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Understanding the failure of crime prevention

1

The time for evidence and reason on human trafficking

7

Making sense of attrition in rape cases

13

Can the new Sexual Offences Bill deliver on its promises?

21

The unfeasibility of compulsory HIV testing for alleged sexual offenders

27

The Sexual Offences Bill: criminalising sex workers' clients

33

CONTENTS

SA Crime Quarterly No. 22 • December 2007

HOW WE REALLY GOT IT WRONG

Understanding the failure of crime prevention

Eric Pelser 1

COUNTERING THE 'SCOURGE'

The time for evidence and reason on human trafficking

Dr Chandré Gould 7

LOSING GROUND?

Making sense of attrition in rape cases

Lillian Artz and Dee Smythe 13

NEW CRIMES AND OLD PROCEDURES

Can the new Sexual Offences Bill deliver on its promises?

Lisa Vetten 21

IMPLEMENTING THE UNFEASIBLE

Compulsory HIV testing for alleged sexual offenders

Stefanie Roehrs 27

WELL-INTENTIONED BUT MISGUIDED?

Criminalising sex workers' clients

Nicolé Fick 33



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HOW WE *REALLY* GOT IT WRONG

Understanding the failure of crime prevention

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In the previous issue of the *SA Crime Quarterly*, Antony Albekker argued that the country's decision after 1994 to 'place the prevention of crime at the centre of the strategic vision for the criminal justice system' undermined the building of an effective criminal justice system and may have led to the country's high crime levels. In response to Albekker's article which is based on his new book *A country at war with itself. South Africa's crisis of crime* (published by Jonathan Ball), this article explains why his arguments¹ leave one both disappointed and despairing.

Essentially, Albekker's book presents an analysis of what to do about violent crime in South Africa. But it is disappointing that the book does not answer the key question it sets itself; it misses the essential point of South African crime prevention policy; and then proposes an unimaginative, contradictory and, most likely, ineffective response to the situation.

To take this critique in the order it is presented, the book sets out to answer the question: why is crime in South Africa so violent? A simple but ambitious question, and very difficult, if not impossible to answer. In his attempt, Albekker is reduced to tautology: crime in South Africa is so violent because South Africa has so many violent criminals. Quite. But why?

Understanding violence

For Albekker, the pervasiveness of crime and violence is:

... the result of a chain reaction that has seen high levels of criminality lead to ever

more people copycatting others into crime. This has turned what would have been a serious crime problem into one that has turned violence into something approaching epidemic proportions, a problem far bigger than can be explained solely by the factors – whether historical, social or economic – that are usually deemed to be 'the root causes' (Albekker 2007:130).

To elaborate on this: he uses an analogy of a dance floor at a party that is, after a few people take to it, increasingly populated as the music pumps and more and more join in. In his article in the *SA Crime Quarterly*, Albekker uses a different and slightly more crass analogy: crime is 'contagious', it is "caught" by non-criminals from contact with criminals in the same way that obesity seems to spread through a population.'

Despite the flourish in these analogies, the analysis is neither new nor particularly original, and the loose conflation of crime and violence is not helpful in explaining why those criminals whom

the copycats emulate are so violent in the first place.

Here, the country's history may well be more important than Altbeker acknowledges. Actually, his analogy refers to an analysis made 21 years ago by the late Percy Qoboza who, writing in *City Press* in April 1986 about 'the dark, terrible beauty' of the courage of the young township fighters acknowledged '... a great shame ... that this is our heritage to our children: the knowledge of how to die, and how to kill.' This analysis was then taken up 15 years ago by, amongst others, Colin Bundy (1992), in an article presciently entitled 'At war with the future? Black South African Youth in the 1990s' and then a little later by Graeme Simpson who wrote with real insight on the 'amagents' and the emerging 'culture of violence'. So, when Altbeker argues that 'Suggesting that violence in South Africa is a cultural phenomenon, like any culture-based argument is controversial, even provocative' (2007:119), this is an issue that we have known about and lived with for some time now.

Therefore, while Altbeker's analogy may be useful as an easy reference to this work and, perhaps, to Bandura's (1977) 'social learning theory' and France and Homel's (2007) theory of criminal 'pathways', it does not address the key issue: why has the music been allowed to play on, and get louder?

This question refers to the second critique of Altbeker's book – it misses the essential point of South African crime prevention policy, which is simply that it has never been implemented.

The ignored policy

Altbeker will no doubt know (and probably agree) that the only bits of the 1996 National Crime Prevention Strategy that were implemented were those concerned with improvements to the criminal justice system (CJS). Specifically, this included the Business Against Crime (BAC)-supported Integrated Justice System programme that aimed at improving the management of offenders and victims and the flow of information through the CJS, and which initiated projects intended to enhance systems of

reporting, recording and investigation at police stations and detective units, improve the administration of the courts and strengthen the sentencing regime, and reduce escapes from prison and parole violations (Rauch 2001).

Altbeker will also know that the 1998 White Paper on Safety and Security was, from the date of its Cabinet approval, almost wholly ignored.

This has meant that the key social and situational crime prevention policy provisions contained in these policy documents have either not been implemented, or, when there has been an attempt at implementation, at nowhere near the scope and scale envisaged by those who drafted and approved the policy.

So, the real issue is not so much that South Africa's crime prevention policy is wrong or ineffective, as Altbeker would have it, but rather more about why it has not been tested properly. One reason may be that the rhetoric associated with the supposedly tough approach adopted by the police following the 1999 elections consistently puts the police at the centre of 'a war against crime'. This has allowed the Departments of Social Development, Education, Health, Housing and Transport to either ignore or abdicate their responsibilities, with the result that the police continue to be seen, incorrectly, as the primary crime prevention agency.

To argue then, as Altbeker does, that South Africa's embrace of crime prevention has resulted in a weakening of law enforcement is simply wrong. In fact, it is South Africa's misguided embrace of law enforcement since roughly 2000 that has weakened crime prevention. The point therefore is less about the country's embracing of crime prevention at the expense of effective law enforcement, as Altbeker argues, but rather more about the fact that we have done neither coherently nor consistently.

This is clearly visible in the lack of engagement by the social cluster departments (health, education and social development) and in the weakening of the detective service, about which Altbeker is right. The constant organisational restructuring, the change of reporting lines and the demise of the

specialised units have been disastrous for the investigative capacity of the police service. But this was never policy. Rather, it is the result of a police administration that has simply ignored the policy it was meant to implement. Also, this seems to have happened with the complicity of the Portfolio Committee in Parliament that was supposed to oversee the implementation of that policy.

In short then, Altbeker's analysis of what went wrong in crime prevention in South Africa is fundamentally flawed and so too is his key policy recommendation.

Is cultural change through imprisonment plausible?

Altbeker argues that to deal with violent crime, South Africa needs to double the number of convicts over the coming years. In Altbeker's analogies, this will limit the number of dancers getting to the floor, or in his other analogy, 'quarantine the infected'.

There are a number of things that are not clear in Altbeker's argument. First there is nothing in this argument that motivates why doubling the number of convicts would provide the critical mass or tipping point that changes the values held by a significant proportion of South Africa's young men. Why only double the numbers? Why not triple them? The trajectory is not difficult to see and the populist appeal is obvious.

However, Altbeker does not explain just how a massive increase in the number of convicts would actually positively change the values of those who are incarcerated and those with whom they interact. Although there is little agreement on the actual number, most analysts agree that South Africa has a very high recidivism rate – variously 'guess-timated' at upwards of 60 per cent – and this surely indicates the weakness in the argument.

In the words of Celia Dawson, the deputy executive director of the National Institute for Crime and Rehabilitation of Offenders (Nicro):

Research and practice worldwide has shown that prison is not the ideal environment for rehabilitation. In fact, imprisonment can

often worsen an offender's cognitive and behavioural patterns, as he becomes more deeply socialised into accepting criminal behaviour as normative, learning the 'tricks of the trade' and (becoming) more able and eager to commit crime on release (Kendall 2007).

There is, it appears, some truth in the colloquial description of prison as the 'college of knowledge'.

It would appear that rather than a deterrent or a quarantine ward, prison functions for a large number of its inmates as a finishing school, and those graduating may well have 'earned' themselves greater acknowledgement and 'respect' amongst their peers and in their neighbourhoods. As a participant in Cathy Ward's recent focus groups study among youngsters in Cape Town said:

... And once you go out and sell drugs then it's over; you are part of the gang. But you must go to jail to get the tattoos of what the names of the gangs are. They call it the history. You go to jail and you become a man (Ward 2007).

So, returning to Altbeker's analogies, larger scale imprisonment of young men may simply function to turn the music even louder, to draw more people on to the dance floor; the 'quarantine' may result in greater rates of 'infection'.

South Africa's prisons currently release some 7 000 prisoners every month (except when government provides an amnesty, when the numbers can increase substantially). It is not clear that Altbeker has thought through what the impact of doubling (or tripling) the number of ex-offenders or parolees may be. What is clear though, is that Altbeker's recommended solution contradicts his own analysis of the initial problem, and may plausibly exacerbate that problem.

Finally on this issue, it is worth noting that the large scale and longer term imprisonment of offenders is precisely the intention of the tough

policing approach that has been implemented since roughly 2000 in South Africa. Now, Altbeker does not argue for more of the same – he wants it done a whole lot better. However, I think the obvious and spectacular failure of this approach should serve as an indicator of its weakness.

While it is not easy to explain why crime in South Africa is so violent, it should by now be clear that if South Africa is required to change the values of a generation, then prison is not the place to do it.

So much for the disappointment in Altbeker's thesis. Now for the despair.

It is worrying that an analyst of Altbeker's experience and acumen can reach the point where all he can really say is 'nail 'em 'n jail 'em.' There is certainly much more that can be done and Altbeker's thesis is surely a sign of frustrated desperation. However, of more concern is who will hear him.

In roughly 18 months, South Africa will have a new administration which, because of the neglect of the past administration, will no doubt have to say it is 'serious about crime', that it 'will leave no stone unturned' and similar platitudes. However, it will also have to make a show of some of this, and because of the limited institutional memory and learning in many of the key government departments, Altbeker's voice will no doubt resonate loudly in the newly refurbished corridors. Perhaps expecting this, Altbeker has already started to do some of the maths – in the *Business Day* piece, he proposes a R60-billion prison building programme, over ten years.

Now, no-one can rationally argue against Altbeker's desire to improve the investigative capacity of the police – the task is urgently required. Nor can one argue against making South Africa's prisons more humane and the fact that to make this happen we may need to build more (if only to house the current numbers). These are necessary interventions, but they are surely not sufficient – particularly if the point is to effect change in a value system in which crime and violence has been normalised.

