



# Engendering the parliamentary agenda: Strategic opportunity or waste of feminist energy?

## Introduction

In 1997, a project committee was appointed to the South African Law Commission (SALC) to undertake an investigation into sexual offences law applicable to children. Ten years later, with the investigation having been expanded to include adults, this process finally concluded in the promulgation of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 (SOA or 'the Act') on 16 December 2007. The result was a disappointment, being first and foremost a clumsily drafted encyclopaedia of sexual offences, rather than the major advance in rape survivors' rights envisaged by women's and children's organisations.

In theory this indifferent outcome should have been prevented. Following South Africa's first democratic elections, the South African women's movement had negotiated a set of mechanisms, or National Gender Machinery (NGM), to institutionalise equality in the norms and procedures of government.<sup>1</sup> The use of quotas by the African National Congress (ANC) in particular had increased the representation of women in both parliament and government which, it was assumed, would result in a state more responsive to women's interests. Women and children's organisations had also mobilised nationally around the draft bill. Yet none of these interventions was sufficient to promote organisations' access to and influence over this particular law reform process.

This monograph explores the ways in which women's and children's organisations sought to engage with parliamentary processes and the extent to which parliament opened up (or closed down) spaces for feminist agendas. This case study is preceded with a description of parliamentary structures forming part of the NGM at the time of the SOA, as well as a brief sketch of the broader political context in parliament. This situates the description that follows of civil society advocacy around the SOA, as well as the responses of parliamentary committees to these efforts.

In compiling this record of organisations' engagement with parliamentary structures, the monograph draws extensively on the correspondence, minutes and reports developed by the National Working Group on Sexual Offences (NWGSO), specifically formed to advocate around the SOA.<sup>2</sup> Because this account reflects the thinking of one individual, who was also an insider, it is inevitably partial and incomplete. There are also very many rich strands to the story of the SOA, not all of which can be dealt with here in the space available.

In addition, NWGSO members were not the only organisations to engage with parliament around the act; other groupings<sup>3</sup> also have their tale to tell – including

<sup>2</sup> It is important to note here that the Tshwaranang Legal Advocacy Centre was a member of the NWGSO. Lisa Vetten is currently employed by Tshwaranang.

<sup>3</sup> Among others these include the Western Cape Consortium on Violence against Women, the Rape Action Group (RAG), assorted individuals and organisations, and religious groupings such as Doctors for Life.

<sup>1</sup> Hassim, 2003

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the parliamentarians concerned. In the absence of these voices, the monograph relies extensively on minutes of committee meetings compiled by the Parliamentary Monitoring Group (PMG).

### **Parliament's institutional mechanisms for the promotion of gender equity**

Initially the key structures responsible for pursuing the promotion of gender equity in parliament comprised the Joint Monitoring Committee on the Improvement of the Quality of Life and Status of Women (JMC), the Women's Empowerment Unit (WEU) and the Women's Caucus. In 2005 the Women's Parliament was introduced. Later, following the 2009 elections, the JMC was disbanded and replaced with the Portfolio Committee on Women, Children and Disabilities in the National Assembly and the Select Committee on Women, Children and Disabilities in the National Council of Provinces (NCOP).

#### **Women's Empowerment Unit and Women's Caucus**

In the post-1994 period the Speaker's Forum<sup>4</sup> established the WEU to define and address obstacles that impacted upon women's ability to participate in the lawmaking process. For a short period of time the WEU was also involved in the training of MPs. The Parliamentary Women's Group (PWG) was set up in 1994 to work with the WEU in building the capacity of women MPs to craft gender-equitable legislation and to drive the kind of institutional transformation required to make parliament a gender-sensitive environment.

In 1997 it was decided that the PWG would focus only on issues of internal transformation while the JMC would take responsibility for legislative reform and the monitoring of government. It was envisaged that the PWG would both create a platform for women to engage across party political lines, as well as support the work of the JMC. However, the work of the PWG never really got off the ground due to the lack of clarity around its role and the fact that it had virtually no resources at its disposal. Both the WEU and the PWG soon ceased to have a presence and gradually disappeared.

In 2007, as part of attempts to rejuvenate the PWG, a proposal was made that the multi-party Women's Caucus ('the Caucus') be constituted as a fully-fledged

parliamentary committee with a budget and human resources to support its work. The Caucus was launched as a parliamentary committee on 18 March 2008 with the following functions:

- Promoting the discussion of women's issues in parliament;
- Introducing a women's perspective and focus in parliamentary activities, including the programming of debates;
- Engaging in developmental and empowerment issues with women in political structures outside parliament and women MPs internationally; and
- Considering any other matter within its mandate referred to it by either house of parliament.

Notably, despite having become a full committee, the Caucus still does not have the same kind of resources at its disposal as other parliamentary committees. Unlike other committees, it has not been allocated a committee secretary or a researcher.

#### **The Joint Monitoring Committee on the Improvement of the Quality of Life and Status of Women**

The JMC was established in terms of the Joint Rules 128–32 of the South African Parliament. Its mandate was to monitor and evaluate progress towards improving the quality of life and status of women in South Africa, specifically in relation to government's commitments to the Beijing Platform for Action (BPFA), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and any other international instruments.

The mandate of the JMC was multi-sectional, covering all national departments and organs of state. The JMC was also expected to monitor legislation for its potential impact on women's lives. Because the Committee did not have a direct role to play in the passing of bills, it was meant to engage with portfolio and select committees on any issues of concern in a bill. As part of its monitoring role, it could also engage with departments on service delivery issues from a gender perspective and it had the authority to peruse departmental reports in terms of their impact on gender relations in society.

Under the leadership of its first chairperson, Pregs Govender, the JMC initially enjoyed some considerable

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<sup>4</sup> This forum is comprised of speakers from the national and provincial legislatures.

success,<sup>5</sup> with the role they played in the finalisation of the Domestic Violence Act of 1998 providing but one example of their effectiveness.

In 1997, following a review of progress in areas the committee had designated as priorities, the JMC identified domestic violence as an issue requiring 'urgent' attention and argued in their annual report that a bill had to be tabled in 1998. By early 1998, the South African Law Commission's (SALC's) project committee on domestic violence had prepared a discussion paper and draft legislation. However, for legislation to be considered during the 1998 parliamentary process, it would have needed to be tabled by June at the latest. When discussions with the SALC made it clear that the bill would not be ready by then, the then chair of the JMC devised a strategy to push the bill through parliament before the end of session. With the intervention of the then minister of justice and the then chair of the PC on Justice, the bill was fast-tracked for discussion in parliament by cutting out the process of public input typically following the release of a SALC discussion paper.<sup>6</sup>

At this point tensions in the SALC surfaced. Judge Olivier, Chairperson of the SALC, and Jeremy Gauntlet, a commissioner, rejected the domestic violence project committee's report and draft bill and drew up a minority report which was sent to parliament instead. Infuriated by this dismissal of their work, the SALC Project Committee (which included feminist lawyers active in the field of domestic violence) and the JMC lobbied intensively behind the scenes, with the result that the chair of the PC on Justice demanded to see the majority report.

Ultimately it was the project committee's bill that appeared before parliament and which formed the basis for the legislation eventually enacted in 1998. Thus the JMC's influence was such at the time that it was able to prioritise the legislation and head off an attempt to replace a feminist-influenced piece of legislation with something far more conservative. The result was a law widely regarded as one of the more progressive examples of such legislation internationally.<sup>7</sup>

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in the process.<sup>8</sup> It also shaped the Maintenance Act (99 of 1998), the Skills Development Act (97 of 1998), and the Employment Equity Act (55 of 1998) and was integral in ensuring that a sexual harassment code was incorporated into the Labour Relations Act (97 of 1998).

The JMC also ensured that the Job Summit targeted employment creation for women and regularly engaged with the Finance Ministry on the need to engender the country's macroeconomic policy and national budget. The Women's Budget initiative was also the brainchild of Govender who worked closely with IDASA and Community Agency for Social Enquiry (CASE) to produce the first Women's Budget publications.

