

**GUIDELINES**  
for  
**SERVICE PROVIDERS**  
on the  
**COMBATING OF RAPE**  
**ACT OF NAMIBIA**

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**POLICE**  
**PROSECUTORS**  
**MAGISTRATES**  
**MEDICAL PROFESSIONALS**  
**SOCIAL WORKERS & COUNSELLORS**



Legal Assistance Centre  
2005

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Ambassade van het  
Koninkrijk der Nederlanden



**Legal Assistance Centre**  
4 Körner Street, Windhoek  
P.O. Box 604 Windhoek  
Tel. (264) (061) 223356  
Fax 234953  
Email [info@lac.org.na](mailto:info@lac.org.na)  
Website [www.lac.org.na](http://www.lac.org.na)

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# INTRODUCTION

## BACKGROUND TO THE GUIDELINES

Each set of guidelines was drafted by members of the profession in question. The draft guidelines were circulated to professionals from every region in the nation for comment. They were discussed in numerous workshops held in various locations, and revised in light of the comments received. They were also discussed widely with members of the public, and with other professionals who may be involved in rape cases (such as psychologists and counsellors). Thus, the final drafts are genuinely representative of the concerns and needs of those people who deal directly with rape complainants.

Four of the five sets of guidelines have been formally approved by the relevant professions. The guidelines for police, prosecutors, magistrates and social workers have all been approved by senior government officials responsible for the administration of these professions. The guidelines developed for the medical profession have not received formal approval from the Ministry of Health and Social Services, but they are included here because they have been developed during the course of several workshops with a range of medical professionals including representatives of the National Forensic Science Laboratory and so could be helpful to medical professionals.

## WHY ARE GUIDELINES HELPFUL?

The main idea behind the guidelines is that they should set the standard for a consistent and sensitive professional response. The following additional motivations for adopting guidelines have been identified in other countries:

- Guidelines make sure that all members of a profession follow the steps which have been identified as best practices.
- Guidelines ensure that all members of the profession show sensitivity to the complainant, and alert service providers to important gender issues.
- Guidelines help make service provision more cost effective.
- Guidelines make professionals more accountable by informing the public on what kind of service they should expect.
- Guidelines help to make sure that all complainants receive service on a basis of equality, regardless of sex, race or ethnicity.
- Guidelines facilitate co-operation between different agencies and help eliminate duplication of services.
- Guidelines help to provide consistency in service provision, rather than allowing it to depend on individual discretion and personalities.

- Guidelines help to provide continuity in service, by maintaining consistent procedures through staff changes.

Professional discretion is necessary and important to avoid rigid services. However, in recent years, many countries have begun to develop policies and guidelines for police, prosecutors, courts, health care professionals and other service providers on various forms of violence against women – including rape, sexual harassment and domestic violence.

This can be particularly important in the criminal justice context. The criminal case is between the state on the one side and the accused on the other. The complainant has no direct voice. There is no one with an official duty to protect the complainant's interests. The complainant must rely on the police, the prosecutor, the presiding officer and various support persons to play this role.

In the past, complainants in a rape case have sometimes been blamed for the rape, because of where they were or what they were wearing or what kind of sexual reputation they have. They were cross-examined in court about their sexual history, and made to feel as if they were the ones on trial. The new law makes an effort to move away from those false stereotypes about women, but law reform alone will not be sufficient. Clear procedures can help to make sure that stereotypes do not creep into the response of individual players in the criminal justice system. They can also give guidance on how to respond to a rape complainant in an appropriate manner.

A sensitive professional response is also crucial to the outcome of the case. A complainant who is met with rudeness or disbelief may not continue to co-operate with the criminal justice system, leaving a rapist to go free and endanger others.

## **Police**

The primary role of the police is to collect information and evidence, but the complainant has other immediate needs such as the need for medical attention and counselling or psychological treatment. Sensitivity to the complainant's position will lead to improved co-operation, which will increase the chances of conviction in the case at hand, and improve relations between the police and the community at a broader level. Police officers should continue to treat the complainant with sensitivity and respect as the investigation proceeds, even if there is not sufficient evidence to proceed to court.

Because police will often be the first point of contact for a rape complainant, they have a special responsibility to make sure that the complainant gets clear and complete information about the prevention of HIV, other sexually transmitted diseases and pregnancy.

### **Prosecutors**

The traditional focus of the prosecutor is on presenting the evidence and securing a conviction. However, it is important to take note of the fact that the court process looms large for most people who have experienced rape. Many rape survivors say that they feel that they cannot really get on with their lives until the court case is completed.

Testifying about the rape may be like re-living the experience. Talking about sexual matters in front of strangers may be very embarrassing. The experience of appearing in court itself is unfamiliar and traumatic for many people. The process is unnecessarily mysterious,

which can add to the trauma. And yet a complainant who feels more comfortable with the court setting will probably make a better witness. Therefore, it is in the interests of the prosecutor to take some time to put the rape complainant at ease – as well as being a new legal responsibility in terms of the Combating of Rape Act.

## **Magistrates**

Because the law on rape has been dramatically changed, it will probably be necessary for presiding officers to control rape trials strictly to make sure that there is no backwards slide into the previous approaches to rape.

The presiding officer must make sure that no prohibited cross-examination on sexual history or reputation takes place, and that cross-examination which may be allowed is dealt with strictly in terms of the procedures set forth in the new law. Since the absence of consent is no longer an element of the crime, it will probably be necessary for presiding officers to be vigilant about cutting off irrelevant questions on this issue from both prosecutors and defence counsel who have been conditioned by the previous way of dealing with rape cases.

The presiding officer is also in a position to control the courtroom in a way which can minimise added trauma. For example, the presiding officer can take steps to minimise contact between the complainant and the accused, or call for a recess if the complainant is experiencing acute distress. The presiding officer also has the power to introduce court personnel to the complainant (such as the police officer who receives evidence, the clerk who records the proceedings and any interpreters who are present), so that the complainant knows why the presence of these persons is necessary. The presiding officer can explain what is happening so that the complainant will understand and feel more comfortable in the unfamiliar environment.

It is of course necessary for the presiding officer to remain impartial in every respect, but this does not preclude taking steps to ensure that the complainant is treated with respect and dignity. The accused has the benefit of many legal safeguards at the time of the trial – but the complainant has few legal rights, since he/she is only a witness.

## **Medical professionals**

It is vital for medical personnel to have guidelines on how to deal with rape complainants, both for purposes of collecting evidence and for dealing appropriately with the medical needs of the complainant – including injury from the rape as well as preventative measures for HIV, other sexually transmitted diseases and pregnancy.

## **Social workers and counsellors**

A rape complainant may see a social worker soon after the rape has taken place, especially if the case is reported at a Woman and Child Protection Unit. This means that social workers have a special duty to make sure that the complainant is informed about the prevention of HIV, other sexually transmitted diseases and pregnancy.

Rape complainants need ongoing support during the long process of taking the case to court. If the crime was committed by someone known to the complainant, he/she may come under

serious pressure from the accused or from family members to withdraw the case. Because the case may take a long time to reach the court, the complainant may have moved on with his/her life and be more reluctant to pursue the prosecution. Regular contact and information about the progress of the case will aid a successful prosecution.

Special trauma may arise if there is not enough evidence to proceed with the case, or if the accused rapist is found “not guilty”. Such outcomes may make the complainant feel that he/she was not believed, and create an added need for support and reassurance.

It is also important to remember that the after-effects of rape may not be felt immediately. The complainant, the complainant’s spouse and other family members may need support and counselling over a long period, and they may not even be ready to begin a counselling process until some time has passed.

## USING GUIDELINES EFFECTIVELY

Here are some suggestions on how to use the guidelines effectively:

1. **Training:** The guidelines can be used as the basis for training new members of the professions on how to handle rape cases.
2. **Checklists:** The different points in the guideline are arranged in a list which service providers can use as a checklist in individual rape cases. Copies of the guidelines could be made for each case, with each item being ticked off as it is completed. If an item is not ticked off as being done, then an explanation could be noted on the checklist. The completed checklists could then be included in case files and social work reports for monitoring purposes.
3. **Basis for monitoring and reviewing procedures:** Each profession could monitor and review its guidelines from time to time, as a way of measuring the effectiveness of their response to rape. Over time, service providers may identify ways to work more effectively with rape cases, and amend their guidelines accordingly.
4. **Guiding public expectations:** The guidelines will also function as a means of letting the community know what to expect from service providers. The members of the public can also lay a monitoring role which will help to improve service provision in Namibia. This is why the final guidelines are being published and distributed to interested members of the public as well as to professionals who work with rape victims.

The publication of the guidelines is only a starting point. It is up to the different professions to make them meaningful. Everyone in the profession must know about the guidelines and be committed to following them. They should be a tool to make people’s jobs easier, not harder.

The Combating of Rape Act has sent out a strong message to society that Namibia is serious about rape. The utilisation of professional guidelines is another important piece of the movement to combat this crime.



# GUIDING PRINCIPLES

1. **Rape is a serious crime** that requires a serious response from the criminal justice system and the community.
2. Everyone has a right to be free from the fear of rape. Rape is by definition an act of force or coercion. **No one invites** a rape by his or her behaviour.
3. The **health, safety and welfare of the complainant** in a rape case are of the highest importance.
4. **Rape is a very traumatic crime.** Different people will react to the trauma of rape in different ways. It is not possible to make a judgement about what has happened from the complainant's behaviour.
5. **There are many reasons why a person who has been raped may delay before reporting the crime to the police, or before telling anyone what has happened.** Sometimes people feel such shock or shame that they do not want anyone to know. The rapist may have threatened to kill the complainant if he or she tells anyone. Delay is not a valid reason for doubting the complainant's truthfulness.
6. The **dignity of the rape complainant** should be respected at all times.
7. The law requires that every accused person be considered innocent until proven guilty. In the same way, **every complainant should be treated as if he or she is telling the complete truth** until such time as definite evidence to the contrary comes to light.



# DEFINITIONS

The new Combating of Rape Act, (Act 8 of 2000) and the Combating of Immoral Practices Amendment Act (Act 7 of 2000) provide the following definitions:

1. The **definition of rape** is the “intentional commission of a sexual act under coercive circumstances”. The definition needs further explanation on the meaning of “sexual act” and “coercive circumstances”.
2. **“Sexual act”** covers the most intimate kinds of sexual contact, namely:
  - the insertion (to even the slightest degree) of the penis into the vagina or anus of another person (with the term “vagina” including the external female genitalia).
  - the insertion of the penis into the mouth of another person.
  - the insertion of any other part of the body into the vagina or anus.
  - the insertion of any object into the vagina or anus (excluding the insertion of objects consistent with sound medical practices and carried out for medical purposes).
  - cunnilingus, which is oral stimulation of the genitals.
  - any other form of genital stimulation.
3. **“Coercive circumstances”** includes force, threats of force, and other situations which enable one person to take unfair advantage of another. It includes all the following circumstances listed below, but it can also include other forms of coercion, which are not mentioned in the law.
  - physical force against the complainant (victim) or another person.
  - threats of physical force against the complainant or another person.
  - threats to cause harm other than bodily harm to the complainant or another person, in circumstances where it is not reasonable for the complainant to disregard the threats.
  - the complainant (victim) is under the age of 14 and the perpetrator is more than 3 years older
  - the complainant (victim) is unlawfully detained.
  - the complainant (victim) is -
    - physically or mentally disabled
    - drunk or drugged
    - asleepand cannot understand what is happening or is unable to communicate unwillingness.
  - the perpetrator pretends to be another person
  - the presence of more than one person is used to intimidate the complainant (victim).
4. **Rape may occur in any relationship, including a marriage.**





## Guidelines for **POLICE**



***If the complainant (or someone acting on behalf of the complainant) contacts the police by telephone –***

1. Find out the address the complainant is calling from and whether the complainant is in any danger. Send a police vehicle to the complainant immediately.
2. Find out whether the complainant is injured and whether an ambulance or other medical help is needed. If so, send medical help immediately.
3. Remind the complainant on the telephone not to wash or change clothes.
4. Keep talking to the complainant as long as possible while help is on the way, to provide support and reassurance. This is not always possible, but where possible it should be done.

***If the complainant comes to the police station –***

5. Introduce yourself and explain your role in the investigation. Give the complainant your name, rank and contact telephone number.
6. Find out whether the complainant is injured and whether an ambulance or other medical help is needed. If so, arrange medical help immediately.
7. Find a quiet place outside the charge office where the rape complainant can be interviewed.
8. If the complainant is unable to proceed with a statement at the moment because of injury or emotional state, open a docket and take down basic details (name address, etc). Write down the case number for the complainant, to make follow-up easier.
9. Contact the investigating officer as soon as possible.

***The first police priority should be the safety and well-being of the complainant. This means making sure that the complainant gets access to any medical attention required, including medication to prevent HIV, other sexually transmitted diseases and pregnancy.***

10. Inform every rape complainant of the importance of prompt preventative medication for HIV and help to obtain such medication as quickly as possible.
11. Provide or arrange transport to the nearest doctor, hospital or clinic, and accompany the complainant to the medical examination for the purpose of collecting evidence.

12. Ask the complainant if he/she would like to see a social worker or a counsellor. Ask if he/she would like to have a social worker or counsellor present while making the statement. If the answer is yes, arrange this right away (if there a social worker or counsellor reasonably available).
13. Do not leave the complainant alone while waiting for the investigating officer to arrive.

