



REPUBLIC OF NAMIBIA

LAW REFORM AND DEVELOPMENT COMMISSION

REPORT

on the law pertaining to

RAPE

LRDC4

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LAW REFORM AND DEVELOPMENT COMMISSION OF NAMIBIA

THE HONOURABLE MINISTER OF JUSTICE, DR E N TJIRIANGE

I have the honour to submit to you in terms of section 9(1) of the Law Reform and Development Commission Act, 1991 (Act 29 of 1991) the Commission's report on the law pertaining to Rape.

I would further like to draw your attention to paragraph 1.1 of the report in which it is explained why the Commission, after discussions with you as reflected in the said paragraph, has decided to finalize the report in this form.

**MRU DNUJOMA
CHAIRPERSON
1997-07-17**

LAW REFORM AND DEVELOPMENT COMMISSION OF NAMIBIA

The LRDC was established by the Law Reform and Development Commission Act, 1991(Act 29 of 1991).

The members of the LRDC (on 15 July 1997) are:

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ANNEXURE: DRAFT CRIMINAL LAW AMENDMENT BILL

1. INTRODUCTION

1.1 Form of Report

1.1.1 The Commission finalized the bill, which is recommended by it and forms an Annexure hereto, some time ago and has been in the process to draft a comprehensive report. Such a report would have reflected on the situation from an international perspective and would have given more background to the problems experienced with the existing law and the reasons why it has been found unsatisfactory. It would also have referred to reform in other jurisdictions, Commonwealth and others, it would have indicated some options with the arguments for and against them and it would, in particular, have advanced the reasons for the specific reform recommended by the Commission. The Commission could not reached consensus on all the recommendations and members would have had the opportunity to incorporate in such a report their minority views with their arguments for it. Although it would have been a report of the Commission, as it would have been submitted to the Minister of Justice, the Commission envisaged to suggest to him that he should deal with it as a discussion paper with a view to further consultations.

1.1.2 However, before the Commission could finalize such a report with the necessary involvement of all its members, Namibia experienced an increase in cases of the most abhorrent manifestations of rape, mainly on children, even infants. This resulted in a public outcry for urgent action backed up by demonstrations and which culminated in a special debate in Parliament. Against this background, it was decided, in consultation with the Honourable Minister of Justice, to provide him immediately with the bill recommended by the Commission.

1.1.3 The Commission then further decided that the bill should be accompanied by a very brief report basically in the form of a brief explanatory memorandum to the bill. It seems at this point in time that the further legislative process on this legislation will still include extensive public consultations, most probably also by means of a Parliamentary Select Committee, and in which the Commission as such - or via its Women and Law Committee and individual members and staff - could be involved.

1.2 Background to the project

1.2.1 The Honourable Minister of Justice instructed the Commission during the latter part of 1995 to do research and make recommendations to him on the law pertaining to rape. This was made a separate project of the Commission and which was dealt with by the Women and Law Committee of the Commission.

- 1.2.2 It must however, for the sake of completeness, be pointed out that the Commission has also, with the concurrence of the Honourable Minister, embarked since ± July 1996 on a more comprehensive project on Violence against and Abuse of Women and Children. This project entailed workshops throughout all 13 regions, public hearings at different towns throughout Namibia and also on a national basis in Windhoek and legal as well as sociological research. The Commission is still processing the results of these consultations and research. It may still take several months to complete.
- 1.2.3 The Commission would further like to point out that some of the issues addressed in this recommended bill in respect of the crime of rape, in particular the issue of minimum sentences, should also as soon as possible be addressed as far as other serious crimes, eg. murder, are concerned. Failure to do so may, at least in the long run, bring about discrepancies in the legal system.
- 1.2.4 The Commission has however no doubt that legislation dealing in particular with rape, as recommended hereby, should be proceeded with urgently.

2. DISCUSSION OF DRAFT BILL (See Annexure)

2.1 CLAUSE 1

Clause 1 defines the term "complainant". The term is used throughout the bill to refer to the person against whom the crime is committed. It is the most appropriate term to use and is preferable to terms such as "victim".

2.2 CLAUSE 2

Clause 2 deals with the definition of the crime. Because the crime is completely redefined, it is necessary to change rape from a common law crime to a crime that is defined statutorily.

The common law definition of rape is as follows: Sexual intercourse by a man with a woman without the woman's consent.

