

RAPE

**An
Assessment
of the
Operation
of the
Combating
of Rape Act
8 of 2000
SUMMARY REPORT**

**Gender Research and
Advocacy Project
LEGAL ASSISTANCE CENTRE
2006**



**in
Namibia**



HIVOS

unicef 
unite for children

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We dedicate this study to all those who have experienced rape, in the hope that the information and recommendations in the report can help improve Namibian's response to this horrendous crime.

“I would particularly like to express my concern about the recent spate of violent crimes directed at women and children. These crimes represent a gross violation of the fundamental rights of our citizens and must therefore be condemned.”

President Sam Nujoma,
opening of Parliament,
11 February 2003

OVERVIEW

This study examines national police statistics on rape, plus a sample of rape cases which originated during 2000-2005, to see how Namibia's Combating of Rape Act 8 of 2000 is working in practice.

Reported rapes and attempted rapes in 2003-2005 amount to 1100-1200 cases per year, which is equal to about 60 reported cases per 100 000 people in Namibia – as compared to about 117 reported cases per 100 000 people in South Africa and about 9 reported cases per 100 000 people in Kenya.

It is impossible to determine if the increase in the number of reported rapes and attempted rapes over time results from an increase in the number of rapes being committed, an increase in the number of rapes being reported, or a mixture of these two factors.

Recent police statistics indicate that just over one-third of all victims of rape and attempted rape are under age 18.

The expanded gender-neutral definition of rape is being applied in practice. Both females and males are laying charges of rape, although rape complainants are still overwhelmingly female. The broad definition of "sexual act" applied by the new law is being utilised, even though the majority of rape cases still involve sexual intercourse. Similarly, the broad new definition of "coercive circumstances" is also being applied as intended. All of the different types of coercive circumstances are being recognised in practice, even though most rapes still involve force or threats of force.

Most rapes in our sample were committed by partners, family members or acquaintances, with only about 12% of all rapes being committed by strangers. About 11% of the rape cases examined involved multiple perpetrators. The vast majority of perpetrators (more than 99%) were male, and about 13% of the perpetrators were young men under the age of 18.

Despite the creation of Woman and Child Protection Units (WCPUs) staffed by many committed police officers, some rape complainants still receive an unsympathetic response when reporting rapes – particularly rapes by husbands or other partners. This may stem in part from the lack of adequate training for WCPU personnel.

Police response also continues to be hampered by practical problems such as lack of transport, the absence of expertise for dealing with child rape complainants and inadequate communication between police stations regarding WCPU staff who are "on call" after-hours.

Police investigation techniques could be improved by earlier involvement of prosecutors, particularly now that the Office of the Prosecutor-General has established a specialised unit for handling sexual offences and domestic violence.

Problems with police statements are sometimes a barrier to successful prosecution; this could be improved by the use of tape-recorded statements in the complainant's mother-tongue.

Now that all rape cases are handled by WPCUs, Parliament should allocate a specific budget to WCPUs for this purpose.

One of the weakest aspects of the criminal justice system's response to rape pertains to the collection and use of medical

evidence, which is often crucial in obtaining convictions. Many doctors who examine rape complainants appear to lack sufficient time, training and sometimes commitment to the task. More intensive training and monitoring of doctors who carry out this task is crucial if conviction rates are to be increased.

One big problem in this respect appears to be a breakdown in communications between police, prosecutors, courts and the National Forensic Science Institute, with courts being told that lab results are not yet ready when they are in fact waiting to be collected. New systems of distribution and control of rape kits are in the process of being established, but presiding officers could address this problem immediately by the simple expedient of insisting on confirmation from the lab in any instance where a postponement is requested on the grounds of unfinished lab results.

The provision of medical services for rape complainants, including post-exposure prophylaxis to reduce the chances of acquiring HIV from the rape, is not yet satisfactory – particularly in rural areas. However, the Ministry of Health & Social Services is still in the process of rolling out these services and providing appropriate training to those responsible for administering such medications. Public awareness of the need for post-rape medications appears to be low.

One way to improve official response would be to establish a regular, informal forum for key role players from different ministries and institutions to come together to discuss issues and problems across sectors.

Only 16% of the perpetrators accused of rape or attempted rape are convicted of either of these crimes. The most serious gap is between charge and trial. About one-third of all rape complainants request withdrawal of their cases, usually within 1-2 months of laying the charge – with almost two-thirds of these cases involving rapes perpetrated by partners, family members or acquaintances. It may be that some of these complainants prefer to resolve the matter by means of compensation under customary law, although technically this remedy could be pursued at the same time as a criminal charge for rape.

Case withdrawals could be reduced by the introduction of a victim's assistance programme staffed primarily by trained volunteers who could support the survivor, help explain the court process, assist with logistical questions, keep the complainant informed of the progress of the case and accompany the complainant to court proceedings. This could reduce trauma to the rape complainant and at the same time free prosecutors to focus on the legal issues.

Most of those interviewed appeared to be familiar with the provisions aimed at assisting vulnerable witnesses in court, and had utilised many of them to the extent that available resources permitted – particularly the use of support persons, having the presiding officer re-state questions to the complainant, moving furniture or dispensing with robes to make the atmosphere less intimidating, and using screens or closed-circuit television to shield the complainants from seeing the accused. However, there are also indications that the options for vulnerable witnesses are

often being ignored, possibly because of a lack of clarity on who is responsible for suggesting them.

The most consistent procedural oversight is lack of implementation of the provision on closed court, with few service providers being aware that the new law requires the court to be closed during the entire rape trial unless the complainant requests otherwise.

The minimum sentences appear to be working in practice, although the statistics suggest that courts often look to the minimum sentences as being fixed sentences instead of base level sentences – especially when it comes to the heavier minimums of 10 and 15 years. Members of the public often call for stiffer sentences for rapists, but the study findings indicate that it would make more sense to spend energy and public resources on decreasing case withdrawals and increasing conviction rates.

Namibia's Combating of Rape Act appears to be one of the most progressive rape laws in southern Africa to date, and other African countries have looked to it as a model in many respects. Therefore, the recommendations contained in this study may be useful beyond the borders of Namibia.

All of the recommendations contained in the report are compiled at the end of this summary for easy reference.

“The Combating of Rape Act 8 of 2000 is one of the most progressive laws on rape in the world. Implicit in the Act is a recognition that rape is not a sexual crime, but that it is a crime of violence and power which uses sex as a weapon to humiliate and destroy.”

Narnia Bohler-Muller,

“Valuable lessons from Namibia on the combating of rape”,
South African Journal of Criminal Justice, Vol. 14, No. 1, 2001 at 74.

Part 1

THE PROBLEM OF RAPE

Chapter 1

INTRODUCTION

1.1 The primary purpose of this study is to collect information on how well the **Combating of Rape Act 8 of 2000** is operating in practice to combat the problem of rape in Namibia.

The study also touches on the **Combating of Immoral Practices Amendment Act 7 of 2000**, which gave improved protection to boys and girls under age 16 against sexual acts or “indecent or immoral acts” with someone at least three years older.

It also assesses the implementation of the **Criminal Procedure Amendment Act 24 of 2003** in rape cases. This law provides for special arrangements intended to make it less traumatic for rape complainants (and other vulnerable witnesses) to testify in court.

1.2 The study is based on information from the following sources collected during 2005-6:

- ▶ **409 police dockets**
- ▶ **entries in court registers for 547 cases**
- ▶ **58 key informant interviews**
- ▶ **6 small focus group discussions**
- ▶ **questionnaires on PEP returned by 7 district hospitals.**

Relevant **statistics, judicial developments and examples from other countries** have also been considered.

1.3 On the basis of this information, this report makes some **recommendations** for improved implementation of Namibia’s laws on rape.

Chapter 2

THE INCIDENCE OF RAPE IN NAMIBIA

TABLE 2.1: REPORTS OF RAPE AND ATTEMPTED RAPE COMBINED, 1991-2005

YEAR	TOTAL
1991	564
1992	583
1993	611
1994	741
1995	801
1996	830
1997	778
1998	714
1999	687
2000	854
2001	901
2002	975
2003	1 117
2004	1 151
2005	1 184

Source: Figures for 1999-2005 were provided by NAMPOL. The data for the years prior to 1999 is drawn from a variety of sources, all of which attribute their figures to NAMPOL. Efforts to confirm the statistics for these earlier years directly with NAMPOL were unsuccessful. The Combating of Rape Act came into force on 15 June 2000.

- 2.1** During the last three years (**2003-2005**), 1100-1200 cases of rape and attempted rape have been reported each year – amounting to **about 60 reported cases per 100 000 people** in Namibia's population. In **2005**, there were almost **61 rapes and attempted rapes per 100 000 population**. If reported rapes alone are considered, without attempted rapes, the **2005** figure is **48 reported rapes per 100 000 population**.
- 2.2** The annual number of reported rapes and attempted rapes combined has more than **doubled (ie increased by 100%) from independence to 2005** – during a period when the **population has increased by only 39%**, from about 1.4 million to about 1.95 million. **From 2000 to 2005**, the number of reported rapes and attempted rapes cases **rose by about 39%**, during a period when **the population increased by only about 8%**.
- 2.3** The increase in the number of reported rapes and attempted rapes could mean **an increase in the number of rapes being committed, or an increase in the number of crimes which are reported, or a mixture of these two factors**. The fact that males can be victims of rape since the change in the law in mid-2000 accounts for a small portion of this increase.
- One factor which has probably influenced the increase in reported rapes over time is the increased number of police stations**, from 75 police stations and substations at independence in 1990 to a total of 146 stations in late 2006. Furthermore, the gradual establishment of the Woman and Child Protection Units (which have increased from one unit in 1993 to 15 in 2006) has been specifically aimed at encouraging women and children to seek police assistance in cases involving rape and other forms of gender-based or family violence.

- 2.4** Since 2003 (when the police began to record the sex of rape victims), **men have accounted for 6%-8% of the victims of rape and attempted rape.** There is no significant difference in the age of male and female complainants. About one-third of both male and female victims of rape and attempted rape are juveniles, and males account for 6-8% of both adult rape victims and juvenile rape victims.
- 2.5** In 2005, reported rapes and attempted rapes of men amounted to about 8 per 100 000 male population while reported rapes and attempted rapes of women amounted to about 110 per 100 000 female population – a stark measure of the gendered nature of the crime.
- 2.6** Recent police statistics indicate that **just over one-third of all victims of rape and attempted rape are under age 18.** This proportion holds true for both male and female victims. Although there is not enough data on the age of rape victims prior to 2003 to draw firm conclusions, there is no sign that the proportion of child rapes is increasing or decreasing dramatically. **There are currently approximately 45 reported rapes and attempted rapes per 100 000 juvenile population each year.**
- 2.7** Each region's share of rape and attempted rape cases has remained broadly similar over the last six years. Each region's share of both adult rape and juvenile rape has also remained surprisingly constant over the last three years – with the **exception of a disturbing increase of juvenile rape cases in Ohangwena.**

Overall, Kavango, Ohangwena and Omusati have low rates of reported rapes and attempted rapes relative to their populations, while **Hardap has a relatively high rate of reported rapes and attempted rapes.** But this could be the result of factors that influence whether or not rapes are reported, rather than a result of the number of rapes which actually take place.

Reported rapes of children under age 18 were high relative to the regional share of the national population of children under age 18 in three regions (Erongo, Hardap and Karas), with the discrepancy being particularly pronounced in the Hardap region. Reported rapes of juveniles in the Kavango and Omusati Regions were proportionally much *less* than the juvenile population of these regions. Again, it must be kept in mind that these distinctions could indicate either variations in the *incidence* of child rape in these areas, or variations in the *reporting* of such rapes.

RECOMMENDATION:

Reported rapes of both children and adults are particularly high in the Hardap Region, by every measure. Thus, it would make sense to target this region for particularly intense interventions on the prevention of gender-based violence, with particular emphasis on preventing and combating child rape. Even if the distinction reflects a greater willingness to report rape rather than a higher incidence of rape, targeted intervention would still be warranted as this would still mean that the issue of rape is being dealt with more openly in this region than in others.

RECOMMENDATION:

Police and WCPUs could increase our knowledge of rape if more detailed statistics could be compiled and published, particularly with more age breakdowns and information on arrests and case outcomes. WCPUs should also keep records on follow-up with

the complainant with regard to PEP, pregnancy prevention, preventative treatment for STIs, HIV testing and counselling and follow-up counselling.

- 2.8** International comparisons must be made with caution because different countries use different definitions of rape and different methods of record-keeping. Keeping this in mind, **if the number of reported rapes is calculated per 100 000 population for purposes of comparison, then the “rape rate” in Namibia is high compared to many other developing (and developed) countries.**

For example, in the Eighth Survey of the United Nations Survey of Crime and Criminal Justice Systems (UNCJS) which covered the years 2000-2001, **Namibia appears to rank 3rd out of the 53 countries which provided data on the rate of reported rapes per 100 000 of the population, with 46-49 rapes per 100 000 people in 2001 and 2002** – behind South Africa with 121 reported rapes per 100 000 people and Canada with 77 reported rapes per 100 000 people, and just ahead of the United States with about 32 reported rapes per 100 000 people.

- 2.9** **As another point of comparison, consider the fact that Kenya has only 2000-3000 reports of rape per year, 2-3 times the number of reported rapes as in Namibia, while at the same time having more than 17 times the population.**

- 2.10** **But this does not mean that Namibia has more rapes than other countries. The high level of reporting could be a result of many positive factors** – such as higher official sensitivity to rape, well established bureaucratic recording practices, increased awareness of the crime on the part of both police and members of the public, and the progressive empowerment of women.

RECOMMENDATION:

We recommend that Namibia should periodically conduct nationally-representative surveys about crime which give particular attention to rape and other forms of gender-based violence, as a method of determining the incidence of such crimes more accurately.

RECOMMENDATION:

We suggest that future National Demographic and Health Surveys should include broader questions on violence against women, the circumstances of such violence, and whether the violence was reported to the police. This could provide useful data on both rape and domestic violence.

- 2.11** **There are several forms of rape which are particularly likely to go unreported: marital rape, child rape, “tournaments” (sex acts involving one girl and more than one boy which may sometimes involve coercion), the rape of sex workers, the rape of persons from marginalised groups such as the San and the Himba, the rape of persons with disabilities and the rape of prisoners.** Studies which provide data on the incidence of some of these specific forms of rape in Namibia are summarised in the full report.

Part 2

THE LAW REFORMS

Chapter 3

NAMIBIA'S COMBATING OF RAPE ACT

3.1 The following **key changes to the law on rape** were made by the Combating of Rape Act:

- ▶ **It re-defines rape in gender-neutral terms to reflect the fact that men and boys can be raped.**
- ▶ **It broadens the definition of rape** to cover a range of “sexual acts”, including sexual intercourse, anal intercourse and oral contact with the genitals.
- ▶ **It removes the emphasis on the victim's “absence of consent”, replacing it with an examination of the rapist's use of force or coercion.** “Coercive circumstances” include the use of physical force or threats of force, situations where the complainant is being unlawfully detained, and situations where the complainant is unable to make a meaningful decision about a sexual act because of mental or physical disability, intoxication, the influence of drugs or sleep. Also included in the list are various forms of fraud which would deprive the complainant of free choice. The result of this emphasis on the actions of the accused is that rape victims should no longer feel that *they* are the ones who are being put on trial.

- ▶ **It gives greater protection against sexual abuse of children.** Rape is committed whenever a sexual act is committed with a boy or a girl under the age of 14, by someone who is more than three years older. The accompanying amendments to the Combating of Immoral Practices Act give additional protection to boys and girls under the age of 16, where there is sexual contact with someone more than three years older.
- ▶ **It acknowledges the fact that rapes can occur within marriage.** A marriage, or any other relationship, is no longer a defence to a charge of rape.
- ▶ **It provides stiff minimum sentences for rapists.** Depending on the circumstances of the rape, the minimum sentence for a first offence is five, ten or fifteen years. A second offence is punishable by a minimum sentence of 10, 20 or 45 years. The court has the power to depart from the minimum sentences only where there are substantial and compelling circumstances which would justify more lenient treatment. The minimum sentences do not apply to young offenders under the age of 18.
- ▶ **It provides stiffer bail conditions,** as well as a procedure whereby the victim has an opportunity to inform the court of any threats from the accused *before* bail is considered. It also provides that no accused rapist who is released on bail is allowed to have any contact with the complainant.
- ▶ **It protects rape victims from irrelevant questions about their sexual history.** Evidence about the complainant's sexual reputation is no longer admissible under any circumstances. Evidence about the complainant's previous sexual conduct or experience with the accused or with any other person is now admissible only on certain limited grounds. For example, the accused is allowed to lead evidence that pregnancy, semen, disease or injury which is being attributed to the alleged rape actually had its source in another sexual encounter.
- ▶ **It makes the knowing spread of HIV an aggravating factor in the sentencing of rapists.** Where a rapist knew that he or she was infected with HIV at the time of the rape, this places the rapist in the stiffest sentencing category.
- ▶ **It gives greater protection to the rape victim's privacy and provides stiff penalties for revealing the identity of rape victims in the press.** It also provides for automatic closure of the court during a rape trial, unless the complainant requests otherwise.
- ▶ **It eliminates several archaic evidentiary rules based on the unsupported myth that false charges of rape are common.** The rule requiring courts to treat the evidence of a complainant in a sexual offence case with special caution is abolished, and courts are forbidden to draw any negative conclusions simply from the fact that a complainant did not tell anyone else about the rape, or delayed before laying the charge.
- ▶ **It makes evidence of similar offences by the accused admissible during the trial.** Previously, such evidence was not admissible except on the question of sentencing. But now the prosecutor can ask the court to listen to evidence of previous rapes or similar offences by the accused only if this is relevant to show that the perpetrator has a tendency to force certain kinds of sexual acts on people.

“We know of few other law reform issues which have received such a broad range of public support.”

Women's Solidarity,

“Open letter to the Law Reform and Development Commission”,
22 November 1994

Chapter 4

LAW REFORM ON VULNERABLE WITNESSES

4.1 The following **key changes concerning vulnerable witnesses** were made by the Criminal Procedure Amendment Act 24 of 2003:

- ▶ The **definition of “vulnerable witness”** includes (among other persons) anyone under the age of 18, and any victim of a sexual offence.
- ▶ **Special arrangements for vulnerable witnesses** can include any of the following steps:
 - ▶ The trial can be held in an alternative venue.
 - ▶ 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.
 - ▶ The witness may be allowed to testify behind a one-way screen or by means of closed-circuit television.
 - ▶ A support person can accompany witnesses while they are testifying.

The presiding officer may also authorise other appropriate steps.

- ▶ **Any witness under age 14 is no longer required to give an oath or an affirmation before giving evidence.** Evidence will be received from any witness who appears to be able to give intelligible testimony, thus eliminating confusing questions about a child’s understanding of abstract concepts like truth and lies.
- ▶ **The reliability of a child’s evidence and the weight which should be given to it must be assessed in the same way as the evidence of any other witness.** There is no need to treat evidence with special caution just because the witness is a child.
- ▶ **Any witness under age 13 may be cross-examined *only* through the presiding officer or through an intermediary,** to avoid intimidation by the accused or the accused’s defence counsel.
- ▶ **Information given by children under age 14 prior to the trial, such as statements to social workers or police officers, can be considered at the trial, subject to certain safeguards.** This will prevent the child from having to repeat traumatic details.
- ▶ **The reforms strengthen the power of the presiding officer to limit irrelevant cross-examination,** to prevent badgering or intimidation of witnesses.
- ▶ **Medical records prepared by a medical practitioner who treated a victim may be used in a criminal case as evidence of the injuries recorded in the documents,** even if the medical practitioner in question is not available to testify personally.

Part 3

THE ACT IN ACTION

Chapter 5

METHODOLOGY

5.1 The following sources of data were used in the study:

Police dockets: We examined **409 police dockets** for rapes and attempted rapes committed in 2001-2005 from **16 selected urban and rural locations in nine of Namibia's 13 regions**. The sample is not nationally representative, but it draws on a sufficient variety of locations to give a reasonable picture of what is going on nationally.

Court registers: We also examined court registers from the High Court and magistrates' courts in **eight locations in seven of the 13 regions**. Information was compiled in respect of **547 cases** of rape or attempted rape, from the years 2001-2005.

Interviews: The quantitative information is supplemented by qualitative information from interviews with **58 key informants**, including prosecutors, magistrates, police, social workers, rape complainants, legal aid attorneys who defend accused rapists and persons in key posts. We also conducted **6 small focus group discussions** with members of the public. This information was supplemented by written **questionnaires on post-exposure prophylaxis (PEP)** sent to all district hospitals in Namibia, with responses being received from seven locations: Eenhana, Mariental, Ohangwena, Otjiwarongo, Otjozondjupa, Outapi and Walvis Bay.

Court cases: We examined **written opinions in court cases** decided under the Combating of Rape Act, and **attended a limited number of court cases as observers**. Other information was obtained from **clients** of the Legal Assistance Centre. Additional information was drawn from **newspaper reports on rape cases**.

Consultative workshop: Preliminary findings and recommendations from this report were presented at a workshop of key stakeholders on 9 November 2006. This workshop was attended by **33 participants from 6 regions**. Input from the workshop has been incorporated into this report.

- 5.2** It should be noted that the Ministry of Gender Equality and Child Welfare is in the process of collecting information on gender-based violence from dockets at Woman and Child Protection Units in selected regions. This database, which is being posted on the Internet at www.gbv.gov.na, could be used as a source of information for future research on rape.

“The socially-constructed roles of women dictate that they have little control over their own sexuality... Culturally, men decide on when, where and with whom to have sexual intercourse.”

Eunice Iipinge & Debie Lebeau,
Beyond Inequalities 2005: Women in Namibia,
Southern Africa Research & Documentation Centre, 2005

Chapter 6

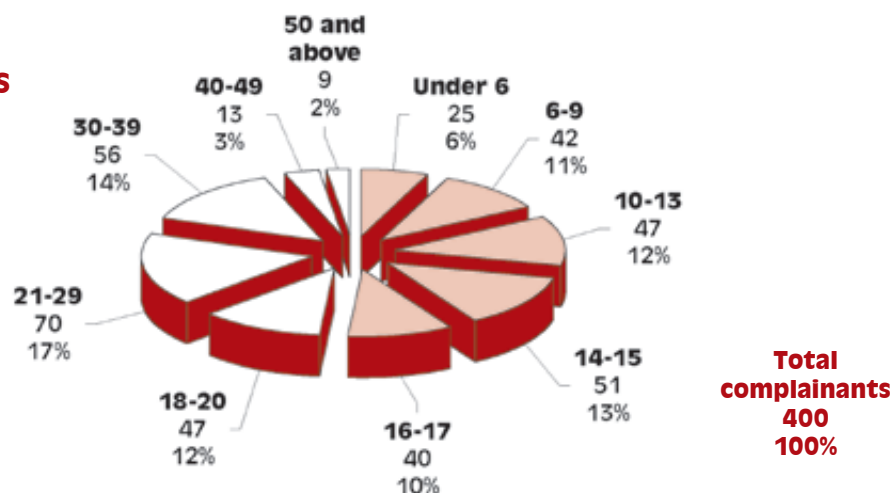
THE RAPE

Complainants

- 6.1** **Our sample of police dockets confirmed the fact that the vast majority of victims of rape are girls and women.** However, our sample had slightly fewer male complainants (about 5% male complainants compared to 95% female complainants) than police reports for the whole country for 2003-2005 (where about 93% of all complainants are female, with the remaining 7% being male).
- 6.2** **The youngest rape victim in the sample was 1 year old** (raped anally by a 17-year-old perpetrator), **and the oldest was 83 years old** (raped by a 33-year-old perpetrator who broke into her house).
- 6.3** The national police statistics on rape distinguish only between adults and juveniles (using age 18 as the dividing line). In our sample, about 51% of the cases involved child complainants under age 18, as compared to only some 35% of cases in the national police statistics for 2003-2005. Thus, **the incidence of child rape in the LAC sample is considerably larger than that in police statistics for the nation as a whole. Keeping this point in mind, our sample of 409 police dockets provides a more detailed age breakdown than the national police statistics:**
- ▶ **about 28% of the complainants were under age 14**
 - ▶ **about 41% of the complainants were under age 16**
 - ▶ **about 51% of the complainants were under age 18**
 - ▶ **about 63% of the complainants were minors under age 21.**

Child rape is obviously a serious problem in Namibia. The rape of very young children is not common, but there is nevertheless a disturbing percentage of such cases. **More than 16% of the cases in our sample involved complainants under age 10, with more than 6% involving children under age 6.**

**CHART 6.1:
AGE GROUPS
OF COMPLAINANTS
(POLICE DOCKET
SAMPLE)**



- 6.4** Only a small percentage of female rape complainants in the LAC sample were over age 50, and there were no male complainants in this age category.

Rapes of persons with disabilities

- 6.5** Out of a total of 409 police dockets, only about 3% (14 dockets) involved persons with disabilities as complainants – most of which involved females (there was one male) with mental disabilities (12 out of the 14 dockets). Most of the complainants with disabilities were young, with nine of the 14 complainants with disabilities being between the ages of 12 and 22.

In 7 of the 14 cases involving complainants with disabilities, the perpetrators were reportedly known to the rape victims, with relationships ranging from step-fathers to landlords of the complainants.

Persons with disabilities are likely to be more vulnerable to rape due to a number of reasons – less capability for physical self-defence, difficulty in reporting rape due to communication problems, a greater amount of dependence on other people for care (who may in some cases take advantage of this situation), or the lack of a caretaker to protect them from harm.

In the 14 dockets in our sample involving disabled complainants, only two of the cases led to a conviction against the accused persons. Most of the cases involving complainants with disabilities appear to have been withdrawn by the prosecutor for lack of evidence. Without witnesses to the rape other than a mentally-disabled complainant, it is often difficult to prosecute.

- 6.6** The rape of persons with disabilities is likely to be vastly under-reported, as the same factors which make such persons vulnerable to rape may serve as barriers to seeking help.

Because persons with disabilities often find themselves isolated from mainstream society, and because some forms of disability may interfere with ability to communicate, such persons may endure sexual abuse for longer periods of time than others before it comes out into the open.

Some rapes may be the result of negligence on the part of institutions or care-takers charged with the duty of looking after persons with disabilities.

This is an area which is urgently in need of attention.

RECOMMENDATIONS:

The Combating of Rape Act should be amended to make rape of persons with physical or mental disabilities a basis for imposing the highest category of minimum sentence.

Police dockets and J-88 forms, which doctors are required to complete when they examine a rape complainant, should have a particular space for indicating whether or not a complainant is disabled, and the particular form of disability should be specified. Currently, the J-88 only contains a question on mental state, which refers to the general emotional state of the complainant and not to the presence of a mental disability.

Requests for the withdrawal of cases involving complainants with mental disabilities should be treated with strict caution. While mental disabilities vary, many persons with such disabilities may lack the coherency to ask for a withdrawal or to understand the implications of such an action.

Rape cases involving persons with disabilities should be recorded and tracked as part of the standard record-keeping system of police and Woman and Child Protection Units, with information on this category of cases incorporated into regular reporting of crime statistics. Failure to include information on this category of cases might be interpreted as indifference towards persons with disabilities, and could also serve to create the false impression that rape and other crimes are rarely experienced among this category of people. In a larger body of cases, information about rapes of complainants with disabilities could give insights into how to decrease the vulnerability of such persons, and information about perpetrators in such cases might show who is most likely to abuse – caregivers, institutional workers, neighbours or others who stand in a special relationship to the complainant. This information would be useful in identifying preventative strategies.

Government and non-governmental organisations should produce more educational materials on rape and other legal rights aimed at persons with particular disabilities which make general public information inaccessible to them. While the efforts of government and non-governmental organisations to disseminate information on legal rights are commendable, there is a gap when it comes to persons with disabilities. The Legal Assistance Centre has made a small start in this direction by producing material on rape and domestic violence in Braille, but there is still a need for more materials aimed at persons with disabilities.

Community members and institutions should be provided with information on how to identify signs of abuse in persons with mental disabilities in particular, and how to equip disabled persons to protect themselves. Moreover, community members must be encouraged to report rape and other abuse of persons with disabilities to the appropriate authorities. There is also a need for educational material on the sexual needs and rights of persons with various disabilities, particularly mental disabilities.

“Many abused children were blamed and even beaten after abuse was disclosed. Many perpetrators were supported by their family, friends and community. Unless society learns to articulate and act upon a clear stance condemning child sexual abuse it will not be possible to substantially reduce the problem.”

Rachel Jewkes, Loveday Penn-Kekana, Hetty Rose-Junius, Josephine Malala,
Child Sexual Abuse and HIV: Study of Links in South Africa & Namibia, Medical Research Council, Pretoria, June 2003

Perpetrators

6.7 About 11% of our police docket sample of 409 cases involved multiple perpetrators, with 10% of the cases involving 2-3 perpetrators. The maximum number of perpetrators involved in cases in our sample was five.

Similarly, from the sample of 547 cases in the court registers examined (which covered only those accused who had been arrested and charged), about 9% involved multiple accused, with 8% involving 2-3 accused. Cases with more than 3 accused were uncommon.

Although comparisons between countries must always be made with caution, the proportion of gang rapes in Namibia appears to be broadly consistent with that in other countries

CHART 6.2:
MORE THAN ONE PERPETRATOR? (POLICE DOCKET SAMPLE)



6.8 More than 99% of the perpetrators in both the police docket sample and the court register sample were male, proving that rape is a form of gender-based violence. Neither sample includes a single case in which a female was convicted of rape.