***The second police priority should be taking a statement and collecting evidence.***

## **Interviewing procedures**

14. Introduce yourself and explain your role in the investigation. Give the complainant your name, rank and contact telephone number.
15. Because medical evidence may disappear, arrange if possible for a forensic medical examination to take place before the statement is taken.
16. Rape cases should take priority over other cases. If other people are waiting to give a statement, attend to the rape complainant first. However, it may be necessary to give the rape complainant some time to recuperate before he/she is capable of making a statement.
17. If the complainant is too upset or injured to make a statement at the time, arrange for a subsequent interview. Forcing a detailed statement from a person who is in no condition to give one will result in bad evidence. It may be better to write down brief initial information for a skeleton docket, and then arrange for a detailed statement at a later time. Only one statement should be taken for court purposes.
18. Where possible, arrange for a police officer of the same sex as the complainant to take the statement. The most senior investigating officer of the same sex should take the statement.
19. Take the statement in private, but allow the complainant to have a friend, relative, social worker or counsellor present to act as a support person if he/she wishes.
20. Try to remove or minimise disruptions, such as telephone calls and other distractions.
21. Allow the complainant to give the statement in the language of his or her choice. Arrange a translator if necessary. Record the statement in English. Indicate on the statement what language the complainant used when giving the statement, and what language was used to verify the statement with the complainant. Use words that the complainant feels comfortable with. Avoid using difficult or advanced terms.
22. Do not leave the complainant alone during the interview process, or at any other time.
23. Do not interrupt the complainant, as this may prevent the complainant from conveying important information.
24. Encourage the complainant to give full information. For example, if the complainant has consumed alcohol or drugs, it is best to include details about this in the statement. If there was some previous sexual contact of a consensual nature between the complainant and the accused, this should also be recorded. Full disclosure of all facts

will make the complainant more credible. *But questions about the complainant's behaviour should at all costs avoid creating the impression that the complainant was in any way to blame for what happened.*

25. Ask questions in a calm and matter-of-fact tone. Be calm and patient. Be sensitive to the horrible experience the complainant has been through. Let the complainant know that you believe him/her and want to help him/her. Use tone of voice, eye contact and the way that you phrase your questions to show support.
26. Do not rush the complainant. Give the complainant as much time as he/she needs.
27. If the complainant is a child, use the prescribed special procedures for interviewing children.
28. Avoid using terms like "alleged rape". While this is legally correct, it may be misunderstood by the complainant as a signal that he/she is not being believed.
29. Try to get a full description of the perpetrator (if his/her identity is unknown) and circulate this description immediately. If the identity of the perpetrator is known, try to obtain both home and work addresses, or other information about where the perpetrator might be found. If it is necessary to ask the complainant to accompany police to point out the perpetrator, explain this carefully and be sensitive to the degree of trauma this will involve.
30. Ask the complainant if the accused has a firearm or used a firearm in the rape. If so, record this information so that the bail application can include a request for an order prohibiting the possession of a firearm.
31. Ask the complainant if the accused threatened him/her in any way at the time of the rape, before or afterwards. Record this information in the statement for use in the bail application.
32. Tell the complainant that he/she has a right to present evidence directly or through the police on the question of bail, so that bail can be denied if the complainant has a good reason for being afraid of harm from the accused.
33. Record any information which is relevant to the bail application in the statement or in the investigation diary.
34. Tell the complainant that he/she has a right to be present at the bail proceedings to give information, but encourage the complainant to avoid the trauma of personal testimony at this hearing by conveying information through the investigating officer. *A standard procedure for bail hearings should be developed and followed.*
35. Tell the complainant that the law protects his/her privacy. It is illegal for newspapers, radio or television to publish any information about the rape that might reveal his/her identity.
36. Take photographs of the complainant's injuries if possible and use these in the bail application (as well as in the subsequent court case).
37. Explain what other investigative steps will be taken, including a medical examination (if this has not already taken place), fingerprinting, photographs, identity parade and any other anticipated steps.

38. Obtain full contact information from the complainant (addresses and telephone numbers) to make follow-up easier.
39. Allow the complainant to read through his/her statement to make sure that it is correct.
40. Encourage the complainant to contact the investigating officer with any new information or evidence.
41. If an identification parade is needed, this must take place *before* the bail proceedings so that the complainant is not influenced by the knowledge that a particular suspect has been arrested.

## **Late reports**

42. A person can lay a charge of rape at any time. Proceed in the prescribed manner even if a significant time period has already passed since the rape took place.

## **High-risk cases**

43. Identify high-risk cases. The complainant may be in particular danger if the accused (a) is a spouse, ex-spouse, relative or acquaintance of the complainant; (b) made threats to the complainant; (c) has been following or harassing the complainant. Take the following steps in high-risk cases.
44. Find out if the complainant has somewhere else to stay if necessary.
45. Make sure that the complainant knows that the accused has no right to contact him/her or threaten him/her if the accused is released on bail. Tell the complainant that he/she can contact you or any other police officer right away if this happens so that bail can be revoked.
46. Make sure that the complainant has a way to contact you if there is a problem. If the complainant has no access to a telephone, arrange to check on him/her if possible during the next few days.
47. Arrange transport back home (or to another safe place) for the complainant after the interview.

## **Collection of evidence**

### **General**

48. All rape investigations should be handled by the most senior investigating officer available.
49. Investigations in rape cases should commence as soon as possible, and always within 24 hours of receiving the report.
50. If the suspect is a police officer, refer the matter to the Complaints and Discipline Department for investigation by an impartial person.



## **Medical evidence**

51. Use the official Forensic Laboratory Crime Kit. The investigating officer should preferably take this kit along when accompanying the complainant to the hospital or clinic. It is the responsibility of the station commander to ensure that the police station has sufficient kits in stock at all times. Always ensure that your office has a supply.
52. All samples should be air dried before being sealed. Failure to air dry samples properly can destroy them.
53. Always use brown paper bags for evidence, never plastic bags.
54. If the sexual act in question involved the mouth, do not let the complainant drink any liquids before the medical examination. Oral swabs can provide evidence up to 6 hours after the incident.
55. If the complainant needs to use the toilet before the medical examination takes place, advise him/her to retain any toilet paper used for purposes of evidence collection.
56. Advise the complainant that underwear and other clothing may be needed as evidence but can be returned after the case is over.
57. Take photographs of the complainant's injuries if possible. If possible, take further photographs a day or two later when bruising may become visible for the first time.
58. The accused perpetrator should also be examined for injuries which could relate to the rape. Samples should be taken from the accused as well as the complainant.
59. Make sure that the person conducting the medical examination follows proper guidelines on collecting evidence from both the complainant and the accused.
60. Ensure that all medical evidence is properly labelled, stored and controlled. Samples sent to the forensic laboratory by registered post will not be accepted.
61. Follow-up on any information which indicates that the accused perpetrator know that he/she was HIV positive or had a serious sexually transmitted disease (such as syphilis or hepatitis) at the time of the rape. Knowledge that the rape could have exposed the complainant to such a disease is grounds for the heaviest minimum sentence.

## **Crime scene**

62. Record a detailed description of the crime scene.
63. Take photographs if possible.
64. Take fingerprints if possible.
65. Follow the usual forensic procedures to check for any other evidence, such as blood, semen, or signs of struggle.
66. Identify and interview any other potential witnesses.

## **Follow-up action by investigating officer**

67. Contact the complainant within a week of the initial report to provide information on the progress of the case.
68. Inform the complainant right away if an arrest is made. If no arrest is made, explain the reason for this to the complainant.
69. Give the complainant any information about the status of the case requested by the complainant.

## **Steps by investigating officer if complainant wants to withdraw the charge**

70. Question the complainant to see if intimidation has taken place. If there has been intimidation, contact the prosecutor to get bail revoked.
71. Question the complainant to make sure that fear of publicity is not influencing the decision. Explain the legal provisions prohibiting publication of identifying information about the complainant.
72. Refer the complainant to a social worker or a counsellor for support.
73. If bail has been granted, examine the bail conditions to make sure that they are sufficient to protect the complainant. Explain again to the complainant what to do if any of the bail conditions are violated.
74. Include relevant information about the complainant's desire to withdraw the case in the investigation diary for the information of the prosecutor who will decide whether to proceed.

## **Steps by investigating officer relating to bail**

75. Inform the complainant of the time and place of the bail hearing. Tell the complainant that he/she has a right to attend the bail hearing personally, or as an alternative, the right to ask the investigating officer to convey any concerns about bail on his/her behalf. *It is the duty of the officer in charge of the police station where the accused is being held to ensure that the complainant is fully informed. (See section 12 of the Combating of Rape Act 2000.)* Make a note in the investigation diary, or in a separate statement, so that the prosecutor knows that the information has been conveyed.
76. Ask the complainant if the statement he/she has already made contains information about any reasons to fear the accused. Ask if the accused has contacted him/her or threatened him/her directly or indirectly since the initial statement was made. Ask the complainant if he/she has any other information that might be important for the bail hearing.
77. If the bail hearing is postponed, inform the complainant of the new time and place for the bail hearing. Make a note in the investigation diary, or in a separate statement, so that the prosecutor knows that the information has been conveyed.

78. Contact the complainant to inform him/her whether bail was granted or denied (if the complainant did not attend the hearing personally). If bail is granted, explain the bail conditions. Tell the complainant exactly who to contact if any of these conditions are violated. Make a note in the investigation diary, or in a separate statement, so that the prosecutor knows that the information has been conveyed.

*The Combating of Rape Act places a legal duty on the prosecutor to inform the complainant of the bail conditions, but it will usually be easier for the investigating officer to contact the complainant and then report back to the prosecutor. (See section 60A(8) of the Criminal Procedure Act 51 of 1977, as amended by section 12 of the Combating of Rape Act, or section 64 of the Criminal Procedure Act 25 of 2004.)*

79. Contact the complainant at least once each month to make sure that the accused is complying with the bail conditions.
80. If information is received from the complainant or from any other source about a breach of bail conditions, the investigating officer should notify the prosecutor immediately.

## **Referrals**

81. Consider referring the rape complainant to a specialised agency, a counselling organisation, a psychologist, a psychiatrist, or any other appropriate person or group for information or assistance. A referral involves more than just giving the complainant a name or a telephone number. Collect information about services that are available locally so that you can describe these services accurately to the complainant. Try to meet personally with the persons and groups who work with rape in your area to form more effective links.

## **During the court case**

82. The court case is often the most traumatic aspect of the entire investigation for the complainant. The investigating officer can help to ensure that the complainant is prepared for the court proceedings by referring him/her to the prosecutor or to a social worker or counsellor who can help the complainant understand the procedures which will take place.

## **Monitoring and feedback**

83. Include a copy of the guidelines in the case docket with completed steps ticked and brief notes on steps that have not been taken, for purposes of monitoring and feedback.
84. Make sure that channels for complaints about your profession's services are made known to rape complainants.
85. Review your profession's guidelines periodically to see if they are still relevant and adequate.
86. Encourage appropriate personnel in your profession to consult periodically with the community and with relevant stakeholders about the appropriateness of your profession's guidelines and the effectiveness of their implementation.



# Guidelines for PROSECUTORS

## General

1. All rape cases will, where possible and practical, be assigned to a specific prosecutor when they reach the trial stage, and that prosecutor will follow the case throughout the trial to completion.
2. Rape cases will, where possible, be handled by an experienced prosecutor.
3. Rape cases involving young children will be given priority in terms of scheduling trial dates, because of the special concerns about the memory of young children.

## Bail

4. Communication between the police and the prosecutor takes place primarily through the investigation diary. If the information in the docket and the investigation diary is not complete, contact the police to make sure that the complainant (a) has been questioned about any concerns with respect to the release of the accused on bail; (b) has been informed of his/her right to be present at the bail hearing; and (c) has been informed of the time and place of the bail hearing, and of any postponements.

*See section 60A of the Criminal Procedure Act 51 of 1977, as amended by the Combating of Rape Act 8 of 2000, or section 64 of the Criminal Procedure Act 25 of 2004.*

*In terms of these sections, it is the duty of the person in charge of the police station (or any other place where the accused is detained) to inform the complainant of the place, time and date of the accused's first appearance in court. The complainant has a right to request the prosecutor to present any relevant information to the court in a bail proceeding.*

5. If the bail hearing is postponed and the complainant is not present, inform the complainant of the date and time when the bail hearing will proceed and of the complainant's right to attend or to request the presentation of information or evidence.

*This is the responsibility of the prosecutor in terms of section 60A(8) of the Criminal Procedure Act 51 of 1977, as amended by the Combating of Rape Act, or section 64(9) of the Criminal Procedure Act 25 of 2004. The information could be conveyed by the investigating officer, and feedback given to the prosecutor to confirm the communication in the form of an entry in the investigation diary or in a separate statement.*

6. Oppose bail vigorously in any case where the complainant has legitimate grounds for fear based on events or relationships before, during or after the rape.
7. Make sure that the "no-contact" bail condition required by law is imposed by the court. The prosecutor should also consider whether to request that other specific witnesses be covered by a "no-contact" provision.

*See section 62(2) of the Criminal Procedure Act 51 of 1977, as amended by the Combating of Rape Act 8 of 2000, or section 65(2) of the Criminal Procedure Act 25 of 2004.*

8. Request a prohibition on possession of firearms as a condition of bail if the accused used a firearm in the commission of the rape.
9. If the complainant is not present at the bail hearing, make sure that the complainant is informed of the granting of bail and the conditions of bail imposed.

*This is the responsibility of the prosecutor in terms of section 60A(8) of the Criminal Procedure Act 51 of 1977, as amended by the Combating of Rape Act 8 of 2000, or section 64(9)(a) of the Criminal Procedure Act 25 of 2004. The information could be conveyed by the investigating officer, and feedback given to the prosecutor to confirm the communication in the form of an entry in the investigation diary or in a separate statement.*

10. If bail conditions are not complied with, take immediate steps to have bail revoked.

## **Criminal trial**

*Note that section 9(b) of the Combating of Rape Act places a duty on the prosecutor “to provide all such information to the complainant as will be necessary to lessen the impact of the trial on the complainant”.*

11. Give the rape complainant fair warning of the trial date.
12. Make sure that the complainant and all witnesses are subpoenaed in time.

*The prosecutor can request that the investigating officer remind the complainant and the witnesses of the trial date if the subpoenas have been served far in advance of this date.*

13. Review the docket a few days prior to the trial and discuss any need for additional evidence with the investigating officer.
14. Check for previous convictions of the accused on sexual offences since this information is now admissible in the rape trial for certain purposes.

*See section 211A of the Criminal Procedure Act 51 of 1977, as amended by the Combating of Rape Act 8 of 2000, or section 237 of the Criminal Procedure Act 25 of 2004.*

15. Ascertain whether there is any evidence to indicate that the accused had knowledge that he or she was infected with any serious sexually transmitted disease, including HIV, at the time of the alleged rape as this is relevant for purposes of sentencing.

