



**REPUBLIC OF NAMIBIA**

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**LAW REFORM AND DEVELOPMENT COMMISSION**

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**FURTHER REPORT**

on the law pertaining to

**RAPE**

**LRDC 18**

**Windhoek, Namibia;  
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REPUBLIC OF NAMIBIA

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**LAW REFORM AND DEVELOPMENT COMMISSION**

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Hon. Mrs. Pendukeni Iivula-Ithana, MP  
The Minister of Justice  
Windhoek

Dear Honorable Minister,

**Statutory Submission of a Further Report on Rape by  
the Law Reform and Development Commission**

1. The Law Reform and Development Commission (LRDC) is obliged to report to the Minister of Justice for consideration pursuant to section 9(1) of the Law Reform and Development Commission Act, 1991 (Act No. 29 of 1991) [as amended] in regard to any matter examined by it.
2. The attention of the Honorable Minister is therefore drawn to the Further Report on Rape, contained herein, which has the object of improving the law as it relates to rape, and impacts the following pieces of legislation:
  - 2.1 The Combating of Rape Act, 2000 (Act No. 8 of 2000);
  - 2.2 The Criminal Procedure Act, 1977 (Act No. 51 of 1977);
  - 2.3 The Criminal Procedure Act, 2004 (Act No. 25 of 2004); and
  - 2.4 The Combating of Immoral Practices Act, 1980 (Act No. 21 of 1980).
3. It is therefore my privilege as Chairperson of the LRDC to present to you this Further Report on Rape, and in doing so, thank the previous Commissioners of the LRDC, stakeholders and the staff involved in bringing about the said Further Report on Rape for their inputs.
4. The LRDC will avail itself to assist the Minister in the consideration of the contents of the Further Report on Rape.

Sincerely

**Sacky Shanghala**  
CHAIRPERSON

**June 4, 2012**



## LAW REFORM AND DEVELOPMENT COMMISSION

The Namibian Law Reform and Development Commission (the LRDC) is a creature of statute established by **Section 2** of the **Law Reform and Development Commission Act, 1991 (Act No. 29 of 1991)**.

The core mandate of the Commission is to undertake research in connection with all branches of law and to make recommendations for the reform and development thereof.

The Commission members are –

Mr S Shanghala, Chairperson  
Ms D Hubbard, Deputy Chairperson  
Adv J Walters, Ombudsman  
Mr M Frindt  
Mr N Marcus  
Ms D Muroko  
Mr F Nghiishililwa  
Mr R Rukoro

The Secretary to the Commission is Mr. J. T. Namiseb who heads the Directorate of Law Reform, an organizational component in the Ministry of Justice. The Directorate of Law Reform serves as Secretariat to the Commission, assisting the Commission in the exercise of its powers and the performance of its duties and functions under the Act. The Secretariat is housed on the 2<sup>nd</sup> Floor, Mutual Platz Building, Post Street Mall, Windhoek.

The project leaders assigned to this project were initially **Ms M. E. Mungunda** and **Mrs. A. H. Diergaardt**<sup>1</sup>, chief legal researchers in the Law Reform Directorate, Ministry of Justice. This Report was finalized for the LRDC by the Legal Assistance Centre (LAC). The LRDC Chairperson edited the Report and drafted the Combating of Rape Amendment Bill annexed to the Report.

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<sup>1</sup> Mrs. A.H. Diergaardt has since left the LRDC for the Magistracy. Ms. M.E. Mungunda (née Visagie) has, with the assistance of the LAC, finalized the report and also left the public service since.

## CONTENTS

|  | <b>Page</b> |
|--|-------------|
| 1. Introduction and Background.....                      | 1           |
| 2. Discussions and Recommendation.....                   | 3           |
| 3. Annexure: Draft Combating of Rape Amendment Bill..... | 22          |

## 1. INTRODUCTION AND BACKGROUND

1.1 In 2000, Namibia enacted a new statute on rape called the **Combating of Rape Act, 2000** (Act No. 8 of 2000). This Act re-defined the common law crime of rape to cover a variety of sexual acts committed under coercive circumstances, modified certain rules of evidence applicable to sexual offences, provided minimum sentences for convicted rapists and introduced new measures aimed at protecting rape complainants and reducing the trauma of rape victims when participating in the criminal trial of perpetrators of rape offences.