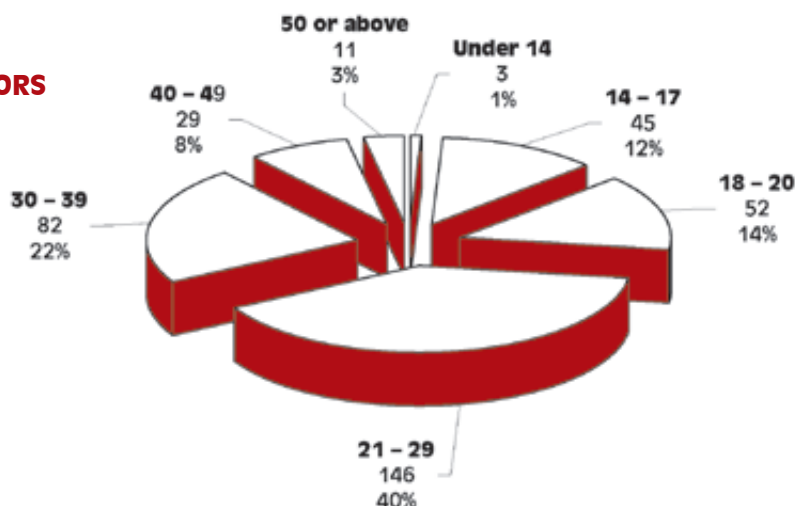
6.9 About 13% of the perpetrators in both our police docket sample and our court register sample were young offenders below the age of 18. There were three cases in each sample involving perpetrators below age 14.

At least one-fourth of the perpetrators in both samples were minors (below age 21), while close to two-thirds of perpetrators in both samples were under age 30. **Perpetrators in both samples were most highly concentrated in the age group 21-29.** The average age of the accused rapists in the two samples was 27-28 years.

One cannot help but ask, what is happening that so many of our young men in Namibia are combining sex and violence?

The samples show that while rapists come in all ages, they typically range in age from about puberty up to age 39, which are probably the most sexually-active years for most men. **The oldest perpetrator in the two samples was age 92, while the youngest was age 7.**

CHART 6.3:
AGE OF PERPETRATORS (POLICE DOCKET SAMPLE)



Circumstances of the rape

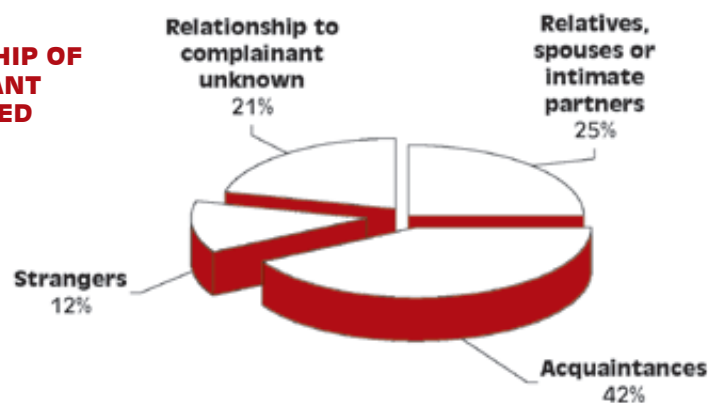
Relationship between complainant and perpetrator

6.10 The vast majority of rapes involve persons known to the victim. This was true in at least 67% of the 409 cases in the police docket sample, while only 12% of the cases involved rapes by strangers. Gang rapes were slightly more likely to involve strangers, but the majority of both single-perpetrator rapes and gang rapes involved persons known to or related to the complainant.

Shockingly, about one-fourth (25%) of the rapes in the sample involved family members, spouses or intimate partners – including ex-spouses and ex-partners. **Thus, rape constitutes a serious form of domestic violence.** Cases involving rape within marriage were rare, and none of these charges ultimately led to prosecution. There were 2 cases where fathers allegedly raped their own daughters, 4 cases where half-brothers allegedly raped their half-sisters and 15 cases where uncles allegedly raped their nieces.

It appears that the new law's recognition of marital rape as a crime has increased public recognition of forced sex in this context as a wrongful act, although victims of marital rape may still be reluctant to lay charges.

**CHART 6.4:
RELATIONSHIP OF
COMPLAINANT
AND ACCUSED**



6.11 The police docket sample indicates that **most rapes involve victims and complainants of the same language group**, which is not surprising given the fact that most rapes are perpetrated by intimate partners, family members or acquaintances of the victim. There were more instances of rapes across language lines where there were multiple perpetrators, but the majority of such cases involved perpetrators and complainants from the same language group. Thus, it appears that rapes of all kinds usually involve victims and perpetrators from the same cultural groups. This would appear to indicate that race and ethnicity are seldom part of the motive for rape.

Sexual act

6.12 The most common sexual act in the police docket sample was sexual intercourse, which was previously the only sexual act that constituted rape. However, a significant number of cases (13%) involved sexual acts which would not have been classified as rape under the old law. Furthermore, in 9% of the cases in the sample, the **only** sexual acts which took place were acts which would not have been classified as rape under the old law. This shows that the expanded definition of sexual act is being utilised in practice.

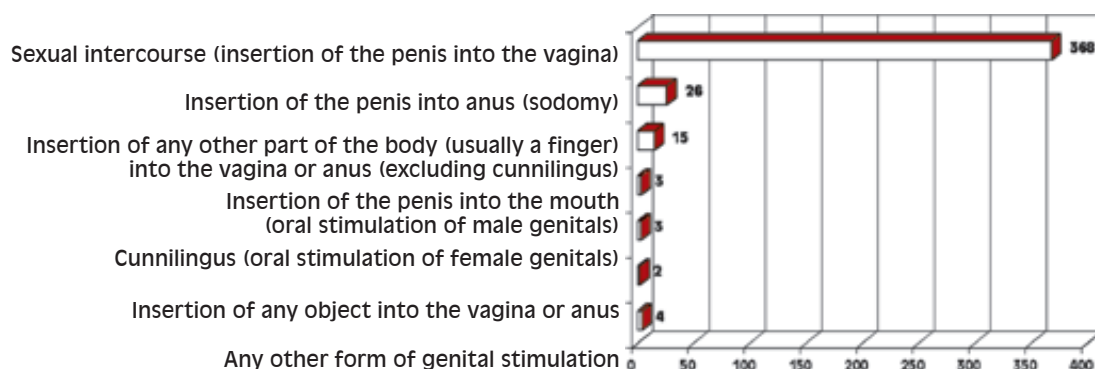
The second most common sexual act was insertion of the penis into the anus (sodomy), followed by the insertion of another body part (usually a finger) into the vagina or anus.

Oral sex and the insertion of objects into the vagina or anus were not common.

There were only a few cases (3%) where the *only* sexual act which took place was genital stimulation or the insertion of a body part other than the penis into the vagina or anus. Thus, sexual acts which might arguably be viewed as less serious physical invasions are seldom the *sole* basis for charges of rape, even though the law allows this.

These findings indicate that there is a significant level of awareness on the part of public, police and prosecutors that a broad range of sexual acts are now sufficient to support a charge of rape. The figures also show that arguably less invasive physical violations are not being used in practice to “water down” the concept of rape.

CHART 6.5: TYPES OF SEXUAL ACTS (POLICE DOCKET SAMPLE)
A single case may involve more than one type of sexual act.



- 6.13 In almost 14% of the cases, rapes took place on different dates, or on an ongoing basis.** For example, one complainant was raped by one perpetrator five times over several days. One complainant was raped by two different accused on different dates. Another was raped repeatedly on an ongoing basis by two relatives.
- 6.14 At least 8% of the cases involved more than one sexual act committed by a single perpetrator on the same date.** For example, one case involved six incidents of rape by one perpetrator against one complainant on the same date.
- 6.15 As noted above, at least 11% of the cases involved multiple perpetrators,** ranging from two perpetrators to at least five perpetrators. The details of the gang rapes were, not surprisingly, horrific. One complainant was raped by four different perpetrators, four times vaginally and two times in the anus. Another was raped a total of eight times by possibly as many as seven men.
- 6.16 Most rapes (77%) involved a single sexual violation. However, in at least 93 out of 409 cases (almost 23%), the complainant suffered multiple sexual violations — whether at the hands of a single perpetrator or multiple perpetrators.** For example, one complainant was raped four times by four perpetrators – twice in her vagina and twice in her anus. Two cases involved forced oral sex as well as sexual intercourse.

Coercive circumstances

- 6.17 Multiple forms of coercion were often present. Physical force and threats of physical force together** accounted for 62% of the total forms of coercion, **utilised in 78% of the cases in the police docket sample.**

About 17% of the total forms of coercion, utilised in **28% of the cases**, involved the age of consent, where a sexual act was committed with a **complainant under age 14 by someone more than 3 years older.**

About 11% of the total forms of coercion, utilised in **17% of the cases**, involved situations where the **complainant was unable to communicate unwillingness** because of sleep, because of being drunk or drugged, or because of mental or physical disability.

There were a surprising 40 out of 409 cases (almost **10%**) involving **complainants who were unlawfully detained** at the time of the rape. These involved cases where the victim was, for example, locked into a place (such as a room, a house, a car or a garage) or was dragged by the perpetrator to his caravan. The line between unlawful detention and physical force is in some cases blurred, so our researchers' interpretation of this coercive circumstance may not be completely precise.

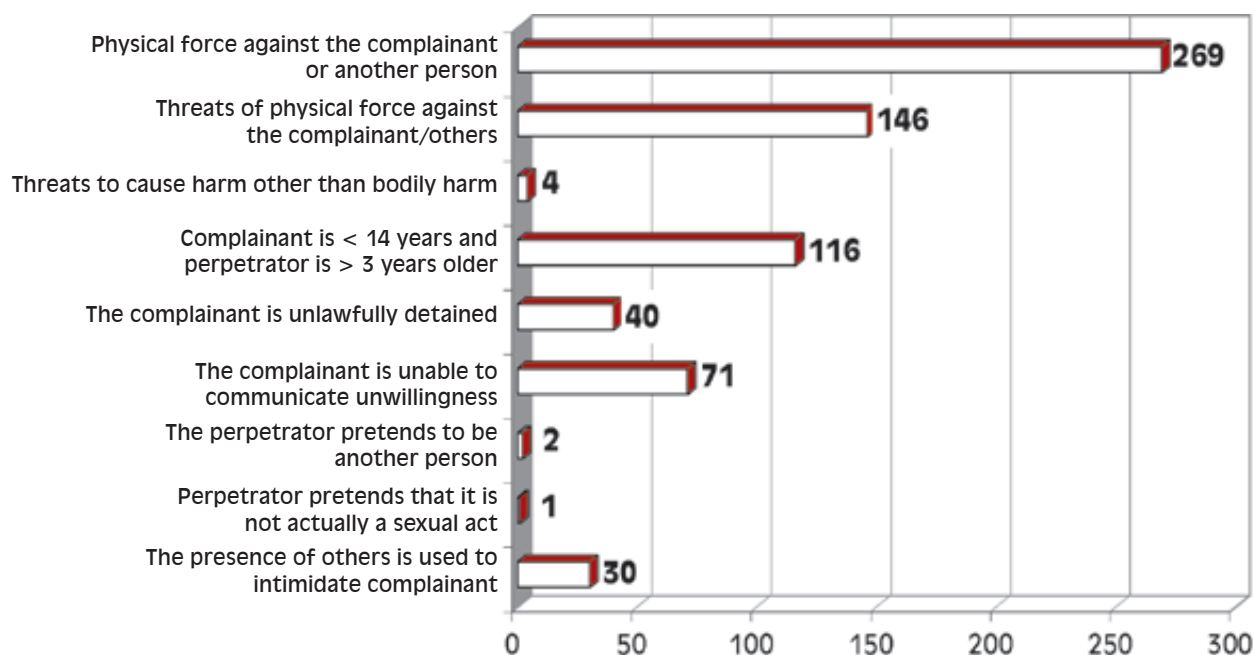
In 30 out of 409 cases (**7%**), the **presence of more than one person was used to intimidate the complainant**. This generally refers to cases where more than one perpetrator raped the victim or where others (usually friends) were watching or witnessed the incidence without intervening, even if (in some cases) the victim pleaded for help. Again, there is room for differences of interpretation here.

Only four cases involved threats of harm other than bodily harm to the complainant or another person, in situations where it would not be reasonable for the complainant to resist – which is arguably the weakest form of coercion under the Act. These involved threats by the perpetrator to kill himself, or a threat by a perpetrator who was a close friend of a child complainant that he would end up being harmed if the complainant revealed what had happened. (These types of threats do not really fit well into this or any of the categories of coercion.)

About half of the rape cases examined involved multiple forms of coercion. Where there were multiple forms of coercion, physical force or threats of physical force were almost always present. Only 92 cases (22% of the sample) did *not* include physical violence or threats of physical violence, and more than half of these involved complainants under the age of 14 and perpetrators more than three years older.

Thus, there is **no indication that the more unusual forms of coercion are being relied upon inappropriately**. However, the fact that the entire range of coercive circumstances listed in the law appears in police dockets indicates that **police and prosecutors are aware of the many forms of coercion which can be the basis for rape**.

CHART 6.6: COERCIVE CIRCUMSTANCES INVOLVED IN THE RAPE (POLICE DOCKET SAMPLE)



- 6.18** Looking at sexual acts in combination with coercive circumstances, it is clear that the broadening of the law on both of these points does not seem to be watering down what is being alleged and tried as rape. The dockets in our sample reveal very few cases which could possibly be construed as “minor” incidents, by any measure.

Weapons

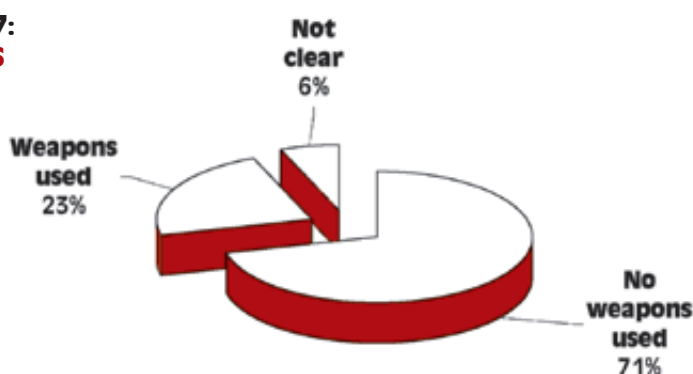
- 6.19** Despite the prevalence of physical force as a coercive circumstance, **weapons were used in less than a quarter of the cases (23%) in the sample.**

Knives were the most common weapon, being used in just over half of all the cases involving weapons – or in about 13% of all the cases in the sample.

Firearms were not commonly used as weapons, occurring in only about 8% of the cases which involved weapons – or in only about 2% of all the cases in the sample.

Many of the weapons employed were common items found around the house – knives, broken bottles, belts, stones, and even things like forks, brooms and scissors.

CHART 6.7:
WEAPONS
USED



Injuries to complainant

- 6.20** **The complainant sustained injuries – other than the injury of the rape itself – in at least 28% of the cases examined.** Some cases involved multiple injuries. Bruises and cuts were the most commonly-reported injury, which is consistent with the types of weapons described.

The most serious injury was loss of life. There were at least two cases in the sample where the rape was followed by murder, both of which involved child victims.

There were four reports of broken bones. Even though firearms were used in 2% of the cases, there were no reports of gunshot wounds.

This data may underestimate the actual extent of injuries to the complainant, as most of the data on injuries was gleaned from the “J-88” forms which doctors are required to complete when they examine a rape complainant.

Time and place of rape

- 6.21** **There is no time of day that is ‘safe’. But night-time proved to be about twice as dangerous as daytime – 47% of the rapes in our sample took place at night (between 20h00 and 6h00), compared to 27% which took place in the daytime (between 6h00 and 20h00).** (In the other cases, the time of rape could not be ascertained or took place over a period of time.)

There could be many reasons why more rapes take place at night. It may be because rapists think that they will be more likely to evade detection during the hours of darkness, because more people are at home (where most rapes take place), because there are more

opportunities for privacy and secrecy after dark, or simply because there is less other activity at night to distract potential rapists. It is also possible that the time frames for rape may be related to the more popular times for alcohol consumption.

- 6.22 And what is the riskiest place in terms of rape? Home**—the home of the complainant, the perpetrator, the common home that they share, a relative's home or someone else's home. **More than 52% of the rapes in our sample occurred in a home. Rapes also occurred much more often indoors than outdoors.** This finding is consistent with the fact that rapes tend to be perpetrated by a partner, relative or acquaintance of the complainant – it appears that the complainant is often in a home setting with someone who is trusted when the rape occurs.

Rape in police and prison cells

- 6.23 Of the 409 cases in the police docket sample, 6 involved rapes of male prisoners by one or more of their male cellmates. This is a small number, but our key informant interviews suggest that it could be indicative of a larger problem.** It is also disturbing to note that half of the victims were minors, while several of the perpetrators were also minors.

RECOMMENDATION:

The problem of rape in prisons and police cells needs to be officially acknowledged so that appropriate steps can be taken to increase security and prevent such incidents.

HIV cure myth

- 6.24 The myth that sex with a virgin or a young child can cure AIDS did NOT play a role in any of the case dockets examined, and only one person interviewed cited a specific case where this was a factor.**

This myth fortunately does not appear to be widespread. For example, only 7% out of 400 persons in a 1999 survey in northern Namibia agreed with the statement that “You can get rid of AIDS if you have sex with a virgin”. Similarly, only 6% of 712 respondents in a 2004 study in a selection of settlements in Katutura agreed with this statement.

The percentages of people who believe the myth, though small, are clearly cause for concern. However, there is no concrete evidence that belief in this myth is a major factor behind the rape of minors.

Therefore, while this myth should certainly be combated wherever it exists, caution should be exercised on two scores: (1) simplistic public education campaigns refuting the myth might have the unintended effect of spreading it amongst those who have not heard of it and (2) a focus on refuting this myth should not replace other interventions targeting more prevalent causes of child rape.

RECOMMENDATION:

Strategies for addressing the myth that sex with a virgin or a young child can cure AIDS should be discussed with the Traditional Healers Board.

Chapter 7

REPORTING THE RAPE TO THE POLICE AND POLICE INVESTIGATION

Addressing public reluctance to lay charges

- 7.1** There are many social barriers to the reporting of rapes – including shame, shyness, fear, family attitudes, pressure from the community to protect the rapist, and the fact that the victim may be blamed for the rape.
- 7.2** Police stations and WCPUs in several regions reported that they have engaged in community outreach programmes which are designed to encourage the community to report rapes. There is, however, little involvement by traditional leaders in such programmes.

RECOMMENDATIONS:

The Namibian Police and the Woman and Child Protection Units in particular are to be congratulated on their **community outreach efforts**, and **encouraged to continue** with such programmes. **Traditional leaders should be encouraged to become more involved** in these programmes.

It would be useful to engage an **independent expert to evaluate these programmes periodically** to see if there is any way in which the outreach efforts can be made even more effective.

Public awareness campaigns should seek to motivate persons to report rapes to the police by including information on the **danger of repeat rapes** by such persons.

Non-governmental organisations working with gender-based violence should share plans for workshops with the National Coordinator of the WCPUs, to facilitate better coordination and more effective coverage of different parts of the country.

Criminal charges or compensation under customary law?

- 7.3** Many complainants in rape cases prefer to resolve the case by the payment of compensation from the perpetrator or his family in terms of customary law instead of working through the criminal justice system. However, in theory, compensation for a rape from a traditional court and laying a criminal charge with the police for the rape are not mutually-exclusive options. This is because traditional authorities are not authorised to deal with criminal cases for rape, so the compensation which is ordered in such cases must be a form of civil proceeding which would be no bar to laying a criminal charge at the same time.

RECOMMENDATIONS:

Public awareness campaigns should emphasise that **receiving compensation for a rape with the assistance of traditional authorities and laying a charge with the police are not mutually exclusive options.**

This issue should be discussed with traditional leaders, who should be mobilised to encourage the reporting of rape (and other crimes) to the police as a mechanism for protecting the community from repeated crimes of violence.

The future possibility of seeking compensation for damages in conjunction with a criminal trial for rape under the new Criminal Procedure Act 25 of 2004 (once it comes into force) should be publicised.

Perceived barriers to laying charges with the police

- 7.4** There is a great deal of confusion about who has the legal right to lay a charge with the police. The answer is: anyone who has knowledge of a crime, regardless of the attitude of the complainant. It is *not* necessary for a child's parent or guardian to consent to the laying of a charge involving the child as the complainant, although it will be better for the child to have the support of some adult.
- 7.5** There are also public misperceptions about defamation. **There is no need for complainants or police to fear lawsuits for defamation as long as they have acted in good faith, even if the accused is eventually acquitted.**

RECOMMENDATION:

Correct information on **who can lay a charge** and on **defamation** should be included in all public awareness campaigns. **Circulars on these points should also be sent to all police stations** so that police will be sure to give correct information to the public on these concerns.

How soon are rapes reported to the police?

7.6 Typically, rapes were reported either on the same day that they occurred (33%), or on the following day (35%). A total of about 68% of these cases in our sample were reported this promptly. A total of 78% of the rapes in the sample were reported to the police within 2 days. Almost 92% of the cases in the sample were reported within a week of the incident. Almost 98% of the cases were reported within one month of the offence.

This means that the majority of cases are reportedly promptly enough to allow for the collection of crucial medical evidence, and in time for the complainant to receive PEP and medication which can prevent other sexually-transmitted diseases and pregnancy.

However, lack of efficient transport may still be hampering rural residents in particular from reporting rapes promptly (and perhaps even from reporting them at all).

RECOMMENDATIONS:

Continue and expand community outreach and radio information programmes.

Use radio and school programmes to encourage children to speak to a trusted adult promptly if they experience any kind of abuse.

Explain bail provisions in public awareness campaigns – so that complainants will know that rapists who have threatened them are likely to be denied bail, and will be forbidden to have any contact with them even if bail is granted.

Telecom should work together with rural communities to provide a network of public phones and cell phones in rural areas, including “hotline” phones which allow free calls to police. In areas without Telecom coverage, perhaps local churches or traditional leaders could be equipped with satellite phones similarly programmed to make emergency calls only. Donors might be asked to consider funding such phones in selected communities on a trial basis.

Police must be equipped with sufficient transport to respond to such calls for help, which in some regions means 4x4 vehicles.

If transport is not available through the police, inter-ministerial arrangements should be made to allow police to utilise the vehicles of other government agencies to respond to emergencies.

It is recognised, however, that such improvements in communications services and transport would be feasible only if strict and workable controls could be implemented to ensure that such facilities were not abused.

Response of police stations and Woman and Child Protection Units

7.7 There are a total of 15 Woman and Child Protection Units (WCPUs) in place as of 2006, with at least one such unit in every region. The WCPUs were designed to provide a more comfortable and sensitive environment, particularly for women and children, to encourage the reporting of rape and domestic violence.

Current police practice is to refer all cases of violence against women and children (including rape) to the nearest WCPU.

Yet **WCPUs are not yet well-prepared to handle rape cases**, as they often lack adequate transport, facilities, equipment and properly-trained personnel.

7.8 Several key informants cited the unsympathetic atmosphere in police stations as a factor that discourages reporting. Many complaints were reported about the response at WCPUs, which are meant to provide a particularly supportive response to rape victims.

People with complaints must provide details, particularly the name of the person in question, if the complaint is to be addressed. Police administrators report that WCPU staff are supposed to wear official name-tags, but this rule does not appear to be consistently followed at present. This is a problem, because some people who report bad service say that the officers in question are reluctant to provide their names.

Each WCPU is supposed to have at least one officer who is "on call" after hours. However, another problem cited is that charge officers at other police stations and persons who answer emergency calls are not informed of the contact information for these WCPU personnel.

RECOMMENDATIONS:

All WCPU staff should be required to wear **official nametags** when on duty, **so that they can be clearly identified by members of the public**. Compliance with this rule should be monitored and enforced.

Members of the public must be encouraged to report problems experienced with details so that they can be addressed by the WCPU management.

All charge officers and persons who answer emergency calls should be regularly informed of the **correct contact information for WCPU staff members on call after-hours**.

The contact numbers for officers on call should be displayed on notice boards outside the WCPUs for the information of members of the public.

WCPU staff should be provided with regular counselling, as it is very emotionally stressful to deal regularly with cases of rape and domestic violence.

"I see in my area that under-aged girls are used for sexual activities. Things are getting worse and even after rape, they are also killed. Police are not effectively doing their job. If you contact or report any rape case to the police they take about 2 or 3 days to turn up. Then all the evidence is gone."

Legal Assistance Centre interview with traditional leader, 2005

PROBLEMS WITH A WOMAN AND CHILD PROTECTION UNIT?

CONTACT:

Chief Inspector Shatilwe, National Coordinator
telephone: 209 4395 or 209 4396
cell phone: 081-128-9751

You must report the name of the police officer in question or provide some other specific details to make it possible to investigate your complaint.

7.9 The fact that Namibia has established a network of WCPUs is a very good start, but several key informants pointed to the gap between the ideal and the reality of the WCPUs.

As a starting point, it might be useful for Namibia's WCPUs to articulate **a clear set of goals, along with strategies for achieving them**. This would be useful for communication with the public, as well as facilitating future assessments of the impact of the WCPUs.

Close co-operation between different role-players is clearly crucial, as the most successful WCPUs have close ties to the community and good working relationships between different service providers.

The lack of appropriate training is probably the biggest hurdle faced by most of the WCPUs. Even if only a small cadre of police could receive intense training in how to handle rape cases, this would be helpful, as the most difficult cases could be referred to them. Several key role players suggested that Namibian service providers should visit similar centres in other countries, such as the Thuthuzela Care Centres in South Africa, to exchange ideas.

The experience of other countries suggests that if the WCPUs were transformed into truly specialised units staffed with experienced and specially-trained personnel, they could make a significant difference in the outcome of rape cases.

RECOMMENDATIONS:

The Woman and Child Protection Units should have a clear set of goals and strategies for achieving those goals, to make regular assessments more effective. An official Mission Statement and goals would also be helpful in giving the public a clear idea of what to expect from the WCPUs.

Improve the operation of the Woman and Child Protection Units by implementing the recommendations put forward in the 2006 UNICEF assessment as a matter of urgency. The provision of specialised training for WCPU staff should be a particular priority.

Encourage closer cooperation between the different service providers who work with rape complainants. Some more detailed proposals for achieving this goal are discussed in additional recommendations below.

Police investigation

7.10 Current police policy is for all rape cases to be investigated by a Woman and Child Protection Unit. Only WCPUs now keep rape kits for the collection of medical evidence in supply, so the complainant must be brought to the nearest WCPU, or the WCPU staff must go the complainant (meaning that adequate transport is particularly crucial).

There is no special budget earmarked for the operation of the WCPUs. The WCPUs have been established with assistance from donors, particularly UNICEF, but cannot permanently rely on such donor funds. **Insufficient funds currently impede the provision of adequate transport, personnel, equipment and training.**

RECOMMENDATION:

Parliament should **allocate a specific budget to the Woman and Child Protection Units** which is sufficient to allow them to fulfil their tasks of investigating rape cases adequately and efficiently. This would give concrete meaning to the government's stated commitment to combating gender-based violence.

7.11 A serious effort to combat rape and other crimes in Namibia would require the provision of **adequate transport for the police**, utilised within a framework of procedures which ensure responsible use and maintenance of police vehicles.

RECOMMENDATION:

The provision and control of **adequate police transport** should be a **budgetary and administrative priority**.

7.12 WCPU personnel are not routinely equipped with firearms. The absence of weapons is part of the effort to create a “friendlier” atmosphere, although WCPU staff can be issued with firearms on request and some WCPU staff already carry firearms when necessary.

The absence of firearms can make the police response to a call on rape or domestic violence, as well as the ensuing investigation, dangerous for the police officer, the social worker and the complainant. Some social workers refuse to accompany police officers who are working on rape cases for this reason, especially at night.

RECOMMENDATION:

WCPU personnel should be routinely **equipped with firearms** to protect themselves and other service providers, as well as the rape complainant, and to increase public confidence that WCPU staff have the power to protect the public and to apprehend offenders.

7.13 The Office of the Prosecutor-General has recently established a specialised unit for prosecution of sexual offences and domestic violence cases. In South Africa, a similar approach has yielded positive results. However, in South Africa, prosecutors are based at the Thuthuzela Care Centres which are analogous to Namibia's WCPUs, where they work directly with police in **"prosecutor-guided" investigations**. This system has been successful in reducing delays and increasing conviction rates.

RECOMMENDATION:

Specialised prosecutors should be assigned to rape cases immediately when the docket is opened, so that they can work closely together with police to guide the investigation from the beginning, to reduce delays and increase conviction rates. This can be done by means of regular telephone contact even if the prosecutor cannot physically work with the police in question.

Statements taken by police

7.14 Interviewing procedures: Although some people reported complaints about the lack of privacy for making statements in some WCPUs, many police personnel interviewed clearly make efforts to take the complainant's statement in private, and with sensitivity.

Police interviewees reported that they deal with many cases involving minors, and many were concerned about their lack of knowledge on how to deal with children, and about the lack of social worker support, especially in the smaller centres.

Several police officers stated that the use of anatomically correct dolls (dolls with indications of the sexual organs) through the WCPUs has helped to get clear and accurate information from children, while one had stopped using these because of a perception that this might create problems in court later on. Another option is to use the dolls in court later on, to clarify the child's testimony, rather than in the police interview.

Persons who work with child complainants would benefit from guidelines on the correct and incorrect use of such dolls – and other techniques, such as drawings – so that complainants' evidence is not biased by inappropriate suggestion on the part of the service provider.

As an alternative to written statements, it might be advisable to introduce tape-recording of all police statements. Modern technology makes this possible and reliable with relatively inexpensive equipment. It might not be necessary or cost-effective to transcribe all such tapes as a matter of course, but if a complainant alleges in court that a written police statement is not consistent with what he or she actually said, there would be a reliable way of checking on this point. Police would have to receive proper training on the use of such equipment, and particularly on storing and indexing tape-recordings in a manner which would enable them to be retrieved when needed.

