

WELL WORTH THE WAIT?

The Sexual Offences Bill in 2006

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The Sexual Offences Bill finally seems to be winding its way to conclusion in parliament. It has taken three years to reach this point since its first introduction in 2003, raising serious questions about the government's sense of urgency in addressing sexual assault. This article looks at the Bill to establish what it really holds for victims of sexual assault.

After its initial tabling in parliament in 2003, the Sexual Offences Bill¹ was followed in relatively short succession by public hearings and vibrant deliberations in the portfolio committee on Justice and Constitutional Development. Towards the end of February 2004, the drafters of the Department of Justice and Constitutional Development produced a working document with some of the changes proposed by the committee. At this point, parliament adjourned for the national elections. And the Sexual Offences Bill vanished from sight... for almost two years, as we will see.

This silence soon elicited negative criticism from civil society organisations. A sense of impatience on their part was understandable, given that the parliamentary process had already been preceded by a lengthy investigation by the South African Law Reform Commission [SALRC]. This investigation began its life in 1996 as an inquiry into sexual offences committed against (and by) children. The scope of this investigation was eventually expanded in 1999 to include adults as well as children.²

The SALRC conducted an extensive and thorough inquiry, entailing the publication of several issue papers and discussion papers. The Commission

concluded the project in December 2002 with its final report, which also contained a draft Bill.³ It was this Bill that formed the basis of Bill B50-2003, introduced to parliament in 2003.

The hiatus

When parliament reconvened after the 2004 elections, women's organisations were hopeful that the Sexual Offences Bill would be high on the portfolio committee's list of priorities. However, time passed without any indications as to the fate of the 2003 Bill or the subsequent working document. This delay was difficult to understand, in the face of consistent public reassurances by the Ministry of Justice and Constitutional Development that the Bill would be 'fast-tracked' – without any apparent effect. It was also difficult to understand in the face of the 55,114 cases of rape reported for the year 2004 to 2005 in South Africa.⁴

It is significant to note that during this period, while the Bill was languishing in corners unknown, a regional magistrate preempted the legislation by finding that the common law definition of rape was too narrow and therefore discriminatory.⁵ The ambit of the offence therefore had to be extended to include anal penetration. The distinction between rape and indecent assault is important for a number

of reasons, but specifically for purposes of the mandatory minimum sentencing legislation, which treats indecent assault as a less serious offence than rape.⁶

The accused in this matter was originally charged with rape. However, the victim, a nine-year old girl, testified that he had penetrated her *per anum*. The magistrate, relying on an extended definition, found the accused guilty of rape instead of indecent assault. This finding was subsequently confirmed by the Pretoria High Court.⁷ In his original judgment, the regional court magistrate was specifically critical of parliament and the 'unreasonable delays' in the finalisation of the Bill.

The revival

During this period, some degree of public debate was sustained around the Sexual Offences Bill through the efforts of civil society organisations. However, at the beginning of 2006, sexual offence trials were starkly drawn back into the public domain by the highly publicised Zuma rape trial. In this matter, the former deputy president of South Africa was charged with raping a family friend. The trial proceedings, the evidence led by both sides and the eventual verdict of 'not guilty', were broadcast to saturation level.

Shortly before the conclusion of the Zuma trial, Cabinet approved a reworked version of the Bill,⁸ which was introduced in the Portfolio Committee for Justice and Constitutional Development on 19 June 2006.⁹ The committee was briefed¹⁰ by the drafters from the Department of Justice and Constitutional Development as well as the previous chairperson,¹¹ and commenced deliberations on the Bill during the course of August 2006.

Overview of the Bill

Introductory provisions

The Bill consists of seven chapters. The first chapter sets out the definitions and objects of the legislation. Significantly, these objects include affording complainants of sexual offences 'the maximum and least traumatizing protection that the law can provide'.¹² These statements of principle in Clause 2 should be seen as providing the basis for the implementation and interpretation of the Act as a whole.

Definitions of sexual offences

Chapters 2 to 4 set out to codify the law relating to sexual offences. (At present, certain of these offences are set out in the Sexual Offences Act,¹³ while others, such as rape and indecent assault, are so-called 'common law' offences.)

Clause 3 makes provision for an extended definition of *rape*. This is perhaps to date one of the most well-publicised aspects of the Bill. The new definition reads that:

any person (A), who unlawfully and intentionally commits an act of sexual penetration with a complainant (B), without the consent of B, is guilty of the offence of rape.