1.2 Also in 2000, the **Combating of Immoral Practices Amendment Act, 2000** (Act No. 7 of 2000) amended section 14 of the **Combating of Immoral Practices Act, 1980** (Act No. 21 of 1980) to re-define the offence of "statutory rape" and thus give improved protection to boys and girls in that sexual contact (including a sexual act or an indecent or immoral act) with boys or girls under age 16 by someone who is at least 3 years older than the complainant constitutes a criminal offence.

1.3 The Commission's decision to make the recommendations contained herein emanated largely, from proposals for reform by Ms. Dianne Hubbard of the Legal Assistance Centre, following on an extensive study of the operation of the Combating of Rape Act, 2000 (Act No. 8 of 2000). The report, *Rape in Namibia: An Assessment of the Operation of the Combating of Rape Act 8 of 2000*, was published by the Legal Assistance Centre in 2006 and launched in May 2007. The report is available on the website of the Legal Assistance Centre: [www.lac.org.na](http://www.lac.org.na).

1.4 At a meeting held on 30 April 2008, the Law Reform and Development Commission, agreed to embark on a new project to consider the

recommendations from this study. On 12 May 2008 the project was allocated to legal researchers in the Law Reform Directorate.

1.5 This Report was preceded by an Issue Paper, a Discussion Paper and two stakeholder workshops.

(a) The **Issue Paper** was circulated amongst various stakeholders for criticism and comment. Its purpose was to initiate and stimulate debate and to serve as a basis for further deliberation. Stakeholders were given a deadline of 19 June 2008 for input.

(b) On 15 June 2008, the proposed amendments to the Act were discussed at a workshop attended by various stakeholders, including prosecutors, legal practitioners and members of civil society.

(c) The next step was a **Discussion Paper** summarizing the public comments and the outcome of the discussions at the 2008 workshop. The public was invited to give further comment, with a deadline of 17 June 2009.

(d) A final follow-up workshop was held on 16 June 2009 and was again attended by various stakeholders, including prosecutors, legal practitioners and members of civil society.

1.6 The project was delayed somewhat when the term of office of the members of the Law Reform and Development Commission ended in November 2010, with a new Commission taking office on that date. The reconstituted Commission approved this Report on 24 November 2011 for publication.

1.7 The purpose of this Further Report on Rape is to recommend to the Minister of Justice, proposals for the amendment of certain statutes germane



to the crime of rape with a view to providing further protection for victims in line with the input received from relevant stakeholders.

## 2. DISCUSSIONS AND RECOMMENDATIONS

- 2.1 The background to the principal recommendations is recorded in the Legal Assistance Centre research report, the Issue Paper and the Discussion Paper, which preceded this report.
- 2.2 This Report presents a brief summary of the recommended amendments, which the LRDC hereby recommends for enactment as contained in the **Annexure**. The said **Annexure** containing the **Draft Combating of Rape Amendment Bill** is preceded by a general explanatory discussion with recommendations as follows:
- 2.3 **The following amendments relate to the Combating of Rape Act, 2000 (Act No. 8 of 2000), related provisions of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) and the corresponding provisions of the Criminal Procedure Act, 2004 (Act No. 25 of 2004).**
- 2.3.1. A new coercive circumstance should be added to the law to cover abuse of power or authority. This can be achieved by:

The addition to section 2(2) of the Combating of Rape Act, 2000 of the following text:

*(j) 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.*



2.3.2. The law should be clarified to end confusion on attempted rape. This issue is currently misunderstood in practice because the law on attempts is contained in the Riotous Assemblies Act, 1956 (Act No. 17 of 1956).

2.3.3. The minimum sentences for rape apply with equal force to attempted rape, but there is frequently confusion on this point. This issue can be helpfully clarified by:

The addition to section 2 of the Combating of Rape Act, 2000 of the following text:

**(4) Any person who attempts to commit rape as defined in terms of this section shall be guilty of the offence of attempted rape and liable on conviction to the punishment to which a person convicted of actually committing the rape would be liable.**

2.3.4. The Minimum sentences for rape should be increased. Rape of persons with physical or mental disabilities should be a basis for imposing the highest category of minimum sentence. The law can be improved in the above regard by:

The addition to section 3(1) of the Combating of Rape Act, 2000 with the insertion of the bold text as follows:

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

**(a) in the case of a first conviction –**

**(i) where the rape is committed under circumstances other than the circumstances contemplated in subparagraphs (ii) and (iii), to imprisonment for a period of not less than ~~five~~ **ten** years;**

(ii) where the rape is committed under any of the coercive circumstances referred to in paragraph (a), (b) or (c) of subsection (2) of section 2, to imprisonment for a period of not less than ~~ten~~ **fifteen** years;

(iii) where –

(aa) the complainant has suffered grievous bodily or mental harm as a result of the rape;

(bb) the complainant –

(A) *is under the age of thirteen years;*

(B) *is by reason of age exceptionally vulnerable;*

**(C) *is by reason of mental or physical disability exceptionally vulnerable; or***

**(D) *is for any other reason exceptionally vulnerable;***

(cc) the complainant is under the age of eighteen years and the perpetrator is the complainant's parent, guardian or caretaker or is otherwise in a position of trust or authority over the complainant;

(dd) the convicted person is infected with any serious sexually-transmitted disease and at the time of the commission of the rape knows that he or she is so infected;

(ee) the convicted person is one of a group of two or more persons participating in the commission of the rape; or

(ff) the convicted person uses a firearm or any other weapon for the purpose of or in connection with the commission of the rape,

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

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

(i) where the rape is committed under circumstances other than the circumstances contemplated in subparagraphs (ii) and (iii), to imprisonment for a period of not less than ~~ten~~ **twenty** years;

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

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

(iii)

2.3.5. Regional Magistrate's Courts should be empowered to impose any penalty prescribed under the Act notwithstanding the limitations upon its jurisdiction as may be imposed under the Magistrates Court Act, 1944 (Act No. 32 of 1944). This can be achieved by:

The addition to section 3 of the Combating of Rape Act, 2000 of the following text:

***(5) Notwithstanding anything to the contrary contained in any other law, a magistrate's court of a regional division shall have jurisdiction to impose any penalty or additional penalty provided for in this Act, even though the penalty may, either alone or together with any additional penalty imposed by the court, exceed the punitive jurisdiction of the court.***

2.3.6. There should be stricter limits on what portion of a minimum sentence must be served before an offender is eligible for parole, beyond the one-third requirement already contained in the Prisons Act, 1998 (Act No. 17 of 1998). This objective can be achieved by:



The addition to section 3 of the Combating of Rape Act, 2000:

***(6) Notwithstanding anything contained in the Prisons Act 17 of 1998, a convicted person sentenced under section 2 of this Act who was 18 years of age or older at the time of the commission of the offence shall be eligible for remission or parole only after serving two-thirds of such sentence.***

2.3.7. In *S v Lopez* 2003 NR 162 (HC) the High Court rendered a ruling on "substantial and compelling circumstances" which causes concern. In that judgment, the court considered that rape by a spouse or intimate partner was not serious and should be regarded as a mitigating factor. It expressed that "*it must be accepted that the complainant, as the appellant's wife of some years was no stranger to having sexual intercourse with him*". What is important is the actual evidence of the impact of the crime of rape upon the particular victim as rape by a spouse or intimate partner may be as equally or more traumatic for the victim/complainant than rape perpetrated by a stranger. The law can be improved as follows:

By the addition to section 3 of the Combating of Rape Act, 2000:

**3B. When imposing a sentence in respect of a conviction for the offence of rape, the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:**

- (a) the complainant's character, sexual reputation or previous sexual conduct or experience;**
- (b) an apparent lack of physical injury to the complainant apart from the rape itself;**
- (c) an accused person's cultural or religious beliefs about rape; or**
- (d) any relationship between the accused person and the complainant prior to the offence being committed.**



2.3.8. With a view to deter and appropriately punish rape offenders, sentences ought not to run concurrently (at the same time as other sentences, e.g. 5 years for 3 offences under the Act amount to 5 years of imprisonment) but rather consecutively (one after the other, e.g. 5 years for 3 offences under the Act amount to 15 years). The law can therefore be improved as follows:

By the addition to section 3 of the Combating of Rape Act, 2000:

**3C. A sentence of imprisonment imposed in respect of a conviction for an offence under section 2 of this Act shall, notwithstanding anything to the contrary contained in any other law, not run concurrently with any other sentences of imprisonment imposed on the convicted person under this Act, or with any part of such sentences, unless the presiding officer finds that the cumulative effect of requiring such sentences to run consecutively would be so harsh and unreasonable as to constitute cruel, inhuman or degrading punishment.**