RECOMMENDATIONS:

Additional training in techniques for interviewing children would be helpful. Alternatively, each WCPU should have access to 1-2 people with specialised training in interviewing children – a specially-trained police officer, a social worker, or some other local person with appropriate expertise – and these personnel should be "on call" for taking statements from minors or for assisting police who are doing this.

There should be clear guidelines from the Office of the Prosecutor-General on when and how to use the anatomically correct dolls to assist in taking statements from children without creating problems in court later on.

The Police Training College should include more practical training on statement taking, using mock crime situations as a basis for practice statement-taking which is assessed by the trainers.

The police should introduce a system for tape-recording statements as a method for obtaining accurate statements and overcoming the problem of poor literacy and writing skills on the part of police officers.

7.15 Language of statements: Statements are always taken by the police in the language which the complainant prefers, and written down in English by the person taking the statement.

The main objection against recording the language in the complainant's mother tongue is the requirement of obtaining an official translation into English for use in court. There are fears that this process could entail delay and expense. Also, there might continue to be difficulties where there is no investigating officer who speaks the complainant's home language. However, the interviews carried out for this study indicate that the usefulness of this procedure would justify the extra effort and expense involved.

RECOMMENDATION:

The police should introduce a new procedure whereby all police statements are initially written down in the complainant's home language. These statements would need subsequent translation into English by a sworn translator, but the increased accuracy and reliability of the statements would appear to outweigh the extra effort and expense entailed. **The system of tape-recording statements proposed above could work in conjunction with the use of mother-tongue statements.**

Identification parades

7.16 Identification parades are not common in rape cases, which is consistent with the finding that most rapes are committed by persons known to the complainant.

However, police interviewees from a variety of locations confirmed that **when identification parades do take place, they are done face-to-face because of the lack of one-way glass or similar facilities.** (The only exception to this is in Windhoek, where a facility for ID parades equipped with one-way glass is already available.) This can be a source of severe trauma for rape complainants, who are usually expected to touch the suspect on the arm.

Our legal research indicates that it appears that **methods other than physical touching to indicate a specific person would be acceptable in court if the standard criteria for valid identification parades are observed.** Some legal commentators have even suggested that identification parades by means of photographs and videotapes might be a preferable alternative to physical parades.

One-way glass is not tremendously expensive. Local companies quoted about N\$3000-4000 for a piece of one-way glass 2 metres X 900mm (or roughly the size of an

average door). Such glass could be cheaply mounted into a screen or partition. The low incidence of ID parades in rape cases alone might not justify the expense of special equipment in all regions. However, the use of ID parades in other crimes could be assessed to see if the provision of one-way glass at all police stations is warranted.

In areas where special victim-friendly court facilities are already in place, these could be utilised for ID parades before or after court hours. Apparently the only barrier to this is the fact that it would involve personnel from one ministry using the facilities controlled by another ministry, but inter-ministerial cooperation could certainly overcome such a constraint.

RECOMMENDATIONS:

Provide one-way glass at as many WCPUs as possible to reduce the trauma of ID parades for the complainant.

In areas where special victim-friendly court facilities are already in place, police could make arrangements with the Ministry of Justice to utilise these for ID parades before or after court hours.

The Office of the Prosecutor-General should work with police to develop guidelines on acceptable interim or alternative procedures which could be utilised to minimise trauma to the complainant:

- ▶ The complainant could identify the perpetrators without touching, by means of numbers worn by the different persons, or by use of an inexpensive mechanism such as a focused laser pointer of the type used in lectures or even an ordinary torch with a clearly focused beam.
- ▶ The technique described by an interviewee where the suspects passed by an office one by one to be viewed by the complainant, instead of being viewed all at once in a formal line-up, could be used more widely if approved by prosecutors on legal grounds.
- ▶ Photographs could be used in place of actual persons.

Support for the victim

7.17 As of 2006 only the Windhoek WCPU has a social worker specifically assigned to it. The ideal of social worker support for all rape complainants is hampered by the **severe shortage of social workers nationwide**, as the Ministry of Health and Social Services currently has a 49% vacancy rate for its social worker posts. Even where a rape complainant is lucky enough to receive some assistance from a social worker, follow-up after the initial contact is virtually non-existent.

7.17 One way to encourage reporting would be to provide increased support services for complainants, following examples from other countries. **A well-run victim's assistance programme staffed primarily by volunteers could encourage reporting, reduce case withdrawals and promote more successful prosecutions.** Because there are already women's groups established in many regions in Namibia, there is already a potential pool of volunteers to provide support in rape cases. It is also likely that churches might be willing to be involved in such a programme.

RECOMMENDATION:

We recommend that Namibia adopt a **Victim Support Programme staffed by volunteers who are supervised and trained by an administrative official based in the Ministry of Health & Social Services or the Office of the Prosecutor-General**, with the following aims:

- ▶ to inform complainants and witnesses of case status and progress
- ▶ to communicate the complainant's needs and concerns to social workers or appropriate persons in the criminal justice system
- ▶ to orient complainants to court procedures (with the aid of simple-language educational material approved by the Office of the Prosecutor-General)
- ▶ to accompany complainants to court proceedings
- ▶ to involve complainants, when possible, in decision-making processes (such as explaining special arrangements for vulnerable witnesses so that they can consider which might make them more comfortable)
- ▶ to assist complainants with logistics related to court appearances
- ▶ to encourage the reporting of crime and discourage case withdrawals.

Approved volunteers should have a nametag and a photo ID. They should also be given clear guidelines on their role and the boundaries of their involvement.

This programme could be piloted in cases of rape (and perhaps domestic violence as well) and extended to other crime victims if successful.

Chapter 8

MEDICAL EVIDENCE

The importance of medical evidence

- 8.1 Medical evidence can be very important in the effort to secure convictions for rape.** Since rape usually happens without any witnesses, the medical evidence can serve as important corroboration – or non-corroboration – of the complainant's evidence. Almost every member of the police force interviewed mentioned this aspect of the case as being a crucial factor in whether or not there would be a conviction.
- 8.2 Medical examinations of both complainant and perpetrator appear to be routine police practice, where the time lapse since the rape does not make this useless.** Most police officers interviewed stated that they take rape complainants to a doctor for a medical examination before taking a statement.

All police interviewees said that the **police will provide transport to the hospital or clinic if needed.** (Some WCPUs are located adjacent to hospitals, rendering this service unnecessary.)

- 8.3 Like all the other professions who work with rape victims, the health professions are hampered by a shortage of human and financial resources, high turnovers and insufficient orientation and training.** These factors have an impact upon both the collection of medical evidence and the provision of appropriate health interventions to rape complainants.

National Forensic Science Institute

- 8.4** To understand the procedure for collecting and analysing physical medical evidence, it is useful to begin with an **overview of the National Forensic Science Institute.**

A forensic laboratory is different from other laboratories, because its findings are usually subject to rigorous cross-examination in court. This means that its work must satisfy the highest standards of accuracy and reliability in order to be useful.

As of mid-2006, the National Forensic Science Institute has a total of some 23-25 staff, including both full-time and part-time staff, of which more than 20 are scientists. The skill level is high, but the lab is under-staffed.

The lab has one 3-person team which collects evidence at the scenes of serious crimes throughout the country – unfortunately, this level of staffing does not permit the inclusion of rape in the category of “serious crimes” for this purpose. The lab’s Scene of Crime Unit is on call around the clock every day of the year, and often travels long distances to assist with crime investigations in far-flung parts of the country. The collection of material for laboratory analysis is in itself an important scientific process, as improperly-collected evidence does not yield the same results. Thus, the ideal situation would be to have multiple Scene of Crime Units staffed by scientists which could attend every crime in the country.

- 8.5 The National Forensic Science Institute faces two key constraints. The first is its budget.** The current annual budget of the National Forensic Science Institute for lab consumables and equipment is N\$229 000 (financial year 2006-07). The entire operational budget of the lab translates into about N\$138/case, on average. The following price comparisons give some idea of the constraints which flow from such under-budgeting:

- ▶ A blood alcohol kit for one blood alcohol test costs N\$120.
- ▶ **A rape kit costs about N\$100 for a complainant and about N\$90 for an accused. Both are normally necessary to provide useful evidence in a rape case.**
- ▶ **A DNA kit which can be used for 10-15 cases costs N\$50 000, with the costs of each such test being about N\$5000-N\$6000.**

The second basic problem is the lab facility, which is less than 500 square metres. The lab possesses adequate equipment, but not all of it can be used because there is nowhere to put it – and certainly no space for additional equipment. Similarly, even if there were money to hire more staff, there would be no space for them to work.

As a result of the constraints on its work, the National Forensic Science Institute follows a policy of “first in, first out”. In other words, they analyse forensic evidence in the order that it is received, as budgetary constraints permit.

- 8.6** The National Forensic Science Institute receives requests to analyse evidence in approximately 2400 crime cases each year, including **about 360 rape cases per year** (based on 2005 figures). This is significantly lower than the number of rape cases which

are reported annually, because not all rape cases produce medical evidence which can be usefully analysed.

- 8.7 Scientists who conduct the analysis must often testify in criminal trials at locations throughout the country, to explain their findings.** In complex cases, this testimony can extend over several days. At present, lab scientists testify in some 500 cases per year, in all categories of crime.

Rape kits

- 8.8 “Rape kit” refers to an official package for the collection of medical evidence in rape cases.** There are different rape kits for the accused and the complainant.
- 8.9 Rape kits are provided to the police by the National Forensic Science Institute.** The rape kit for an accused costs \$90/kit, and the rape kit for a complainant costs just under N\$100.
- 8.10 The design of Namibia’s rape kit is currently undergoing a radical change.** At present, the necessary items for collecting samples are inside a brown manila envelope which is stapled shut, with directions for its use on the outside. The method of stapling the envelopes shut has proved to leave the kits vulnerable to pilfering (as there are vials and needles inside with some commercial value), and is not ideally suited to the task of ensuring a clear chain of evidence. The new rape kits will be sealed in a more secure way, to prevent tampering both before use for evidence collection and after the evidence is inside.
- 8.11 The improved kits are expected to cost only N\$100-120/kit, thus providing increased security without a substantial increase in price.**
- 8.12 The availability of rape kits was cited as a problem in many locations. The main cause for this is the current system of distribution.** The current system is for police to be given a replacement kit for each one which they bring into the lab for analysis. However, police in far-flung parts of Namibia often ask other police personnel to transport the kits to the lab, and these intermediaries sometimes neglect to deliver the replacement kits to the police station where the used rape kit originated.
- Another possible cause of the perceived shortages is theft and pilfering, as rape kits are often stored at police stations in unlocked cupboards, leaving them vulnerable to interference.** This could explain the incomplete kits noted by some interviewees, since the kits are all reportedly intact when they leave the National Forensic Science Institute.
- There can also be instances where there is in fact an absolute shortage of rape kits, because of budgetary constraints.**
- 8.13 The National Forensic Science Institute is in the process of developing a more sophisticated computer management system which will be used for accurate, centralised distribution.** In future, each rape kit will be tagged in a manner which allows for digital tracking, similar to the way that bar codes are used for tracking products in the commercial sphere. This Lab Inventory Management System (LIMS) will allow the lab to use a central computer to keep track of how many rape kits have been distributed to which police stations, in the same way that a wholesaler tracks the distribution of its commercial products to suppliers throughout the country. If rape kits should disappear, it will be possible to trace their route. This improved logistical management system should resolve most of the distribution problems which have been reported.

8.14 Because doctors report that some rape complainants arrive at hospitals first, before going to the police, **a small supply of rape kits should be stored at public and private hospitals** to be used in this situation. However, doctors would need to exercise special caution in protecting the chain of evidence in such circumstances, perhaps by asking a colleague to witness the collection of samples for analysis. **The National Forensic Science Institute should issue clear instructions to doctors on what procedures to follow in cases where a rape complainant is examined before reporting the rape to the police.**

8.15 **Some concerns were expressed about the lack of equipment for fingernail scrapings and pubic hair combing in the current rape kits.** But these items have significance in less than 1% of cases.

Skin of the assailant may be present in fingernail scrapings from incidents where there was a struggle (which is rare in rape cases), but it is not possible to do DNA tests or any other kind of typing from skin cells – so there is no way to link any such traces of skin to a particular perpetrator.

Similarly, pubic hair combing may pick up foreign pubic hairs, but these cannot be used for DNA tests or to distinguish individuals in any other way. The most that can be ascertained from a foreign pubic hair is the broad genetic origin of the person who was the source of the hair – which will seldom be useful in a prosecution.

The lab will re-introduce items for these tests in the new rape kits, in response to demand, despite the small likelihood that such evidence will be helpful.

8.16 **The new kits will contain (in layperson's terms) tamper-proof containers for all samples:** vials for blood collection; swabs to be used for samples from the genitals, mouth or anus; a spatula for fingernail scrapings; and microscopic slides for any other relevant evidence. The kits will also include materials to collect samples for DNA testing, if the lab budget is sufficient for such tests.

Each rape kit will also contain simple pictorial instructions for the doctor, and a simple checklist so that the doctor can, with minimum time and effort, record which samples have been collected.

The kit will also contain a form which is similar to the J-88, but improved to minimise the time required by the doctor to record clear information. This form will be provided with carbons, so that two copies will instantly be available – one for the police docket and one to be retained by the doctor for monitoring and reference purposes. It is envisaged that this new form could eventually replace the J-88 forms currently in use.

8.17 **The key tests in a rape case, under current budgetary constraints, are typing of blood, saliva and semen.** If there is foreign blood or saliva on the complainant's body or clothes or at the crime scene, these can be typed and compared with samples from the accused. There are 6 blood types and 2 saliva types, so this evidence can be very useful, particularly in combination. (If the accused and the complainant have the same types of blood and saliva, then the evidence will not be useful). Semen can be similarly typed. **DNA tests can narrow the field even further**, although (contrary to popular belief) affordable DNA tests cannot always point to a single individual as the certain culprit.

The chain of evidence

8.18 **The National Forensic Science Institute conducts regular training on techniques of forensic evidence collection for police in all 13 regions.** Unfortunately, the impact of this training is sometimes undermined by high turnover in police personnel, including rotations of personnel which result in changed responsibilities for specific persons.

8.19 In the past, specimens were delivered to the lab by courier or registered mail. To improve security, this system was dropped in favour of hand delivery by police personnel – usually the local Scene of Crime Units.

The new delivery system currently being developed will be even more secure. In addition to the secure sealing method for all rape kits, it will utilise biometric management – which means use of indisputable physical means of identification (such as fingerprints or the unique patterns of each individual's eye).

This biometric identification will be used to identify the police officer who delivers the sealed kit to the lab. There will also be biometric information identifying each person at the lab who handles the evidence, and the police officer who collects the final lab results. The lab will assign the kit a lab identification number, and no one in the lab will have any information connecting this number to the case number. If the kit received by the lab is not properly sealed, the lab will not accept it for analysis, but will instead prepare a report explaining why it must be rejected.

The police officer who collects the completed lab results and the new replacement kit to be returned to the police station in question will also be identified by means of biometric information. Under this system, the sources of any problems in the handling of rape kits should be easily traceable.

This new system should assist with compliance with the requirements for an unbroken “chain of evidence” recently set forth in the Namibian case of *S v Zingolo*.

RECOMMENDATIONS:

The new rape kits and the improved distribution and tracking systems seem likely to resolve many of the problems encountered in the past. These new systems will hopefully ensure that rape kits are available at all police stations, and resolve past problems concerning the unbroken chain of evidence. These new systems should be put into place as soon as possible.

We suggest that the National Forensic Science Institute assess the effectiveness of this new approach to distribution after its first year of operation, and make the results of the assessment public so that a wide range of stakeholders can respond with suggestions if necessary. Alternatively, it might be useful to arrange independent monitoring of the new systems by an outside consultant in due course to see if they are effective in practice.

The new design for rape kits should prevent pilfering from the kits, but will not on its own stop theft of the entire kit. The Namibian Police should issue an official directive that all rape kits must be stored in a locked cupboard with limited access until needed, with compliance monitored by appropriate police officials.

Parliament should ensure that the National Forensic Science Institute has a realistic and sufficient budget to perform the necessary forensic tests to secure convictions of guilty parties in rape cases. This should include an adequate budget for DNA tests. Skimping on this budget may result in a waste of other state resources spent in investigating and prosecuting cases which are ultimately lost because of the lack of sufficient forensic evidence.

If there is a continued overall budgetary shortage, the National Forensic Science Institute should be authorised to give priority to rape cases (and perhaps certain other specified crimes, such as murder), at least for a specified time period as part of an overall campaign to combat rape. There should be a sufficient budget for rape kits for every rape case in which such evidence can be collected.

Police and doctors should receive annual training in the proper collection of forensic evidence, and each police station should have an investigator who has received specialised training in the collection of forensic evidence in rape cases. As an alternative, the government could support a special focus on rape cases by providing funding for a special Scene of Crime Unit within the National Forensic Science Institute dedicated to respond only to rape cases, at least for a limited time period.

A small supply of rape kits should be stored at public and private hospitals, and the National Forensic Science Institute should issue clear instructions to doctors on what procedures to follow in cases where a rape complainant is examined before reporting the rape to the police.

The National Forensic Science Institute should discuss the forensic value of pubic hair combings and fingernail scrapings with doctors and police to combat misunderstandings on this point.

Collection of medical evidence

Time lapse between rape and medical examination

8.20 The time frame between the rape and the medical examination could be ascertained in 253 of the 409 cases. In these cases, **the medical examination typically took place on the same day as the rape (almost 40% of the cases), or on the following day (another 35% of the cases).** Examination on the following day does not necessarily mean that there was a time lapse of more than 24 hours, as this might mean that the examination took place shortly after a rape which was committed late in the evening.

With all samples, faster collection will produce better results. Foreign saliva will usually disappear within about 5-6 hours of the rape. Seminal fluid will usually disappear completely after about 72 hours. Blood from clothes or the crime scene can be collected after a longer time lapse, but late collection of samples may entail a different type of lab analysis. **Since there are different time boundaries for different types of evidence, police officers should not easily assume that it is “too late” to take the complainant for a medical examination or to examine items such as clothing or bedding.**

Medical examination of minors

8.21 **There seems to be a lack of consistency on policy about medical examination of minors.** Some said that parents must be present and give consent, while others said that the examination could be done without the parent's presence or consent if the minor did not want them to know about the rape.

The Legal Assistance Centre understands the official policy to be that the superintendent of the hospital or medical facility can give the necessary permission if consent from a child's legal guardian is absent. Otherwise, a police officer can apply for legal consent from a magistrate or the police official in charge of the police station. 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.

RECOMMENDATIONS:

The Ministry of Health and Social Services should issue an official circular setting out official policy on examination of minor rape victims. This circular should discuss in particular (a) when the consent of a parent or guardian is necessary (b) what to do if a parent or guardian is not present and cannot be located within a reasonable time and (c) what to do if a minor rape victim does not want his or her parents to be informed about the rape, or if the parent or guardian is the rape suspect.

The Ministry of Health and Social Services should develop new standard consent forms for the examination of all rape victims, including a provision on consent to the collection of medical evidence.

The Children's Act 33 of 1960 is expected to be replaced by a new Child Care and Protection Act. The Ministry of Gender Equality and Child Welfare should ensure that this new law contains a provision explicitly addressing consent to medical examination of minors and the provision of appropriate post-rape medication to minors in instances where parental consent cannot be obtained, where the minor rape victim does not want his or her parents to be informed about the rape, or where the parent or guardian is the rape suspect.

Getting medical evidence from perpetrators

8.23 Do suspected perpetrators have a legal right to refuse to give blood or other physical evidence on the grounds that this is a violation of their human dignity, or on the grounds that they are not Constitutionally required to give testimony to incriminate themselves? The answer is almost certainly no.

Section 37 of the Criminal Procedure Act 51 of 1977 authorises a police official to collect certain forms of bodily evidence from an accused person (including blood samples) by means of such steps as may be necessary, regardless of whether the accused consents. The accused must be arrested or at least summoned before such bodily evidence can be taken. Furthermore, only a medical practitioner or nurse may take a blood sample.

The right against self-incrimination would probably not help the accused, as it has been interpreted very literally in most jurisdictions (including South Africa), to apply only to matters which are *communicated* by the accused and not to bodily evidence such as fingerprints, breath samples and blood samples. Also, a recent South African case held that while the act of taking blood for DNA profiling is an invasion of the individual's right to privacy and an infringement of the right to bodily security and integrity, such an infringement is justifiable where the blood sample is part of a criminal investigation.

What medical evidence is being collected in rape cases?

8.24 Of the 409 cases examined in the police docket sample for this study, 314 complainants (about 77%) were examined for evidence by a doctor. But the dockets recorded the collection of specimens for analysis in only 189 of the 409 cases.

8.25 One concern which arises from the data is the imbalance between samples taken from complainants and accuseds. The findings indicate that at least 117 blood samples were taken from complainants, compared to only 36 blood samples from accused. Yet blood from the complainant is useful in most cases only with a corresponding sample from the accused. The same is true of saliva swabs, where the dockets record 107 samples from complainants and only 35 from accuseds.

It is possible, of course, for samples to be taken from an accused at a later date once the samples for the complainant or the crime scene are on file, but key informants report that this type of follow-up seldom takes place in practice.

This suggests that police and doctors need more intensive training on how information from rape kits is utilised in court.

Problems with collection of specimens by doctors

8.26 Sometimes the specimens collected by doctors do not yield useful evidence because doctors do not use proper techniques for collecting the evidence.

Sometimes wet items (such as underwear or blood-stained clothing) are not air-dried before being placed in plastic packets, with the result that mould can destroy the desired evidence – despite clear instructions on the packet that all items must be air-dried before being placed inside.

Sometimes concerns are misplaced because of inaccurate information. For example, while the perfect ideal would be to refrigerate samples of bodily fluids to slow down the growth of yeast and fungi, this is not usually a serious problems if samples are correctly air-dried before packaging and delivered to the lab within a reasonable time period. Thus, fridges are not necessary (as some people think), just efficient delivery of samples collected according to the lab's instructions.

Some doctors are careless about the chain of evidence, delegating some of the final steps in the collection of specimens to others instead of handling this personally. The new rape kit should assist with this problem, as it has been simplified to minimise the time input from the doctor while still providing full and clear information.

The National Forensic Science Institute conducts regular workshops to train doctors in evidence collection techniques, including orientations for new state doctors who work in this area. However, these efforts have not yet produced the desired impact. The problem is exacerbated by the high turnover of doctors in Namibia, including the use of foreign doctors who spend only a short time in the country and may be further hampered by language barriers.

One idea under consideration by the National Forensic Science Institute is to designate only specific doctors to collect medical evidence. Another possibility could be to train selected nurses in evidence collection. One drawback to these approaches is the possibility that the designated persons might not be available when they are needed, particularly in rural areas.

RECOMMENDATION:

We endorse the idea under discussion that specific doctors should be trained and authorised to collect medical evidence, along with selected nurses with appropriate experience.

J-88 forms

8.27 The J-88 form is an official form designed to facilitate the recording of the findings of a medical examination for use in court. Of the 409 cases in the police docket sample, 314 complainants (about 77%) were examined for evidence by a doctor, and there were complete J-88 forms in the dockets of 286 cases (91% of those where medical examinations took place).

Many of the J-88 forms in the dockets contained little useful information, often appearing cursory or incomplete. Many police, prosecutors and magistrates cited this as a serious hurdle to successful prosecutions for rape. Doctors interviewed had mixed feelings on the new J-88, ranging from “clear” to “impossible”.

A total of at least 101 different doctors completed the forms in our sample, so the problems observed cannot be attributed to a few individuals. The medical examinations in our sample also took place in at least 30 different medical facilities, including both public and private facilities.

Prosecutors often make use of the new provision which allows introduction of the J-88 form as evidence on the facts contained in it, even if the doctor who completed the form is not available to testify, and this is reportedly efficient in practice – but improperly-completed forms can undermine this option.

The National Science Forensic Institute has developed a booklet for doctors which will accompany the newly designed rape kits which will soon be in use. This booklet is clear and simple, and designed to minimise the time required in paperwork by the doctor. It should be assessed by the Office of the Prosecutor-General to see if it could replace the J-88 form in future.

It has been suggested that the police officer who is present should take a more active role in assisting the doctor to connect the medical examination to the statement – for example, with statements such as “Doctor, the complainant stated that she Did you find any evidence of this during the examination?”

The following suggestions put forward in respect of South Africa seem equally applicable to Namibia:

- ▶ It needs to be emphasised to doctors that **the J-88 is fundamentally a legal form, and not a medical one.**
- ▶ **Doctors need to be trained in how to testify in court** – including what is relevant, what is helpful, and how best to communicate information.
- ▶ **Doctors should be warned against the tendency to write “normal” or “not consistent with rape” on the J-88** since these are excessively sweeping conclusions.
- ▶ **Doctors should be encouraged to pay more attention to subtle details and physical confirmation of what the complainant alleges.** (For example, if she says that she was dragged over gravel, is there any evidence of gravel marks on her body?)
- ▶ **Training for newly-appointed medical professionals should be mandatory.**

RECOMMENDATIONS:

The Ministry of Health and Social Services and the Office of the Prosecutor-General should consider appropriate disciplinary or even criminal sanctions against doctors who wilfully fail to follow proper procedures in collecting medical evidence and completing any required forms (such as J-88 forms).

The form developed by the National Science Forensic Institute to accompany rape kits should be assessed by the Office of the Prosecutor-General to see if it could replace the J-88 form in future.

Police should take more responsibility for supervising the completion of the J-88 form and ensuring that it is complete and accurate. The police officer who is present should have clear authority to complain to the appropriate official if the doctor does not complete the form fully and correctly.

The doctor who conducted the examination should keep a carbon copy of the J-88 for monitoring purposes, and to assist the doctor in preparing to testify in court.

A Spanish translation of the J-88 form should be prepared for use by Cuban doctors working in Namibia. Arrangements could be made in Windhoek or other urban centres for a sworn translation for use in court.

Foreign doctors working in Namibia should receive a more comprehensive orientation to the local legal, social and cultural environment.

The performance of doctors who examine rape victims and complete J-88 forms should be regularly assessed by a medical management team from the Ministry of Health and Social Services, as a means of monitoring doctors' performance and identifying training needs. Copies of J-88 forms retained by the doctors who perform the examinations could be the basis of such monitoring.

All police stations, or at least Woman and Child Protection Units, should be equipped with cameras which self-develop photographs immediately, which could be used in conjunction with the medical examination to document visible injuries. The Office of the Prosecutor-General and the Namibian Police could issue instructions on how best to authenticate the photos to ensure that they will be admissible as evidence in court.

Lab results

8.28 In the 409 dockets that we examined for this study, 314 complainants were examined for evidence by a doctor and the collection of specimens for analysis was recorded in 189 cases. However, only 18 of these dockets (less than 10% of those where samples were taken) contained a report from the National Forensic Science Institute – and few of these reports contained any findings which could have possibly been helpful in court (often because of poor collection techniques by doctors).

The statistics seem to support the theory that lab results are completed but not collected. The lab reports that it processed rape kits for about 320 rape cases in 2005, when 944 rapes were reported to police. (Attempted rapes are not counted here, as they would be less likely to produce relevant medical evidence for analysis.) **The**

annual number of rape cases processed by the lab is thus almost 30% of the total number of reported rape cases. Yet the files in our sample contained lab reports in less than 6% of all the cases studied, and in less than 10% of the cases in which medical evidence was collected. This discrepancy points to a serious gap between the lab results being processed by the lab and the lab results which end up in the case dockets for use as evidence.

Another problem sometimes encountered involves matching lab results to the correct docket. The lab reference number is unrelated to the numbers assigned to the case by the police, to safeguard the objectivity of the scientific results. However, if the lab reference number is not recorded on the case docket by the investigating officer, then those dealing with the case outside the lab will have trouble tracing the rape kit. Prosecutors who enquire about lab results under the current system must provide the lab reference number and not any of the other numbers assigned to the case.

The new systems soon to be put in place by the National Forensic Science Institute will address some of these problems. The proposed systems will be able to trace precisely who has collected or handed in a rape kit at the lab, and who within the lab has handled the kit at every stage. This should help to pinpoint weak links in the process required to get the sample to the lab and the lab result back into the docket. The forthcoming computer management system for rape kits will also embed the case number (the “CR number”) and other police reference numbers as cross-references which will not be accessible to the scientist working with the sample, but can be used to trace samples if necessary.

It should also be noted that there seem to be many misunderstandings about the lab testing process, with many people who were interviewed having ideas about lab work that appear to be factually incorrect. Broader dissemination of information in layperson’s terms by the lab could address such misunderstandings.

RECOMMENDATIONS:

Prosecutors should be advised to cross-check with the lab directly when the docket indicates that samples were sent to the lab but contains no lab report. Surprisingly, this is not common procedure in practice. A simple telephone call could thus bring the lab results together with the case docket.

Where postponements of rape cases are requested in court on the grounds that the lab results are not available, courts should request confirmation from the lab before granting a postponement on these grounds. This simple expedient would prevent anyone from using “no lab results” as an excuse to cover up other shortcomings in respect of the case. Anyone who says in court that lab results are not yet available while knowing that this is untrue should be dealt with severely. Cross-checking procedures such as these would help to identify with certainty where communications have broken down, and which institution is at fault.

The National Forensic Science Institute should prepare a short and simple briefing document on their procedures for distributing rape kits and processing medical evidence, including the normal time frames for lab results, which could be used for reference by police, prosecutors, defence counsel, presiding officers and the media.