Rethinking the policy framework

This is amply demonstrated by recent research conducted by the Centre for Justice and Crime Prevention (CJCP) among 395 young offenders (of mainly violent crimes), their parents or other caregivers, and their siblings.²

Five points from this research are relevant to the argument:

- 163 of the 395 young offenders (41 per cent) reported they had lived mostly with their mothers only – just one in five said they lived with both parents (23 per cent).
- More than half of these respondents (53 per cent) indicated that they had not received emotional support from their fathers (who were either not around, or, if they were, did not seem to care much), as did 48 per cent of their siblings. Just 29 respondents (7 per cent) indicated that they had had a positive and consistent relationship with their father.
- Their households, in which five or six people lived, consisted of a single breadwinner (usually the woman head of household) and were often violent – 43 per cent of the young offenders reported having witnessed a violent interpersonal dispute in their homes, while the same was reported by one in four of their siblings (27 per cent) and roughly one in five of their caregivers (22 per cent). The victims of this violence were mainly other members of the family.
- Also, criminal activity was prevalent in many of these households – when asked whether they had knowledge of any family members who had, in the year preceding the interview, dealt or sold any drugs, 21 per cent of the young offenders reported that they did; and a further one in three of this sample also reported knowing of family members who were engaged in other illicit activities that could get them into trouble with the law (36 per cent).
- More than trouble with the law, it is clear that for many of the young offenders, the imprisonment of members of their families is a relatively common experience. A total of 165 of the 395 young offenders (42 per cent) reported that a member of their family had been imprisoned before their own incarceration.

Of course there is much more to be learnt from this study, but the point here is that if we are to work on changing the values held by a significant proportion of South Africa's young population, then the family (the place of primary socialisation), rather than the prison, is a good place to start.

This view is supported by a stream of empirical research which indicates that 'parenting variables' mediate some 80 per cent of the factors like 'family dissolution, unemployment, geographic mobility and household crowding on juvenile participation in crime' (Laub and Sampson 1988) and demonstrates that an 'aggregate level variable measuring parenting quality ... mediates the effects of structural variables on crime' (Weatherburn and Lind 2007).

In other words, while we need to enhance the investigative capacity of the police, ensure the swift and fair administration of justice for offenders, and make our prisons more humane, this is not going to be effective in reducing crime unless it is supported and complemented by serious and comprehensive interventions in the ways in which young South Africans are socialised.

What is clearly required then, is:

- A coherent and sustained family support programme that focuses on single-parent households, particularly those headed by teenage mothers
- A dedicated and comprehensive early childhood development programme that provides support to the children coming from these and other dysfunctional households (for instance, those households in which the primary breadwinner has been imprisoned)
- A functional national youth service programme that picks up and supports those young people aged between 14-22 years who are not in school or working
- A sustained effort to improve the management and quality of South Africa's schools, so that they function more positively as places of positive socialisation

This is, of course, exactly what the drafters of South Africa's crime prevention policy intended 11 years

ago. So, what we really need to do is to go back to what South Africa's policy on crime prevention actually entails, review and amend it where necessary and, importantly, secure the political will and management capacity to implement it.

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Endnotes

- 1 Also presented in summary in the *SA Crime Quarterly*. No. 21 and The Great South African Crime Debate, *Business Day*, September 28, 2007.
- 2 This research, together with research analysing the key factors that build resilience to crime, will be published early in 2008.

COUNTERING THE 'SCOURGE'

The time for evidence and reason on human trafficking

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Since the late 1990s South African media have drawn attention to the problem of human trafficking and called for state intervention to stop the practice. Reports by several non-governmental organisations have referred to the growing plague of human trafficking, particularly that of women and children for purposes of sexual exploitation. A recent, in-depth study of the sex work industry in Cape Town by the ISS and SWEAT calls into question allegations that there is large-scale trafficking into the sex work industry and suggests that a law enforcement approach may not be the most appropriate way to counter the problem.

Nobuntu (not her real name) comes in at ten in the morning to start work. She will be back home by six. Exchanging her street clothes for sexy lingerie she cuts a sad figure, a middle-aged mother who looks uncomfortable in her gold high heels standing under a television displaying grunting pornography. She agrees to speak to me in the seedy unused bar area in a rent-a-room-by-the hour agency in Cape Town's northern suburbs.

As we start to speak she is tearful. 'Have you been doing this for long?' I ask her. 'Only a week,' she says, not really in the mood for a chat. 'Are you OK?' I ask – knowing the answer but feeling the need to show her some sympathy. 'Yes', she replies, rather unconvincingly. 'Why did you start doing this work?' I ask. 'I was working for Shoprite. There I earned R300 a week. I have two children at high school. My transport to work costs R120 a week, their transport to school costs R100 a week. Then its school fees and clothes – I couldn't make it.'

As difficult as her current situation is to bear, now at least she knows that at the end of the week she will

have enough money to cover her expenses. Like many other women in the sex work industry, Nobuntu made a difficult decision to enter a stigmatised profession in order to meet the daily financial needs of her family.

Trafficking and prostitution

It is impossible, in South Africa and internationally, to separate discussions about prostitution from discussions about how to deal with human trafficking. The international and national discourse about human trafficking focuses almost exclusively on the trafficking of women and children for purposes of sexual exploitation. Indeed, much of the international debate is charged with claims by anti-prostitution feminists who argue that all sex work is abuse and exploitation, should be considered trafficking – and banned.

Their concern about what would happen to women like Nobuntu and her children seems to be overshadowed by the urgency of their mission to end prostitution. Add to this explosive mix a good handful of moral panic (such as claims that trafficking is the biggest threat to societal mores)

and a bogey man in the form of invisible, all-encompassing, organised crime, and you have a recipe for policy that emphasises stamping out evil through tougher law enforcement.

When the media focus on human trafficking it is often to draw attention to the dreadful abuses associated with trafficking, and to increase public pressure on government to respond quickly and effectively to bring an end to the scourge. Since these abuses are indeed dreadful they elicit a visceral reaction from readers or viewers who cannot help but be appalled by the examples of sexual slavery. But readers of such articles are only being given a small piece of the story.

The whole story is complex.

There is no question that the state should do everything in its power to identify when and where abuse takes place and to stop it. Where there is exploitation it too should be detected and stopped. But when it comes to making policy to deal with the social ills of exploitation and abuse we have to be very specific. It doesn't help to make policies to end trafficking that ignore the very reasons why people are vulnerable to abuse in the first place. It also does *not* help to have an exaggerated sense of the scale of the problem.

Getting perspective on the issue of human trafficking

The hype around human trafficking does little to help the victims of the practice, nor to help people like Nobuntu. In becoming a catch-all for the ills of society, the impression is created that a strong law enforcement response will solve the problem. This forces expenditure of resources inappropriately and doesn't address the causes of vulnerability and exploitation. It also serves particular conservative political agendas that are both anti-immigration and anti-prostitution.

When the numbers of trafficking victims are exaggerated to draw attention to the problem, as they have been around the world, it has a number of negative effects. The first is to create the impression that the problem is so large and pervasive as to be almost impossible to counter, and

certainly extremely expensive to counter effectively. When driven by powerful lobby groups and states, it is easy for states to be pressured to allocate their limited resources to an issue that could be dealt with more creatively and effectively.

The Trafficking in Persons (TIP) Report produced annually by the Department of State in the United States is one such means of placing international pressure on states. The TIP report bases its findings on press reports, interviews with NGOs and state officials. In 2004 it placed South Africa on the 'tier-two watch list', identifying it as a destination, transit point and source of victims of trafficking. It also said that the South African government had not put in place sufficient legal or structural measures to counter the problem.

Since failure to improve in the TIP ratings carries not only stigma but also the possibility of sanctions, immense pressure is placed on state resources to work to counter trafficking. This would be commendable if we were sure that South Africa is indeed a hotbed of human trafficking – but we are not. Indeed, indications from the first piece of research that attempts to quantify the problem, are that the problem is of a manageable size.

A state's resources are not infinite – increasing resources for one thing means taking them away from something else. That is why we need to be very sure that the resource solutions called for to deal with human trafficking are both necessary and effective. There is no certainty that increasing police action, raising public awareness and cracking down on brothels will have the effect of reducing human trafficking. Indeed, this article will argue that it is fairly sure that increasing police action in and around brothels will do none of these. What it will do is drive sex workers – who often know where abuse is taking place – further from the police and public services that should be able to help.

Behind the numbers

A survey of ten per cent of sex workers working in Cape Town brothels carried out during the second half of this year (2007), has revealed that trafficking *does* take place on a small scale in the sex work

industry. But the majority of sex workers enter the profession to meet their immediate and pressing financial needs and obligations and because it offers them more flexibility and better returns than would many other jobs.

In two years of intensive research in the sex work industry in Cape Town, researchers from the ISS and SWEAT encountered eight cases of trafficking. Furthermore, over the past 39 months (just over three years) the International Organisation for Migration (IOM) has assisted 194 victims of trafficking in South and southern Africa – despite extensive media campaigns, a well advertised 24-hour hotline and working closely with law enforcement agencies in the region. ISS and SWEAT are therefore confident that these findings are an accurate reflection of the size of the problem. Plainly stated, the number of actual victims may be lower than may have been believed.

The information about the eight victims of trafficking came from 154 interactions with individuals involved in the sex work industry. In addition, 21 allegations of exploitation or abuse were picked up, ranging from agents offering to procure women, to women being forced by others, or by their addiction to drugs, to sell sex.

The victims were two Chinese women who had been trafficked into sex work in the past (but who were working voluntarily at the time of our survey); four Eastern European women who were debt-bonded in a club in Cape Town; and two South African women. One of these was a woman from Cape Town who started work at a residential agency, knowing that she was going to sell sex, but when she started working was not allowed to leave the premises of the agency. She was forced to clean rooms, have paid sex with clients, and was raped by the owner before managing to escape. At the time of the interview she was working at a brothel, where she was happy with the working conditions.

The eighth woman, also South African, told how she had been recruited from a Cape Town brothel. She and several of her colleagues were taken to a brothel in Witbank where they were kept behind barbed wire fences and not allowed out. She

managed to get a friend to help her escape and took some of her colleagues along with her. At the time of this interview she was working as a sex worker in Cape Town and said that she had heard that the Witbank agency had closed down.

These women are all deserving of assistance by the state and the perpetrators of their abuse should be brought to justice. Yet, in almost all of the cases, the women involved were able to extricate themselves from their situations of abuse and chose to continue working as sex workers.

The ISS/SWEAT research process has been extensive. Over the past two years 36 visits were conducted to 14 different sites where sex workers work on the street. All the advertisements for sexual services that appeared in three newspapers (*Cape Times*, *Argus* and *Die Burger*) over a period of a month were captured and all the advertised numbers called to verify their information. In all, successful calls were made to 713 sex workers. Details obtained from the Sex Trader and Body Heat internet sites and from the glossy *Sex Trader* magazine were added to this information.

More than 20 brothels were visited (many of which were unmarked flats or houses in residential suburbs). In-depth interviews were conducted with 19 managers or owners of brothels, and with 20 sex workers. In total, contact was made with 1 460 people in the industry (either through one-on-one interviews, questionnaires or telephonic contact). These included 13 agencies that advertised the services of foreign (predominantly Eastern) women. A detailed questionnaire was also administered to 83 brothel-based sex workers and 35 street-based sex workers. In the 36 visits to the 14 areas where sex workers work on the street, four underage sex workers were encountered.

It is not unreasonable to assume (borne out by data gathered through interviews) that the clients of sex workers do not specifically seek out, or want, trafficked, bonded, abused, foreign or young sex workers. What they do want is the service that sex workers offer. It follows that it doesn't make economic sense for traffickers to remove trafficked victims from the general industry and to keep them

hidden and apart, because that would mean that they are largely unavailable to their clientele. The researchers believe that on this basis, and given the wide-ranging data collection, it is fair to posit that the research is unlikely to have missed a large portion of the industry.

But let us look at some of the other findings.

