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Submission to the Parliamentary Portfolio Committee on Justice and Constitutional Development, Parliament of South Africa, on the draft Criminal Law (Sexual Offences) Amendment Bill, 2003, from Amnesty International and Human Rights Watch

Human Rights Watch and Amnesty International welcome the opportunity to comment on the Criminal Law (Sexual Offences) Amendment Bill (Sexual Offences Bill) that is currently before Parliament. We recognise that the draft law has resulted from extensive preparatory work undertaken by the South African Law Commission, non-governmental organizations (NGOs) and the Ministry of Justice. The draft law, along with the development of specialised sexual offences courts and other initiatives, are part of a program of reforms that reflect the commitment of the Government, Parliament, civil society organisations and the country as a whole to improve access to justice and the efficiency of the criminal justice system in its response to rape and other sexual offences. This commitment is particularly necessary in the context of the disturbingly high rates of reported rape and attempted rape of women and children and the enormous suffering experienced by victims as a result of these crimes. The trauma of rape has been increased by the life-threatening possibility of transmission of HIV through sexual assault.

Sexual violence against women and girls is a problem of epidemic proportions in South Africa, including a virtually unprecedented epidemic of child rape. Existing data suggest that 40 percent of rape survivors are girls under eighteen. Although exact numbers are hard to come by, there is evidence that child rape is becoming more common. According to police statistics, the reported incidence of rape and attempted rape among children has increased, even as the incidence among adults has begun to stabilize.[1] Far too many girls have no safe haven from sexual violence: many girls are coerced to have sex and otherwise subjected to sexual harassment and violence by male relatives, boyfriends and schoolteachers or male classmates.

In the context of South Africa's explosive HIV/AIDS epidemic, sexual violence can be a death sentence for too many women and girls. A recent study found that more than 1 in 20 children ages two to fourteen in South Africa are HIV-positive and that most of this infection cannot be attributed to mother-to-child transmission. The study suggested sexual abuse as one of the factors that may contribute to this finding.[2] In light of these

[1] Crime Information Analysis Centre, South African Police Service, *The Reported Serious Crime Situation in South Africa for the Period January - September 2001*, December 2001.
[2] Human Sciences Research Council et al., *South African National HIV Prevalence, Behavioural Risks and Mass Media, Household Survey 2002* (Cape Town: Human Sciences Research Council, December 2002), p. 63.

Amnesty International
International Secretariat
1 Easton Street, London WC1X 0DW, United Kingdom
Tel: Int. Code: 44 (20) 7413 5500. Fax: Int. Code: 44 (20) 7956 1157.
E-Mail: amnestyis@amnesty.org

Human Rights Watch
HIV/AIDS and Human Rights Program
350 Fifth Avenue
New York, NY 10118-3299, USA
Tel: 1-(212) 290-4700, Fax: 1-(212) 736-1300
E-Mail: hrwnyc@hrw.org

circumstances, the commitment to improve the response to rape and other sexual offences is a matter of urgent necessity.

It is noteworthy that the *Preamble* situates the Sexual Offences Bill within the nexus of human rights protected under the Constitution and in terms of international human rights instruments, including the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child which "place obligations on the Republic towards the eradication of violence against women and children." The *Preamble* further states that the "Act is intended 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 fortify the state's commitment to eradicate the pandemic of sexual offences committed in the Republic or elsewhere by its citizens." These aspirations are also reflected in the 15 Guiding Principles listed in Schedule 1 which enjoin all those involved in implementing the law, for instance, to treat complainants in a non-discriminatory manner and with dignity and respect and to inform them of their rights and the procedures within the criminal justice system which affect them. The Sexual Offences Bill, when implemented, could contribute significantly to combating the impunity enjoyed by the majority of the perpetrators of sexual violence and to achieving justice without causing further trauma to survivors.

In its present form the Sexual Offences Bill does contain important reforms which are consistent with developments in international criminal, human rights and humanitarian law. The following comments, which are not exhaustive, are intended to welcome these reforms but also to raise a number of concerns and make several recommendations.

