual offences against children, but Childline South Africa recommended that children under 14 years and children who are first offenders are not included in the register.[33] In Justice Committee deliberations on the Bill, the Democratic Alliance expressed disfavour with having two separate registers on the same matter in both the Children's Act and in Clause 43 of the

[31] PMG minutes of the meeting of the Portfolio Committee on Justice and Constitutional Development, 6 August 2003.

[32] International Congress of the Society for the Prevention of Child Abuse and Neglect, Denver, Colorado, USA 2002 and the International Conference on the Treatment of Sexual Offenders, Vienna, Austria, 2002.

[33] Childline SA, June 2006, *Submission to Parliament on Criminal Law (Sexual Offences and Related Matters) Amendment Bill*: 4.

Bill, but Chohan-Khota, as chairperson in 2006, was of the view that that there was a need for this Bill to establish a register as soon as possible because it could very well take a substantial time for the more comprehensive register in the Children's Act to be made operational. The length of time it would take to establish a register under the Bill was apparently not a factor under consideration.

4.6 Chapter 7: General provisions

The general provisions deal with a range of clauses. Miscellaneous offences are listed as: the obligation to report the commission of sexual offences against children or persons who are mentally disabled; and the attempt, conspiracy, incitement or inducing another person to commit a sexual offence. It is reiterated in the Sexual Offences Bill that the claim of a marital relationship is not a valid defence to rape: it was only with the enactment of the Prevention of Family Violence Act in 1993 that a husband could be convicted of the rape of his wife. This signified an important development in the law, as marital rape is a hidden yet devastating phenomenon, often resulting in severe and long-term physical and psychological consequences as a result of the multiple nature of the assaults.[34] Deception regarding age on the part of a child *is* a valid defence for an accused, as is the contention that both the accused persons were children and the age difference between them was not more than two years at the time of the alleged commission of the offence. This chapter also deals with the inability of children under 12 years and persons who are mentally disabled to consent to sexual acts. Other evidentiary matters and extra-territorial jurisdiction are outlined. The National Policy Framework (NPF), as well as national instructions and directives, are included here. Lastly, a transitional provision relating to trafficking in persons for sexual purposes is included.

4.6.1 National Policy Framework

The NPF will provide an interdepartmental co-ordinating and oversight body for the implementation of the sexual offences legislation and policy. It will also clarify and monitor the implementation of the responsibilities of different departments for various aspects of the legislation. According to the Bill, the NPF will need to be established within one year of the implementation of the Act: although there are some precedents for the NPF, such as the National Policy Guidelines for Victims of Sexual Offences (1998), there has never been a comprehensive and legislated body that focuses on the management of sexual offences. The NPF is specifically designed to ensure a uniform and co-ordinated approach by all Government departments and institutions in dealing with matters relating to sexual offences; guide the implementation, enforcement and administration of the Sexual Offences Act; and enhance the delivery of services as envisaged in the Act by the development of a plan for the progressive realisation of services for victims of sexual offences within available resources. As such, the NPF is a crucial development and could help enormously to reduce the levels of secondary victimisation experienced by victims of sexual offences in the criminal justice system.

The only fly in the ointment is that the NPF as legislated in the Bill does not provide for the inclusion of civil society — the NPF is constituted by, created by and implemented by government. This seems to be a significant oversight considering the essential services that NGOs provide to victims of sexual offences, often stepping in when government has failed the victim. In addition, independent research organisations and NGOs have a wealth of knowledge and information pertaining to both the victims and perpetrators of sexual offences that would be invaluable in developing policies and co-ordinating approaches to the management of sexual offence cases.

The Bill makes provisions for policy directives and national instructions regarding the management of sexual offences cases and the requisite training in relation to police officials, court officials and healthcare workers. The provision for the development of these policies is a positive step and if effective policies are developed they could have a greater impact than the actual legislation in ensuring that sexual violence victims are not further victimised in the criminal justice system. However, as with all such guidelines and directives, it is crucial that they are implemented effectively in each department and that the relevant governmental officials know about, subscribe to and practice the guidelines included in those policies. For example, the National Policy Guidelines for Victims of Sexual Offences mentioned above are a solid and comprehensive set of guidelines for

[34] See: Raquel Kennedy Bergen, 1999, *Marital Rape,* Applied Research Forum: National Electronic Network on Violence against Women.

the management of sexual offences cases but are rarely followed, or even known about, by the government departments who are meant to implement them. Unfortunately, the clause ensuring that all directives and instructions are binding and enforceable and that they carry appropriate disciplinary consequences when not adhered to, has been removed from the latest version of the Bill, meaning that the implementation of the policies are only as good as the dedication of the relevant staff putting them into practice.

