

**REPORT OF THE COMMITTEE ON LEGAL AFFAIRS, GOVERNANCE,
HUMAN RIGHTS AND GENDER MATTERS ON THE PENAL CODE
(AMENDMENT) BILL, N.A.B NO. 47 OF 2010 FOR THE FIFTH SESSION OF
THE TENTH NATIONAL ASSEMBLY APPOINTED ON 23 SEPTEMBER, 2010**

Consisting of:

Mr J J Mwiimbu, MP (Chairperson); Mr B E Chimbaka, MP; Mr B Sikazwe, MP; Mr K Kakusa, MP; Mr L H Chota, MP; Mrs S T Masebo, MP; Rev V M Sampa-Bredt, MP; and Mr L P M'sichili, MP.

Following Cabinet reshuffles in December, 2010, which saw the appointment of Mr B Sikazwe, MP and Mr B E Chimbaka, MP, to ministerial positions, the membership of the Committee was reduced to six. However, Mr G Lubinda, MP and Mr G G Nkombo, MP, were co-opted into the Committee, raising the number of members to eight.

The Honourable Mr Speaker
National Assembly
Parliament Buildings
LUSAKA

Sir

Your Committee has the honour to present its Report on the Penal Code (Amendment) Bill, N.A.B No.47 of 2010 referred to it by the House on 25 November, 2010.

Functions of the Committee

2. In addition to any other duties conferred upon them by the Honourable Mr Speaker, or any order of the House, your Committee may consider any Bills referred to it by the House.

Meetings of the Committee

3. Your Committee held eight (8) meetings to consider the Penal Code (Amendment) Bill, N.A.B No. 47 of 2010.

Procedure Adopted by the Committee

4. Your Committee, in considering the Bill, requested written submissions from various stakeholders who also appeared before it and made oral submissions.

Objects of the Bill

5. The objects of the Penal Code (Amendment) Bill, N.A.B No. 47 of 2010, are to:

- (a) revise the age of a child;
- (b) revise the provisions on rape, indecent assault, defilement and child pornography; and
- (c) provide for matters connected with, or incidental to, the foregoing.

Consideration of the Penal Code (Amendment) Bill, N.A.B No. 47 of 2010

Background

The main amendments that the Penal Code (Amendment) Bill seeks to make are the introduction of a minimum sentence for rape and the re-introduction of the defence of mistake of fact in defilement cases.

Specific Provisions of the Bill

Clause 2 – This Clause seeks to repeal and replace section 133 of the Principal Act by introducing a minimum sentence for rape.

Clause 3 – This clause seeks to amend section 137A of the Principal Act by providing for the defence of reasonable belief that a child against whom the offence of defilement is committed was of or above the age of sixteen.

Clause 4 – This Clause seeks to amend section 138 of the Principal Act by providing for the defence of reasonable belief that a child against whom the offence of defilement is committed was of or above the age of sixteen.

Clause 5 – This Clause seeks to repeal section 143.

Clauses 6 and 7 - Seek to amend section 159 and 161 to rationalise the Clauses dealing with incest by males and females.

Clause 8 – This Clause seeks to amend Section 177A.

Issues and Concerns raised by stakeholders

Your Committee interacted with various stakeholders in considering the Bill. During these interactions, the issues of concern set out below.