2.3.9. The law should give prosecutors a clear duty to ensure that the complainant receives orientation to the court and court procedures prior to the trial, as the procedures for vulnerable witnesses available as a result of the amendments made to the Criminal Procedure Act, 1977 (Act No. 51 of 1977) by the Criminal Procedure Amendment Act, 2003 (Act No. 24 of 2003) are currently under-utilized. The following is proposed:

The amendment of section 9(b) of the Combating of Rape Act, 2000 by the insertion of the bold text as follows:

*(b) to provide all such information to the complainant as will be necessary to lessen the impact of the trial on the complainant, **including without being limited to ensuring that the complainant receives an orientation to court procedures and information about special arrangements for vulnerable witnesses in advance of the trial.***

2.3.10. The 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, or solely from evidence that the hymen is unbroken.

2.3.11. Photographic and technical information presented by South African expert Dr. Franz to Namibian stakeholders in 2008 conclusively demonstrated that it is a myth that penetration of the vagina necessarily breaks the hymen. Therefore, the following is proposed:

The addition of a new section 8A to the Combating of Rape Act, 2000:

**8A. In criminal proceedings at which an accused is charged with an offence of a sexual or indecent nature, the court shall not draw any inference only from the absence of evidence of semen or other bodily fluids on or within the body of a complainant, or from the absence of evidence of rupture of a complainant's hymen.**

2.3.12. The Act should provide for regulations to allow for the official form for recording notice to the complainant of the bail hearing, the outcome of the

bail hearing and the bail conditions. Therefore, the following is proposed as a new section:

The insertion of a new section 18A of in the Combating of Rape Act, 2000:

**18A. (1) The minister responsible for justice may make any regulations relating to –**

- (a) ***the procedure for notification regarding bail hearings in terms of section 60A of Act 51 of 1977, as amended by section 12 of this Act;***
- (b) ***guidelines for orientation of the complainant to court procedures and vulnerable witness provisions under section 9(b) (as amended);***
- (c) ***guidelines for service providers who deal with rape complainants; and***
- (d) ***any other matter aimed at furthering the objectives of this Act.***

2.3.13. The Act should place the duty of informing the complainant of the outcome of the bail hearing on the investigating officer rather than on the prosecutor, to conform to current practice, whilst still giving the prosecutor a duty to ensure that the information has been transmitted. This can be achieved by the following:

Amending section 60A(8) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) with the insertion of the bold text as follows:

***(8) If a complainant is not present, as contemplated in subsection (7), the prosecutor in such proceedings shall inform the complainant, or ensure that the complainant is informed by the investigating officer in the case –***

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



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

Amend the corresponding section 64(9) of the Criminal Procedure Act, 2004 (Act No. 25 of 2004) which has been passed by Parliament but has not yet come into force with the insertion of the bold text as follows:

(9) *If a complainant is not present as contemplated in subsection (8), the prosecutor in the bail proceedings in question must inform the complainant **or must ensure that the complainant is informed by the investigating officer in the case** –*

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

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

2.3.14. Amend subsection 60A(3), which places upon the *accused* the responsibility to ask the station commander to inform the complainant of the time and place of the bail application in certain circumstances. There should be no situation that encourages communication between the accused and the rape complainant. Furthermore, placing this duty on the accused is expecting an accused to act against his/her own interest. Therefore the following is suggested:

The amendment of section 60A(3) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) with the insertion of the bold text as follows:

(3) *If an accused who is in custody on a charge of rape intends to apply to the court for bail on a date or at a time of which the complainant has not*



*been otherwise informed in terms of this section, **the prosecutor in the proceeding shall ensure that the complainant is informed accordingly.***

The amendment of the corresponding section 60A(4) of the Criminal Procedure Act, 2004 (Act No. 25 of 2004) which has been passed by Parliament but has not yet come into force with the insertion of the bold text as follows:

(4) If an accused who is in custody on a charge of rape or a domestic violence offence intends to apply to the court for bail on a date or at a time of which the complainant has not been otherwise informed in terms of this section, **the prosecutor in the proceeding shall ensure that the complainant is informed accordingly.**

- 2.3.15. Empower 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. The following is suggested:

The amendment of section 62(2) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) as follows:

(2) *If an accused who is in custody on a charge of rape is released on bail, the court shall, notwithstanding the provisions of subsection (1), add such further conditions of bail as will, in the opinion of the court, ensure that the accused does not make contact with the complainant concerned: **Provided that the bail conditions may allow contact if this is in the interests of the complainant, in which case the court may impose any conditions on contact or any other conditions which may be necessary to protect the complainant from intimidation or harm.***

The amendment of the corresponding section 65(2) of the Criminal Procedure Act, 2004 (Act No. 25 of 2004) which has been passed by Parliament but has not yet come into force as follows:

(2) If an accused who is in custody on a charge of rape is released on bail, the court must, notwithstanding section 63(14) and subsection (1) of this section, add such further conditions of bail as will, in the opinion of the court, ensure that the accused does not make contact with the complainant concerned: **Provided that the bail conditions may allow contact if this is in the interests of the complainant, in which case the court may impose any conditions on contact or any other conditions which may be necessary to protect the complainant.**

- 2.3.16. It should be clarified how the procedure for testing whether a child witness is capable of giving intelligible testimony should be done. Therefore, the following is suggested:

The amendment of section 164(3) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) and identical section 185(2) in the Criminal Procedure Act, 2004 (Act No. 25 of 2004) which has been passed by Parliament but has not yet come into force as follows:

(2) Notwithstanding anything to the contrary in this Act or any other law contained, the evidence of any witness required to be admonished in terms of the proviso to subsection (1) shall be received unless it appears to the presiding judge or **magistrate, on the basis of such informal preliminary questioning by the presiding judge or magistrate as is necessary to assess the child's maturity,** that the witness is incapable of giving intelligible testimony.

- 2.4 The following recommendation relates to the new Criminal Procedure Act, 2004 (Act No. 25 of 2004), passed by Parliament but not yet in force.**

- 2.4.1. The LRDC is of the view that there is a need to amend the Criminal Procedure Act, 1977 (Act No. 51 of 1977) to bring it in line with jurisprudential demands of the Namibian Constitution's Chapter 3 Bill of Rights provisions, as was envisaged with the Criminal Procedure Act, 2004 (Act No. 25 of 2004). However, as exhibited by the proposals for amendments contained in this Report, the object of correcting the shortcomings of a law promulgated in a different legal order was not achieved, and in fact, some of the provisions of the new Criminal Procedure Act, 2004 may cause more harm than the intended good.
- 2.4.2. Therefore, **the LRDC is of the view that the new Criminal Procedure Act, 2004 should be repealed** to allow for a more carefully structured reform of the Criminal Procedure Act, 1977.
- 2.4.3. The LRDC is of the further view that should the Criminal Procedure Act, 2004 be brought into force in its current form, it will, with specific reference to the combating of sexual offences *inter alia*, result in a negation from the gains made hitherto in relation thereto. The bringing into force of the Criminal Procedure Act, 2004 without at least the amendments proposed herein having been effected may very well be described as a reckless endeavor.
- 2.4.4. The LRDC is not of the view that the herein proposed amendments to the new Criminal Procedure Act, 2004 will cure all of its defects, as it has only focused on the current analysis of the narrow subject matters proposed herein for amending the said new Criminal Procedure Act, 1977 (Act No. 51 of 1977).
- 2.4.5. It is likely that a thorough review may reveal the need for further amendments to the new Criminal Procedure Act, 2004 and instead of two processes being adopted, one focusing on the old Criminal Procedure Act,



1977 whilst another focuses on the new Criminal Procedure Act, 2004, it may be a better use of resources, no matter which institution does it, that a comprehensive new Criminal Procedure Bill is drafted taking into account the shortcomings of the two pieces of legislation. The LRDC will be engaging stakeholders on the matter for further guidance.

**2.5 *The following recommendations and amendments relate to the new Criminal Procedure Act, 2004 (Act No. 25 of 2004), passed by Parliament but not yet in force), which watered down some of the vulnerable witness provisions contained in the Criminal Procedure Amendment Act, 2003 (Act No. 24 of 2003).***

2.5.1. The recommended amendments made hereunder are necessary should the new Criminal Procedure Act, 2004 (Act No. 25 of 2004) be brought into force and effect, otherwise, the LRDC is of the view as discussed *supra* at paragraph 2.4.2, that the new Criminal Procedure Act, 2004 ought to be repealed to allow for a comprehensive reform of the old Criminal Procedure Act, 1977 (Act No. 51 of 1977).