4.6.2 Rules of evidence and procedure

There has been relatively little change in the rules of evidence and procedure governing a rape trial. On the positive side, access to intermediaries for persons with a mental age below 18 has been improved. A delay in reporting (currently known as "evidence in delay of reporting" and treated by the courts as evidence that is rape claim is false) may not be viewed by the court in a negative light and it cannot be used against a victim if s/he did not tell anyone else about the rape immediately.

The rules around the admittance of a complainant's previous sexual history have been tightened. No evidence relating to previous sexual history, unless it pertains to the incident on trial, may be adduced. The exceptions to this are when: the court has, on application by any party to the proceedings, granted leave to adduce such evidence or to put such question; or the evidence has been introduced by the prosecution. An application may only be granted if the court is satisfied that such evidence or questioning is relevant to the proceedings pending before the court. This is determined by the following factors: it is in the interests of justice, with due regard to the accused's right to a fair trial; it is in the interests of society in encouraging the reporting of sexual offences; it relates to a specific instance of sexual activity relevant to a fact in issue; it is likely to rebut evidence previously adduced by the prosecution; it is fundamental to the accused's defence; it is not substantially outweighed by its potential prejudice to the complainant's personal dignity and right to privacy; or it is likely to explain the presence of semen or the source of pregnancy or disease or any injury to the complainant, where it is relevant to a fact in issue. Furthermore, an application will not be granted if the court believes that such evidence or questioning is sought to be adduced to support an inference that by reason of the sexual nature of the complainant's experience or conduct, the complainant is more likely to have consented to the offence being tried or is less worthy of belief.

Although these clauses around the admittance of previous sexual history evidence have been strengthened, protection for the victim is still limited in that the admittance of such evidence is nonetheless largely at the discretion of the judicial officer and can be misused by magistrates and judges who do not fully understand the implications for the victim of admitting such evidence.

The SALRC recommended that the application of *all* cautionary rules (whereby caution is applied to the testimony of certain witnesses as they are deemed unreliable), with the exception of the rule related to single witnesses, be discontinued. They maintained that the normal process of the court establishing the truthfulness of any witness is sufficient.

Although concluded before the passing of the new sexual offences legislation, the Jacob Zuma rape trial in 2006 highlighted how the above two points of law are utilised at the discretion of the presiding judge. Despite the fact that much of the complainant's previous sexual history related to incidents when she was still a minor, Justice van der Merwe allowed extensive, humiliating and distressing cross-examination on her previous sexual history because the prosecution had led with aspects of it first (albeit one small incident to ascertain when the complainant had last had consensual sex). The judge justified granting the defence's application to adduce evidence pertaining to the complainant's previous sexual history because he felt that "in the end if evidence has sufficient cogency the witness must endure a degree of embarrassment and perhaps psychological trauma. This harsh reality must be accepted as part of the price to be paid to ensure that only the guilty are convicted."[35] Despite a ruling by the Supreme Court of Appeal in 1998[36] that the cautionary rule is irrational and outdated, in his judgment Van der Merwe took a cautionary *approach* to the complainant's testimony as a result of evidence adduced by the defence that the complainant

[35] *State* v. *Jacob Gedleyihlekisa Zuma*, High Court of South Africa, 8 May 2006: 37.

[36] *S* v. *Jackson* 1998(1) SACR 470 (SCA): 476e–477d.

had previously laid false rape allegations and had been traumatised by previous sexual assault (implying that the complainant was now emotionally imbalanced when it came to any sexual behaviour). Even if the Sexual Offences Bill had been passed prior to the Zuma rape trial, the limitations in relation to the admittance of previous sexual history would not have altered Van der Merwe's position on allowing the evidence. He himself stated, in reference to the recommendations around previous sexual history made by the SALRC, that: "Whether or not the proposal [of the SALRC] becomes in due course the subject of legislation, the matters [i.e. limitations] identified must, even in the present state of the law, be regarded as considerations of great importance in arriving at a properly-considered judgment on admissibility in terms of s 227(2)."[37] The upshot of this statement is that, despite limitations imposed on judicial officials in legislation, the discretionary powers of those officials are still fairly far-reaching.

The Bill retains the clause stating that, in the absence of a defence attorney, the accused can direct the cross-examination of the complainant him/herself. This is one of those cases where the rights of the accused have to be carefully balanced against the rights of the victim. Despite the fact that this rule applies to all criminal trials and that it would therefore be potentially prejudicial to the accused if s/he were not allows to face his/her accuser, the especially traumatic and invasive nature of a sexually violent crime needs exceptional consideration. Organisations that deal with rape victims, especially those providing court support services, lobbied to have this clause removed from the Bill by arguing that this allowance only serves to undermine the dignity and psychological safety of the complainant, who has to face her/his attacker while trying to give effective testimony to a court of law. It amounts to a form of intimidation by the accused and is tantamount to at best distracting and at worst silencing the complainant, denying the court the benefit of the whole truth.[38] If this clause had been amended to disallow direct cross-examination of a victim by an accused, the accused would still be able to conduct his own defence, but instead of cross-examining the complainant directly, would need to pose his/her questions through the court.