Subclause (1) contains the actual definition of the crime. The following aspects of this definition is important. Firstly, the crime of rape will not longer be limited to sexual acts committed by a man. Under the new gender neutral definition, any person can commit rape. Coupled with the new definition of "sexual act", discussed below, the bill will also include forced oral or anal intercourse, regardless of the gender of the perpetrator or the

complainant. Under the existing law, these acts were only punishable as the lesser crime of indecent assault. Under the proposed bill the distinction between rape and indecent assault will be between penetrative and non-penetrative sexual acts. Secondly, the "absence of consent" element that is required by the common law, is replaced with the requirement of "coercive circumstances". The existing law is problematic because it puts the complainant "on trial", in effect, by requiring the prosecution to prove beyond a reasonable doubt that the complainant did not consent to the sexual act. As a result, the sexual behaviour or reputation of the complainant can become the focus of the trial rather than the conduct of the accused. Even where serious violence is involved, a reasonable doubt may be raised as to whether the complainant had given consent. The intention of the bill is to put the crime of rape on the same foot as other crimes, where the prosecution must prove the conduct of the accused beyond a reasonable doubt. This will help to ensure that a judgement is based upon objective circumstances put before the court rather than the court's appraisal of the subjective intention of the complainant.

Subclause (2) gives a description of exactly what is meant by a sexual act. If a person performs one of these acts, he or she is guilty of rape, and if he or she performs another indecent act, the applicable crime would be indecent assault. Only paragraph (d) requires further comment. The purpose of this paragraph is to cover the case where the perpetrator continues with a sexual act against the will of the complainant which was started with his or her consent.

The effect of **subclause (3)** is to reaffirm the common law rule that even the slightest penetration is sufficient to constitute rape.

Subclause (4) contains a list of exactly what is meant by coercive circumstances. Generally, they coincide with the circumstances that our courts have found to be cases where consent is absent. As will be noted this is not an exhaustive list.

Paragraph (4)(d) requires some elaboration. In the existing law, a girl of less than 12 years is deemed incapable of giving consent to sexual intercourse. That means that sexual intercourse with a girl younger than 12 years is rape and her consent or lack thereof is completely irrelevant. Where a boy of thirteen years has sexual intercourse with a girl of eleven, the rule that a boy under fourteen cannot be convicted of rape will operate. Because this rule is

now removed, special provision should be made for the above-mentioned case. The bill therefore provides that there should be at least three years age difference between the perpetrator and the complainant.

Subclause (5) abolishes the common law rule (if it still forms part of our law) that a husband cannot be convicted of raping his wife. In the present law, even the most brutal rape of a man on the woman to which he is legally married, even if they are living apart, will be lawful. This is however not the case if such a man and a woman only live together. This anomaly must be removed from our law.

The purpose of **subclause (6)** is to indicate that the law relating to rape is codified and that the common law crime rape would no longer exist.

2.3 CLAUSE 3

Clause 3 provides for minimum sentences for rape. The section provides for different minimum sentences, depending on the seriousness of the crime and whether it is a first or subsequent conviction. It should be noted that these sentences are minimum sentences and not maximum or recommended sentences.

Subclause (3) caters for the situation where a case has such special circumstances that the minimum sentence is so inappropriate that a court would find that the sentence constitutes cruel and degrading punishment as contemplated in Article 8 of the Namibia Constitution.

Subclause (4) provides that no remission may be granted to persons who are sentenced for rape. This only refers to the most common way in which the sentences of prisoners who serve sentences of several years are reduced in terms of the Prisons Act, 1959 (Act 8 of 1959) and other legal provisions that relate to release or reduction in sentence are not affected by this subclause. As a minimum sentence is now introduced, the provisions of section 29.7 of the Criminal Procedure Act, 1977 (Act 51 of 1977), which refer to minimum sentences and the suspension thereof, will now be relevant. Suspension of such minimum sentences should not be allowed.

2.4 **CLAUSE 4**

Clause 4 provides for a compensation order in favour of the complainant. This reform is also inspired by the customary law where the emphasis is on compensation for the complainant. The bill provides for a compulsory fixed order of compensation upon each criminal conviction. Under the current law, a complainant can pursue damages by means of a civil suit in which case the damages must be proved in the manner required in civil cases. This makes the procedure complicated and costly and hence impractical. Under the proposed new law, because the compensation order will be compulsory and the amount is prescribed, compensation will be available to all complainants. It should be noted that the compensation order in the criminal proceeding does not preclude the complainant from seeking additional damages in a civil court.

