

AN OVERVIEW OF THE COMBATING OF RAPE BILL (1999)

The Combating of Rape Bill just introduced by the Minister of Justice into Parliament is probably the most eagerly-awaited piece of legislation for women since independence. In this column, Dianne Hubbard of the Legal Assistance Centre gives an opinion of what is significant -- and controversial -- about the bill.

TWELVE REASONS WHY THE BILL IS SO IMPORTANT

1. **It re-defines rape to reflect the reality that men and boys can be raped.** The new definition of rape is completely gender-neutral.
2. **It broadens the definition of rape to include other serious sexual violations.** The new definition covers a range of “sexual acts”, including sexual intercourse, anal intercourse and oral contact with the genitals.
3. **It removes the present emphasis on the victim’s “absence of consent”, replacing it with an examination of the rapist’s use of force or coercion.** A rape will be committed whenever certain “coercive circumstances” are present, regardless of what the rape victim said or did. “Coercive circumstances” include the use of physical force or threats of force, situations where the complainant is being unlawfully detained, and situations where the complainant is unable to make a meaningful decision about a sexual act because of mental or physical disability, intoxication, the influence of drugs or sleep. Also included in the list are various forms of fraud which would deprive the complainant of free choice. The result of this emphasis on the actions of the accused is that rape victims will no longer feel that *they* are the ones who are being put on trial.
4. **It gives greater protection against sexual abuse of children.** Under the existing law, the “age of consent” is 12 for girls, and 7 for boys. Under the new bill, rape is committed whenever a sexual act is committed with a boy or a girl under the age of 13, by someone who is more than three years older. A companion piece of legislation will amend the Combating of Immoral Practices Act to give additional protection to boys and girls under the age of 16, where there is sexual contact with someone more than three years older.
5. **It acknowledges the fact that rapes can occur within marriage.** A marriage, or any other relationship, will not be a defence to a charge of rape.
6. **It provides stiff minimum sentences for rapists.** Depending on the circumstances of the rape, the minimum sentence for a first offence is five, ten or fifteen years. A second offence is punishable by a minimum sentence of 10, 20 or 45 years. The court will have the power to depart from the minimum sentences only where there are substantial and compelling circumstances which would justify more lenient treatment. The minimum sentences will not apply to young offenders under the age of 18.

7. **It provides stiffer bail conditions.** It will ensure that the victim has an opportunity to inform the court of any threats from the accused *before* bail is considered. It also provides that no accused rapist who is released on bail is allowed to have any contact with the complainant.
8. **It protects rape victims from irrelevant questions about their sexual history.** Evidence about the complainant's sexual reputation will not be admissible under any circumstances. Evidence about the complainant's previous sexual conduct or experience with the accused or with any other person will be admissible only on certain limited grounds. For example, the accused will be allowed to lead evidence that pregnancy, semen, disease or injury which is being attributed to the alleged rape actually had its source in another sexual encounter.
9. **It makes the knowing spread of HIV an aggravating factor in the sentencing of rapists.** Where a rapist knew that he or she was infected with HIV at the time of the rape, this will place the rapist in the stiffest sentencing category.
10. **It gives greater protection to the rape victim's privacy and provides stiff penalties for revealing the identity of rape victims in the press.** The protection against publication applies from the time the offence is committed. The bill also provides for automatic closure of the court during a rape trial, unless the complainant requests otherwise.
11. **It provides measures to reduce the trauma of court testimony for child witnesses.** Children who are too young to understand an oath will no longer need to be subjected to extensive questioning about the meaning of "truth" if it is clear that they are capable of giving intelligible testimony. Even more importantly, children under the age of 13 cannot be questioned directly by lawyers or by the accused, but only through the judge or magistrate. The judge or the magistrate will be able to re-phrase or simplify questions if necessary. This will protect child witnesses against unnecessary bullying. It will also help to prevent them from being confused by complicated legal terminology.
12. **It eliminates several archaic evidentiary rules based on the unsupported myth that false charges of rape are common.** Statistics gathered in Namibia and elsewhere in the world show that the incidence of false charges of rape is about the same as for any other crime. So the rule requiring courts to treat the evidence of a complainant in a sexual offence case with special caution is abolished. In addition, courts are forbidden to draw any conclusions simply from the fact that a complainant did not tell anyone else about the rape, or delayed before laying the charge.

FOUR PROVISIONS WHICH SHOULD BE CHANGED

An early draft of the Combating of Rape Bill was widely circulated for comment. But some new provisions were added to the draft at a later stage, without the benefit of public discussion and comment. Four of these provisions in particular weaken what is otherwise a progressive and welcome bill.

1. **The definition of sexual act is too broad.** In addition to vaginal, anal and oral sex, a sexual act includes “any other form of genital stimulation”. The precise meaning of this phrase is not entirely clear. Furthermore, the stiff minimum penalties for rape also apply in the case of these other forms of “genital stimulation”. This has the effect of trivialising the more invasive sexual acts which are intuitively equated with “rape”. Except perhaps in cases involving children, non-penetrative sexual touching should be treated as indecent assault, or at least dealt with outside the context of the minimum sentences for rape.
2. **One aspect of the definition of “coercive circumstances” is too broad and vague.** It will be a “coercive circumstance” where a person engages in a sexual act by means of threats of harm *other than bodily harm* against the complainant or a third person. According to the bill, this can include threats of “extortion”, “public humiliation or disgrace”, or “mental harassment”. So for example, suppose a man says to a woman, “If you do not have sexual intercourse with me, I will tell everyone that you are a prostitute.” If she has intercourse with him, she can then charge him with rape. But shouldn’t she rather take responsibility for telling the man to get lost and then charging him with defamation if he follows through with his threat? This kind of threat should be grounds for a rape charge only where it is unreasonable for the complainant to take any other course of action than to submit – for example, in the case of children or in circumstances where the complainant is unable to summon assistance. Otherwise, it waters down the concept of rape to the point that women are portrayed as being completely helpless to confront any form of social pressure.
3. **The bill will treat it as rape if a perpetrator engages in a sexual act without disclosing to the other party that he she is infected with HIV.** While this action should be (and already is) criminally punishable, should it be defined as “rape”? The theory appears to be that the other party would never have consented to a sexual encounter if he or she had known about the HIV. But this would also probably be true in the case of a failure to disclose infection with syphilis, or even marital status. Furthermore, since “sexual act” is defined to include *any* form of “genital stimulation”, a person who has hidden his or her HIV status could in theory be charged with rape for engaging in a consensual sexual act which cannot possibly transmit the virus.

4. **The bill would allow evidence of previous sexual history or experience which “tends to prove bias or motive to fabricate on the part of the complainant”.** This clause re-enacts the very same false stereotype that other provisions of the act attempt to overcome. Rape can and does occur in the context of marriage, divorce, and past or present dating relationships. So the fact that the parties had a previous sexual relationship does not in itself tell the court anything about the truth of the complainant’s allegations. It is important to ensure that no accused is prevented from introducing relevant evidence that might prove his or her innocence, but this right can be protected without perpetuating unfounded myths about rape.

Overall, the Combating of Rape Bill is an exciting step forward in protecting the human rights of women and children in Namibia against the scourge of sexual violence. With only a bit of tinkering, it could bring Namibia praise for passing one of the most comprehensive and sensible pieces of rape legislation in the world.