Those concerned about exploitative working conditions should take note that all brothel-based sex workers have to share their income (usually in a 60/40 per cent split) with their employer. ISS/SWEAT found that many agencies impose fines on sex workers for minor infringements of rather arbitrary rules as a way of increasing their share of their 'employees' income. Such practices are only possible because the industry is unregulated and not monitored.

The research findings indicate that the typical sex worker is around 29 years of age. Most of those who work in brothels, clubs and residential agencies – unmarked suburban houses – have at least completed matric and have previously held other jobs. And, importantly, they are on average likely to more than double the salary they earned in regular jobs.

The average income for street-based sex workers is R3 850 a month (with the lowest income reported as R800 and the highest as R12 000). Those who had previously held other jobs (17 of the 35 respondents) reported having earned an average of R1 382 a month. The earnings of brothel-based sex workers were predictably higher. The average monthly wage (after the agency had taken its cut) was found to be R11 740 (ranging from R2 000 to R40 000). The average earning for the 69 of 83 respondents who had held previous jobs was R4 220 a month. While this study did not ask sex workers whether they were financially supporting others, a previous survey conducted by SWEAT of 200 sex workers found that the 200 sex workers were supporting 405 dependents of which 279 were children and 126 were other adults.

Why do women enter this industry? Of the 32 street-based sex workers we spoke to (more than ten per cent of the total number identified during the

mapping process) 24 said they entered the industry as a result of financial need, and only three entered because it represented a financial opportunity (in other words not to overcome a financial crisis or to survive). Two refused to answer the question. Twenty of the 32 were introduced to the industry by a friend (who was already working), four were introduced by a family member (e.g. cousin) and eight found it for themselves (e.g. by seeing people working on the side of the street). None said that they had been *forced* into prostitution by another person.

In response to a question about whether they were aware of anyone else who had been forced to prostitute themselves, eight said they were. They qualified their answers by explaining that the people they knew had been forced to do the work by their addiction to drugs or by their boyfriends/husbands. One said she knew of someone forced by a pimp.

Thirty-two brothel-based sex workers said they were introduced to the work by a friend, six had been introduced by a family member and one Chinese woman said that she had been lured into the work by an agent in China.

Four respondents said that they had been forced to do this work in the past – one through financial circumstances, the other three by other people. Of the 16 respondents who said they were currently being forced to work as a prostitute, 15 said they were forced by financial circumstances. Only one said she was afraid to leave the agency she was working at because of verbal threats from her boss.

A higher number, 22 of 83, said they knew of someone else who was being forced to do this work. Of those 22, 13 said they were being forced by boyfriends/husbands or drug addiction. Others said they had heard of people being forced but were not aware of specific cases.

What about foreign sex workers on the street? None admitted to being foreign, although the questionnaire administrator identified one man she believed was Angolan (from his appearance and accent). Twelve did not grow up in Cape Town,

having come to the city from other parts of South Africa. In massage parlours, clubs and residential agencies six of 83 respondents were not born in South Africa (UK, Portugal, Italy, China, Botswana), 12 (of 83) grew up in a rural area or town in South Africa (not Cape Town) and 13 grew up in another South African city. Fifty respondents said they grew up in Cape Town.

If this is, as we believe it to be, a reasonably accurate picture of the sex work industry in Cape Town – previously identified as a key location for human trafficking into the sex work industry – the findings beg a number of questions. One of these is: if the number of cases of trafficking for sexual exploitation is not as high as it has been thought to be, is the hype about human trafficking perhaps fuelled by other concerns?

The need to be specific

Let us try to determine exactly what it is that we, as a society committed to human rights, are concerned about and wish to put an end to. Is it prostitution, is it illegal migration or labour exploitation, is it rape, is it abduction, is it paedophilia, is it organised crime? Because if one looks at what is frequently said in the media about the horrors of trafficking and the urgency required to deal with it, it would appear that ending trafficking would also end these other abuses. For each of these, legislation already exists. Indeed, prosecuting those involved in any one of these crimes is relatively commonplace in South Africa. Certainly legislation against human trafficking would be a welcome addition to the legal arsenal against abuse, but legislation is not a panacea.

As a society we should not like the fact that women who migrate illegally in search of economic opportunity are vulnerable to exploitation and abuse. They are vulnerable because they are women; they are vulnerable because they are illegally here; they are vulnerable because they don't have money or access to support networks. We don't like labour exploitation: that individuals may be forced to do unpleasant work for very little return under awful conditions. We don't like rape. We don't like the fact that children from dysfunctional, impoverished families may find

themselves scraping together a living on the street, or selling sex. We don't like the consequences of organised crime – police corruption, fear and further exploitation. We don't like the fact that women and children addicted to drugs are vulnerable to manipulation and abuse by others.

But none of these problems can be overcome in society unless we know how prevalent they are, understand what causes them and are creative in finding solutions that don't just mask or hide the problem, but really offer alternative solutions to economic vulnerability.

Seeking solutions

So what really needs to be done in terms of shifting our own thinking, and in terms of making policy that works? We need to look at assistance rather than policing for women migrants. We need to open up the sex work industry to scrutiny and regulation through decriminalising sex work. We probably have to accept that finding income generating solutions for older teenagers is necessary and that we need to allocate more state resources to providing better support for children and women and boys from dysfunctional, abusive families.

We certainly have to deal with drug addiction more effectively by making rehabilitation more accessible and by cracking down on drug dealing. We also have to recognise that we are unable to offer women the kinds of income and flexibility that they can find in the sex work industry when offering them work that is commensurate with their skills.

To date consideration of and response to the problem of 'human trafficking' has been framed as a matter for law enforcement. All the more so since the most recent iteration of international concern about human trafficking comes in the context of the 'war on organised crime' and even the 'war on terror'. As human rights activists, certain feminists and those concerned with social justice will attest, trafficking is little more than advantage being taken by those in a position of power of those who wish to migrate, and find the obstacles to migration to be so great as to be unable to overcome them alone. Indeed, for as long as it is impossible for women who do not have access to resources to move to

seek a better future, we shall continue to see cases of trafficking, exploitation and abuse, as such women place their futures in the hands of those who can work the system.

It is certainly far easier to frame social problems as law enforcement problems, because that way it is obvious who has to respond, and who will have to take responsibility when the situation fails to improve: the police (just as they are quite illogically asked to account for the high levels of crime in South Africa every year when the crime statistics are released). There is no denying that a robust, efficient police force supported by good relationships with the communities they serve and quick effective courts would go a long way towards dealing with crime.

Yet, as many an analyst will tell us, the causes of crime are social. Until we shift our thinking and begin to deal with the more difficult, messy social causes of crime we are unlikely to see the statistics dropping. Just as, unless we take a humanitarian approach to migration, stop quibbling about numbers and the difficult politics of our neighbours, we are unlikely to see an end to the human rights abuses associated with illegal immigration. The tendency of policy makers to respond to social problems as if they are law enforcement problems only leads us further and further from finding long term solutions to social dysfunction, and contributes towards undermining human rights and the ability of the police to do their job effectively.

LOSING GROUND?

Making sense of attrition in rape cases

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South Africa is notorious for being the 'rape capital of the world.' The new Sexual Offences Bill introduces a number of legal reforms intended to improve the handling of sexual offences cases. But these new reform efforts will not have the desired impact if laws are not properly implemented or interpreted. It is argued that we need to pay urgent attention to the unacceptable high number of cases that drop out of the system, and ensure that victims are given the tools and support to participate effectively in the legal process.

The levels of rape and other forms of sexual assault in South Africa have been the subject of international attention and condemnation over the past ten years. The repeatedly cited dictum that refers to South Africa as the 'rape capital of the world' is often accompanied by the presentation of South Africa's (often contested) rape statistics, which fluctuate between 52 500 and 54 000 per year.

It has also been suggested that in South Africa, rape has one of the lowest conviction rates of all serious crimes, with research indicating that only about ten per cent of reported rapes receive guilty verdicts (SALC 1999). The Department of Justice and Constitutional Development figures also show that of more than 54 000 cases of rape reported in 1998, fewer than seven per cent were prosecuted. In contrast, South Africa is also known for its commitment to constitutional rights and protections and for engaging in progressive legal reform processes.

Accepting that levels of rape 'are high', and are arguably an important measure of women's safety and equality, the focus on reported rape statistics

and convictions has the potential to detract policy-makers from the more substantive issues surrounding the treatment of rape victims within the criminal justice and public health care systems.

Over the past decade, non-governmental organisations have worked tirelessly in advocating for systemic shifts in how rape cases are treated within these systems. The objective of these advocacy efforts has been to shift the criminal law and encourage the criminal justice process to be more responsive to the needs and experiences of rape survivors.

The introduction of appropriate procedural measures to rectify the historically poor treatment of rape survivors has resulted in an exhaustive process to change the law on sexual offences and to ensure concomitant shifts in criminal justice practice in relation to the management of rape cases. The concerted focus on the Sexual Offences Bill (see the next article in this issue), for instance, has been an attempt to improve the treatment of sexual offences cases through changes in the definition of rape as well as the introduction of

legal measures to eliminate inappropriate, insensitive and discriminatory practices within the criminal justice system.

The government has signified a commitment to interleave these proposed legal reforms into practice. This is illustrated by the proposed adoption of national health guidelines for the management of rape survivors, national anti-rape strategies as well as the establishment of designated sexual offences courts, multi-service Thuthuzela Care Centres and inter-service level protocols to guide the management and disposition of cases. At its most instrumental, the aim of the shifts in law and practice is to increase reporting and conviction rates in rape cases.

Paradoxically, the measures by which criminal justice agencies gauge their success in dealing with cases is not always consonant with these objectives. The most obvious example is the focus on decreasing the levels of reported rape. While laudable, it is not the level of reported rape cases that is at issue. Instead, it is the staggering number of cases that – due to the inadequate management of rape cases – do not make it through the criminal justice system that is of primary and immediate concern.

Our research on sexual offences over a number of years has illustrated that at various stages within the criminal justice process, cases simply 'drop out of the system' – a phenomenon known as 'case attrition'. Between 2003 and 2006 we conducted two studies, which together examined the disposition of approximately 1 600 rape cases across six urban police stations. The objectives of these studies were to examine the processing, investigation and prosecution of sexual offences cases as well as to analyse the possible reasons for high attrition rates in sexual offences cases.

While the number of cases that simply 'drop out' of the system is alarming, it is the factors that contribute to attrition that require in-depth attention. Much like current discussion on reporting/conviction rates, it is not the numbers that are relevant, but the actual reasons for attrition that are worth examining.

Attrition rates and conviction rates

It is perhaps important at this juncture to call attention to some of the difficulties in establishing and discussing attrition rates. For instance, depending on what stage of the criminal justice process 'case fallout' is established, attrition rates might be calculated according to the proportion of cases where there has been a conviction, or the total number of rape cases reported to the police (referred to as the report-to-conviction rate), or the proportion of cases convicted out of the total number of rape cases brought to trial (referred to as the trial-to-conviction rate). The report-to-conviction rate will always be substantially lower than the trial-to-conviction rate. When 'conviction rates' are reported in research, it is often not clear whether the rate is reflective of conviction rates of cases reported (a docket opened) or investigated (charges laid) by the police, or whether conviction rates apply only to cases which have been brought to trial.

Conviction rates are lower when the statistics include cases that were reported, but not investigated (for example, disposed of at reporting or early on in the investigation stage of the case). They may also be calculated with or without the number of convictions overturned on appeal. In specific relation to rape cases, rape conviction rates may also include rape and attempted rape, or just rape. Thus, specialised sexual offences courts should expect to yield higher conviction rates, due to the specialised nature of the prosecutorial and court practices in these courts, and because the conviction rate is calculated using the trial-to-conviction formula.