2.5 **CLAUSES**

Clause 5 prescribes a minimum period within which a trial for rape should be commenced. The point of departure with this section is that higher priority should be given to rape cases than to other criminal cases (even very serious ones). It is the opinion of the Commission that if the requisite care is taken, it should be possible to institute rape trials within the prescribed period. Because this provision is enacted in the interest of the complainant and not that of the accused, the non-compliance with that period should not entitle the accused to an acquittal. This aspect does not unduly burden the accused, because Article 12(1)(b) of the Namibian Constitution protects the accused against undue delays in the institution of a criminal trial. The rest of the clause requires no further elaboration.

2.6 **CLAUSE 6**

Clause 6 removes an old rule from the Roman law that a boy under the age of 14 is deemed to be incapable of sexual intercourse. The implication of the rule was among other things that the boy cannot be convicted of rape. Because this rule is in the form of a fiction, it is necessary to repeal it completely, so that all anomalous results that have followed from it, is completely removed. The rules relating to criminal capacity that operate in

our law, will therefore operate in a similar manner with relation to rape. These rules are basically that a child under seven is regarded as incapable of committing a crime. In the case of a child between seven and fourteen, the state must prove that the child is mature enough to appreciate that his actions are wrong.

2.7 CLAUSE 7

Clause 7 removes the common law rule that the evidence of a rape complainant should be treated with special caution. The section confirms the rule developed by the Namibian courts that the cautionary rule no longer forms part of our law.

2.8 CLAUSES 8

The purpose of clause 8 is to affirm the fact that the trauma of the complainant might cause her to delay the laying of a complaint, while she might not be able to give a satisfactory explanation for the delay. It is however important to take into account that provisions such as this one should be worded carefully in order not to deny the accused a fair trial. The effect of the provision is therefore that the court may draw an inference from a late complaint if it, together with other evidence, suggest that the complainant has fabricated the charge. What the clause however provides is that a court should not assume that a late complaint *per se* would be an indication that the charge is a fabrication.

2.9 CLAUSE 9

Clause 9 provides for the admissibility of that evidence that the complainant is suffering from rape trauma syndrome as evidence that the accused committed a sexual act against the complainant under coercive circumstances. Similar provisions are found in rape and sexual assault statutes of other jurisdiction.

2.10 CLAUSE 10

Clause 10 provides for certain special rights for the complainant. It basically provides that the complainant may appoint a legal representative and that the legal representative may take an active part in the case. In the present law, the rights of a complainant in a criminal case are extremely limited and are confined to attending the case and to suggesting lines of cross-examination to the prosecutor. It was felt that the complainant should have more rights in a case and that the special nature of a rape trial justifies such provisions. Public prosecutors are not the representatives of the complainant, but of the state, and may fail to object to hostile or degrading cross-examination.

Subclauses (1) and (2) define the role that the legal representative of the complainant will have and these provisions require no further elaboration. The purpose of **subclause (3)** is to ensure that the complainant does not listen to the evidence of the other prosecution witnesses and may then change her evidence in order to fit in with the evidence of the other witnesses.

2.11 CLAUSE 11

Clause 11 only inserts the definition of complainant in the Criminal Procedure Act so that the word has the same meaning in that act than it has in this bill.

2.12 CLAUSE 12

Clause 12 provides that the complainant can oppose bail and can be heard at a bail application. The rest of the clause provides for procedures to ensure that the complainant has knowledge of the proceedings. The provisions are an attempt to balance the right of the complainant with that of the accused to bring an application for bail. It is trusted that these added procedures would not further delay the finalisation of the trial.

2.13 CLAUSE 13

Clause 13 amends the Criminal Procedure Act to provide for the compulsory introduction of bail conditions to ensure that the accused does not make contact with the complainant.

The suggestions made with regard to bail are of course only preliminary proposals while awaiting the recommendations of the Commission of Inquiry into Legislation for the more effective Combating of Crime in Namibia.

2.14 CLAUSE 14

Clause 14 amends the Criminal Procedure Act to provide that the part of a rape trial where the complainant gives evidence would be held *in camera*. It is therefore not necessary for an application to be made.

