Criminal Law (Sexual Offences and Related Matters) Amendment Bill [B50-2003]

Submission to the National Council of Provinces

12 September 2007

by the

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Chairperson
Select Committee on Security and Constitutional Affairs
National Council of Provinces
Parliament of South Africa

12 April 2007

Dear Mr Mokoena

SUBMISSIONS ON THE CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT BILL [B50-2003]

The Consortium on Violence Against Women welcomes the opportunity to make submissions to the National Council of Provinces on various aspects of the Criminal Law (Sexual Offences and Related Matters) Amendment Bill (the Sexual Offences Bill).

Members of the Consortium have been involved with this Bill since 1998, when we were requested by the then Deputy Minister of Justice to produce a study on the legal aspects of rape (*The Legal Aspects of Rape*, authored by Pithey, Artz, Combrinck and Naylor). This document formed the basis of the South African Law Reform Commission's Discussion Paper on the substantive law relating to sexual offences. The Consortium subsequently made over 250 pages of submissions in response to the SALRC's Discussion Paper on process and procedure. These are available at www.ghjru.uct.ac.za. We have also participated fully in the various Parliamentary processes pertaining to this Bill since 2003.

The members of the Consortium have taken leading roles over the years in a wide range of areas relating to sexual violence, including research, policy development, litigation, counselling and court support for victims. This submission draws from that experience to make a number of recommendations regarding the Sexual Offences Bill.

Firstly, there are a number of important and positive aspects to the Bill, including:

- The gender neutral definition of Rape
- The broader range of acts defined as Rape
- The acts described in the crime of Sexual Assault
- The offences relating to sexual exploitation of children
- Developments regarding evidence of previous consistent statements

- The creation of a national policy framework
- Provisions relating to policy directives and national instructions for state departments in these matters.

We are however concerned that over the past 3-4 years the Bill has undergone a fundamental shift with the removal of most victim-centred provisions. As a result we would suggest that the Bill might not have the kind of impact that Parliament and Civil Society would like to see in improving the position of victims (providing appropriate services and reducing secondary victimisation) or in improving criminal justice outcomes by increasing convictions.

The NCOP is well placed to revisit these issues of concern and to fundamentally reorientate Bill. We hope that it will take full advantage of that opportunity. The areas of greatest concern to us are as follows (with page numbers refering to this submission):

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Please note that we have deliberately kept our submissions concise and would be happy to provide the Committee with further, more detailed, support for these submissions. We would also like to request the opportunity to make oral representations to the Committee in this regard.

Yours faithfully.

Dee Smythe
On behalf of the Consortium on Violence Against Women

1. Interpretation Clause: Balancing of Rights

The interpretation clause guides the application of the Act. The need to take account of the complainant's rights in a rape case when considering the rights of the accused should be made explicit in the interpretation clause. The clause should therefore read as follows (with subsection (b) inserted):

Interpretation of this Act.

(1) Any person applying this Act must interpret its provisions to give effect to—

(a) the Constitution;

(b) ***the constitutional imperative to balance the rights of an accused person with the rights of the complainant to dignity, privacy to freedom from all forms of violence; and***

(b) the Preamble and the objects of this Act, thereby fulfilling the spirit, purport and objects of this Act.

2. Sexual Offences Against Persons with Mental Disabilities

We wish to draw the Committee's attention to the particular vulnerability of disabled persons to sexual victimisation and to the specific difficulties experienced by victims with disabilities in accessing justice. In the context of sexual offences, these persons are usually women, who are therefore doubly disadvantaged in respect of both gender and disability.

We believe that the Committee can substantially improve the position of victims with disabilities by –

(a) the explicit recognition of persons with disabilities as a vulnerable group in the **Preamble** to the Bill;

(b) the inclusion of the following sub clause under the section dealing with **National Instructions and Directives** (currently s66):

The national instructions, directives and training courses by each Department or institution contemplated in this section must make specific provision for access to justice for persons with disabilities.

(c) putting in place two specific offences relating to the sexual abuse of persons with mental disabilities by those caring for them ("caregivers"), analogous to those contained in sections 38 and 39 of the UK Sexual Offences Act of 2003 (copied below for comparative purposes)

(d) The draft South African Sexual Offences Bill already covers the acts where a caregiver engages in a sexual activity in the presence of a person with a mental disorder/disability or causes a person with a mental disorder/disability to watch a sexual act. We propose that the **penalty clause** of the Bill should prescribe a heavier penalty where the offences set out in clause 8 (compelling a person to be in the presence or to watch a sexual activity) are committed by a caregiver in respect of a person who is mentally disabled.

Please note that this submission will be followed up with a more detailed submission by the Community Law Centre at the University of the Western Cape.

In respect of recommendations (c) and (d) above we attach for comparative purposes sections 30 - 44 of the UK Sexual Offences Act of 2003, which contains comparable offences against persons with mental disabilities (referred to in that Act as 'persons with mental disorders').

We also propose that Chapter 4 of the Sexual Offences Bill should contain –

- a definition of "caregiver" similar to that set out in the UK Act;
- exemptions similar to those set out in sections 43 and 44 of the UK Act.

However, we draw the Committee's attention to the presumptions contained in sections 38(2), 39(2), 43(2) and 44(3), which are likely to be problematic in the South African constitutional context and should therefore not be replicated as they stand.

We believe that through the inclusion of these straightforward provisions, the Committee will firstly accomplish the important objective of drawing attention to the perspective of persons with disabilities, which is often overlooked. Secondly, the Committee will ensure that adequate provision is made for these victims in the drafting of the operational instructions and directives that will be the key to the successful implementation of this legislation.

Annexure: Sexual Offences Act 2003 (UK)

38 Care workers: sexual activity with a person with a mental disorder

(1) A person (A) commits an offence if—

(a) he intentionally touches another person (B),

(b) the touching is sexual,

(c) B has a mental disorder,

(d) A knows or could reasonably be expected to know that B has a mental disorder, and

(e) A is involved in B's care in a way that falls within section 42.

(2) Where in proceedings for an offence under this section it is proved that the other person had a mental disorder, it is to be taken that the defendant knew or could reasonably have been expected to know that that person had a mental disorder unless sufficient evidence is adduced to raise an issue as to whether he knew or could reasonably have been expected to know it.

(3) A person guilty of an offence under this section, if the touching involved—

(a) penetration of B's anus or vagina with a part of A's body or anything else,

(b) penetration of B's mouth with A's penis,

(c) penetration of A's anus or vagina with a part of B's body, or

(d) penetration of A's mouth with B's penis,

is liable, on conviction on indictment, to imprisonment for a term not exceeding 14 years.

(4) Unless subsection (3) applies, a person guilty of an offence under this section is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 10 years.

39 Care workers: causing or inciting sexual activity

(1) A person (A) commits an offence if—

(a) he intentionally causes or incites another person (B) to engage in an activity,

(b) the activity is sexual,

(c) B has a mental disorder,

(d) A knows or could reasonably be expected to know that B has a mental disorder, and

(e) A is involved in B's care in a way that falls within section 42.

(2) Where in proceedings for an offence under this section it is proved that the other person had a mental disorder, it is to be taken that the defendant knew or could reasonably have been expected to know that that person had a mental disorder unless sufficient evidence is adduced to raise an issue as to whether he knew or could reasonably have been expected to know it.