2.5.2. It is the LRDC's view that the amendments must give the presiding officer a qualified duty to re-state or re-phrase questions put to witnesses under the age of 14. This can be achieved by:

Amending section 187(4) of the Criminal Procedure Act, 2004 (Act No. 25 of 2004) as follows:

(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** during the cross-examination of any witness under the age of 14 years restate **any question** put to that witness **if such question is in the view of the presiding officer unclear, confusing or likely to traumatize or intimidate the complainant, and may in**



his or her discretion, **re-state**, simplify or rephrase any questions put to such witness in cross-examination.

- 2.5.3. The amendments must restore the provision from the current law 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. This can be achieved by:

Adding the following to section 185 of the Criminal Procedure Act, 2004 (Act No. 25 of 2004):

- (4) 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.**

- 2.5.4. Section 245 of the Criminal Procedure Act, 2004 (Act No. 25 of 2004) on admissibility of previous statements by child witnesses must be amended to restore the previous criteria from section 216A of the Criminal Procedure Act, 1977 with the addition of the test of the "interests of justice" to ensure the protection of the accused's rights. This can be achieved by:

- (a) Changing the wording in 245(1) by deleting the words "incapable of giving" and substituting them with the words "unable to give" as follows:

the child concerned is ~~incapable of giving~~ **unable to give** evidence relating to any matter contained in the statement concerned

- (b) Retaining the following wording in subsection 245(1), but have the technical drafters confirm that "interests of justice" is a suitable standard for use in this provision:

- (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**.
- (c) Deleting subsection 245(4)(a) which is nonsensical (since it prohibits doing exactly what the overall provision is designed to do):
  - (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

2.5.5. The amended section 245 of the Criminal Procedure Act, 2004 would read as follows:

#### **245 Admissibility of certain statements made by young children**

- (1) Evidence of a 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 who made that statement is **incapable** of giving unable to give evidence relating to any matter contained in the statement; and
    - (ii) the 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 was 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.

2.5.6. Provisions which provide heavier minimum sentences for the common-law crime of rape than for rape under Combating of Rape Act, 2000 should be amended to retain the existing framework for minimum sentences that is in the Combating of Rape Act, 2000. This can be done by:

i. **Deleting section 309(3)(c) Criminal Procedure Act 25 of 2004;**

[refer to section 15 of the Draft Combating of Rape Amendment Bill Annexed to this report]



and

- ii. Adding a new provision to the Combating of Rape Act, 2000 specifying that the minimum sentences set forth in that Act will apply to the residual common-law crime of rape, to avoid a return to the use of the common-law crime in a manner that would undermine the purposes of the Act.

[refer to the inserted section 3A under section 3 the Draft Combating of Rape Amendment Bill Annexed to this report]

**2.6 The following amendment relates to the Combating of Immoral Practices Act, 1980 (Act No. 21 of 1980) as amended by the Combating of Immoral Practices Amendment Act, 2000 (Act No. 7 of 2000).**

- 2.6.1. Remove the "marriage defence" to statutory rape as there is no minimum age for customary marriage, which can take place very early, and because where a minimum age is in place, no state official should approve of an exception allowing marriage for a child under age 16 to someone more than 3 years older. This can be achieved by the following:

Deleting the indicated phrase in section 14 of the Combating of Immoral Practices Act, 1980 (Act No. 21 of 1980):

14. Sexual offences with youths

Any person who-

- (a) commits or attempts to commit a sexual act with a child under the age of sixteen years; or
- (b) commits or attempts to commit an indecent or immoral act with such a child; or
- (c) solicits or entices such a child to the commission of a sexual act or an indecent or immoral act, and who-
  - (i) is more than three years older than such a child; and



(ii) ~~is not married to such a child (whether under the general law or customary law),~~

shall be guilty of an offence and liable on conviction to a fine not exceeding N\$40 000 or to imprisonment for a period not exceeding ten years or to both such fine and such imprisonment.

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**ANNEXURE:****COMBATING OF RAPE AMENDMENT BILL****EXPLANATORY NOTE:**

\_\_\_\_\_ Words underlined with solid line indicate insertions in existing enactments.