2.15 CLAUSE 15

Clause 15 is only a consequential amendment of section 154 of the Criminal Procedure Act. The important issue is however that section 154 prohibits the publication of details of *in camera* trials in newspapers. This prohibition is extended by this amendment to the situation now covered by the previous clause.

2.16 CLAUSE 16

Clause 16 amends section 227 of the Criminal Procedure Act. Section 227 provides that the English law of evidence as it relates to the character of the accused and that of the rape complainant apply. The purpose of this section is therefore only to say that these rules no longer apply to the rape complainant.

2.17 CLAUSE 17

Clause 17 inserts a new section 227A into the Criminal Procedure Act and states the new rules that should apply with regard to this aspect. This provision precludes the introduction of evidence of the prior sexual conduct or reputation of the complainant except under limited circumstances related directly to providing or disproving the conduct which is the basis of the prosecution against the -accused.

2.18 CLAUSE 18

This clause contains the short title.

DRAFT BILL

To provide for the redefinition of the crime rape; and for the imposition of a minimum sentence for the crime rape; and for the abolition of the rule that a boy under the age of 14 is deemed to be incapable of sexual intercourse; and for the modification of certain rules of evidence applicable to sexual offences; and for certain special rights for the complainant of rape; and to amend the Criminal Procedure Act, 1977, so as to further regulate the circumstances under which certain criminal proceedings shall not take place in open court; and to extend the prohibition of the publication of certain information relating to certain offences; and to further regulate the admissibility of evidence relating to the character of a person against whom an offence of an indecent nature has been committed; and to provide for matters incidental thereto.

(Introduced by the Minister of Justice)

BE IT enacted by the Parliament of the Republic of Namibia as follows: -

Definition

1. In this Act, unless the context indicates otherwise, "complainant" shall mean the person against whom the offence has been committed, irrespective of whether that person has actually laid a complaint or gives evidence in the criminal proceedings concerned.

Definition of rape

2. (1) A person (hereinafter referred to as "the perpetrator") who intentionally performs a sexual act with another person under coercive circumstances or who under coercive circumstances intentionally causes a person to perform a sexual act (whether with himself or herself or with a third person), is guilty of rape.

(2) For the purposes of this Act, a sexual act shall mean-

- (a) the insertion (to the least extent) of the penis of one person into the vagina, anus or mouth of another person;
 - (b) the insertion of any object or part of the body of one person into the vagina or anus of another person under circumstances that are not medical treatment generally accepted by the medical profession;
 - (c) cunnilingus;
 - (d) the continuation of a sexual act as defined in paragraph (a), (b) or (c).
- (3) For the purposes of this section, the term "vagina" shall include the whole of the female sexual organ.
- (4) For the purposes of subsection (I), coercive circumstances shall include-
- (a) the use of force;
 - (b) threats (whether verbally or through conduct) to use force (either against the complainant or another person);
 - (c) threats (whether verbally or through conduct) to cause harm other than bodily harm (either to the complainant or to another person);
 - (d) circumstances where the complainant is less than 12 years and the perpetrator is more than three years older than the complainant;
 - (e) circumstances where the complainant is unlawfully detained by the perpetrator;
 - (f) circumstances where the complainant is affected by -
 - (i) sleep;
 - (ii) drugs, alcohol or other substances; or
 - (iii) mental or other disability, or any other condition whether

temporary or permanent,

to such an extent that he or she is unable to appreciate the nature of the sexual act concerned, or that he or she is unable to resist against the performance of the sexual act concerned, or that he or she is unable to communicate unwillingness;

- (g) circumstances where the complainant believes that the perpetrator or the person, in respect of whom the complainant performs the sexual act, is another person;
- (h) circumstances where the complainant is mistaken as to whether a sexual act is performed by the perpetrator.

(5) No marriage or relationship shall constitute a defence to a charge of rape as defined in this Act.

(6) No person shall be charged with or convicted of the common law crime of rape in respect of an act performed after the commencement of this Act.

(7) Subject to the provisions of this Act, any reference to "rape" in any law shall be deemed to be a reference to the crime of rape as defined in this section: Provided that any reference to "rape" where it relates to an act performed before the commencement of this Act shall be construed as a reference to the common law crime of rape.