(3) A person guilty of an offence under this section, if the activity caused or incited involved—

(a) penetration of B's anus or vagina,

(b) penetration of B's mouth with a person's penis,

(c) penetration of a person's anus or vagina with a part of B's body or by B with anything else, or

(d) penetration of a person's mouth with B's penis,

is liable, on conviction on indictment, to imprisonment for a term not exceeding 14 years.

(4) Unless subsection (3) applies, a person guilty of an offence under this section is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 10 years.

40 Care workers: sexual activity in the presence of a person with a mental disorder

(1) A person (A) commits an offence if—

(a) he intentionally engages in an activity,

(b) the activity is sexual,

(c) for the purpose of obtaining sexual gratification, he engages in it—

(i) when another person (B) is present or is in a place from which A can be observed, and

(ii) knowing or believing that B is aware, or intending that B should be aware, that he is engaging in it,

(d) B has a mental disorder,

(e) A knows or could reasonably be expected to know that B has a mental disorder, and

(f) A is involved in B's care in a way that falls within section 42.

(2) Where in proceedings for an offence under this section it is proved that the other person had a mental disorder, it is to be taken that the defendant knew or could reasonably have been expected to know that that person had a mental disorder unless sufficient evidence is adduced to raise an issue as to whether he knew or could reasonably have been expected to know it.

(3) A person guilty of an offence under this section is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 7 years.

41 Care workers: causing a person with a mental disorder to watch a sexual act

(1) A person (A) commits an offence if—

(a) for the purpose of obtaining sexual gratification, he intentionally causes another person (B) to watch a third person engaging in an activity, or to look at an image of any person engaging in an activity,

(b) the activity is sexual,

(c) B has a mental disorder,

(d) A knows or could reasonably be expected to know that B has a mental disorder, and

(e) A is involved in B's care in a way that falls within section 42.

(2) Where in proceedings for an offence under this section it is proved that the other person had a mental disorder, it is to be taken that the defendant knew or could reasonably have been expected to know that that person had a mental disorder unless sufficient evidence is adduced to raise an issue as to whether he knew or could reasonably have been expected to know it.

(3) A person guilty of an offence under this section is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 7 years.

42 Care workers: interpretation

(1) For the purposes of sections 38 to 41, a person (A) is involved in the care of another person (B) in a way that falls within this section if any of subsections (2) to (4) applies.

(2) This subsection applies if—

(a) B is accommodated and cared for in a care home, community home, voluntary home or children's home, and

(b) A has functions to perform in the home in the course of employment which have brought him or are likely to bring him into regular face to face contact with B.

(3) This subsection applies if B is a patient for whom services are provided—

(a) by a National Health Service body or an independent medical agency, or

(b) in an independent clinic or an independent hospital,

and A has functions to perform for the body or agency or in the clinic or hospital in the course of employment which have brought him or are likely to bring him into regular face to face contact with B.

(4) This subsection applies if A—

(a) is, whether or not in the course of employment, a provider of care, assistance or services to B in connection with B's mental disorder, and

(b) as such, has had or is likely to have regular face to face contact with B.

(5) In this section—

- "care home" means an establishment which is a care home for the purposes of the Care Standards Act 2000 (c. 14);
- "children's home" has the meaning given by section 1 of that Act;
- "community home" has the meaning given by section 53 of the Children Act 1989 (c. 41);
- "employment" means any employment, whether paid or unpaid and whether under a contract of service or apprenticeship, under a contract for services, or otherwise than under a contract;
- "independent clinic", "independent hospital" and "independent medical agency" have the meaning given by section 2 of the Care Standards Act 2000;
- "National Health Service body" means—

  (a) a Health Authority,
  (b) a National Health Service trust,
  (c) a Primary Care Trust, or
  (d) a Special Health Authority;

- "voluntary home" has the meaning given by section 60(3) of the Children Act 1989.

43 Sections 38 to 41: marriage exception

(1) Conduct by a person (A) which would otherwise be an offence under any of sections 38 to 41 against another person (B) is not an offence under that section if at the time—

(a) B is 16 or over, and

(b) A and B are lawfully married.

(2) In proceedings for such an offence it is for the defendant to prove that A and B were lawfully married at the time.

44 Sections 38 to 41: sexual relationships which pre-date care relationships

(1) Conduct by a person (A) which would otherwise be an offence under any of sections 38 to 41 against another person (B) is not an offence under that section if, immediately before A became involved in B's care in a way that falls within section 42, a sexual relationship existed between A and B.

(2) Subsection (1) does not apply if at that time sexual intercourse between A and B would have been unlawful.

(3) In proceedings for an offence under any of sections 38 to 41 it is for the defendant to prove that such a relationship existed at that time.

3. Rules of Evidence and Procedure

The experience of going to court and testifying in a sexual offence case is very distressing for victims. During the trial victims are confronted with the presence of the accused, they have to recount the events of the attack in detail and they have to undergo traumatic cross examination by the defence.

This means, in many cases, that the full details of the incident are not brought to the court's attention. The court cannot base its decision on all the relevant facts and the decision is not a true reflection of justice. Many victims report a deep sense of betrayal due to the fact that the courts added to the trauma of the rape, that they are not protected and do not feel safe during and after the trial.

The current Bill is conservative in improving the rules of evidence in sexual offences cases. Rules of evidence are often the reason that cases end in an acquittal and they can also contribute to the secondary victimisation of complainants. The rules are often based on gender stereotypes, such as the notion that women lie about sexual offences, and a lack of understanding of the impact of rape on a survivor. We would like to draw the Committee's attention to the following aspects in particular:

3.1 Delayed reporting

It is stereotypically believed that a person who is raped will, at the first possible opportunity, report their sexual violation to the police. This is not true and there are many rational reasons, well established through social science, medical and mental health studies, as to why a person may not immediately report. These include fear of stigmatisation, mistrust of the police or the justice system, fear of the perpetrator or of community condemnation and embarrassment. It has nonetheless been the position of the courts to draw a negative inference from delayed reporting as to the credibility of the victim. An example of this can be seen in the case of *S v De Villers en 'n Ander* (1999) 1 SARC 297 (O), where the court rejected the explanations by three complainants as to why they had delayed reporting and consequently rejected any evidence given by the victims, resulting in a in a serial rapist walking free from court. In short, a rape victim who does not immediately report being raped risks being branded a liar.

The National Assembly sought to remedy this situation by the inclusion of s59 of the Bill, which reads as follows:

"In criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof."

It is our submission that this section does not go far enough and will therefore, in practice, be ineffective in achieving its goal. As such, we recommend that this section be amended to explicitly exclude **negative** inferences being drawn. It should therefore reads as follows:

In criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any <u>negative</u> inference only from the length of any delay between the alleged commission of such offence and the reporting thereof.

3.2 Previous Sexual History – Section 227 of the Criminal Procedure Act

Prohibition of publication – new provision

The unprecedented media interest in the *Zuma* trial demonstrated the urgent need to protect the privacy rights of the complainant in sexual offence trials. Details of the complainant's previous sexual history were daily spread across the media. While the proposed amendment to s227 of the Criminal Procedure Act is supported, it does not yet adequately protect the victim's right to privacy and dignity in a rape case.

This proposed amendment to s227 is largely modelled on Canadian legislation (sections 276 and 277 of the Canadian Criminal Code). We recommend that the Committee include a critical aspect of the Canadian legislation which has not been included in the Bill. This section (s276.3(1) of the Canadian Criminal Code) prohibits the publication of-

- the contents of an application for a hearing to determine whether evidence of previous sexual history evidence is admissible;
- any evidence heard and representations made at such a hearing; and
- the determination of the judge regarding admissibility of the evidence and the reasons (unless that determination is that the evidence is admissible, or the judge, after taking into account the complainant's right to privacy and the interests of justice, orders that the determination and the reasons may be published).