However, in 2002, Govender resigned as chair of the JMC, as well as as a MP. For a brief period the JMC was chaired by MP Lulu Xingwana, followed by MP Storey Morutoa after Xingwana was appointed to cabinet. By 2004 the JMC was described as 'practically dysfunctional' and 'to have lost momentum'.<sup>9</sup> Even in those instances

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5 Gouws, 2006

6 Meintjes, 2003

7 Combrink, 2005

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8 Gouws, 2004

9 Gouws, 2006

where it did embark on worthy initiatives, the lack of follow-up resulted in very little impact.

In 2006, for example, the JMC visited KwaZulu-Natal, the Eastern Cape and Gauteng to ask women about their experiences of the implementation of the Domestic Violence and Maintenance acts. It also participated in parliament's review of the Prevention of Unfair Discrimination and Promotion of Equality Act (4 of 2000). While these initiatives produced important information in terms of South African women's lived realities, the information was not used to design an effective intervention strategy that was acted upon. In May 2009, the JMC was accused of having accomplished very little, of having no strategic vision regarding what it had wanted to achieve and of having contributed little to the transformation of women's lives.<sup>10</sup>

It was not only a lack of leadership that contributed to the decline of the JMC; administrative factors also served to impede its smooth running. Because the JMC was a joint committee, with members from both the National Assembly and the NCOP, it experienced great difficulty in scheduling meetings that accommodated the activities and programmes of both houses. A report aimed at identifying some of the factors hampering the work of the JMC noted that National Assembly was finding it difficult to schedule JMC meetings because 'the JMC overlaps with all Portfolio Committees and cannot easily be accommodated in any of the groups of committees as identified for scheduling purposes'.<sup>11</sup>

This wording is indicative of the inferior status of the JMC and the priority accorded to gender issues. Because the JMC 'overlapped' with other committees, as opposed to other committees overlapping with the JMC, other committees were accorded first preference in terms of scheduling priorities.

Within the NCOP context, the parliamentary programme is structured in such a way that the NCOP component of the JMC was often required to be in the provinces on Fridays, the day allocated to JMC meetings. This served as a further administrative impediment in the scheduling of JMC meetings. There have also been instances in the past where one or both houses convened on Friday mornings. For example, in 2003 a total of 18 meetings scheduled for Fridays could not take place for this reason. Furthermore, the JMC should have been

able to meet at fairly short notice if, in the process of monitoring bills, they identified issues of concern. This was not possible in practice.

The following table reflects the total number of meetings held by the JMC from 2000–06.<sup>12</sup>

Year	Number of meetings held
2000	16
2001	27
2002	10
2003	12
2004	1
2005	18
2006	12

As the table illustrates, the JMC met once in 2004, which clearly indicates that no work was done in that year. In 2006 the JMC met 12 times, amounting to an average of about 3 meetings a term. Considering the scope of the mandate of the JMC, this was clearly insufficient for its purposes. A JMC report produced in 2004 noted that in addition to the difficulty in finding days to conduct meetings, the committee had experienced problems with poor attendance at meetings and often had insufficient representation to achieve a quorum.

### The Women's Parliament

The Women's Parliament is one of a number of sectoral parliaments (including the Youth Parliament and People's Assembly) created to provide opportunities for public participation in legislative processes. These have become annual events since 2005. Potentially a powerful tool for parliamentary oversight, the sectoral parliaments have been hamstrung by a number of problems, not least of which being that they are not institutionalised into the work of Parliament. Treated as annual, unconnected parliamentary 'events', no linkage is made to the previous year's event and no report provided on progress made during the year.

The following factors would need to be attended to to institutionalise the Women's Parliament so that it can act as an effective oversight tool:

- **Reconceptualising the sectoral parliaments** so that they are an integral part of the work of parliament by being inextricably linked to the work of the

<sup>10</sup> Van der Westhuizen, 2009

<sup>11</sup> Hahndiek, 2004

<sup>12</sup> Sourced from Committee Section records.

committees. All resolutions adopted and decisions taken would therefore need to be subsumed within the work of committees. A proposed name change is Sub-Plenaries on Women, Youth etc;

- ❑ **Developing a mechanism for dealing with matters which arise** and referring them to the relevant committees. In order to facilitate effective oversight, these issues would need to be incorporated into committee programmes;
- ❑ **Developing monitoring and tracking mechanisms** to ensure that matters which arise are taken up and adequately dealt with by committees and put into effect by government departments and agencies;
- ❑ **Developing a system for reporting back on progress made** so that committees are able to collate information and measure advancement;
- ❑ **Developing reports** on progress made on a year-to-year basis which are then discussed at the pursuant sub-plenary; and
- ❑ **Evaluating**, on a periodic basis, the efficacy and the impact of the sectoral parliaments.

A number of other critical challenges in relation to the Women's Parliament need to be resolved as a matter of priority. Currently, the process of developing thematic areas of focus takes place on a year-to-year basis with no medium to long-term planning process in place. While the advantage of this process is that the themes are

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informed by what is currently topical and relevant, the disadvantage is that there is no long-term vision for the project, no continuity between areas of focus from year to year and that each Women's Parliament exists as a completely separate event.

As mentioned previously, no provision has been made for reporting back on progress made in addressing issues raised at the previous year's parliament and there is no synergy or logical flow from one event to the next. Reports emanating from the Women's Parliament are often not tabled at all, or tabled almost a year after the event. At the time of writing the evaluation of the Women's Parliament conducted by the Parliamentary Research Unit had not been used to assess how best to institutionalise the Women's Parliament and ensure that it is effective and worth the costs incurred.

#### **The parliamentary context: 2002–09**

Govender's departure not only marked the decline of the JMC, but also coincided with parliament's increasing loss of credibility in the public's eyes. Her challenging of government's denialist stance on HIV/AIDS through the hosting of parliamentary public hearings to enquire into the extent to which AIDS was affecting South African women began a political fall from grace that eventually culminated in her resignation from parliament.<sup>13</sup> Other issues such as the arms deal, 'Travelgate' and the dissolution of the Directorate of Special Operations (or the Scorpions), further contributed to parliament increasingly being depicted as a rubber stamp of the executive and/or the ruling party.<sup>14</sup>

Over and above the questions of ethical conduct raised by these issues, parliament also faced significant challenges in linking with the electorate, according to the Independent Panel appointed to assess parliament. The panel, which carried out its mandate between 2006 and 2008, concluded that South Africa's party-list electoral system tended to promote MPs' loyalties to their political parties, rather than to their constituencies. This diminished MPs' accountability and responsiveness to the electorate and weakened public participation. The panel highlighted too that the power of political parties to remove MPs discouraged the expression of individual views in favour of party political views.<sup>15</sup> Finally, they noted the difficulties they had experienced

<sup>13</sup> Govender, 2007

<sup>14</sup> Parliament of the Republic of South Africa, 2009

<sup>15</sup> Ibid: 8

in meeting with representatives of the executive branch of government. This unresponsiveness, they pointed out, may encourage perceptions that the executive is dismissive of parliamentary processes.<sup>16</sup>

It was against this backdrop of under-resourced, weak gender structures, located within a parliamentary context more responsive to party-political interests than those of the electorate, that the Sexual Offences Bill was negotiated.

### What the Sexual Offences Bill proposed and what organisations wanted

The SALC's investigation into the procedural and substantive aspects of sexual offences legislation concluded in December 2002 with the publication of a final report which contained a proposed bill, as well as non-legislative recommendations. Bill B50-2003 was then published in the *Government Gazette* No. 25282 on 30 July 2003.

The SALC bill was the creation of a project committee which had not only included representatives from both women and children's organisations with a track record in dealing with sexual violence, but had also followed a highly participatory process of consultation. However, any lingering illusions organisations may still have harboured around their continued ability to influence legislative reform were dispelled once parliamentary deliberations around the bill began. From then onwards it became clear that the key sites of struggle would be around the content of the bill, as well as the scope for influencing the law reform process. Somewhat later, a third site of struggle emerged around the length of time being taken to finalise the legislation.