Definition of the offence of rape

We welcome the provisions of the Sexual Offences Bill in Section 2 which expand the definition of rape to include anal as well as vaginal genital penetration, describe victims of the crime in gender-neutral terms and remove the emphasis placed on absence of valid consent by the victim to focus instead on the actions of the perpetrator. The elements of the crime are that the perpetrator must have unlawfully and intentionally committed an act which causes penetration. Unlawfulness involves acts committed under "coercive circumstances" or under "false pretences or by fraudulent means" or against a person who is "incapable in law of appreciating the nature of an act which causes penetration."

We are concerned, however, with two particular aspects of the new definition of rape. First, Section 2 of the Bill limits the definition of rape to penetration by genital organs and creates the separate offences of Sexual Violation and Oral Genital Sexual Violation to cover penetration by objects or by body parts other than genital organs or involving penetration of the mouth. We are concerned that by creating separate offences to cover these crimes, they may consequently be seen by criminal justice officials or the public as lesser crimes. However because they may be as damaging and traumatic as genital rape, we recommend that "sexual violation" and "oral genital sexual violation" as presently defined by the Bill be included within the definition of rape.

Secondly Section 2(4) (c) of the Bill defines rape to include situations where a person "intentionally fails to disclose to that person in respect of whom an act which causes penetration is being committed, that he or she is infected by a life-threatening sexually transmissible infection in circumstances in which there is a significant risk of transmission of such infection to that person." As a practical matter, this provision, read with Section 2(1), is likely to increase women's vulnerability to a charge, largely due to circumstances beyond

their control. In so far as "life-threatening infection" refers to HIV, women are more likely than men to know their HIV status due to testing which is conducted through antenatal clinics. Many HIV-positive women, who were themselves infected by their husbands or partners who acquired HIV outside of the relationship, risk violence or other serious consequences if they reveal their status, or if they insist on condom use or refuse sex. As a result, this provision will likely only further victimise women, who already are suffering disproportionately from the epidemic. To the extent that the Portfolio Committee wishes to ensure that particularly egregious cases of intentional HIV transmission are criminalized, it should note that intentional HIV transmission may in certain circumstances be covered by common law crimes (such as assault or attempted murder). We therefore recommend that this provision be removed from the Sexual Offences Bill.

Evidentiary rules and permissible defences

We welcome the clear exclusion as a defence to a charge of rape the fact of a previous or existing marital or other relationship between the perpetrator and the complainant (Section 2(6)).

Section 16, which provides that courts may not draw an inference "solely on account of (a) the fact that previous consistent statements have not been made, and (b) the length of any delay between the alleged commission of such offence and the reporting thereof," eliminates significant obstacles to proving sexual offences that permitted the court to draw negative inferences about a complainant's credibility where she failed to report the offence at the "first reasonable opportunity." Many sexual assault survivors are impeded from reporting a sexual offence promptly or even accurately by a range of factors, including intimidation and fear, physical distances or costs involved in reaching police stations and medical facilities, incompetent statement-taking by police, poor histories taken by examining doctors, lack of adequate preparation of witnesses for the trial process itself or, in the case of children, lack of access to intermediaries.

We also support Section 18 which addresses a critical concern for survivors of sexual violence by providing that courts must not treat the evidence of a witness in criminal proceedings pending before a court with caution and must not call for corroboration of evidence solely on account of the fact that the witness is the complainant of a sexual offence or a child.

Authority to terminate an investigation

Section 21 makes the National Director of Public Prosecutions or the provincial Director of Public Prosecutions (DPP) as delegated responsible for deciding whether or not an investigation by police into a complaint of a sexual offence should be discontinued. This provision safeguards the rights of complainants in situations where the local investigating officer may not take the complaint seriously or may come under pressure from relatives of the accused person to tell the complainant to withdraw the charge, or the complainant may be directly pressured by others to withdraw the charge. This Section could include provision for a review process where a case may have been wrongly closed. The provision should also encourage formal consultations between the police and the office of the DPP at an earlier stage in the investigation of sexual offences cases.