Chapter 9

PEP AND OTHER MEDICAL SERVICES FOR COMPLAINANTS

- 9.1** PEP (post-exposure prophylaxis) is a course of medication which can reduce a rape victim's chances of becoming infected with HIV as a result of the rape. PEP works only if it is taken immediately after the rape and continued regularly for one month. The course of medicine MUST begin within 72 hours of the rape (the sooner the better), or it will not work. PEP is available at all district hospitals in Namibia.
- 9.2** Rape complainants should also be counselled about HIV testing, which should be done immediately after the rape and then at appropriate later intervals.
- 9.3** There is also medication that can be administered after a rape to reduce the chances of contracting other sexually transmitted infections such as syphilis or hepatitis. Like PEP, this medicine is most effective if administered as soon as possible.
- 9.4** Anyone who is in danger of falling pregnant from a rape can be given pills that can prevent pregnancy, often referred to as the "morning-after" pills. These pills can be taken up to 72 hours after unprotected sex and should be administered as soon as possible. An IUD can be used to prevent pregnancy if more time has elapsed since the rape. Information about pregnancy tests and the possibility of a legal abortion should be provided to the complainant.
- 9.5** It is possible to get a legal abortion where the rape results in a pregnancy.
- 9.6** The *Guidelines for Anti-Retroviral Therapy* published by the Ministry for Health and Social Services include a section with details on PEP and other medical treatment for rape complainants.
- 9.7** Most police dockets examined did not have information on health services provided to the complainant.
- 9.8** Most police personnel interviewed stated that they regularly advise rape complainants about PEP, and assist them to get access to PEP and counselling. This was supported by comments from some doctors and social workers.
- 9.9** There is no clear policy on providing access to PEP for those who receive medical attention at clinics in rural areas. Clinics do not seem to be offering PEP to rape complainants, and district hospitals gave inconsistent replies on how they would respond to requests for PEP from clinics.

Pilot projects for roll-out of PEP and related services to clinics are already underway in Katutura and Oshakati. The next phase will involve roll-out of these services to other large clinics, followed by additional de-centralisation. As an interim measure, some larger clinics and hospitals give outreach services to smaller centres. For example, the Otjiwarongo District Hospital gives outreach services to the Otavi Health Centre. This model could be replicated in other parts of Namibia.

9.10 Despite the presence of clear written guidelines, not all doctors gave consistent descriptions of the use of PEP. Particular areas of confusion include:

- ▶ policy on administering PEP to minors
- ▶ understanding that PEP should be discontinued only if the complainant's rapid HIV test is *positive*
- ▶ use of starter packs as an emergency measure
- ▶ approaches to pregnancy prevention where the rape occurred more than 72 hours previously
- ▶ who bears responsibility for follow-up with the complainant
- ▶ the procedure for legal abortion where pregnancy results from a rape
- ▶ procedures for appropriate follow-up when PEP is administered to suspected perpetrators.

Ministry of Health officials point out that these interviews were conducted during the roll-out period for PEP, and they believe that knowledge of the guidelines on the treatment of rape complainants has already improved amongst state-employed medical personnel.

9.11 Poor public awareness means that rape complainants themselves are not clear on the importance and use of PEP and other post-rape medications.

Officials from the Ministry of Health say that nurses and community counsellors at ART clinics are being trained on follow-up procedures for rape complainants. The follow-up should ideally take place though one of the ART clinics, which are staffed by doctors, nurses and community counsellors.

Rape complainants should be given a date on which to go to the nearest ART clinic for follow-up tests and counselling. At present the procedure is for the follow-up date to be written in the complainant's health passport. However, perhaps more emphasis could be placed on the follow-up appointment. The rape complainant should also be directed to contact the nearest ART clinic at any time to get assistance if there are side-effects from the PEP medication

9.12 Inability to pay for PEP and other post-rape medications does not seem to be a barrier to receiving them.

Government policy is to provide PEP to rape complainants regardless of their ability to pay. The other treatments which are cited above also appear to be available without charge through the state health services, for those who cannot afford to pay.

All of the medical aid schemes which we contacted randomly by telephone cover the costs of PEP for rape victims, and some mentioned an even wider range of funded services for rape complainants.

RECOMMENDATIONS:

Continue roll-out of PEP and associated services to clinics. As an interim measure, pair all clinics with district hospitals and encourage clinic staff to refer rape complainants to the nearest district hospital for PEP. Police could be asked to assist with transport for this purpose if necessary.

Prepare a standard form to be placed inside the police docket, or a space on the police docket cover, for recording the health services provided to complainants in rape cases. This will make it possible to carry out more systematic monitoring of the provision of indicated health interventions. (This information, of course, should not include any indication of the complainant's HIV status, in order to preserve confidentiality.)

Health issues pertaining to rape should be the focus of public awareness campaigns.

All service providers should be given clear training and information on PEP and other post-rape medications, the time frames for their use, and their importance to the rape complainant.

All rape complainants who receive PEP should be given a pamphlet to take home which contains clear and simple information such as instructions on how to take the medication, information about side-effects, the recommended dates for follow-up tests and the importance of completing the course of medication as prescribed. This would be useful for the future reference of the rape survivor, who may be too traumatised at the time of the rape to take in information clearly.

The rape complainant should also be given an appointment in writing for a follow-up visit to the nearest ART clinic, and directed to contact the nearest ART clinic if there are problems with side effects from the PEP or any other post-rape medication. Because of the trauma involved in a rape, we suggest that **a community counsellor should be asked to initiate contact with the rape complainant if she or he does not appear at the follow-up appointment.**

The Ministry of Health and Social Services should issue guidelines on appropriate follow-up procedures when PEP is administered to suspected perpetrators.

Chapter 10

ARRESTS AND CHARGES

Detection and arrest

- 10.1** The detection rate in Namibia indicates which cases were “solved”. Detected cases are cases which are disposed of through the operation of the criminal justice system, if they are not withdrawn by the complainant or the prosecutor. In the police docket sample of 409 cases, only 46 case dockets (11%) were marked as unfounded or undetected, giving a **detection rate of 89%.** **Figures in respect of other years in Namibia indicate that the detection rate in rape cases is consistently close to 80%, which generally**

compares well with the detection rate for other “crimes against the person” (such as murder, assault and kidnapping).

As a point of comparison, the detection rate for rape cases was 49% in South Africa in 2000, and 41% in England and Wales in 2001/2. Namibia’s rate is still comparatively high even if differences between these countries in the definition of “detected” cases is taken into account.

There were at least 470 perpetrators in our police docket sample of 409 cases (because some cases involved multiple perpetrators). Out of these, a total of 329 are known to have been arrested – which constitutes 70% of the total.

This is a high rate of arrest, and probably a result of the fact that most rapists are known to their victims.

Rapes involving multiple perpetrators seem to have a lower arrest rate than those involving single perpetrators. This difference could be accounted for in part by the fact that the rapes involving multiple perpetrators were more likely to be carried out by strangers to the complainant than the rapes involving single perpetrators.

- 10.2 Typically, arrests in rape cases took place on the same day that the offence was reported, usually on the day after the rape took place.** On average, arrests of single perpetrators took place within about one week of the date on which the charge was laid. This is once again consistent with the fact that the identity of most perpetrators is known to the complainant. It also indicates that initial police response is reasonably prompt and efficient.

CHART 10.1: CASE DETECTION RATE



CHART 10.2: PERPETRATOR ARREST RATE



Charges

- 10.3 Some of the police dockets examined involved multiple charges, such as rape and assault, rape and kidnapping, or rape and murder. Rape is most commonly associated with the crime of assault.**
- 10.4 Most dockets and court registers simply indicated a charge of “rape”** without further details, rather than specifying the Combating of Rape Act as they should. **But there is no indication that the common-law crime of rape was being used instead of the statute.** (The “common-law” crime of rape is the one used in Namibia prior to the Combating of Rape Act. It is not contained in any statute, but was developed in court cases decided over the years. The Combating of Rape Act did not repeal it, so it could still be relevant in unusual situations.)

RECOMMENDATION:

For purposes of research and monitoring, it would be useful if there were a **standard system for indicating whether the charge is common-law rape or rape in terms of the Combating of Rape Act**. This distinction is particularly important for the purposes of assessing the operation of the minimum sentences which apply to rape in terms of the Combating of Rape Act.

- 10.5 In the case of rape with the help of an accomplice, both the principal actor and the accomplice can be charged with the crime of rape.** Namibian law is clear that gang rape can give rise to charges of multiple counts of rape on this basis. But the number of cases in the police docket sample involving multiple perpetrators is significantly higher than the number of cases involving charges of more than one count of rape. **This indicates that the possibility of imposing multiple charges of rape for gang rape is not being uniformly applied in practice.**

RECOMMENDATION:

Police, prosecutors and presiding officers need to be alerted to **the permissibility and appropriateness of multiple charges of rape in a gang rape situation, or in situations where multiple sexual acts by a single perpetrator took place in circumstances which warrant treating them as separate events**. This could be done in training courses or by means of official circulars.

- 10.6 A person can be charged with an attempt to commit both common-law and statutory-based offences**, as a result of the operation of section 256 of the Criminal Procedure Act 51 of 1977 and section 18(1) of the Riotous Assemblies Act 17 of 1956. **Attempted rape thus uses the same definition and carries the same penalties as rape under the Combating of Rape Act.** Most persons consulted felt that attempted rape should attract the same penalties as the completed crime of rape, as the law currently provides. If there are cogent reasons to differentiate between an attempted rape and a completed rape, this can be dealt with by the presiding officer as “substantial and compelling circumstances” for departing from the prescribed minimums.

“Alcohol use and abuse is associated with child sexual abuse in multiple ways. However, many people drink alcohol without abusing children and many people who abuse have not had alcohol when they abuse children.”

excerpt from
**Rachel Jewkes, Loveday Penn-Kekana,
Hetty Rose-Junius, Josephine Malala,**
Child Sexual Abuse and HIV: Study of
Links in South Africa & Namibia,
Medical Research Council,
Pretoria, June 2003

- 10.7 Nationally, attempted rape has accounted for about 20% of total reports of rape and attempted rape in recent years.**

We wondered if there would be more cases of attempted rape of young children, because of physical barriers to complete sexual intercourse. But an examination of the charges of attempted rape by age does *not* give any indication that attempted rape is more common against young children.

RECOMMENDATION:

For the sake of clarity, it would be advisable to **amend the Combating of Rape Act 8 of 2000 to make it clear that attempts to commit a rape in terms of the statute will attract the same minimum penalties as a completed crime** – even though this is already the legal position. Otherwise, or in the meantime, **the Office of the Prosecutor-General should alert all prosecutors and presiding officers to the existing law on attempted rape since the legal authority for this point is contained in a rather obscure statute.** This could be done in training courses or by means of official circulars.

Chapter 11

BAIL

11.1 Information on bail was not contained in many of the police dockets and court registers which we examined, meaning that these statistics must be approached with caution.

The majority of persons arrested on charges of rape are granted bail, with **at least 60-65% of the accused** in both our samples **either being granted bail or released into the care of a parent or guardian.** Because information on bail was missing from so many cases, it is possible that the actual percentage of accused who were granted bail in rape cases is even higher.

Bail amounts range from N\$100 to N\$5000, and were in most cases N\$1000 or less. The relatively low bail amounts are consistent with Namibia's economic setting, as the law requires that bail must be set with a view to the accused's means.

A significant number of cases have to be postponed when an accused who is free on bail does not appear in court on the appointed day. In the court register sample, about 27% of the accused who were not in custody failed to appear in court on at least one occasion.

11.2 **Of the 144 police dockets in our sample with information about bail, there was a record of notice to the complainant of the bail hearing in only 75 cases (just over half).** This does not necessarily mean that other complainants failed to receive notice of the bail proceeding. But it does indicate that police officers should be directed to use an official form for this purpose, which should be placed in the docket for record-keeping and verification.

Rape complainants do not always oppose bail. Of the dockets which contained some details about the notice to the complainant, there were at least 17 cases (22%) where the complainant was *not* opposed to the perpetrator receiving bail – although some complainants specified that they wanted the perpetrator to be required to stay away from them. On the other hand, several complainants opposed bail on the grounds that the accused had already harassed them or made death threats, and others cited fears that they would be killed if the accused were let out on bail.

One prosecutor expressed concern about the provision which places the responsibility for initiating the process to inform the complainant of the time and date for a bail hearing on the accused (or the accused's legal representative),

in circumstances where the complainant has not otherwise been informed. This allocation of responsibility was described as being unrealistic and inappropriate.

Most interviewees said that that **it is rare for the complainant to speak personally at the bail hearing**, but a few police officers were under the mistaken impression that the complainant *must* speak personally if he or she is opposed to the granting of bail. This is not correct. The complainant has the right to request the prosecutor to present any relevant information or evidence, but this could be done through the investigating officer instead of directly. Prosecutors generally understood this aspect of the law clearly, and said that they avoid testimony by the complainant, preferring indirect evidence on behalf of the complainant at this stage.

One magistrate appeared to misunderstand the law, apparently being under the impression that the court does not have power to grant bail if the complainant opposes it. In fact, **the Combating of Rape Act does not affect the court's discretion to decide whether or not bail should be granted**, but is intended to ensure that the court has all relevant information before making a decision on bail.

It is actually police who usually inform the complainant of the outcome of the bail hearing, despite the fact the law technically gives this duty to the prosecutor.

RECOMMENDATIONS:

Introduce an official form for recording notice to the complainant of the bail hearing, the outcome of the bail hearing and the bail conditions. The Combating of Rape Act could be amended to allow the issue of accompanying regulations, so that such a form could be officially promulgated.

Consider amending section 64 of the Criminal Procedure Act 25 of 2004 to place the duty of informing the complainant of the outcome of the bail hearing on the investigating officer rather than on the prosecutor so that the law conforms to usual practice and the responsibility is clear. The prosecutor should have a duty to inform the investigating officer of the outcome of the bail hearing, and the investigating officer should have a duty to cause the complainant to be informed of the outcome as soon as reasonably possible.

Consider amending section 64 of the Criminal Procedure Act 25 of 2004 to remove subsection (3), which gives the *accused* responsibility for asking the station commander to inform the complainant of the time and place of the bail application in certain circumstances. It is probably not to the accused's advantage to ensure that the complainant is timeously aware of the bail application, so this requirement works against logic and interest. **The process should be initiated by the prosecutor instead of the accused in these circumstances.**

Although many professionals involved in implementing the law were clearly well-informed about the provisions relating to bail, some seem to be confused about certain details. This indicates that this aspect of the law should be a focus in training sessions for prosecutors and magistrates. It is particularly important to ensure that presiding officers understand that the complainant's opinion on whether bail should be granted is relevant, but not decisive.

- 11.3 Information about bail conditions could be ascertained from only 23 dockets in the sample. However, of these 23 cases, only 8 contained a prohibition on contact with the complainant – which indicates that the law on this point is possibly not being correctly implemented in practice.** Most prohibited “interference” with the complainant and/or state witnesses, which is similar but not quite the same thing.

On the other hand, in a few cases, the bail conditions went farther than what the law requires – such as forbidding contact with the complainant's family and /or children as well as with the complainant.

It appears that the revocation of bail for violation of bail conditions relating to the complainant is rare.

RECOMMENDATIONS:

The mandatory "no-contact" provision should be a focus of training and discussion for prosecutors and magistrates.

If the complainant and accused share the same residence, the court should always specify who is to leave the residence while the case is pending, with priority being given to the complainant's wishes unless special circumstances dictate otherwise.

Consider amending the law to allow the court in unusual instances to impose conditions other than a no-contact provision which could protect the complainant, if this is in accordance with the complainant's wishes. For example, where the complainant and the accused are family members or have children together, a complete prohibition on contact may be impractical or simply unenforceable.

11.4 There is still community opposition to bail for accused rapists, despite the fact that the denial of all possibility of bail would probably be unconstitutional.

It appears that the added safeguards on bail in the Combating of Rape Act have not substantially diminished general public opposition to bail for accused rapists. However, public opposition to bail extends beyond rape cases to other crimes and often seems to arise from a failure to acknowledge that a person who is arrested for a particular crime might in fact turn out to be innocent.

RECOMMENDATION:

The Legal Assistance Centre and other human rights organisations should take steps to help the general public understand the concept of bail more clearly, as part of their general education on human rights.

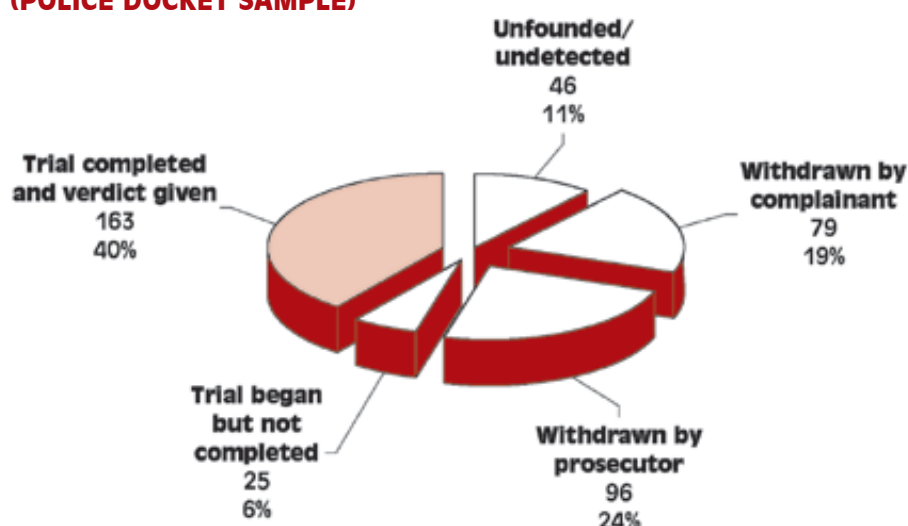
"The problem women face with the court and law is that not all women understand how the law works. You even find some of the educated women who do not understand the law. Some report cases to the police but they leave some of the evidence and the person will not be punished because there is not enough evidence. I think women in this country need to be educated about the courts and laws."

Dolly, 23-year-old Coloured woman as quoted in **Debie LeBeau and Grant J Spence**, "Community perceptions on law reform: people speaking out" in Justine Hunter, ed, *Beijing +10 The way forward: An introduction to gender issues in Namibia*, Namibia Institute for Democracy, 2004

Chapter 12

CASE OUTCOMES, CASE WITHDRAWALS AND CRIMINAL TRIALS

CHART 12.1:
CASE OUTCOMES PER CASE
(POLICE DOCKET SAMPLE)



12.1 Only 40% of the cases in our police docket sample resulted in a completed criminal trial.

Of the 409 dockets originally opened, 43% were withdrawn either at the complainant's request, or because of a prosecutorial decision. Withdrawals are thus the single most significant reason why a rape case does not proceed to trial. This factor will be explored in detail below.

At least one perpetrator was found guilty of some crime in 97 cases (24%). But only 74 (18%) of these 409 cases resulted in convictions for rape or attempted rape.

TABLE 12.1: ATTRITION BY CASE AT EACH STAGE OF THE PROCESS
(POLICE DOCKET SAMPLE)

Cases where rape was alleged	409
Cases detected	363
Cases where at least one person was tried for rape	188
Cases where criminal trial was completed and verdict given	163
Cases where at least one accused convicted of some crime	97
Cases where at least one accused convicted of sexual offence	88
Cases where at least one accused convicted of rape or attempted rape	74

12.2 It is also useful to look at the outcome per accused. **Because some cases had multiple perpetrators, there were at least 470 perpetrators in our police docket sample of 409 cases. Out of these 470 perpetrators, a total of 329 are known to have been arrested – which constitutes 70% of the total.**

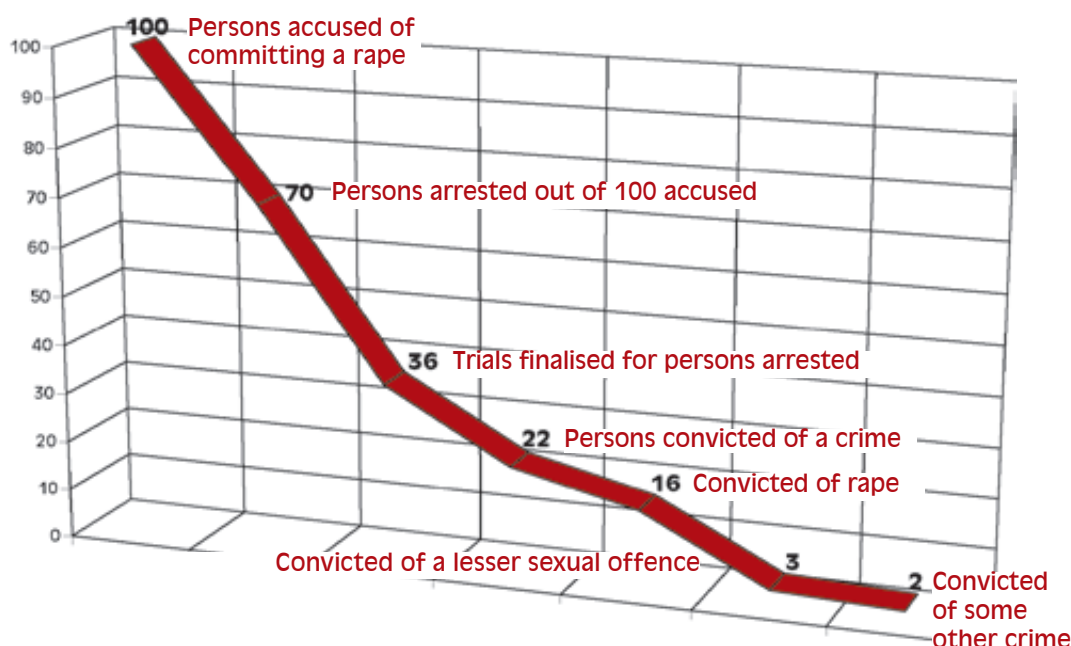
Trials were completed in respect of only 170 of these accused (36%). 102 were found guilty on at least some of the charges against them (22%), but only 77 of these perpetrators were found guilty of rape or attempted rape (16%). Another 14 perpetrators (3%) were found guilty of some other sexual offence, such as indecent assault or violation of section 14 of the Combating of Immoral Practices Act which protects children under age 16. The other convicted persons were found guilty of crimes such as assault, kidnapping or theft.

In other words, only about 1 out of 5 of all the perpetrators alleged to have committed rapes (21.7% or 102 out of 470) were ultimately arrested, tried and found guilty of any crime.

The flip side of the picture is that 66 of the accused perpetrators were not found guilty of any crime (14%). It must be remembered that **a verdict of “not guilty” does not necessarily mean that that no rape took place.** A “not guilty” verdict could mean that the accused was truly innocent of any crime, or that the accused may have committed a crime but the state could not prove its case against him or her. Some such outcomes as this are inevitable in democracies where people charged with crimes are considered innocent until proven guilty, but can usually be minimised by good police work and skilled prosecution.

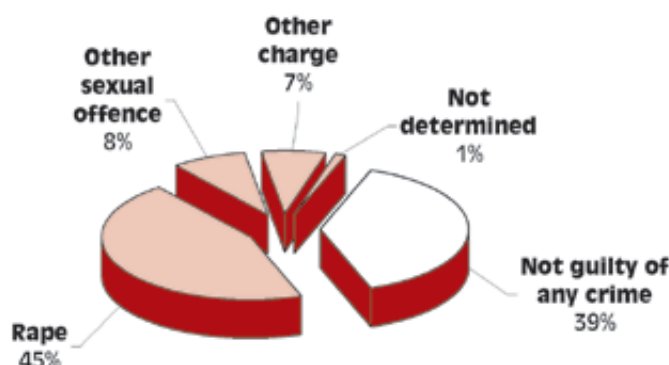
To make these statistics easier to understand, think about it this way. **Suppose 100 people are accused of committing rapes in Namibia. Only 70 of them will be arrested.** Some of the cases against these 70 accused will be withdrawn by the complainant – often because the complainant and the perpetrator are related. Even more will be withdrawn by the prosecutor, mostly because of lack of enough evidence to make a strong case. A few accused will abscond. In a few cases, trials will be underway but not yet complete. Trials will be finalised for only about 36 of the 100 alleged perpetrators, and only about 19 of them will be convicted of any sexual offence at all. **Only 16 of these 100 alleged rapists will be convicted of rape or attempted rape.** Another 3 will be found guilty of some lesser sexual offence, and another 2 found guilty of some other kind of crime. About 14 will be acquitted of any wrongdoing.

CHART 12.2: PROBABLE OUTCOMES FOR 100 PERSONS ACCUSED OF COMMITTING A RAPE



- 12.3 Convictions of some sort are obtained in respect of some 60% of the perpetrators who are tried.** This is not a bad rate. However, most prosecuting authorities understandably tend to try only those cases where there is a reasonable prospect of success as a way to focus prosecution resources on the most promising cases. Thus, **the weakest cases are withdrawn before trial.**

**CHART 12.3:
VERDICTS IN
COMPLETED
TRIALS
(POLICE
DOCKET
SAMPLE)**

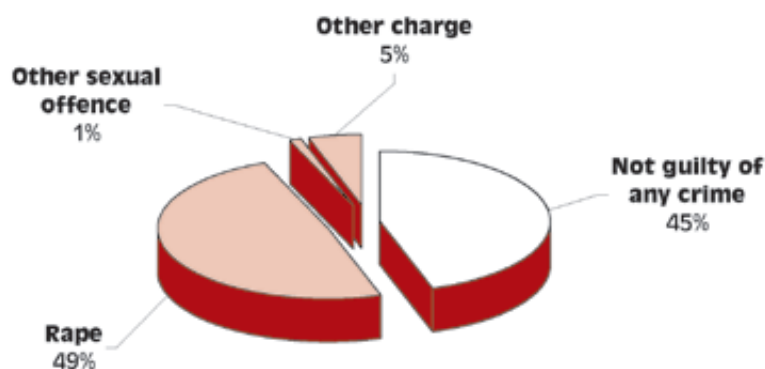


- 12.4** The most serious gap is between charge and trial, as criminal trials were completed for only about half of all persons arrested for rape in our sample.
- 12.5** The figures from the court register sample paint an even more disturbing picture, as this sample includes only persons who have already been charged, arrested and brought to trial. However, it must be noted that we were unable to ascertain the outcomes of 34% of the cases in the sample from the court registers (207 out of 612 accused). For example, some trials were recorded as being postponed to a particular date and then there is no further record of the case at all. Our researchers searched the court registers more broadly (instead of looking only on the date when the trial should have reconvened), but were unable to find any other records of these cases on any other dates.

Therefore, we can analyse the outcomes for only 405 of the 612 accused in the court register sample. **Trials were completed for only 33% (132 accused) and were still underway for another 21% (83 accused). Over 13% of these accused persons had reportedly absconded (54 individuals). Cases against almost one-third (31%) of the accused were withdrawn.** This includes only those cases which were withdrawn after the criminal trial had actually begun, or at least after the first court appearance by the accused in the case.

- 12.6 Of the 132 accused in the court register sample for whom criminal trials were completed, 55% (72 accused) were found guilty and sentenced of some crime, with 46% (61 accused) being found guilty of rape or attempted rape by the trial court. In comparison, 45% (60 accused) were found not guilty – an outcome which is similar to that found in the police docket sample.**

**CHART 12.4:
VERDICTS IN
COMPLETED
TRIALS
(COURT
REGISTER
SAMPLE)**



12.7 The vast majority of rape cases are not resolved by a verdict at all because they are withdrawn – sometimes at the request of the complainant and sometimes on the decision of the Office of the Prosecutor-General. This creates an enormous waste of state resources involving police, prosecutors, magistrates, court personnel and sometimes legal aid lawyers. Of course, it would be even more wasteful to attempt to go forward with prosecutions in cases where there is little chance of obtaining a conviction on the basis of the evidence.

The bottom line is that a rapist in Namibia has very little chance of being punished for the crime.

12.8 How does this compare to the overall outcome for crimes in Namibia? Attorney-General and Minister of Justice Pendukeni Iivula-Ithana provided figures in Parliament for the 2005/06 financial year (March 2005-February 2006). Of the 22 279 finalised cases during that period:

- ▶ 52% were withdrawn (11 527)
- ▶ 40% resulted in convictions (8 839)
- ▶ 9% resulted in acquittals (1 913).

If the data we have compiled for rape cases (from the police docket sample of 409 cases) is organised in the same manner, this would be the resulting comparison. Of all the cases where a police docket would have been referred to a prosecutor for action, 338 cases were finalised in the same sense as the term is used in the Minister's speech. Of these 338 finalised cases:

- ▶ 52% were withdrawn (175)
- ▶ 29% resulted in convictions for rape or some other crime (97)
- ▶ 18% resulted in acquittals (62)
- ▶ 1% outcome unknown (4).

It would be useful to have a larger body of data with which to make comparisons, but these two limited data sets suggest several interesting points of comparison and contrast:

- ▶ **Rape cases do not appear to have any higher rate of withdrawal than other crimes.** However, we do not have enough information to compare withdrawals *at the request of the complainant* for rape versus other crimes.
- ▶ **The conviction rate for rape appears to be significantly lower than the overall conviction rate.** The data suggests that the acquittal rate in rape cases may be twice that of the overall conviction rate for all crimes combined.

These two tentative conclusions should be tested against other sources of data on conviction rates in rape cases compared to other crimes.

Factors influencing convictions

12.9 We used cross-tabulations to try to see what factors were related to case outcomes in the police docket sample, where we had more information about the case.

These cross-tabulations showed that 22 of the 70 cases in which accused were found guilty of rape (almost one-third) involved visible injuries to the complainant (cuts, bruises, swelling or a broken bone). This emphasises the fact that medical evidence such as that recorded in the J-88 forms is very important to case outcomes.

The cross-tabulations also showed that 40 of the 70 cases involving convictions for rape had complainants under age 18, including 27 cases involving complainants under age 14.

If conviction rates are examined by location, they prove to be higher relative to the number of rape cases reported in respect of the dockets opened at some of the rural stations and smaller urban areas. This indicates that the increased resources usually available in larger urban areas are *not* the key factor influencing convictions.

Prosecution and conviction rates in Namibia over time

12.10 Some data on prosecution and conviction for rape in Namibia over time can be extracted from the United Nations Surveys of Crime Trends compared with information on reported rapes and attempted rapes from the Namibian Police in respect of the same years. **The rate of prosecution for rape appears to have decreased over time in Namibia – while the conviction rate seems to have gone up.** This could be a sign that the Office of the Prosecutor-General has become more selective about which cases to prosecute, focusing its scarce resources on cases with a more reasonable likelihood of success.