*See section 3 of the Combating of Rape Act 8 of 2000.*

16. Interview the complainant in advance of the trial date in every instance. Persons who have experienced a rape have undergone a traumatic shock. Additional care in listening to their concerns and explaining the court process, though time consuming, is necessary to the successful conduct of the case. Social workers, community volunteer counsellors and some NGOs can be called upon to assist with the orientation process.

- 16.1 Be calm and patient. Be sensitive to the horrible experience the complainant has been through. Let the complainant know that you believe him/her and want to help him/her. Use tone of voice, eye contact and the way that you phrase your questions to show support.

- 16.2 Conduct this interview in the language of the complainant's choice. Arrange for an interpreter to be present, if the complainant has no objections. If an interpreter is needed, arrange for an interpreter of the same sex as the complainant if possible.
- 16.3 Do not rush the complainant. Give the complainant as much time as he/she needs.
17. If the complainant wishes, take him/her to the courtroom and explain in detail where the different parties will be and what will happen at the trial.
  18. Find out if the complainant needs a letter to give to his/her employer to get time off for the trial. If the complainant has other practical difficulties, such as problems with transport or child care, arrange a referral to a social worker.
  19. Refer the complainant to the Clerk of the Court for information about financial reimbursement that is available in respect of the complainant's appearance at trial (such as reimbursement for travel expenses).
  20. Tell the complainant how to contact a social worker or a counsellor (if the complainant is not already receiving counselling).
  21. Explain the privacy provisions of the new law to the complainant. Find out if the complainant wishes the courtroom to be open to the public for any reason.
- See section 153-154 of the Criminal Procedure Act 51 of 1977, as amended by the Combating of Rape Act 8 of 2000, or section 175(4), Criminal Procedure Act 25 of 2004.*
22. Make sure that the complainant knows that a friend, relative, counsellor or other support person who will not be a witness to the case can accompany him or her.
  23. Make sure that the complainant has a chance to review the statement he or she made to the police prior to the trial.
  24. If an interpreter is needed at trial, arrange for an interpreter of the same sex as the complainant if possible.
  25. Consider introducing expert testimony on the psychological effects of the rape, in light of the new legal provisions on this point.
- See section 8 of the Combating of Rape Act 8 of 2000.*
25. Object to any unnecessary or aggressive cross-examination. Object to any questions about sexual reputation. Object to any questions about sexual history if the appropriate procedure for obtaining court permission is not followed.
- See section 227A of the Criminal Procedure Act 51 of 1977, as amended by the Combating of Rape Act 8 of 2000, or section 258 of the Criminal Procedure Act 25 of 2004.*
26. Try to minimise contact between the accused and the complainant outside the courtroom if possible. For example, use different entrances and exits to the courtroom and provide a private room where the complainant can wait before the trial starts, if these measures are possible. Make sure that the complainant has a safe and comfortable place to wait if he/she must stay outside the courtroom during the evidence of other witnesses. Make sure that the complainant cannot be subjected to intimidation by the accused or the accused's friends or family members at this crucial time.



27. If there is a postponement, make sure that the complainant understands why this has happened.
28. If the complainant wishes to withdraw the case, meet with the complainant to discuss the reasons for this fully before the withdrawal takes place in court, and record a withdrawal statement.
  - 28.1 Consider the possibility of proceeding with the case in spite of the complainant's objections, after discussing the pros and cons of this with the complainant and considering the complainant's point of view. Avoid requiring the testimony of the complainant in such a situation if at all possible.
29. After the verdict is given, if possible, make sure that the complainant understands what has happened.
  - 29.1 If the verdict is 'not guilty', explain that this is not the same as a finding that the rape did not take place.
  - 29.2 If the verdict is 'guilty', explain how the sentencing works. Explain the effect of any suspended sentences, and explain when the convicted person will first be eligible for parole.

## **Sentencing**

30. Inform the complainant when sentencing will take place if this is not done at the time of trial. Tell the complainant how to contact you (or the investigating officer) to find out what sentence was imposed if the complainant is not going to be present at sentencing.

*The investigating officer can be asked to convey information on the sentence to the complainant. The prosecutor should check the investigation diary to ensure that this has actually been done. See section 9(b) of the Combating of Rape Act 8 of 2000.*

31. Once the accused is convicted, use section 300 of the Criminal Procedure Act to obtain an order for compensation for property damage or loss, if this is appropriate. Discuss this possibility with the complainant and obtain information about property-related expenses that may have resulted from the rape.

## **Monitoring and feedback**

32. Include a copy of the guidelines in the case file with completed steps ticked and brief notes on steps which have not been taken, to ensure continuity if the case passes from one prosecutor to another and for purposes of feedback.
33. Make sure that channels for complaints about your profession's services are made known to rape complainants.
34. Review your profession's guidelines periodically to see if they are still relevant and adequate.
35. Encourage appropriate personnel in your profession to consult periodically with the community and with relevant stakeholders about the appropriateness of your profession's guidelines and the effectiveness of their implementation.



# Guidelines for MAGISTRATES

## Bail

1. Confirm that the police and the prosecutor have fulfilled their duties to (a) inform the complainant of the place, time and date of the bail application and (b) invite the complainant to present relevant information to the court either directly or through the investigating officer.

*See section 60A of the Criminal Procedure Act 51 of 1977, as amended by the Combating of Rape Act 8 of 2000, or section 64 of the Criminal Procedure Act 25 of 2004.*

*In terms of these sections, it is the duty of the person in charge of the police station (or any other place where the accused is detained) to inform the complainant of the place, time and date of the accused's first appearance in court. The complainant has a right to request the prosecutor to present any relevant information to the court in a bail proceeding.*

2. If the bail hearing is postponed when the complainant is not present, confirm before the application proceeds that the complainant has been informed of the new date and time, and of his or her right to attend or to request the presentation of information or evidence.

*This is the responsibility of the prosecutor in terms of section 60A(8) of the Criminal Procedure Act 51 of 1977, as amended by the Combating of Rape Act, or section 64(9)(b) of the Criminal Procedure Act 25 of 2004.*

## Trial and sentencing

3. Give rape cases involving young children priority over other cases in terms of scheduling trial dates if possible, because of the problems pertaining to children's memories.
4. Encourage all court personnel who deal with the rape complainant to treat him/her with dignity, respect, and sensitivity.
5. Apply the provisions on vulnerable witnesses to the complainant and any other parties or witnesses as appropriate.
6. Because the new law on rape with its focus on "coercive circumstances" is a marked departure from the old law which focused on "absence of consent", be especially alert to control questions and comments based on the old notions of rape.
7. The stiffest category of minimum sentence applies to a perpetrator who knew *at the time of the rape* that he or she was infected with a serious sexually-transmitted disease (section 3 of the Combating of Rape Act). Allow questions as to the perpetrator's sexual health at the time of the alleged rape only during the sentencing phase of the trial. Information about HIV status is confidential and should be heard only in closed court.
8. Be alert to the need for a recess to allow the complainant to collect himself/herself if testimony is proving to be traumatic.

9. When the court goes into recess or is adjourned, apply safeguards to protect the complainant from unnecessary contact with the accused if possible. Such safeguards could include the use of different entrances and exits, allowing the complainant to leave first, providing an empty office or other room as a private waiting room for the complainant, or arranging for a court official or a police officer to escort the complainant to protect him/her from intimidation.
10. Enforce the legal rules on closed court strictly, but allow the complainant to be accompanied by a friend, relative, counsellor or other support person who will not be a witness to the case if he or she wishes.
11. Speak loudly and clearly to make sure that the accused, the complainant and any other persons present can hear and understand what is happening. Explain procedures (such as postponements and adjournments) briefly and simply for the benefit of the accused, the complainant and other persons present.
12. If there is a postponement, an adjournment or a reservation of judgment, explain the reason for this and make sure that the complainant knows when the trial, verdict or sentencing will take place, even if the complainant's presence is not required. Warn witnesses of the next court date if they need to be present.

## **Monitoring and feedback**

13. Make sure that channels for complaints about your profession's services are made known to rape complainants.
14. Review your profession's guidelines periodically to see if they are still relevant and adequate.
15. Encourage appropriate personnel in your profession to consult periodically with the community and with relevant stakeholders about the appropriateness of your profession's guidelines and the effectiveness of their implementation.

# Guidelines for **MEDICAL PROFESSIONALS** (DOCTORS/NURSES)

## **Intake and administration**

1. Victims of rape should at all times be treated with dignity and respect by the medical staff (including doctors, nurses, intake workers and others).
2. Any male or female of any age (including children) who claims to be a victim of rape/sexual abuse should always be treated as a possible rape victim. He/she must be seen and treated.
3. Even if another person requests assistance for a complainant (victim), this victim must be seen and treated. Another person can especially request medical treatment on behalf of a rape/sexual abuse victim if the victim is:
  - under 18 years.
  - mentally retarded.
  - under the influence of alcohol.
  - unconscious.
4. Victims should be seen within all public health facilities, such as clinics, doctor's surgeries and hospitals.
5. A medical doctor should see and treat the rape/sexual abuse victim. More senior medical staff should if possible examine suspected rape cases on admission or in the casualty department. This is especially necessary to ensure that the doctor is seen as a reliable expert witness.

### **Referrals**

- 5.1 If no doctor is available at the clinic or hospital, the nurse or administrative staff (if no nurse is available) must organize a referral to a clinic, hospital or medical health facility where a doctor is available.
- 5.2 This referral must be done as soon as possible. It is crucial for the collection of forensic evidence that the victim be seen by a doctor within no more than a few hours after the rape.
- 5.3 Medical staff must treat victim's immediate dangerous and serious injuries such as cuts before referring the rape/sexual abuse victim elsewhere.
- 5.4 Referrals must be made to a center where the rape/sexual abuse victim can be seen by a medical doctor who can complete the necessary medical form (J-88). A private doctor may also treat the rape victim.

- 5.5 The doctor at the medical health center (hospital/clinic) must be contacted to inform him/her of the referral, thereby linking the victim to his/her referral doctor. The doctor will then be able to ensure that the victim is definitely expected and treated at his/her medical facility.
- 5.6 It is the referring doctor or nurse's responsibility to arrange the referral to a specialist center should more specialised treatment be required, such as an operation.
- 5.7 A rape/sexual abuse victim should never arrive at another hospital or clinic without the clinic knowing of his/her referral. This communication is essential to ensure that the victim is handled as a priority case.

6. The rape/sexual abuse victim must be treated as a priority case by all staff, from the intake staff to the nurses and doctors (although life-threatening cases may be given priority over a rape victim who is not in immediate danger).
7. Protect the privacy of the rape victim if possible, for example by allowing him/her to be brought into the examining room through a separate entrance.
8. When a person presents for medical examination, forensic evidence should be collected as soon as possible. However, the immediate dangerous and serious injuries of the victim must be treated and are more important than forensic needs.
9. If a victim comes to a health care centre without reporting the case, the police should be called to the health centre to take a statement.
10. Even if the rape/sexual abuse occurred outside the jurisdiction of the hospital, the victim must first be treated before referring him/her to the clinic/hospital in the appropriate area.
11. The normal administrative procedures, such as opening of a file must be completed. The attending medical staff must however not become caught up in administrative procedures at the expense of the patient.

## ***General medical examination***

***The physical assessment should always begin with a systemic general examination, once any emergency needs have been addressed.***

## **Introduction**

12. Introduce yourself. Give your name, qualifications and position in the health care facility.
13. Explain the purpose of the examination:
  - *Why:* Collection of evidence for court purposes.
  - *How:* Full body medical examination including genitals and anus.
  - *Photos:* If necessary, photos will be taken to illustrate the degree of injuries. These will be kept by doctor/police on file, to be used as court evidence if needed.

14. It is important to explain to the victim and parents/guardians that the testimony by the doctor will be given in a closed court. This reassurance will allow the victim to possibly admit confidential information.
15. Take full particulars of complainant or victim's address, name, telephone number. Also include the contact address of a next of kin (family/friend) as the victim's address may change.

## **Consent to the examination**

16. Obtain written consent for examination if possible. If possible obtain consent from guardians when examining a child.
17. If a child's legal guardian is not available, the superintendent of the hospital or medical facility can give the necessary permission. Otherwise, a police officer can apply for legal consent from a magistrate or the police official in charge of the police station for the child to be examined. These procedures can be followed in cases where the parent or legal guardian is unable to give consent, such as in the following circumstances:
  - cannot be traced or grant consent within a reasonable time
  - is a suspect in the possible rape/sexual abuse case
  - unreasonably refuses to consent to the examination
  - is incompetent due to mental disorder to consent to the examination
  - is deceased.
18. Keep a copy of the consent form in the patient's file, for the future court appearance (rape cases can take years to run to completion).

## **Conducting the medical examination**

19. The medical doctor and nurse should explain all steps to the victim.
20. A good light source is essential.
21. Obtain full medical history and record information carefully. The following information is relevant for background medical history:
  - Previous pregnancies
    - Pregnancies: State number (miscarriages included).
    - Deliveries: State number, and vaginal or caesarean section.
  - Pregnancy test: Decide whether necessary.
  - Contraception: State method, date of last dose (tablet or injection).
  - Date of last menstruation: State date, days and cycle (eg 3 to 7 December 1995, 4/28 cycle)
  - Date of last intercourse with consent.
    - It is advisable to first examine a teenage girl/boy before making a decision whether he/she is a virgin. Many teenagers will not admit to sexual experience until after the examination.
  - State any drugs the patient is presently using.
22. Every effort should be made to minimize any traumatic consequences of the examination. Children and vulnerable victims should be asked, if possible, whom they would prefer to be present. Minimal touching by the examiner is desirable. Repeated physical examina-

tions should be avoided unless there are overwhelming medical reasons for such examinations.

23. Examinations under anesthesia should be avoided except under the following circumstances:
  - Vaginal bleeding or trauma, indicating a need for surgery or removal of a foreign body.
24. Use new gloves for the examination to avoid contamination of the forensic evidence. Remember the specific gloving procedures such as using sterile gloves, washing hands. All the things used during the examination, such as the gloves, must be put in a brown paper bag and sent with the samples for forensic testing.
25. Accurate description of injuries is crucial:
  - The age of injuries must be described.
  - Comment on the severity of the injuries.
  - Draw and label the injuries on the sketches on the J-88 form (preferably with a red pen). If there are multiple injuries, it is advisable to number them and to describe each by its number.