Vulnerable witnesses and implementation of protective measures

The Sexual Offences Bill imposes duties on prosecutors and court officials to take steps to minimise the possibilities for secondary trauma and the intimidation of complainants, child witnesses and other possible "vulnerable witnesses". The prosecution will be obliged under Section 14 to inform a witness who is to give evidence in criminal proceedings in which a

person is charged with a sexual offence, or if the witness is a child, to inform the child/parent/guardian that s/he may be declared a vulnerable witness and also to inform them of certain protective measures prior to the commencement of their giving evidence. The court must ask the prosecutor, prior to evidence being given, if the witness has been so informed and to ensure that they are so informed if not done, before evidence is given.

In turn the court is obliged under Section 15 to declare as a vulnerable witness a complainant in the criminal proceedings pending before it involving the alleged commission of a sexual offence or a child witness. The court also has the discretion to declare other witnesses to be vulnerable on other possible grounds such as trauma or the possibility of intimidation.

Where a witness has been declared to be vulnerable, the court "must direct" that such witness be protected by one or more of the following measures: giving evidence by means of CCTV/giving evidence through an intermediary/closed court proceedings (but with proper safeguards for fair trial for the accused)/prohibition of the publication of the identity of the complainant/complainant's family/any other measure as appropriate. In the case of a child the court must direct that an intermediary be appointed.

The provisions regarding vulnerable witnesses would help ensure access to justice for complainants by assisting them with presenting evidence with confidence and without fear. We are concerned however that not all magistrates' courts are currently in a position to implement them without additional financial and human resources being made available.

Resource implications

Section 24 of the Bill directs the Minister of Justice and Constitutional Development to "prepare a national policy framework to guide the implementation, enforcement and administration of this Act in order to secure acceptable and uniform treatment of all sexual offence matters." The Guiding Principles instruct that "binding inter-sectoral protocols following an inter-disciplinary approach should be followed" and that all professionals and role-players involved in the management of sexual offences cases "should be properly and continuously trained." (Guiding Principles (m), (n)). Targeted training will be necessary for police, medical staff and justice officials who may be involved in investigating sexual offences, examining victims or prosecuting rape and other related crimes in the context of the provisions of the new law.

We hope that these resource and training requirements will be considered and planned for, so that proposed reforms in the Sexual Offences Bill can be implemented effectively for the benefit of survivors and in the interests of justice. This could be done in conjunction with the preparation by the Minister of Justice and Constitutional Development of a "national policy framework to guide the implementation, enforcement and administration of this Act in order to secure acceptable and uniform treatment of all sexual offence matters." (Section 24).

Deletion of clause relating to medical services for survivors of sexual violence

The final comment which we would like to make on the Sexual Offences Bill concerns a provision which was deleted from the draft law following its consideration by Cabinet in July. We have attached for the information of the Portfolio Committee a copy of a letter which Amnesty International and Human Rights Watch sent to the Minister of Justice and Constitutional Development, Dr Penuell Maduna, on 7 August 2003 on this issue.

The excised clause was intended to oblige the State to provide and bear the cost of the care and medical treatment and counselling for survivors of sexual violence who may have

sustained injuries, psychological harm or been exposed to the risk of sexually transmitted infections as the result of a sexual offence. This provision would inscribe into a law a commitment made by the South African Cabinet in April 2002 to provide anti-retroviral drugs to survivors of sexual violence as part of a comprehensive package of support that included counselling, treatment for sexually transmitted infections and testing for and prevention of HIV transmission as a result of rape.

As argued in the joint letter to the Minister, the deletion of this section will serve to undermine the purpose, as stated in its *Preamble,* of the Sexual Offences Bill. Reassuring survivors that their most immediate and urgent needs and fears will be addressed, including steps to prevent HIV transmission, will encourage them to cooperate in what in many cases is a lengthy and uncertain criminal justice process, beginning with the forensic medical examination and the taking of the history of the assault. As noted by the South African Law Commission, putting into law the guarantee of post-exposure prophylaxis in the Sexual Offences Bill was intended "to encourage victims of violence to approach the system for assistance and to improve the experiences of those victims who choose to enter the system…."

As indicated in Section 25 of the Sexual Offences Bill, implementation of the new law will require the co-operation of a number of government ministries, including the Ministry of Health, in order to achieve or promote the objectives of this Act. Section 25 envisages this co-operation to involve the development of subordinate regulations. We strongly urge the Portfolio Committee, first of all, to consider the issue of the provision of medical services for survivors of sexual violence in relation to achieving the objectives of the proposed law. Secondly, we urge the Portfolio Committee to consider the importance of incorporating into the law positive obligations on the part of the State to provide these medical services.