Penalty

3. (1) Subject to the provisions of subsection (2), a person who is convicted of rape shall be liable-

- (a) where-
 - (i) the complainant suffers grave bodily harm or great mental anguish;
 - (ii) more than one person participate in the commission of the

offence; or

- (iii) the perpetrator uses a deadly weapon in the commission of the offence,

to imprisonment for a period of not less than fifteen years;

- (b) where the sexual act concerned is performed under the coercive circumstances contemplated in section 2(4)(a), 2(4)(b) or 2(4)(e) to imprisonment for a period of not less than ten years;
- (c) in any other case to imprisonment for a period of not less than five years.

(2) In the case of a person who has previously been convicted of rape (whether under the common law or under this act) such person shall be liable to imprisonment-

- (a) for life if the rape concerned or any rape for which he or she has been convicted previously, was committed under the circumstances referred to in subsection(1)(a);
- (b) for a period of not less than twenty years if the rape concerned or any rape for which he or she has been convicted previously, was committed under the circumstances contemplated in section 1(b);
- (c) for a period of not less than ten years in any other case.

(3) A court who convicts a person of rape may impose a sentence that is less than the applicable sentence provided for in subsection (1) or (2) if, in its opinion, there are special circumstances that would have the effect that that sentence would constitute cruel and degrading punishment as contemplated in Article 8(2)(b) of the Namibian Constitution.

(4) If an accused is sentenced to imprisonment for rape, no remission of sentence shall be granted under section 63 of the Prisons Act (Act 8 of 1959).

Order for the payment of compensation to complainant

4. (1) Notwithstanding the provisions of any other law, a court that convicts an accused of rape shall make an order that the accused pay an amount of N\$10 000 to the complainant as compensation.

(2) The Minister of Justice may by notice in the *Gazette* increase the amount referred to in subsection (1).

(3) The provisions of subsection (1) shall not deprive the complainant of the right to claim compensation in any other court: Provided that the court that awards further compensation may take the order under subsection (1) into account when it makes a further award.

(4) Subject to the provisions of subsection (3) -

(a) an order made under subsection (1) by a regional court shall have the effect of a civil judgment of the magistrate's court of the district in which the relevant trial took place;

(b) where the High Court makes an order under subsection (1), the Registrar of the High Court shall forward a certified copy of the order to the clerk of the magistrate's court designated by the presiding judge, or, if no court is designated, to the clerk of the magistrate's court in whose area of jurisdiction the offence in question was committed, and thereupon such order shall have the effect of a civil judgment of that magistrate's court.

Trials for rape shall commence within three months

5. (1) If an accused is charged with rape, the proceedings shall be commenced within three months (or such longer period as may be allowed in terms of subsection (4)) from the date on which the accused is arrested.

(2) Subject to Article 12(1)(b) of the Namibian Constitution, the accused shall not be entitled to an acquittal if the provisions of subsection (1) have not been complied with.

(3) For the purposes of subsection (1), proceedings are commenced when the prosecutor starts to adduce evidence or examine the witnesses for the prosecution as contemplated in section 150(2) of the Criminal Procedure Act, (Act 51 of 1977).

(4) If there exist special circumstances that make it impossible to comply with the provisions of subsection (1), an application may be lodged with a judge or regional magistrate for the extension of the period provided for in subsection (1).

(5) When an application under subsection (4) is considered, the judge or regional magistrate shall take into account that the highest priority is to be given to the speedy commencement and completion of criminal proceedings where the accused is charged with rape.

(6) If the provisions of subsection (1) have not been complied with or when an application is brought under subsection (4), the judge or regional magistrate shall enquire into the reasons for the delay and, if in his or her opinion, such delay was caused by the failure of any person to fulfil his or her duty diligently, he or she shall forward a recommendation to the appropriate functionary to consider the taking of disciplinary steps.

(7) If, in criminal proceedings where the accused is charged with rape, the court considers whether to grant a postponement of such proceedings, that court shall give due consideration to the trauma of the complainant and the interest of the complainant in the speedy completion of such proceedings.

No rule as to incapacity of boy under 14 years to perform sexual intercourse shall operate

6. (1) If, in any legal proceedings, the question is in issue whether a male person has performed sexual intercourse or is the father of any child, such questions shall be determined as questions of fact and no presumption or rule of law to the effect that a person under the age of 14 years is incapable of performing sexual intercourse, shall operate.