## Genital examination

26. All genital injuries (eg bruises, tears, laceration, swelling, tenderness) should be recorded. Comment on the age and stage of the injuries.
27. Indicate whether recent intercourse may have occurred according to clinical findings.
28. Try to determine whether intercourse was normal or forceful, according to the bruises, lacerations and swellings.
29. If possible, it should be noted whether injuries were consistent with being caused by forceful penetration of penis or other foreign objects (eg fingers, weapons, bottles, etc). If no injuries are recorded, it should be noted that this finding does not necessarily exclude rape.
30. A discharge and signs of seminal fluid should be recorded stating facts such as white and thick, consistent with semen; physiological (mid cycle); menstruation or infection etc.

## Forensic special examination

*The health care professional (medical doctor or nurse) should take all possible specimens which could assist with the criminal case of the rape/sexual abuse.*

31. Use the official Forensic Laboratory Crime Kits that are available at the various Woman and Child Protection Units or police stations. These kits clearly specify the necessary blood samples and other possible tests.
32. Take the necessary samples as requested/discussed with investigating officer. Information on the alleged rape/sexual abuse will guide the doctor on which tests to do. Some or all of the following samples should be taken:

- A saliva sample must always be taken, regardless of the kind of sexual assault which took place.
    - Semen.
    - Hair (pubic, body, head). Use the comb provided.
    - Blood samples for alcohol content, if necessary.
    - Fingernail scrapings.
    - Clothing.
    - Vaginal and/or anal swabs. (The type of swab usually used for vaginal tests should also be used for anal tests.)
    - Relevant blood tests.
    - DNA tests can be done if requested.
    - Abrasions on elbows and knees must be noted.
33. If necessary, arrangements can be made with the police officer to re-examine the victim after approximately 72 hours in order to look for the development of bruising.

### **Treatment of the victim**

*The victim should receive the necessary treatment for injuries.*

34. Treat injuries according to the needs of the injury.
35. Get consent of parent or guardian for treatment of a minor or mentally-incapacitated person. If this is not possible, consent can be given by the Regional Director (for clinics) and the Hospital Superintendent (in hospitals).
36. Provide preventative treatment for HIV, others sexual transmitted diseases and pregnancy in accordance with the guidelines on the following pages.



# POST-EXPOSURE PROPHYLAXIS (PEP)

excerpt from *Guidelines for Anti-Retroviral Therapy*  
Ministry of Health and Social Services, First Edition, April 2003

## Prophylaxis after rape

### Introduction

All women and men, presenting to a health facility after being raped should be counselled by the examining health worker about the potential risks of HIV transmission post-rape. If the survivor presents within 72 hours of being raped, post exposure prophylaxis (PEP) should be offered to prevent HIV transmission

### Issues to be addressed during counselling

The following issues should be addressed during counselling:

- The risk of HIV transmission is not known, but it exists.
- It is important for the survivor to know her/his HIV status prior to using any ARV, as using the standard PEP regimen of AZT and 3TC is not adequate therapy in a known HIV infected person and may lead to ARV drug resistance.
- It is important to start PEP as soon as possible.
- It is the survivor's choice to receive PEP and to have HIV testing.
- For each rape survivor, blood and urine will be taken routinely to screen for syphilis, HIV and existing pregnancy. [Note: this should be a routine offer]
- If the possible risk for HIV transmission has been established, the rape has occurred within a period of 72 hours, and the rape survivor is HIV negative or results are not immediately available, ARV prophylaxis will be offered.
- The efficacy of AZT and 3TC in preventing HIV sero-conversion in cases of sexual assault is not known.
- The common side effects of the drug should be explained, with particular reference to feelings of tiredness, nausea, and flu-like symptoms.
- PEP should be discontinued as soon as a HIV positive result of the survivor is known. Even in the absence of on-the-spot rapid testing, this should not take more than 3 days.
- The importance of compliance should be emphasised

All women who choose to use AZT and 3TC should undergo pregnancy testing to ensure that pregnant women have been booked and are undergoing appropriate antenatal care. The use of AZT and 3TC in the first trimester of pregnancy has not been shown to be teratogenic. The possibility of HIV transmission to their unborn babies should they sero-convert should be discussed, and the women should be advised on the option of termination of pregnancy if they so choose.

Survivors presenting after 72 hours should be counselled about the possible risk of HIV transmission. For those who request AZT and 3TC, it should be explained that there is good evidence that the use of AZT and 3TC so long after the rape will have NO impact on preventing HIV sero-conversion. This patient will therefore not be given ARVs.

### Laboratory tests

Voluntary HIV testing should be made available and should be done on all opting for PEP (if possible using rapid testing). Further tests include a syphilis test and pregnancy test and Hepatitis B antibody testing.



It may be difficult to obtain informed consent for HIV testing shortly after the rape. The importance of an HIV test should be explained, as a 4-week course of AZT/3TC may induce resistance to these drugs and compromise future ARV treatment. All rape survivors who present within 72 hours should be offered a 3-day course of AZT/3TC while HIV test results are awaited or consent for testing can be obtained.

Blood tests to monitor toxicity of ARV that will be done should include full blood count (FBC), urea & electrolytes for creatinine test and transaminase test (AST or ALT). This should be repeated at one and 2 weeks follow-up or when symptoms occur. HIV serology should be done at 6 weeks, 12 weeks and 6 months.

## Antiretroviral regimen

The recommended antiretroviral regimen is **AZT 300mg plus 3TC 150mg bd for 28 days**.

Survivors should be given three days supply of AZT and 3TC and a date to return for reassessment for further counselling and evaluation. The remainder of the AZT and 3TC should be given at this visit.

In specific cases (such as gang rape with severe lacerations) adding a third drug may be considered, e.g. Efavirenz 600 mg once daily or Indinavir/Ritonavir (800mg/100mg bd), although there is no evidence that these regimens are more effective.

The next visit should be at 6 weeks, then 3 months, and 6 months after the rape. HIV testing should be performed at each of these visits.

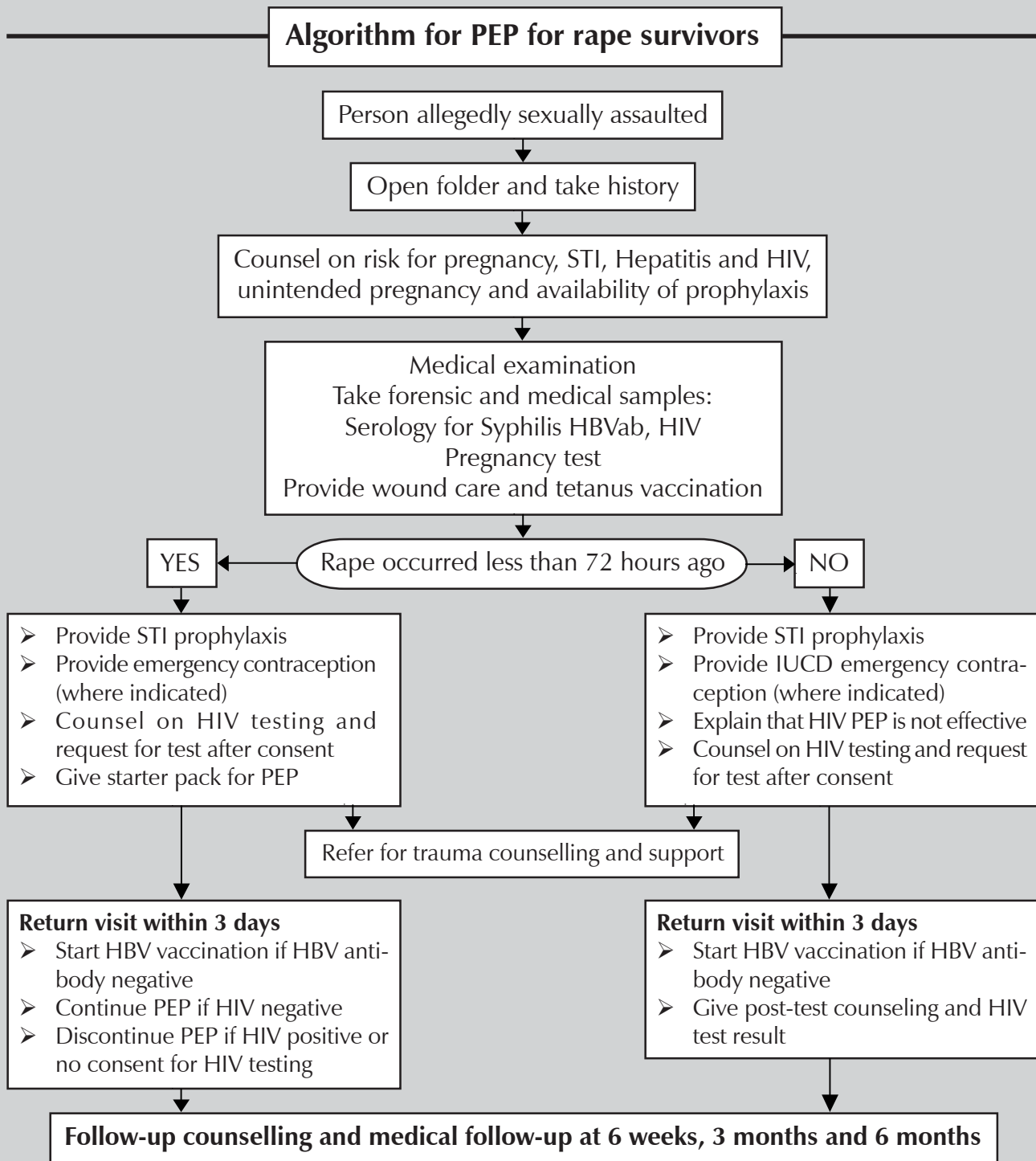
Survivors who are either known to be HIV positive or found to be HIV positive should not be offered AZT and 3TC. They should be appropriately counselled and referred to an appropriate health facility for long-term management of HIV infection.

Relative contra-indications to the use of AZT and 3TC include significant renal or liver impairment and severe anaemia. Where in doubt about the use of AZT and 3TC in individual patients, refer to a specialised physician or referral centre for advice.

## Comprehensive management

- It is strongly suggested that AZT and 3TC be administered only in the context of a **comprehensive support** for Rape Survivors. This should encompass the following:
- **STD prophylaxis:** Presumptive prophylaxis should be given in the form of Ciprofloxacin 500mg (STAT) plus Azithromycin 1g (STAT) or Doxycycline 100mg bd for 7 days. Azithromycin is preferred as it is a single dose and covers Chancroid, Chlamydia and incubating syphilis.
- **Emergency contraception within 72 hours:** Levonorgestrel 1.5 mg (4 tablets STAT) or norgestrel 0.5mg (500 mcg) and ethinyl oestradiol 0.05mg (50 mcg): 2 tablets STAT and 2 tablets 12 hours later. A copper T IUCD can be inserted up to 5 days after the first unprotected intercourse or up to 5 days after the calculated earliest day of ovulation.
- **Hepatitis B vaccination** should be started as soon as possible and no later than 21 days after the incident. Vaccination at 0, 1 and 3 or 6 months.
- **Counselling of the rape survivor**, identification of support needs, and necessary referrals should be done.

- In cases where rape survivors have severe bleeding, the issue of **proper nutrition** with regard to foods that are high in iron, folate, riboflavin, vitamin A and vitamin B12 to avoid developing anaemia should be emphasised
- In subsequent visits, issues relating to **stress management** should be discussed as part of the support programme. The survivor should be made aware of the indicators that point to stress such as general irritability, trembling, pain in neck and/or lower back, changes in appetite or sleep pattern etc., as stress may eventually cause exhaustion and illness, either physical or psychological
- **Medico-legal assessment** of injuries
- **Completion of appropriate registers**



37. Should the victim become pregnant as result of the rape, the normal procedures can be followed to apply for a legal abortion (if this is requested by the rape victim). Guidelines on the necessary procedures are available at the major medical health centres and hospitals throughout Namibia.
  - Note that the law on abortion does *not* require that the rape be reported to the police to obtain a legal abortion if there is a reasonable explanation for the failure to report.
  - Note also that it is *not* necessary for the rape trial to take place before the abortion can be authorised.
38. Inform the patient or the patient's parents/guardians about referral counselling centres and support organizations which are available. (Refer to the Guidelines for Counsellors and Social Workers).

### ***Detailed guidelines for completion of forensic report (J-88 form)***

***A J-88 form which can be photocopied is included in this publication.***

*It is very important that the form be completed as fully as possible, for the following reasons:*

- (1) An incomplete form may prevent a conviction, thus leaving a rapist free to endanger others.*
- (2) A medical professional who fails to record the injuries of a rape victim fully and accurately on the J-88 form could be found guilty of the crime of perjury. This crime applies not just to evidence given at a court proceeding, but also to any statement which can be used as evidence in court, where such a use is contemplated by the person making the statement.*
- (3) Medical records prepared by a medical practitioner who treated a victim may be used in a criminal case as prima facie proof that the victim suffered the injuries recorded in the documents, even if the medical practitioner in question does not testify personally. The records are not admissible as evidence of any opinions stated unless the medical practitioner is available to testify. This provision is designed to take care of situations where doctors have left the country or are otherwise unavailable. (See section 212(7A) of the Criminal Procedure Act 51 of 1977, as amended by Act 24 of 2003, or section 238(9) of the Criminal Procedure Act 25 of 2004.)*

### **General**

39. Every practitioner should establish a routine for examination and recording that incorporates all potentially relevant information, including data required for forensic purposes. Take detailed written and diagrammatic notes of all observations.
40. Record findings of medical examination in detail and duplicate. This should be done on the J-88 form. Add an addendum if the space on the J-88 form is insufficient.
41. The doctor must complete the J-88 form *as thoroughly as possible*. This form is crucial to the case. The more legible, complete and detailed the J-88 form, the less likely the chance that the doctor will have to appear in court to testify.

42. The entire report must be completed in the doctor's own handwriting. The police are not allowed to write on this form.
43. *Each page* of the J-88 Form must be signed by the doctor.
44. The report must be written in duplicate. The original J-88 form must be given to the police officer. A duplicate copy must be kept on the patient's file for use if/when the doctor is asked to testify in court.
45. The patient card or patient file, or locally designed forms, must be completed in full and should include all information as set out on the J-88 form.