We believe that the inclusion of a similar provision in South African legislation is essential in order to protect the complainant's right to privacy. Importantly, the accused's right to challenge and adduce evidence is in no way limited through this provision.

3.3 Expert testimony during the trial (as opposed to only at sentencing)

The South African Law Reform Commission recommended the use of expert witnesses to inform the court about the psycho-social context and effects of rape. This was contained in section 19 of the draft Bill. This section drew extensively on the Namibian Combating of Rape Act and provided for evidence of the psycho-social effects of a sexual offence to be adduced during criminal proceedings to show that a sexual offence is likely to have been committed under coercive circumstances. It further provided that such evidence may be adduced for the purposes of imposing an appropriate sentence. The Portfolio Committee removed this section from the Bill on the basis that a court is always entitled to call such evidence, making the provision redundant.

While any court is free to call expert witnesses the fact is that in practice this seldom happens. As such, far from being redundant, the provision would show the legislature's support for the use of expert witnesses and its recognition that rape trials are complex and contextually nuanced. We believe it is important to re-introduce this provision in order to encourage prosecutors to make use of expert witnesses and judicial officers to hear evidence regarding issues such as the reasons for the period of delay between the commission of the offence and laying the complaint of sexual assault, rape trauma syndrome, symptoms and implications of post-traumatic and other psychological trauma. The relevant section should read as follows:

Evidence of surrounding circumstances and impact of sexual offence

(1) Evidence of the surrounding circumstances and impact of any sexual offence upon a complainant may be adduced at criminal proceedings where such offence is tried in order to prove –

(a) whether a sexual offence is likely to have been committed -
(i) towards or in connection with the person concerned;
(ii) under coercive circumstances as referred to in section 3(3);17

(b) for purposes of imposing an appropriate sentence, the extent of the harm suffered by the person concerned.

(2) A court, in criminal proceedings referred to in subsection (1), may, subject to subsections (3) and (4), order that the complainant be assessed by a suitably qualified person in order to establish the impact of the offence being tried upon such complainant.

(3) A court may not order that the complainant be assessed as referred to in subsection (2) unless such complainant, or if he or she is mentally impaired or a child, his or her parent or guardian, consents to the assessment.

(4) In ordering the assessment of a child of the age of 12 years or less, the court must establish whether such child has been assessed before, and if so, must consider the harmful impact of a further assessment upon that child.

4. Specific Issues Pertaining To Children

1. General issues for child witnesses
2. Protective measures – Section 170A and 158
3. Credibility of Children – the Cautionary rule and Competence test

CHILD WITNESSES AND THE COURT ENVIRONMENT

Current court practice and rules have been developed for adults and not with children's needs in mind. The result is that children face added obstacles to justice in these matters.

Research indicates that children are further victimised in the criminal justice process as a result of delays in the process, being exposed to the perpetrator, recounting the distressing and often humiliating detail of the event during evidence in chief, aggressive cross examination and acquittal of guilty accused.[1] These pressures affect the emotional and psychological well-being of the child (during and after the trial), the quality and accuracy of the child's evidence and the way that the court interprets the child's evidence and manner.

The majority of child complainants report[2] extreme fear and anxiety at the prospect of facing the accused in court. Anxiety is associated with facing the accused at court, this exacerbates confusion and influences the ability of the child to remember details of the event. The child may, as a result of the anxiety or as a result of shame at speaking to strangers and the public about the sexual offence, withhold important information or close down completely in order to protect themselves from the memory and the perceived emotional danger.

The court environment is not child friendly and is alienating to children. In this environment children quickly become bored and distressed, due to this they are less able to provide the court with the level of detail that is necessary for the court to make an informed decision in addition studies indicate that children give more detail and accurate information when testifying in a familiar and comfortable environment than in a court room[3]. They remember more elements of the experience freely, they give fewer "I don't know" answers and less "no responses", there are fewer errors in the recollection and they are less likely to become confused by misleading questions[4].

[1] Whittam A and Ehrat H (2003)*Child Witnesses in the Criminal Justice System – The Issue of Vulnerability* Conference Paper at *Child Sexual Abuse: Justice Response or Alternative Resolution Conference.*
[2] Victim Support UK *Children in Court: the views of young witnesses and their carers* and *The views of Witness Service Volunteers. At* www.victimsupport.org.uk/vs_england_wales/about_us/publications/children_in_court/cic_chapter7.php *and*
Focus Group discussion with RAPCAN court supporters 13 May 2006 and Authors direct experience with adolescent sexual offence complainants over period September 1999 to November 2005.
[3] Muller, K *An Inquisitorial Approach to the Evidence of Children*
[4] Saywitz, K.J. and Nathanson, R. 1993. *Children's testimony and their perceptions of stress in and out of the courtroom.* Child Abuse and Neglect. 17:613.
Hill, P.E. and Hill, S.M. 1987. *Videotaping children's testimony: An empirical view.* Michigan Law Review. 85:809-833 in Muller, K *An Inquisitorial Approach to the Evidence of Children*

Current provisions within the Criminal Procedure Act 51 of 1977 are intended to provide protection to complainants and to ensure that the evidence placed before the court is of the optimum standard. These measures should provide complainants with protection from the negative impact of testifying about the traumatic experience of sexual violence in the presence of the accused person in the court environment. They include:

- Section 158 says that a Closed Circuit Television (CCTV) system can be set up for a complainant, regardless of age, where s/he can give evidence in a separate room linked to the court via the CCTV system.
- Section 170A says that for complainants under the age of 18, an "*intermediary system*" can be used whereby the child is in a separate room with a court intermediary and they are linked to the court via the CCTV system. The child is questioned by the intermediary and does not see or hear the court proceedings directly.

However courts are inconsistent and tend to be conservative in their application of these measures.

We refer to the preamble of the bill which recognises that "*The South African common law and statutory law do not deal adequately, effectively and in a non-discriminatory manner with many aspects relating to ... the commission of sexual offences*"

The United Nations *Guidelines on Justice Matters involving Child Victims and Witnesses of Crime*[5] recognises that "*children…are particularly vulnerable and need special protection, assistance and support appropriate to their age, level of maturity and unique needs in order to prevent further hardship and trauma that may result from their participation in the criminal justice process"*

In light of the above we are concerned that this Bill is failing to provide complainants with the "*maximum and least traumatising protection that the law can provide*" – as set out in section (2) Objects of the bill.

ACCESS TO THE INTERMEDIARY SYSTEM

The Criminal Procedure Act (Act 51 of 1977) Provides in section 170A for witnesses under the age of 18 to testify outside of the court environment (usually though the CCTV system) through a person who acts as an intermediary. This provision includes the qualification that the system should be implemented where a witness under the age of 18 will be **exposed to *undue mental stress or suffering*** if s/he testifies in the proceedings.

[5] Resolution 2005/20 of the Economic and Social Council

In general courts are not utilizing this protective measure for children older than 12 years[6] and children as young as eight are still subjected to testifying in some court rooms[7]. These decisions are based on assumptions of courts that older children are less vulnerable than younger children are. However this is not the case, older children are vulnerable in different ways to younger children as they tend to have less support, are less likely to be believed and are often subjected to more intensive and aggressive cross examination than younger children are[8].