Ironically, there is no clear indicator – across all offence types and in relation to sexual offences more specifically – of what constitutes a 'good conviction rate'. Both criminal justice reports and more scholarly research on attrition and conviction rates have sidestepped the setting of concrete thresholds for what constitutes effective prosecution and 'good' conviction rates, despite using them as performance indicators.

This raises the question of whether an 'increase' in conviction rates means that the actual criminal justice process is more effective, or whether

convictions are a good indicator of effective justice for rape complainants. Bearing in mind the original emphasis of the Sexual Offences Bill – to effect fair, sensitive and appropriate justice and to protect rape survivors within the courtroom – the conviction rate question becomes somewhat negligible.

In addition, the goals of case disposition also vary between criminal justice agents. For instance, for the police, low reporting of cases is considered a good indicator of policing (effective crime prevention), and a 'high' rate of referrals to prosecution is a good indicator of effective case disposition. For the prosecution service, high numbers of case referrals mean crime prevention is failing (because of increased levels of crime). Similarly, successful prosecution is based on conviction rates, to the exclusion of other indicators that may signal successful prosecuting practice. In rape cases, this may include key performance indicators that may not be easily quantifiable, but reflect the more qualitative aspects of investigations and prosecutions as well as the experiences of victims throughout the investigation and trial processes.

How attrition happens

At each stage of the criminal justice process there are multiple opportunities for discretion to be exercised. Rape cases within the criminal justice system are disposed of or finalised in a number of different ways. These include:

- Undetected
- Undetected – complainant not traced
- Withdrawn – no consequence
- Undetected – warrant issued
- Nolle prosequi
- Withdrawn in District Court
- Acquittal at Regional Court

See the box below for more detail on these processes.

Ways in which rape cases can be disposed of

- In order for a case to be categorised as 'undetected', the police standing orders on closing of dockets specifies that the investigation should have failed to disclose

the identity of the offender, although the police are convinced on the basis of prima facie evidence that an offence has been committed. In other words, undetected cases are those where a rape is believed to have occurred, but the police have been unable to positively identify the offender. In police terms it constitutes a failed investigation.

- The police standing orders for closing of dockets allows for a docket to be closed as '*undetected – complainant not traced*' when a complainant cannot be found after reporting the matter. This category accounts for around one in ten rape cases reported.
- In terms of the standing orders an investigating officer may only withdraw a case of '*no consequence*' upon an affidavit from the complainant requesting withdrawal.
- If the identity of the perpetrator is known, but his whereabouts are not, the police standing orders provide that a case may be filed as '*undetected – warrant issued*'. Should the perpetrator resurface at a later stage he may be arrested on this warrant.
- A prosecutor may decline to prosecute an alleged offence when he/she does not believe that there is a reasonable prospect of instituting a successful prosecution. In other words, there is no prima facie case on the basis of which to pursue prosecution at that time. A case may be dismissed nolle prosequi at any stage before the accused pleads to the charges.
- Bail applications are heard in the District Magistrates Court and, for the most part, cases are withdrawn at this level for further investigation. Note that indications that a case has been 'referred to court' (that is, successfully investigated) must be seen against the fact that at some stations as many as one third have in fact been *withdrawn (at the District Court)*, for one reason or another, without having been captured on the system.

- At the *Regional Magistrates Court* cases may result in convictions or *acquittals*. Many are however withdrawn by the prosecution under section 6(a) or 6(b) of the Criminal Procedure Act (51 of 1977). Section 6(a) refers to the authority of the prosecutor to withdraw a charge before the accused pleads to that charge, in which event the accused is *not entitled to a verdict of acquittal* in respect of that charge. Section 6(b) refers to the authority of the prosecutor to, at any time after an accused has pleaded (but before conviction) stop the prosecution in respect of that charge, in which event the court trying the accused *must acquit the accused* in respect of that charge

In South Africa, the practice of 'filtering' rape cases through the criminal justice system was only recently identified as a serious concern. The findings of a 1998 CIETafrica study in the box below demonstrate how attrition works.

Example of attrition based on the findings of a 1998 CIETafrica study

For every 394 women raped in the Southern Johannesburg Metropole



272 (69%) reported the attack to the police



Of those who reported, only 17 (6%) became 'rape cases'¹



1 of the 17 was 'lost' in a manner considered fraudulent



5 were referred to court for prosecution



1 resulted in a conviction

This means that a rapist in the Southern Johannesburg Metropole had a one in approximately 394 chance of being convicted.

At each point at which cases have been shed from the system there has been attrition. Interestingly, each of these attrition points coincides with the stages of the criminal justice process where criminal justice personnel exercise the most discretion. From a reformist perspective, it seems obvious that it is exactly these sites of discretion that need to be more strictly regulated if attrition rates are to decrease and we are to see increased prosecutions and convictions (assuming that increased convictions are a good indicator of effective justice).

But attrition does not work only in the reasonably linear broad strokes painted by CIETafrica. At each stage there are multiple opportunities for discretion to be exercised and incentives for exercising them in a particular way. It could also be argued that in some instances victims also exercise choice and agency in their own dealings with the system, contributing to attrition.

The CIETafrica study illustrates that the number of reported rapes is relatively high, but only a small proportion of these cases actually make it to trial or result in conviction. Key factors contributing to attrition in rape cases include the victim's decision to report the rape, the likelihood of arresting the accused, the scope of the investigation, the dismissal of the case by the prosecutor, and acquittal at trial. Other studies (Kelly 2002) have shown that factors increasing the likelihood of arrest include:

- The use of a weapon and/or the use of force
- The level of resistance used by the victim
- The existence or availability of other witnesses

If the victim appears ambivalent, 'difficult', intoxicated, or confused about the facts of the case, police are less likely to vigorously pursue the case.

Our analysis of rape cases has shown that there is considerable variance from station to station and court to court, even within the same magisterial jurisdiction, in the disposition of cases. It is acknowledged, of course, that the nature and extent of attrition is dependent on the individual circumstances of each reported case. Our findings, however, show that attrition goes far beyond these individual factors and implicates more serious systemic disparities in the management of rape

cases. This is illustrated by the example provided in Table 1 below.

<i>Table 1: How rape cases were 'finalised' in two neighbouring urban police stations</i>		
How cases were filed	% cases filed in police station A	% cases filed in police station B
Undetected	33	4
Case withdrawn due to complainant	16	7
Withdrawn in court	21	8
Nolle prosequi	16	61
Finalised in regional court	12	17

Seen in isolation from prosecutorial decision-making, police performance at station B above seems very impressive (Table 1). This is certainly true when one compares the 33 per cent of cases filed as undetected at station A against the mere 4 per cent at station B. However, on closer examination it appears that we may not in fact be looking at better performance and certainly, as far as victims are concerned, are not achieving the goal of better service provision.

Comparative studies illustrate that the highest proportion of cases fall out at the early stages, with half or more cases dropping out even before referral to prosecutors. Similar to international findings on attrition, the results of our own research have also highlighted key attrition points in the criminal justice system. The first, and most difficult to investigate, is the decision of rape victims not to make an official report – a phenomenon that is simply incalculable in terms of criminal justice statistics.

The next most noteworthy attrition point is police discretion. Police use their wide discretionary powers to establish whether an incident is 'criminal' or warrants investigation in ways that replicate traditional interpretations – often based on stereotypical assumptions – of what constitutes 'real rape' and what is considered 'criminal' activity. This is sometimes based on what the police perceive to be acts that occur 'naturally' within intimate or

social interactions and what they perceive as constituting a genuine incident of rape. These myths, as Kelly (2002) has argued, are 'non-factual presumptions that serve (intentionally or unintentionally) to deny, minimise or misrepresent what we know from both research and accounts of victims and perpetrators about rape.

Other stages of the criminal justice process – including reporting, forensic medical examinations, statement taking, investigations/evidence gathering and arrest of accused persons – are also key attrition points in our criminal justice system. The ability to find the accused, and in some cases the complainant, has a great impact on the ability of the criminal justice system to assist rape complainants. Without the accused the case cannot proceed. Other aspects of the investigation, including the ability of investigating officers to collect appropriate and relevant evidence for the prosecution of rape cases, are also questionable in a significant proportion of cases.

The quality of medico-legal examinations by medical practitioners is also similarly critical to the effectiveness and integrity of investigations and prosecutions. The medico-legal examination often forms a crucial aspect of rape cases and therefore requires detailed attention to injuries and complaints made by the survivor at the time of the examination. When these examinations are not properly documented or are incomplete, the tenacity of the evidence and the strength of prosecution can be severely compromised.

The impact of discretion in rape cases

International studies on police investigation and prosecution of rape cases have found that police officers and prosecutors become particularly sceptical of rape victims when their stories do not coincide with what Estrich (1987) has called the 'real rape' template. Kelly (2002) makes a similar finding. As a result the credibility of rape victims is questioned. Temkin (1999) similarly found that the police and prosecution service still held a culture that anticipates high levels of false reporting and that the majority of cases are 'lost' due to their designation as false allegations by the police or because of victims withdrawing their statements.

Our research in the South African context has repeatedly demonstrated a pervasive belief by criminal justice personnel that there are a large proportion of cases that are withdrawn because of 'false allegations'. Our analysis of dockets, however, shows little evidence of this, with less than 1 per cent cases being withdrawn by complainants on the basis of false allegations. These instances were cases of alleged statutory rape.

Comparative studies on attrition have shown that the manner in which police discretion is exercised is crucial to the effective management of sexual assault cases. An investigation into attrition rates should therefore consider the 'modes of discretion' used by charge officers, investigating officers and prosecutors in rape cases to declare the cases 'unfounded' (when cases are dropped because of lack of merit), or to continue (investigate and bring to trial) rape cases. Our research found that the following elements of case disposition are particularly relevant in examining attrition:

- The factors and elements used by police and prosecutors to determine whether the case is 'unfounded' or worthy of investigation and prosecution. For example, what they believe they are expected to do by law in terms of substantive definitions and evidentiary procedures.
- The factors important to criminal justice agents in deciding whether to arrest, investigate or prosecute in a rape case. This includes factors considered to be important in producing successful judicial outcomes.
- Investigation and prosecutorial methods, strategies or policies applied and considered useful in processing rape cases.
- Factors that limit or hamper effective investigation and prosecution of rape cases, including infrastructural/material, procedural, circumstantial and personal obstacles.

The quality of investigations by the police is universally cited, and locally confirmed, as a major factor in attrition of rape cases. The accessibility of investigating officers, high case loads and the extent to which investigating officers are 'qualified' to investigate rape cases are contributing factors to the quality of rape investigations. Information regarding the status of a case, including of an arrest, is difficult

to establish. Statement taking by the police is also problematic, with dockets containing often-vague victim statements, which not only contain irrelevant information and details, but do not even set out the basic elements of the offence.

Clearly, a high proportion of these cases are getting lost at the early stages of the criminal investigation. This may be due to the police designating cases as 'false reports' or as 'withdrawals by the victim'. Internationally – and increasingly in South Africa – research is also beginning to reveal that the two most important factors influencing the outcome of a rape trial are the evidence of physical injury and admission to offence by the perpetrator.