It is beyond the scope of this monograph to provide a detailed exegesis of the criminal justice system's very many failings in relation to sexual violence.<sup>17</sup> However, briefly these include:

- The under-reporting of such crimes. While many factors give rise to under-reporting, the contribution of the criminal justice system to this phenomenon includes victims' fear of retaliation or intimidation by the abuser, especially when combined with a lack of confidence that the legal process will result in a conviction; fear of legal processes, including

experiencing rudeness and poor treatment by the police; and fear of having to relive the trauma in court and during the investigation;<sup>18</sup>

- The attrition of sexual offences cases through the criminal justice system. Research tracking the outcomes of a sample of 2 068 rape cases reported in Gauteng found 50,5% of cases to have resulted in an arrest, 17,3% to have led to a trial and a scant 4,1% to have resulted in a conviction of rape;<sup>19</sup>
- The prejudicial and discriminatory nature of sexual offences law (manifested in how such violence was defined<sup>20</sup>), the rules of evidence applied to sexual offences matters<sup>21</sup> and the frequently hostile nature of adversarial trial processes (leading many survivors to feel that they, rather than the accused, were on trial); and
- Victim-blaming or secondary victimisation due to the fact that the law both reflects and shapes society's thinking and attitudes. Such blaming – and even indifference – finds expression in the unhelpful attitudes of those who attend to victims of sexual offences and has been shown to significantly aggravate their psychological distress.<sup>22</sup>

These adverse psychological consequences should not to be underestimated because while all victims of crime are affected by their experiences, long-lasting and destructive symptoms are particularly likely among survivors of sexual offences. In comparison to non-victimised women, rape survivors are six times more likely to develop Post-Traumatic Stress Disorder (PTSD) at some point in their lives and also constitute the single largest group suffering from PTSD.

In fact, of all the traumatic stressors studied to date (including natural disasters like earthquakes, tsunamis and hurricanes), it is sexual violence that most strongly predicts the likelihood of victims subsequently developing PTSD.<sup>23</sup> These findings are corroborated by South African research. Drawing on nationally-representative data,

<sup>16</sup> Ibid: 12

<sup>17</sup> See Artz and Smythe (2008) for a more detailed discussion of the deficiencies in the criminal law's response to sexual offences.

<sup>18</sup> Jewkes et al, 2002

<sup>19</sup> Vetten et al, 2008

<sup>20</sup> Absence of consent is one element of the crime of rape which ensures that the conduct of the victim comes under scrutiny. This makes rape the only crime where the victim bears some of the burden of proof.

<sup>21</sup> The best-known example is the cautionary rule applicable to victims of sexual offences. This rule obliged judicial officers to treat rape complainants' evidence with caution and invited them to speculate about possible reasons for the falsity of rape allegations. The existence of this rule ensured that survivors of sexual offences were the only crime victims to have been treated as inherently deceitful.

<sup>22</sup> Campbell et al, 1999

<sup>23</sup> Astbury, 2006

But it was not only the content of Bill B50-2003 that caused concern; it was also the fact that one day's notice was given of the PC on Justice's intention to hold that all-important public hearing which occurs only once in the lifecycle of a law's finalisation. Indications of further exclusion were also evident.

the South African Stress and Health (SASH) study found rape to have the strongest association with PTSD among women. Among men, the trauma most predictive of PTSD was an experience of political torture<sup>24</sup> – a finding that illustrates how akin in effect rape is to torture.

In various ways the SALC bill had largely attempted to address these concerns. However, Bill B50-2003 presented to the PC on Justice for discussion was different to that drafted by the SALC, cabinet having either altered, or removed altogether, certain key provisions, such as:

- Clauses legislating medical care, treatment and counselling to all survivors who sustained physical, psychological or other injuries as a result of the sexual offence. The clause was also worded in such a way as to include victims' family members. All these services were to be provided at state expense;
- A range of modest measures intended to protect both adult and child victims from the excesses of the adversarial trial process (including the designation

of such victims, under particular circumstances, as 'vulnerable witnesses'). According to cabinet both this and the previous provision were too costly to the government;<sup>25</sup> and

- The reinsertion of consent as an element of the definition of rape and the removal of the notion of 'coercive circumstances'.

These changes were greeted with dismay as they effectively gutted the SALC bill of its most transformative and victim-centred elements.

But it was not only the content of Bill B50-2003 that caused concern; it was also the fact that one day's notice was given of the PC on Justice's intention to hold that all-important public hearing which occurs only once in the lifecycle of a law's finalisation. Indications of further exclusion in future were also evident. The SALC bill had contained provisions obligating the minister of justice to develop a national policy framework guiding the implementation, enforcement and administration of the proposed bill.

These had also included the requirement that the minister consult with the public and non-governmental organisations (NGOs), along with all organs of the state, in developing this framework. This had been replaced with a provision giving the minister the responsibility of implementing the legislation. If NGOs' involvement was not legislated, it would be left dependent upon the magnanimity of the government departments concerned.

### **Civil society advocacy: the example of the national working group on sexual offences**

During this first set of deliberations around Bill B50-2003, 128 written submissions were made to the PC on Justice.<sup>26</sup> Sixteen presenters also made oral submissions to the committee from 16–17 September. During these two days of public hearings, a number of organisations attempted to oppose the excision from Bill B50-2003 of those measures directly intended to benefit victims, including the reintroduction of consent into the definition. (The first of many efforts to raise the age of consent was also made during these hearings.) But when parliament closed for the 2004 elections, it was clear that these representations had been largely ignored.

Many organisations, especially outside the Western

24 Kaminer et al, 2008

25 PMG minutes, 6 August 2003

26 PMG minutes, 10 November 2006

Cape, had not been able to participate in the 2003 public hearings. There was also great concern about the direction the PC on Justice's deliberations had taken. Following a meeting between Childline and the Centre for the Study of Violence and Reconciliation (CSV), it was decided to convene a national meeting to discuss advocacy around the bill.

On 6 May 2004, representatives of nine organisations met and formed the National Civil Society Coalition.<sup>27</sup> This grouping eventually numbered 26 organisations spanning the women's, children's and HIV/AIDS sectors. Advocacy around the bill focused on three issues: the content of the bill; the lack of participation in the legislative process; and the time taken to finalise the bill.

### **Communicating with the PC on Justice and the Department of Justice and Constitutional Development (DoJ&CD)**

On 17 May 2004, the NWGSO wrote to the new Justice PC requesting that public hearings be held on the bill. MP Delport of the Democratic Alliance (DA) responded by stating his support for further public hearings and undertaking to raise this with the Justice PC.

In August the CSV wrote to Brigitte Mabandla, the Minister of Justice and Constitutional Development, while Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN) and Childline wrote to her in September. Both sets of letters offered to meet with the minister around the bill. No response was received to the first offer while the second was politely declined and the authors referred to the PC on Justice as the appropriate arena for such representations.

In August a letter was written to the new chair of the PC on Justice, Fatima Chohan,<sup>28</sup> asking about the process of redrafting the bill, as well as the scope for making submissions. The response confirmed that it was indeed being revised and that submissions would be welcomed by the PC on Justice once the bill returned to parliament.

As 2004 drew to an end and 2005 marched on, organisations were still no clearer about the content or status of the bill, so they turned to more active engagement with other stakeholders, as well as the media. Finding parliament to be an invited space to which they could not gain admission, they began inventing spaces in which to articulate their demands.

<sup>27</sup> This was the name initially assigned to the NWGSO.

<sup>28</sup> The former chair, Advocate Johnny de Lange, became the Deputy Minister of Justice following the 2004 elections.

### **Mini-conferences and press releases**

In 2004, coinciding with National Women's Day on 9 August, People Opposing Women's Abuse (POWA) coordinated a Sexual Offences Bill Awareness (SOBA) week. This included a mini-conference organised by the Centre for Applied Legal Studies (CALS) and the CSV around the Sexual Offences Bill.

A second mini-conference took place in August 2005 entitled 'Creating Sexual Offences Legislation and Policy which Promotes the Well-being of Victims/Survivors and Manages Sex Offenders'. In the run-up to the Conference a press release was issued highlighting the stagnation of the bill since the 2004 elections. The length of time being taken by the bill was widely-covered in the media.

### **'Justice Denied!' campaign**

Three months later, on 16 November 2005, Rape Crisis Cape Town Trust (RCCTT) and its partners organised a demonstration outside parliament to demand that the bill be made a priority. At the same time a memorandum to this effect was handed over to a DoJ&CD representative. The need to prioritise the draft legislation was reiterated the following day during a workshop on the bill.