5. OMISSIONS IN THE BILL

There are also a number of omissions from the Bill which will have a significant impact on affording "complainants of sexual offences the maximum and least traumatising protection that the law can provide".

The SALRC recommended that victims of sexual violence should be considered "vulnerable witnesses" by the courts. As such, the state would have been obliged to provide the complainant with at least four protective measures in court (such as testimony via CCTV camera, in-camera hearings, etc.) in order to improve equal access (across age and gender) to the protective measures available to witnesses in court proceedings. The concept of a vulnerable witness was dismissed with contempt by Jonny de Lange, the 2003 chairperson. He declared that "there was no sense or logic to it as it created categories of people" and that "the prejudices of the people in the system led to secondary victimisation and declaring someone a vulnerable witness was not going to help that". [39] It is clear that De Lange could not conceptualise that a significant amount of gender bias and discrimination in the criminal justice system can be ameliorated by legislating certain protective measures that would leave little room for discrimination. Furthermore, De Lange decided that calling rape complainants "vulnerable witnesses" would categorise them as victims rather than survivors. It is important to note that many women who have been raped do not consider themselves survivors until years after the fact and those who have gone through the criminal justice system only consider themselves survivors, if at all, once the ordeal of the trial is over. It seems presumptuous and misguided to assume that women or men who have been raped are survivors rather than victims at the time the trial commences.

The SALRC recommended a range of protective measures, excluded from the Bill, which would ensure the complainant did not encounter secondary victimisation from within the criminal justice system. These are outlined below.

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[37] *State* v. *Jacob Gedleyihlekisa Zuma,* High Court of South Africa, 8 May 2006: 35.

[38] National Working Group on Sexual Offences fact sheets are available at <http://www.tlac.org.za/content/view/24/40/>.

[39] PMG minutes of the meeting of the Portfolio Committee on Justice and Constitutional Development, 6 August 2003.

Witnesses would be notified of protective measures. The prosecutor would have a duty to inform the witness of the protective measures available and the court was required to use at least one of four protective measures. This clause was intended to acknowledge and build into the procedural aspect of the justice system that some witnesses need protective measures to enable them to testify without undue trauma. When this point was raised, De Lange questioned the need for the clause by arguing that the NPA knew how to handle witnesses and would discharge its duties accordingly.[40]

The SALRC recommended that the CCTV system (section 158 of the CPA), which is currently underutilised, be made more accessible to those adult complainants whose testimony would benefit from the use of this protective measure. Many adult complainants find the experience of facing the accused and testifying about their experience in court extremely traumatic, which results in a poor standard of evidence being placed before the court. Most courts fail to appreciate this impact on adult complainants. However, this has not been included as part of the Bill.

In the SALRC draft Bill, provision was made for witnesses to have support persons in court with them: a complainant could be seated next to a trusted person while s/he testified, or in the case of children, on that person's lap. Research has shown that the ability of children to recount the details of their ordeal improves dramatically when close to a support person. However, the Department of Justice was concerned that it would not be able to secure these support services due to the cost on the state and therefore that portion of the clause was removed.

The use of expert assessors to aid the magistrate or judge was also recommended by the SALRC — this would have provided the presiding officer with the necessary expertise to make difficult decisions in the highly complex area of sexual offences, one that is often misunderstood by those who do not have an in-depth awareness of some of the issues involved. Again, this provision was excluded from the Bill.

Although some of these measures can be introduced as part of the comprehensive policies that will hopefully emanate from the section of the Bill that deals with national instructions and directives, policy does not have the same directly enforceable rights and obligations as legislation does. It is therefore a pity that these essential protective measures were not included in the Bill.