Other significant studies, spanning a period of 30 years, support our contention that inappropriate or poor police discretion directly affects attrition rates (Temkin 1997; Kelly 2002). International studies also alert us to the importance of addressing poor administration – such as delays and postponements, lack of pre- and post-court support and courtroom intimidation – in curbing attrition, and that policing and prosecutorial agencies still rely on stereotypes about rape victim credibility (Bargen & Fishwick 1995; Polk 1985; Frohmann 1991; Kersetter 1990; La Free 1989; Martin & Powell 1994).

Similar to our experiences in South Africa, Kelly's research on attrition in the UK found that the reporting and investigation stage is the point at which the largest number of rape cases leak from the system. She argues that:

the initial responses of police officers, their skill and expertise as investigators and evidence gatherers, as well as their treatment of complainants are vital elements in criminal justice system responses [to rape cases] (Kelly 2002).

She also found that a staggering 62 per cent of cases reported to the police fall out during the investigation process, either because the perpetrator cannot be identified or found, or because insufficient evidence is collected. Of those cases that are referred to the prosecution, many are dismissed by the prosecution (*nolle prosequi*) without ever going to trial.

Adler's (1987) analysis of rape cases found that the success of the rape complaint was consistently based on six predictors:

- The victim's sexual inexperience
- Her respectability
- Absence of consensual contact with the perpetrator prior to the rape
- Resistance and injury
- Early complaint
- A lack of acquaintance with the accused

The way in which the responses of police, prosecutors and judges shape the construction of rape within the criminal justice system has been the subject of scathing critique, most notably in the form of Estrich's landmark book, 'Real Rape' (1987). 'Real rapes', according to Estrich, are still those involving a weapon and injury, committed by strangers, outdoors. These are the cases that criminal justice personnel take seriously.

Kelly (2002) also speaks of the 'real rape template' adopted by criminal justice agents, arguing that conformity to this template, (which informs the victim's self-conception of the assault as a rape and her belief that the police will also see it that way) is one of the strongest predictors of whether a rape complaint will make it all the way through the system.

Frohmann's 1997 study into prosecutorial discretion within two US jurisdictions provides a useful insight into this aspect of criminal justice practice. She illustrates in this study the exercise of prosecutorial discretion through 'official typifications of rape-relevant behavior' (Frohmann 1997:217), in respect of 'rape scenarios', 'post-incident interaction' (Frohmann 1997:218), 'rape reporting' (Frohmann 1997:219), and 'victim's demeanor', used by prosecutors to inform their decisions as to whether the complainant is credible. In respect of each of these aspects she shows how prosecutors draw on a store of subjective 'knowledge', through which they have constructed a 'typical' rape scenario against which complaints are measured (Frohmann 1997:217-219).

She emphasises the important role that 'convictability' (Frohmann 1997:399) plays in

shaping prosecutorial decisions and argues that this narrow approach is self-reinforcing: prosecutorial assessments of the way in which decision-makers 'downstream' (ultimately the jury or judge) will evaluate the complaint inform their decision whether to send the matter to trial. However, this means that only a narrowly defined group of potentially convictable cases gets seen in court, which reinforces stereotypical perceptions of what amounts to 'real rape'.

In South Africa, the decision whether to follow through with a rape case appears, at least in part, also to be based on what the criminal justice agent anticipates will happen at the next stage of the criminal justice process:

- For the reporting officer the question is whether the investigating officer will have enough information to proceed with the investigation
- For the investigating officer the question is whether the prosecutor will prosecute the case on the basis of investigation
- For the prosecutor the question is whether the court will find the offender guilty of the offence

Both investigating officers and prosecutors inevitably approach a rape complaint from a cost-benefit perspective that is ultimately focused on the 'convictability' of the case and an evaluation of whether the case has evidential difficulties. That is, given the resources to hand, will the time, energy and money spent on investigation and preparation for trial, result in a realistic possibility of conviction?

Conclusion

In 1993 Henderson (1993:41) wrote that:

Two decades of feminist law reform efforts to hold men responsible for raping women have yielded disappointing results. Rape myths, woman-blaming, and resistance to taking rape seriously flourish, and successful prosecution of cases not meeting the stereotype of real rape, while no longer impossible, remains improbable.

It is our contention that attrition rates will remain inordinately high despite new law reform efforts. Contributing to perspectives on the 'successful'

investigation and prosecution of rape cases, and the resultant impact on official attrition rates, scholars point to evidence that laws are not being applied (Adler 1987; NSW Department of Women 1996) and, when they are applied, that they are narrowly interpreted (Adler 1987; NSW Department of Women 1996) and have thus been 'rapidly undermined' (Kelly 2002:33).

While the significance of the new Sexual Offences Bill lies in its expanded definition of rape and other sexual offences (see Lisa Vetten's article in this issue), there is little evidence that it will make a recognisable impact on the management of sexual offences cases. In order to achieve its stated objectives of providing protection, reducing secondary victimisation and trauma within the criminal justice process, and offering timely, effective and non-discriminatory investigation and prosecution, the proposed Bill offers little in this regard.

Without creating enforceable, regulatory provisions for the effective administration and implementation of the law, the high levels of attrition will continue unabated. Key to reducing attrition is ensuring that mechanisms are created that reduce excessive discretion, increase accountability to victims and other criminal justice agents, and ensure that systems are created to fully trust, support and encourage victim participation in the criminal justice process.

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Endnotes

- 1 It should be noted that some of the 'excluded' cases may result from re-labelling of the offence to, for example, indecent assault. A substantial portion reflects, however, police decisions to close the matter or victims that decide (or are persuaded) to drop the case. See CIETafrica (1988:44).

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NEW CRIMES AND OLD PROCEDURES

Can the new Sexual Offences Bill deliver on its promises?

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In 1996 Dullah Omar, the then-Minister of Justice, established a project committee in the South African Law Reform Commission (SALRC) to investigate sexual offences against children. Eleven years later, having widened the scope of the legal reforms to include adults, the National Assembly finally passed the much-delayed Criminal Law (Sexual Offences and Related Matters) Amendment Bill (SO Bill 10 Nov 06 (SOBPC06)) on 23 May 2007. The Bill is ambitious, its objects being: 'To afford complainants of sexual offences the maximum and least traumatising protection that the law can provide, to introduce measures which seek to enable the relevant organs of state to give full effect to the provisions of this Act and to combat and, ultimately, eradicate the relatively high incidence of sexual offences committed in the Republic' (Sexual Offences Bill 2006: 9). This article briefly sets out some of the Bill's content and then examines whether or not the Bill, in its current form, does indeed meet the high aims set for itself.

A short Preamble introduces the Bill, which contains seven chapters. The first chapter sets out definitions of the various terms used in the Bill and the Bill's objects. The next three define a range of new sexual offences generally, as well as those specifically committed against children and people with mental disabilities. The fifth chapter sets out the provisions of post-exposure prophylaxis (PEP) to prevent HIV infection after rape and also outlines procedures allowing for court-mandated testing of alleged rapists for HIV. Chapter six allows for the establishment of a national register for sex offenders while the final chapter deals with a variety of general provisions, including national instructions, directives, regulations and the creation of a National Policy Framework.

This framework is intended to 'protect[ing] complainants of sexual offences and their families

from secondary victimisation and trauma by establishing a co-operative response between all government departments involved in implementing an effective, responsive and sensitive criminal justice system relating to sexual offences;' and 'promot[ing] the spirit of *batho pele* in respect of service delivery in the criminal justice system dealing with sexual offences' (Sexual Offences Bill 2006: 9). This chapter also contains transitional provisions relating to trafficking in persons for sexual purposes.

New sexual offences

The new definition of rape contained in the Bill states that 'Any person (A) who unlawfully and intentionally commits an act of sexual penetration with a complainant (B), without the consent of B, is guilty of the offence of rape.' Rewritten in non-legalese, this revised definition recognises that men

and boys can be raped and also allows for women to be charged with rape. 'Sexual penetration' will include any act causing any penetration of the genital organs, or anus, or mouth of the victim with a penis, or any other body part or object (such as a stick or finger). Additionally, penetrating any of these orifices with an animal's body part(s) is also understood to constitute sexual penetration.

The current crime of 'indecent assault' will be replaced with that of 'sexual assault' and will cover different forms of sexual violation. Conduct defined as 'sexual violation' includes direct or indirect contact between the genital organs and anus of one person and any body parts of another person or animal, or any object resembling the genital organs or anus. It also covers contact between the mouth of one person and the genital organs, anus, or breasts of another.

Three new crimes recognising how people can be forced into performing sexual acts are also introduced: compelled rape, compelled self-sexual assault and compelling persons over the age of 18 to witness a sexual offence or act. While the last of these offences is self-explanatory, the first two are somewhat more complex.

'Compelled rape' criminalises the conduct of someone who forces another person to rape a third. A typical example of what this new crime is intended to address would be when a gang breaks into a home and forces the occupants to have sex with one another. 'Compelled self-sexual assault' is intended to address those situations where one person forces, or coerces, another to masturbate for them.

Controversially, the Bill criminalises those who buy sex from adults. For a fuller discussion of this clause, read *Nicolé Fick's* article on the topic in this issue.

New sexual offences against children

'Sexual grooming of children' is another new crime established by the Bill and refers to the process through which offenders sexualise children over time. Grooming children for sex takes place gradually, often beginning with innocuous-enough affectionate behaviour between adult and child and progressing to increasingly more intimate touching

and fondling. It often also includes showing children pornography.

In terms of this provision those who manufacture, distribute or possess any article or publication that promotes sexual acts with children, or may be used in such acts, can be charged with sexual grooming of a child – as will those who show pornography to children, or masturbate in front of them. This provision is also intended to cover those situations where sex offenders make contact with children via the internet and then engage them in sexualised discussions, or persuade them to send photographs; or suggest they meet in order to have sex.

The new Bill also attempts to come down hard on child prostitution, or 'sexual exploitation of children'. Thus, anyone who engages the sexual services of a child under the age of 18, or offers those services to anyone else, will be guilty of sexually exploiting a child. Those who in any way live off the earnings of a child prostitute, or who allow their property or premises to be used for acts of child prostitution, will also be charged with the sexual exploitation of children. Lastly, this section of the Bill also creates the offence of 'promoting child sex tours'.

The Bill also attempts to provide some guidance around dealing with the complexities of adolescent sexuality. The age of consent to sexual activity is set at 16 for both boys and girls and sex with a minor (commonly referred to as statutory rape) is defined as a 'consensual act of sexual penetration with a child' (between the ages of 12 and 16). When both parties are children in this age category, and their activities are consensual, their prosecution for 'consensual sexual penetration with a child' can only be instituted with the written permission of the National Director of Public Prosecutions. Should a prosecution be instituted, it must be against both parties.

New sexual offences against disabled persons

This chapter creates four new crimes:

- Sexual exploitation of persons who are mentally disabled
- Sexual grooming of persons who are mentally disabled
- Exposure or display of or causing exposure or display of pornography or harmful materials to

- persons who are mentally disabled
- Using persons who are mentally disabled for pornographic purposes or benefiting from such activity

The essential elements of these offences are identical to those against children.

National register of sex offenders

The Bill also allows for the creation of a national register of sex offenders. In terms of this provision anyone who has been convicted of a sexual offence against either a child or person with a mental disability, whether before or after the new Bill is introduced, will not be allowed to work with children, supervise or care for children, or become a foster parent, adoptive parent or care-giver. Provision is also made to include on the register people who have been accused of sexual offences against children but were incapable of standing trial due to mental illness or cognitive impairments. Sex offenders' names must be listed on the register and employers are obliged to check that no potential or current employees are included therein.