### **'Get on the Bus and Stop Violence against Women and Children' campaign**

On 8 March 2006, the 'Get on the Bus and Stop Violence against Women and Children' campaign was launched in Johannesburg. Coordinated by the CSV and supported by 26 organisations, the Campaign had three aims:

- Promoting communities' awareness of women's rights contained in key pieces of legislation such as the Domestic Violence Act, the Recognition of Customary Marriages Act and the Firearms Control Act;
- Collecting signatures petitioning both parliament and the DoJ&CD to consult with civil society around the finalisation and enactment of the Sexual Offences Bill; and
- Taking women and children's voices to parliament by recording their concerns and experiences of violence.

Staffed by three volunteers from the organisations Lifeline, RCCTT and the Gender Advocacy Programme (GAP), the bus travelled through each of South Africa's nine provinces, stopping along the way to distribute pamphlets and other materials to communities, as well as run workshops and information sessions. On 10 April



2006 the bus ended its journey outside parliament with a demonstration by organisations. A memorandum was submitted to both Mrs Morutoa, the then chair of the JMC, and a representative of the DoJ&CD. In addition, the over 2 000 signatures gathered calling for the public release of the Sexual Offences Bill, as well as the book containing people's thoughts about violence against women, were handed over to the chair of the JMC.

Indeed, it was so changed that the bill had been referred back to cabinet. As Fatima Chohan, the new Chair of the PC on Justice noted, this represented a departure from the procedure parliament normally followed in drafting bills.

The memorandum requested the DoJ&CD to provide, in writing and by May 10, the dates by when they would release the Sexual Offences Bill for public comment; the time frames allocated towards public consultation and discussion of the bill; and the date by when the bill was to be finalised. No response to the memorandum was received, but on 10 May 2006 the PC on Justice issued a press release stating that the redrafted bill was now once again back with the committee for further processing and finalisation. Interested parties were invited to make written submissions around the bill to the committee.

### Participation and submissions

With the bill once more on the table, energies were again put into preparing and making submissions. This third version of the bill (subsequently tagged Bill B50B-2003) was considerably altered and included an entirely new

section allowing for the compulsory testing of alleged rapists for HIV/AIDS<sup>29</sup>, as well as a chapter establishing a national register for sex offenders. Indeed, it was so changed that it had been referred back to cabinet.

As Fatima Chohan, the new Chair of the PC on Justice noted, this represented a departure from the procedure parliament normally followed in drafting bills.<sup>30</sup> It was argued that further public hearings should take place. The chair however, would only accept written submissions.

In July 2006, to encourage the submissions process, the NWGSO developed 12 fact sheets around the bill (including one on making a submission). Intended for media representatives, organisations and any other members of the public, the fact sheets provided a brief summary of those problematic sections of the bill and set out recommendations for how the bill could be revised. Between 20 July and 19 August a representative of Childline conducted workshops in all nine provinces around the bill, assisted in some instances by CALS, the Thohoyandou Victim Empowerment Programme (TVEP) and Tshwaranang. At each workshop the fact sheets were distributed and organisations were encouraged to participate in the submissions process.

To track the substance of the deliberations, representatives of organisations based in Cape Town sat in the meetings of the PC on Justice and then provided short email reports to others on the daily discussions. If an issue came up on which the committee sought further answers, an organisation with the requisite knowledge would attempt to respond via a written submission. Ultimately, a further 59 submissions were made to the PC on Justice.<sup>31</sup> But as those who witnessed the deliberations rapidly realised, many were being disregarded, with minutes of the meetings suggesting as much.

On 19 June 2006 the chair stated that only those submissions which dealt with the most recent version of the bill would be considered.<sup>32</sup> Organisations responded via the media and on 21 June the chair said that 'she wished to make it clear that it was definitely not the case that NGOs and civil society had been marginalised' during the redrafting process. But she was adamant that the committee would not consider issues 'already laid to

29 A separate and different project committee of the SALC investigated the compulsory testing of sexual offenders for HIV, at the request of the Justice PC (project 85). The report on their findings was completed in November 2000 and the Compulsory HIV Testing of Alleged Sexual Offenders Bill (B10-2003) was introduced into parliament in February 2003.

30 PMG minutes, 19 June 2006

31 PMG minutes, 10 November 2006

32 PMG minutes, 19 June 2006

rest'.<sup>33</sup> Later, in August, MP Camerer noted that the PC on Justice had received a number of new submissions and asked if a summary of these would be provided to committee members. The chair replied that the new submissions had not raised many new issues and thus no summary was required.<sup>34</sup>

In the midst of this, Doctors for Life successfully brought an application challenging the constitutional validity of certain bills.<sup>35</sup> Of key interest was their argument around the constitutional obligation upon the state to involve the public in law-making processes. In this particular matter, two of the bills under dispute had generated substantial public interest and requests for public hearings.

In response the NCOP decided to hold hearings and advised interested groups of the fact. The bills were also of the sort that warranted public hearings being held. However, due to insufficient time, the majority of provinces did not conduct the hearings and nor did the NCOP, choosing to go ahead with enacting the legislation anyway. On this basis the Constitutional Court concluded that the NCOP did not comply with its constitutional obligation to facilitate public involvement.<sup>36</sup>

The NWGSO seriously contemplated a similar application and Tshwaranang sought legal advice on the matter. The senior counsel consulted did not think that particular application would succeed. Attenuated and parsimonious as the process was, it nonetheless amounted to comparatively more public involvement around this bill than for that in the Doctors for Life matter.

### **Chapter 9 institutions: the Commission for Gender Equality (CGE) and the South African Human Rights Commission (SAHRC)**

The CGE was attentive to the tightly controlled nature of access to the JPC on Justice and proposed their own public hearings on the bill in five provinces.<sup>37</sup> These called for oral submissions on the compulsory testing of alleged sexual offenders for HIV; expert witness testimony; and the relevance and admissibility of evidence around the psychosocial impact of rape upon survivors, as well as

their previous sexual history, among other things. At least 24 organisations participated in this process, with their comments included in the CGE submission handed out by the PC on Justice on 5 September.<sup>38</sup>

Another opportunity to advocate around the need for comprehensive services presented itself in early 2007 when the SAHRC conducted a public inquiry into the right to have access to health care services and called for submissions in this regard. The NWGSO compiled a report detailing the challenges confronting adult and child survivors of sexual violence seeking healthcare in the aftermath of a sexual assault.

It was noted that the SALC had recommended that the state provide psychosocial support and healthcare to victims of sexual offences but that the DoJ&CD had rejected this recommendation. The SAHRC was asked to consider requesting reasons from the DoJ&CD for refusing to legislate the provision of psychosocial and medical care to victims/survivors of sexual offences. But while the submission generated media interest, the SAHRC only released its final report in 2009 when the bill had already become law.

### **The retagging of the bill**

Legislation is of two types and, depending on its purpose, will fall under either section 75 or 76 of the constitution. Bills tagged under section 75 of the constitution are chiefly decided upon by the National Assembly, while those with provincial implications are section 76 bills and the responsibility of the NCOP. An attempt was made to force greater public participation around the bill by exploiting this difference.

During its deliberations on the bill, the PC on Justice decided to insert a clause criminalising the behaviour of those who 'intentionally engage the services of a person 18 years or older for financial or other reward, favour or compensation'. The Sex Worker Education and Advocacy Taskforce (SWEAT) was understandably concerned by this move, particularly because it pre-empted a separate SALC process examining adult commercial sex work. In conjunction with the Women's Legal Centre, they wrote to the speaker of the National Assembly stating that the bill had been incorrectly tagged. Had the argument succeeded, the bill would have been forced back to the NCOP and the process of deliberations reopened.<sup>39</sup>

33 PMG minutes, 21 June 2006

34 PMG minutes, 10 August 2006

35 These included the Sterilisation Amendment Bill, the Traditional Health Practitioner's Bill, the Choice on the Termination of Pregnancy Amendment Bill, and the Dental Technician's Amendment Bill.

36 *Doctors for Life International v Speaker of the National Assembly and Others* CCT 12/05.