## Specific instructions for completion of the J-88 Form

### FORM A

#### *Page 1*

46. Case number: This number should be included on the J-88. Write the full case number, including year, as the case could be heard long after the actual incident. The Crime Kit has only the victim's case number and should include no indication of the complainant's identity (rape/sexual abuse victim's name). It is therefore essential that the case number be clearly and carefully written on the forms, additional documents and forensic specimens from the Crime Kit to link all the evidence to the complainant.

*There is no special space provided on the form for the case number. It can be recorded in one of the corners of the form.*

47. Person requesting examination: If the police refer a case, the name of the investigating officer and force number must be clearly written on the J-88. In other cases, indicate the name of the person requesting the examination such as the guardian/mother, social worker etc.
48. Name of medical practitioner: The doctor must print his/her name in legible print. Add an official stamp if available. The address of the doctor is important for court purposes. Do not forget to include the telephone number in the space provided.
49. Date and time: Include date and time of examination, using 24-hour notation. This is especially important in acute cases.
50. Place of examination. State name of clinic, hospital, private rooms, etc.
51. Information regarding incident: In order to be able to come to a conclusion as to whether the clinical findings fit in with the time and circumstances of the alleged incident, a short explanation of the allegation is necessary. This explanation should be very brief and give only the essential facts necessary for medical conclusions. Do not give any more detailed information, as it might not be exactly the same as in the statement given to the police and thus could lead to problems in court. This statement should always start with: "It is alleged by ... that ..."

eg "It is alleged by Child Y that before Christmas during the holidays when visiting family, an adult male known to her sexually assaulted her".

52. Details of patient:

- State the full name of the person examined, as it appears on the person's identity document.
- Include the name by which person is usually called in brackets (eg "Suzie").
- Apparent age: Add date of birth if available especially in children. The doctor may state the victim's estimated age if no date of birth is known.
- Name of guardian or other person present: State name of nurse, mother, relative, etc, and not just relationship or position.

53. Condition of clothing. Do not describe colour or style of clothing. Describe tears, missing buttons, pockets, and stains such as:

- blood
- ejaculate
- dirt
- vomit.

**Page 2**

54. Record all injuries, redness, bruising, swelling, adhesions, tears, cuts. Never say "N/A" or "NAD" (not applicable), rather state "NORMAL".

55. Any other observations:

- Any distinguishing physical features on the complainant should be recorded.
- Document any medical condition diagnosed during examination (common cold, heart murmur, etc).
- Document any obvious diagnosis relevant to mental health - mental retardation, hyperactive behaviour, abnormal knowledge of sex-related language, hysteria etc. This information may be especially important for certain cases.

**FORM B**

**Page 3**

56. Breasts: Describe aspects pertaining to the breasts. State whether breasts are pre or past puberty, use Tanner staging (if this system is familiar). Explain specific bruising to the breast and surrounding area.

57. Discharge: Describe the discharge – such as "none" or "white and thick, consistent with semen" or "physiological (mid-cycle)" or "menstruation" or "infection" etc.

58. Examination: Describe physical vaginal/anal examination results. Include information such as "easy" or "painful", and give extra detail like "uncomfortable", "difficult because of lack of co-operation" etc.

**Page 4**

59. Conclusion. Never give negative conclusion like "no sign of rape" etc. Always say eg "Absence of injuries does not exclude penetration". *Never use the term rape.* Rather state eg "Injuries fit with penetration by small object like finger put in hymen" or "Injuries fit with penetration by large object eg erect penis put into labia majora, hymen, vagina" etc.

60. State whether findings fit in with time of alleged incident.

61. It is necessary to come to a conclusion immediately after the examination. It is impossible to remember details months or even years later in court.
62. Inferences must be reconciled with the findings. Very vague findings cannot have a very specific grand inference.

### **Page 5**

63. In a vaginal rape, the victim's underwear should be kept for forensic testing if she has not changed since the rape, because it is the most likely area for collection of sperm and seminal fluid. Any other clothing on which the victim thinks ejaculate may be present should be collected. Each piece of clothing must be labelled with the victim's name and the case number and should be placed in a brown paper (not plastic) bag.
64. Samples:
  - Rape kit: State that the Forensic Laboratory Crime Kit was used. The seal number must be written in the space provided. All Forensic Laboratory Crime Kits should have additional labels inside which can be stuck in this space.
  - Other samples: State that the Forensic Laboratory Crime Kit was used if appropriate. The seal number must be written in the space provided. All Forensic Laboratory Crime Kits should have additional labels inside which can be stuck in this space.
  - Explanatory notes: Add explanations concerning additional items, eg "torn and stained panties given to police in sealed brown paper envelope" etc.

### **Pages 6-7**

65. Indicate injuries on the sketches (in a contrasting color if possible) and number them. Use the number to connect with a brief description on page 7 in the space for explanatory notes, eg "(1) 2 cm laceration sutured with 4 stitches on left forearm. Circumorbital swelling and bruising left eye, with sub-conjunctival bleeding."

### **Additional information on separate pages**

66. Relevant medical history. In the case of abused children, it is especially important to ask about previous fractures, injuries, burns etc. If necessary, find old patient records. State conditions like diabetes, asthma, epilepsy, mental retardation, behavioural problems, HIV. State how this information was obtained (mother, own information, medical records).

### **Medical examination of suspect**

*Examination of the alleged perpetrator (suspect) may provide crucial information necessary for the criminal case. A thorough examination should be done. The J-88 form can be used to record information about the suspect.*

67. Do a complete physical examination. Remember to do a careful examination of fingers and nails, as well as knees and elbows for any abrasions.
68. Genital examination of the suspect: Penile penetration into vagina or rectum of a small child cannot be accomplished without considerable force, and this will frequently result in some injury to the penis of the assailant. Careful examination is necessary, noting any:



- abrasion to the glans
  - tears of the frenulum in the uncircumcised
  - traces of blood, faeces and lubricant in coronal sulcus.
69. Forensic samples must be taken of the following:
- Saliva sample: Always take a saliva sample. This sample is crucial.
  - Pubic hairs: These must be combed from the suspect's pubic area. Place the hairs in a clearly marked soft paper envelope.
  - Control hair sample from the suspect's head: A minimum of 20 hairs are required. These must be pulled from different places on the suspect's head as there can be length and colour differences.
  - Place the hairs in a clearly marked soft paper envelope.
  - Blood sample: Take blood samples. DNA samples may also be necessary. Take samples for DNA tests if specifically requested.
  - Blood for determining alcohol content: Take a blood sample if the suspect seems to be under the influence of alcohol.
70. If the accused perpetrator consents, the doctor should take blood tests for HIV. If the perpetrator possibly knew his/her HIV status prior to the alleged rape, this result can be utilised during the court case as a circumstance that requires a more serious sentence. However, if the accused does not give consent, there is no legal basis for compelling this test at a pre-conviction stage.
71. Great care must be taken to ensure that accidental contamination of samples does not occur. *Remember*: If samples from both the victim and the suspect are packed on the same contamination table or surface, contamination of the samples can occur.

## Handling of samples

72. The samples must be clearly marked and sealed properly.
73. Hand the completed J-88 form and Forensic Laboratory Crime Kit *only* to the investigating officer. If the police officer is not present, *keep* the form and the kit. *Do not give them to anyone else*. This is essential to maintain the chain of evidence for the court case.
74. The J-88 form or any other report *must never be given to the patient or guardian*.
75. On receiving the J-88 form and Crime Kit, the police officer must sign the patient's file. The doctor or nurse should also record the name of the person to whom the specimens were handed.
76. From the moment the investigating police officer takes the samples into possession, the police are responsible for maintaining the chain of evidence.

## Court appearance

77. All medical doctors and nurses must be prepared to give evidence in court. This is often a traumatic experience.
78. If the doctor is no longer available to give evidence, due to leaving the medical facility (hospital or clinic) or a relapsed working contract, the head of the medical facility should

take responsibility to arrange that another doctor be appointed to testify. The other doctor will testify on the information available in the patient's file and the J-88 form.

79. Arrangements should be made with the prosecutor to avoid unnecessary delays with the doctor's testimony. The doctor is an expert witness and should be accommodated to give evidence and not be confronted with unnecessary delays.
80. The doctor's testimony should be heard in closed court, to protect confidentiality.
81. The doctor's testimony should be on what was seen and found and the conclusion derived.
82. The doctor should not let himself or herself be harassed by the defence counsel on petty non-medical issues. It should be remembered that prosecutors, attorneys, advocates, magistrates and judges are not medical doctors and often have very little medical knowledge. The doctor is the expert and should be able to defend his/her opinion.

### **Training, monitoring and feedback**

83. All health care professionals at various health care institutions throughout Namibia should be provided with training on the crucial aspects of the forensic investigation. Staff at the Forensic Laboratory have offered to provide this training.
84. Make sure that channels for complaints about your profession's services are made known to rape complainants.
85. Review your profession's guidelines periodically to see if they are still relevant and adequate.



# Guidelines for **SOCAL WORKERS and COUNSELLORS**

## **General**

1. Provide unconditional acceptance and support to the complainant and his/her family.
2. Respond to a request for counselling or support as promptly as possible, to ensure that the assistance is provided at the time it is most needed, when the complainant is feeling most vulnerable.
3. Make sure that the complainant receives all necessary medical attention for injury or health problems, which arise in the aftermath of the rape. It may be necessary to accompany the complainant to the hospital or health facility to ensure that she/he actually receives the necessary treatment. Provide or arrange transport to the nearest doctor, hospital or clinic if the complainant does not have his/her own transport.
4. Inform every rape complainant of the importance of prompt preventative medication for sexually transmitted diseases, including HIV, and pregnancy. Help the complainant to obtain such medication as quickly as possible.
5. Make sure that the complainant knows when to have follow-up tests for HIV, STDs and pregnancy. If possible, offer to be available to provide additional counselling and support when the complainant comes in for these follow-up tests.
6. Explain to the complainant why pre- and post-test HIV counselling is important, and arrange such counselling for the complainant if he/she wishes to undergo an HIV test. Also arrange for follow up counselling for the complainant with an appropriately qualified HIV/AIDS counsellor in the event of the complainant having contracted HIV as a result of the rape.
7. If the complainant has fallen pregnant as a result of the rape, explain her options, including adoption and legal abortion. Should she choose adoption or abortion, assist her throughout this process and provide the necessary support. The complainant may find this process more traumatic than the actual rape, and she should be supported unconditionally.
8. Counsel the complainant and provide her/him with all necessary support. Offer to arrange specific counselling for the complainant at any appropriate stage, and also for the spouse or other family members. Explain the importance of counselling to resolve long-term feelings.
9. Prepare the complainant for the court case by explaining the procedure and by physically accompanying the complainant to the courtroom in advance of the trial if he/she wishes.

10. Compile a report which could be used in the criminal trial, even if this is not specifically requested. If the prosecutor or the court wants to make use of a social worker report in court, they should request this in writing long enough in advance to allow enough time for proper investigation of all relevant circumstances.
11. Keeping in mind that some reactions to rape may surface only after time has elapsed, make regular follow-up contact with the complainant for at least one year following the rape. Make sure that the de-briefing process continues until after the rape trial has come to an end.
12. Maintain continuity by keeping the case with the same social worker if possible.
13. Identify local organisations through which the rape complainant might receive support. She/he might want to become a volunteer on issues of combating violence at an appropriate stage, which could be helpful to his/her healing process.
14. If possible, set up support groups of persons from the same community who have experienced rape and offer the complainant the choice of participating in such support groups.
15. Keep detailed records of rape cases. This information may be important if a report is requested for use in the criminal case. It will also help the social worker or counsellor to assess the complainant's responses and to measure her/his recovery process.
16. Consider referring the rape complainant to a specialised agency, a counselling organisation, a psychologist, a psychiatrist or any other appropriate person or group for information or assistance. A referral involves more than just giving the complainant a name or a telephone number. Collect information about services that are available locally so that you can describe these services accurately to the complainant. Try to meet personally with persons and groups who work with rape in your area to form more effective links.
17. If the complainant seems to be in need of specialised services but declines a referral, try to find out the reasons for the refusal to see if there is some problem that can be overcome.

## **Monitoring and feedback**

18. Make sure that channels for complaints about your profession's services are made known to rape complainants.
19. Review your profession's guidelines periodically to see if they are still relevant and adequate.
20. Encourage appropriate personnel in your profession to consult periodically with the community and with relevant stakeholders about the appropriateness of your profession's guidelines and the effectiveness of their implementation.

**AFFIDAVIT IN TERMS OF SECTION 212 (4) (a) OF THE CRIMINAL  
PROCEDURE ACT NO. 51 OF 1977**

I .....  
(full names and surname in capital letters)

.....  
(qualifications)

state under oath / affirm\*

I am in the service of the State as a district surgeon / medical legal officer / medical practitioner\* at

On ..... I conducted a medical examination on the person of  
..... and recorded my findings on the  
attached form (J 88), which facts I ascertained by means of an examination requiring skill in biology  
/ anatomy / pathology\*.

I know and understand the contents of this declaration.

I have objection / no objection\* to taking the prescribed oath.

I consider the prescribed oath to be binding / not binding\* on my conscience.

Place ..... Date .....

.....  
District surgeon, Medical officer, Medical practitioner

I certify that the deponent has acknowledged that he / she\* knows and understands the contents of  
this declaration which was sworn to / affirmed\* before me and the deponent's signature / thumb-print  
/ mark\* was placed thereon in my presence.

Place ..... Date .....

.....  
Commissioner of oaths

Full names: (capital letters) .....

Business address: (capital letters) .....

Designation / Rank: ..... Ex officio Republic of Namibia

\* Delete words not applicable

NB: Deletions to be done accurately and alterations to be initialed.

# MEDICAL EXAMINATION REPORT IN A CASE OF ALLEGED ASSAULT OR OTHER CRIME (J 88)

(TO BE COMPLETED BY DISTRICT SURGEON, MEDICAL OFFICER OR MEDICAL PRACTITIONER)

Form 'A' should be completed in all cases and form 'B' should be completed in cases where a patient has been examined in connection with a sexual offence. PLEASE COMPLETE IN CAPITAL LETTERS.

THIS IS TO CERTIFY that at the request of: .....