As South African advocates have noted, it has now become accepted in South African law that the 1996 Constitution, read with international human rights law, imposes certain duties on the South African state to address violence against women, including sexual assault[3]. These duties include enacting appropriate legislation and allocating sufficient state resources to ensure proper implementation of such legislation.[4]

The availability of treatment at the policy level will remain meaningless without measures to ensure its availability and accessibility to all sexual assault survivors on a non-discriminatory basis. Sexual assault survivors cannot exercise their right to treatment if they are not informed of this option and are barred by third parties or by lack of means to access it. Policy documents, directives, and similar guidelines are in general not known or easily accessible to members of the public. The exposition of the nature and extent of state duties in sexual offences legislation serves the important function of informing victims and service providing NGOs of the right to treatment as well as the obligations of state officials. The inclusion of the duties of state agencies or service providers in national legislation, as opposed to instructions/directives/guidelines only, will help ensure that state officials are

[3] See Helene Combrinck, "Positive Duties of State Officials Towards Victims of Sexual Assault," submitted on behalf of the Gender Project, Community Law Centre, University of the Western Cape, as part of the submission to the South African Law Commission Discussion Paper 102, by the Children's Rights Project, Community Law Centre, University of the Western Cape; Department of Forensics and Toxicology, University of Cape Town; Gender, Law & Development Project, Institute of Criminology, University of Cape Town; Gender Project, Community Law Centre, University of the Western Cape; and Women's Legal Centre, March 2002.

[4] Ibid; see also *Minister of Health and Others v. Treatment Action Campaign and Others*, CCT 8/02 (2002); *Government of the Republic of South Africa and others v. Irene Grootboom and others*, CCT 11/00 (2000).

aware of their obligations and that they will be publicly accountable for conforming with them. Inscribing the treatment provision into law will help ensure that South Africa will give meaning to its commitment to ensure the right to the highest attainable standard of health of sexual assault survivors.

We thank you for the opportunity to offer comments on the proposed Sexual Offences Bill and hope that our submission will be of assistance in consideration of this important legislation.

Yours sincerely,

Joanne Csete
Director, HIV/AIDS and Human Rights Program
Human Rights Watch

Jeremy Smith
Acting Director, Africa Program
Amnesty International

Appendix: Copy of letter to the Minister of Justice and Constitutional Development from Amnesty International and Human Rights Watch

Ref.: TG: AFR/53/2003.14

Dr Penuell Maduna
Minister of Justice and Constitutional Development
Private Bag X276
Pretoria 0001
South Africa

Per fax: 00 27 12 321 1708/21 465 2783

07 August 2003

Dear Minister,

We are writing to you on behalf of Amnesty International and Human Rights Watch to express our concern and request information on the recent deletion of a clause related to medical services for survivors of sexual violence in the Criminal Law (Sexual Offences) Amendment Bill, 2003. This clause was intended to oblige the State to provide and bear the cost of the care and medical treatment of survivors of sexual violence who may have sustained injuries, psychological harm or been exposed to the risk of sexually transmitted infections (STIs). It is our understanding that the deletion was made at the request of Cabinet in late July and that the bill was then certified by state law advisors, prior to its presentation to the parliamentary Portfolio Committee on Justice and Constitutional Affairs this week.

We welcome many of the provisions in the draft law which overall should enhance the capacity of the criminal justice system to provide effective remedies to adult and child survivors of rape and other forms of sexual violence. We hope to have an opportunity at a later date to forward comments on the Sexual Offences Bill to the Portfolio Committee. However we believe that the deletion of the section relating to the provision of care and medical treatment for survivors will serve to undermine the purpose, as stated in its Preamble, of the bill. Reassuring survivors that their most immediate and urgent needs and fears will be addressed, including steps to prevent HIV transmission, will encourage them to cooperate in what in many cases is a lengthy and uncertain criminal justice process, beginning with the forensic medical examination and the taking of the history of the assault. As noted by the South African Law Commission, putting into law the guarantee of post-exposure prophylaxis in the Sexual Offences Bill was intended "to encourage victims of violence to approach the system for assistance and to improve the experiences of those victims who choose to enter the system…."[i]