(2) The criminal capacity of an accused under the age of 14 years in a charge of rape shall be determined in the same manner as the criminal capacity of an

accused under the age of 14 years who is charged with another offence.

Abolition of cautionary rule relating to offences of an indecent nature

7. No court shall treat the evidence of the complainant in criminal proceedings where the accused is charged with rape or an offence of an indecent nature, with special caution merely because such accused is charged with rape or an offence of an indecent nature.

Evidence of period of delay between commission of act and laying of charge

8. In criminal proceedings where the accused is charged with rape, the court shall not draw any inference only from the length of the delay between the commission of the act and the laying of a complaint.

Evidence of the psychological effect of rape

9. (1) Evidence of the psychological effects of rape shall be admissible in order to prove-

- (a) that the act that forms the subject-matter of the charge has been committed; and
- (b) that the sexual act concerned has been committed wider coercive circumstances.

(2) The court shall determine the weight to be attached to the evidence referred to in subsection (1) after such evidence has been heard, with due consideration of-

- (a) the qualifications and experience of the person who gives such evidence;
- (b) all the other evidence given in the case.

Rights of complainant where accused has been charged with rape

10. (1) In criminal proceedings where the accused has been charged with rape, the complainant has the right (either personally or through a legal representative) to -

- (a) address the court on any issue on which the prosecutor may address the court;
- (b) put any question to a witness called by the prosecutor that the prosecutor might have put to such witness;
- (c) object to any evidence adduced by the prosecution or the defence, or to any question put to any witness, whether by the prosecution or the defence;
- (d) adduce any admissible evidence, which the prosecution has not adduced;
- (e) cross-examine any witness (including the accused) who is called by the defence.

(2) Subject to the provisions of subsection (1), a witness called by the complainant shall for all purposes be regarded as a witness called by the prosecution.

(3) A complainant whose presence is required in order to avail himself or herself of the rights contemplated in subsection (1), shall, unless the court on good cause shown allows otherwise, give his or her evidence before any other witness has testified.

Amendment of section 1 of Act 51 of 1977

11. Section 1 of the Criminal Procedure Act, 1977, (hereinafter referred to as "the principal act") is hereby amended by the insertion of the following definition after the definition of "charge":

"complainant" in respect of rape or an offence of an indecent nature, shall

mean the person in respect of whom the offence concerned has been committed, irrespective of whether that person has laid a complaint or gives evidence in the proceedings concerned;".

Insertion of section 59A of Act 51 of 1977

12. The following section is hereby inserted after section 59 of the principal act)-

"Right of complainant to be heard in bail application where accused is charged with rape

59A. (1) Where a court is considering the question whether an accused who is in custody for a charge of rape, is to be released on bail, the complainant shall have the right to address the court (whether personally or through a legal representative) and shall also have the right to present any relevant evidence or information to the court.

(2) If an accused is in custody on a charge of rape, the person in charge of the police station or place referred to in section 50 (1), shall cause the complainant to be informed, as soon as practical, by means of a written notice served on him or her in the same manner *mutatis mutandis* as a summons referred to in section 54, or if it is not possible, in any other manner

(a) of the date, time and place of the first appearance of the accused in court;

(b) of the rights of the complainant under subsection (1).

(3) The person who informs the complainant as contemplated in subsection (2), shall prepare an affidavit stating -

(a) whether the provisions of subsection (2) have been complied with and, if they have not been complied with, the reason why it was not possible to comply with them;

- (b) the method by which the complainant has been informed as contemplated in subsection (2);
- (c) if the complainant has been informed in a manner other than by means of a written notice contemplated in subsection (2), the reason why such other method was used;
- (d) the time and date when he or she has informed the complainant as contemplated in subsection (2).

(4) When an accused who is in custody for rape, is brought before the court for the first time, the affidavit referred to in subsection (3) shall be handed to the judicial officer who presides at that court and shall form part of the record of the proceedings concerned.

(5) If the complainant is present in proceedings where the accused is before the court for rape, and such proceedings are postponed, the complainant shall be informed of the date to which such proceedings have been postponed and of his or her rights under this section and section 10(1) of the Criminal Law Amendment Act, 1997.