The lack of other treatments and services for victims of rape is problematic. Rape is an event that has a profoundly damaging physical and psychological impact on the victim. To not treat the damage holistically is to exacerbate the primary trauma experienced by the victim. The provision of PEP is vastly inadequate without a range of other essential preventive and remedial services, such as those for sexually transmitted infections, unwanted pregnancies, physical injuries, and psychological trauma. The SALRC recommended that sexual offences legislation be enacted "to provide that in sexual offences cases:

- All victims of rape should receive HIV testing, *the best possible medical care, treatment and counselling.*
- As it is the duty of the state to protect its citizens, the state should cover all costs for treatment and counselling required by the victim of a rape as a result of the assault, *including* the provision of PEP, HIV-antibody testing and counselling."[41]

Despite the fact that this clause was overwhelmingly supported by public submissions, it was not included in the Bill. In his briefing to the Justice Committee on the Bill in 2006, De Lange (as deputy minister) explained that while the 2002 SALRC draft Bill contained a provision known as the "treatment clause", which stipulated that the state must, in respect of all complainants who sustained physical, psychological or other injuries in sexual offence cases, provide appropriate medical care, treatment and counselling, it was clear that the "treatment clause" would lead to substantial financial expenditure for the state, especially the provision of medical care and counselling for the complainant. Furthermore, to include this clause would have created severe disparities between the victims of sexual assault and the victims of other violent crime, who are not entitled to special medical

[40] PMG minutes of the meeting of the Portfolio Committee on Justice and Constitutional Development, 27 January 2004.

[41] South African Law Reform Commission, 2000, *Discussion Paper 102: Project 107: Sexual Offences: Process and Procedure: Volume I*, Chapter 5: 29 (my emphasis).

care and counselling. On the basis of these considerations, the treatment clause was dropped. When he was chairperson, De Lange had felt that these proposals and the treatment provision should be located in legislation by the Department of Health instead.

A comprehensive framework for dealing with the management of offenders has also been excluded from the Bill. The SALRC recommended a range of options, including rehabilitative treatment, drug and alcohol treatment, the supervision of dangerous sex offenders, and diversion and restorative justice for child offenders. However, the inclusion of an offender management framework would have been an added cost to the state, as the SALRC recommended that all convicted offenders should have equal access to rehabilitation irrespective of economic means. The cost of sex offender rehabilitation programmes would have to be carried by the state if the court was satisfied that the convicted person had no adequate means to bear such cost. Furthermore, if these provisions had been made available to sexual offenders only, the inclusion of an offender management framework would have created inequities with regards to other types of offenders. The SALRC's recommended comprehensive sex offender management framework would have provided that periods of imprisonment, correctional supervision, parole and presidential pardon processes should allow for the completion of rehabilitation programmes. This is, however, already dealt with in the policies of the Department of Correctional Services; the Correctional Services Act stipulates that offenders should be rehabilitated and the White Paper outlines the programmes that must be available to offenders.

Two last points are worth considering.

The Bill is written in very complex and legalistic language. This has implications for programmes of education and awareness around the Bill and may lead to confusion and contention about the meaning of certain clauses, even among the lawyers and court officials dealing with the cases. Those service providers and government departments that engage with victims of sexual assault on a regular basis need to have a thorough understanding of the Bill themselves, in order to be able to "translate" it into comprehensible sections for the victims. Indeed, it would be of great benefit to all those in the field of sexual violence if the Bill was transcribed into an accessible format and distributed widely for use by victims, service providers and government officials dealing with the management of sexual assault cases.

Lastly, the Bill provides a platform from which to dismantle the sexual offences court system. The sexual offences courts have a proven track record in attaining more convictions, and have numerous specialised facilities that make the court experience much less traumatic and intimidating for the sexual offence victim.[42] The theory behind the dismantling of the specialised courts is that the expertise and knowledge contained therein should be mainstreamed to all courts, whereby all prosecutors would be trained to at least have a basic understanding of the specific nature of sexual offence cases. Although the theory is creditable, the reality is that the sexual offences courts provide an essential specialised service to victims of sexual assault. Rather than undertaking a mainstreaming process that may not work effectively, it would be preferable for the Department of Justice to roll out more sexual offences courts across the country, in their proven capacity of improving the sexual assault victim's experience of the criminal justice system.

[42] However, the Deputy Minister of Justice and Constitutional Development believes that there is a real risk that "a complainant could challenge government on the grounds of equality before the law, if their sexual offence case was drawn out and ultimately thrown out because it had to go through a non-capacitated ordinary court". PMG minutes of the meeting of the Portfolio Committee on Justice and Constitutional Development, 7 August 2006.