In its April 2002 statement on HIV/AIDS, the South African Cabinet pledged to provide anti-retroviral drugs to survivors of sexual violence as part of a comprehensive package of care that included counselling, treatment for STIs and testing for and prevention of HIV transmission and pregnancy as a result of rape. The originally proposed treatment clause in the draft law would therefore have inscribed into statutory law an obligation arising from a commitment already made by government. In so doing the government would move closer to ensuring that all South Africans are able to enjoy the rights to life, equality and health guaranteed by the South African Constitution and under the international and regional human rights treaties to which South Africa is party.

It is curious that the South African government would make a pledge to guarantee access to anti-retroviral therapy for rape survivors and then move to strike provisions that would codify this pledge and make it meaningful for those who need it. The spokesperson for the Ministry of Justice, Paul Setsetse, is reported in the Sunday Independent on 3 August as explaining that "the amendment [deletion] was effected due to cost implications," and that "the fact that a person must be provided with anti-retrovirals [as post-exposure prophylaxis] immediately (after) they are raped at the nearest state hospital remains. They don't have to have a medical aid. The concern in amending the law was concerns that if government makes this compulsory, then they have to budget for it and people would find that difficult to do. So we don't necessarily legislate it, we make it a principled position."

A "principled position," as referred to by the Ministry's spokesperson, without a concomitant commitment to secure the necessary budget to "achieve the progressive realisation" of the right involved in the policy, is a hollow promise and a false economy.

In relation to another matter, the Constitutional Court recognized that for a public health program to be implemented optimally, it must be made known effectively to all concerned and that "for a public programme such as [in the MTCT case] to meet the constitutional requirements of reasonableness, its contents must be made known appropriately."[ii] Where, as here, the national government has made a commitment to providing post-exposure prophylaxis treatment for rape survivors, it has an obligation to provide information necessary to give meaning to this commitment, including providing information to survivors of sexual violence about its availability.

Many South African victims of sexual violence are poor and do not have the means to pay for treatment. Both Amnesty International and Human Rights Watch have interviewed adult and child survivors in rural and poorer communities and have been struck by the extent to which their impoverished circumstances have constrained their ability to gain access to state health, police and justice infrastructure. The interventions of local non-governmental organizations have helped create a vital bridge to services for many individuals. The policy change announced by the government in April 2002 should in principle overcome a problem of discriminatory access to treatment, those on medical aid schemes or living in certain provinces having had greater access to this treatment. However in practice since April last year, the access for rape survivors to post-exposure prophylaxis treatment against HIV transmission has still been subject to arbitrary factors, including the relative commitment of the different provincial departments of health.

The Ministry and Department of Justice have shown great commitment to combating the widely acknowledged high levels of sexual violence against women and children in South Africa through, for instance, law reform, strengthening the prosecution service and developing specialised sexual offences courts. The epidemic of HIV/AIDS, which has been shown to be disproportionately affecting women and girls, should be given equal commitment and should be addressed by all relevant government departments including that of Justice. The timely provision of an established standard of care and treatment to rape survivors who are at risk of HIV transmission and other STIs, as well as affected by physical and psychological trauma, can only assist with the prosecution of sexual offences by encouraging victims to come forward in the first place.

In conclusion, we would welcome clarification of your ministry's role in and the reasoning behind the decision to remove the treatment provision from the draft Sexual Offences Bill. If the Ministry of Justice has concluded that this provision is not appropriate in a justice bill for whatever reason, we would be grateful to know if another government department has made a concurrent commitment to sponsor a bill incorporating the deleted provision. This matter concerns the government's obligations under both the Constitution and international human rights treaties and relates to a situation of extreme urgency in light of the gravity of the risk to the health and life of women and children.

Yours sincerely,

Joanne Csete
Director HIV/AIDS and Human Rights Program
Human Rights Watch

Jeremy Smith
Acting Director Africa Program
Amnesty International

[i] South African Law Commission, *Report on Sexual Offences*, December 2002, p.4.
[ii] Minister of Health et al v Treatment Action Campaign, Case CCT 8/02.