International comparisons on attrition in rape cases

12.11 “Attrition” refers to the phenomenon whereby there is a progressive reduction between the number of rapes that are committed and the number of perpetrators who are actually convicted. **Attrition in rape cases is a very serious problem in many countries.**

Comparisons must be made with caution because of differences in the methodology used for generating such statistics. With this in mind, the following table shows how Namibian compares to a selection of other countries for which comparable statistics could be obtained.

TABLE 12.2: HOW DOES NAMIBIA'S CONVICTION RATE COMPARE?

Hungary	49%	2001
Germany	24%	2001
Namibia	18%	2001-2005
Finland	16%	2001
South Africa	7%	2000
England and Wales	6%	2002
Sweden	6%	2001
Ireland	2%	2000

Note: The percentage for Namibia determined in this study was 16% if measured by accused, and 18% if measured by case (because some cases had multiple accuseds). The case measure is more appropriate for making international comparisons.

Case withdrawals

12.12 Policy on withdrawals: We refer to “withdrawals by the complainant”, but this is not technically correct. A complainant who wants to withdraw a charge must give reasons for this to the police. The police will complete a withdrawal statement, which will be referred to the prosecutor. The final decision must be taken by the Office of the Prosecutor-General in Windhoek, and not by the local prosecutor. The procedure is the same for cases involving adult or minor complainants. In respect of a minor, the parent or guardian can make a withdrawal statement, but the decision lies with the Office of the Prosecutor-General.

“Withdrawal by the prosecutor” generally refers to a decision not to proceed with the case which is not based on the complainant’s wishes. Decisions not to prosecute most often result from insufficient evidence; a case will not be prosecuted if there is no reasonable chance of obtaining a conviction. This decision is also taken by officials in the Office of the Prosecutor-General and not by the local prosecutor who is actually handling the case.

Interviews with key informants indicated that there are differing understandings on the part of police about the procedure for withdrawing cases, and on the rules for withdrawals by minors versus adults.

12.13 Number of withdrawals: A total of 43% of the 409 cases in the police docket sample were withdrawn – 20% at the request of the complainant, and another 23% by the prosecutor.

The court register sample shows only withdrawals which took place after criminal proceedings had already begun. The cases against 127 out of 612 accused in this sample were withdrawn (21%).

12.14 Time frame for withdrawals: Complainants who withdrew cases typically did so within less than 6 months of the rape, and in many cases much sooner than this. In fact, half of the case withdrawals by complainants occurred within two and a half months of the rape. This suggests that complainants do not usually withdraw cases because of frustration at the slowness of the court process.

Where the withdrawal came from the prosecutor, this was typically about 9-10 months after the offence occurred. This shows that prosecutors allow a reasonable time for police investigation to turn up sufficient evidence to sustain a prosecution. On the other hand, 9-10 months is quite a long time for a police investigation and a decision on the basis of the information contained in the police docket. Perpetrators are usually known to complainants in rape cases, and arrests in most rape cases take place promptly. There are usually few witnesses to rape cases, and medical evidence must be collected promptly to be useful. So this would seem to be an area where the time frame could be shortened.

12.15 Withdrawals by complainants: There were a total of 88 case withdrawals initiated by the complainant in the police docket sample, which accounted for more than one-third of all the rape cases in this sample. (Sometimes a complainant wanted to withdraw a case which was actually discontinued for some other reason.)

65% of the withdrawal requests occurred in cases where the accused was a relative or acquaintance of the complainant, and 25% of the complainants who withdrew their cases said that the reason for the withdrawal was that the perpetrator was a relative, husband, boyfriend or ex-partner, with some saying that he was the family’s main breadwinner or the father of the complainant’s children. Many other complainants (21%) said that they wanted to withdraw the case because they had “forgiven” the perpetrator, or because the perpetrator had apologised.

Other complainants (24%) wanted to withdraw their cases for a variety of personal reasons – because they simply wanted to get on with their lives, they wanted to avoid the trauma of the court process, they were moving away, they were persuaded to withdraw the case by a boyfriend or family member, they did not want to put their children through the trauma of the trial or they simply “lost interest” in the case.

Only four complainants in this sample indicated that they wanted to withdraw their cases because no rape really took place – and we cannot discount the possibility that some of these complainants may have said this to make sure that the case did not proceed against their wishes. Two of the four said that they had initially been forced to lay the charge by their boyfriends.

Only two complainants said that they were withdrawing the case because they preferred to get compensation from the perpetrator – which does not necessarily mean that no other complainants were motivated by compensation. Many key informants

interviewed thought that the desire for compensation is a key motivation for case withdrawals by the complainant.

Cross-tabulations show that **cases of child rape were somewhat less likely to be withdrawn than cases involving adults.**

12.16 One step which could help reduce withdrawals by complainants is a Victim Support Programme which could be staffed primarily by community-based volunteers. The establishment of solid support programmes could both encourage reporting and discourage withdrawals.

The high rate of withdrawals of cases involving spouses, boyfriends and family members is somewhat understandable. Studies indicate that forced sex within such relationships is not such an unusual occurrence in Namibia, and the prospect of a criminal trial followed by a long prison sentence for the perpetrator could be emotionally, socially and financially devastating for the extended family. **Rather than criticising complainants who withdraw cases under these circumstances, we should ask whether or not they need a wider range of alternatives.**

One possibility is a "diversion option" involving counselling and therapy where rapes of adults are committed by family members. However, most persons consulted felt that this would be too "soft", even if the complainants themselves were in favour of it.

Participants at the consultative workshop suggested that there should rather be a more in-depth study of the issue of case withdrawals in order to ascertain what forms of assistance and support might dissuade complainants from seeking to withdraw rape cases.

RECOMMENDATIONS:

Establish a **Victim Support Programme** as described in Chapter 7.

The government should commission a study of case withdrawals initiated by complainants in order to ascertain what forms of assistance and support might dissuade complainants from seeking to withdraw rape cases.

12.17 Withdrawals by prosecutors: There were a total of 112 cases where it appears that the prosecutor decided to withdraw the rape case. In many of these cases (20%), no reason for the decision to withdraw was recorded. The most common reason (46% of the withdrawals) was simply a decision not to prosecute, apparently based on insufficient evidence.

Some of these withdrawals were at the request of the complainant, or because the complainant indicated unwillingness to proceed without making a formal request for withdrawal, or after the complainant had moved away or disappeared (13% in total). In 9 cases (8%), either the complainant or the accused died. In 7 cases (6%), the accused absconded and could not be found. One case was withdrawn after the complainant returned to police and said that she had lied about the rape.

12.18 Location of withdrawals: A cross-tabulation to see where rape cases are most likely to be withdrawn shows that withdrawals by complaints were high relative to the numbers of rape cases reported in urban areas rather than in rural areas. This calls into question the conviction of key informants that compensation through traditional structures is the key factor behind such case withdrawals. This finding reinforces the suggestion that more field research is required on the specific issue of case withdrawals.

There is less of a clear pattern for prosecutorial withdrawals. Most of the largest urban centres had relatively fewer prosecutorial withdrawals, which could be a result of more human and financial resources for police investigation in the largest centres. However, conviction rates are best in respect of the dockets opened at some of the rural stations and smaller urban areas, which points in the opposite direction.

Criminal trials for rape

Reducing trauma to complainant

12.19 The Act places a responsibility on prosecutors “to provide all such information to the complainant as will be necessary to lessen the impact of the trial on the complainant”. However, this duty does not seem to be carried out very effectively in practice. Most prosecutors interviewed stated that they usually meet the complainant only on the day of the trial, or occasionally the day before.

At most courts, complainants and accuseds must use the same entrance and exit to the courtroom, although there is sometimes a separate entrance for accused persons in custody who are coming from the cells. This leaves open the possibility of discomfort to the complainant, or some form of intimidation by the accused.

Social workers gave differing feedback about whether they ever accompany rape complainants to court. Most had never done this, while one regularly accompanies children but not adults.

There is also a need for support to the complainant after the criminal trial.

RECOMMENDATIONS:

The Victim Support Programme described in Chapter 7 could train volunteers to assist with explaining the court process to the complainant, with the assistance of materials developed especially for this purpose (such as comic books and colouring books on the court procedure for children, similar to those in use in South Africa, and appropriate indigenous language materials for adults). Volunteers could take complainants to the empty courtroom in advance of the trial and be available to answer any questions the complainant might have about practical issues such as transport and accommodation. This would free prosecutors to focus more fully on the legal issues which are their area of expertise.

Alternatively, or as an interim measure, social workers could be drafted to assist with this task. This would be particularly appropriate for social workers who are already working with Woman and Child Protection Units. However, as a general matter, the shortage of social workers mitigates against providing them with any extra duties.

Another approach would be for the Office of the Prosecutor-General to re-organise the workload of prosecutors involved in rape cases with their legal duty to the complainant in mind, so that they are able to dedicate more time and energy to this role.

Representation for accused

12.20 The workload on legal aid lawyers from rape cases appears to be considerable. We interviewed two legal aid lawyers for this study. One said that he had represented about 80 accused rapists in the past year, and the other had represented about 150.

Key informants expressed **concern about the time that it takes for legal aid applications to be approved, with one estimating that in an efficiently-functioning system, a decision on such an application should be processed in a maximum of 14 days, when in fact it can take as long as 3 months.** Current moves to de-centralise legal aid services should help to reduce such delays in future, and backlogs in processing legal aid applications have reportedly already been addressed.

Delays in processing legal aid applications sometimes inspire accused persons to decide to represent themselves instead of waiting any longer. This is understandable in cases where an accused who is out on bail may have to appear in court repeatedly – perhaps taking time off work or travelling considerable distances – just to find out that the case is postponed. The decision to proceed without legal representation in respect of a serious charge like rape should not be made purely out of frustration with the system's slowness.

One lawyer employed by legal aid reported that in most cases where prosecutors complained about delays in approving applications for legal aid, the Legal Aid Office had not in fact received the application concerned.

There were complaints that some legal aid lawyers (and other defence counsel) double-book court dates or fail to show up in court for trivial reasons. It was suggested that it would be useful for courts to take a tougher line on any legal practitioner (legal aid or otherwise) who fails to show up for court without a good reason and without giving the required notice to the other party, by charging them for wasted costs, reporting such instances to the Law Society and/or the Ministry of Justice for possible disciplinary action, or holding the lawyers in question in contempt of court.

RECOMMENDATIONS:

The decentralisation of legal aid services which is already underway should help to prevent backlogs in decisions on legal aid applications. However, it appears that there are sometimes administrative break-downs between processing the application and forwarding the application to the appropriate legal aid office. A particular official at each court should be given responsibility for this task, to allow for monitoring and follow-up.

Encourage presiding officers to take a harder line against any legal practitioners who cause unwarranted delays in criminal cases.

Closed court

12.21 The Combating of Rape Act amends section 153 of the Criminal Procedure Act 51 of 1977 to require that **all rape trials in their entirety must automatically be held in closed court** – unless the complainant (or someone with authority to act on behalf of a minor complainant) requests that the court be *open*. This aspect of the law is not universally well understood, and not consistently applied in practice.

RECOMMENDATION:

The **provision requiring closed courts during rape trials** is not universally well known by prosecutors, legal aid lawyers and magistrates. **The Ministry of Justice should issue a circular informing existing officials of the correct legal position, and training for new officials should incorporate this issue.**

Postponements

12.22 Some postponements in a criminal trial are normal and inevitable. For example, it would not be feasible to deal with bail proceedings, plea, and the criminal trial all on the same court date.

It was difficult to compile clear information about postponements from either the police dockets or the court registers, but the court registers appeared to be somewhat more complete and reliable on this point.

Of the 547 cases in the court register sample, no information about postponements could be ascertained in respect of 43 of them. The remaining 504 cases had a combined total of 3924 postponements – which would produce an average of about 8 postponements in each case. However, in actual fact there were many cases with as few as 1-2 postponements (which may include cases which were withdrawn or cases which were not yet finalised), and 16 cases which had 20 or more postponements.

The reasons for postponements varied. There was no one reason which stood out as a particular “culprit” in case postponements; the problem seems to be more the cumulative effect of postponements for a range of reasons.

Postponements in the court register sample extended for 47 days on average, but the most typical postponement period extended for 28 days. The longest postponements occurred when cases were transferred from one court to another, and the shortest ones were for bail-related matters (including where the accused did not show up in court). Postponements pertaining to a decision by the Prosecutor-General on whether or not to prosecute and for matters pertaining to legal aid were also typically for longer periods than postponements for other reasons.

Each case follows an individual course, which makes patterns with respect to postponements harder to identify and analyse. This also makes solutions to the “postponement problem” harder to identify. Nevertheless, on the basis of our discussion with key role players, we can offer some suggestions which might improve the efficiency of criminal trials for rape.

Improving the process

12.23 The overall goal of minimising delays in the judicial system has been acknowledged by government and is already receiving attention. However, there are additional measures which could be considered.

12.24 Police investigations: Police administrators estimate that a police investigation in an average rape case should be complete within 72 hours. Postponements for further police investigation could not be abused if presiding officers routinely required details on why more time is necessary before agreeing to this basis for postponement.

The recent UNICEF study of Woman and Child Protection Units made the following recommendations on dealing with delays in police investigations:

- ▶ Institute a system of control so that Unit Commanders can monitor the time spent in investigations and the reasons for requesting court postponements for further investigation.
- ▶ Arrange regular staff meetings where investigating officers report on case progress, so that investigations still to be finalised can be discussed and analysed and plans made to fast-track lagging cases.
- ▶ The National Coordinator for WCPUs should play a more aggressive role in monitoring, control, guidance and assistance with addressing barriers to efficient investigation.

We endorse these recommendations and suggest that they be implemented as a matter of urgency.

12.25 Prosecutors: As already noted, the Office of the Prosecutor-General has recently established a specialised unit for prosecution of sexual offences and domestic violence cases. This unit is still in its formative stages, but its establishment opens up new opportunities for more effective management and prosecution of rape cases.

Closer cooperation between prosecutors and police at a very early stage could increase efficiency. This could be accomplished in a variety of ways; the crucial point is early collaboration and communication between the investigating officer and the prosecutor who will ultimately try the case, or with the personnel in the Office of the Prosecutor-General who will supervise and monitor rape cases.

Early involvement by the prosecutor who will handle the criminal trial, or by supervisory personnel, could also result in speeding up the process of summarising the docket and making a decision on whether to prosecute. The Office of the Prosecutor-General estimates that a prosecutor should be able to summarise a docket and send it for decision within 1-2 days of receiving the final docket from the police.

A South African study recommends that prosecutors who handle rape cases would benefit from training on the relevant medical issues, so that they would be better-placed to use the medical evidence to strengthen their case and better equipped to question doctors and elicit the responses that the court needs, rather than what medical practitioners think is relevant.

Another idea for enabling prosecutors to work more effectively would be to reduce their administrative burden.

Arranging for volunteers or social workers to spend time with the rape complainant explaining the general court procedure and addressing practical needs (such as transport and accommodation) might also relieve some of the burden on prosecutors, as well as allowing for more attention to the complainant's concerns.

12.26 Courts: Many postponements relate to the capacity of the courts. The Ministry of Justice has recently appointed temporary additional and permanent magistrates to help with the backlog of cases in general (although there is a limit to how many additional magistrates can operate without additional court space). The expected opening of a second High Court in the North should also help. The heavy workload of prosecutors and legal aid lawyers is also a factor here. Meaningful improvements in these sources of delays will entail committing more of the nation's budget to the criminal justice system.

One step which could be taken without the commitment of extra resources is simply to give rape cases involving child victims priority on the court roll. Hearing such cases while the child's memory is still fresh would probably increase conviction rates, and it might help to limit the period of intense trauma for the child, who may be frightened by the court process in addition to having endured a rape.

More generally, it might also help if presiding officers were encouraged to impose stricter requirements for postponements. It was noted by key informants that there seems to be a trend towards presiding officers "remanding" cases without recording a particular reason for this. No postponement should be granted without an application

which details the reason for the postponement, and a finding on the application which is recorded. While this in itself could be time-consuming for the court and the parties, it could help to inject more rigour into the progress of the case.

12.27 Regular forum for exchange of information between sectors: Key informants say that many problems are exacerbated by lack of close coordination between the various sectors involved in the criminal justice process. This problem is exacerbated by the high staff turnover amongst police, prosecutors, social workers and other personnel. **It would be extremely helpful if there were a small forum where key officials could meet regularly to discuss issues and problems.** We would suggest that this forum should bring together the following personnel for short monthly or quarterly meetings:

- ▶ National Coordinator, Woman and Child Protection Units, Ministry of Safety and Security
- ▶ Head of Specialised Unit for Prosecution of Sexual Offence and Domestic Violence Cases, Ministry of Justice
- ▶ Chief of Lower Courts, Ministry of Justice
- ▶ Director, Legal Aid, Ministry of Justice
- ▶ Director, National Forensic Science Institute, Ministry of Home Affairs and Immigration
- ▶ Chief Social Worker, Subdivision: Family Welfare, Ministry of Health and Social Services
- ▶ Deputy Permanent Secretary (responsible for supervision of district surgeons), Ministry of Health and Social Services.

This list is a merely a suggestion which might be improved upon. The idea would be to create a small, informal group which has the power to act on matters needing attention across ministry boundaries. We would suggest that this national forum be mirrored by local and regional forums wherever possible.

RECOMMENDATIONS:

Presiding officers should be encouraged to insist upon clear and sound reasons for postponements, and particularly for postponements for further police investigation or on the grounds that lab results are not yet ready (including a requirement of confirmation from the lab in such cases, as discussed in Chapter 8).

Presiding officers should be encouraged to reprimand investigating officers who do not appear in court promptly and timeously and give their full cooperation to the court. This could help to prevent a situation where conscientious work by some investigating officers is undermined by problems with a few individuals.

Members of the public and prosecutors should be encouraged to report long delays in police investigation to the Nampol complaints department so that monitoring and supervision of this problem can be intensified.

The Ministry of Justice or the Office of the Prosecutor-General should work together with the police to formulate clear rules on who is responsible for ensuring that witnesses attend criminal cases, to ensure that there is budgetary provision for carrying out this duty.

The recommendations put forward in the recent UNICEF study of Woman and Child Protection Units on dealing with delays in police investigations should be implemented:

- ▶ **monitoring and control by Unit Commanders of time spent in investigations and reasons for requesting court postponements for further investigation**
- ▶ **regular staff meetings to discuss case progress**
- ▶ **more aggressive supervision by the National Coordinator for WCPUs.**

The Office of the Prosecutor-General and the police should institute a system of prosecutor-guided investigations, as recommended in Chapter 7.

Provide prosecutors with more training on the relevant medical issues, to facilitate their use of medical evidence.

Reduce the administrative burden on prosecutors by providing more support from court clerks, court orderlies or other administrative personnel for non-legal tasks.

Arrange for volunteers or social workers to spend time with complainants explaining the general court procedure and addressing practical needs, through a Victim Support Programme as described in Chapter 7, or more informally.

Recommendations in respect of legal aid have already been discussed above.

Give rape cases involving minors, or at least children under age 16, priority on the court roll so that they can be heard promptly, before the child's memory of the incident fades.

Establish a small forum where key officials meet regularly at national level to discuss issues and problems pertaining to rape cases across ministerial lines. This could be replicated at regional and/or local levels. Of all the recommendations for improved action on rape cases, this one is probably the most fundamental.

In respect of all agencies dealing with rape, **Parliament should allocate sufficient budgetary resources for responding to rape cases.** Expenditures on rape cases should be tracked and reported on to Parliament.

Length of trial

12.28 In most of the rape cases in the police docket sample, the docket was opened within one day of the rape. Where there was an arrest which led to court proceedings, the first court date was typically about 2 months after the rape had occurred. **In the cases which resulted in a completed criminal trial, it was typically one and a half years after the offence before judgment was given and (for those cases with guilty verdicts) a sentence imposed. Some cases were finalised only 3 or 4 years after the offence occurred.**

The cases in which the accused was acquitted, or found guilty of some crime other than rape, tended to take 1-2 months longer than those where the accused was found guilty of rape as charged.

To keep this time frame in perspective, it must be remembered that the accused – even an accused who is ultimately acquitted – may have been held without bail during the entire trial. An accused who is out on bail pending the completion of the trial may incur significant expense in appearing in court repeatedly only for the case to be postponed. This is also a problem for complainants and witnesses once the actual trial is set to begin. And the complainant must spend this entire period in a state of uncertainty, unable to put the rape in the past and move forward.

The court register sample did not include the date when offence occurred or the date on which the charge was laid with the police. But the completion of a criminal trial for rape in this sample typically took 9 -10 months from the first appearance in that court. The longest completed criminal trial in the sample lasted over 3 years. Where trials in this sample were still ongoing, the time already elapsed was even longer, with one year being typical – and no way of telling how much more time would pass before the trial would be completed.

New evidentiary rules

12.29 Several prosecutors were enthusiastic about the overall evidentiary reforms, and the two legal aid lawyers who have defended accused rapists generally had no problems with the new evidentiary provisions.

RECOMMENDATION:

A few of the professionals who are involved in the implementation of the Combating of Rape Act are not completely clear on some of the finer points of the new evidentiary rules. This should be a focus of information and training.

Admissibility and credibility of evidence from children

12.30 The new provisions exempting children under age 14 from the oath or affirmation were intended to eliminate the old approach of questions aimed at finding out if the child knows the difference between the truth and a lie, because such questions were often abstract and confusing. However, interviews with prosecutors and legal aid lawyers indicate that the old approach is still being applied in practice.

One prosecutor suggested that magistrates should ask some simple introductory questions such as “What colour is that object?” and “What is the name of your teacher at school?” to see if a child is capable of giving intelligible testimony. This is precisely the approach that was envisaged in respect of the new provisions.

Several prosecutors felt that presiding officers need more sensitisation on how to deal with children’s testimony.

RECOMMENDATIONS:

The **new rules on admissibility and credibility of evidence from children** are not uniformly understood and applied. This should be **a focus of information and training, particularly for presiding officers.**

More generally, **presiding officers would benefit from information and sensitisation on the testimony of child witnesses by experts in this field.** Given the prevalence of child rape in Namibia, it would be appropriate for the judiciary to arrange workshops on this topic.

Make sure that children are given an **appropriate orientation to court procedures** so that they will understand what is happening and feel comfortable in the court setting.

Vulnerable witness provisions

12.31 Most of those interviewed appeared to be familiar with the vulnerable witness provisions, and had utilised many of them insofar as available resources permitted – particularly the use of support persons, having the presiding officer re-state questions to the complainant, moving furniture or dispensing with robes to make the atmosphere less intimidating. Where facilities allowed, screens and testimony via closed-circuit television had been used where possible.

The lack of appropriate equipment was cited as a limiting factor in many regions, as currently there are full “victim-friendly” court facilities only at Windhoek, along with more rudimentary arrangements at Walvis Bay.

Proper maintenance of resources can also be a factor. For example, when one of our researchers toured the Victim-Friendly Courtroom in Katutura in February 2006, the microphone which is part of the equipment that allows for testimony via closed circuit television was not working.

It should be noted that not all rape complainants want to be hidden from the accused while they are testifying.

Two prosecutors complained that magistrates don’t follow the practice of re-phrasing questions for witnesses under age 13, but allow direct questioning by the defendant’s lawyer which can intimidate the witness.

The biggest problem with the vulnerable witness arrangements seem to be that no one is quite sure whose responsibility it is to initiate them. The law allows any of the specified special arrangements to be made on the application of any party to the proceedings or the witness concerned, or on the court’s own motion. But in practice, no one seems sure where the duty should lie to make sure that appropriate arrangements are considered and arranged. Social workers, who have some training in child development would be the most well-suited to make suggestions, but the current reality is that many rape complainants will not ever meet with a social worker.

RECOMMENDATIONS:

Victim Support Programme volunteers could explain the possible special arrangements and help to determine the complainant’s preferences. (The idea of such a programme is explained in more detail in Chapter 7.)

Prosecutors should take primary responsibility for suggesting special arrangements, but presiding officers should also be sensitised to play more active role just as they are expected to give special attention to the rights of an unrepresented accused.

Court rules should require that the record of any case of sexual abuse involving a child under age 18 should indicate what vulnerable witness provisions were utilised, and the reasons for applying or not applying the potential special arrangements. This would ensure that the vulnerable witness options are given appropriate consideration.

Court interpreters

12.32 When the complainant is speaking through an interpreter, it is important that the interpreter approaches the task with sensitivity. Translation of terms for sexual acts and private parts of the body can be particularly problematic, especially where speaking about such matters violates cultural taboos. Such issues can obviously be crucial in

rape cases, and sensitive but accurate translation could be crucial here. This becomes even more important where the witness is a child.

RECOMMENDATIONS:

The Ministry of Justice should provide specific training on rape cases to court interpreters, to increase their understanding of how to make sensitive and accurate translations on sexual issues.

Where possible, the Ministry of Justice should provide interpreters of the same sex as the rape complainant, or of whatever sex the complainant prefers.

Fairness to accused

12.33 No one interviewed felt that the rape law reforms were unfair to the accused. Magistrates in particular, who would be expected to have the most even-handed perspective, unanimously said that the law was not unfair to accused persons.

Appeals

12.34 It has always been possible for an accused to appeal the court's verdict or sentence to a higher court. This power was made reciprocal by 1993 amendments to the Criminal Procedure Act, meaning that now the prosecutor can appeal against any decision made by the court in favour of the accused. No useful data on appeals could be ascertained from our samples.

Special courts for sexual offences?

12.35 South Africa has set up special courts to hear cases involving sexual offences. We would not recommend that Namibia should attempt to establish such special courts at this stage, as this would create a strain on both human and financial resources. We would recommend rather that attention be given to improving the response to rape complainants, and the investigation and prosecution of rape cases, within Namibia's existing court structure.

The experience of the Woman and Child Protection Units shows that creation of a new institution is not as challenging as ensuring that the institution provides the intended services effectively, with the assistance of well-trained and experienced staff. We believe that some of the recommendations contained in this report would be a more cost-effective way to improve the outcomes of rape cases, and more feasible given Namibia's size, population and government resources.

“Rape has got nothing to do with sex, it's about power. When a man has low self-esteem or is angry or hurt, he might want to hurt somebody else. They [men who rape women] feel the need to overpower someone - normally someone who is weaker than themselves. It's also about being in control.”

“James”, convicted of raping a 15-year-old girl
The Namibian Weekender, 1 March 2002

Chapter 13

SENTENCES FOR RAPE

Sentences for rape prior to the new law

- 13.1** At the time when the Combating of Rape Act was passed, concerns about lenient sentences for rape were well-justified. Research by Women's Solidarity and the Legal Assistance Centre showed that the average sentence for rape in 1988-89 was 4-6 years, rising to 7-8 years in 1995. While this data shows that sentences for rape were increasing over time, there were still a disturbing number of lenient sentences. Assuming that no suspended sentences were actually served, a total of six rapists convicted in 1995 served *no time in prison*.

TABLE 13.1: SENTENCES FOR RAPE & ATTEMPTED RAPE BY COURT, 1988-1995

	High Court			Regional Magistrate's Court	
	1988	1989	1995	1988	1995
Number of perpetrators sentenced	78	50	7	94	81
Sentence range	0-15	0-14	5-12	0-10	0-10
Average actual sentence	5.9	6.2	8.2	4.1	6.7
Average effective sentence	4.9	5.0	6.4	3.2	5.0

"Actual" means the full sentence imposed by the court. "Effective" means the time to be served in prison, taking into account any portion of the actual sentence which was suspended.

- 13.2** To re-cap, the minimum sentences under the Combating of Rape Act are as follows: 5, 10, or 15 years for a first offence and 10, 20 or 45 years for a second or subsequent conviction, depending on the circumstances of the rape. The maximum sentence for any rape is life imprisonment. A court is not allowed to suspend a sentence for rape in such a way that the time spent in prison will actually be less than the prescribed minimum sentence.

The court may depart from the minimum sentences in cases where it finds that "substantial and compelling circumstances" justify a lesser sentence. Case law in Namibia has given guidance on the meaning of "substantial and compelling circumstances", with two recent High Court cases setting forth guidelines on how courts should advise unrepresented accuseds on this concept.

The minimum sentences do not apply to persons who were under the age of 18 at the time the rape was committed.

Case law in Namibia has also examined the question of appropriate sentences for rape, with the trend being to uphold relatively heavy sentences (such as one sentence of 20 years and another of two 20-year sentences to run consecutively). One recent case gave guidance on how to apply the minimum sentences to cases involving previous convictions.