I (full name and surname in capital letters) .....

Address: ..... Tel. no. ....

have on this ..... day of ..... 20 ..... at ..... h

examined at: (place where examination was carried out) .....

the under mentioned patient and have to report as follows:

Information regarding incident: .....

.....

.....

.....

## DETAILS OF PATIENT:

Full name: .....

Address: .....

Sex: ..... Apparent age: .....

Name of guardian or person *in loco parentis* present: .....

## INITIAL OBSERVATIONS (EXTERNAL OBSERVATIONS)

General state of health: .....

Mental state: (calm / aggressive / hysterical / confused / shocked / crying etc) .....

Condition of clothing: (changed since incident / describe tears, missing buttons, stains i.e. blood, dirt, vomit, ejaculation, etc) .....

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**DESCRIPTION OF OPEN WOUNDS, IF ANY:** (note the exact nature, extent and position) .....

**FRACTURES OR DISLOCATIONS IF ANY:** (note the exact nature, extent and position) .....

**OTHER NOTICEABLE INJURIES:** (note the exact nature, extent and position) .....

**OBSERVATIONS IN RESPECT OF STATE OF INTOXICATION:** (if applicable) .....

**ANY OTHER OBSERVATIONS:** .....

# REPORT ON EXAMINATION IN A CASE OF ALLEGED RAPE OR OTHER SEXUAL OFFENCE (PLEASE COMPLETE IN BLOCK LETTERS)

Full name of patient: .....

## GIVE DETAILED DESCRIPTION OF BRUISING, WOUNDS ETC TO THE FOLLOWING:

Breasts: .....

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Labia majora: .....

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Labia minora: .....

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Fourchette: .....

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Vestibule: .....

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.....

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Hymen: .....

.....

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.....

Vagina (1, 2, 3 fingers): .....

Discharge: .....

.....

Examination: (easy / painful) .....

Haemorrhage: .....

Date of last menstruation: .....

Anus: .....

Perineum: .....

Penis: .....

Scrotum: .....

Inner thighs and/or buttocks: (give detailed description of bruising, redness and/or tenderness) .....

Other observations: .....

Conclusion: (Please state whether or not in your opinion, the injuries fit / do not fit with the time and circumstances of the alleged incident.) ...



## SPECIAL INVESTIGATIONS

Microscopical or other special examinations of stains, etc. ....

Specimens taken for special examination: (i.e. clothes / shoes / other objects and give a description thereof) ....

### RAPE KIT:

(a) Taken: Seal number: .....

(b) Not taken: (reasons) .....

### BLOOD SAMPLE FOR HIV / BLOOD-ALCOHOL ETC:

(a) Taken: Seal number: .....

(b) Not taken: (reasons) .....

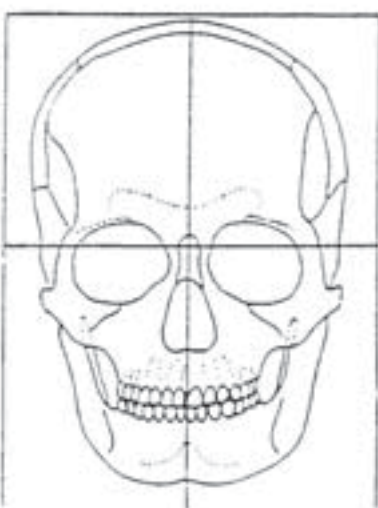
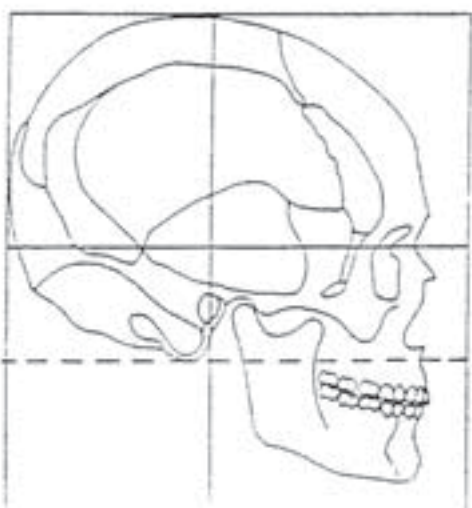
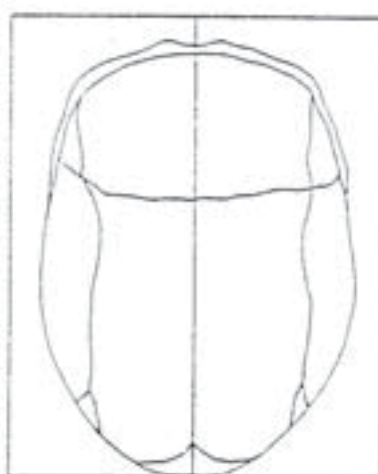
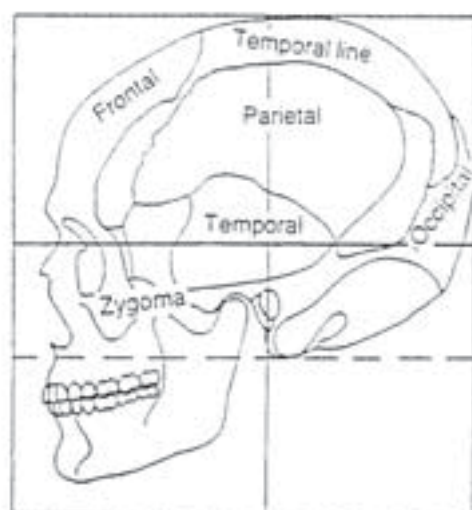
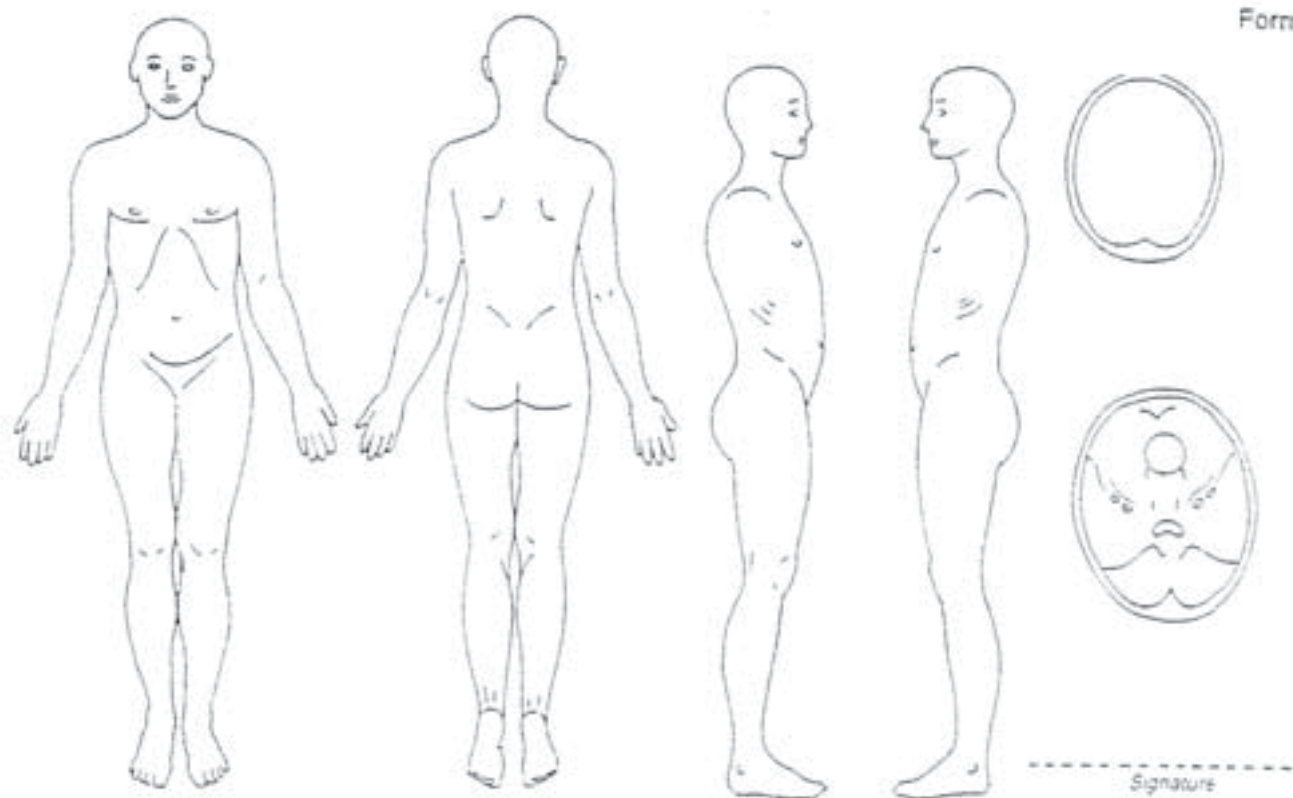
Specimens handed to: (full name and surname in capital letters) .....

Address: .....

Signature: ..... Date: .....

### EXPLANATORY NOTES:





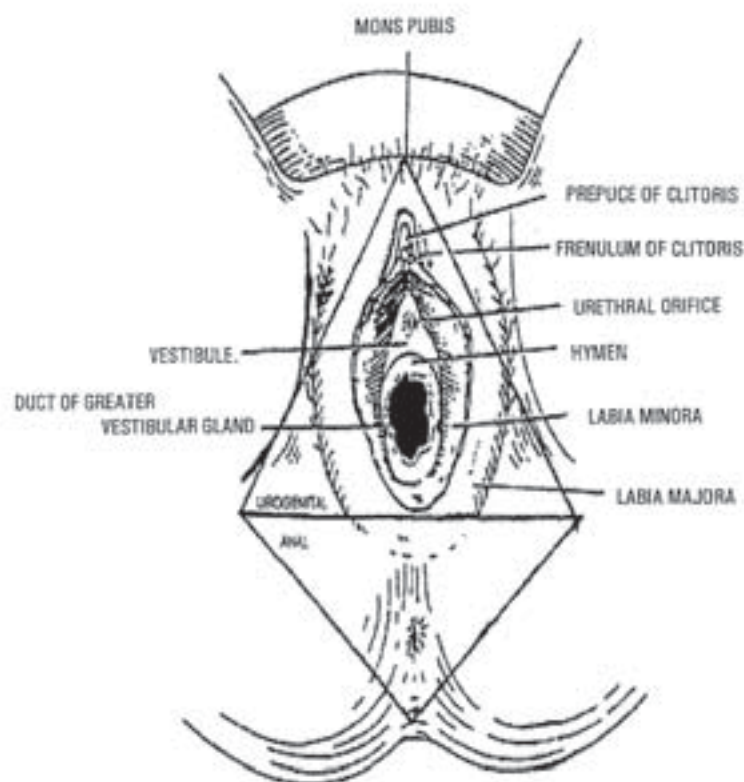


Fig. A

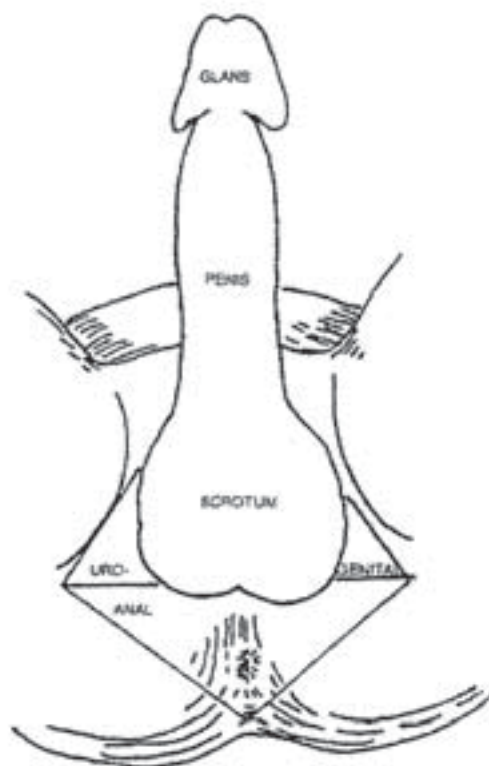


Fig. B

EXPLANATORY NOTES:

[illegible]



# GOVERNMENT GAZETTE

## OF THE

# REPUBLIC OF NAMIBIA

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N\$1.65

WINDHOEK - 10 May 2000

No. 2326

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### CONTENTS

*Page*

#### GOVERNMENT NOTICE

No. 114    Promulgation of Combating of Rape Act, 2000 (Act 8 of 2000), of  
the Parliament .....

1

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## Government Notice

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### OFFICE OF THE PRIME MINISTER

No. 114

2000

#### PROMULGATION OF ACT OF PARLIAMENT

The following Act which has been passed by the Parliament and signed by the President in terms of the Namibian Constitution is hereby published in terms of Article 56 of that Constitution.

No. 8 of 2000: Combating of Rape Act, 2000

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Act No. 8, 2000

## COMBATING OF RAPE ACT, 2000

## EXPLANATORY NOTE:

Words underlined with a solid line indicate insertions in existing provisions.

[ ] Words in bold type in square brackets indicate omissions from existing provisions.

## ACT

To provide for the combating of rape; to prescribe minimum sentences for rape; to provide for the abolition of the rule that a boy under the age of fourteen years is presumed incapable of sexual intercourse; to provide for the modification of certain rules of evidence applicable to offences of a sexual or indecent nature; to impose special duties on prosecutors in criminal proceedings relating to sexual offences; to impose special duties on members of the police in respect of certain bail applications; to amend the Criminal Procedure Act, 1977, so as to insert a certain definition; to make provision for the rights of a complainant of rape in bail proceedings; to further regulate the granting of bail to persons charged with rape; to further regulate the circumstances in which certain criminal proceedings shall not take place in open court; to extend the prohibition of the publication of certain information relating to certain offences; to further regulate the admissibility of evidence relating to similar offences by an accused; and to further regulate the admissibility of evidence relating to the character of a complainant of rape or an offence of an indecent nature; and to provide for matters incidental thereto.