37 According to the invitation these were Gauteng, KwaZulu-Natal, Limpopo, Eastern Cape and the North West Province.

38 PMG minutes, 5 September 2006

39 Artz and Smythe, 2008

Parliament's legal advisers initially agreed with this argument. The tagging dispute led the National Assembly to reject the bill and refer it back to the PC on Justice for consultation with parliament's Joint Tagging Committee.<sup>40</sup> By May 2007 it was reported that the Joint Tagging Mechanism had confirmed the bill as a section 75 bill. This led the PC on Justice to unanimously adopt the bill and refer it to the National Assembly.<sup>41</sup>

### Last days

Four months later, in September 2007, the bill made its appearance in the NCOP's Security and Constitutional Affairs Committee.<sup>42</sup> The Consortium on Violence Against Women made a last-ditch attempt to persuade the NCOP to reconsider aspects of the bill in relation to people with disabilities generally (and not only those with mental disabilities); particular rules of evidence; making legal representation available to victims; and providing victims with psychological and medical care in addition to HIV post-exposure prophylaxis (PEP).<sup>43</sup> These submissions did not succeed either.

In its final form the act consisted of seven chapters. The first set out the objects of the SOA while the next three introduced new crimes and codified crimes previously defined under the common law. A fifth chapter legislated the provision of PEP to rape survivors and also set out the procedures to be followed for the compulsory testing of alleged rapists for HIV. Chapter six dealt with the national register for sex offenders, while the final chapter comprised a miscellany of provisions applicable to defences and sentencing, the establishment of a National Policy Framework (NPF) and transitional provisions around trafficking (among others).

The NWGSO and others had fought a persistent and determined battle and, as the record of deliberations show, did succeed in exerting some pressure on the PC on Justice. Some organisations' recommendations had even made it into the bill. For instance, there was a liking for a grammatical alteration proposed by the Community Law Centre<sup>44</sup>, as well as the SAHRC's recommendation that the bill refer to 'people with mental disabilities', rather than the 'mentally disabled'.<sup>45</sup>

On a more substantive level, even though the

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element of consent remained in the definition, the notion of coercive circumstances had found its way back into the SOA. A clause legislating the provision of PEP was also contained in the act – although this was a sop at best which fell far short of the comprehensive care and treatment originally envisaged. Given that Cabinet had already taken the decision to make such drugs available to rape survivors in April 2002, all this provision achieved was to elevate existing health policy into law.

The next section, which scrutinises minutes of the PC on Justice's deliberations around the bill, begins to provide some insight into how the content of the SOA was decided.

### Deliberating the Sexual Offences Bill

A review of the PMG minutes suggests that participation in and influence over the law reform process was derived from at least four sources: the SALC; government departments and the DoJ&CD in particular; civil society groupings; and parliament – mostly in the form of the PC on Justice. Other parliamentary committees<sup>46</sup> showed a

40 PMG minutes 16 March 2007

41 PMG minutes, 18 May 2007

42 PMG minutes, 12 September 2007

43 PMG minutes, 30 October 2007

44 PMG Minutes, 20 October 2006

45 PMG Minutes, 10 October 2006

46 On 16 June 1999, Joan van Niekerk, the project leader of the SALC's project committee on sexual offences, appeared before the portfolio committee on Welfare and Population Development to brief them on the content of the committee discussion paper. In June 2005, the DoJ&CD briefed the Correctional Services PC on the Sexual Offences and Child Justice bills. However, due to the fact that the committee's chief interest was the impact of these bills on children in prison, little discussion of the Sexual Offences Bill ensued (PMG, 3 June 2005).

fleeting interest in the SOA, but appear to have exercised no effect whatsoever on its content. Participation was also hierarchically ordered, with power chiefly vested in the PC on Justice to determine involvement and influence.

The SALC's position in this pecking order was set out early in the process. As the PMG minutes put it: 'The Chairperson noted that he wanted to make it very clear that the Law Commission was an advisory body and that no one was bound by what they said'.<sup>47</sup> Gauging from the response to organisations, it could be said that they occupied a rung roughly similar to that of the SALC.

Government departments ranked more highly. So the SALC and organisations were scolded for not costing victim-centred measures beforehand,<sup>48</sup> but once the DoJ&CD and Department of Health had met and agreed to the provision of HIV PEP, such provision was made.<sup>49</sup> Sections of the bill dealing with the register were also forwarded to the South African Police Service (SAPS) for comment.<sup>50</sup> Reference to 'the high incidence' of sexual offences in South Africa was also deleted from the Preamble to the SOA on the basis that the Minister of Safety and Security might disagree with this statement.<sup>51</sup>

Of all the government departments it was the DoJ&CD which exercised the most influence over the bill however. Because the separation between parliament and the department was not always entirely clear, they have been included in the discussion on the parliamentary committees.

### **The Joint Monitoring Committee on the Improvement of the Quality of Life and Status of Women**

A search of PMG minutes suggests that the JMC devoted exactly four of its meetings to the Sexual Offences Bill, with two taking place during MP Govender's tenure. The first occurred in 1998 when representatives of RCCTT addressed the JMC on the challenges plaguing the handling of rape cases and the concomitant need for sexual assault legislation.

The committee identified such legislation as one of four bills it considered to be of critical importance.<sup>52</sup> (Notably, at this point the SALC's investigation was

restricted to children. It was only in 1999 that the investigation was expanded to include adults.) In 2001 the JMC engaged with the SALC around the law reform process and asked whether or not the draft bill would be finished by the end of that year. On hearing that it would only be completed in the second half of the following year, Govender commented on the length of time elapsing between an issue being prioritised and it being implemented.<sup>53</sup>

In 2003 the JMC, now chaired by MP Xingwana, once again picked up on the Sexual Offences Bill. A representative of RCCTT appeared before the committee to outline some of the gains achieved by the bill, as well as its weaknesses. A discussion of these issues ensued, leading the chair to conclude that the JMC needed to formulate a submission around the bill for discussion with the Speaker and the DoJ&CD.<sup>54</sup> Whether or not such a submission was ever made is unknown.

The final discussion of the bill took place in May 2005 when the SALC again appeared before the JMC to discuss the Sexual Offences Bill. Much of this meeting focused on the usefulness of a Sexual Offender's Register (this had not been included in the SALC's draft bill), as well as aspects of the law relating to children.<sup>55</sup>

Minutes of the PC on Justice allude to the JMC's presence in at least two other meetings dealing with the bill. PMG minutes show the JMC to have been present during a PC on Justice meeting of 19 June 2006. The minutes do not record the JMC as having made any intervention at all into the discussion. During another meeting MP Camerer stated that the approach taken by the 2003 bill to the age of consent had created 'a huge fuss', necessitating a special session with the JMC and the NCOP. She asked if a record of the outcomes of that meeting was available<sup>56</sup> and said that the PC on Justice must obtain the views of the JMC on the age of consent. In reply, the chair of the PC on Justice said they had been invited to meetings.<sup>57</sup>

Thus in stark contrast to their role in the passage of legislation such as the Domestic Violence Act and the Recognition of Customary Marriages Act, the JMC's input into the SOA was negligible, judging from records in the public domain. When they were galvanised into action, it was motivated by the concern to determine the legal

47 PMG minutes, 6 August 2003

48 PMG minutes, 17 September 2003

49 PMG minutes, 29 January 2004

50 PMG minutes, 16 August 2006

51 PMG minutes, 31 October 2006

52 PMG minutes, 3 June 1998

53 PMG minutes, 29 August 2001

54 PMG minutes, 14 November 2003

55 PMG minutes, 27 May 2005

56 Such a record would not appear to exist.

57 PMG minutes, 21 June 2006

The committee member most responsive to NGO concerns was MP Camerer. Indeed, on the strength of the minutes, it would largely appear to be her persistence that resulted in the inclusion of the clause legislating the provision of anti-retroviral drugs (or PEP) to prevent HIV infection in rape survivors.

age at which children may have sex. There is no written, public record of the JMC ever discussing the petitions or the memorandum from the bus campaign.

#### The Justice PC and its personalities

The PC on Justice's first round of minuted discussions on the bill took place between 5 August 2003 and 24 February 2004. Six committee meetings during this period focused on the bill, with two of these meetings (16–17 September) taken up with hearings. Discussion of the bill resumed on 19 June 2006 and concluded on 18 May 2007, with the bill having been the subject of a further 30 meetings in this period.