The requirement to show that undue mental stress or suffering will result means that the court must hold a "trial within a trial" in order to access this provision. This has impact on further delays and increased waiting times for children. Prosecutors don't always lead expert evidence on the question of undue mental stress and suffering to the complainant and many magistrates when faced with this information indicate that stress and suffering is inevitable in the trial process and therefore not "undue".

The constitutionality of this provision has been tested by the courts and it is established that the accused's rights to see, question and cross examine his/her accuser are not unfairly undermined by utilization of this provision. The defence is able to view the witness, her demeanour and her responses through the CCTV system[9]. In spite of this presiding officers routinely accept the argument of the defence that this provision unfairly limits the accused's right to a fair trial.

The State has a duty to respect, protect, promote and fulfill the rights of the complainant to equality, dignity, not to be treated or punished in a cruel, inhuman or degrading way as well as to psychological integrity. These rights are undermined for the majority of child complainants who testify in court in the presence of the accused and these rights are seldom given weight in the decision of a court to utilise the intermediary system.

More widespread application of this measure will mitigate against the secondary trauma that is caused to the majority of child complainants who testify in court in the presence of the accused. In addition this will impact on the quality of evidence that is placed before the court.

We note that the South African Law Reform Commission recommended under its section on "Vulnerable witnesses" that once a person was declared a 'vulnerable witness' that the court must direct that the witness be protected by one or more of the following measures including: *"Directing that the witness must give evidence through an intermediary as provided for in section 170A of the criminal Procedure Act, 1977 (Act No. 51 of 1977),* ***irrespective of any additional qualifying criteria prescribed by that section."***

[6] Focus Group discussion with RAPCAN court supporters 13 May 2006.
[7] Court Supporter Parrow Court Cape Town 13 May 2006
[8] Whittam A and Ehrat H (2003) *Ibid*
[9] In *Klink v Regional Court Magistrate NO and Others* 1996 (3) BCLR 402 (SE) at 448C–D it is noted that: *"the accused's right to a public trial is not violated merely because the complainant gives evidence in a separate room. Nor does this provision result in the infringement of any other constitutional right of an accused person to a fair trial"*

We submit that it is necessary to amend section 170(A) of the Criminal Procedure Act 51 of 1977 to ensure that this provision is available to all complainants under the age of 18. We recommend that the test for undue stress or suffering be removed. It is our opinion that only when a child requests or chooses to testify in the court room should this be done.

The current version of the Bill does little to address this in that it only sets out in the Policy Directives for the National Prosecuting Authority in section 66(2)(iii) *The criteria to be used and circumstances in which the prosecution must request the court to consider* [use of section 170A] *in respect of witnesses and in particular child complainants below the age of 16* years old.

Applications to the court for the use of this measure are unlikely to significantly impact on the number of cases in which it is used. This is because it is the presiding officer and not the prosecutor who makes the decision.

We are concerned with the special reference to children under 16, although it may have been the intention to ensure that these provisions were more strongly applied for younger children it will effectively undermine the application of this provision for children who are 16 and 17 years old.

We recommend that the phrase *child complainants below the age of 16 years* be amended to read: *child complainants*.

The Schedule to the Bill includes an amendment to section 170A of the Criminal Procedure Act, this requires a court to place on record any reason for not appointing an intermediary when it is requested by a prosecutor for a child under the age of 14 years. We support this provision in this Bill as we believe it will improve access to the *Intermediary System*. However again an arbitrary age distinction is made, this time not at 16 years but at 14 years.

We recommend that section 9 of the Schedule relating to amendment of section 170A of the Criminal Procedure Act be amended to read: *"… the appointment of an intermediary in respect of child complainants ~~below the age of 14~~ …"*

We strongly support the amendment made in Section 9 of Schedule 1 of this Bill to section 170A of the Criminal Procedure Act which makes this provision available to complainants with intellectual disabilities who are chronologically above 18 years of age but who have an equivalent mental age of a person less than 18 years.

CCTV SYSTEM (WITHOUT THE INTERMEDIARY)

The Criminal Procedure Act (Act 51 of 1977) provides in section 158 for the use of CCTV system for witnesses in sexual offence cases. These provisions apply to all witnesses of any age. This system is rarely used for adults and is at times used for child complainants instead of the Intermediary system.

We recommend that this system be available for children who choose not to testify through the intermediary system but who do not wish to testify in the court room.

Similar provisions exist in section 66(2)(ii) of the Bill relating to policy directives for prosecutors as in the above discussion on the *Intermendiary System* in which the age of 16 is referred to and in section 7 of the Schedule in which the age of 14 is referred to.

We recommend that these references to specific ages be removed and the sections refer only to "*child complainants*".

THE CREDIBILITY OF CHILD WITNESSES

Historically and currently children are incorrectly assumed to be inherently unreliable and less worthy of belief than adults are. Numerous research projects have tested these assumptions and none have found that children are intrinsically more likely to lie than adults are. Children as with adults may be motivated to lie about certain experiences, certainly a sex offender has a clear motivation to lie. It must also be noted that younger children lack the cognitive ability to tell complex lies and to maintain these lies under questioning and examination.

The *United Nations Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime* states that: "*Every child should be treated as a capable witness, subject to examination, and his or her testimony should not be presumed invalid or untrustworthy by reason of the child's age alone as long as his or her maturity allow the giving of intelligible and credible testimony, with or without communication aids and other assistance*"[10]

A cautionary rule currently applies to the evidence of child witnesses. This requires a presiding officer to apply extra caution to the evidence of a child on the basis of the assumption outlined above. This discriminates against children on the basis of their age.

This rule as it applies to children has been scrapped in other jurisdictions such as Canada, the requirement for corroboration of children's evidence was dropped in all states in the US during

[10] Resolution 2005/20 of the Economic and Social Council of the United Nations Article 18

the 1980s[11]. The rules to which the evidence of any witness is subjected to assess credibility will apply to the evidence of children.

Although the cautionary rule that was applicable to all complainants in sexual offence matters has been clearly scrapped by this Bill, the Bill is silent on the cautionary rule that relates to children's evidence.

We recommend that the cautionary rule as it applies to child witnesses be scrapped through a provision in the Bill.

In addition to the application of the cautionary rule, children are required to undergo a competency test before they are allowed to testify in court.

Section 193 of the Criminal Procedure Act (57 of 1977) provides that the court will decide upon the competency of a witness, however there is no requirement that all or any child witnesses be subjected to a competency test. Section 164 of the Criminal Procedure act provides that a witness who does not understand the nature of an oath may be admonished to speak the truth and then give unsworn evidence.

Studies show that children's response to the competence examination does not predict the truthfulness of their testimony[12] and that adults viewing the competence test does not improve the ability of the adult to distinguish between truth and lies.

In addition the Competence test is administered differently by different courts. Many courts require that children explain the difference between the concepts 'truth' and 'lie' or that the child describe the word 'truth' or 'lie'. This form of testing results in the testimony of many children who are capable of giving intelligible and credible account of their experience being excluded from court proceedings.

There are particular age appropriate tests that can be administered, however few court officials are appraised of these and the child is thus disadvantaged by the ignorance of the adults in the system.

We recommend that the Bill include a clause stating that all witnesses under the age of 18 are to be presumed competent to testify if they are able to understand questions that are posed and respond in an intelligible manner.