- (a) A number of stakeholders submitted that there was need for a revision of the definition of a child from one who is below the age of 16 years to anyone below the age of 18 years.
- (b) Most stakeholders welcomed the introduction of a minimum sentence for rape. However, they felt that the Penal Code should also include a provision for aggravated penalties in instances of HIV/STI transmission or where the victim was of unsound mind or other aggravating circumstances as the court may determine.
- (c) Many stakeholders expressed serious concern with regard to the insertion of the proviso at section 138 that “...*it shall be a defence for a person charged with an offence under this section to show that the person had reasonable cause to believe, and did in fact believe, that the child against whom the offence was committed was of, or above, the age of sixteen.*” They contended that this defence sought to focus the inquiry on the mind of the perpetrator at the time of commission of the offence rather than on the body of the victim, where the impact and consequences of the act occurred. It also appeared to absolve the offender from the responsibility of making serious inquiries as to the age of the child and provided an excuse for reckless sexual conduct. Further, it was strongly argued that this defence would increase the vulnerability of girls who were taller and more developed and who may look older than their age to defilement. In addition, some stakeholders argued that taking into account the fact that court proceedings could be drawn out over months or even years, the court’s ability to accurately determine the appearance of the child at the time of commission of the offence might be compromised due to physiological changes that the child may have undergone in the intervening period.
- (e) There were also a number of submissions that the Penal Code should be further reviewed to remove the word ‘*unlawful*’ before ‘*carnal knowledge*’ in the definition of defilement so as to criminalise any carnal knowledge of under-age children. This would help resolve the clash between customary and written law, which had culminated in the common practice of early marriages sanctioned under customary practices.
- (f) Several stakeholders submitted that there was need to revise the definition of “sexual harassment” in the Penal Code, which currently, only recognised that the offence could be committed against a child, so as to bring it in line with the definition contained in the Anti Gender-Based

Violence Bill, which recognises the offence as one that could be committed against “a person”.

- (g) Further, they contended that there was need to revise the provisions of section 157 of the Penal Code to make harmful cultural practices an offence if performed on any person rather than confining the offence to a situation where the practices were performed on a child as was currently the case.

COMMITTEE’S OBSERVATIONS AND RECOMMENDATIONS

Your Committee notes the submissions by various stakeholders and observes that a number of provisions in the Penal Code, which are not the subject of the current amendments, are causing concern among the stakeholders. Your Committee, therefore, strongly urges the Government to initiate the necessary consultative process with a view to undertaking a comprehensive review of the Penal Code. In light of the amendments under consideration, your Committee wishes to make the observations set out hereunder.

- (a) The introduction of the minimum sentence for rape is welcome and highly commendable. Your Committee notes that while relatively minor gender-based offences such as sexual harassment and indecent assault have mandatory minimum sentences, the more serious and prevalent offence of rape does not. This is clearly an anomaly that needs attention and the amendment is, therefore, timely.
- (b) Your Committee welcomes the insertion of the proviso for the defence of mistake of fact to the offence of defilement. Your Committee notes that the absence of this defence goes against the general principle of criminal law, which requires a person to have a guilty mind in order to be liable for a crime. Your Committee is confident that the courts will exercise their discretion in the interest of justice to identify cases of genuine mistake, depending on the prevailing circumstances, without allowing culprits to go scot-free.

CONCLUSION

Your Committee wishes to put on record its gratitude to you, Mr Speaker, for affording it an opportunity to scrutinise the Penal Code (Amendment) Bill, N.A.B No. 47 of 2010. Your Committee wishes to thank the Office of the Clerk of the National Assembly for the support and advice rendered to it throughout the deliberations. Your Committee is indebted to all the witnesses who appeared before it for their cooperation in providing the necessary submissions.

We have the honour to be, Sir, your Committee on Legal Affairs, Governance, Human Rights and Gender Matters mandated to scrutinise the Penal Code (Amendment) Bill, N.A.B No. 47 of 2010.

Mr J J Mwiimbu, MP
(Chairperson)

Mr G Lubinda, MP
(Member)

Mr L H Chota, MP
(Member)

Mr K Kakusa, MP
(Member)

Mrs S T Masebo, MP
(Member)

Rev V M Sampa-Bredt, MP
(Member)

Mr G G Nkombo, MP
(Member)

Mr L P M'sichili, MP
(Member)

January, 2011
LUSAKA

J J Mwiimbu, MP
CHAIRPERSON

LIST OF OFFICIALS

Mr S M Kateule, Principal Clerk of Committees.
Mr G Lungu, Deputy Principal Clerk of Committees.
Mr S C Kawimbe, Committee Clerk (SC).
Mr E B C Mumba, Senior Research Officer.
Ms C Musonda, Assistant Committee Clerk.
Mrs C K Mumba, Assistant Committee Clerk.
Mrs F M Mwanza, Senior Personal Secretary.
Ms C Mtonga, Typist.
Ms S Kayawa, Typist.
Mr C Bulaya, Committee Assistant.
Mr S M Likunyendo, Parliamentary Messenger.