The bill was adopted by the PC on Justice for the first time on 10 November 2006, for a second time on 18 May 2007 following the tagging dispute and for a third time on 21 November 2007. Between 12 September and 13 November 2007, the bill also made eight appearances in the Security and Constitutional Affairs Select Committee in the NCOP. However, as the chief architects of the SOA, this discussion focuses on the PC on Justice's deliberations.

The members of the PC on Justice did not contribute

equally to the deliberations. While it may be an artefact of the recording practices of the PMG minute-taker, there is practically no record of the United Democratic Movement (UDM) and the Inkatha Freedom Party (IFP) representatives having contributed to discussions. The overwhelming bulk of the discussions around the bill were thus shaped by MP Swart of the African Christian Democratic party (ACDP), MP Camerer of the Democratic Alliance (DA) and the ANC.

Within the ANC (which had the most representatives on the committee due to its status as the majority party), the Chair of the committee, Advocate Johnny de Lange, dominated discussions, until he was replaced as chair by Fatima Chohan, who then came to similarly dominate discussions. To a lesser extent the voice of ANC MP Jeffreys is also reflected in the minutes (chiefly in relation to legal technicalities) as well as that of ANC MP Solomon. However, these various MPs' interests and efforts were not equivalent. MP Swart, for instance, was preoccupied to the exclusion of all other issues, with increasing the age of consent to sexual activity to 18.

The committee member most responsive to NGO concerns was MP Camerer. Indeed, on the strength of the minutes, it would largely appear to be her persistence that resulted in the inclusion of the clause legislating the provision of anti-retroviral drugs (or PEP) to prevent HIV infection in rape survivors. She raised the issue in three out of the first six deliberations around the bill, as well as with a number of presenters during the hearings. By the seventh deliberation on 29 January 2004, a clause legislating the provision of HIV PEP had been agreed to.<sup>58</sup>

#### The role of the Deputy Minister of Justice and Constitutional Development

It is the former chair of the PC on Justice and later deputy minister of justice whose imprint the SOA most clearly bears, as this extract from a discussion in the PC on Justice illustrates:

*Mr S Swart (ACDP) wondered if it would not be useful to get the previous Chairperson of the Committee (Adv J de Lange) to come and brief the committee on some issues relating to the bill ... The committee had delegated a lot of issues to him while he was still its chairperson.*

<sup>58</sup> PMG minutes, 29 January 2004

*Mr B Magwanishe (ANC) said ... [I]t was important for the committee to refresh its memory on what was originally agreed upon.*

*The chairperson had no problem with the suggestion as long as she would not be 'accused of blending the separation of powers'. She noted that some of the new submissions that the committee had received dealt with issues that the committee had already discussed when dealing with the bill as originally introduced in parliament. It might be useful for the previous chairperson to refresh the committee's mind on the discussions held and decisions taken.*

*Mr L Landers (ANC) asked if there was any suggestion that Adv de Lange might have drafted clauses without consulting with the chief drafter of the bill. The chief drafter was supposed to know everything that had taken place. He was not suggesting that the committee should not call him to come and brief it.<sup>59</sup>*

No response to Mr Landers' question is recorded. As this discussion shows, when parliament closed in 2004, the chair was mandated by the Justice PC to further develop the working document.<sup>60</sup> Given that he was appointed to the position of Deputy Minister of Justice and Constitutional Development after the elections in 2004, it is likely that he worked on the draft in his position as a member of the Executive. His appearance before the PC on Justice was also an opportunity to 'remind' MPs of what was now closed for discussion.

The SOA illustrates the preferences of the former deputy minister in at least one other respect: the creation of the National Sex Offenders' Register. This measure was first proposed on 17 September 2003, when the then chair stated that 'huge support' existed for a sexual offenders register. (Where this support derived from is unclear; such a register was certainly not proposed by any of those who made oral submissions.)

This comment emerged in response to the CGE representative's observation that such a register would be costly to maintain – and one of the reasons why they would not support such a measure.<sup>61</sup> Significantly, this

was the only time the issue of cost in relation to the register was ever raised.

By 29 January 2004 the PC on Justice had become aware that a National Child Protection Register already existed in provisions of the Children's Act (Act no 38 of 2005) which had not yet been implemented. Nonetheless the then-Chair asked the DoJ&CD drafters to put together provisions around a 'paedophile register'.

On 21 June 2006 a comparison of the two registers was presented to the PC on Justice. The chief differences lie in the administration of the different registers, as well as the procedures followed. Their purpose is almost identical (preventing people who have harmed children from working with children and/or being placed in a position of authority, supervision or care of children). In fact, the National Child Protection Register ('Protection Register') is broader in scope than the National Register for Sex Offenders ('Offender Register') and arguably of greater protective value to children.

The Offender Register, managed by the DoJ&CD, includes only the details of those found guilty of a sexual offence against a child or person with mental disability. By contrast, the Protection Register, to be maintained by the Department of Social Development, captures the details of those found unsuitable to work with children by a children's court, any other court in any criminal or civil proceedings, or any disciplinary forum in proceedings concerning a person's conduct towards a child. Such a finding must be made if the accused person is convicted of murder, attempted murder, rape, sexual abuse or assault with intent to do grievous bodily harm to a child.

The offender register requires the police, correctional services personnel, the registrar or clerk of the court and the Department of Health to forward the details of convicted offenders to the DoJ&CD. In terms of the Protection Register, the registrar of the relevant court, the relevant administrative forum, or person who brought the application for a finding of unsuitability, are required to forward information to Social Development.

MP Camerer later raised concerns around the wisdom of having two registers on the same matter. The chair, Fatima Chohan, replied that while the Children's Act had been passed into law, the provision dealing with the register was not yet operational. Thus aspects of this register might not be implementable. She speculated further that it might take some time for the Protection Register to be established. On this basis she argued that the Offender Register should be established as soon as

<sup>59</sup> PMG minutes, 20 June 2006

<sup>60</sup> PMG minutes, 20 June 2006

<sup>61</sup> PMG minutes, 17 September 2003

possible, even if it were to be 'used as a learning curve', rather than to leave it out of the bill in favour of a register which might never be implemented.<sup>62</sup>

It is remarkable that the PC on Justice did not consider it parliament's role to ensure the implementation of legislation but chose instead to enthusiastically pursue an uncosted and duplicate register. In a presentation to the Portfolio Committee for Women, Children and Persons with Disabilities, the police stated this 'learning curve' was going to cost in the region of R300 million to implement.<sup>63</sup>

The argument around costs as a basis for excluding particular services from the bill was therefore highly selective. Certainly there is no record in the PMG minutes of any committee member ever asking for the register to be costed as was the case for support persons, comprehensive treatment, care and counselling and the long-term supervision orders for sex offenders – all of which were dropped from the bill on the basis of their expense.

### The opening up of parliamentary space

Access to parliamentary structures was tightly controlled during the deliberations around the SOA, with this exclusion felt not only in relation to the SOA but also by those who worked on the Child Justice Bill (also under consideration at the time). Dr Don Pinnock, a criminologist and one of the principal drafters of the Child Justice Bill, wrote the following in this regard:

*In the Justice Portfolio Committee, however, the [Child Justice] Bill hit hard times and was refashioned (some say mangled) by the then Deputy Justice Minister, Johnny de Lange, who attempted to make it more punitive. After that it was dropped from the agenda, badly battered, and became lost in the system. Last year ... it was painstakingly reconstructed to reflect its original intentions and finally, on the eve of the new government, signed into law. Its passing was clearly assisted by the appointment of a new head of the Justice Committee, Yunus Carrim, a sociologist by training.<sup>64</sup>*

The shuffling of MP Yunus Carrim (then Chair of the Portfolio Committee on Public Enterprises) to the PC

on Justice came about in late August 2007. One of the reasons given for this move was the fact that the Deputy Minister of Justice and MP Chohan were engaged in a personal relationship which, according to an unnamed MP, made it easy for critics to impugn her integrity – particularly in the context of controversial judicial reform legislation sponsored by de Lange.<sup>65</sup>

While the appointment of MP Carrim to the PC on Justice came too late to save the SOA, it did have the effect of opening up the PC on Justice once again to organisations. On 3 June 2008, representatives of the NWGSO met with a sub-committee of the PC on Justice to present and discuss a briefing paper dealing with the NPF, Regulations and Directives of the SOA. In the same meeting the PC on Justice also instructed the representative of the DoJ&CD to ensure that organisations were consulted around the NPF.