[11] Ceci SJ and de Bruyn E (1993) *Child Witnesses in Court. A Growing Dilemma* in *Children Today* US Dept. of Health and Human Services, 1993, Volume 22, No.1

[12] London, K, and Nunez, N (2002) Examining the efficacy of truth-lie discussions in predicting and increasing the veracity of children's reports. *Journal of Experimental Child Psychology, 83,* 131-147 and Lyon T D (2000) Child witnesses and the oath: Empirical evidence. *Southern California Law Review, 73* 1017-1074 both in Talwar V, Lee K, Bala N, Lindsay RCL (2006) Adults' Judgements of Children's Coached Reports *Law Hum Behav (2006) 30*:561-570

5. Vulnerable witnesses and the obligation to apply protective measures

During the process of finalising the Bill the Portfolio Committee removed the procedural guarantees provided to those deemed to be 'vulnerable witnesses'. These included the declaration of a person as being a vulnerable witness, the use of CCTV for the testimony of vulnerable witnesses, non disclosure of identity and the presence of a support person during *in camera* (closed) proceedings.

The committee preferred the approach that instructs the National Department of Public Prosecutions (NDPP) to set out all the circumstances that each Prosecutor must take note of in considering the issue. Thus, while committee accepted the need to provide protection for vulnerable witnesses (which was widely supported) in principle, it has opted for a procedure that will undermine these protections.

This approach is unacceptable for various reasons:

- The courts are often under capacitated, and inexperienced and over worked prosecutors may not take into account the guidelines
- It gives too much discretion to the individual prosecutor, who may exercise the discretion in a manner that prejudices the witness
- Witnesses will not be aware of these 'rights' as they will not have access to NDPP instructions and guidelines
- The protection is watered down from an automatic protection (which can be waived) to a consideration the prosecutor can take into account when preparing their case.

The proposed clauses provide for measures to provide emotional support and a conducive environment to the complainant and other witnesses to alleviate the trauma associated with testifying and improve the quality of evidence before the court.

Accordingly, we propose the inclusion of the following clauses:

Protective measures for vulnerable witnesses

1. A Court, in criminal proceedings involving the alleged commission of a sexual offence, must declare a witness, other than the Accused, who is to give evidence in those proceedings a vulnerable witness if such witness is -
   (a) the Complainant in the proceedings pending before the Court; or
   (b) a child; or
   (c) has witnessed the offence being tried.

2. The Court may, on its own initiative or on request of the prosecution or any witness, other than a witness referred to in subsection (1) who is to give evidence in proceedings referred to in subsection (1), declare any such witness, other than the Accused, a vulnerable witness if in the Court's opinion he or she is likely to be vulnerable on account of one or more of the following factors–
   (a) age;
   (b) intellectual, psychological or physical impairment;
   (c) trauma associated with giving evidence in relation to the alleged commission of a sexual offence and / or testifying in the presence of the Accused or in open court in sexual offence proceedings;
   (d) cultural differences;
   (e) the possibility of intimidation;
   (f) race;
   (g) religion;
   (h) language;
   (i) the relationship of the witness to any party to the proceedings;
   (j) the nature of the subject matter of the evidence;
   (k) risk of further harm; or
   (l) any other factor the Court considers relevant.
3. The Court must, if in doubt as to whether a witness should be declared a vulnerable witness in terms of subsection (2), summon any knowledgeable person to appear before and advise the Court on the vulnerability of such witness. For the purposes of this subsection, a "knowledgeable person" is any person with knowledge of one or more of the factors listed in subsection (2).

4. Upon declaration of a witness as a vulnerable witness in terms of this section, the Court must, subject to the provisions of subsection (5), direct that such witness be protected by one or more of the following measures -
   (a) allowing that witness to give evidence by means of closed circuit television as provided for in Section 158 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), irrespective of any additional qualifying criteria prescribed by that section;
   (b) directing that the witness must give evidence through an intermediary as provided for in Section 170A of the Criminal Procedure Act, 1977, irrespective of any additional qualifying criteria prescribed by that section ;
   (c) directing that the proceedings may not take place in open Court as provided for in Section 153 of the Criminal Procedure Act, 1977, irrespective of any additional qualifying criteria prescribed by that section;
   (d) directing that the cross examination of the complainant be conducted via the court, an intermediary or in the presence of a support person where the accused does not have legal representation;
   (e) prohibiting the publication of the identity of the Complainant provided for in Section 154 of the Criminal Procedure Act, 1977, or of the Complainant's family, including the publication of information that may lead to the identification of the Complainant or the Complainant's family; or
   (f) any other measure which the Court deems just and appropriate.
5. Once the Court has declared a child a vulnerable witness the Court must direct that an intermediary referred to in subsection (4)(b) be appointed in respect of such witness unless the interests of justice justify the non-appointment of an intermediary, in which case the Court must record the reasons for not appointing an intermediary, which reasons may be challenged by such witness or by another

person on their behalf and be determined by the Court prior to such witness being required to commence with their testimony.

6. In determining which of the protective measures referred to in subsection (4) should be applied to a witness, the Court must have regard to all the circumstances of the case, including –
   (a) any views expressed by the witness, but the Court must accord such views the weight it considers appropriate in view of the witness's age and maturity; and
   (b) views expressed by a knowledgeable person who is acquainted with or has dealt with the witness.
7. The Court may, on its own initiative or upon the request of the prosecution, at any time revoke or vary a direction given in terms of subsection (4), provided that it is satisfied that such revocation or variation is in the interests of justice and is likely to improve the quality of evidence of the witness having regard to all the circumstances of the case and subsections 6(a) and (b), and the Court must, if such revocation or variation has been made on its own initiative, furnish reasons therefor at the time of the revocation or variation.
8. The prosecution shall inform a witness who is to give evidence in criminal proceedings in which a person is charged with the alleged commission of a sexual offence, or if such witness is below the age of eighteen years, such witness, his or her parent, guardian or a person in loco parentis, of the possibility that he or she may be declared a vulnerable witness in terms of section 13 and of the protective measures listed in paragraphs (a) to (g) of section 13(4) prior to such witness commencing with his or her testimony at any stage of the proceedings."

Designation of support persons

1. Subject to the provisions in this section, Complainants should have the right to have present at all times during proceedings in terms of this Act a support person, which person may be a family member, partner, friend or important person in the complainant's life.

2. The police official responsible for the investigation of a charge relating to the alleged commission of a sexual offence shall, at the commencement of such an investigation, inform the complainant in such charge and any child witness or his or her parent, guardian or a person in loco parentis, of their right to be accompanied by a support person of the complainant's or witness's choice while making any statement, undergoing any examination, medical or otherwise, being interviewed or being questioned.

3. A support person referred to in subsection (1) is not designated by the court and may accompany the complainant or witness during any of the investigative steps contemplated in that subsection.

4. The prosecutor in criminal proceedings involving the alleged commission of a sexual offence shall inform the complainant and any child witness or his or her parent, guardian or a person in loco parentis, of their right to be accompanied by a support person of the complainant's or witness's choice prior to the witness commencing with their evidence.

5. Whenever criminal proceedings involving the alleged commission of a sexual offence are pending before any court and a complainant or any child witness is to give evidence in such court, the court must confirm, prior to such witness commencing with their evidence, that such witness has been informed of their rights in accordance with subsection (3) and record the witness's response to being accompanied by a support person of the witness's choice when giving evidence in court.

6. If the court has not designated a support person in respect of a witness in terms of subsection (4), the court may at any time on its own initiative or upon request by the prosecutor direct that such witness be accompanied by a support person of the witness's choice when giving evidence in court.