6. REFLECTIONS ON THE DISCUSSION PROCESS AND ITS SIGNIFICANCE FOR THE DEMOCRATISATION OF CRIMINAL JUSTICE

Normally, once a Bill has been approved by Cabinet, tabled in the National Assembly and published in the Government Gazette, it is then referred to the relevant Portfolio Committee in the National Assembly which considers the Bill and may agree to it, propose amendments or reject the Bill, generally after a process of public consultation.[43] The legislative process followed by the Sexual Offences Bill was slightly unusual due to the long delays involved with the Bill. The 2003 draft of the Bill was published in the Government Gazette but the Justice Committee gave only one day's notice for public hearings on the Bill, which effectively excluded interested organisations and persons outside Western Cape from attending. The Justice Committee deliberated on the Bill and incorporated their proposed changes into a working document that was never made public. Because of the elections in 2004, the Bill was sent back to Cabinet for approval (where more changes were made) before it was again deliberated on by the Justice Committee in August 2006. The version of the Bill made public in 2006 had shifted dramatically from the comprehensive research of the SALRC and the Bill gazetted in 2003, with important provisions removed and new provisions inserted in the absence of consultation or research. The Justice Committee began deliberations on various provisions of the 2006 draft, which was not gazetted, thus making it difficult for the public to access the document. It was emphasised by the Chohan-Khota that although written submissions were welcome, the Committee would not be considering those submissions that dealt with issues discussed in 2003 — submissions needed to concentrate on new issues. While only a few organisations were able to make oral submissions during the public hearings in 2003, a significant number of organisations made written submissions to the Justice Committee both in 2003 and 2006.[44] Submissions on the Sexual Offences Bill by civil-society organisations in 2003 and 2006 focussed on trying to recover clauses contained in the SALRC draft Bill and later dropped from the Sexual Offences Bill. It was generally felt by civil society organisations that the SALRC's extensive research and consultations had generated the best possible and most progressive piece of legislation and that the draft and recommendations made by the SALRC should constitute the bulk of the Bill.

A matter for concern is that any action on the progress of the Bill appeared to be reactive rather than proactive on the part of Parliament. Civil-society organisations have played a major role in advocating for progress to be made on the Bill: a mini-conference held in August 2006 generated much media coverage and publicity around the Bill and its delay. In November 2005, civil society organisations held a protest outside Parliament and a representative from the Justice Committee accepted a memorandum and, in response to questioning on the delay of the Bill, publicly stated the intention of Parliament to finalise the Sexual Offences Bill early in 2006. In May 2006, as part of the national "Get on the bus and stop violence against women and children" campaign, a second memorandum was submitted both to the Department of Justice and Constitutional Development as well as the Joint Monitoring Committee on the Improvement of the Quality of Life and Status of Women asking for the Bill to be put back on Parliament's agenda. Two major public events also helped to spur on the movement of the Bill. In May 2006, the then deputy president of the ANC, Jacob Zuma, was on trial for rape. This much-publicised trial put the Bill and its delays back into the spotlight as gender activists were given space in the national media. After this, the 2006 Bill was published and deliberations began anew. Civil-society organisations were invited to make written submissions on the Bill and many did so, both reiterating points made in submissions in 2003 and looking at new issues in the Bill. Then again, after a silence of five months on the Bill, the May 2007 judgment of the Constitutional Court regarding the extension of the definition of rape to include anal penetration returned the media's attention to the Bill and the long delays in its promulgation, which had prompted the Constitutional Court case in the first place. From the above, there is the strong sense that there was a lack of focus and

[43] The legislative process is available at <http://www.pmg.org.za/parlinfo/sectionb3.htm>.

[44] Including, among others, AIDS Legal Network, Centre for Applied Legal Studies, Commission on Gender Equality, Childline SA, Tshwaranang Legal Advocacy Centre, Centre for the Study of Violence and Reconciliation, Sex Worker Education and Advocacy Taskforce, South African Human Rights Commission, Human Rights Watch, People Opposing Woman Abuse, Sisonke, Doctors for Life, SAYsTOP, Molo Songololo, Institute of Criminology (UCT), African Christian Action, Children's Rights Project, Sarah Baartman Legal Advice and Training Project, RAPCAN, Rape Crisis, IDASA, Women's Legal Centre, NADEL, UCT Department of Gynaecology, Western Cape Network on Violence Against Women, Transformative Human Rights Unit and Southern Africa Media and Gender Institute.

political will to pass this legislation, which is unfathomable in a country which is notorious for its sexual violence figures and where the citizens are so concerned about crime.

Despite assurances and reiterations from the Justice Committee that they were interested in the written submissions from interested organisations and that people should feel free to engage in the process even after they have made their submission, it was never clear what impact the public submissions actually had on the Sexual Offences Bill. Very few of the substantial issues raised by submissions have been included or altered in the Bill. Technical changes and word changes have been accepted — for example, consensual rape was replaced by sexual contact — and submissions on issues that the majority of the Justice Committee agreed with (for example, keeping age of consent at 16) were accepted. Civil-society organisations such as RAPCAN and Childline, which had been a part of the process regarding the Children's Bill, noted that long written submissions were not often read by the Justice Committee and only short summaries received attention. When civil society organisations protested the lack of consultation on the Bill, Chohan-Khota objected that it was definitely not the case that NGOs had been marginalised during the processing of the redrafted Sexual Offences Bill of 2006. She told the Justice Committee that all submissions received by the Committee were considered and emphasised that the Committee would continue to receive and consider submissions on the Bill as it deliberated on it, as long as they were issues that had not already been laid to rest.[45]

