



CREATIVELY COMBATting GENDER BASED VIOLENCE

22 October 2021

TO: **The Presidency, Republic of South Africa**
Attention: **His Excellency, President Cyril Ramaphosa**
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Email: malebo@presidency.gov.za
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CC: **Department of Justice and Correctional Services**
Attention: **Minister Ronald Lamola**
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CC: **Parliamentary Portfolio Committee on Justice and Correctional Services**
Attention: **Vhonani Ramaano**
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Directors: Leanne Berger and Lee-Anne Germanos

Dear Mesdames/Sirs

CONSTITUTIONAL INVALIDITY: CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT AMENDMENT BILL [B16-2020]

1. We are The Embrace Project, a non-profit organisation that combines art and advocacy through law to ‘creatively’ combat gender-based violence and femicide (“GBVF”) in South Africa. We wish to raise a constitutional issue with the statutory definition of the crime of rape contained in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (“the Act”) and, by implication, the meaning of consent in section 1 of the Act.
2. This letter is addressed to Your Excellency on the basis that the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill [B16-2020] (“the Amendment Bill”), one of three ‘GBV Bills’ introduced by the Minister of Justice and Correctional Services (“the Minister”) in August 2020, has failed to remedy the constitutional invalidity contained in the aforementioned sections of the Act. The Amendment Bill was passed by both houses of Parliament in September 2021, and currently sits with Your Excellency for assent.
3. We acknowledge that prior to the passing of the Amendment Bill in both houses of Parliament, the Parliamentary Portfolio Committee on Justice and Correctional Services (“the Committee”) conducted a public participation process in September and October 2020. We record that we participated in this process and made written submissions to the Committee on 9 October 2020. We were subsequently invited to make oral representations on 23 October 2020.
4. Regrettably, the Amendment Bill does not address the Act’s problematic approach to rape and consent, which, as explained below, is unconstitutional. In our submissions, we attempted to draw attention to problems with the Act’s approach to consent, but this was not taken up by the Committee.
5. At the end of August 2021, a rape survivor approached us with her prosecuted case, which was decided in the Gauteng Division of the High Court in 2019. In her case, the High Court found that the accused had committed an act of sexual penetration without her consent, but was acquitted due to the prosecution having failed to prove that he had intended to rape her.

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6. Section 3 of the Act currently reads as follows:

“Any person (“A”) who unlawfully and intentionally commits an act of sexual penetration with a complainant (“B”), without the consent of B, is guilty of the offence of rape.”

7. A purely subjective test is imputed in the establishment of the “intentionally” element of the statutory definition of rape. Although a subjective test is also applied to establish fault in common law crimes, sexual assault – and more specifically rape – is neither an ordinary crime, nor a common law crime. The crime of rape, and its statutory definition, implicates and affects a complainant’s section 10 constitutional right to dignity, and, if the complainant is not male, implicates and affects their section 9 right to equality. In 2019, in the landmark case of *Tshabalala v S*,¹ the Constitutional Court held that:

“[F]or far too long rape has been used as a tool to relegate the women of this country to second-class citizens, over whom men can exercise their power and control, and in so doing, strip them of their rights to equality, human dignity and bodily integrity. The high incidence of sexual violence suggests that male control over women and notions of sexual entitlement feature strongly in the social construction of masculinity in South Africa.”

8. The constitutional implication of “intentionally[’s]” inclusion in the definition of rape is that it places an unreasonable and unjustifiable emphasis on the accused’s subjective state of mind, an overreach of the rights and protections afforded an accused person in terms of section 35(5) of the Constitution, at the expense of the complainant’s section 12(2) constitutional right to bodily and psychological integrity, which includes the right to security in and control over one’s body. Furthermore, “consent” is vaguely defined in section 1(2) of the Act to mean “voluntary and uncoerced agreement”, without having defined either “voluntary” or “uncoerced” anywhere else in the Act. Instead, an open list of circumstances in which a complainant “does not voluntarily or without coercion” agree to sexual penetration is provided in section 1(3) of the Act. This, despite the recommendations made to the legislature in the South African Law Reform Commission’s Report almost 20 years ago.²

¹ [2019] ZACC 48; 2020 (5) SA 1 (CC); 2020 (3) BCLR 307 (CC); 2020 (2) SACR 38 (CC).

² South African Law Reform Commission Report on Sexual Offences Project 107 (2002) 30.

9. The practical implication of the current statutory definition of rape is that it has proven to be an almost insurmountable barrier to the conviction of accused persons who have been found, by courts, to have committed acts of sexual penetration *without the consent* of the complainant (objectively), where the prosecution have been unable to prove that the accused persons subjectively *intended* to rape the complainant. Additionally, the vague statutory definition of consent results in findings of consent where none ought to have been found. The most recent example of the controversy around intent and consent when it comes to rape is [Coko v S](#),³ which drew both public and legal scrutiny,⁴ and which also highlights that the law is no longer reflective of the *boni mores* of society (if it ever was).
10. Sections 1 and 3 of the Act, as they currently stand (unamended by the Amendment Bill before Your Excellency), are not only among the greatest barriers to a better rape conviction rate, which sits at 8.6% in a country with the highest rates of GBVF in the world, but further victimises rape survivors by protecting perpetrators based on their subjective state of mind regarding consent. That is a major setback to South Africa's fight against GBVF.
11. The Act is also out of step with the laws of other jurisdictions, such as the United States, the United Kingdom, Canada and Australia, which, many years ago, replaced the defence of a purely subjective belief in consent with a defence of *reasonable* belief in consent.
12. Should the Amendment Bill be signed into law, in its current state, varying forms of travesties of justice will persist. We accordingly request that Your Excellency urgently exercise your prerogative (under section 79 of the Constitution) to refer the Amendment Bill back to the National Assembly with reservations as to the constitutionality of the Act's approach to rape and consent.

³ [2021] ZAECGHC 91.

⁴ See Ben Winks [Recent rape acquittal shows why we need to revise our laws on sexual consent](#) News24 (16 October 2021).

Yours faithfully



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