A further sign that parliamentary space may be more open to organisations has come with the appointment of the Portfolio and Select Committees on Women, Children and Persons with Disabilities in May 2009, when the fourth democratic parliament commenced its term. Unlike the JMC, the Portfolio and Select Committees have a direct role to play in the passing of legislation and also have a department directly accountable to them – that on Women, Children and Persons with Disabilities.

Given that they only came into being towards the end of May 2009, it is too soon to assess the performance of the committees. But it is worth noting that in 2009, the Portfolio Committee met at least weekly during each of the parliamentary terms, averaging a total of approximately 21 meetings since May. The focus for 2009 was largely on violence against women, children and persons with disabilities.

In dealing with this, the committee sought to balance inputs from government departments with that of inputs from civil society organisations. Within the short period of time since its inception, it therefore made a concerted attempt to directly engage with civil society organisations on matters that pertain to its mandate.<sup>66</sup>

The committee has also shown that it is able to listen to women's voices and take action accordingly. For example, as a direct result of a joint presentation to the committee

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65 'Massive Parly reshuffle'. *Mail and Guardian*, 13 August to 6 September 2007.

66 The NCOP Select Committee has fared less well. Since May 2009, it met approximately 9 times. This included a briefing by the Department of Women, Children and Persons with Disabilities and the joint public hearings hosted together with the Portfolio Committee on domestic violence.

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62 PMG minutes, 15 August 2006

63 PMG minutes, 26 August 2009

64 'An Act of Compassion'. *Mail and Guardian online*, 3 June 2009.

Key individuals in leadership positions within state apparatus, both in the political sphere of the legislature and in ministries, have to be committed to and champion the issue on a constant basis. These key women leaders have to be in a position to develop alliances with other key politicians in order for the policy and legislation to succeed.

by Tshwaranang and GAP in September 2009, during which both organisations called for public hearings around the implementation of the Domestic Violence Act, the Portfolio Committee (together with its counterpart in the NCOP, the Select Committee) subsequently hosted such hearings on 28 and 29 October 2009. A draft report for intervention in this regard has been drafted by the Committee. This report has been significantly impacted upon by the inputs made by civil society organisations.

### Conclusions

In her analysis of the processes leading to the promulgation of the Domestic Violence Act of 1998, Meintjes<sup>67</sup> argues that the successful integration of gender policies in the state requires necessary and sufficient conditions. The first necessity is that women in society are mobilised politically; while the second is that key support networks exist among women politicians and within the bureaucracy to take up gender issues

within the state. The third necessity for key alliances to work effectively in promoting change is a substantive normative or democratic discourse and framework that integrates gender.

But none of these conditions is sufficient unless there are people in civil society with the technical knowledge and skills to engage in highly complex processes of intervention and negotiation with appropriate state apparatuses. In addition, key individuals in leadership positions within state apparatus, both in the political sphere of the legislature and in ministries, have to be committed to and champion the issue on a constant basis. These key women leaders have to be in a position to develop alliances with other key politicians in order for the policy and legislation to succeed.

This description of the process of reforming sexual offences law supports Meintjes' analysis. In this particular instance only one of the conditions she identifies as necessary for the successful integration of gender into state policies was evident and that was the mobilisation of civil society.

Structures specifically set up to facilitate women's entry into the parliamentary policy-making arena were effectively dysfunctional and unresponsive to our demands. And while women occupied key leadership positions in the Ministry of DoJ&CD and in the PC on Justice, theirs was a feminine, or descriptive presence, rather than a feminist or strategic presence. They resisted efforts at building alliances with organisations and were impervious to our proposals. Perhaps they had little choice.

At the time, decision-making in government was highly-centralised (a factor which contributed to the revolt against Thabo Mbeki at Polokwane in December 2007) and, as the Independent Panel observed, the party-list electoral system does make politicians more loyal to the party than their constituencies (which include women's and children's organisations). There is thus a risk in tying gender equality too closely to the fortunes of the ruling party.

Further, with one exception (and even that was limited), the opposition parties in parliament failed to contribute in any way to ensuring that the SOA was made a transformative piece of legislation. They too need to be engaged in future and made responsible for promoting gender equality; it cannot be the ANC's responsibility alone.

Finally, while this monograph acts as something

<sup>67</sup> 2003: 141



Further, with one exception (and even that was limited), the opposition parties in parliament failed to contribute in any way to ensuring that the SOA was made a transformative piece of legislation. They too need to be engaged in future and made responsible for promoting gender equality; it cannot be the ANC's responsibility alone.

of a cautionary tale of weak institutions, it also points to where influence and space may be created in future. Parliament is a complex institution comprising different committees, different MPs and different political parties, each with conflicting interests that offer different incursions for feminist prospects. Shifting participatory practices and building alliances will not transpire of their own accord, but require active and ongoing civil society intervention.

## References

- Artz, L. and Smythe, D. (2008). *Should we consent? Rape law reform in South Africa*. Juta and Co. Ltd, Cape Town.
- Astbury, J. (2006). *Services for victim/survivors of sexual assault. Identifying needs, interventions and provision of services in Australia*. Australian Centre for the Study of Sexual Assault Issues No. 6, December 2006.
- Campbell R., Wasco S.M., Ahrens C.E., Sefl T. & Barnes, H.E. (2001). 'Preventing the "Second Rape" – Rape survivors' experiences with community service providers' in *Journal of Interpersonal Violence* 16(12):1239–59.
- Combrinck, H. (2005). 'The dark side of the rainbow: Violence against women in South Africa after ten years of democracy' in Murray C. and O' Sullivan, M. (eds) *Advancing Women's Rights*. Juta, Faculty of Law, University of Cape Town, Cape Town.
- Gouws, A. (2004). 'The Politics of State Structures: Citizenship and the National Machinery for Women in South Africa' in *Feminist Africa* 3.
- Gouws, A. (2006). 'The state of the national gender machinery: structural problems and personalised politics' in Buhlungu S., Daniel, J., Southall R and Lutchmann J. (eds). *The State of the Nation: South Africa 2005–2006*. Human Sciences Research Council, Pretoria.
- Govender, P. (2007). *Love and Courage: A Story of Insubordination*. Jacana Press, Johannesburg.
- Hahndiek, K. (2004). 'Mandates and functioning of the Joint Monitoring Committees.' Discussion Document produced by Secretary of the National Assembly.
- Hassim, S. (2003). 'The gender pact and democratic consolidation: Institutionalising gender equality in the South African state'. *Feminist Studies* 29(3): 505–28.
- Jewkes, R., Penn-Kekana, L., Rose-Junius, H. and Malala, J. (2002). *Child sexual abuse and HIV: study of links in South Africa and Namibia*. Medical Research Council, Pretoria.
- Kaminer, D., Grimsrud, A., Myer, L., Stein, D.J. and Williams, D.R. (2008). 'Risk for Posttraumatic Stress Disorder associated with different forms of interpersonal violence in South Africa.' Conference paper presented at *Researching Gender-based Violence: Challenges and Opportunities*, Cape Town, South Africa 25–27 March 2008.
- Meintjes, S. (2003). 'The Politics of Engagement: Women Transforming the Policy Process – Domestic Violence Legislation in South Africa' in Goetz, A.M. and Hassim, S. (eds). *No Shortcuts to Power*. Zed Books Ltd, London.