It is clear from the minutes of the Justice Committee meetings on the Bill that strong personalities and individual opinion played a significant role in the decision-making process around the Bill. Despite the SALRC's considerable research and consultative process around the Bill, which resulted in their draft legislation, De Lange, chairperson in 2003, declared that he wanted to make it very clear that the SALRC was an advisory body and that no one was bound by what they said. He made it clear to the Justice Committee that they were entitled to deviate from the SALRC's recommendations. While probably accurate in his interpretation of the SALRC's mandate, it seems short-sighted to have dismissed so much of what the SALRC recommended, considering the work that went into their proposed legislation.

Two issues in particular threw the process of public participation on the Bill into relief. One was the exclusion of the category of "vulnerable witness" in the Bill and the other was the inclusion of the clause criminalising the clients of sex workers. Both issues were vehemently argued for or against on either side, but ultimately it was the perspective of the Justice Committee that was reflected in the Bill.

Despite overwhelming support for including a category of "vulnerable witnesses" and affording them automatic access to a number of protective measures, De Lange dismissed this out of hand. The Justice Committee argued against the clause on two fronts: on a practical level, they questioned whether the clause had been costed and objected to passing a law when they knew that it could not be implemented properly due to cost implications. While acknowledging the Justice Committee's concerns about the cost implications of this clause, some civil society organisations made it clear that they believed the resources did in fact exist but that the victims of sexual offences were not being prioritised. On a conceptual level, De Lange (as chairperson) commented that the government had tried its best to get rid of gender inequality in the law, and he thus found it demeaning that there are "still people who want a woman to be declared by the whole justice system as a vulnerable person just because she has been sexually assaulted".[46] Members of civil society tried to argue that the proposed clause should not be taken as relating to the complainant's gender but rather to the specific nature of sexual offences which is associated with extreme trauma, a profound level of violation, and a high level of humiliation in the reporting, medical and court processes. A further point raised by the Justice Committee was that if the Bill declared certain people as vulnerable, it would also have to stipulate the rights and obligations that stemmed from such a declaration (see the argument above regarding the Objects' mention of the *needs* rather than the *rights* of the victims of sexual violence).

When briefing the Justice Committee on the Bill in 2006, De Lange suggested that the Committee include the criminalisation of sex workers' clients in the Bill. Civil society noted that the late inclusion with no public participation or research (especially in the light of the SALRC investigation into these issues) was highly irregular and amounted to an unconstitutional course

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[45] PMG minutes of the meeting of the Portfolio Committee on Justice and Constitutional Development, 21 June 2006.

[46] PMG minutes of the meeting of the Portfolio Committee on Justice and Constitutional Development, 17 September 2003.

of action. The chairperson, Chohan-Khota, justified the inclusion by stating that the clause was in line with a Constitutional Court ruling from the *Jordan* case.[47] As such, the Justice Committee was not changing the law in an ill considered way or without consulting people. Chohan-Khota emphasised that it was important for people to understand that the Bill would retain the law as it currently stood until such time the SALRC had finalised its review.

Civil society repeatedly made submissions around the inclusion of civil society organisations, NGOs and service providers in the National Policy Framework. This request was not entertained by the Justice Committee and there has been no indication why the National Policy Framework has excluded the participation of civil society.

It is perhaps difficult to gauge how democratic the process of the development of the Sexual Offences Bill was. On the one hand, the SALRC initially held very comprehensive consultations around the Bill and the Justice Committee did engage with a number of civil society organisations during oral and written submissions, where lively debate was held on a number of issues. The Justice Committee had to balance the very real budgetary constraints of government while trying to provide victims of sexual assault with adequate care. They also had to balance the rights of the victims with the rights of the accused to a fair trial, and take into consideration the mandates of the other government departments. On the other hand, from the point of view of civil society organisations, the process was flawed and the power resided very much in the hands of Parliament: much of their initial input into the SALRC draft Bill was eventually excluded; the process was unnecessarily long and the public were not well-informed about what was happening with the Bill; the oral hearings were held at one day's notice; and there was no clear indication that the submissions were having any real effect on the Justice Committee. Some individuals working with victims of sexual assault, such as Joan van Niekerk from Childline, had invested 10 years in working on the Bill and felt that much of their hard work had been in vain.[48] It was, ultimately, a process that had been drawn out for too long, and considering the passion of the people working in the field, one that was bound to hold disagreements. In the end, it is probably a true reflection to say that the jubilation of the sector to the passing of the Bill had more to do with the fact that it had eventually come to pass than with the contents of the Bill. However, the Bill has been hailed by the Justice Committee as a significant success and it certainly does make progress in the sexual offences legislation in South Africa.