The expansion of the current definition of rape becomes clear when one looks at the definition clause,¹⁴ which describes 'sexual penetration' as any act that causes penetration (to any extent) of the genital organs of one person into the genital organs, anus or mouth of another person, or of any other body part or object into the genital organs or anus or another person.¹⁵

The definition therefore no longer makes any reference to the sex of the perpetrator or the victim, as does the current definition,¹⁶ nor does it prioritise certain forms of sexual penetration above others. (This was the dilemma that confronted the court in *S v Masiya*.) The interest to be protected here is that of sexual and physical autonomy and integrity, and from a policy perspective, the extension of the definition of rape is therefore to be welcomed.

This chapter further sets out the following offences:¹⁷ sexual assault, compelled rape, compelled sexual assault, compelled self-sexual assault, exposure or display of sexual acts or genital organs or pornography to persons 18 years or older, incest, bestiality and sexual acts with a corpse.

Sexual offences against children and against mentally disabled persons

Chapter 3 deals with sexual offences against children or young persons. The major controversy here has been the offence of so-called 'statutory rape', with the debate ranging over whether the 'age of consent'

should be 16 or 18.¹⁸ The Sexual Offences Bill proposes that an adult who performs a sexual act with a young person older than 12 but under the age of 16 with his or her consent will be guilty of an offence.

The chapter further deals with offences relating to the sexual exploitation and sexual 'grooming' of children, engaging in sexual acts in the presence of children and exposure or display of genital organs, pornography or sexual acts to children. Chapter 4, which sets out sexual offences against mentally disabled persons,¹⁹ mirrors the provisions of Chapter 3 on children, except for the omission of offences relating to 'consensual sexual activity'.²⁰

Post-exposure prophylaxis

Chapter 5 bears the ambitious heading of 'services for victims of sexual offences and compulsory HIV testing of sexual offenders'. Upon closer examination, it appears that services for victims, as set out in this chapter, consist of the following: A victim may receive PEP²¹ for HIV infection at a designated public health establishment at state expense, and be given free medical advice surrounding the administering of PEP. She may also be supplied with a prescribed list of public health establishments for purposes of providing PEP or carrying out compulsory HIV testing. She may apply to a magistrate for an order that the alleged offender be tested for HIV, at state expense.

However, a victim may only receive these services if she lays a charge with the South African Police Service (SAPS) in respect of an alleged sexual offence, or reports an incident of sexual assault at a designated health establishment within 72 hours after the incident took place.

The Bill provides that a victim or 'an interested person'²² must, when laying a charge or making a report, be informed of the importance of obtaining PEP for HIV infection within 72 hours after the assault took place and the need to obtain medical advice and assistance regarding the possibility of other sexual transmissible infections. In the case of an application for compulsory HIV testing of the offender, she must also be provided with information regarding this process.

Compulsory HIV testing of the alleged offender

Compulsory HIV testing has been one of the most contentious issues in the realm of sexual offences legislation. A separate Bill, entitled the Compulsory HIV Testing of Alleged Sexual Offenders Bill,²³ was introduced to parliament in 2003. The introduction of the reworked Sexual Offences Bill in 2006 saw, for the first time, the consolidation of the two Bills.

The proposed procedure for compulsory testing of an alleged sexual offender entails that the victim may apply to a magistrate within 60 days after the alleged commission of the offence for an order that the offender be tested for HIV. If the magistrate is 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 60 calendar days have lapsed from the date on which it is alleged that the offence in question took place, s/he must order the testing of the offender for HIV and the disclosure of the results to the victim and alleged offender.

Significantly, the Sexual Offences Bill now also allows for a SAPS investigating officer to apply for an order to have an alleged offender tested for HIV.²⁴ S/he may, for purposes of investigating a sexual offence, apply to a magistrate for an order for HIV testing of the alleged offender. If the court is satisfied that there is *prima facie* evidence that a sexual offence has been committed by the offender and that HIV testing would appear to be necessary for purposes of investigating or prosecuting the offence, the magistrate must issue an order for such testing and for the test results to be disclosed to the investigating officer and to the alleged offender.

The Bill states, in clause 37, that the results of an HIV test may only be used to inform a victim whether the alleged offender is infected with HIV with the view to 'making informed personal decisions', or as evidence in ensuing civil proceedings arising from the sexual assault in question. The results may also be used to 'enable an investigating officer to gather information' with the view to using them as evidence in criminal proceedings.

National register for sex offenders

Chapter 6 contains a series of provisions relating to a national register for sex offenders. The purpose of this register is to ensure that no person who has been found guilty of the commission of a sexual offence against a child will be allowed to work with children. The register will be completely confidential: employers will be required to apply to the register to ascertain whether potential employees were listed. If they are, they may not be employed in that position. The Bill also imposes a duty on the convicted person to disclose that he has been convicted of a sexual offence against a child, and a failure to do so constitutes a further criminal offence.