*(Signed by the President on 19 April 2000)*

**BE IT ENACTED** by the Parliament of the Republic of Namibia, as follows:-

## Definitions

1. (1) In this Act, unless the context otherwise indicates –

“complainant”, in relation to an offence of a sexual or indecent nature, means a person towards or in connection with whom any such offence is alleged to have been committed, irrespective of whether or not that person has actually laid a complaint or gives evidence in the criminal proceedings in question;

“perpetrator” means a perpetrator as referred to in section 2(1);

“sexual act” means –

- (a) the insertion (to even the slightest degree) of the penis of a person into the vagina or anus or mouth of another person; or
- (b) the insertion of any other part of the body of a person or of any part of the body of an animal or of any object into the vagina or anus of another person, except where such insertion of any part of the body (other than the penis) of a person or of any object into the vagina or anus of another person is, consistent with sound medical practices, carried out for proper medical purposes; or
- (c) cunnilingus or any other form of genital stimulation;

“vagina” includes any part of the female genital organ.

(2) Any reference in any other law to rape shall, subject to the provisions of this Act, be construed as including a reference to rape under this Act.

### **Rape**

2. (1) Any person (in this Act referred to as a perpetrator) who intentionally under coercive circumstances –

- (a) commits or continues to commit a sexual act with another person; or
- (b) causes another person to commit a sexual act with the perpetrator or with a third person,

shall be guilty of the offence of rape.

(2) For the purposes of subsection (1) “coercive circumstances” includes, but is not limited to-

- (a) the application of physical force to the complainant or to a person other than the complainant;
- (b) threats (whether verbally or through conduct) of the application of physical force to the complainant or to a person other than the complainant;
- (c) threats (whether verbally or through conduct) to cause harm (other than bodily harm) to the complainant or to a person other than the complainant under circumstances where it is not reasonable for the complainant to disregard the threats;
- (d) circumstances where the complainant is under the age of fourteen years and the perpetrator is more than three years older than the complainant;
- (e) circumstances where the complainant is unlawfully detained;
- (f) circumstances where the complainant is affected by -
  - (i) physical disability or helplessness, mental incapacity or other inability (whether permanent or temporary); or
  - (ii) intoxicating liquor or any drug or other substance which mentally incapacitates the complainant; or
  - (iii) sleep,

to such an extent that the complainant is rendered incapable of understanding the nature of the sexual act or is deprived of the opportunity to communicate unwillingness to submit to or to commit the sexual act;

- (g) circumstances where the complainant submits to or commits the sexual act by reason of having been induced (whether verbally or through conduct) by the perpetrator, or by some other person to the knowledge of the perpetrator, to believe that the perpetrator or the person with whom the sexual act is being committed, is some other person;
- (h) circumstances where as a result of the fraudulent misrepresentation of some fact by, or any fraudulent conduct on the part of, the perpetrator, or by or on

## Act No. 8, 2000

## COMBATING OF RAPE ACT, 2000

the part of some other person to the knowledge of the perpetrator, the complainant is unaware that a sexual act is being committed with him or her;

- (i) circumstances where the presence of more than one person is used to intimidate the complainant.

(3) No marriage or other relationship shall constitute a defence to a charge of rape under this Act.

**Penalties**

**3.** (1) Any person who is convicted of rape under this Act shall, subject to the provisions of subsections (2), (3) and (4), be liable-

- (a) in the case of a first conviction -

- (i) where the rape is committed under circumstances other than the circumstances contemplated in subparagraphs (ii) and (iii), to imprisonment for a period of not less than five years;
- (ii) where the rape is committed under any of the coercive circumstances referred to in paragraph (a), (b) or (c) of subsection (2) of section 2, to imprisonment for a period of not less than ten years;
- (iii) where –
  - (aa) the complainant has suffered grievous bodily or mental harm as a result of the rape;
  - (bb) the complainant –
    - (A) is under the age of thirteen years; or
    - (B) is by reason of age exceptionally vulnerable;
  - (cc) the complainant is under the age of eighteen years and the perpetrator is the complainant's parent, guardian or caretaker or is otherwise in a position of trust or authority over the complainant;
  - (dd) the convicted person is infected with any serious sexually-transmitted disease and at the time of the commission of the rape knows that he or she is so infected;
  - (ee) the convicted person is one of a group of two or more persons participating in the commission of the rape; or
  - (ff) the convicted person uses a firearm or any other weapon for the purpose of or in connection with the commission of the rape,

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

- (b) in the case of a second or subsequent conviction (whether previously convicted of rape under the common law or under this Act) –

- (i) where the rape is committed under circumstances other than the circumstances contemplated in subparagraphs (ii) and (iii), to



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## COMBATING OF RAPE ACT, 2000

imprisonment for a period of not less than ten years;

- (ii) where the rape in question or any other rape of which such person has previously been convicted was committed under any of the coercive circumstances referred to in paragraph (a), (b) or (e) of subsection (2) of section 2, to imprisonment for a period of not less than twenty years;
- (iii) where the rape in question or any other rape of which such person has previously been convicted was committed under any of the circumstances referred to in subparagraph (iii) of paragraph (a), to imprisonment for a period of not less than forty-five years.

(2) If a court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the applicable sentence prescribed in subsection (1), it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.

(3) The minimum sentences prescribed in subsection (1) shall not be applicable in respect of a convicted person who was under the age of eighteen years at the time of the commission of the rape and the court may in such circumstances impose any appropriate sentence.

(4) If a minimum sentence prescribed in subsection (1) is applicable in respect of a convicted person, the convicted person shall, notwithstanding anything to the contrary in any other law contained, not be dealt with under section 297(4) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977): Provided that, if the sentence imposed upon the convicted person exceeds such minimum sentence, the convicted person may be so dealt with in regard to that part of the sentence that is in excess of such minimum sentence.

**No rule as to incapacity of boy under fourteen years to have sexual intercourse shall operate**

4. (1) If, in any legal proceedings, the question is in issue whether a male person has had sexual intercourse or has performed an act of a sexual nature with another person or is the father of any child, such question shall be determined as a question of fact, and no presumption or rule of law to the effect that a boy under the age of fourteen years is incapable of sexual intercourse, shall operate.

(2) The criminal capacity of an accused under the age of fourteen years who is charged with an offence of a sexual nature shall be determined in the same manner as the criminal capacity of an accused under the age of fourteen years who is charged with any other offence.

**Abolition of cautionary rule relating to offences of a sexual or indecent nature**

5. No court shall treat the evidence of any complainant in criminal proceedings at which an accused is charged with an offence of a sexual or indecent nature with special caution because the accused is charged with any such offence.

**Evidence of previous consistent statements**

6. Evidence relating to all previous consistent statements by a complainant shall be admissible in criminal proceedings at which an accused is charged with an offence of a sexual or indecent nature: Provided that no inference may be drawn only from the fact that no such previous statements have been made.

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## COMBATING OF RAPE ACT, 2000

**Evidence of period of delay between commission of sexual or indecent act and laying of complaint**

7. In criminal proceedings at which an accused is charged with an offence of a sexual or indecent nature, the court shall not draw any inference only from the length of the delay between the commission of the sexual or indecent act and the laying of a complaint.

**Evidence of psychological effects of rape**

8. (1) Evidence of the psychological effects of rape shall be admissible in criminal proceedings at which an accused is charged with rape (whether under the common law or under this Act) in order -

- (a) to show that the sexual act to which the charge relates is likely –
  - (i) to have been committed towards or in connection with the complainant concerned;
  - (ii) to have been committed under coercive circumstances;
- (b) to prove, for the purpose of imposing an appropriate sentence, the extent of the mental harm suffered by that complainant.

(2) In estimating the weight to be attached to evidence admitted in terms of subsection (1), the court shall have due regard to -

- (a) the qualifications and experience of the person who has given such evidence; and
- (b) all the other evidence given at the trial.

**Special duties of prosecutor where accused is charged with sexual offence**

9. In criminal proceedings at which an accused is charged with an offence of a sexual nature, it shall be the duty of the prosecutor to consult with the complainant in such proceedings in order -

- (a) to ensure that all information relevant to the trial has been obtained from the complainant, including information relevant to the question whether the accused should be released on bail and, if the accused were so released, whether any conditions of bail should be imposed; and
- (b) to provide all such information to the complainant as will be necessary to lessen the impact of the trial on the complainant.

**Special duties of member of police in respect of bail applications where accused is charged with sexual offence**

10. In criminal proceedings at which an accused is charged with an offence of a sexual nature, it shall be the duty of the member of the Namibian Police Force in charge of the investigation -

- (a) to forthwith inform the prosecutor in such proceedings of any reason to believe that the complainant would be at risk if the accused is released on bail and of any other investigations involving the accused (if any); and
- (b) if bail has been granted to the accused, to forthwith, after becoming aware thereof, inform that prosecutor of any failure by the accused to comply with his or her conditions of bail.



**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 in subsection (1) after the definition of “charge” of the following definition:

“‘complainant’, in relation to an offence of a sexual or indecent nature, means a person towards or in connection with whom any such offence is alleged to have been committed, irrespective of whether or not that person has actually laid a complaint or gives evidence in the criminal proceedings in question;”.

**Insertion of section 60A in Act 51 of 1977**

12. The following section is hereby inserted in the principal Act after section 60:

**“Rights of complainant in bail application where accused is charged with rape**

**60A. (1)** A complainant of rape shall have the right -

- (a) to attend any proceedings where the question is considered whether an accused who is in custody on a charge of rape should be released on bail or, if bail has been granted to the accused, whether any further conditions of bail should be imposed under section 62 or whether any such conditions of bail should be amended or supplemented under section 63; and
- (b) to request the prosecutor in proceedings referred to in paragraph (a) to present any information or evidence to the court that might be relevant to any question under consideration by the court in such proceedings.

(2) If an accused is in custody on a charge of rape, the person in charge of the police station or any other place where the accused is detained in terms of section 50 (1), or any other person designated by such first-mentioned person, shall as soon as possible inform the complainant concerned of -

- (a) the place, date and time of the first appearance of the accused in court; and
- (b) the rights of the complainant under subsection (1).

(3) If an accused who is in custody on a charge of rape intends to apply to the court for bail on a date or at a time of which the complainant has not been otherwise informed in terms of this section, the accused or his or her legal representative shall request the person referred to in subsection (2) to inform the complainant accordingly, whereupon such person shall so inform the complainant.

(4) The person who informs, or who is required to inform, the complainant in terms of subsection (2) or (3), as the case may be, shall prepare an affidavit stating -

- (a) whether the provisions of subsection (2) or (3), as the case may be, have been duly complied with and, if they have not been so complied with, the reasons for not complying with any such provision;
- (b) the manner in which the complainant has been so informed; and

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(c) the date and time when the complainant has been so informed.

(5) An affidavit prepared in terms of subsection (4) shall be handed to the judge or judicial officer presiding at the proceedings at which bail is considered, and such affidavit shall form part of the record of such proceedings.

(6) If a complainant is present at proceedings at which bail is considered in respect of an accused who is in custody on a charge of rape, and such proceedings are postponed, the court shall inform the complainant of the date and time to which such proceedings have been postponed and of the complainant's rights under subsection (1).

(7) If a complainant is not present at proceedings referred to in subsection (6), the court shall enquire into the question whether the complainant has had knowledge of such proceedings, and -

(a) shall, if it is satisfied that it is likely that the complainant has had knowledge of such proceedings, direct that the matter be dealt with in the absence of the complainant; or

(b) shall, if it is not so satisfied, postpone such proceedings in order to obtain the presence of the complainant: Provided that, if it is in the interests of justice (with due regard to the interests of the complainant) that the matter be dealt with forthwith, the matter may be dealt with in the absence of the complainant.

(8) If a complainant is not present, as contemplated in subsection (7), the prosecutor in such proceedings shall inform the complainant -

(a) where bail has been granted to the accused, of the granting of bail and the conditions of bail imposed;

(b) where such proceedings have been postponed, of the date and time to which such proceedings have been postponed and of the complainant's rights under subsection (1).

(9) The provisions of subsections (4) and (5) shall, with the necessary changes, apply in respect of a notification given in terms of subsection (8)(b)."

**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, the existing section becoming subsection (1):

"(2) If an accused who is in custody on a charge of rape is released on bail, the court shall, notwithstanding the provisions of subsection (1), add such further conditions of bail as will, in the opinion of the court, ensure that the accused does not make contact with the complainant concerned."

**Amendment of section 153 of Act 51 of 1977**

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

(a) by the deletion of paragraphs (a) and (b) of subsection (3);

(b) by the insertion after subsection (3) of the following subsections:

"(3A) Notwithstanding the provisions of subsections (1), (2), (5) and (6) but subject to the provisions of subsection (3B), in criminal proceedings

relating to a charge that the accused committed or attempted to commit-

- (a) any sexual or indecent act towards or in connection with any complainant; or
- (b) any act for the purpose of procuring or furthering the commission of a sexual or indecent act towards or in connection with any complainant,

the court before which such proceedings are pending shall, to the extent authorized thereto by the provisos to Article 12(1)(a) and (c) of the Namibian Constitution, direct that any person whose presence is not necessary at such proceedings, shall not be present at such proceedings, unless the complainant in such proceedings, or, if he or she is a minor, his or her parent or guardian or a person *in loco parentis*, otherwise requests.

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

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

“(7) To the extent that the provisions of this section provide for a limitation of the fundamental right to a public hearing and to the giving of judgment in criminal proceedings in public contemplated in paragraphs (a) and (c), respectively, of Sub-Article (1) of Article 12 of the Namibian Constitution, in that they authorize the exclusion of the public from criminal proceedings or any part thereof, such limitation is enacted on authority of the said paragraphs (a) and (c).”.

#### **Amendment of section 154 of Act 51 of 1977**

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

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

“(2) (a) Where a court under section 153(3) directs that any person or class of persons shall not be present at criminal proceedings, no person shall publish in any manner whatever any information which might reveal the identity of any complainant in the proceedings: Provided that the presiding judge or judicial officer may authorize the publication of such information if he or she is of the opinion that such publication would be just and equitable: Provided further that such information may be published with regard to any complainant in the proceedings if that complainant is eighteen years of age or older and has authorized the publication of such information.

(b) Where a court in terms of section 153(3A) directs that any person shall not be present at criminal proceedings or where any person is in terms of section 153(3B) not permitted to be present at criminal proceedings, no person shall publish in any manner whatever any information which might reveal the identity of any complainant in the proceedings: Provided that the presiding judge or judicial officer may authorize the publication of such information if he or she is of

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the opinion that such publication would be just and equitable: Provided further that such information may be published with regard to any complainant in the proceedings if that complainant is eighteen years of age or older and has authorized the publication of such information.

