

**RESOURCES AIMED AT PREVENTION OF CHILD ABUSE AND NEGLECT
(RAPCAN)**

SUBMISSION TO THE PARLIAMENTARY PORTFOLIO COMMITTEE ON JUSTICE
AND CONSTITUTIONAL DEVELOPMENT

ON THE

CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT
BILL

20 JUNE 2006

INTRODUCTION

Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN) is a non-governmental and non-profit organisation that has been in existence since 1989. We are devoted to promoting children's rights, especially those involving child abuse and neglect. Among our other activities RAPCAN runs a child witness support project at 6 sexual offence courts in the Western Cape (Khayelitsha, Wynberg, Atlantis, Cape Town, Paarl & Parrow/Goodwood). Through this project we are daily in contact with all of the child complainants in sexual offence matters at these courts in 2005 we prepared over 2 500 child witnesses for court.

RAPCAN welcomes many of the provisions in the Criminal Law (Sexual Offences and Related Matters) Amendment Bill 2006. This includes:

- The objects of the bill
- The gender neutral definition of Rape
- The broader range of acts defined as Rape
- The acts described in the crime of Sexual Assault
- The manner in which consensual sexual acts with children between the ages of 12 and 16 are dealt with.
- The offences relating to sexual exploitation of children
- Developments regarding evidence of previous consistent statements and a delay in reporting sexual offence matters.
- The creation of a national policy framework
- Provisions relating to policy directives and national instructions for state departments in these matters.

We are concerned, however, that this bill is missing an opportunity to provide complainants with the "*maximum and least traumatising protection that the law can provide*" – section (2) Objects

We refer further 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"

We submit that it is necessary to go further than the bill currently does in amending provisions within the Criminal Procedure Act that are currently implemented in an unequal and discriminatory manner in sexual offence trials.

Current provisions within the Criminal Procedure Act 51 of 1977 are supposed to provide protection to complainants and to ensure that the evidence placed before the court is of the optimum standard. However our courts have taken an extremely conservative approach in implementing these provisions thus undermining their intent.

These measures 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. These measures include:

- Section 153(3A) *In Camera Evidence* says that the public can be ordered to leave the courtroom while the complainant is testifying. The survivor is expected to speak in front of the accused and the other court role-players.
- Section 154 prevents the media from publishing any details that would identify the survivor/victim.
- 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 170(A) 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 hear the court proceedings directly.

While some of the measures such as the application of section 153(3A) and 154 of the Criminal Procedure Act 51 of 1977 can be improved through the development of policy directives for prosecutors, others cannot. Section 158 and 170(A) are undermined by the decision of the magistrate, a policy directive requiring a State Prosecutor to inform a complainant of these provisions or even to request them in court, will not substantially improve the decision of presiding officers to utilise them.

Children who have been sexually violated must deal with the personal impact of the traumatic experience, family and social pressures and responses to the experience and the pressures of the criminal justice system including the trial process. 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.

Anxiety is the most prevalent response to an upcoming trial extreme anxiety is associated with not knowing and what to expect and with facing the accused at court. Research shows that anxiety reduces motivation and effort to remember details; it results in disorganised recall, adds to confusion about events and thus seriously impacts on the credibility of a witness. It also affects the child's ability to eat and sleep in the days

preceding the trial thus affecting the child's physiological ability to concentrate.

INTERMEDIARY SYSTEM

The majority of child complainants report¹ extreme fear and anxiety at the prospect of facing the accused in court. Because a sexual offence involves a psychological violation as well as a physical violation the child is not emotionally safe in the presence of the perpetrator in court. It only takes an intimidating look from the accused to powerfully impact on the child in the court room, this creates great stress in the child. It is shown that high levels of stress have a negative impact on a person's ability to recall information. The child may, as a result of the stress, withhold important information or close down completely in order to protect themselves.

The court environment is alienating to the child. 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 regarding the event that is necessary for the court to make an informed decision². When testifying children may also be silenced by speaking in public about a traumatic event that the child often feels deeply ashamed of and is made to feel responsible for.

Research³ indicates that children give more detail and accurate information when testifying a familiar and comfortable environment than in a court room. 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.