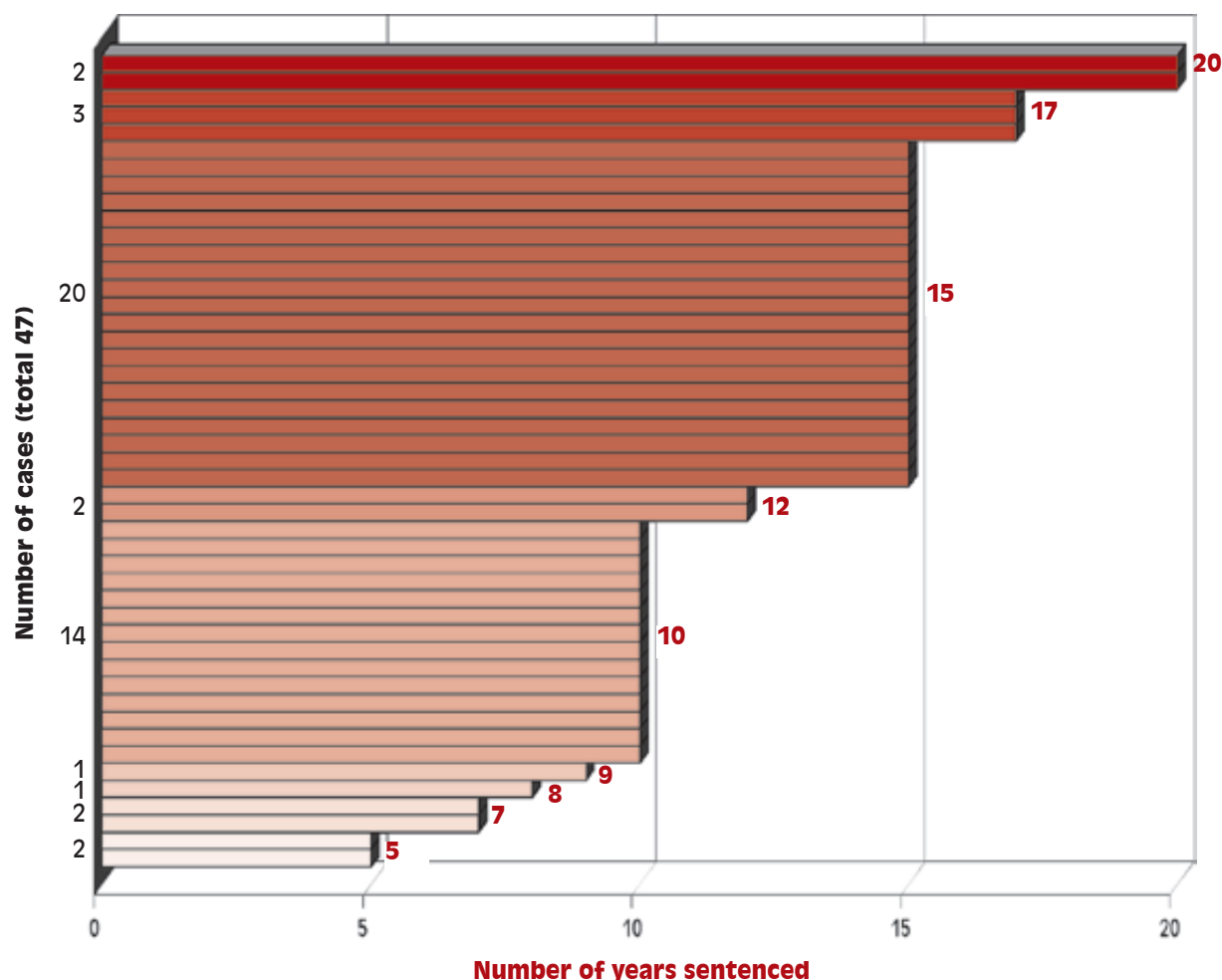
- 13.3** In the police docket sample, there were **50 cases involving adults convicted on a single count of rape in terms of the Combating of Rape Act. Only three received**

sentences which were lower than the most lenient minimum sentence of 5 years for a first conviction.

The statistics indicate that courts are often looking to the minimum sentences as being fixed sentences instead of base level sentences – especially when it comes to the heavier minimums of 10 and 15 years.

Only 5 persons received sentences of more than 15 years – three sentences of 17 years and two sentences of 20 years.

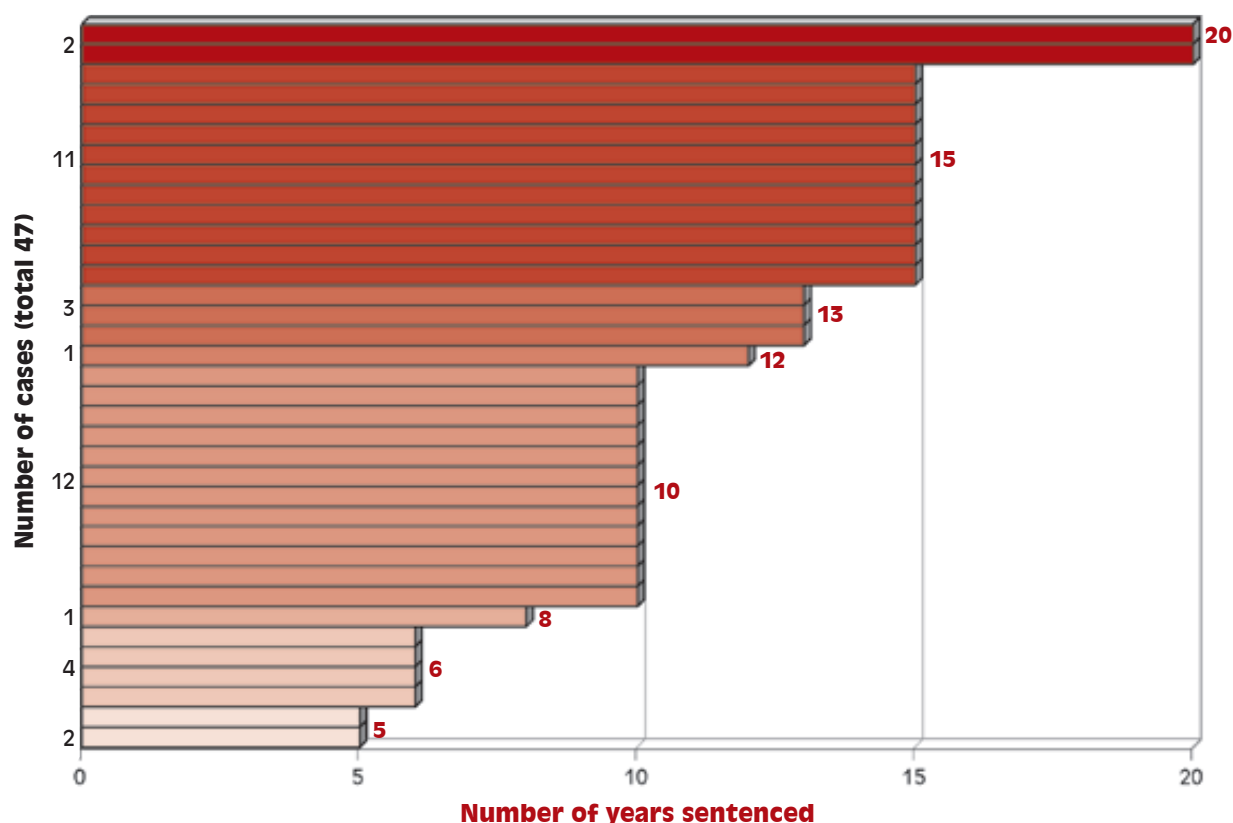
CHART 13.1: EFFECTIVE SENTENCES FOR RAPE WHERE MINIMUM SENTENCES APPARENTLY APPLIED (POLICE DOCKET SAMPLE)



13.4 The findings from in the court register sample were similar. **There were convictions on 47 counts of rape for which we could determine the sentence imposed for a single count of rape. Of these, 11 received sentences for rape which are lower than the most lenient minimum sentence.** Some of these cases may have involved perpetrators under age 18 who are exempt from the prescribed minimums.

The remaining convictions for rape resulted in effective sentences ranging from 5 years to 20 years. As in the case of the police docket sample, it appears likely that many rapists received precisely the minimum sentence. Only two rapists received more than 15 years for a single count of rape – both receiving sentences of 20 years.

CHART 13.2: EFFECTIVE SENTENCES FOR RAPE WHERE MINIMUM SENTENCES APPARENTLY APPLIED (COURT RECORD SAMPLE)



- 13.5** It must be noted that most of the cases which we examined were heard in the Regional Magistrate's Court which is empowered to impose maximum sentences of 20 years (on a single count of rape).
- 13.6** Information gleaned from press clippings paints a similar picture. Most of the press reports examined describe sentences which are equal to or slightly above the prescribed minimum.
- 13.7** Most prosecutors interviewed were happy with the minimum sentences, and magistrates generally found them useful.

RECOMMENDATION:

More detailed information and training on the legal position regarding minimum sentences, and case law developments in this area, would assist prosecutors and presiding officers. All prosecutors and presiding officers should be reminded that the statutory minimums do not apply to offenders under age 18.

- 13.8** The new Criminal Procedure Act 24 of 2004 (passed by Parliament but not yet in force) sets life imprisonment as the minimum sentence for the most serious instances of rape if the perpetrator is over age 16. However, the increased minimum sentences for rape will apply only to "rape other than rape under a statute" – which must refer to the common-law crime of rape that survives alongside the Combating of Rape Act. This could inspire a return to charges of rape under the common law (which requires

proof of absence of consent) instead of under the Combating of Rape Act (which changes the focus to the presence of coercion). Such a development could undermine the intention of the Combating of Rape Act.

RECOMMENDATION:

The common-law crime of rape should not invoke heavier minimum sentences than rape under the Combating of Rape Act. Increased deterrence of potential rapists would be better achieved by a focus on increasing conviction rates rather than by increasing punishment for offenders.

- 13.9 Members of the public often call for stiffer sentences for rapists.** However, it may be that such calls for heavier sentences stem in part from frustrations about the perceived high incidence of rape, in the absence of any other clear and simple ideas about what action could be taken to combat rape in Namibia. If members of the general public were more aware of the low conviction rates for rape and the preponderance of case withdrawals, they might focus on other remedies instead of on heavier sentences.

RECOMMENDATIONS:

Using the Stock Theft Act 15 of 1990 as a model, the Combating of Rape Act should be amended to empower Regional Magistrate's Court to impose any minimum penalty specified in the Act, even if such penalty exceeds the ordinary jurisdiction of the court, and to place restrictions on concurrent sentences for rape – but without completely removing judicial discretion in this regard. For example, the Act might require that sentences for multiple counts of rape be served consecutively unless the court finds substantial and compelling circumstances which warrant concurrent sentences. This would effectively create a presumption in favour of consecutive sentences for rape.

Consideration should be given to amending the Combating of Rape Act to place limits on what portion of a minimum sentence must be served before an offender is eligible for parole.

Encourage members of the public to focus on strategies to increase reporting and to reduce case withdrawals by complainants instead of on more severe punishment.

“As long as circumstances make it reasonable for women to conclude that it is useless to report rape, then I would contend that the state and its structures are complicit in sustaining and perpetuating a culture of social ethics of rape...”

Louise du Toit, “A Phenomenology of Rape: Forging a New Vocabulary for Action” in Amanda Gouws, ed, (Un)Thinking Citizenship: Feminist Debates in Contemporary South Africa, University of Cape Town Press, 2005 at 26 7

“Even where laws against gender-based violence exist, enforcement and legal systems may not be supportive. Sometimes they re-victimize women. Such laws often lack budgetary appropriations, leaving critical gaps between intention and reality.”

UNFPA State of World Population 2005, “The Promise of Equality: Gender Equity, Reproductive Health and the Millennium Development Goals”, at 68

Chapter 14

FALSE CHARGES

14.1 The first point to consider in a discussion of false charges is that **a verdict of “not guilty” does not always mean that the complainant laid a false charge.** As in most democracies, Namibia’s criminal law is biased to protect the innocent, even if this means that a guilty person sometimes goes free. It is the state’s responsibility to prove the guilt of the accused, and not the responsibility of the accused to prove that he or she is innocent. The burden of proof in all criminal cases is “beyond a reasonable doubt”, which is a very high standard. In proving the case, the evidence of a single witness must be treated with great caution if there is no corroborating evidence. This continues to be true in the case of rape, as well as for all other crimes. Thus, to obtain a conviction, the state must marshal very convincing evidence. If the accused’s version of events could even possibly be the true one, then he or she will probably go free.

This system means that **false charges are difficult to get away with.** While it could happen (and certainly has happened) that an accused person will be wrongly convicted in Namibia as in other jurisdictions, there is no evidence that this is a common problem. The constitutional right of an accused person to legal representation, the provision of state-funded legal aid and the right of appeal to a higher court are all designed to ensure that an accused person gets a fair trial. These rights help to weed out false claims in respect of any crime.

14.2 **Where there is a false claim, the complainant can be charged with any one of several crimes:**

- ▶ the crime of **perjury** (the unlawful and intentional making of a false statement in the course of a judicial proceeding)
- ▶ contravention of **section 300(3) of the Criminal Procedure Ordinance 34 of 1963** (contradicting a statement on oath such as an affidavit with a conflicting statement made on oath such as in a subsequent affidavit or under cross examination)
- ▶ contravention of **section 9 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963** (making a false statement in a sworn document such as an affidavit)
- ▶ the common law crime of defeating or obstructing the course of justice.

14.3 The correct procedure is for the police to investigate any report which raises a reasonable suspicion that a crime has been committed. The Office of the Prosecutor-General will then make a decision on whether to prosecute based on the information in the docket. If the case goes to trial, it will be the role of the court to weight the credibility of the various witnesses.

14.4 There have been no studies of false charges for rape in Namibia. Recent and reliable international statistics on false rape charges could not be located.

14.5 **In the 409 police dockets studied for this survey, there is evidence of false charges in 5 out of these 409 cases (1%). This statistic is not very significant, however.** People who have lied to the police are unlikely to admit this later, especially if they know that it could lead to criminal sanctions. Conversely, someone who wanted

to make sure that a withdrawal request was accepted (in favour of the option of monetary compensation, for example) might say that she lied even if she really did not. Furthermore, it is possible that some complainants might be pressured by the accused or by family members into retracting their charges even if they were true.

- 14.6** Most police and prosecutors interviewed did not think that false charges are common in rape cases, although a few people expressed concern about this.

RECOMMENDATIONS:

Include information on the repercussions of false charges for the complainant in public outreach programmes.

Encourage all local media to give prominent coverage to acquittals on charges of rape, and to legal actions against complainants who lay false charges of rape.

Chapter 15

MEDIA ISSUES

- 15.1** To re-cap the relevant provisions of the Combating of Rape Act, the court is supposed to be automatically closed to the press and public during a trial for rape, unless the complainant (or the complainant's parent or guardian in the case of a minor) requests that the court be open. Furthermore, it is a criminal offence to publish any information which might reveal the identity of the complainant, starting from the time of the commission of the offence.
- 15.2** **There were differences of opinion amongst the media practitioners interviewed for this study on the requirement of a closed court and the restriction on revealing the complainant's identity.** Some thought that the media should rather be relied upon to be self-governing, saying that the matter should be covered by journalistic ethics and enforced by ethical bodies rather than by placing legal restrictions on the freedom of the press. However, current practice indicates that the media is not yet uniformly applying ethical standards or even observing the law.
- 15.3** **The Legal Assistance Centre's research indicates that *The Namibian* is particularly responsible about omitting details which could inadvertently reveal the complainant's identity.**
- Several journalists cited the *Windhoek Observer* as regularly violating the prohibitions on publication. An examination of press clippings by the Legal Assistance Centre showed this allegation to be true. Ironically, the editor of the *Windhoek Observer*, in an interview for this study, spoke out strongly about the importance of respecting the complainants' privacy, while at the same time admitting to violating the law with respect to photographs.

The full report provides illustrations of good and bad practices from these two publications, as examples of two opposite ends of the media spectrum.

One journalist suggested that the ultimate goal of the women's movement should be to “de-stigmatise rape” so that women feel empowered to the point where they would not mind having their identity as a rape complainant revealed.

- 15.4 It is noteworthy that features about gender-based violence regularly appears in all the nation's major print media and on the state television station, the Namibian Broadcasting Corporation. This media attention to the topic has surely helped to raise public awareness of the new law on rape.**

RECOMMENDATION:

The provisions on privacy in the Combating of Rape Act are not being enforced in practice. **We suggest that media who violate the law on this score should be prosecuted.**

Chapter 16

LEGAL DUTIES AND POTENTIAL LIABILITIES

- 16.1 International law imposes a legal duty on states to exercise due diligence to address violence against women.** There is no uniform definition for the standard of due diligence within the context of international law. However, due diligence appears to encompass action to prevent, investigate, punish and provide compensation for such violence. Namibia is party to the United Nations' Convention on the Elimination of all Forms of Discrimination Against Women, which is one of the international sources of this duty.
- 16.2 Namibian jurisprudence has not yet explored the question of the extent to which specific service providers – such as police, prosecutors and doctors who wilfully fail to complete J-88 forms carefully – could be held liable to victims of violence for the damages which result from their failure to exercise their duties properly. However, developments in other jurisdictions give some guidance on the path which the law could take in Namibia.**
- 16.3 In South Africa, a series of recent cases has allowed delictual actions (actions for damages) by victims of violence against individual state agents who failed to take**

action which could have prevented the violence. In the leading case in this issue, *Carmichele v The Minister of Safety and Security*, a man who was free on bail after being charged with rape attacked and injured another woman. The police and prosecutor were held liable for damages to this second victim, because they failed to exercise their duties with respect to the bail matter in a reasonable fashion, having neglected to put relevant information before the court which would have alerted the court to the danger of future violence by the man in question.

16.4 In Canada the civil liability of public authorities in the context of sexual assault has been unquestionably broadened. The leading case in this area is *Jane Doe v Metropolitan Toronto (Municipality) Commissioners of Police*, where police were held liable for breaching their duty of care by failing to warn her and other affected women of the danger that the police knew they might face as potential victims of a serial rapist who was targeting women with a particular profile in a particular neighbourhood. The court also found that the actions of the police constituted gender discrimination and thus violated Jane Doe's rights to equal protection of the law and to security of the person.

16.5 Some jurisdictions are taking a much more cautious approach to legal development of the concept of the duty of care on the part of police to potential victims of violence.

16.6 Could Namibian law take a similar path as the jurisprudence in South Africa and Canada?

There have been few reported cases involving delicts since Namibia's independence. However, these few reported cases point in the direction of a similar expansion of the law of delict as in South Africa. The 2002 High Court case of *Namibia Breweries Ltd v Seelbinder, Henning & Partners* supports the progressive evolution of the law on breach of duty.

The 2005 Supreme Court cases of *Dresselhaus Transport CC v The Government of the Republic of Namibia* held the police liable for failing to take reasonable steps to fulfil their duty of care, finding that this negligent omission was the direct cause of a loss to a transport company when a truck overturned and the beer inside was looted by members of the public without police interference. This decision is a move in the direction of holding police liable for their failure to act to protect citizens, and could be a stepping stone to a finding of liability for omissions of duty in respect of rape cases.

On the basis of the existing Namibian case law, it appears likely that police and perhaps even other service providers in Namibia could in future be found liable to citizens for failure to take reasonable steps to prevent rape, or even to investigate and prosecute rape cases, where this results in continued violence by a rapist who goes free.

RECOMMENDATION:

Following on the examples of South Africa and Canada as well as recent Namibian jurisprudence, **legal practitioners should explore possibilities for further development of the law of delict and the duty of care on the part of police and other service providers in appropriate cases involving gender-based violence.**

Chapter 17

RAPE AND THE NEW CRIMINAL PROCEDURE ACT 25 OF 2004

- 17.1** The Combating of Rape Act 8 of 2000 made several amendments to the Criminal Procedure Act 51 of 1977 on procedural issues pertaining to rape cases. Except where noted below, these amendments have all been re-enacted in the Criminal Procedure Act 25 of 2004, which has been passed by Parliament but is not yet in force.
- 17.2** The new Criminal Procedure Act will make it harder for an accused to be released on bail, particularly when charged with the crime of rape.
- 17.3** Most of the special provisions for vulnerable witnesses are re-enacted in the new law. The new law contains some additional procedural provisions on intermediaries which are useful (such as what to do if the court discovers after the fact that an intermediary appointed in good faith was not in fact competent to be appointed as an intermediary). However, the mandatory requirement for examination of young witnesses through the presiding officer or an intermediary has been removed, constituting a considerable weakening of the 1977 law on this point.
- 17.4** It would be advisable to amend the wording in the 2004 Act to clarify the procedure for testing whether a child witness is capable of giving intelligible testimony, as several presiding officers have expressed queries on this issue.
- 17.5** One significant difference between the two laws is that the amended 1977 law stated that the evidence of a child shall not be regarded as being unreliable, or treated with special caution, just because the witness is a child. This means that the reliability of a child's evidence and the weight which should be given to it must be assessed in the same way as the evidence of any other witness. However, there is no corresponding provision in the 2004 law.
- 17.6** The 2004 law places severe limits on the admissibility of previous statements by children under age 14, negating to a great extent the reforms made by the corresponding provisions in the previous law.
- 17.7** The 2004 Criminal Procedure Act incorporates some general new provisions for victims which will be useful in rape cases. The key innovations pertain to legal representation for the victim, the use of victim impact statements and victim compensation.

The 2004 Act provides that a victim of any offence against person or property may appoint a private legal practitioner (at the victim's own expense) to represent the victim's interests at the criminal trial of the offence which caused the injury, damage or loss to the victim.

There is a detailed procedure for "victim impact statements" containing full particulars of the injury, damage or loss suffered by the victim as a result of the crime, which will be used to guide sentencing and to provide a basis for victim compensation.

The new law also provides for victim compensation for "injury, damage or loss" resulting from a criminal offence as an adjunct to the criminal proceedings. This is an improvement over the current situation where compensation in the course of a criminal trial is limited to damage or loss of property.

- 17.8** The 2004 law provides a minimum sentence of life imprisonment for rape under certain circumstances, but this applies only to rape "other than rape under a statute". These stiffer minimum sentences thus appear to apply only to rape under the old common-law definition which was used before the Combating of Rape Act was passed.

There would appear to be no reason to apply *heavier* minimum sentences to the common-law crime of rape than to comparable rapes charged under the Combating of Rape Act. In fact, such an approach might inspire a return to charges of rape under the common law (which requires proof of absence of consent) instead of under the Combating of Rape Act (which changes the focus to the presence of coercion). Yet, if the heaviest minimum sentences for rape are available only in respect of the common-law crime, prosecutors may be under public and political pressure to revert to this approach.

RECOMMENDATIONS:

Several of the special provisions enacted for vulnerable witnesses in 2003 (by the Criminal Procedure Amendment Act 24 of 2003) have been removed or weakened in the 2004 Criminal Procedure Act. We recommend that these provisions should be essentially restored.

- a) Amend section 187(4) to require that the presiding officer must re-state or re-phrase questions put to witnesses under age 14.**

(4) Notwithstanding subsection (1) or (2) or anything to the contrary in any other law contained but subject to section 193, the presiding judge or magistrate must ~~may~~, during the cross-examination of any witness under the age of 14 years, either restate the questions put to that witness, and may ~~or~~, in his or her discretion, simplify or rephrase such questions.

This would restore the position under section 166(4)-(5) of the Criminal Procedure Act 51 of 1977, as amended by Criminal Procedure Amendment Act 24 of 2003 on vulnerable witnesses.

- b) Restore the provision which states that the evidence of a child shall not be regarded as being unreliable, or treated with special caution, just because the witness is a child, so that the reliability of a child's evidence and the weight which should be given to it must be assessed in the same way as the evidence of any other witness. This following should be added as subsection (5) of section 185, or as an new section of the Act:**

(5) A court shall not regard the evidence of a child as inherently unreliable and shall therefore not treat such evidence with special caution only because that witness is a child.

This proposed provision mirrors section 164(4) of the Criminal Procedure Act 51 of 1977, which was omitted in the 2004 law.

c) Amend section 245 on the provision on the admissibility of previous statements by child witnesses to restore the previous criteria from section 216A of the 1977 Criminal Procedure Act, with the addition of the “interests of justice” in order to ensure protection of the accused’s rights.

245. (1) Evidence of any statement made by a child under the age of 14 years is admissible at criminal proceedings as proof of any fact alleged in that statement if the court –

(a) is satisfied that –

(i) the child concerned is unable to give evidence ~~incapable of giving evidence~~ relating to any matter contained in the statement concerned; and

(ii) such statement considered in the light of all the surrounding circumstances contains indications of reliability; and

(b) having regard to any prejudice to a party to the proceedings that the admission of such evidence might entail, is of the opinion that such evidence should be admitted in the interests of justice.

(2) If a child under the age of 14 years gives evidence in criminal proceedings, evidence of a statement made by that child is admissible as proof of any fact alleged in that statement if that child gives evidence to the effect that he or she made that statement.

(3) Evidence of a statement contemplated in subsection (1) or (2) may in criminal proceedings be given in the form of –

(a) the playing in court of a videotape or audiotape of the making of that statement, if the person to whom the statement was made gives evidence in such proceedings;

(b) a written record of that statement if the person to whom the statement has been made gives evidence in such proceedings;

(c) oral evidence of that statement given by the person to whom the statement was made, but only if it is not possible to give evidence in the form contemplated in paragraph (a) or (b).

(4) This section does not render –

~~(a) admissible any evidence that is otherwise inadmissible;~~

~~(b) inadmissible any evidence that is otherwise admissible under section 244 as hearsay evidence.~~

Amend the wording of section 185(2) in the 2004 Act as follows to clarify the procedure for testing whether a child witness is capable of giving intelligible testimony.

... unless it appears to the presiding judge or magistrate, on the basis of such informal preliminary questioning by such presiding judge or magistrate as is necessary to assess the child’s maturity, that the witness is incapable of giving intelligible testimony.

We recommend that section 309(3)(c) be deleted, thus retaining the minimum sentences in the Combating of Rape Act for rape under a statute or at common law. Alternatively, we recommend deleting the term “rape under a statute” from section 309(3)(c) and from Part 1 of Schedule 5 so that the same minimum sentences will apply to the common-law crime of rape as to rape under a statute, to avoid a return to use of the common-law crime in a manner that would undermine the purposes of the Combating of Rape Act.

“One of the central findings of this study is that men rape primarily to bolster their masculine pride and feed their desire for power. This is largely attributable to the rapist’s need to live up to society’s ideal of masculinity - to be aggressive, strong, virile, dominant and all-powerful; his need to compensate for feelings of powerlessness stemming from the family, alienation in the workplace and political and racial oppression; his socialised belief in rape myths; his objectification of women; his conditioning which leads him to believe that violence is the simplest means to solve problems and to get what he wants; his need to compensate for sexual and masculine inadequacy; and his strong association of sex with violence.”

Lloyd Vogelmann, *The Sexual Face of Violence*,
Raven Press: Johannesburg, 1990
(a study based primarily on interviews with 27 convicted rapists
from the Riverlea community in South Africa)

“In general, men who rape women mostly feel powerless. Because of that powerlessness, they want to exert power and often that is through raping someone. We have to look at the history of Namibia - the colonial oppression has a lot to do with how many of us behave. Socio-economic factors like poverty and the militaristic male environment we are raised in are also factors to be considered. Teaching the male to be aggressive and to be reserved about his emotions can be damaging when the child grows up.”

Namibian psychologist Shaun Whittaker,
The Namibian Weekender,
1 March 2002

Chapter 18

RAPE STATUTES IN OTHER COUNTRIES IN AFRICA

18.1 The situation in a sampling of other African countries is summarised in the table on pages 76-77.

18.2 The law on sexual offences in Africa has changed dramatically in recent years, especially in southern Africa. There is an increasing acknowledgement that men as well as women and children are vulnerable to sexual abuse. There is a trend towards broadening the range of sexual acts which constitute offences, and towards providing increased protection for children.

The **most contentious issues** seem to be the following, which have produced marked differences in approach in different countries:

- ▶ the appropriate **minimum and maximum sentences** for different sexual offences
- ▶ the **role of HIV in the definition of offences and in sentencing**, and the approach to HIV testing of perpetrators.

Thus, more discussion and debate of these topics at an international level would be useful.

18.3 Namibia's Combating of Rape Act is one of the most progressive rape laws in southern Africa, and it seems that neighbouring countries such as Lesotho, South Africa and Swaziland have looked to it as a model in many respects. Therefore, the recommendations contained in this study may be useful beyond the borders of Namibia.

RECOMMENDATIONS:

The statutes surveyed in other African countries, many of which appear to have borrowed from Namibia, suggest in turn some points on which Namibia's legislation could be improved.

As already proposed in this study in Chapter 6, **section 3 of Namibia's Combating of Rape Act should be amended to make the heaviest category of minimum sentence applicable to the rape of any person with a mental or physical disability.** (Compare Zimbabwe's 2001 legislation.)

Section 9 of Namibia's Combating of Rape Act (on the special duties of the prosecutor) should be amended to specifically require that the prosecutor shall ensure that the complainant receives orientation to the court and court procedures prior to the trial. (Compare Lesotho's legislation.)

Namibia's Combating of Rape Act should be amended to provide that the court may not draw any adverse inference solely from the fact that no semen or vaginal fluid was found on any part of the body of the complainant. (Compare Lesotho's legislation.)

The definition of "coercive circumstances" in section 2 of Namibia's Combating of Rape Act should be amended to include "abuse of power or authority to the extent that the person in respect of whom an act is committed is inhibited from indicating his or her resistance to such an act or his or her unwillingness to participate in such an act". (Compare Kenya's legislation.)

Many of the statutes examined contain provisions on extra-territorial jurisdiction. However, this is because many of the other status cover a broad range of sexual offences, including trafficking, sexual exploitation of children and offences pertaining to prostitution. There would appear to be no need to include extraterritorial jurisdiction in Namibia's Combating of Rape Act, but this issue should be kept in mind in respect of future law reforms pertaining to trafficking, child prostitution, and sex tourism.

Many of the statutes and bills examined incorporate issues of policy. This approach is not recommended for Namibia at this stage, as policy implementation within or outside a statute will depend primarily on political will and adequate budgets, and not on judicial enforcement.

"In rape-prone societies women hold limited power and authority, and males express contempt for women as decision-makers. In such societies, 'masculinity' is predicated on an ideology of toughness and an acceptance of interpersonal violence.

In rape-free societies by contrast, women are respected and influential members of the community, and the maternal features of nurturance and childbearing provide a basis of human interaction.

The attitude towards the environment is one of reverence, rather than dominance and exploitation, while the relationship between the sexes tends to be symmetrical and equal. Finally, rape is regarded with abhorrence and treated very seriously. In

West Sumatra, for example, a man who rapes has his masculinity ridiculed and is considered to have demeaned himself and everyone associated with him.

He faces assault - if not death - and may be driven from his village, never to return."