General provisions

Chapter 7 contains certain sections relating to evidence and also makes provision for the implementation of the Act. The two evidence provisions relate to the question of so-called 'first report' evidence, and, more importantly, the negative inference that is often drawn when a victim does not report an incident of sexual assault at the first 'reasonable' opportunity. Clause 55 deals with this situation by stipulating that the court may not draw an adverse inference *only* from the length of any delay between the alleged commission of a sexual offence and the reporting thereof. Clause 54 provides that a court may not draw an adverse inference *only* from the absence of a previous consistent statement.

From an implementation perspective, Clauses 57 to 61 form the heart of the Bill. Clause 57 requires the Minister of Justice and Constitutional Development to adopt a national policy framework 'to ensure a uniform and coordinated approach by all Government departments and institutions in dealing with sexual offences'. The Bill also establishes an inter-sectoral Committee for the Management of Sexual Offences Matters, to consist of several highly placed members of government (but no representatives from civil society). This committee will be responsible for developing a draft national policy framework.

The Bill further contains extensive provisions relating to the issuing of national instructions and

directives, as well as the development of training courses. These sections are unusually specific: for example, clause 61(2)(a) sets out the subject matter to be covered by the directives issued by the National Director of Public Prosecutions. These include the circumstances in which the prosecution must apply to court for an order that a witness give evidence by means of closed circuit television, as provided for in section 158 of the Criminal Procedure Act, as well as the circumstances in which the prosecution must request the court to consider directing that the proceedings may not take place in open court, as provided for in section 153 of the Criminal Procedure Act.

Chapter 7 further contains certain transitional provisions relating to trafficking in persons for sexual purposes. In addition, Schedule 1 sets out the provisions of legislation amended by the Bill. Noteworthy here are provisions relating to prescription, the appointment of an intermediary in terms of section 170A of the Criminal Procedure Act, the admissibility of a complainant's previous sexual history, and the mandatory minimum sentencing legislation.

A cautious verdict

When evaluating the Sexual Offences Bill, one should first and foremost be realistic. Unlike the Domestic Violence Act, this Bill is not aimed at crafting a unique legal mechanism such as a protection order. Instead, it sets out to address various areas of disadvantage experienced by sexual assault victims in the different components that make up the criminal justice process, including substantive criminal law and the law of evidence and procedure. The Bill is therefore by its very nature a multifaceted and in many ways an unwieldy and disparate piece of legislation.

The codification of sexual offences is generally to be welcomed, with specific reference to the expansion of the definition of rape. However, the classifications of the different offences set out in the Bill are complex, and one sincerely hopes that the central objective – the protection of the complainant's sexual and physical integrity – will not be lost in the miasma of body parts tumbling through the definition clause. (This is, to repeat a

familiar refrain, where training will have to play a central role.)

If one compares this version of the Bill with the two previous ones (i.e. the SALRC 2002 Bill and the 2003 Bill), it appears that one area where the legislation has become 'thinner' is that of *service provision*. This is not in itself a cause for despondency, since the national policy framework envisaged under Clause 57 allows for further development of policies relating to service provision. It would have been more satisfactory, from the perspective of victims' rights advocates, to have the Bill spell out that victims of sexual assault are entitled to certain services (at state expense).

However, the fact that the Bill does not expressly refer to such services does not preclude the introduction or improvement of policies relating to service provision. Indeed, the provisions of the Bill, and especially Clause 2, may now provide a stronger basis to argue for the introduction of such policies than before. The Bill should therefore not be seen as the final word on the services provided to sexual assault victims.

In this respect, it is important to note that Clause 61 requires the national instructions and directives for police officials, public prosecutors and health care practitioners to be published in the Gazette. From the viewpoint of civil society organisations providing services to sexual assault victims, this is an important mechanism to ensure accountability and compliance with the legislation. Because organisations will have access to the directives and will therefore know what the expected standards of service provision are, they will be able to respond far more swiftly on behalf of their clients when deviations from these standards occur.

There are aspects of the Bill that appear to be problematic, for example, the question of compulsory HIV testing of alleged sexual offenders. On the one hand, the aim of judicially directed HIV testing is to facilitate the task of the SAPS in investigating instances of intentional transmission of HIV.²⁵ This in itself cannot be faulted, and it should be noted that irrespective of the final decision on whether a 'new' offence of intentional transmission

of HIV is introduced,²⁶ (or the status quo of prosecuting such conduct under the existing common law offences of attempted murder or assault is maintained), the proposed measures could assist the investigation and prosecution of such offences.

On the other hand, it has been stated that the aim of the provision allowing the *victim* to apply for an order for testing of the alleged offender is to 'lessen the secondary trauma on the victim'.²⁷ The potential utility of this measure is questionable, and it remains to be seen whether it will prove to be of any practical benefit to sexual assault victims.