Licensing authorities are also not permitted to provide a license to any entity, business concern or trade involving the supervision or care of children or the mentally disabled, unless they have first checked the applicant's details against the register.

Services to rape survivors

Chapter 5 of the Bill is entitled 'Services for victims of sexual offences and compulsory HIV testing of alleged sex offenders'. This heading is somewhat misleading given that only one service, post-exposure prophylaxis, or PEP, is provided for – which is, in any case, already available to rape survivors following a Cabinet decision taken in April 2002. Indeed, depending on how terms in the proposed Bill such as 'reports in the prescribed manner' and 'designated health establishment' are interpreted, rape survivors' access to PEP could even be narrowed in future as a result of the Bill.

It is also worth contrasting the meagreness of this provision with what was originally envisioned by the South African Law Reform Commission's discussion document on sexual offences. Section 22 of the SALRC's draft legislation, headlined 'The provision of treatment', stated:

- If a person has sustained physical or psychological injuries as the result of a sexual offence, such person shall, as soon as is practicable after the offence, receive the best possible medical care, treatment and counselling as may be required for such injuries
- The state shall bear these costs

The type of comprehensive response recommended by the SALRC above is essential in light of the serious health consequences of sexual violence and coercion. South African research has found that girls sexually assaulted as children are at increased risk of being subjected, as adults, to physical and/or sexual violence at the hands of an intimate partner (Dunkle et al 2004). Another study examining factors associated with teenage pregnancy in Cape Town found forced sexual initiation to be the third most strongly associated factor with such early pregnancies (WHO 2002). Substance abuse is also associated with experiences of sexual violence (WHO 2002).

Women who have been sexually assaulted by their intimate partners are at greater risk of attempting or committing suicide than women who have never experienced partner violence (WHO 2005). Indeed, women who experience sexual assault, whether as children or adults, are also more likely to attempt or commit suicide than women who have never experienced such assaults (WHO 2002:163). Other mental health problems associated with sexual violence include depression, generalised anxiety, reduced self-esteem, panic phobias and post-traumatic stress disorder (PTSD) (Astbury 2006). In comparison to non-victimised women, rape survivors are six times more likely to develop PTSD at some point in their lives and also constitute the single largest group suffering from PTSD (Astbury 2006).

Legislating the principle that government should provide access to comprehensive health services is important for a number of reasons – not least being the recognition that rape entails serious consequences deserving of attention. In addition to helping rape victims cope with their trauma, the research discussed earlier also suggests that mental

health interventions may play a role in preventing further victimisation. Finally, rape victims value counselling services. One study that investigated rape survivors' perspectives on what services they consider most necessary found that women respondents most valued the availability of HIV post-exposure prophylaxis (with an HIV test) and having a sensitive health care provider who could provide counselling (Christofides, Muirhead et al 2006).

Protection in court

Many have described rape victims' experience of going to court and testifying as a kind of second rape during which the victim, rather than the accused, appears to be on trial. The profound distress evoked in rape survivors by the adversarial trial system makes the need for its reform particularly pressing. Here again, as with services, the Bill falls short.

Currently, the Criminal Procedure Act (No 51 of 1977) (CPA) allows for certain measures mitigating some of the harsher aspects of trial processes. These include allowing for in-camera hearings; the Closed Circuit Television (CCTV) system; and the 'intermediary system' for complainants under the age of 18. However, a court must first decide that the complainant will suffer undue trauma if s/he testifies in open court before the latter two measures may be used. This requirement may lead to a 'trial within a trial' and necessitate an expert assessment by a helping professional. Problems also exist with the implementation of all these provisions. Some are utilised routinely by certain courts but not by others, while many complainants have no access to these measures at all.

The SALRC sought to address the many negative aspects of court procedure with the notion of 'the vulnerable witness'. When either child or adult victims are declared 'vulnerable witnesses' the prosecutor would have been obliged to inform such witnesses of the protective measures available, with the court required to use at least one of four protective measures. This provision was removed from the Bill. The SALRC also recommended that the CCTV system (which is currently under-utilised) be made more accessible to those adult

complainants whose testimony would benefit from the use of this protective measure. This too was removed from the Bill, as was the recommendation that all child witnesses should, by right, automatically qualify for the intermediary system. More positively, however, section 170 of the CPA has been amended to allow witnesses over the age of 18 but who have a mental and/or emotional age of under 18, access to this system.

Provision was also made by the SALRC for witnesses to have support persons in court with them. The purpose of the support person was to lessen the emotional trauma to the witness of testifying in court (for example, a young child could be seated on her/his mother's lap or a counsellor could be seated next to the complainant). This clause was removed due to fears that it would increase costs because witness fees would need to be paid to support persons. However, these fees are already paid to parents and caretakers who bring their children to court to testify.

Rules of evidence

Some improvements have been made to the rules of evidence applicable to the testimony of rape survivors.

Currently, delays in reporting the rape arouse great suspicion and almost guarantee the charge being seen as false. The Bill provides that courts may not use a delay in reporting to cast doubt on a rape survivor's credibility. The Bill also attempts to further limit questioning around a victim's previous sexual history by detailing the circumstances in which this evidence can be raised. This offers more protection to complainants than before. However, because it continues to allow such evidence when 'relevant', a term which can be highly subjective, this provision does still leave the door open to the defence to lead unnecessary, prejudicial and intrusive questions.

Certain witnesses' testimony is considered unreliable and requires the courts to exercise caution when considering the evidence of single witnesses, children and sexual offence complainants. In 1998 the Supreme Court of Appeal in *S v Jackson* acknowledged that the

cautionary rule applicable to sexual offences discriminates against sexual offence victims and limited its use. Less helpfully, while stating that the rule may not be applied in a blanket, indiscriminate fashion, they still allowed for a cautionary approach to be used in some cases at the judge's discretion. The Bill abolishes both cautionary rules and approaches. However, the cautionary rule applicable to children's evidence remains in force, despite the SALRC's recommendation that it be discontinued.

Because legal adjudicators have believed children unable to understand the concept of truthfulness, their testimony is sometimes excluded. The SALRC recommended an amendment to section 192A of the Criminal Procedure Act, which said that all children would be presumed competent to testify. An amendment is also proposed to section 154 of the CPA, which says that any person who does not understand the oath may testify if they have been told by the magistrate or judge to tell the truth. Again, neither recommendation was adopted by the Bill.

Conclusions

As is evident from this snapshot summary, much of the emphasis of the new Bill is on the creation of new statutory offences, or the substantive law. With the notable exception of the clause criminalising the purchase of sex, these reforms are long overdue and necessary. They will however present interesting challenges of interpretation, the new definitions being both broad as well as written in a fashion that is both technical and confusing.

The Bill pays considerably less attention to reforming legal procedures applicable to the investigation and prosecution of sexual offences. Indeed, the limited nature of protections in court offered by the Bill, as well as its attenuated approach to psycho-social support for rape victims, ensure that the Bill falls well short of providing 'the maximum' and 'least traumatising' protection of the law. It is also unlikely that the Bill, in and of itself, is capable of 'eradicating' rape in South Africa, given that preventive measures such as psycho-social support, as well as the management and treatment of offenders recommended by the SALRC,

are excluded from the Bill. Thus, from the outset, the Bill's ability to advance the rights of victims of sexual violence is already constrained.

Engaging in successful law reform will not, however, address all the challenges rape survivors experience in the criminal justice system. Challenging the everyday interpretation and practice of the law often requires much more than law reform alone. Even with a considerably improved Sexual Offences Bill in place, organisations will still need to remain vigilant with regard to all the myriad subtle ways in which law is able to disqualify and exclude so many women, children and men's accounts of sexual violence.

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IMPLEMENTING THE UNFEASIBLE:

Compulsory HIV testing for alleged sexual offenders

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Since being approved by both the National Assembly and the National Council of Provinces, it seems likely that the provisions on compulsory HIV testing of alleged sexual offenders will soon be enacted as part of the new Criminal Law (Sexual Offences and Related Matters) Amendment Bill. Whereas an earlier article (see SA Crime Quarterly 20, 2007), questioned the constitutionality of the provisions, this commentary focuses on the implementation challenges of compulsory HIV testing. Despite good intentions, these provisions will not actually be useful for rape complainants. Instead, the potential exists that rape complainants will be endangered and criminalised. Another concern is the feasibility of compulsory HIV testing, which will place an overwhelming burden on the police, who have neither the resources nor the training to provide such services.

The new Criminal Law (Sexual Offences and Related Matters) Amendment Bill (2006) (hereafter: the Bill) aims to address two ills of contemporary South Africa: the large number of sexual offences and the high prevalence of HIV/Aids. The draft legislation is ambitious: 'to combat and ultimately eradicate the relatively high incidence of sexual offences committed in the Republic' (Sexual Offences Bill Section 2). To achieve this aim, it is essential to protect 'complainants of sexual offences and their families from secondary victimisation and trauma' through a 'responsive and sensitive criminal justice system' (Section 2 (d)).

In many instances the Bill effectively pursues this aim, for instance where new sexual offences are created or the definitions of out-dated common law crimes are amended. The provisions on compulsory HIV testing of alleged sexual offenders, however,

remain a major weakness of the proposed legislation.

Compulsory HIV testing provisions

The legislation allows both male and female victims of sexual offences to apply for a compulsory HIV test of the accused sexual offender. The application has two requirements:

- The victim must lay a criminal charge with the South African Police Service (SAPS)
- Not more than 90 days must have passed since the alleged commission of the crime

If these requirements are fulfilled, the victim may apply for a mandatory HIV test of the accused at the police station. The police have to submit the application to a magistrate who must make an order for the alleged sexual offender to be tested for HIV, if satisfied that: a sexual offence has been committed against the victim by the alleged

offender; the victim may have been exposed to the body fluids of the alleged offender; and no more than 90 calendar days have lapsed since the commission of the alleged offence.

The magistrate will then inform the police of the outcome of the application. The police, in turn, must inform the applicant and, where appropriate, make the accused available for the HIV test. The test has to be performed at a designated health facility. The test result will be forwarded to the police who must inform the applicant and the alleged offender of the outcome of the HIV test.

Compulsory HIV testing – a victims' service?

Compulsory HIV testing of the alleged sexual offender is thought to be one of the new, progressive services for rape complainants. However, compulsory HIV testing fails to assist rape victims and may even lead to adverse consequences for those who make use of it. The main concerns are threefold. The provisions on compulsory HIV testing:

- Create a false sense of security in rape victims
- Criminalise rape victims
- Put rape victims at risk for retaliation

False sense of security

Giving victims the opportunity to apply for an HIV test of the alleged sexual offender implies that the test result is somehow relevant to them. The Bill suggests that testing the accused will help:

reducing secondary trauma and empowering the victim to make informed medical, lifestyle and other personal decisions (Sexual Offences Bill Section 34 (a) (i)).

Unfortunately, compulsory HIV testing neither helps victims to make 'medical decisions' around post-exposure prophylaxis (PEP)¹ nor 'lifestyle decisions' around safer sex, because the test result is unreliable. It may, but does not necessarily, reflect the accused's HIV status because the alleged offender may be in the 'window period' when s/he is tested for HIV. This means the HIV test result might be negative although the accused is HIV positive.