Lisa Vetten,

**"Roots of a Rape Crisis",
Crime and Conflict,**

No. 8, Summer 1997 at 9-12

(referring to findings of anthropologist Peggy Reeves-Sanday).

COMPARISON OF SELECTED RAPE STATUTES IN AFRICA

	TANZANIA Penal Code, as amended by the Sexual Offences Special Provisions Act 4 of 1998	BOTSWANA Botswana Penal Code, Chapter 0801 (as amended by the Penal Code Amendment Act 5 of 1998)	NAMIBIA Combating of Rape Act 8 of 2000	ZIMBABWE Criminal Law (Codification and Reform) Act, 23 of 2004	LESOTHO Sexual Offences Act 2003	KENYA Sexual Offences Act, 2006	SWAZILAND Sexual Offences & Domestic Violence Bill (under discussion in 2006)	SOUTH AFRICA Sexual Offences Bill (under discussion in 2006)
Definition of rape	Sexual intercourse with a girl or woman (a) without consent, where the person is not his wife or is his wife but the two are separated; (b) with consent, but under coercive circumstances (c) with consent where the person consenting was of unsound mind due to being alcohol or drugs (d) with consent under the false belief that the man is her husband (e) with or without consent, when the girl is under the age of 18.	"Any person who has unlawful carnal knowledge of another person, or who causes the penetration of a sexual organ or instrument, of whatever nature, into the person of another for the purposes of sexual gratification, or who causes the penetration of another person's sexual organ into his or her person, without the consent of such person, or with such person's consent if the consent is obtained by force or means of threats or intimidation of any kind, or by means of false pretences as to the nature of the act, or, in the case of a married person, by impersonating that person's spouse, is guilty of the offence termed rape."	Intentional commission of a "sexual act" under "coercive circumstances".	Where a male person "knowingly has sexual intercourse or anal sexual intercourse with a female person and, at the time of the intercourse. (a) the female person has not consented to it; and (b) he knows that she has not consented to it or realises that there is a real risk or possibility that she may not have consented to it." Supplemented by gender-neutral crimes of aggravated indecent assault (which also covers other penetrative sex acts) and sexual intercourse or performing indecent acts with young persons. Consent deemed absent in certain coercive circumstances.	Where a "sexual act" takes place in "coercive circumstances".	"A person commits the offence termed rape if – (a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs; (b) the other person does not consent to the penetration; or (c) the consent is obtained by force or by means of threats or intimidation of any kind." "Genital organs" is male or female genital organs and anus. An act is by definition "intentional and unlawful" if it is committed in "coercive circumstances".	Intentional unlawful sexual act with a person or without consent of that person, accomplished through force, threat of violence or intimidation.	"Any person (A), who unlawfully and intentionally commits an act of sexual penetration with a complainant (B) without the consent of B is guilty of the offence of rape". Consent is defined as "voluntary and uncoerced agreement", and will by definition be lacking in certain coercive circumstances.
Gender-neutral? (allows both men and women to lay charges of rape for sexual violations)	no, but supplemented by gender-neutral offence of "grave sexual abuse"	yes	yes	rape, no other sexual offences, yes	yes	yes	yes	yes
Rape within marriage illegal?	not unless couple is separated	no	yes	yes	yes	not stated; appears to be covered by definition of rape	yes	yes
Age of consent	18	16	12 for rape, 16 for Combating of Immoral Practices Act	16	16	18	16	12 for rape, 16 for "consensual sexual penetration and violation"

Coverage for sexual offences committed outside borders of country?	no	no	no	yes	yes	yes	no	yes
HIV status relevant to rapes?	no	grounds for heavier sentence, regardless of whether perpetrator had prior knowledge of status	grounds for heavier sentence, regardless of whether perpetrator had prior knowledge of status	grounds for minimum sentence, regardless of whether perpetrator had prior knowledge of status	grounds for heavier sentence, regardless of whether perpetrator had prior knowledge of status	grounds for higher sentence, regardless of whether perpetrator had prior knowledge of status	grounds for heavier sentence, regardless of whether perpetrator had prior knowledge of status	grounds for heavier sentence, if perpetrator had prior knowledge of status
Provision for involuntary HIV testing of alleged perpetrator?	no	yes (convicted offenders)	no	yes (both charged and convicted offenders)	yes (charged offenders)	yes (charged offenders)	yes (convicted offenders)	yes (charged offenders)
Minimum sentences	30 years with corporal punishment and compensation to victim life imprisonment for rape of girls under 10 or gang rape no minimums for offenders under 18 unless they are repeat offender or victim is under 10	10 years, 15 years if with violence that results in injury to victim	5, 10, or 15 years depending on the circumstances of the rape (first offence) 10, 20 or 45 years, depending on the circumstances of the rape (subsequent offences) not applicable to offenders under age 18	none in general (As of 2006, women's groups were lobbying for minimum sentences to be instituted for rape.) minimum sentence of 10 years for rape or aggravated sexual assault by HIV positive perpetrator	8 years to death penalty, depending on the offence and the circumstances	10 years in general "defilement" of child – ▶ 11 years or younger: life imprisonment ▶ age 12-15: 20 years ▶ age 16-18: 15 years minimum sentence of 15 years for sexual offence by perpetrator with HIV or any other life threatening STI gang rape – 15 years	15 years to life imprisonment, depending on circumstances of rape and age of victim death penalty in some circumstances, including where a parent rapes a child	life imprisonment where – ▶ rape is accompanied by murder ▶ a victim is raped more than once, whether by one or more perpetrators ▶ multiple perpetrators are acting together ▶ the rapist knows that he or she is HIV positive ▶ the victim is a girl under age 16 ▶ the victim is physically disabled ▶ the victim is mentally ill ▶ the rape involves the infliction of grievous bodily harm. 10, 15 or 20 years (1 st , 2 nd of subsequent offence) in other circumstances not applicable to offenders under age 16
Maximum sentences	life imprisonment	life imprisonment	life imprisonment	life imprisonment	death penalty	life imprisonment	death penalty	life imprisonment

Chapter 19

SUMMARY OF RECOMMENDATIONS

PART A GOVERNMENT

1. Cabinet

Encourage closer cooperation between the different service providers who work with rape complainants by establishing **a small forum where key officials meet regularly at national level to discuss issues and problems pertaining to rape cases across ministerial lines**. This could be replicated at regional and/or local levels. Of all the recommendations for improved action on rape cases, this one is probably the most fundamental.

If sufficient transport is not available to allow the police to respond adequately to rape cases, inter-ministerial arrangements should be made to allow police to utilise the vehicles of other government agencies to respond to emergencies. It is recognised, however, that such arrangements would be feasible only if strict and workable controls could be implemented to ensure that such facilities were not abused.

If there is a continued overall budgetary shortage for forensic tests, the National Forensic Science Institute should be authorised to give priority to rape cases (and perhaps certain other specified crimes, such as murder), at least for a specified time period as part of an overall campaign to combat rape. There should be a sufficient budget for rape kits for every rape case in which such evidence can be collected.

The government could support a special focus on rape cases by providing funding for a **special Scene of Crime Unit within the National Forensic Science Institute dedicated to respond only to rape cases**, at least for a limited time period.

The government should **commission a study of case withdrawals initiated by complainants** in order to ascertain what forms of assistance and support might dissuade complainants from seeking to withdraw rape cases.

2. Parliament

In respect of all agencies dealing with rape, Parliament should allocate sufficient budgetary resources for responding to rape cases. Expenditures on rape cases should be tracked and reported on to Parliament.

Parliament should **allocate a specific budget to the Woman and Child Protection Units** which is sufficient to allow them to fulfil their tasks of investigating rape cases adequately and efficiently. This would give concrete meaning to the government's stated commitment to combating gender-based violence.

The provision and control of **adequate police transport** should be a **budgetary and administrative priority**.

Parliament should ensure that the National Forensic Science Institute has a realistic and sufficient budget to perform the necessary forensic tests to secure convictions of guilty parties in rape cases. This should include an adequate budget for DNA tests. Skimping on this budget may result in a waste of other state resources spent in investigating and prosecuting cases which are ultimately lost because of the lack of sufficient forensic evidence.

The government could support a special focus on rape cases by providing funding for a **special Scene of Crime Unit within the National Forensic Science Institute dedicated to respond only to rape cases**, at least for a limited time period.

Focus attention on **strategies to increase reporting and to reduce case withdrawals by complainants instead of on more severe punishment for rapists.**

3. Ministry of Safety and Security

A. Police and Woman and Child Protection Units (WCPUs)

Statistics and record-keeping

SUGGESTIONS FOR IMPROVED NAMPOL RECORD-KEEPING

The Namibian Police are to be congratulated for compiling regional breakdowns of rape and attempted rape cases, and for keeping gender-disaggregated data as well as data on adult versus juvenile victims.

One difficulty with the current statistics is the discrepancy between police regions and political regions. It is useful to compare rape and other crime statistics with a range of demographic and socio-economic data. Yet most regional statistics about Namibia are based on the political regions. Despite the fact that NAMPOL uses police regions which are more administratively convenient for their purposes **published crime statistics with regional breakdowns should be based on Namibia's 13 political regions and not the 13 police regions**. If not, all statistics based on the police regions (which confusingly have identical names to the political regions) should clearly indicate that these are not the same in all cases as the political regions.

It would be useful to have more information about the ages of rape victims. We would suggest the following age breakdowns:

Under age 7

Age 7 is considered in law to be the age at which children are considered to acquire the potential for knowledge of the difference between right and wrong. No child under age 7 can be convicted of a crime.

Age 7 up to age 13

Age 14 is an important dividing line because 14 is the “age of consent” for purposes of the Combating of Rape Act.

Age 14 up to age 15

Consensual sexual contact between a child under age 16 and another person who is at least three years older is an offence under the Combating of Immoral Practices Act, sometimes referred to as “statutory rape”.

Age 16 up to age 18

Persons under age 18 are treated as children for many legal purposes, and this is the age used to define a child in the UN Convention on the Rights of the Child. Furthermore, perpetrators under age 18 are treated as juvenile offenders.

We would also suggest that the police routinely couple reports of rape and attempted rape with statistics on how many of these cases were unfounded (considered to be baseless) or undetected (unsolved).

If possible, the statistics on crimes reported should be coupled with information on:

- (a) arrests made
- (b) withdrawals (and the basis for any withdrawal)
- (c) prosecutions
- (d) convictions or acquittals.

This might be more difficult, as it would involve information from the Office of the Prosecutor-General as well as the police, but all of this information should be recorded on the case docket in any event. **Coupling crimes reported with the outcome of the cases is crucial for measuring the effectiveness of implementation of the Combating of Rape Act.**

SUGGESTIONS FOR IMPROVED WCPU RECORD-KEEPING

The various Woman and Child Protection Units already prepare quarterly reports which include some statistics, but these are not collected in a uniform or optimal way. Because all rape dockets are handed over to Woman and Child Protection Units for investigation, these units are particularly well-placed to collect and record information on rape cases.

We suggest that all WCPU statistics should be broken down by the crime reported. The overall Namibian Police statistics already do this, but the reports from the various WCPUs do not. If crimes are combined, then the information is not useful in providing a profile of any of the various offences. **Rape statistics should include a record of the following crimes:**

- ▶ rape
- ▶ attempted rape
- ▶ indecent assault
- ▶ incest
- ▶ 'statutory rape' under section 14 of the Combating of Immoral Practices Act.

Sexual violence within domestic relationships (which constitutes a domestic violence offence) should be recorded separately from other sexual violence (which is not a domestic violence offence).

We suggest that the following information be recorded for each crime by all WCPUs, and by all police stations if possible:

- a) breakdown of the above by the location or at least by region
- b) sex of victim
- c) sex of perpetrator
- d) age of victim
- e) age of perpetrator
- f) relationship, if any, between victim and perpetrator
- g) number of cases unfounded
- h) number of cases undetected
- i) number of cases withdrawn
- j) number of cases prosecuted
- k) number of cases resulting in convictions.

In rape cases, records should be kept of follow-up with the complainant:

- a) was post-exposure prophylaxis (PEP) given to the complainant?
- b) pregnancy prevention?
- c) treatment for sexually transmitted infections?
- d) HIV test?

- e) HIV counselling?
- f) follow-up counselling and testing?

The follow-up intervals recommended by the MOHSS for health purposes are 3 days, 6 weeks, 3 months and 6 months.

It should be noted that statistics which record only information about cases initially reported to the WCPUs are not very useful for measuring anything other than the work of the WCPUs themselves, since they cannot be measured against any particular segment of the population, nor are they a random sample of cases. Only national statistics from all police stations can provide a profile of reported sexual violence and domestic violence offences, because they can be measured against the entire population of Namibia.

The quarterly reports should be compiled into annual reports which provide information about the crimes *reported at each WCPU*, as well as totals for all the WCPUs combined. This information will be useful for understanding the work of the WCPUs.

Information on specific types of crime, such as rape and domestic violence offences, should be recorded nationally. For such crimes, the WCPUs should record information on all cases *investigated by each WCPU*, regardless of where the case was initially reported.

Rape cases involving persons with disabilities should be recorded and tracked as part of the standard record-keeping system of police and Woman and Child Protection Units, with information on this category of cases incorporated into regular reporting of crime statistics. Failure to include information on this category of cases might be interpreted as indifference towards persons with disabilities, and could also serve to create the false impression that rape and other crimes are rarely experienced among this category of people. In a larger body of cases, information about rapes of complainants with disabilities could give insights into how to decrease the vulnerability of such persons, and information about perpetrators in such cases might show who is most likely to abuse – caregivers, institutional workers, neighbours or others who stand in a special relationship to the complainant. This information would be useful in identifying preventative strategies.

Police dockets and J-88 forms should have a particular **space for indicating whether or not a complainant is disabled, and the particular form of disability should be specified.**

Prepare a standard form to be placed inside the police docket, or a space on the police docket cover, for recording the health services provided to complainants in rape cases. This will make it possible to carry out more systematic monitoring of the provision of indicated health interventions. (This information, of course, should not include any indication of the complainant's HIV status, in order to preserve confidentiality.)

For purposes of research and monitoring, it would be useful if there were a **standard system for indicating whether the charge is common-law rape or rape in terms of the Combating of Rape Act**. This distinction is particularly important for the purposes of assessing the operation of the minimum sentences which apply to rape in terms of the Combating of Rape Act.

Introduce an official form for recording notice to the complainant of the bail hearing, the outcome of the bail hearing and the bail conditions. The Combating of Rape Act could be amended to allow the issue of accompanying regulations, so that such a form could be officially promulgated.

We recommend that Namibia should periodically conduct **nationally-representative surveys about crime** which give particular attention to rape and other forms of gender-based violence, as a method of determining the incidence of such crimes more accurately.

Woman and Child Protection Unit services

The Woman and Child Protection Units should have a clear set of goals and strategies for achieving those goals, to make regular assessments more effective. An official Mission Statement and goals would also be helpful in giving the public a clear idea of what to expect from the WCPUs.

Police must be equipped with sufficient transport to respond to such calls for help, which in some regions means 4x4 vehicles. The provision and control of adequate police transport should be a budgetary and administrative priority.

All WCPU staff should be required to wear **official nametags** when on duty, **so that they can be clearly identified by members of the public**. Compliance with this rule should be monitored and enforced.

Members of the public must be encouraged to report problems experienced at WCPUs with details so that they can be addressed by the WCPU management.

All charge officers and persons who answer emergency calls should be regularly informed of the **correct contact information for WCPU staff members on call after-hours**.

The **contact numbers for officers on call should be displayed on notice boards outside the WCPUs** for the information of members of the public.

WCPU staff should be provided with regular counselling, as it is very emotionally stressful to deal regularly with cases of rape and domestic violence.

WCPU personnel should be routinely **equipped with firearms** to protect themselves and other service providers, as well as the rape complainant, and to increase public confidence that WCPU staff have the power to protect the public and to apprehend offenders.

The police should introduce a system for tape-recording statements as a method for obtaining accurate statements and overcoming the problem of poor literacy and writing skills on the part of police officers.

The police should introduce a new procedure whereby all police statements are initially written down in the complainant's home language. These statements would need subsequent translation into English by a sworn translator, but the increased accuracy and reliability of the statements would appear to outweigh the extra effort and expense entailed. The system of tape-recording statements proposed above could work in conjunction with the use of mother-tongue statements.

Additional training in techniques for interviewing children would be helpful. Alternatively, each WCPU should have access to 1-2 people with specialised training in interviewing children – a specially-trained police officer, a social worker, or some other local person with appropriate expertise – and these personnel should be “on call” for taking statements from minors or for assisting police who are doing this.

Provide **one-way glass** at as many WCPUs as possible to reduce the trauma of **ID parades** for the complainant. In areas where special victim-friendly court facilities are already in place, police could make arrangements with the Ministry of Justice to utilise these for ID parades before or after court hours.

The Office of the Prosecutor-General should work with police to develop **guidelines on acceptable interim or alternative procedures for ID parades** which could be utilised to minimise trauma to the complainant:

- ▶ The complainant could identify the perpetrators without touching, by means of numbers worn by the different persons, or by use of an inexpensive mechanism such as a focused laser pointer of the type used in lectures or even an ordinary torch with a clearly focused beam.
- ▶ The technique described by an interviewee where the suspects passed by an office one by one to be viewed by the complainant, instead of being viewed all at once in a formal line-up, could be used more widely if approved by prosecutors on legal grounds.
- ▶ Photographs could be used in place of actual persons.

The new design for rape kits being introduced by the National Forensic Science Institute should prevent pilfering from rape kits, but will not on its own stop theft of the entire kit. The Namibian Police should issue an official directive requiring that **all rape kits must be stored in a locked cupboard with limited access until needed**, with compliance monitored by appropriate police officials.

Police should receive annual training in the proper collection of forensic evidence, and each police station should have an investigator who has received specialised training in the collection of forensic evidence in rape cases. As an alternative, the government could support a special focus on rape cases by providing funding for a special Scene of Crime Unit within the National Forensic Science Institute dedicated to respond only to rape cases, at least for a limited time period.

Police should take more responsibility for supervising the completion of the J-88 form and ensuring that it is complete and accurate. The police officer who is present should have clear authority to complain to the appropriate official if the doctor does not complete the form fully and correctly.

All police stations, or at least Woman and Child Protection Units, should be equipped with cameras which self-develop photographs immediately, which could be used in conjunction with the medical examination to document visible injuries. The Office of the Prosecutor-General and the Namibian Police could issue instructions on how best to authenticate the photos to ensure that they will be admissible as evidence in court.

Members of the public and prosecutors should be encouraged to report long delays in police investigation to the NAMPOL complaints department so that monitoring and supervision of this problem can be intensified.

The Ministry of Justice or the Office of the Prosecutor-General should work together with the police to formulate **clear rules on who is responsible for ensuring that witnesses attend criminal cases**, to ensure that there is budgetary provision for carrying out this duty.

Improve the operation of the Woman and Child Protection Units by implementing the recommendations put forward in the 2006 UNICEF assessment as a matter of urgency. The provision of specialised training for WCPU staff should be a particular priority.

The recommendations put forward in the UNICEF study for dealing with **delays in police investigations** should also be implemented:

- ▶ monitoring and control by Unit Commanders of time spent in investigations and reasons for requesting court postponements for further investigation
- ▶ regular staff meetings to discuss case progress
- ▶ more aggressive supervision by the National Coordinator for WCPUs.

Anyone who has knowledge of a crime can lay a charge with the police, regardless of the attitude of the complainant. It is *not* necessary for a child's parent or guardian to consent to the laying of a charge involving the child as the complainant. People who act in good faith in reporting an alleged crime to the police, and police who investigate such charges in good faith, have no reason to fear lawsuits for defamation. **Circulars on these points should also be sent to all police stations** so that police will be sure to give correct information to the public on these concerns.

It seems that police and prosecutors may need to be alerted to the **permissibility and appropriateness of multiple charges of rape in a gang rape situation or in situations where multiple sexual acts by a single perpetrator took place in circumstances which warrant treating them as separate events**. This could be done in training courses or by means of official circulars.

Training needs

Additional training for WCPU staff in **techniques for interviewing children** would be helpful.

Police should receive annual training in the **proper collection of forensic evidence**.

Police should be informed accurately on **who can lay a charge**, and on the fact that **subsequent lawsuits for defamation are not possible where charges are laid in good faith**.

The Police Training College should include more practical training on statement taking, using mock crime situations as a basis for practice statement-taking which is assessed by the trainers.

Police training courses should include information on the **permissibility and appropriateness of multiple charges of rape in a gang rape situation or in situations where multiple sexual acts by a single perpetrator took place in circumstances which warrant treating them as separate events**.

Public awareness and community outreach

The Namibian Police and the Woman and Child Protection Units in particular are to be congratulated on their **community outreach efforts**, and **encouraged to continue** with such programmes. **Traditional leaders should be encouraged to become more involved** in these programmes. It would also be useful to engage an **independent expert to evaluate these programmes periodically** to see if there is any way in which the outreach efforts can be made even more effective. The existing community outreach and radio information programmes should be continued and expanded.

Public awareness campaigns should:

- ▶ seek to motivate persons to report rapes to the police by including information on the **danger of repeat rapes** by such persons.
- ▶ emphasise that **receiving compensation for a rape with the assistance of traditional authorities and laying a charge with the police are not mutually exclusive options**.
- ▶ **explain bail provisions** so that complainants will know that rapists who have threatened them are likely to be denied bail, and will be forbidden to have any contact with them even if bail is granted.
- ▶ include information on **the repercussions of false charges**
- ▶ include accurate information on **who can lay a charge**, and on the fact that **subsequent lawsuits for defamation are not possible where charges are laid in good faith**.

Use radio and school programmes to encourage children to speak to a trusted adult promptly if they experience any kind of abuse.

B. Prisons

The **problem of rape in prisons and police cells needs to be officially acknowledged** so that appropriate steps can be taken to increase security and prevent such incidents.

Implement a supervised rehabilitation programme for categories of sexual offenders who show the potential to respond to rehabilitation, beginning during imprisonment and continuing as a transition between imprisonment and release, along the lines of the programme recently enacted in Kenya. Make participation in an appropriate rehabilitation programme a condition of release from prison, and supervise participation in a specified programme in the same fashion that juvenile offenders are supervised in the course of diversion programmes. Failure to complete the programme as required could entail a fine, a return to prison and/or an increased level of supervision.

4. Ministry of Health and Social Services

We suggest that **future National Demographic and Health Surveys** should include broader questions on violence against women, the circumstances of such violence, and whether the violence was reported to the police. This could provide useful data on both rape and domestic violence.

Community members and institutions should be provided with information on how to identify signs of abuse in persons with mental disabilities in particular, and how to equip disabled persons to protect themselves. Moreover, community members must be encouraged to report rape and other abuse of persons with disabilities to the appropriate authorities. There is also a need for educational material on the sexual needs and rights of persons with various disabilities, particularly mental disabilities.

Government should produce more educational materials on rape and other legal rights aimed at persons with particular disabilities which make general public information inaccessible to them. While the efforts of government and non-governmental organisations to disseminate information on legal rights are commendable, there is a gap when it comes to persons with disabilities.

Strategies for addressing the **myth that sex with a virgin or a young child can cure AIDS** should be discussed with the **Traditional Healers Board**.

We recommend that Namibia adopt a **Victim Support Programme staffed by volunteers who are supervised and trained by an administrative official based in the Ministry of Health and Social Services or the Office of the Prosecutor-General**, with the following aims:

- ▶ to inform complainants and witnesses of case status and progress
- ▶ to communicate the complainant's needs and concerns to social workers or appropriate persons in the criminal justice system
- ▶ to orient complainants to court procedures (with the aid of simple-language educational material approved by the Office of the Prosecutor-General)
- ▶ to accompany complainants to court proceedings
- ▶ to involve complainants, when possible, in decision-making processes (such as explaining special arrangements for vulnerable witnesses so that they can consider which might make them more comfortable)
- ▶ to assist complainants with logistics related to court appearances
- ▶ to encourage the reporting of crime and discourage case withdrawals.

Approved volunteers should have a nametag and a photo ID. They should also be given clear guidelines on their role and the boundaries of their involvement. This Victim Support Programme could train volunteers to assist with explaining the court process to the complainant, with the assistance of materials developed especially for this purpose (such as comic books and colouring books on the court procedure for children, similar to those in use in South Africa, and appropriate indigenous language materials for adults). Volunteers could take complainants to the empty courtroom in advance of the trial and be available to answer any questions the complainant might have about practical issues such as transport and accommodation. This would free prosecutors to focus more fully on the legal issues which are their area of expertise.

Victim Support Programme volunteers could explain the possible special arrangements for vulnerable witnesses and help to determine the complainant's preferences.

This programme could be piloted in cases of rape (and perhaps domestic violence as well) and extended to other crime victims if successful.

Doctors should receive annual training in the proper collection of forensic evidence. We also endorse the idea under discussion that only specific doctors should be trained and authorised to collect medical evidence, along with selected nurses with appropriate experience.

Doctors should receive more regular and intense training on the J-88 forms and their legal impact. This training should involve both the National Forensic Science Institute and prosecutors from the specialised unit on sexual offences.

Foreign doctors working in Namibia should receive a more comprehensive orientation to the local legal, social and cultural environment.

A small supply of rape kits should be stored at public and private hospitals, and the National Forensic Science Institute should issue clear instructions to doctors on what procedures to follow in cases where a rape complainant is examined before reporting the rape to the police.

The Ministry of Health and Social Services should issue an official circular setting forth the correct policy on the examination of minor rape victims.

This circular should discuss in particular (a) when the consent of a parent or guardian is necessary (b) what to do if a parent or guardian is not present and cannot be located within a reasonable time and (c) what to do if a minor rape victim does not want his or her parents to be informed about the rape, or if the parent or guardian is the rape suspect.

The Ministry of Health and Social Services should develop new standard consent forms for the examination of all rape victims, including a provision on consent to the collection of medical evidence.

The doctor who conducted the examination should keep a carbon copy of the J-88 for monitoring purposes, and to assist the doctor in preparing to testify in court. Copies of J-88 forms retained by the doctors who perform the examinations could be the basis of such monitoring.

The performance of doctors who examine rape victims and complete J-88 forms should be regularly assessed by a medical management team from the Ministry of Health and Social Services, as a means of monitoring doctors' performance and identifying training needs.

The Ministry of Health and Social Services and the Office of the Prosecutor-General should consider appropriate disciplinary or even criminal sanctions against doctors who wilfully fail to follow proper procedures in collecting medical evidence and completing any required forms (such as J-88 forms).

The booklet developed by the National Science Forensic Institute to accompany rape kits should be assessed to see if it could replace the J-88 form in future.

Work with the police to develop a standard form to be placed inside the police docket, or a space on the police docket cover, for recording the health services provided to complainants in rape cases. This will make it possible to carry out more systematic monitoring of the provision of indicated health interventions. (This information, of course, should not include any indication of the complainant's HIV status, in order to preserve confidentiality.)

Health issues pertaining to rape should be the focus of public awareness campaigns.

Continue roll-out of PEP and associated services to clinics. As an interim measure, pair all clinics with district hospitals and encourage clinic staff to refer rape complainants to the nearest district hospital for PEP. Police could be asked to assist with transport for this purpose if necessary.

All rape complainants who receive PEP should be given a pamphlet to take home which contains clear and simple information such as instructions on how to take the medication, information about side-effects, the recommended dates for follow-up tests and the importance of completing the course of medication as prescribed. This would be useful for the future reference of the rape survivor, who may be too traumatised at the time of the rape to take in information clearly at the time.

The rape complainant should also be given an appointment in writing for a follow-up visit to the nearest ART clinic, and directed to contact the nearest ART clinic if there are problems with side effects from the PEP or any other post-rape medication. Because of the trauma involved in a rape, we suggest that **a community counsellor should be asked to initiate contact with the rape complainant if she or he does not appear at the follow-up appointment.**

The Ministry of Health and Social Services should issue **guidelines on appropriate follow-up procedures when PEP is administered to suspected perpetrators.**

The proposed Victim Support Programme could train volunteers to assist with explaining the court process to the complainant, with the assistance of materials developed especially for this purpose. Alternatively, or as an interim measure, social workers could be drafted to assist with this task. This would be particularly appropriate for social workers who are already working with Woman and Child Protection Units. However, as a general matter, the shortage of social workers mitigates against providing them with any extra duties.

Provide prosecutors with more training on the relevant medical issues, to facilitate their use of medical evidence.

5. National Forensic Science Institute

The new rape kits and the improved distribution and tracking systems seem likely to resolve many of the problems encountered in the past. These new systems will hopefully ensure that rape kits are available at all police stations, and resolve past problems concerning the unbroken chain of evidence. These new systems should be put into place as soon as possible. **We suggest that the National Forensic Science Institute assess the effectiveness of this new approach to distribution after its first year of operation, and make the results of the assessment public so that a wide range of all stakeholders can respond with suggestions if necessary.** Alternatively, it might be useful to arrange independent monitoring of the new systems by an outside consultant in due course to see if they are effective in practice.

Police and doctors should receive annual training in the proper collection of forensic evidence, and each police station should have an investigator who has received specialised training in the collection of forensic evidence in rape cases. As an alternative, the government could support a special focus on rape cases by providing funding for a special Scene of Crime Unit within the National Forensic Science Institute dedicated to respond only to rape cases, at least for a limited time period.

A small supply of rape kits should be stored at public and private hospitals, and the National Forensic Science Institute should issue clear instructions to doctors on what procedures to follow in cases where a rape complainant is examined before reporting the rape to the police.

The National Forensic Science Institute should discuss the forensic value of pubic hair combings and fingernail scrapings with doctors and police to combat misunderstandings on this point.

Doctors should receive more regular and intense training on the J-88 forms and their legal impact. This training should involve both the National Forensic Science Institute and prosecutors from the specialised unit on sexual offences.

The form developed by the National Science Forensic Institute to accompany rape kits should be assessed by the Office of the Prosecutor-General to see if it could replace the J-88 form in future.