- Parliament of the Republic of South Africa. (2009). *Report of the Independent Panel Assessment of Parliament*.
- Vetten L., Jewkes R., Fuller R., Christofides N., Loots L. and Dunseith O. (2008). *Tracking Justice: The attrition of rape cases through the criminal justice system in Gauteng*. Johannesburg: Tshwaranang Legal Advocacy Centre, South African Medical Research Council and the Centre for the Study of Violence and Reconciliation.
- Watson J. and Rhoda L. (2003). *Women and Lawmaking*. Public Education Office, Parliament of the Republic of South Africa.
- Newspaper reports, minutes of meetings and committee reports
- *Mail and Guardian* 'Fix the Gender Machinery' by Christie van der Westhuizen,' 25 May 2009.
- *Mail and Guardian online* 'An Act of compassion', 3 June 2009. Available at <http://www.mg.co.za/article/2009-06-03-an-act-of-compassion>
- *Mail and Guardian* 'Massive Parly reshuffle', 13 August 13 to 6 September 2007.
- Parliamentary Monitoring Group. *Reports on Women, the Budget & Economic Policy & Violence against Women; Sexual Assault Legislation: Briefing*. Minutes for the Ad hoc Joint Committee on the Improvement of the Quality of Life and Status of Women 3 June 1998 Available at <http://www.pmg.org.za/print/7595>
- Parliamentary Monitoring Group. *Reform of Sexual Offences Act: briefing*. Minutes for the Portfolio Committee on Welfare and Population Development, 16 November 1999 Available at <http://www.pmg.org.za/print/5396>
- Parliamentary Monitoring Group. *South African Law Commission on Sexual Offences; Customary Law; Statutory Law Revision and Aspects of the Law Relating to AIDS*. Minutes for the Joint Monitoring Committee on the Improvement of the Quality of Life and the Status of Women, 29 August 2001. Available at <http://www.pmg.org.za/print/835>
- Parliamentary Monitoring Group. *Customary Law of Succession Bill; Compulsory HIV Testing of Alleged Sexual Offenders Bill and Sexual Offences Bill: hearings*. Minutes for the Joint Monitoring Committee on the Improvement of the Quality of Life and the Status of Women, 14 November 2003. Available at <http://www.pmg.org.za/print/3441>
- Parliamentary Monitoring Group. *Criminal Law (Sexual Offences), Judicial Matters (Second), promotion of national Unity and Reconciliation Amendment Bills: briefing*. Minutes for the Justice PC, 6 August 2003. Available at <http://www.pmg.org.za/print/3031>
- Parliamentary Monitoring Group. *Criminal Law (Sexual Offences) Amendment Bill: hearings*. Minutes for the Justice PC, 17 September 2003. Available at <http://www.pmg.org.za/print/3260>
- Parliamentary Monitoring Group. *Criminal Law (Sexual Offences) Amendment Bill: deliberations*. Minutes for the Justice PC, 29 January 2004. Available at <http://www.pmg.org.za/print/3833>
- Parliamentary Monitoring Group. *Programme and Sexual Offences Report: SA Law Reform Commission briefing*. Minutes for the Joint Monitoring Committee on the Improvement of the Quality of Life and the Status of Women, 27 May 2005. Available at <http://www.pmg.org.za/print/5882>
- Parliamentary Monitoring Group. *Child Justice Bill & Criminal Law (Sexual Offences) Amendment Bill: Briefing by the Department of Justice and Constitutional Development*. Minutes for the Portfolio Committee on Correctional Services, 3 June 2005. Available at <http://www.pmg.org.za/print/5944>
- Parliamentary Monitoring Group. *Criminal Law (Sexual Offences) Amendment Bill: Informal briefing; Magistrates Salaries Committee Report: Adoption* Minutes for the Justice PC, 19 June 2006. Available at <http://www.pmg.org.za/print/7956>
- Parliamentary Monitoring Group. *Briefing: Portfolio Committee on Justice and Constitutional Development 19 June 2006*. Document included with minutes for the Justice PC, 19 June 2006. Available at <http://www.pmg.org.za/docs/2006/060619briefing1.htm>
- Parliamentary Monitoring Group. *Criminal Law (Sexual Offences) Amendment Bill: Briefing by the Department*. Minutes for the Justice PC, 21 June 2006. Available at <http://www.pmg.org.za/print/8052>
- Parliamentary Monitoring Group. *Criminal Law (Sexual Offences) Amendment Bill: briefing on Clauses 1 to 13*. Minutes for the Justice PC, 10 August 2006. Available at <http://www.pmg.org.za/print/7986>
- Parliamentary Monitoring Group. *Sexual Offences Bill: briefing by Department of Justice. Parole: briefing on Clauses 36 – 47*. Minutes for the Justice PC, 15 August 2006 <http://www.pmg.org.za/print/8063>
- Parliamentary Monitoring Group. *Criminal Law (Sexual Offences) Amendment Bill: briefing on Clauses 47 – 53*. Minutes for the Justice PC, 16 August 2006 <http://www.pmg.org.za/print/8073>
- Parliamentary Monitoring Group. *Criminal Law*

*(Sexual Offences) Amendment Bill: deliberations.* Minutes for the Justice PC, 5 September 2006. Available at <http://www.pmg.org.za/print/8169>

□ Parliamentary Monitoring Group. *Criminal Law (Sexual Offences) Amendment Bill: proposed amendments.* Minutes for the Justice PC, 12 September 2006. Available at <http://www.pmg.org.za/print/8239>

□ Parliamentary Monitoring Group. *Criminal Law (Sexual Offences) Amendment Bill: deliberations.* Minutes for the Justice PC, 10 October 2006. Available at <http://www.pmg.org.za/print/8298>

□ Parliamentary Monitoring Group. *Criminal Law (Sexual Offences) Amendment Bill: deliberations.* Minutes for the Justice PC, 20 October 2006. Available at <http://www.pmg.org.za/print/8377>

□ Parliamentary Monitoring Group. *Criminal Law (Sexual Offences) Amendment Bill: deliberations.* Minutes for the Justice PC, 31 October 2006. Available at <http://www.pmg.org.za/print/8433>

□ Parliamentary Monitoring Group. *Report of the Portfolio Committee on Justice and Constitutional Development on the Criminal Law (Sexual Offences) Amendment Bill [B50-2003] (National Assembly – sec 75).* Draft report forming part of the minutes for the Justice PC, 10 November 2006. Available at <http://www.pmg.org.za/docs/2006/061110report1.htm>

□ Parliamentary Monitoring Group. *Tagging of Criminal Law (Sexual Offences) Amendment Bill: Committee Report (Closed Meeting).* Minutes for the Justice PC, 16 March 2007 <http://www.pmg.org.za/print/8917>

□ Parliamentary Monitoring Group. *Criminal Law (Sexual Offences) Amendment Bill: adoption of report.* Minutes for the Justice PC, 18 May 2007 <http://www.pmg.org.za/print/9004>

□ Parliamentary Monitoring Group. *Criminal Law (Sexual Offences & Related Matters) Amd Bill: Public Submission; Criminal Law (Sentencing) Amd Bill: briefing.* Minutes for the Security and Constitutional Affairs Committee, 30 October 2007 <http://www.pmg.org.za/print/9671>

□ Parliamentary Monitoring Group. *Criminal Law (Sentencing) & Criminal Law (Sexual Offences) A/B: adoption; Magistrate's Remuneration; Outstanding Bills.* Minutes for the Justice PC, 21 November 2007 <http://www.pmg.org.za/print/9474>

□ Parliamentary Monitoring Group. *Violence against children & women, forced marriages (ukuthwala), femicide, child murders, implementation of Domestic Violence Act, Child Justice & Sexual Offences Acts:*

*Department of Police & Childline briefings.* Minutes for the Portfolio Committee on Women, Children and People with Disabilities, 26 August 2009 <http://www.pmg.org.za/node/17942>

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Joy Watson

**GAP**

Policy brief  
#3

in partnership with



TSHWARANANG  
LEGAL ADVOCACY CENTRE  
TO END VIOLENCE AGAINST WOMEN

GAP is a non-profit, independent organisation based in the Western Cape, where it originated as a grassroots initiative. It strives to transform gender relations in South Africa by organising civil society and petitioning political structures and decision makers for a gender just society in which women are empowered to gain social, economic and political equality. To achieve this, GAP conducts research, training and advocacy to inform, build capacity, mobilise and network relevant stakeholders.

The Tshwaranang Legal Advocacy Centre is a multi-disciplinary centre that promotes the rights of women to live free from violence and have access to adequate and appropriate services. This is done through the provision of free legal services and litigation, public education, research and advocacy. Tshwaranang means “Let us hold each other”.