Consequently, victims who base their medical or lifestyle decisions on the test result may, in fact, run

an increased risk of getting infected with the virus. If, for instance, a victim stops taking PEP, or stops practising safer sex, because the test of the alleged offender came back negative, s/he is at an increased risk for contracting HIV. The emotional impact of testing and waiting for results should also not be underestimated.

The legislation is therefore very misleading and – without in-depth education of the victim – will jeopardise the physical and psychological well-being of victims and their consensual sexual partners.

Criminalisation of victims

The legislation can lead to the criminalisation of victims on two counts: criminalising 'malicious applications' and criminalising HIV disclosure.

Criminalising 'malicious applications'

Research indicates that only 7 per cent of reported rape cases ever result in a conviction of the accused (Amnesty International 2005). Accordingly, the vast majority of alleged offenders walk free after the criminal proceedings. Under these circumstances, those acquitted who were forced to undergo compulsory HIV testing may try to retaliate against the victim, for instance by filing a civil suit. It is possible that civil courts will grant damage claims for those who had to undergo HIV testing but were later acquitted.

As if the risk of civil liability was not enough, the proposed legislation also provides for criminal charges against rape complainants. One may even argue that the Bill encourages alleged perpetrators to initiate a prosecution of the victim by stating that:

Any person who, with malicious intent lays a charge with the South African Police Service in respect of an alleged sexual offence and makes an application [...], with the intention of ascertaining the HIV status of any person, is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding three years (Sexual Offences Bill 38 (1)(a)).

Victims may therefore be prosecuted for laying a charge and requesting an HIV test with malicious intent. Even though the provision only criminalises 'malicious' behaviour, it raises serious concerns.

First, it appears contradictory that legislators allow victims to apply for an HIV test of the accused, knowing that the conviction rates are extremely low, and at the same time allow the prosecution of the victim for malicious intent. Second, such a provision may well deter victims from laying a charge in the first place. Besides, taking into account the emotional state of the rape victim and the amount of information required, it may, in fact, be unrealistic to expect a rape victim to fully comprehend such legal technicalities.

Deterring victims from reporting sexual offences is particularly problematic because rape is already highly underreported. Whereas the SAPS estimates that one in three rapes is reported (SAPS Annual Report 2003), Jewkes & Abrahams (2002) found that only 15 per cent of rape victims between 15 and 49 years report it to the police. Underreporting makes it difficult for the police to effectively address sexual offences. Hence, driving these offences further underground cannot be in the interests of justice.

Legislation promoting the prosecution of rape victims clearly sends out the wrong message. Whereas the blame should be on the perpetrator, the relevant provision may shift the blame onto the complainant by criminalising her or his conduct.

Criminalising HIV disclosure

Another concern is section 38 (b) of the Bill:

Any person who with malicious intent or who in a grossly negligent manner discloses the results of any HIV tests [...] is guilty of an offence and is liable to a fine or to imprisonment for a period not exceeding three years.

This provision applies to anyone who discloses the test result to a person other than:

- The victim or the interested person
- The alleged offender
- The investigating officer
- Where applicable, to a prosecutor or any other person who needs to know the test results for purposes of any civil proceedings or a court order

Accordingly, the victim must not let anybody know of the outcome of the test result, or otherwise faces penalties. Although the protection of the alleged

offender's privacy is understandable, it is unreasonable that the Bill broadly criminalises disclosures by rape victims.

Testing a person for HIV against their will and then disclosing the test result to another individual constitutes a tremendous violation of privacy. But if – in the opinion of the legislators – the victim's 'right to know' outweighs the privacy of the accused and thus justifies the creation of compulsory HIV testing provisions, the legislation should follow through with this. The victim should at least be allowed to disclose the test result to his or her (sexual) partner, counsellor, GP or immediate family members. Since the victim finds him- or herself in a state of shock and trauma after the sexual offence, it is vital for her or his psychological wellbeing to speak to others about the sexual offence, its consequences and entailed risks. Also, if the victim cannot read the written result, s/he may have to ask a friend or relative to read it.

The only safeguard that may protect the victim from being prosecuted is that the prosecution needs to be authorised in writing by the Director of Public Prosecutions. Hopefully, this will prevent negative publicity about victims. It would indeed be better if the provision did not apply to victims or, at least, only penalised malicious disclosures.

Endangering rape victims

Another important issue that the Bill fails to consider is the personal safety and security of the victim during the application process. If the alleged offender has not been arrested or is out on bail, the victim's safety is severely at risk once the alleged offender is asked to do the HIV test. The accused is likely to feel deeply resentful at having to undergo a compulsory HIV test. There is a real possibility that the accused – whether s/he committed the crime or not – will try to intimidate the victim in order to get her or him to withdraw the application. It must also be remembered that HIV and Aids are still highly stigmatised in our communities. An alleged offender will therefore be extremely reluctant to be tested.

The Bill fails to provide for any measures to protect the victim from threats by the alleged offender. It seems unrealistic that the police, who are already over-burdened with the whole process, will be able to

provide additional support for the victim, unless it is a statutory obligation.

Overburdening an under-resourced police service

Besides the serious implications for rape victims it remains questionable whether the provisions will be feasible. Compulsory HIV testing is a complex process. Its implementation requires an efficient and swift response from various role players in the health and criminal justice system, but mostly from the police. The SAPS, already understaffed and under-resourced, will struggle to implement the manifold duties that the Bill imposes on them.

The members of the police bear the greatest brunt at the implementation stage because they have to:

- Inform the victim of services available, including the option of applying for a compulsory HIV testing order
- Run between the police station and the magistrate's court to submit applications and collect orders
- Inform the applicant and the accused of the outcome of the application
- Make the alleged offender available for the HIV test, which may include making an application for a warrant of arrest if the accused fails to comply with the order
- Request a medical practitioner or nurse to take two blood samples of the alleged offender
- Deliver the blood samples to the head of the (designated) health establishment and request that an HIV test be performed
- Hand sealed envelopes with the test result to the applicant and the accused

Before examining some of those duties individually, the entire list raises a number of concerns.

General concerns

The various duties listed above will significantly increase the workload of police officers dealing with sexual offences. It is unclear how an understaffed and under-resourced police service that is already struggling to fight crime and deliver 'regular' services, can be expected to comply with these additional duties, especially since most of these services must be delivered 'as soon as is reasonably practicable'.² According to Leggett (2003), 'If combating crime [...]

is seen as the primary purpose of the police, there is clearly a need for a reallocation of resources'.

Not only does the Bill create a number of new duties, but some of these duties appear particularly time-consuming, for instance: submitting the application to the magistrates court; collecting the court order; bringing the accused to a health facility for a blood sample and delivering the blood sample to the head of the health facility for an HIV test.

The increased workload requires that the budget of the SAPS be adjusted accordingly, and human resources be increased. Possibly, police 'infrastructure' (extra cars, for instance) will have to be upgraded, requiring finance. Furthermore, the implementation of the legislation will require comprehensive in-depth training of all police officials dealing with sexual offences. Training should not only focus on the provisions on compulsory HIV testing, but should also include education on 'soft skills'.

Police officers are often not trained in 'soft skills' because they see their task as 'bringing criminals to book'. Research monitoring the implementation of the Domestic Violence Act (1998) shows that victims of domestic violence who turn to the police are often treated with a lack of respect and sympathy (Parenzee et al 2001:83). Asking the police to deal with sensitive issues such as forced HIV tests overestimates current police qualifications and underestimates the impact of involuntary HIV tests. Whether police officials should, in fact, be assigned to deal with such delicate health matters is a different question altogether.

Individual duties

These raise a number of concerns:

Information

According to the Bill, the police official must inform the victim of:

- The importance of obtaining PEP for HIV infection within 72 hours after the alleged sexual offence took place
- The need to obtain medical advice and assistance regarding the possibility of other sexually transmitted infections
- The following services and details:
 - Provision of free medical advice surrounding the administering of PEP

- Provision of PEP for HIV infection at a public health establishment at state expense
- A list with names and contact particulars of accessible public health establishments
- The option of applying to a magistrate for an order that the alleged offender be tested for HIV at state expense

The provision of this vital information will greatly benefit the victim. Only when victims know their rights, can they exercise them. However, this kind of information must be explained to the victim comprehensively and understandably. This, in turn, requires that police officials are trained comprehensively on sexual offences, HIV transmission, PEP and compulsory HIV testing to ensure the information they provide is correct and any questions by the rape survivor (e.g. 'What is PEP?') can be answered appropriately.

Finding the accused

An application for a compulsory HIV test can only be made up to 90 days after the alleged commission of the offence. It is questionable how the police are supposed to find the suspect within this time frame, as the investigation of rape cases is notoriously difficult because generally there is only one witness (the complainant), and, besides the victim's body, there is no real 'crime scene' where signs of the perpetrator can be found.

Although research indicates that more than half the rapes in South Africa are committed by a person known to the victim, this does not necessarily facilitate the search for and/or arrest of the offender (Simelela/Medecins Sans Frontieres 2006:17 and Roland et al 2005). A study from Khayelitsha, for instance, found that only a third of all rapists are arrested (Simelela/Medecins Sans Frontieres 2006:17). One explanation for this poor arrest rate is that the term 'known to the victim' often means that the victim knew the perpetrator by sight (Roland et al 2005). Thus the name, address or other personal details remain unknown to both the victim and the police. Finding the perpetrator may be even more difficult in multiple perpetrator rapes, which account for approximately 25 per cent of rapes.³

Another problem may be that once the accused has been found and notified of the court order, s/he may

go into hiding. This highlights another problematic issue of the provisions: the 90-day time frame. Unless the notification and the HIV testing are done at the same time, the accused may hide, wait until the 90 days have passed, and thereby avoid HIV testing altogether.

Test results

The final task of the police is to inform the applicant and the alleged offender of the outcome of the HIV test by handing them a sealed envelope with the test result as well as a 'notice containing prescribed information on the confidentiality of and how to deal with the HIV test results'. This procedure leaves it up to the victim and the alleged offender to decide whether, when and where they want to expose themselves to the test result. While it may seem reasonable to give the recipients these choices, it is highly alarming that the victim and the alleged offender will not receive any post-test counselling regarding the test result.

Voluntary HIV testing includes pre- and post-test counselling (DoH 2003). Whereas pre-test counselling ensures that the individual has sufficient information to make an informed decision about having an HIV test, post-test counselling is the counselling that is provided by a health worker or HIV counsellor when an individual receives his or her HIV test result. It seems unethical that the alleged offender will not receive any counselling, even though compulsory HIV testing does not require the suspect to consent to the test. However, it may be desirable to give the alleged offender at least some basic information around the disease that s/he is going to be tested for (e.g. what is HIV, how is it transmitted, etc.) before performing the test.

The real issue though, is post-test counselling. Post-test counselling is particularly important for the support of persons who test HIV positive. According to national health policy (DoH 2003), post-test counselling should include discussions on:

- Feedback and understanding of results
- If the result is negative:
 - Strategies for risk reduction
 - Possibility of infection in the 'window period'
- If the result is positive:

- Immediate emotional reaction and concerns
- Personal, family and social implications
- Difficulties a patient may foresee and possible coping strategies
- Who the client wants to share the results with, including responsibilities to sexual partners
- Immediate needs and social support
- Follow up supportive counselling
- Follow up medical care

Post-test counselling is normally provided by the health worker who discloses the test result to the patient. In the case of compulsory HIV testing, though, the police official is the 'messenger' of the test result: s/he hands out the sealed envelope to both the victim and the alleged offender. Hence, there will be no post-test counselling, leaving the alleged perpetrator apprehensive and emotional. At the very least s/he should be provided with contact details of organisations that offer support services for people living with HIV/Aids.