Section 170(A) of the Act provides for witnesses under the age of 18 to testify outside of the court environment (usually through the CCTV system) through a person who acts as an intermediary. Section 170(A) (1) states that: "*whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the age of eighteen years to **undue mental stress or suffering** if he testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his evidence through that intermediary*".

However this provision is inconsistently applied by courts. In general courts are not utilizing this protective measure for children older than 12⁴ and children as young as eight are still subjected to testifying in the court room⁵.

¹ 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.

² Muller, K *An Inquisitorial Approach to the Evidence of Children*

³ 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

⁴ Focus Group discussion with RAPCAN court supporters 13 May 2006.

⁵ Court Supporter Parrow Court Cape Town 13 May 2006

The question of whether undue mental stress or suffering will result means that in order to access the intermediary system the court must hold a “trial within a trial”. Few prosecutors lead expert evidence on the question of undue mental stress and suffering to the complainant and many magistrates when faced with this information believe that stress and suffering is inevitable in the trial process and therefore not “undue”, this interpretation is highly concerning. Presiding officers also routinely accept the argument of the defence that use of this provision unfairly limits the accused’s right to a fair trial. The constitutionality of this provision has been well tested 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.

In the *S v Stagie and Bosch* in the Cape High Court SS131 of 2001, Sarkin AJ found:
“The ability of the accused to have a fair trial must be protected at all times. The ability of the accused to adequately cross-examine the witness must also be protected. This can be achieved in these circumstances.”

He notes further that the defence is able to view the witness, her demeanour and her responses through the CCTV system.

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”.

and

In *Klink* the court found at 447C–D that the:

“enshrinement of the right to a public trial ensures that secret trials employed by totalitarian states will not be tolerated under the Constitution: but it does not guarantee the right of the accused and the witness to be physically present in the same room.”

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 are seldom given weight in the decision of a court to utilise the intermediary system.

The harm caused to the majority of complainants by testifying in court in the presence of the accused will be mitigated and that the quality of evidence placed before the court by will be improved by the use of this measure. As noted earlier addressing this issue in policy directives alone is inadequate and will not substantially affect the way in which courts interpret the provision in the Criminal Procedure Act.

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 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.”

Due to developments in the Department of Justice and Constitutional Development over the past five years, the CCTV equipment is available at a large proportion of regional courts nationally, to ensure that these systems are available at all regional courts that hear evidence from child complainants should not at this time result in prohibitive cost.

We strongly support the amendment made in 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 mentally age of a person less than 18 years.

CROSS EXAMINATION BY THE ACCUSED

Cross examination is experienced as an attack and harassment from a respected adult, the fact that the other adults present don't protect the child means that the child is helpless and this is often interpreted by children to mean that they are at fault, thus exacerbating the trauma experienced as well as the long term negative impact of the trial. Cross examination is embarrassing, distressing and traumatic to any complainant and more so to a child.

The style and method of questioning during cross examination are often inappropriate to the cognitive development of a child complainant. For example complainants, especially children become confused by multifaceted questions, children younger than ten are not able to understand hypothetical questions and multiple choice questions are easily confusing to children – especially where the choices do not include the correct version. These well tested methods effectively mean that the truth is hidden from the court by the semantics and linguistic agility of the adult questioners.

Policy Directives for prosecutors must address objection to cross examination by the defence that is intended to vilify, insult, annoy, intimidate or offend the witness.

Currently, an unrepresented accused can directly cross examine a child complainant, this severely undermines a child's evidence

We submit that section 166 of the Criminal Procedure Act 51 of 1977 be amended to prevent unrepresented accused from questioning a witness directly.

COMPULSORY HIV TESTING OF ACCUSED

We support the intention of the clause to provide complainants with peace of mind and information regarding the HIV status of the accused. However due to a number of practical considerations we question the ability of this provision to achieve this and we are concerned that this clause will do more harm to complainants than good in its application.