7. If the court has designated a support person in respect of a witness in terms of subsection (5) on its own initiative, such witness may waive the designation of such support person: provided that the court shall accord such waiver the weight it considers appropriate in view of the witness's age and maturity.

8. The court may, notwithstanding a request in terms of this section, refuse the designation of a support person of the witness's choice if the court is of the opinion that the designation of such person will not be in the interests of justice, and may, after consultation with such witness in chambers and upon furnishing reasons for its refusal, designate another person as support person.

9. A support person designated in terms of this section may accompany and be seated with the relevant witness while such witness is making statements to any person, being interviewed or giving evidence in court.

10. The court may, if it deems it to be in the interests of justice and in the best interest of the witness, after having consulted with the said witness in chambers, at any time revoke the designation of a support person and may designate another person of the witnesses choice in his or her place.

11. A person who has been designated as a support person is entitled to such allowance as if he or she was a witness for the State.

6. Legal representation for victims of sexual offences

Rape is an intensely personal violation of the victim's physical and psychological integrity. Despite this, throughout the trial, the victim is treated like any other witness. More than this – as was so graphically illustrated in the Zuma trial – it is her previous sexual conduct and character that is often effectively put on trial. The Criminal Procedure Act (in s227) makes provision for protecting the victim in these circumstances and the Sexual Offences Bill seeks to tighten these protections. Local and international experience with similar provisions shows, however, that these are generally not effective in protecting victims or, therefore, in reducing the traumatic impact of going through the trial process. As a result many victims choose to withdraw their complaints rather than subjecting themselves to a trial. For this reason a number of countries have made provision for the victim to obtain legal representation. While some countries, like Denmark, allow legal representation throughout the trial process (which is ideal), we are recommending that the Committee consider a narrower application of this right as applied in Ireland. Ireland allows legal representation for victims specifically during the trial within a trial that is held to determine whether evidence regarding her previous sexual history or character should be led. We would argue that this is the point in the trial when the victim's constitutional and legal rights are most at risk of violation and that it is imperative that they are therefore protected by someone who 'speaks the language of the courts'. It should be noted that we are not advocating providing new rights for the complainant, only the effective protection of existing rights.

In 1998 research was conducted by Trinity College, Dublin and Dublin Rape Crisis to analyse the effect on the victim of having legal representation at pretrial and trial stages.[13] It considered the rape law process in 15 European Union countries and found that where there was legal representation:

(i) victims experienced significantly fewer difficulties in obtaining information about case developments;
(ii) victims had a significantly clearer understanding in relation to their role at trial;
(iii) victims reported higher levels of confidence and articulateness when testifying;
(iv) victims rated the attitude of the accused's lawyer as significantly less hostile;
(v) the impact of the trial process on the victim's family was considered to be significantly less negative;
(vi) victims were overall significantly more satisfied with the legal process than were participants who did not have their own legal representative during the trial process.

[13] Bacik et al (1998) *The Legal Process and Victims of Rape.*

On the basis of these findings the researchers strongly recommend the introduction of victim's lawyers in all jurisdictions, both adversarial and inquisitorial. This view is endorsed by UN High Commissioner for Human Rights, Mary Robinson, in her forward to the report.

We therefore recommend the insertion into the Bill of the following provision:

Legal Representation for Complainants

(1) Where an application under section 227 of Act 105 of 1977 *(ie evidence regarding the complainant's character or previous sexual history)* is made by or on behalf of a charged with an offence under this Act, the complainant shall be entitled to be heard in relation to the application and, for this purpose, to be legally represented during the hearing of the application.

(2) Notice of intention to make an application under section 227 shall be given to the prosecution by or on behalf of the accused person before, or as soon as practicable after, the commencement of the trial for the offence concerned.

(3) The prosecution shall, as soon as practicable after the receipt by it of such a notice, notify the complainant of his or her entitlement to be heard in relation to the said application and to be legally represented, for that purpose, during the course of the application.

(4) The judge shall not hear the said application without first being satisfied that subsections (2) and (3) have been complied with.

(5) If the period between the complainant's being notified, under subsection (3), of his or her entitlements under this section and the making of the said application is not, in the judge's opinion, sufficient to have afforded the complainant a reasonable opportunity to arrange legal representation of the kind referred to in this section, the judge shall postpone the hearing of the application (and, for this purpose, may adjourn the trial or proceeding concerned) for a period that the judge considers will afford the complainant such an opportunity.

7. Services for victims of sexual offences and compulsory HIV testing of alleged sex offenders

7.1 Broad Medical Care and Medico-Legal Services

For women who have been sexually assaulted, the health care system will often be the initial point of contact with the public services. What takes place during that encounter is crucial for two reasons: the physical and emotional well-being of the sexual assault survivor is at stake; and the medical and forensic evidence obtained at that time may be the only corroboration available to support a victim's complaint. The omission of medico-legal services from the Bill is, therefore, of great concern. That nothing is contained in the proposed Bill that imposes duties on the health sector to perform specific functions in relation to the medical management of rape complainants, only maintains the fragmentation between criminal justice and health service provision.

From the strong recommendations by the SALRC and the numerous submissions to the SALRC, the draft Bill included a clause that referred to the treatment of rape survivors. The SALRC, in its Discussion Paper 102[14] made the following arguments surrounding the need for a more professional, sensitive and accurate medico-legal service:

1. Medical practitioners need to be sensitised to prevent secondary victimisation of rape complainants (s.3.3.1.2; p. 49).

2. Forensic medical evidence is crucial for the successful prosecution of sexual offence cases (s.3.3.2.1; p.50).

3. Medical evidence is only of value if the examination is properly conducted and all the specimens for forensic analysis are collected. Frequently, such evidence is badly taken or incomplete (s.3.3.2.1; p. 50).

4. There are often lengthy delays before a victim is examined by a medical practitioner (s.3.3.2.1; p. 50).

5. … all appropriately trained medical personnel … [must] conduct a proper medical examination of and treat or refer the victim of sexual violence for specialised treatment or counselling, where appropriate (Recommendation s.3.3.2.4; p. 51).

6. … medical personnel [should] link up with the investigating team to share information on the crime scene, the evidence collected or to be collected from both the victim and or the alleged offender, the injuries sustained during the attack, to advise the investigating team on what other possible evidence could be collected

[14] South African Law Commission (2001). Discussion Paper 102, Project 107. Sexual Offences: Process and Procedure.

(Recommendation s.3.3.2.4; p. 51). Proper interaction between the investigating officer and the medical practitioner is crucial (s.3.3.2.6; p. 52).

7. Victims are often not told what the examination will entail and the reasons for conducting certain tests (s.3.3.2.10; p. 53). The victim should be given information regarding the reason for the examination and what it entails, information on possible pregnancy … medication given and possible side effects … HIV … regardless of what kind of medical officer conducts the examination (recommendation s.3.3.2.11; p. 53).

8. Uniform services should be provided … and … coupled with appropriate sanctions for non-compliance (s.3.3.2.19; p. 55).

The Bill presented in the Final Report included the following provision:

21. Provision of Treatment

(1) Where a person has sustained physical, psychological or other injuries as the result of an alleged sexual offence, such person shall, immediately after the alleged offence, receive the appropriate medical care, treatment of counselling as may be required for such injuries.

(2) If a person has been exposed to the risk of being infected by a sexually transmissible infection as the result of a sexual offence, such person shall, immediately after the reporting of the alleged offence to the South African Police Services or to a health care facility –

(a) be advised by a medical practitioner or a qualified health care professional of the possibility of being tested for such infection; and

(b) have access to all possible means of prevention, treatment and medical care in respect of possible exposure to a sexually transmissible infection.