With regard to the victim, one may argue that post-test counselling is not necessary because it is not his or her HIV test. However, rape victims could misinterpret the test result of the alleged offender in the belief that the accused's status reflects their own status. It is therefore important to educate the victim about the implications of the 'window period'. And if the test result of the alleged rapist comes back HIV positive, this also requires counselling of the victim. Post-test counselling for victims, explaining the implications of the test result of the accused, is therefore essential.

Conclusion

Compulsory HIV testing was designed as a tool to assist survivors in the aftermath of rape. Regrettably, it seems that it in fact bears more risks than benefits for victims of sexual violence and that its feasibility remains uncertain, to say the least.

The core problem of compulsory HIV testing is its limited utility for rape victims. The provisions are misleading when they suggest that testing rape suspects for HIV can assist victims to make informed medical and lifestyle decisions.

Besides, the procedures jeopardise the victim's safety and security during the application process and

ignore the victim's need for support once the test results are handed to them. The Bill, furthermore, seems to have lost track of its objectives (and of the real problems) when it criminalises rape survivors for malicious applications and unauthorised HIV disclosures.

The successful implementation of the provisions relies on the performance of the SAPS, because the legislation draws heavily on the police. Members of the SAPS will need to provide a number of new services that are not typically associated with investigating crime or with police tasks. It is unclear how the police are expected to cope with these additional tasks without upgrading or reallocating their financial and human resources.

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- ### Endnotes
- 1 Post exposure prophylaxis is a 28-day programme of antiretroviral drugs, which may prevent the infection of HIV if taken within 72 hours of exposure to HIV. Scientific evidence suggests that the medication needs to be taken within 6 hours of exposure to be effective.
 - 2 See sections 30 (4), 31 (5), 33 (1) of the Bill.
 - 3 See Roland et al, Slide 12. The Bill does not make any specific provision for these cases but only refers to testing 'the alleged offender' (s 30 (1) (a) (i) of the Bill).

WELL INTENTIONED BUT MISGUIDED?

Criminalising sex workers' clients

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The Portfolio Committee on Justice and Constitutional Development has inserted a new clause in the Sexual Offences Bill that will criminalise the clients of sex workers, with the specific intent to protect women and children from exploitation. In reality it has the potential to cause real harm to the women it aims to protect. Although it is possible that the Committee hoped to level the playing field 'so that women who sell sex are not the only ones guilty of an offence, but also the men who purchase it' (Gould 2006), sex workers will be most affected because they will now have to protect the clients who are their only source of income.

In May this year Parliament finally passed the Criminal Law (Sexual Offences and Related Matters) Amendment Bill (for more on the bill in general, see the article by Lisa Vetten in this issue). The Sex Worker Education and Advocacy Taskforce (SWEAT) has been actively involved in commenting on the Sexual Offences Bill since its inception, and has made four submissions on the Bill since 2002. The Sexual Offences Bill was tabled in parliament in 2003. At this time there were official public hearings on the Bill, which included the opportunity to make both written and oral submissions (Combrinck 2006).

After this, for almost two years, there was very little work done on the Bill, and when it emerged again in 2006, it was with substantial changes. In September 2006 the clause criminalising the clients of sex workers was inserted in the Bill (Combrinck 2006). The exact wording of the clause is that it is an offence to: 'unlawfully and intentionally engage the services of a person 18 years or older, for financial or other reward, favour or compensation' (Criminal Law Amendment Bill 2003).

It is significant to note that, although the rest of the Bill is based on extensive research, no research was done to inform the inclusion of this section. More importantly, the clause criminalising the clients of sex workers was not subject to public participation as was the rest of the Bill (Strachan 2006). Sex workers who are most affected by the new clause had very little opportunity to have their opinions heard on the matter.

In its preamble, the objective of the Bill is stated as such:

to afford complainants of sexual offences the maximum and least traumatising protection that the law can provide, to introduce measures which seek to enable the relevant organs of state to give full effect to the provisions of this Act and to combat and, ultimately, eradicate the relatively high incidence of sexual offences committed in the Republic... (Criminal Law Amendment Bill 2003).

Inclusion of the provision that criminalises clients of sex workers is not in agreement with the stated aim of the Bill, which is to provide victims of sexual offences with the maximum protection of the law. In addition to this there is already a separate law review process looking at the issues surrounding adult prostitution. The Constitutional Court has described the issues around adult prostitution as complex and in need of 'serious legislative consideration' (Strachan 2006). The insertion of this clause in the Sexual Offences Bill is contrary to the decision by the South African Law Reform Commission to separate adult prostitution from other sexual offences.

Unlikely to protect women

The Portfolio Committee on Justice and Constitutional Development makes the argument that by criminalising the clients of sex workers they are protecting women from exploitation. This is based to some extent on the assumption that if you eliminate the demand for commercial sex then there would be no need for women to supply sex. However, this ignores the important reality that sex workers actively look for clients. The majority of women enter the industry to support their families or ensure their own survival.

A demographic survey of 200 sex workers done by SWEAT in 2005 found that half of the participants indicated that they started doing sex work because they were not able to find another job (through a lack of training or available job opportunities). Overall, 22 per cent of the participants indicated that they do the work because it allows them to earn more money than they could in any other job. The 200 sex workers interviewed were supporting a total of 405 dependents of which 279 were children and 126 were other adults (Fick 2005).

The other argument made by the Committee in support for the insertion of this clause is that they are not really making any changes to the law. According to them clients are already criminalised under common law provisions, and clients are also seen as an accomplice to a crime under the Riotous Assemblies Act of 1956 (Strachan 2006). The reality is that in practice, clients are rarely

arrested. A sex worker had this to say about whether clients are currently being arrested:

I have been working as a sex worker for about 15 years. I have never experienced the police arresting clients. I have heard from other workers that some police look for people having sex in cars and if they find them they charge the client R400 cash.

Marianne, 42, Kenilworth

When sex workers were asked whether they felt clients should be arrested they said:

No, clients should not be criminalised. They are adults and they are deciding to buy a service from us.

Sandra, 33, Hillbrow

I don't think clients should be criminalised... I think that underage sex workers should be protected from clients...

Neo, 38, Carltonville

It is important to note that during 11 years of working with sex workers, SWEAT has never had sex workers express the desire to see clients criminalised. Seeing fewer clients means that sex workers have to work more hours in less safe places to earn the money that they need to survive. When clients are criminalised, the burden of having to protect them falls squarely onto the shoulders of sex workers:

As we all know, this industry is already undercover and clients don't want to be known. If they are criminalised, it will be worse because if we still manage to get some clients we would try our best to protect them from being arrested... The police themselves are the most bad ones and they would become worse if they have to arrest clients too.

Neo, 38, Carltonville

As was stated earlier, most sex workers are working in order to be able to earn enough money to support themselves and their dependants. Criminalising the clients of sex workers would

negatively affect the earnings of sex workers. When there are fewer clients, sex workers are forced to charge lower prices and there is more competition for clients. To make the same amount of money, sex workers would have to see more clients in one day. This could also lead to an increased willingness on the part of sex workers to accept unsafe sex (as clients offer to pay them more for unsafe sex).

It is also reasonable to assume that with the criminalisation of the client the 'good' clients, who are not violent and are willing to pay, leave, as they are afraid of being arrested. There is a corresponding increase in dangerous clients who are potentially violent and who are not concerned about being arrested (Ostergren nd).

If clients are criminalised, most of them will be too scared to come to us and therefore we won't make any money any more.

Marianne, 42, Kenilworth

The nett result of the criminalisation of the client is that the sex work industry would be forced to operate further underground. Sex workers will not just summarily stop working, as this work is often their only source of income. And if the industry is operating more secretly, it makes sex workers harder to reach. This creates particular difficulties for organisations like SWEAT who assist them with human rights infringements and who provide safer sex education and condoms.

Criminalising the client as a strategy to combat trafficking?

The other key argument that is made in favour of this clause is that it would assist in efforts to combat trafficking in human beings. The argument is made that when sex work is tolerated there are higher levels of trafficking. However, the United States Trafficking in Persons Report identifies both Germany and the Netherlands as countries that are dealing well with the problem of trafficking. It is significant to note that both these are countries where sex work is not a crime and the industry is regulated.

Criminalising the client means that clients of sex workers are lost as potential sources of information

about the abuse, exploitation or trafficking of people in the industry. Sex workers who are trapped or exploited have regular contact with clients, and these clients are often the only people sex workers can confide in if they are being kept against their will. If clients themselves were considered criminals they would certainly be very reluctant to come forward to assist these women. Sex workers themselves are often experts at identifying sources of exploitation.

Reflections on the criminalisation of clients in Sweden

The clients of sex workers (not sex workers themselves) have been criminalised in Sweden for a number of years. It is important to note that the Swedish government has not been able to demonstrate an overall decrease in the number of sex workers since the criminalisation of clients. What has happened is that more sex workers in Sweden are working indoors and advertising through the Internet or working from their cell phones.

Sex workers in Sweden who do work on the street have less time to negotiate with clients and therefore also less time to assess whether a client is dangerous. They are highly reluctant to go to the police when clients are abusive, despite the fact that an overall increase in violence against sex workers has been reported in Sweden (Ostergren nd).

Another report on the Swedish method of dealing with sex work reflects on the difficulties of prosecuting clients for buying sex. This report found that problems with producing evidence was one of the main reasons given for dropping criminal charges. It is difficult to prove that there has been an agreement about payment for sexual relations, as well as to give evidence that sexual services have been provided. Police have resorted to filming the acts clients engage in with sex workers in order to collect evidence. But even if police officers catch the sex worker and the client in the act, both parties can still deny that payment was given. In Sweden few charges of buying sexual services ever lead to conviction (Purchasing sexual services report 2004).

Unintended consequences of the clause

In addition to the difficulties mentioned above, the wording of this clause could have some unintended consequences. When one criminalises the exchange of sex between adults for financial reward, favour or compensation, it means that government is starting to intrude on the area of consensual sex between adults.

As Gould asserts: 'in an attempt to protect women from sexual violation the Bill, perhaps unintentionally, also removes the right of women (and men) to choose how sexual transactions can take place between consenting adults' (Gould 2006). This has implications for the large number of people in South Africa who engage in transactional sex (exchanging sex for food or a place to stay). Clause 11 also renders 'any sexual exchange between adults (over the age of 18) for financial or other gain unlawful' (Gould 2006).

Conclusion

It would appear that this clause has been inserted in the Bill in a misguided attempt to protect women from being exploited or trafficked. However, it is time to listen not just to the analysts, but to the voices of the women who will be most affected by this clause, and who know better than anyone what would make their work easier – and what would protect them:

It would improve our work if sex work was decriminalised or if there was a red light zone where we could work in safety. Our lives would also improve if government could instruct the police not to arrest us just because they know our faces.

Samantha, 32, Salt River

It would improve my life if the police could concentrate on catching murderers, rapists and child killers. The police put a lot of energy, money and time into chasing us around the streets...

Marianne, 42, Kenilworth

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Women outside the Wynberg Magistrate's Court protest the way rape survivors are treated by the courts.

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