- A complainant must start taking the Anti Retroviral Treatment (ART) as soon as possible after exposure (preferably within 6 hours but up to 72 hours later)
- If the accused tests HIV negative, he may be in the window period and thus the complainant will need to continue with HIV ART until the accused is tested a second and a third time. However, many victims/survivors of sexual violence struggle to comply with the ART because of the side effects, confusion regarding when and how to take medication and the constant reminder of the sexual assault at a time when s/he is trying to forget. A negative test result in an accused will add to the reasons for some complainants to discontinue the treatment.
- If an accused tests HIV positive, it does not necessarily mean that the complainant will contract the virus. However instead of providing peace of mind, this result will expose the already traumatised victim/survivor to further unnecessary distress and trauma.
- Section (41) of the Bill provides that persons who request HIV testing of an accused with "malicious intent" will be guilty of a criminal offence. While this makes sense in and of itself, when read in the context of the current situation for sexual assault victims it is extremely concerning. Research indicates that only 5% of cases of child rape result in conviction, this figure is slightly higher for adults at 9%. It is extremely likely that many accused persons who have been required to undergo HIV testing at the request of the complainant and whose cases are not prosecuted or result in an acquittal will seek to ensure that the complainant is prosecuted under this section. The effort to protect a few innocent people who may be maliciously sent for testing will result in the victimisation of a large proportion of victims who have been subjected to a sexual offence.

For these reasons we recommend that the provisions for compulsory HIV testing of accused be removed.

OTHER CONCERNS REGARDING THE BILL

Preamble

The preamble to the bill states that "women and children, being particularly vulnerable, are more likely to become victims of sexual offences, including adult prostitution and sexual exploitation of a child"

Adult prostitution is not a significant issue for victims of sexual offences and seems an obscure reference in this bill, which doesn't deal with the issue of adult prostitution.

We recommend the removal of the clause "including adult prostitution"

Sexual Violation in the definitions section

We support the acts covered by this clause, however we are concerned with the use of the term "sexual violation" to describe acts that are committed

under consenting circumstances, the term sexual contact is more appropriate. Sexual contact becomes a violation or an assault only under coercive circumstances.

Likewise acts of sexual penetration only become a form of violation, namely rape, when committed without consent.

We submit that the term “sexual violation” be changed to “sexual contact”

National Policy Framework and National Instructions and Policy

Currently the Department of Health and the South African Police Service have relatively good policy in place regarding the management of sexual offences. However implementation of these policies is undermined due to a number of factors, ranging from lack of knowledge of the policy, inadequate training on the procedures, poor selection of officials to work with sexual offence complainants and a lack of effective accountability mechanism. It is clear that without built in accountability mechanisms and consequences these excellent policies fail to deliver.

It is unacceptable that people with no aptitude, maturity, training and skills are routinely allowed to interview and examine traumatised children. It is clear that the result of this results in numerous cases of miscarriage of justice because of victim blaming, lack of confidentiality, poor quality of evidence collection, counselling of victims to forgive (seemingly contrite) accused and misinterpretation of responses to the trauma and stress of the experience leading to erroneous conclusions about the case.

The current provisions sections (57) to (61) of this bill address many of the gaps in existing procedure and we support their inclusion here.

We recommend the addition of provisions that state that SAPS national instructions, the Department of Health and National Prosecuting Authority Directives must include: Selection criteria for persons designated to work with victims of sexual offences and accountability mechanisms for non compliance by civil servants to their instruction/directive.

National Register for Sex Offenders

The provisions relating to the creation of a sex offender register duplicate those contained within the Children’s Bill. This Bill only deals with persons convicted of offences against children and those people applying for employment that puts them in contact with children. It does not address persons convicted for sexual offences committed against adults nor people applying for work with other vulnerable groups such a people with physical and intellectual disabilities. These issues and the system developed in this Bill of applying for and producing certificates should be referred to the Children’s Bill so that the two bills do not duplicate provisions.

IN CONCLUSION

In developing the definitions of sexual offences and in the development of the national policy framework and policy directives this bill makes great strides forward from the current situation of sexual offences in South Africa. However it currently fails to address the procedural and evidentiary rules used in trial that contribute significantly to acquittal of guilty accused.

Court practice and rules have been developed for adults, not with children's needs in mind. The result is that children face added obstacles to justice in these matters. It is necessary to address these issues too in order to fulfil their constitutional rights and provide them with the maximum and least traumatising protection that the law can provide.

We thank the committee for the opportunity to make this submission, for further information contact:

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