7. WHERE TO FROM HERE FOR THE SEXUAL OFFENCES BILL AND ITS IMPLEMENTATION?

The Bill was passed by the National Assembly on Tuesday 22 May 2007. When the National Assembly passes a Bill, it must be referred to the National Council of Provinces for passing, proposed amendments or rejection. The National Assembly will then reconsider the Bill, after which it will be sent to the President for signature.

Considering the passage of the Children's Bill through the NCOP, it appears that the NCOP tend to select "moral" issues (like virginity testing) for deliberation. It is possible, therefore, that if the NCOP reopens the debate they may choose to focus on issues like increasing the age of consent. Given the conservative outlook the NCOP has demonstrated in the past, they are most unlikely to challenge the criminalisation of the sex workers' client clause or the compulsory HIV testing of perpetrators clause. It is also unlikely that they will consider any of the legal matters in the Bill.

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[47] *State* v. *Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)*, Constitutional Court, CCT31/01. In 2002 a challenge was brought against the constitutionality of the Sexual Offences Act by a brothel owner, Ellen Jordan. The challenge was against the sections criminalising the sex worker and brothel keeping. The High Court judges found the section criminalising the sex worker to be unconstitutional and this judgment was referred to the Constitutional Court. Six judges to five found that Section 20[1] [aA] withstood constitutional scrutiny and therefore reversed the High Court judgment of March 2002. The judges emphasised that although the section challenged was found to be constitutional, this did not mean it was the most effective piece of legislation and that the SALRC needed to review the present legislation.

[48] Personal telephone conversation with Joan van Niekerk on 24 May 2007.

Apart from the official legislative process, there is still a long way to go for the Sexual Offences Bill. The development of effective regulations, national guidelines and directives is going to be crucial to fill the gaps left by the Bill. Unless policy recommendations for all role players in management of sexual offences are heeded and as a result the criminal justice system improves its response to sexual assault victims (from first reporting until the offender serves his sentence), the Bill will do little to achieve the aims as stated in the Objects. Crucial too, will be the systematic and thorough implementation of the Bill on all levels, most important of which will probably be the training of criminal justice officials to know and understand the Bill and its implications for the work that they do. The National Policy Framework will go a long way towards ensuring that the appropriate measures are put in place to facilitate the speedy and effective implementation of the Bill. Members of civil society, including the National Working Group on Sexual Offences, have pledged their commitment to helping develop sexual offences policy and facilitate the implementation process. The immediate impact of the Bill will, however, be felt when the first victim of sexual assault who had previously been denied the full protection of the law because of outdated legislation, reports the crime and is able to seek justice.

8. THE NATIONAL WORKING GROUP ON SEXUAL OFFENCES

In 2004, a group of organisations that provide counselling and training or undertake research and policy development around sexual violence came together to form a national working group (NWG) around the Sexual Offences Bill.[49] Concerned to ensure that the Bill ultimately enacted reflected the best interests of both adult and child sexual violence survivors, the NWG engaged in education and awareness campaigns, research into issues pertinent to the Bill, as well as vigorous advocacy and lobbying around a number of clauses in the Bill. In February 2007, with the passing of the Bill imminent, the NWG decided to widen its mandate beyond the Bill alone and focus more broadly on laws and policies applicable to sexual offences generally. To this end, the overall aim of the working group is to advocate for sexual offences legislation and policies that as far as possible reflect the best interests of adult and child survivors of sexual violence; and to evaluate and monitor the implementation of such laws and policies on an ongoing basis.

Key objectives of the NWG therefore include: increasing awareness and understanding of sexual offences legislation and policies amongst the general public, relevant government departments, the media and civil society organisations concerned with sexual violence; building the capacity of working group members to engage with and advocate around the Sexual Offences Bill and related policy; developing positions on key aspects of the proposed legislation that will best advance the rights, interests and needs of sexual violence survivors; developing and implementing advocacy strategies including lobbying key role players, mobilising community members and organisations and undertaking media advocacy; and monitoring and evaluating the implementation and application of sexual offences legislation and policies.