(6) If the complainant is not present in proceedings where the accused is before the court for rape, the court shall enquire into the question whether he or she has had knowledge of the proceedings and shall -

- (a) if it is of the opinion that it is probable that the complainant has had knowledge of the proceedings, order that the matter be dealt with in his or her absence;
- (b) otherwise postpone the matter in order to obtain the presence of the complainant, unless it is in the interest of justice (with due regard to the interests of the complainant) that the matter be dealt with forthwith and in the absence of the complainant.

(7) If, in proceedings where the accused is before the court for rape, and such proceedings are postponed in the absence of the complainant, the prosecutor in such proceedings shall cause the complainant to be informed

- (a) of the matters referred to in subsection (5); and
- (b) whether the accused has been released on bail,

and the provisions of subsection (2), (3) and (4) shall apply *mutatis mutandis*."

Amendment of section 62 of Act 51 of 1977

13. Section 62 of the principal act is hereby amended by the addition of the following subsection after the present section that becomes subsection(1):

"(2) If the accused is in custody for rape and a court releases that accused on bail, that court shall impose such conditions referred to in subsection (1) as would ensure that the accused does not make contact with the complainant concerned.¹¹

Amendment of section 153 of Act 51 of 1977

14. Section 153 of the principal act is hereby amended-

- (a) by the insertion of the following subsection after subsection (3):

"(3A) Any person whose presence is not necessary at criminal proceedings referred to in paragraph (a) and paragraph (b) of subsection (3), shall not be present at such proceedings while the other person referred to in those paragraphs is giving evidence, unless such other person, or if he or she is a minor, his or her parent or guardian or a person *in loco parentis*, requests otherwise.";

- (b) by the addition of the following subsection:

"(7) The provisions of this section, in so far as they provide for a limitation on the fundamental rights to a public trial and to the giving of judgment in public contemplated in Article 12(1)(a) and 12(1)(c) of

the Namibian Constitution respectively, are authorised by the provisos to the said paragraphs."

Amendment of section 154 of Act 51 of 1977

15. Section 154 of the principal act is hereby amended-

(a) by the substitution for paragraph (a) of subsection (2) of the following paragraph:

^o (a) Where a court under section 153(3) directs that any person or class of persons shall not be present at criminal proceedings or where any person is in terms of section 153(3A) not permitted to be present at criminal proceedings, no person shall publish in any newspaper whatever or broadcast on radio or television any information which might reveal the identity of any complainant in the proceedings or any particular of the evidence given by such complainant: Provided that the presiding judge or judicial officer may authorise the publication of such information or particular if he or she is of the opinion that such publication would be just and equitable: Provided further that the prohibition contained in this paragraph shall no longer operate if the complainant concerned has authorised the publication of the information referred to in this paragraph.";

(b) by the substitution for subsection (5) of the following subsection:

"(5) Any person who publishes any information in contravention of this section or contrary to any direction or authority under this section or who in any manner whatever reveals the identity of a witness in contravention of a direction under section 153(2), shall be guilty of an offence and liable on conviction to a fine not exceeding N\$5 000 [R500] or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.";

(c) by the addition of the following subsection:

"(6) In so far as the provisions of this section limit the fundamental freedom contemplated in Article 21(1)(a) of the Namibian Constitution, such limitation is authorised by Article 21(2).".

Amendment of section 227 of Act 51 of 1977

16. Section 227 of the Principal Act is hereby amended by the deletion of the words "or as to the character of any female against or in connection with whom any offence of an indecent nature is alleged to have been committed,".

Insertion of section 227A of Act 51 of 1977

17. The following section is hereby inserted after section 227 of the principal Act-

"Evidence of sexual experience or conduct of complainant of rape or other offence of indecent nature

227A. (1) No evidence shall be admissible and no question shall be put to any witness relating to previous sexual conduct or experience of the complainant, or the sexual reputation of the complainant, in a charge of rape or an offence of an indecent nature, unless the court has granted leave to adduce such evidence or to put such question, which leave shall only be granted if-

- (a) such evidence is adduced or such question is asked to contradict or disprove evidence adduced by the prosecution;
- (b) such evidence is adduced or such question is asked in order to explain the presence of semen or injury to the complainant; or
- (c) such evidence relates to or such question is asked in relation to the incident for which the accused is charged.

(2) The court may order that the complainant in respect of whom the evidence is adduced or to whom the question is to be put, shall not be

present, while the request referred to in that subsection is heard.".

Short title

18. This Act shall be called the Criminal Law Amendment Act, 1997.