PERMANENT WITNESSES

Ministry of Justice

Mr C F R Mchenga, SC, Director of Public Prosecution.
Mrs M M Katongo, Acting Principal Parliamentary Counsel.
Mrs Y Chirwa, Senior Parliamentary Counsel.
Ms C Musonda, Parliamentary Counsel.
Ms B L Musopelo, Parliamentary Counsel.
Ms P K Goma, Parliamentary Counsel.

WITNESSES

Ministry of Sport, Youth and Child Development

Mr T D Mulonga, Permanent Secretary.
Mr J C Zulu, Director of Child Affairs.
Mr B Nakachinda, Director of Sports.
Mr C A Mulonda, Director of Youth.
Mr H Kapacha, Chief Planner.
Mr P Mukimba, Acting Principal Accountant.
Mr C Mwiinga, Acting Senior Planner.
Mr B Mungulube, Senior Advisor.
Mrs B M W Bbuku, Acting Director of Human Resources and Administration.

Zambia Police Force

Mr F Kabonde, Inspector-General.
Mrs C Katanga, Director – Legal.
Mr T Kasale, Coordinator - Victim Support Unit .

Council of Churches in Zambia

Ms M Akakulubelwa, Programme Officer.
Ms A Konayuma, Assistant Programme Officer.
Rev P Banda, Coordinator.
Rev L Soko, Minister in Charge - BIC Church.

Non-Governmental Organisations Coordinating Council (NGOCC)

Ms M Mulenga, Board Vice Chairperson.
Ms G Manyonga, Board Secretary.
Ms E B Mwale, Executive Director.
Ms N Ziba, Communication (UNICEF) Coordinator.
Ms N Kaloto Lesa, Child Protection Specialist.
Ms A Sampa Kamwendo, Child Protection Officer.

Magistrates and Judges Association (MAJAZ)

Mr W K Muma, National Secretary.

Ms F M Hamaundu, Chairperson – Lusaka Province.

Mr K Mulife, Committee Member.

Young Women’s Christian Association (YWCA)

Ms P Ndhlovu, Executive Director.

Mr N Mwape, Coordinator.

Ms B Mwiinga, Youth Coordinator.

Ms R Mbewe, Acting Regional Coordinator – Lusaka.

Mr R Havwala, Men’s Network Coordinator.

Forum for Women Educationalists in Zambia (FAWEZA)

Ms D Chimuka, National Coordinator.

Ms M Chuulu, Regional Coordinator – Women and Law and Southern Africa.

Mr M Kamanga, Coordinator – WILDAF.

Ms E Ng’oma, Programmes Manager.

Mr C Sibeene, Programmes Officer, Women in Law and Development in Africa.

Ms K Hana, Programmes Officer, Women in Law and Development in Africa.

Ms M Chibwe, Programmes Officer, Women in Law and Development in Africa.

Ms M Bwalya, Programmes Officer, Women in Law and Development in Africa.

Law Association of Zambia (LAZ)

Mr L Banda, Member.

Tisunge Ana Athu Akazi Coalition (TAAAC)

Ms S Makashinyi, Project Coordinator.

Ms P Chileshe, Executive Director, ZARD.

Ms H K Kumalo, Acting National Coordinator, WLSA.

Mr N Banda, Project Coordinator – ZNWL.

Mr E Mutuma, Director of Programmes, PPAZ.

Ms M M Tembo, Member.

Ms A Davidian, Member.