- (c) No person shall at any stage from the time of the commission of the relevant offence to the appearance of an accused in a court upon any charge referred to in section 153(3) or 153(3A) or at any stage after such appearance but before the accused has pleaded to the charge, publish in any manner whatever any information which might reveal the identity of the complainant towards or in connection with whom such offence is alleged to have been committed.”;

- (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 **[five hundred rand]** N\$10 000 or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.”; and

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

“(6) To the extent that the provisions of this section provide for a limitation of the fundamental rights contemplated in paragraph (a) of Sub-Article (1) of Article 21 of the Namibian Constitution, in that they authorize interference with a person’s freedom to publish information relating to criminal proceedings, such limitation is enacted on authority of Sub-Article (2) of the said Article.”.

**Insertion of section 211A in Act 51 of 1977**

16. The following section is hereby inserted in the principal Act after section 211:

**“Evidence during criminal proceedings of similar offences by accused**

**211A.** (1) Subject to the provisions of subsection (2), in criminal proceedings at which an accused is charged with rape or an offence of an indecent nature, evidence of the commission of other similar offences by the accused shall, on application made to it, be admitted by the court at such proceedings and may be considered on any matter to which it is relevant: Provided that such evidence shall only be so admitted if it has significant probative value that is not substantially outweighed by its potential for unfair prejudice to the accused.

- (2) Evidence of previous similar offences by an accused shall not be admissible solely to prove the character of the accused.

(3) The court's reasons for its decision to admit or refuse to admit evidence of previous similar offences shall be recorded, and shall form part of the record of the proceedings.”.

**Amendment of section 227 of Act 51 of 1977**

17. Section 227 of the principal Act is hereby amended by the deletion of the words “or as to the character of any woman upon or with regard to whom any offence of an indecent nature has been committed,”.

**Insertion of section 227A in Act 51 of 1977**

18. The following section is hereby inserted in the principal Act after section 227:

**“Evidence of sexual conduct or experience of complainant of rape or offence of an indecent nature**

**227A.** (1) No evidence as to any previous sexual conduct or experience of a complainant in criminal proceedings at which an accused is charged with rape or an offence of an indecent nature, shall be adduced, and no question regarding such sexual conduct or experience shall be put to the complainant or any other witness in such proceedings, unless the court has, on application made to it, granted leave to adduce such evidence or to put such question, which leave shall only be granted if the court is satisfied that such evidence or questioning -

- (a) tends to rebut evidence that was previously adduced by the prosecution; or
- (b) tends to explain the presence of semen or the source of pregnancy or disease or any injury to the complainant, where it is relevant to a fact in issue; or
- (c) is so fundamental to the accused's defence that to exclude it would violate the constitutional rights of the accused:

Provided that such evidence or questioning has significant probative value that is not substantially outweighed by its potential prejudice to the complainant's personal dignity and right of privacy.

(2) No evidence as to the sexual reputation of a complainant in criminal proceedings at which an accused is charged with rape or an offence of an indecent nature, shall be admissible in such proceedings.

(3) Before an application for leave contemplated in subsection (1) is heard, the court may direct that the complainant in respect of whom such evidence is to be adduced or to whom any such question is to be put, shall not be present at such application proceedings.

(4) The court's reasons for its decision to grant or refuse leave under subsection (1) to adduce such evidence or to put such question shall be recorded, and shall form part of the record of the proceedings.”.

**Short title and commencement**

19. This Act shall be called the Combating of Rape Act, 2000, and shall come into operation on a date to be fixed by the Minister of Justice by notice in the *Gazette*.



# VULNERABLE WITNESSES

*Trials in rape cases are covered by the Criminal Procedure Act 51 of 1977, as amended by the Criminal Procedure Amendment Act 24 of 2003 (which came into force in December 2003) and the Criminal Procedure Act 25 of 2004 (not in force at the time of publication). This is a summary of the key legal provisions on vulnerable witnesses.*

## WHO IS A VULNERABLE WITNESS?

- 1) anyone **under age 18**
- 2) any **victim of a sexual offence**  
rape, attempted rape, indecent assault, sexual offences under the Combating of Immoral Practices Act, etc.
- 3) a **victim of any offence involving domestic violence**
- 4) a witness who has some **mental or physical disability**  
if the disability creates special needs or may lead to undue stress
- 5) a witness who may be **intimidated** by the accused or any other person  
such as a case involving family members, or members of a criminal gang
- 6) **any person who may suffer undue stress while testifying**
- 7) **any person who needs special arrangements to give full and proper evidence.**

*Section 158A(3), Criminal Procedure Act 51 of 1977  
Section 189(1), Criminal Procedure Act 25 of 2004*

## WHAT SPECIAL ARRANGEMENTS CAN BE USED FOR VULNERABLE WITNESSES?

The following special arrangements for giving evidence can be made (a) at the request of the prosecutor or the accused, (b) at the request of the witness in question or (c) on the court's own motion.

The factors to be considered in respect of any special arrangement are:

- the interest of the state in getting complete and accurate evidence
- the interests and well-being of the witness concerned
- the availability of the necessary equipment and venues
- the interests of justice in general.

*Section 158A(1) and (7), Criminal Procedure Act 51 of 1977  
Sections 189(1) and (6), Criminal Procedure Act 25 of 2004*

- 1) The trial can be held in an **alternative venue**, which will be less formal and less intimidating than a courtroom.

*Section 158A(2)(a), Criminal Procedure Act 51 of 1977  
Section 189(3)(a), Criminal Procedure Act 25 of 2004*



*For example, a small child might feel more comfortable testifying in the magistrate's office. This provision also makes it possible to utilise a venue where any person who might upset the witness can be placed out of the witness's sight.*

- 2) The court can adjourn the trial and re-convene it in an alternative venue which is more suitable for the vulnerable witness during that witness's testimony.

*Sections 189(3)(d) and 191, Criminal Procedure Act 25 of 2004*

- 3) The **furniture in the courtroom can be re-arranged or changed**, or people can be directed to sit or stand in places different from what is usual.

*Section 158A(2)(b), Criminal Procedure Act 51 of 1977*

*Section 189(3)(b), Criminal Procedure Act 25 of 2004*

*For example, a young child may be too short to see and be seen properly while sitting in the usual witness box.*

- 4) The witness may be allowed to **testify behind a one-way screen** or by means of closed-circuit television.

*Section 158A(2)(d) and (6), Criminal Procedure Act 51 of 1977*

*Section 189(3)(ii), Criminal Procedure Act 25 of 2004*

*The Katutura Regional Magistrates' Court has already been equipped with a Victim Friendly Court Room that has these facilities. The accused must be able to see the witness, but the witness does not have to see the accused. For example, a victim of rape or domestic violence might feel less intimidated if she does not have to look at the accused. The accused's legal representative, the prosecutor and the presiding officer must be able to see the witness.*

- 5) A **support person** can accompany witnesses while they are testifying.

*Section 158A(2)(c) and (4)-(5), Criminal Procedure Act 51 of 1977*

*Section 189(3)(c) and (4)-(5), Criminal Procedure Act 25 of 2004*

*For example, a young child could speak to the court while sitting on the lap of a support person who is family member or a teacher (as long as that support person is not going to be giving further testimony in the same case).*

*The support person can stand or sit near the witness and give physical comfort to the witness as necessary. The support person can also interrupt the proceedings to alert the presiding officer to the fact that the witness is becoming upset. The presiding officer can then take appropriate steps, such as calling a short recess.*

*The support person may not help the witness answer questions or instruct the witness on what to say.*

*The presiding officer can instruct the support person not to communicate with the witness during testimony, or to refrain from doing anything which might interfere with the evidence.*

- 6) The presiding officer may authorise **any other steps** that he or she thinks "expedient and desirable" to facilitate the giving of evidence by a vulnerable witness.

*Section 158A(2)(e), Criminal Procedure Act 51 of 1977*

*Section 189(3)(e), Criminal Procedure Act 25 of 2004*

*For example, the presiding officer might take some time to explain to a vulnerable witness how the procedure is going to work before the testimony begins.*



## WHAT OTHER SPECIAL MEASURES APPLY?

The following provisions apply to all witnesses, or to specific categories of witnesses, rather than to “vulnerable witnesses”.

- 1) **Any witness under age 14 is NOT required to give an oath or an affirmation before giving evidence.** The presiding officer must simply warn the witness to tell the truth, the whole truth and nothing but the truth.

*Section 164(1), Criminal Procedure Act 51 of 1977*  
*Section 185(1)(a), Criminal Procedure Act 25 of 2004*

- 2) **Evidence will be received from any witness who appears to be able to give intelligible testimony.** There is no longer any reason for witnesses to be subjected to confusing questions about their ability to tell the difference between right and wrong, or between truth and lies. Anyone, including a child, who appears able to give intelligible testimony will be allowed to testify. The weight which should be given to the evidence will be determined by the presiding officer in light of the usual criteria for judging credibility.

*Section 164(3), Criminal Procedure Act 51 of 1977*  
*Section 185(2), Criminal Procedure Act 25 of 2004*

- 3) **The evidence of a child shall not be regarded as being unreliable just because the witness is a child. The court is no longer required to treat the evidence of a child with special caution just because the witness is a child.** The reliability of a child’s evidence and the weight that should be given to it must be assessed in the same way as the evidence of any other witness.

*Section 164(3), Criminal Procedure Act 51 of 1977*  
*No corresponding provision in the Criminal Procedure Act 25 of 2005*

- 4) **The presiding officer now has strengthened powers to place strict limitations on the use of irrelevant cross-examination to badger or to intimidate any witness.** If cross-examination is taking an unreasonably long time, the presiding officer can ask the cross-examiner to show the relevance of the line of questioning before he or she is allowed to proceed. (This discussion can take place in the absence of the witness if necessary.) The presiding officer can also set reasonable limits on the length of cross-examination, or place reasonable restrictions on certain lines of questioning.

*Section 166(1), Criminal Procedure Act 51 of 1977*  
*Section 187(3), Criminal Procedure Act 25 of 2004*

- 5) **Child witnesses may be cross-examined through the presiding officer or through an intermediary.** An intermediary is a person who has the qualifications gazetted by the Minister of Justice for this purpose. (For example, the Minister might approve social workers or psychologists as intermediaries.) The presiding officer or the intermediary may re-state the questions, simplifying them or re-phrasing them if necessary. The essential meaning of the question must not be changed. The purpose of this provision is to make sure that lawyers do not try to intimidate or confuse a witness with a hostile tone of voice or complicated questions.

*Section 166(4)-(5), Criminal Procedure Act 51 of 1977*  
*Section 187(4) and 193, Criminal Procedure Act 25 of 2004*

*In terms of Act 51 of 1977, children under age 13 MUST be questioned through the presiding officer or an intermediary. The presiding officer’s power to re-state questions applies to children under age 14. An intermediary may be used for any child under age 18.*

- 6) **Medical records prepared by a medical practitioner who treated a victim may be used in a criminal case as *prima facie* proof that the victim suffered the injuries recorded in the documents, even if the medical practitioner in question is not available to testify personally.** The records are not admissible as evidence of any *opinions* stated unless the medical practitioner is available to testify. This provision is designed to take care of situations where doctors had left the country or were otherwise unavailable. Similar arrangements were already in place in the Criminal Procedure Act for documents prepared by other professionals.

*Section 212(7A), Criminal Procedure Act 51 of 1977*  
*Section 238(9), Criminal Procedure Act 25 of 2004*

- 7) **There are now added possibilities for admitting information given by children under age 14 prior to the trial**, such as statements to social workers or police officers, to avoid the necessity of asking the child to repeatedly recount the details of a traumatic experience. The previous statement can be used as evidence to prove a fact contained in the statement if (a) the child is unavailable and (b) the statement “considered in the light of all the surrounding circumstances contains indications of reliability,” OR (c) if the child is present to confirm that he or she made the previous statement. This applies to (a) a statement made on an audiotape or a videotape, if the person who took the statement is in court to give evidence about the procedure (b) a written statement, if the person who took the statement is in court to give evidence about the procedure; or (c) oral evidence about the previous statement by the person to whom it was made (if no audiotape, videotape or written statement is available).

*Section 216A, Criminal Procedure Act 51 of 1977*  
*Section 245(3), Criminal Procedure Act 25 of 2004*

*In terms of Act 25 of 2004, such previous statements are admissible if (a) the child who made the statement is considered capable of giving evidence on any matter contained in the statement; (b) the statement, considered in light of the surrounding circumstances, contains “indications of reliability”; and (c) having regard to any potential prejudice to any party, it is in the interests of justice that the statement be admitted, OR (d) if the child is present to confirm that he or she made the previous statement.*

# ABORTION IN RAPE CASES

*Abortions in rape cases are covered by the Abortion and Sterilization Act 2 of 1975. This is a summary of the key provisions of this law as it pertains to rape cases.*

**It is possible to get a legal abortion where the pregnancy results from rape.**

Two doctors must provide a written certificate stating that they think the pregnancy is the result of a rape. One of these doctors must be a district surgeon (a doctor employed by the state). Either the district surgeon or the other doctor must have been working as a doctor in Namibia for at least four years. Neither of these doctors may perform the abortion.

A magistrate must then give permission for the abortion.

The woman seeking the abortion must make a statement under oath stating that the pregnancy is the result of a rape.

The magistrate can ask the woman questions to decide if she is telling the truth. The magistrate may want to ask other people questions as well. The magistrate may also get information about the case from the police.

IT IS NOT NECESSARY TO LAY A CHARGE OF RAPE WITH THE POLICE IN ORDER TO GET PERMISSION FOR A LEGAL ABORTION. if the woman can give the magistrate a good reason why she has not gone to the police.

For example, maybe she was afraid that the rapist would harm her or her family if she laid a charge. Maybe she is a young girl who did not know what to do when the rape took place.

Even if the woman has laid a charge with the police, it is not necessary for the rapist to be convicted before she can get permission for a legal abortion.

If the trial had to be finished before the abortion could take place, it would be too late for the abortion in most cases. The abortion will almost always take place before the trial even begins.



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