On the Sexual Offences Bill specifically, the NWG have considered that a proactive rather than reactive approach to the passing of the Bill would be the best way forward. Because in reality it could take up to two years for the National Policy Framework to be implemented, the NWG aims to focus on monitoring and evaluating current practice around sexual offences in order to build up a body of information that can be used when engaging with the NPF. For instance, the compulsory testing provisions could potentially be used to further victimise survivors, so the implementation of these provisions needs to be monitored from enactment. In relation to protective measures, the NWG would endeavour to find test cases and establish how to improve the use of these measures through casework. By finding specific cases that show how harm is done to the victim because protective measures are not used, the information could be used to advocate for protective measures more broadly. The information gathered from the monitoring and evaluation process would then inform the drafting of the NWG's own policies and guidelines — this will be a comprehensive process that will begin with an audit of what policies, protocols, guidelines and standing orders exist. A consultative workshop among service providers and research organisations will then help identify which policies are worth retaining, which informal or unofficial policies need to be formalised, where the gaps lie, the impact of legal reform and

[49] The Centre for the Study of Violence and Reconciliation (CSVR) is a member of the NWG and sits on the secretariat of this group.

international comparisons. The policies drafted by the NWG will be linked to realistic and achievable performance indicators and be used to engage with the NPF when it is launched.

The NWG is hoping to use the development of the NPF, the inter-sector committee processes and other regulations to try and ensure that the implementation of the Sexual Offences Bill is as victim friendly as possible. However, because civil society has been excluded from the NPF, the NWG is considering obtaining a legal opinion about whether or not civil society can push for representation in relation to the NPF. Furthermore, SWEAT, a member of the NWG, is looking at bringing a legal challenge to clause 11 (criminalisation of sex workers' clients) based on procedural issues, as a result of the late and unexamined inclusion of the clause into the Bill. The NWG will also undertake a nationwide education and awareness campaign to inform the public about what is contained in the Bill, what their rights are in relation to the sexual offences legislation, and how to undertake the process of accessing their rights in relation to the Bill. The NWG sees its main challenges in the next phase related to the Sexual Offences Bill as being the development of a good policy framework within one year and the inclusion of NGOs in this process, the training of service providers on the provisions of the new Act, and a comprehensive public awareness programme.[50]

One concern the NWG has around the enactment of the Bill is that there is going to be an increase in the number of reported rapes as a result of the extended definition. It will therefore be important, considering the present reality and perceptions of around crime in South Africa, to monitor very carefully the strategies that will be used to ensure that the statistics do not create further unease around the levels of crime. As there are also a number of new crimes included in the Bill, the manner in which the crimes are recorded by the SAPS and are prosecuted will need to be monitored to ensure that there is equal access to justice and that elements of the Bill are not being used for misguided purposes.

Moving away from the Sexual Offences Bill specifically and looking at sexual offences more broadly (including issues such as HIV/AIDS and domestic violence), the NWG looked at putting into operation a number of activities, including:

- Monitoring how criminal justice system officials are carrying out their duties in relation to sexual offences.
- Lobbying to alter the performance indicators set in the budget for the Department of Justice.
- Engaging service providers to document common problems around sexual offences at provincial levels.
- Educating and capacity building of service providers in the provinces.

In sum, the NWG aims to engage in the following processes: education and awareness, taking the Bill to communities; policy development in order to be proactive rather than reactive; developing monitoring and evaluation strategies to monitor implementation; deal with outstanding issues in the Sexual Offences Bill in terms of process, regulations, etc.; lobby around performance indicators.

9. CONCLUSION

After 10 years in the legislative process, the Sexual Offences Bill that will be signed into law by President Thabo Mbeki is a mixed bag. The widening of the definition of rape and the tabling of new sexual offences signify tremendous gains in terms of those who will be able to access justice after sexual violation; but there are areas, all outlined above, where the Bill could have extended more protection to victims and has not.

[50] Draft report of the National Consultative Workshop of the National Working Group on the Sexual Offences Bill: Beyond the Sexual Offences Bill, 22–23 February 2007. Unpublished.

Legislation remains a paper tiger until it is actually implemented and becomes a living protective mechanism in the lives of citizens. Although appropriate legislation does play a crucial role in reacting to sexual violence in society (by, above all, acknowledging the full range of potential sexual offences) and in overseeing the effective and non-discriminatory management of sexual offence cases, law reform can, unfortunately, achieve only blunt and limited changes in a society that continues to be plagued with discriminatory attitudes and the acceptance of violence as a form of expression. The Sexual Offences Bill will therefore not dramatically change the way the criminal justice system handles rape cases. Yes, very importantly and positively, the definition of rape has been widened, and the understanding of intellectual disability and protective measures for this group has been strengthened, but the Bill is not likely, by itself, to change the actual experience of testifying in court or make the court process a gentler and more sensitive experience for the victims of sexual violence. What is needed is a systemic change in attitude towards victims of sexual assault and the debunking of destructive myths that continue to cling to those who have been sexually violated. This can only be achieved with a huge commitment on the part of government and civil society to educating the youth around the rights already enshrined in South Africa's constitution, especially those that speak to equality, human dignity, and freedom and security of the person. A culture of human rights and respect needs to be instilled in a country that has heretofore been characterised more by violence than mutual respect.