It should be remembered that the Bill is still 'a work in progress'. At the time of writing, the committee is still busy formulating certain clauses that have not yet been included in the reworked version of the Bill. The cautionary rule relating to complainants in sexual offence cases is a case in point.²⁸

A question posed by many commentators after the Zuma trial was whether the course, and indeed the outcome, of the case would have been different if the Sexual Offences Bill had been in operation at the time. It is clear from the above that the simple answer would have to be 'no'.

The reason for this is that the Sexual Offences Bill does not create a separate legal universe for the adjudication of sexual offences – nor was it ever intended to do so, in spite of the high expectations that the Bill has raised over the past years. Rape law reform in other jurisdictions has shown that legislative interventions are circumscribed by the inherent limitations of an adversarial criminal justice system,²⁹ as well as by the closely held personal perceptions of those responsible for the administration of this system.

The Deputy Minister of Justice and Constitutional Development explained this difficulty quite succinctly during the recent briefing of the portfolio committee on the Bill by stating that we find ourselves in a patriarchal society with a certain mindset, and that this is difficult to change. The problem is thus systemic, with every judicial officer interpreting cases in terms of their own world view:

"it is not possible to legislate how they look at the world".³⁰

However, one should not descend into legal nihilism and under-estimate the symbolic value of legal reforms. By enacting the Sexual Offences Bill, the legislature will be sending an important message about sexual assault and the treatment of sexual assault victims – which may in the long run be as important as any of the 'instrumental' changes brought about by the legislation.³¹

Endnotes

- 1 Full title: Criminal Law (Sexual Offences and Related Matters) Amendment Bill B50-2003.
- 2 The topic of sexual offences committed by children was subsumed into the broader investigation on juvenile justice.
- 3 One aspect of this investigation which remains incomplete is the issue of adult commercial sex work, which the SALRC has elected to deal with by means of a separate process.
- 4 <http://www.saps.gov.za/statistics/reports/crimestats/2005/_pdf/crimes/rape.pdf.>
- 5 *S v Masiya* (Unreported judgment dated 11 July 2005, Graskop Regional Court, Case Number SHG 94/04.)
- 6 Act 105 of 1997.
- 7 Judgment was given in the Pretoria High Court on 25 July 2006. The matter must now be referred to the Constitutional Court due to the finding that the common law offence of rape is unconstitutional.
- 8 Cabinet approved the Bill on 3 May 2006. The Zuma judgment was handed down on 8 May 2006.
- 9 The Bill is still officially entitled B50-2003, although it is now referred to as 'as introduced on 19 June 2006' in order to distinguish it from the previous version. All references to 'the Bill' from this point are to the 2006 version, unless specifically indicated otherwise.
- 10 Minutes of these briefings are available on www.pmg.org.za.
- 11 Adv JH de Lange, now the Deputy Minister of Justice and Constitutional Development. The minutes of this briefing, which took place on 7 August 2006, are available on www.pmg.org.za.
- 12 Clause 2.
- 13 Act 23 of 1957.
- 14 Clause 1.
- 15 Subclause (c) also lists the penetration of the genital organs of an animal into the mouth of another person.
- 16 The current definition of rape requires a male perpetrator having sexual intercourse with a female victim without her consent.
- 17 The scope of this article does not allow a comprehensive discussion of these offences.
- 18 Political parties such as the ACDP have called for the age limit to be increased to 18 years.
- 19 See Clause 1 for the definition of a 'mentally disabled person'.
- 20 The motivation provided for this distinction is that disabled persons are unable to 'provide valid consent to those acts' - briefing by Adv JH de Lange on 7 August 2006 (minutes available on www.pmg.org.za). We suggest that this reasoning may be incorrect.
- 21 Post-Exposure Prophylaxis.
- 22 Defined in Clause 30 as 'any person who has a material interest in the well-being of a victim, including a spouse, same sex or hetero-sexual permanent life partner, family member, care giver, counselor, medical practitioner, health service provider, social worker or teacher of such victim'.
- 23 B10-2003.
- 24 This provision was not contained in Bill B10-2003.
- 25 The current legal position appears to be that section 37 of the Criminal Procedure Act 51 of 1977, which allows for the drawing of blood for purposes of criminal investigation, is inadequate to cover these situations.
- 26 The portfolio committee decided in 2004 that a new statutory offence of intentional transmission of HIV should be created. However, this provision was removed from the reworked Bill at the request of Cabinet, where it was decided that the matter needed further research and discussion.
- 27 Briefing by Adv JH de Lange on 7 August 2006.
- 28 Briefing by Adv JH de Lange on 7 August 2006.
- 29 See e.g. C Spohn & J Horney *Rape Law Reform* (1992) at 174.
- 30 Briefing by Adv JH de Lange on 7 August.
- 31 Spohn & Horney *Rape Law Reform* 175.