As the Bill current stands, there is no clause that deals with the medical management of sexual assault survivors. While we are of the opinion that the previous clause, before removal, was not entirely sufficient in that it did not include the full complex of medico-legal services, we strongly recommend that a clause referring to medical management be included in the Act. Moreover, the above provision focused broadly on the "treatment" of rape survivors, rather than the "medical management" of survivors. The medical management of rape survivors involves not only treating the rape survivor for sexually transmissible infections, but involves a detailed medico-legal examination, which includes documentation of all injuries, both physical and genital and the collection of all potential forensic evidence from the body of the complainant, including trace evidence and biological evidence. It also includes the assessment of the patient's risk for falling pregnant and an assessment for the risk of psycho-social complications as well as the provision of treatment thereof.

We strongly recommend that a clause regarding the medical management of complainants be included in this Act to replace the previous clause 21 "provision of treatment". We recommend the following formulation of this section:

Medical Management of Rape Survivors

(1) Where a person has been the victim of an alleged sexual offence, such a person shall, immediately after the alleged offence or as soon as possible thereafter, be offered a medico-legal examination, where deemed appropriate by a qualified health care practitioner.

(2) Where a person has been the victim of an alleged sexual offence, such a person shall, immediately after the alleged offence or as soon as possible thereafter, receive the appropriate medical management, by a designated health care worker.

Definitions

We further recommend that the following definition is included in section 1 of the Act:

Designated Health Care Facility is a health care facility that has been designated as able to manage sexual assault complainants based on a set of defined criteria as set out in the Regulations of this Act.

The criteria include, but are not limited to the following:

- Must be a 24 hour facility.
- Must have an accredited health care practitioner/sexual assault care practitioner attached to the facility, who is immediately available.
- Must have separate area designated for these cases, which must include an examination room and bathroom or shower facility.
- Must have available, at all times, the equipment necessary to conduct the examination of the rape complainant.
- Must have a supply of Sexual Assault Examination Collection Kits.
- Must have a safe or secure cupboard with an evidence register.
- Must have all the required medication in pre-packaged courses for the treatment of pregnancy, STI's, HIV, pain and tranquilizers, etc. for the rape complainant.
- Must have copies of the examination protocol.

7.2 Access to Medication

The Sexual Offences Bill provides in s28 that rape survivors will have access to Post Exposure Prophylaxis (PEP) for the prevention of HIV if they report the incident to the police or to a designated health facility. The Bill does not specify the other types of medicines that survivors need to access after being raped or sexually assaulted, such as medication to prevent pregnancy

and sexually transmitted diseases. This is problematic as the Bill should ensure accessibility of such medication and accountability if it is not provided.

Sexual violence causes both physical and psychological trauma. After a sexual offence the survivor may require medical and psycho-social treatment for:

- HIV – including pre- and post-test counselling, and Post Exposure Prophylaxis (PEP);
- The possible transmission of other sexually transmitted infections;
- Injuries to any part of the body;
- The prevention of pregnancy;
- The termination or management of pregnancy;
- Psychological shock (including Post Traumatic Stress Disorder, disturbed sleep and eating patterns, anxiety and depression).

Until recently, the health-related consequences of rape or sexual violence were not comprehensively addressed: policies only required the State to perform the forensic medical examination for the collection of case evidence, and the systematic treatment of survivors was overlooked. Recent provincial and national health policies recognise the need to treat the physical impact of the attack. However, the implementation of these policies has been erratic and slow, which has meant that many survivors still do not have access to treatment. It is therefore imperative that this be clearly spelled out in the Sexual Offences Bill.

7.3. Conditions for access to Post Exposure Prophylaxis (PEP) for HIV

There is a high rate of HIV in South Africa, which is compounded by a high rate of rape and sexual violence that increases the risk of HIV transmission. This means that Post Exposure Prophylaxis (PEP) is of extreme concern to victims of sexual violence. Failure to immediately provide this and other treatment may result in long-term impacts that are irreversible. Critically, experts recommend that rape victims begin a course of PEP within 6 hours of being raped (and no later than 72 hours). It is therefore important that the legislature facilitates access to PEP as far as possible and does not do anything to prevent effective access.

As currently formulated s28, guaranteeing access to PEP, is ambiguous and can create the impression that *only* victims who lay a charge in respect of an alleged offence may receive (PEP). In this respect subsection (2) currently reads:

> **(2) Only a victim who-**
>
> **(a) lays a charge with the South African Police Service in respect of an alleged sexual offence; or**

> **(b) reports an incident in respect of an alleged sexual offence in the prescribed manner at a designated health establishment contemplated in subsection 1(a) (i),**
>
> **Within 72 hours after the alleged sexual offence took place, may receive the services contemplated in subsection (1) (a).**

Access to treatment cannot be made contingent on laying a charge of rape. A victim might have very good reasons for not laying a charge and should have a right to be protected against HIV, irrespective of whether s/he decides to go forward with criminal proceedings against the perpetrator. Furthermore, even when the victim decides to lay charges, it is not advisable to only commence treatment after the charge has been laid, since delays at police stations and hospitals are common.

The Bill must allow for the treatment of survivors who present at a healthcare facility without a direct referral from the SAPS, and the provision of services must be available in cases where no report is made. Medical treatment for sexual offence victims must be a priority and wherever possible the victim must be attended to immediately.

This section should therefore be redrafted to read:

> **(2) Only a victim who reports an incident in respect of an alleged sexual offence in the prescribed manner at a designated health establishment contemplated in subsection 1(a) (i) within 72 hours after the alleged sexual offence took place, may receive the services contemplated in subsection (1) (a).**

7.4 Compulsory HIV Testing of Alleged Sex Offenders

The Bill provides for rape victims to make an application for a compulsory HIV test of the alleged sexual offender. Furthermore, investigating officers can apply for an HIV test of an alleged sexual or other offender, if the testing appears to be necessary for purposes of investigating or prosecuting such an offence. Although the provisions on compulsory HIV testing pursue good intentions, they raise numerous concerns and may lead to adverse consequences for victims of sexual offences.

With regard to victims, the major concerns are:

- **Lack of practical utility**
  The HIV test result of the alleged sexual offender is useless for the victim because medical decisions about antiretroviral medication (PEP) and personal decisions about safer sex cannot be based on the alleged offender's HIV status. When the alleged offender is tested for HIV, s/he may be in the 'window period' which means s/he tests HIV negative although s/he is HIV positive. An HIV negative test result of the alleged offender may therefore create a false sense of security in the victim.

- **Confusion about urgency of accessing antiretroviral treatment and of completing the course**

  The Bill implies that victims of sexual offences can wait until they receive the test result to make decisions about post-exposure prophylaxis (PEP). However, this medical treatment needs to be started no later than 72 hours after the rape and must be continued for 28 days. It is extremely problematic if victims stop taking PEP on the basis of a negative test, both in terms of the alleged offender being in the window period and in terms of developing drug resistance.

- **Prosecution of victims**

  Only between 5% and 9% of reported rape cases result in conviction of the accused. The vast majority of alleged offenders walk free after the criminal proceedings. Under these circumstances, those who are acquitted and who were forced to undergo compulsory HIV testing may try to sue the victim for damages, or have her/him prosecuted for requesting an HIV test with malicious intent. Such provision might not only deter victims from applying for a compulsory HIV test, but might even prevent them from reporting the rape in the first place.

