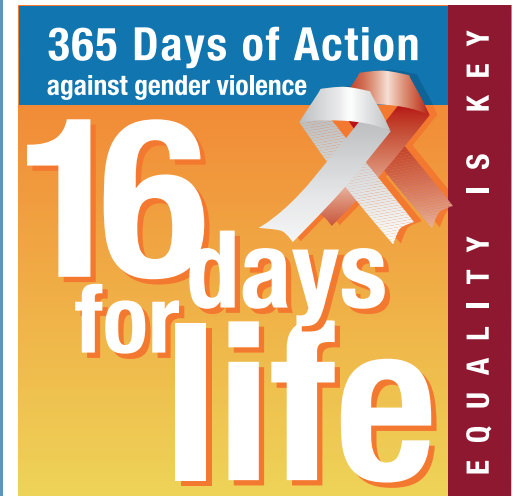


Celebrate 16 Years of 16 Days

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



Over ten years in the making, Deputy President Phumzile Mlambo-Ngcuka promised during the 2005 campaign that the Sexual Offences Bill would be passed early in 2006. At the time of writing, final touches were being put to the Bill. But it is not likely to be passed into law until early 2007.

The delay in passing the act came under the public glare during the high profile case in which former Deputy President Jacob Zuma was acquitted of charges of raping a young woman and family friend in a court case that some commentators speculated may have taken a different turn if the legislation had been in place.

Currently, sexual offences are governed by the Criminal Procedure Act that proceeds from the premise that women are apt to lie in such cases (the so-called “cautionary rule”) and that their past sexual history (extensively examined in the case of the Zuma complainant) may have a bearing on the case at hand.

What the legislation will change

A progressive piece of legislation that draws from international best practice, the Sexual Offences Bill abolishes the cautionary rule, except in the case of children: one of the points of contention, since research globally shows that it is not true that children are more likely to lie than adults and may indeed be far more honest witnesses.

On the plus side, the bill does severely restrict the circumstances in which past sexual history can be brought to bear. It also widens the definition of rape beyond the current narrow definition of “unlawful, intentional sexual intercourse with a woman without her consent” to include a number of different kinds of penetration that could be perpetrated against women or men.

After much protest against earlier drafts that made provision for the rehabilitation of perpetrators but not treatment of victims (on grounds, it would seem, that these had not been costed and the government did not want to risk being sued if a victim found that they could not access the services they needed after a sexual assault) the treatment clause has been reinstated: but in a limited form.

Where the legislation falls short

The South African Law Review Commission (SALRC) made the case, strongly supported by NGOs working in the sector, that the clause cover comprehensive treatment and care for survivors of sexual assault, including socio-psycho counseling; the possibility of pregnancy, Sexually Transmitted Diseases as well as HIV and AIDS. As it stands, the clause only includes access to Post Exposure Prophylaxis (PEP) to ward against HIV and AIDS, at a list of sites designated by the Department of Health to be made available to survivors by the police at the time of reporting the case.

PEP is a combination of anti retroviral drugs that must be taken within 72 hours of a sexual assault (if the victim is not already HIV positive) to reduce the risk of contracting HIV. The fact that PEP has been provided for in the Sexual Offences Bill is an important victory for women's rights in that this recognises the obligation of the state to protect women from the added trauma of contracting HIV that has become such a real possibility given the high levels both of gender violence and of HIV.

However, the fact that this is only at a list of designated sites is a source of concern. Several recent research studies have found that while PEP is now available at big and well known health facilities, it is not available in the smaller, far flung clinics that are most accessible to the majority of women.

In addition, a recent cost analysis commissioned by the Department of Health on providing PEP stresses that "our findings suggest that much more emphasis should be placed on meeting women's emotional needs after rape" rather than just providing the drugs that have to be taken over 28 days and that many women who take them do not complete due to lack of follow up and socio-psycho support.

In line with the SALRC and NGO position, the study, conducted by the Medical Research Council (MRC), argues that post rape health services must not simply become "Pep services" but should cover all areas of need, including counseling.

Comparing two centres in Cape Town (a government only programme) and Thohoyandu (a partnership with an NGO) the report found uptake and completion of the Pep regimen much higher in the latter case in which the NGO provided follow up home visits.

This underscores another major gap in the legislation. Despite the "365 day initiative" by NGOs and government in May to craft a multi sector National Action Plan on gender violence, the "Inter sectoral Committee for the Management of Sexual Offences Matters" provided for in the bill excludes NGOs (as well as some key government ministries, such as education).

Other areas of concern are:

- Acts of consensual penetration with certain children referred to as "consensual rape" Section 14 and Section 15: This section deals with sexual acts with a child where the child has consented to the sexual act. Rape and sexual assault are unlawful; they cannot be both unlawful and consented to.
- Vulnerable witnesses/ undue mental stress: In order for the provisions of s170A of the Criminal Procedure Act 51/1977 to apply, the court must accept that the witness (under the age of 18 years) would be exposed to "undue mental stress or suffering" should s/he be required to testify in open court. Both Canada and England have recently passed legislative interventions in which relief is automatically available to witnesses (under the age of 18 years). The SALRC recommended that child sexual offence witnesses qualify automatically as vulnerable witnesses, and that certain categories of adult witness qualify, in order to benefit from the protective measures as contained in s170A. These provisions take account of the trauma suffered by survivors of gender violence.