Prosecutors should be advised to cross-check with the National Forensic Science Institute directly when the docket indicates that samples were sent to the lab but contains no lab report. Surprisingly, this is not common procedure in practice. A simple telephone call could thus bring the lab results together with the case docket.

The National Forensic Science Institute should prepare a short and simple briefing document on its procedures for distributing rape kits and processing medical evidence, including the normal time frames for lab results, which could be used for reference by police, prosecutors, defence counsel, presiding officers and the media.

Provide prosecutors with more training on the relevant medical issues, to facilitate their use of medical evidence.

6. Ministry of Justice

A. Proposed amendments to the Combating of Rape Act 8 of 2000

Make rape of persons with physical or mental disabilities a basis for imposing the highest category of minimum sentence. (Compare Zimbabwe's 2001 legislation.)

For the sake of clarity, amend the Act to state that **attempts to commit a rape in terms of the statute will attract the same minimum penalties as a completed crime** – even though this is already the legal position.

Using the Stock Theft Act 15 of 1990 as a model, amend the Act **to empower Regional Magistrate's Court to impose any minimum penalty specified in the Act, even if such penalty exceeds the ordinary jurisdiction of the court, and to place restrictions on concurrent sentences for rape** – but without completely removing judicial discretion in this regard. For example, the Act might require that sentences

for multiple count of rape be served consecutively unless the court finds substantial and compelling circumstances which warrant concurrent sentences. This would effectively create a presumption in favour of consecutive sentences for rape.

Amend the Act **to place limits on what portion of a minimum sentence must be served before an offender is eligible for parole.**

Amend section 9 of the Act (on the special duties of the prosecutor) **to specifically require that the prosecutor shall ensure that the complainant receives orientation to the court and court procedures prior to the trial.** (Compare Lesotho's legislation.)

Amend the Act **to provide that the court may not draw any adverse inference solely from the fact that no semen or vaginal fluid was found on any part of the body of the complainant.** (Compare Lesotho's legislation.)

Amend the definition of "coercive circumstances" in section 2 of the Act to include "abuse of power or authority to the extent that the person in respect of whom an act is committed is inhibited from indicating his or her resistance to such an act or his or her unwillingness to participate in such an act". (Compare Kenya's legislation.)

Introduce an official form for recording notice to the complainant of the bail hearing, the outcome of the bail hearing and the bail conditions. Amend the Act **to allow the issue of accompanying regulations**, so that such a form could be officially promulgated.

B. Proposed amendments to Criminal Procedure Act 24 Of 2004

Amend section 64 of the Act **to place the duty of informing the complainant of the outcome of the bail hearing on the investigating officer rather than on the prosecutor** so that the law conforms to usual practice and the responsibility is clear. The prosecutor should have a duty to inform the investigating officer of the outcome of the bail hearing, and the investigating officer should have a duty to cause the complainant to be informed of the outcome as soon as reasonably possible.

Amend section 64 of the Act to **remove subsection (3), which gives the accused responsibility for asking the station commander to inform the complainant of the time and place of the bail application in certain circumstances.** It is probably not to the accused's advantage to ensure that the complainant is timeously aware of the bail application, so this requirement works against logic and interest. **The process should be initiated by the prosecutor instead of the accused in these circumstances.**

Amend the Act **to allow the court in unusual instances to impose conditions other than a no-contact provision which could protect the complainant, if this is in accordance with the complainant's wishes.** For example, where the complainant and the accused are family members or have children together, a complete prohibition on contact may be impractical or simply unenforceable.

Several of the special provisions enacted for **vulnerable witnesses** in 2003 (by the Criminal Procedure Amendment Act 24 of 2003) have been removed or weakened in the 2004 Criminal Procedure Act. We recommend that these provisions should be essentially restored.

a) Amend section 187(4) to require that the presiding officer must re-state or re-phrase questions put to witnesses under age 14.

(4) Notwithstanding subsection (1) or (2) or anything to the contrary in any other law contained but subject to section 193, the presiding judge or magistrate must ~~may~~, during the cross-examination of any witness under the age of 14 years, either restate the questions put to that witness, and may ~~or~~, in his or her discretion, simplify or rephrase such questions.

This would restore the position under section 166(4)-(5) of the Criminal Procedure Act 51 of 1977, as amended by Criminal Procedure Amendment Act 24 of 2003 on vulnerable witnesses.

b) Restore the provision which states that the evidence of a child shall not be regarded as being unreliable, or treated with special caution, just because the witness is a child, so that the reliability of a child's evidence and the weight which should be given to it must be assessed in the same way as the evidence of any other witness. This following should be added as subsection (5) of section 185, or as a new section of the Act:

(5) A court shall not regard the evidence of a child as inherently unreliable and shall therefore not treat such evidence with special caution only because that witness is a child.

This proposed provision mirrors section 164(4) of the Criminal Procedure Act 51 of 1977, which was omitted in the 2004 law.

c) Amend section 245 on the provision on the admissibility of previous statements by child witnesses to restore the previous criteria from section

216A of the 1977 Criminal Procedure Act, with the addition of the test of the “interests of justice” in order to ensure protection of the accused’s rights.

245. (1) Evidence of any statement made by a child under the age of 14 years is admissible at criminal proceedings as proof of any fact alleged in that statement if the court –

(a) is satisfied that –

- (i) the child concerned is unable to give evidence ~~incapable of giving evidence~~ relating to any matter contained in the statement concerned; and
- (ii) such statement considered in the light of all the surrounding circumstances contains indications of reliability; and

(b) having regard to any prejudice to a party to the proceedings that the admission of such evidence might entail, is of the opinion that such evidence should be admitted in the interests of justice.

(2) If a child under the age of 14 years gives evidence in criminal proceedings, evidence of a statement made by that child is admissible as proof of any fact alleged in that statement if that child gives evidence to the effect that he or she made that statement.

(3) Evidence of a statement contemplated in subsection (1) or (2) may in criminal proceedings be given in the form of –

- (a) the playing in court of a videotape or audiotape of the making of that statement, if the person to whom the statement was made gives evidence in such proceedings;
- (b) a written record of that statement if the person to whom the statement has been made gives evidence in such proceedings;
- (c) oral evidence of that statement given by the person to whom the statement was made, but only if it is not possible to give evidence in the form contemplated in paragraph (a) or (b).

(4) This section does not render –

- ~~(a) admissible any evidence that is otherwise inadmissible;~~
- ~~(b) inadmissible any evidence that is otherwise admissible under section 244 as hearsay evidence.~~

Amend the wording of section 185(2) in the 2004 Act as follows to clarify the procedure for testing whether a child witness is capable of giving intelligible testimony.

... unless it appears to the presiding judge or magistrate, on the basis of such informal preliminary questioning by such presiding judge or magistrate as is necessary to assess the child’s maturity, that the witness is incapable of giving intelligible testimony.

The common-law crime of rape should not invoke heavier minimum sentences than rape under the Combating of Rape Act. Increased deterrence of potential rapists would be better achieved by a focus on increasing conviction rates rather than by increasing punishment for offenders. **We recommend that section 309(3)(c) be deleted, thus retaining the minimum sentences in the Combating of Rape Act for rape under a statute or at common law.** Alternatively, we recommend deleting the term “rape under a statute” from section 309(3)(c) and from Part 1 of Schedule 5 so that the same minimum sentences will apply to the common-law crime of rape as to rape under a statute, to avoid a return to use of the common-law crime in a manner that would undermine the purposes of the Combating of Rape Act.

C. Office of the Prosecutor-General

The Office of the Prosecutor-General should work with the police to institute a system of prosecutor-guided investigations. Specialised prosecutors should be assigned to rape cases immediately when the docket is opened, so that they can work closely together with police to guide the investigation from the beginning, to reduce delays and increase conviction rates. This can be done by means of regular telephone contact even if the prosecutor cannot physically work with the police in question.

There should be clear guidelines from the Office of the Prosecutor-General on when and how to use **anatomically correct dolls** to assist in taking statements from children without creating problems in court later on.

Requests for the withdrawal of cases involving complainants with mental disabilities should be treated with strict caution. While mental disabilities vary, many persons with such disabilities may lack the coherency to ask for a withdrawal or to understand the implications of such an action.

The Office of the Prosecutor-General should work with police to develop guidelines on acceptable interim or alternative procedures for ID parades which could be utilised to minimise trauma to the complainant:

- ▶ The complainant could identify the perpetrators without touching, by means of numbers worn by the different persons, or by use of an inexpensive mechanism such as a focused laser pointer of the type used in lectures or even an ordinary torch with a clearly focused beam.
- ▶ The technique described by the interviewee where the suspects passed by an office one by one to be viewed by the complainant, instead of being viewed all at once in a formal line-up could be used more widely if approved by prosecutors on legal grounds.
- ▶ Photographs could be used in place of actual persons.

Doctors should receive more regular and intense training on the J-88 forms and their legal impact. This training should involve both the National Forensic Science Institute and prosecutors from the specialised unit on sexual offences.

The Ministry of Health and Social Services and the Office of the Prosecutor-General should consider appropriate disciplinary or even criminal sanctions against doctors who wilfully fail to follow proper procedures in collecting medical evidence and completing any required forms (such as J-88 forms).

The form developed by the National Science Forensic Institute to accompany rape kits should be assessed by the Office of the Prosecutor-General to see if it could replace the J-88 form in future.

All police stations, or at least Woman and Child Protection Units, should be equipped with cameras which self-develop photographs immediately, which could be used in conjunction with the medical examination to document visible injuries. The Office of the Prosecutor-General and the Namibian Police could issue instructions on how best to authenticate the photos to ensure that they will be admissible as evidence in court.

Prosecutors should be advised to cross-check with the National Forensic Science Institute directly when the docket indicates that samples were sent to the lab but contains no lab report. Surprisingly, this is not common procedure in practice. A simple telephone call could thus bring the lab results together with the case docket.

It seems that prosecutors may need to be alerted to the **permissibility and appropriateness of multiple charges of rape in a gang rape situation or in situations where multiple sexual acts by a single perpetrator took place in circumstances which warrant treating them as separate events.** This could be done in training courses or by means of official circulars.

Introduce an official form for recording notice to the complainant of the bail hearing, the outcome of the bail hearing and the bail conditions. The Combating of Rape Act could be amended to allow the issue of accompanying regulations, so that such a form could be officially promulgated.

Although many professionals involved in implementing the law were clearly well-informed about the provisions relating to bail, some seem to be confused about certain details. This indicates that this aspect of the law should be a focus in training sessions for prosecutors. It is particularly important to ensure that presiding officers understand that the complainant's opinion on whether bail should be granted is relevant, but not decisive.

The mandatory "no-contact" provision should be a focus of training and discussion for prosecutors.

The government should commission a study of case withdrawals initiated by complainants in order to ascertain what forms of assistance and support might dissuade complainants from seeking to withdraw rape cases.

We recommend that Namibia adopt a **Victim Support Programme staffed by volunteers who are supervised and trained by an administrative official based in the Ministry of Health and Social Services or the Office of the Prosecutor-General**, with the following aims:

- ▶ to inform complainants and witnesses of case status and progress
- ▶ to communicate the complainant's needs and concerns to social workers or appropriate persons in the criminal justice system
- ▶ to orient complainants to court procedures (with the aid of simple-language educational material approved by the Office of the Prosecutor-General)
- ▶ to accompany complainants to court proceedings
- ▶ to involve complainants, when possible, in decision-making processes (such as explaining special arrangements for vulnerable witnesses so that they can consider which might make them more comfortable)
- ▶ to assist complainants with logistics related to court appearances
- ▶ to encourage the reporting of crime and discourage case withdrawals.

Approved volunteers should have a nametag and a photo ID. They should also be given clear guidelines on their role and the boundaries of their involvement.

This Victim Support Programme could train volunteers to assist with explaining the court process to the complainant, with the assistance of materials developed especially for this purpose (such as comic books and colouring books on the court procedure for children, similar to those in use in South Africa, and appropriate indigenous language materials for adults). Volunteers could take complainants to the empty courtroom in advance of the trial and be available to answer any questions the complainant might have about practical issues such as transport and accommodation. This would free prosecutors to focus more fully on the legal issues which are their area of expertise.

Victim Support Programme volunteers could explain the possible special arrangements for vulnerable witnesses and help to determine the complainant's preferences.

This programme could be piloted in cases of rape (and perhaps domestic violence as well) and extended to other crime victims if successful.

Arrange for volunteers or social workers to spend time with complainants explaining the general court procedure and addressing practical needs, though a Victim Support Programme or more informally.

Make sure that children are given an **appropriate orientation to court procedures** so that they will understand what is happening and feel comfortable in the court setting.

In the absence of a Victim Support Programme, the Office of the Prosecutor-General should re-organise the workload of prosecutors involved in rape cases with their legal duty to the complainant in mind, so that they are able to dedicate more time and energy to the task of orienting rape complainants to the court process.

Prosecutors should take primary responsibility for suggesting special arrangements for vulnerable witnesses.

The **provision requiring closed courts during rape trials** is not universally well known by prosecutors, legal aid lawyers and magistrates. **The Ministry of Justice should issue a circular informing existing officials of the correct legal position, and training for new officials should incorporate this issue.**

Prosecutors should be encouraged to report long delays in police investigation to the NAMPOL complaints department so that monitoring and supervision of this problem can be intensified.

The Ministry of Justice or the Office of the Prosecutor-General should work together with the police to formulate **clear rules on who is responsible for ensuring that witnesses attend criminal cases**, to ensure that there is budgetary provision for carrying out this duty.

Provide prosecutors with more training on the relevant medical issues, to facilitate their use of medical evidence.

Reduce the administrative burden on prosecutors by providing more support from court clerks, court orderlies or other administrative personnel for non-legal tasks.

A few of the professionals who are involved in the implementation of the Combating of Rape Act are not completely clear on some of the finer points of **the new evidentiary rules**. This should be a focus of information and training.

The **new rules on admissibility and credibility of evidence from children** are not uniformly understood and applied. This should be a **focus of information and training**.

More detailed information and training on **the legal position regarding minimum sentences, and case law developments in this area**, would assist prosecutors. All prosecutors should be reminded that the statutory minimums do not apply to offenders under age 18.

Encourage all local media to give prominent coverage to acquittals on charges of rape, and to legal actions against complainants who lay false charges of rape.

The provisions on privacy in the Combating of Rape Act are not being enforced in practice. **We suggest that media who violate the law on this score should be prosecuted.**

The Office of the Prosecutor-General should **alert all prosecutors and presiding officers to the existing law on attempted rape since the legal authority for this point is contained in a rather obscure statute**. This could be done in training courses or by means of official circulars.

Revision of J-88 forms

J-88 forms should have a particular space for indicating whether or not a complainant is disabled, and the particular form of disability should be specified.

Currently, the J-88 only contains a question on mental state, which refers to the general emotional state of the complainant and not to the presence of a mental disability.

The **booklet developed by the National Science Forensic Institute to accompany rape kits should be assessed** by the Office of the Prosecutor-General to see if it could replace the J-88 form in future.

A Spanish translation of the J-88 form should be prepared for use by Cuban doctors working in Namibia. Arrangements could be made in Windhoek or other urban centres for a sworn translation to be added to the docket as soon as possible.

D. Courts

Information and training for presiding officers

Where postponements of rape cases are requested in court on the grounds that the lab results are not available, courts should request confirmation from the National Forensic Science Institute before granting a postponement on these grounds. This simple expedient would prevent anyone from using “no lab results” as an excuse to cover up other shortcomings in respect of the case. Anyone who says in court that lab results are not yet available while knowing that this is untrue should be dealt with severely. Cross-checking procedures such as these would help to identify with certainty where communications have broken down, and which institution is at fault.

Although many professionals involved in implementing the law were clearly well-informed about the provisions relating to bail, some seem to be confused about certain details. This indicates that this aspect of the law should be a focus in training sessions for magistrates. It is particularly important to ensure that presiding officers understand that it is not the complainant’s opinion on whether bail should be granted is relevant, but not decisive.

The **mandatory “no-contact” provision** should be a **focus of training and discussion for magistrates.** If the complainant and accused share the same residence, the court should always specify who is to leave the residence while the case is pending, with priority being given to the complainant’s wishes unless special circumstances dictate otherwise.

A particular official at each court should be given **responsibility for processing legal aid applications and forwarding them to the appropriate legal aid office**, to allow for monitoring and follow-up.

Encourage presiding officers to take a harder line against any legal practitioners who cause unwarranted delays in criminal cases.

The **provision requiring closed courts during rape trials** is not universally well known by prosecutors, legal aid lawyers and magistrates. **The Ministry of Justice should issue a circular informing existing officials of the correct legal position, and training for new officials should incorporate this issue.**

Reduce the administrative burden on prosecutors by providing more support from court clerks, court orderlies or other administrative personnel for non-legal tasks.

Give rape cases involving minors, or at least children under age 16, priority on the court roll so that they can be heard promptly, before the child's memory of the incident fades.

A few of the professionals who are involved in the implementation of the Combating of Rape Act are not completely clear on some of the finer points of the **new evidentiary rules**. This should be **a focus of information and training**.

The **new rules on admissibility and credibility of evidence from children** are not uniformly understood and applied. This should be **a focus of information and training**.

More generally, **presiding officers would benefit from information and sensitisation on the testimony of child witnesses by experts in this field**. Given the prevalence of child rape in Namibia, it would be appropriate for the judiciary to arrange workshops on this topic.

Prosecutors should take primary responsibility for suggesting special arrangements for vulnerable witnesses, **but presiding officers should also be sensitised to play a more active role** just as they are expected to give special attention to the rights of an unrepresented accused.

Court rules should require that the record of any case of sexual abuse involving a child under age 18 should indicate what vulnerable witness provisions were utilised, and the reasons for applying or not applying the potential special arrangements. This would ensure that the vulnerable witness options are given appropriate consideration.

More detailed information and training on **the legal position regarding minimum sentences, and case law developments in this area**, would assist presiding officers. All presiding officers should be reminded that the statutory minimums do not apply to offenders under age 18.

Court interpreters

The Ministry of Justice should provide specific training on rape cases to court interpreters, to increase their understanding of how to make sensitive and accurate translations on sexual issues.

Where possible, **the Ministry of Justice should provide interpreters of the same sex as the rape complainant**, or of whatever sex the complainant prefers.

E. Legal aid

The decentralisation of legal aid services which is already underway should help to prevent backlogs in decisions on legal aid applications. However, it appears that there are sometimes **administrative break-downs between processing the application and forwarding the application to the appropriate legal aid office**. A particular official at each court should be given responsibility for this task, to allow for monitoring and follow-up.

The **provision requiring closed courts during rape trials** is not universally well known by prosecutors, legal aid lawyers and magistrates. **The Ministry of Justice**

should issue a circular informing existing officials of the correct legal position, and training for legal aid lawyers should incorporate this issue.

A few of the professionals who are involved in the implementation of the Combating of Rape Act are not completely clear on some of the finer points of the **new evidentiary rules**. This should be **a focus of information and training**.

7. Ministry of Gender Equality and Child Welfare

The Children's Act 33 of 1960 is expected to be replaced by a **new Child Care and Protection Act**. The Ministry of Gender Equality and Child Welfare should ensure that this new law contains **a provision explicitly addressing consent to medical examination of minors and the provision of appropriate post-rape medication to minors** in instances where parental consent cannot be obtained, where the minor rape victim does not want his or her parents to be informed about the rape, or where the parent or guardian is the rape suspect.

Reported rapes of both children and adults are particularly high in **the Hardap Region** by every measure. Thus, it would make sense to **target this region for particularly intense interventions on the prevention of gender-based violence, with particular emphasis on preventing and combating child rape**. Even if the distinction reflects a greater willingness to report rape rather than a higher incidence of rape, targeted intervention would still be warranted as this would still mean that the issue of rape is being dealt with more openly in this region than in others.

Government should produce more educational materials on rape and other legal rights aimed at persons with particular disabilities which make general public information inaccessible to them. While the efforts of government and non-governmental organisations to disseminate information on legal rights are commendable, there is a gap when it comes to persons with disabilities.

Public awareness campaigns should:

- ▶ seek to motivate persons to report rapes to the police by including information on the **danger of repeat rapes** by such persons.
- ▶ emphasise that **receiving compensation for a rape with the assistance of traditional authorities and laying a charge with the police are not mutually exclusive options**.
- ▶ **explain bail provisions** so that complainants will know that rapists who have threatened them are likely to be denied bail, and will be forbidden to have any contact with them even if bail is granted.

- ▶ include information on **the repercussions of false charges**
- ▶ include accurate information on **who can lay a charge**, and on the fact that **subsequent lawsuits for defamation are not possible where charges are laid in good faith.**

Use radio and school programmes to encourage children to speak to a trusted adult promptly if they experience any kind of abuse.

8. Traditional leaders

Traditional leaders should be encouraged to become more involved in community outreach efforts relating to rape, in cooperation with the Namibian Police and the Woman and Child Protection Units.

Traditional leaders should inform their constituencies that receiving compensation for a rape with the assistance of traditional authorities and laying a charge with the police are not mutually exclusive options. Community members should be informed of the danger of repeat rapes and encouraged to lay charges with the police for the protection of the community.

PART B

STAKEHOLDERS OUTSIDE GOVERNMENT

1. NGO community

Reported rapes of both children and adults are particularly high in the **Hardap Region** by every measure. Thus, it would make sense to **target this region for particularly intense interventions on the prevention of gender-based violence**, with particular emphasis on preventing and combating child rape. Even if the distinction reflects a greater willingness to report rape rather than a higher incidence of rape, targeted intervention would still be warranted as this would still mean that the issue of rape is being dealt with more openly in this region than in others.

Non-governmental organisations should produce more educational materials on rape and other legal rights aimed at persons with particular disabilities

which make general public information inaccessible to them. While the efforts of government and non-governmental organisations to disseminate information on legal rights are commendable, there is a gap when it comes to persons with disabilities. The Legal Assistance Centre has made a small start in this direction by producing material on rape and domestic violence in Braille, but there is still a need for more materials aimed at persons with disabilities.

Public awareness campaigns should:

- ▶ seek to motivate persons to report rapes to the police by including information on the **danger of repeat rapes** by such persons.
- ▶ emphasise that **receiving compensation for a rape with the assistance of traditional authorities and laying a charge with the police are not mutually exclusive options.**
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- ▶ include information on **the repercussions of false charges**
- ▶ include accurate information on **who can lay a charge**, and on the fact that **subsequent lawsuits for defamation are not possible where charges are laid in good faith.**

Health issues pertaining to rape should also be the focus of public awareness campaigns.

All service providers and counsellors should be given **clear training and information on PEP and other post-rape medications, the time frames for their use, and their importance to the rape complainant.**

The Legal Assistance Centre and other human rights organisations should take **steps to help the general public understand the concept of bail more clearly**, as part of their general education on human rights.

Use radio and school programmes to encourage children to speak to a trusted adult promptly if they experience any kind of abuse.

Non-governmental organisations working with gender-based violence should share plans for workshops with the National Coordinator of the WCPUs, to facilitate better coordination and more effective coverage of different parts of the country.

Members of the public must be encouraged to report problems experienced at WCPUs with details so that they can be addressed by the WCPU management.

Members of the public should be encouraged to **report long delays in police investigation to the NAMPOL complaints department** so that monitoring and supervision of this problem can be intensified.

2. Telecom

Telecom should work together with rural communities to provide a network of public phones and cell phones in rural areas, including “hotline” phones which allow free calls to police. In areas without Telecom coverage, perhaps local churches or traditional leaders could be equipped with satellite phones similarly programmed to make emergency calls only.

3. Donor community

Telecom should work together with rural communities to provide a network of public phones and cell phones in rural areas, including “hotline” phones which allow free calls to police. **In areas without Telecom coverage, perhaps local churches or traditional leaders could be equipped with satellite phones similarly programmed to make emergency calls only. Donors might be asked to consider funding such phones in selected communities on a trial basis.**

Police must be equipped with sufficient transport to respond to such calls for help, which in some regions means 4x4 vehicles. It is recognised, however, that such improvements in transport would be feasible only if strict and workable controls could be implemented to ensure that vehicles were not abused.

4. Media

Encourage all local media to **give prominent coverage to acquittals on charges of rape, and to legal actions against complainants who lay false charges of rape.**

The provisions on privacy in the Combating of Rape Act are not being enforced in practice. **We suggest that media who violate the law on this score should be prosecuted.**

5. Legal profession

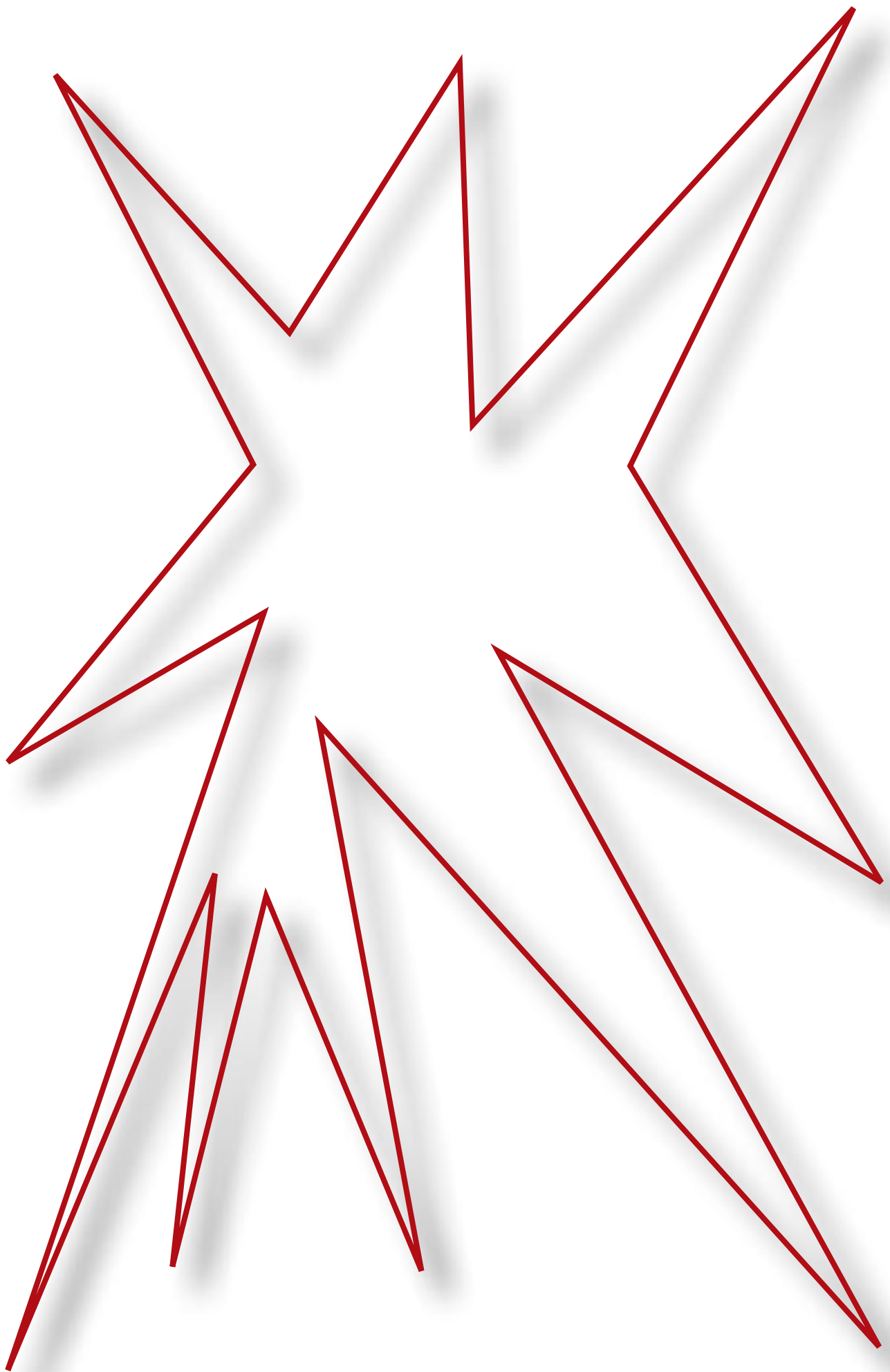
Following on the examples of South Africa and Canada as well as recent Namibian jurisprudence, **legal practitioners should explore possibilities for further development of the law of delict and the duty of care on the part of police and other service providers in appropriate cases involving gender-based violence.**

What can private companies do to fight rape?

- 1) Provide a counselling service where employees can discuss personal problems with an in-house social worker, or by means of referral to an appropriate private counsellor at company expense.
- 2) Arrange periodic classes for employees during working hours on how to deal with stress and anger.
- 3) Arrange video showings and facilitated discussion of films on the topic of violence against women and children for small groups of male employees.
- 4) Ask employees to take the White Ribbon Campaign pledge not to support or stand silent in the face of violence. (More information about this can be obtained from Namibian Men for Change or the White Ribbon Campaign, two national groups of men who have joined together to fight against violence against women and children.)
- 5) Sponsor company employees to act as mentors to young boys in the community who do not have responsible father figures in their lives. Companies might consider a "Big Brother" programme involving regular outings and sports activities for employees and the young boys they are paired with. Such a programme should be established with guidance and back-up from a social worker or psychologist.
- 6) Private companies could sponsor construction, renovation or furnishing of Woman and Child Protection Units and court-friendly facilities, or the provision of one-way glass for ID parades.
- 7) Support medical aid schemes with good coverage for rape victims, including PEP.

“Rape is a serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilization... The Courts are under a duty to send a clear message to the accused, to other potential rapists and to the community: We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights.”

S v Louw,
High Court,
Case No. CC 09/05,
24 November 2006 (Mainga, J),
quoting with approval
S v Chapman
1997(2) SACR 3(A)
at 5B a\ (Mohamed, C.J).



**Gender Research and
Advocacy Project
LEGAL ASSISTANCE CENTRE**