With regard to investigating officers, the major concern is:

- **Reproduction of what is already available**

  Section 37 of the Criminal Procedure Act states that any police official may order a blood test to ascertain whether the body of an accused shows any condition or appearance. This provision also allows the police to order an HIV test to obtain evidence for a trial. The relevant provisions of the Sexual Offences Bill are therefore completely redundant.

We therefore strongly recommend that the provisions on compulsory HIV testing be omitted from the Bill. Victims of sexual offences will not benefit from compulsory HIV testing of the alleged offender but will be mislead and further victimised through the provisions.

8. Bail in Sexual Assault Cases

The Sexual Offences Bill does not currently contain any provisions relating to bail. We respectfully submit that it is important for the Bill to deal with bail in sexual assault cases. This submission is based on the results of a three-year research project on the granting of bail in sexual assault cases that we conducted during 2000-2003.

BRIEF OVERVIEW OF THE RESEARCH ON BAIL IN SEXUAL ASSAULT CASES

During 2000-2003, the Consortium on Violence Against Women conducted research to establish–

- How is the law on bail currently applied in cases of sexual assault?
- What are the needs and concerns of victims of sexual assault around bail?

This research project originated (*inter alia*) in pre-trial consultations with rape survivors at Rape Crisis, Cape Town as well as concerns that the amendment of bail legislation in 1997 did not go far enough to encompass the specific difficulties encountered in sexual assault cases.

The research project consisted of -

- An analysis of the legislative and policy framework and relevant case law;
- Screening of 397 police dockets in sexual assault cases at 11 police stations in the Cape Town, Mitchell's Plain and George regional divisions;
- Screening of 268 charge sheets at 5 courts;
- Interviews with police officials, prosecutors and magistrates; and
- Interviews with victims of sexual assault and group discussions with counsellors at Rape Crisis, Cape Town.

MAIN RESEARCH FINDINGS

Our main research findings are set out in the following two documents (copies can be made available to the Committee):

- R Barday and H Combrinck *Implementation of Bail Legislation in Sexual Assault Cases: First Report* (2002);
- H Combrinck and Z Skepu *Bail in Sexual Assault Cases: Victims' Experiences* (2003).

Certain of our findings, for example, the observation that victims experience major difficulties in obtaining information about the status of their cases (including the question whether or not the accused has been arrested and released on bail) have already been referred to earlier in this

submission where we argued for the inclusion of victims' rights in the sexual offences legislation. Based on our research findings, we are further of the opinion that the safety of the victim should be made more prominent in the court's consideration of whether or not the release of the accused will be in the interests of justice, and we accordingly recommend the amendment of the relevant provisions of section 60(4) of the Criminal Procedure Act. Similarly, the determination of appropriate bail conditions should also be made with a clear awareness of the victim's need for protection against further violence, intimidation or harassment by the accused.

- **Factors considered by the court in deciding on bail**[15]

A prosecutor interviewed during the research project felt that the interests of the accused weigh quite heavily with presiding officers:

> 'So, although the legislation makes provision for the safety of her [sic] and various things, you're still reliant on the discretion of the magistrate. And I think the magistrates will often go back to the basics, you know, the interest of the accused to have his freedom, of course. Does he have a fixed address, is he going to escape, is he going to interfere with the judicial process? So these factors will play quite largely despite the legislation.' [P4]

Interestingly, a number of magistrates indicated that of the five 'indicators' of the interests of justice listed in section 60(4),[16] they regard the question of whether there is a likelihood (in exceptional circumstances) that the release of the accused wil disturb the public order or undermine the public peace as particularly significant in sexual offence cases. However, another magistrate prioritized the likelihood that the accused will attempt to influence or intimidate witnesses:[17]

> 'Therefore that's the most important thing, that the court must be sure that no intimidation will take place because for most victims it's even very difficult for them to make a case, so in that same breath she will also be easily intimidated to withdraw the case, so that is very important to look at that aspect.' [MG1].

- **Focus of the bail investigation**[18]

Although certain investigating officers did acknowledge that aspects such as threats made to the complainant are important to investigate for purposes of bail, the majority appeared to concentrate on information relevant to whether or not the accused will stand trial, such as

15. This section is based on Barday and Combrinck (op cit) at 44.
16. According to this subsection, the interests of justice do not permit the release from detention of an accused where one or more of the five listed grounds are established.
17. See s 60(4)(c).
18. This section is based on Barday and Combrinck (op cit) at 32-33.

whether he has a fixed address, permanent employment, etc. Investigating officers generally did not believe that involving the complainant in the bail investigation is helpful.

- **Intimidation and harassment of the victim**

Victims who participated in the research reported high levels of intimidation and harassment by the perpetrator and his family and friends.[19] Where victims reported such instances of intimidation, the official response appeared to be less than satisfactory, with little or no attempt to intervene to secure the victim's safety. On the other hand, when going through case dockets and court records, researchers found no instances of applications to cancel an accused's bail due to his non-compliance with bail conditions aimed at prohibiting contact with the victim. There could be several explanations for this discrepancy: it could be that bail conditions to prohibit the accused from making contact with the victim are not imposed in all instances where this should happen. Secondly, it is possible that victims are not informed of the bail conditions and of what they should do in the event of the breach of a 'no contact' bail condition. Thirdly, it is further possible that where victims do report alleged breaches of the bail conditions, officials do not take action to intervene – thus explaining the lack of applications for cancellation. This example again reinforces the importance of informing victims of key events in the criminal justice process, as we have argued above. In addition, we argue that the documents setting out the standards for case management, discussed above, should clearly impose a duty to on the police to inform the victim of the outcome of the bail hearing, of the nature of bail conditions and what she should do in the event of a breach of such conditions. Police and prosecutors should further be required to take immediate action when the victim reports an alleged breach of a 'no contact' bail condition.

AMENDMENT OF SECTION 60 OF THE CRIMINAL PROCEDURE ACT

We recommend the insertion of the following provisions (as indicated):

(7) In considering whether the ground in subsection 4(c) has been established, the court may, where applicable, take into account the following factors, namely –
- (a) the fact that the accused is familiar with the identity of witnesses and with the evidence which they may bring against him or her;
- (b) whether the witnesses have already made statements and agreed to testify;
- (c) whether the investigation against the accused has already been completed;
- (d) the relationship of the accused with the various witnesses and the extent to which they could be influenced or intimidated;
- (e) how effective and enforceable bail conditions prohibiting communication between the accused and witnesses are likely to be;
- (f) whether the accused has access to evidentiary material which is to be presented at his or her trial;
- (g) the ease with which evidentiary material could be concealed or destroyed;

19 . See Combrinck and Skepu (op cit) at 24-25, 26-27.

(h) **the view of any person against whom an offence was allegedly committed regarding their safety;** or

(i) any other factor which in the opinion of the court should be taken into account.

Add to sec 60(10):

Notwithstanding the fact that the prosecution does not oppose the granting of bail, the court has the duty, contemplated in subsection (9), to weigh up the personal interests of the accused against the interests of justice: **Provided that the interests of justice should be interpreted to include, but not be limited to, the safety of any persons against whom the offence has allegedly been committed.**

Add to sec 60(12):

The court may make the release of an accused on bail subject to conditions which, in the court's opinion, are in the interests of justice: **Provided that the interests of justice should be interpreted to include, but not be limited to, the safety of any persons against whom the offence has allegedly been committed.**