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

**BILL**

**To amend the Combating of Rape Act, 2000, the Criminal Procedure Act, 1977, the Criminal Procedure Act, 2004 and the Combating of Immoral Practices Act, 1980 so as to provide for newer coercive circumstances for rape; to include for the punishment of attempted rape with the minimum sentences for rape to apply equally; to assign the highest category of minimum sentences for the rape of persons with physical, mental disabilities or other vulnerabilities; to provide for increased jurisdiction for Regional Magistrate's Courts to impose penalties for rape; to provide for a stricter limit for the serving of minimum sentences before convicted offenders are eligible for parole; to provide for additional duties to the prosecutor towards the complainants and vulnerable witnesses before the commencement of trials; to require that a court shall not draw any inference only from the absence of semen or other bodily fluids on or within the complainant, or from the absence of evidence of the rupture of the hymen in criminal proceedings of offences of a sexual or indecent nature; to empower the minister responsible for justice to make regulations related to the procedures for notification of bail hearings, guidelines for the orientation of complainants and vulnerable witnesses, guidelines for service providers who deal with rape complainants and other regulations relating to the furtherance of the objects of the Combating of Rape Act, 2000; to provide for the duties of the investigating officer and the prosecutor with regard to notification of the outcome of bail hearings to the**



complainant or of the intention of the accused to apply for bail; to empower the court to impose conditions upon bail relating to contact necessary to protect the complainant; to clarify the procedure for testing whether a child witness is capable of giving intelligible testimony; to impose upon the presiding officer a qualified duty to re-state or re-phrase questions put to a witness under a given age; to impose upon the court the duty not to regard the testimony of a child as inherently unreliable or to treat it with special caution simply because the witness is a child; to ensure the admissibility of previous statements by child witnesses and to ensure the protection of the accused's rights; to clarify certain provisions of the Criminal Procedure Act, 2004; to make provision for heavier minimum sentences for rape under the Combating of Rape Act, 2000 equal to the minimum sentences for the common-law crime of rape; to remove the defence of marriage; and to provide for matters incidental thereto.

*(Introduced by the Minister of Justice)*

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

**Amendment of section 2 of Act No. 8 of 2000**

1. Section 2 of the Combating of Rape Act, 2000 (Act No. 8 of 2000), is amended by –
  - (a) the insertion after subsection (2)(i) of the following paragraph:
 

“(j) 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.”;  
and
  - (b) the insertion of the following subsection after subsection (3):
 

“(4) Any person who attempts to commit rape as defined in terms of this section shall be guilty of the offence of attempted rape and liable on conviction to the punishment to which a person convicted of actually committing the rape would be liable.”.

### Amendment of section 3 of Act No. 8 of 2000

2. Section 3 of the Combating of Rape Act, 2000(Act No. 8 of 2000), is amended by –

(a) the substitution for subsection (1) of the following item:

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

(a) in the case of a first conviction –

(i) where the rape is committed under circumstances other than the circumstances contemplated in subparagraphs (ii) and (iii), to imprisonment for a period of not less than ~~[five]~~ ten years;

(ii) where the rape is committed under any of the coercive circumstances referred to in paragraph (a), (b) or (c) of subsection (2) of section 2, to imprisonment for a period of not less than ~~[ten]~~ fifteen years;

(iii) where-

(aa) the complainant has suffered grievous bodily or mental harm as a result of the rape;

(bb) the complainant-

(A) is under the age of thirteen years; or

(B) is by reason of age exceptionally vulnerable; or

(B) is by reason of mental or physical disability exceptionally vulnerable; or

(D) is for any other reason exceptionally vulnerable;”; and

(cc) the complainant is under the age of eighteen years and the perpetrator is the complainant’s parent, guardian or caretaker or is otherwise in a position of trust or authority over the complainant;

- (dd) the convicted person is infected with any serious sexually-transmitted disease and at the time of the commission of the rape knows that he or she is so infected;
- (ee) the convicted person is one of a group of two or more persons participating in the commission of the rape; or
- (ff) the convicted person uses a firearm or any other weapon for the purpose of or in connection with the commission of the rape,

to imprisonment for a period of not less than **[fifteen]** twenty years;

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

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

(b) the insertion of the following subsections after subsection (4):

“(5) Notwithstanding anything to the contrary contained in any other law, a magistrate's court of a regional division shall have jurisdiction to impose any penalty or additional penalty provided for in this Act, even though the penalty may, either alone or together with any



additional penalty imposed by the court, exceed the punitive jurisdiction of the court.

- (6) Regardless of anything contained in the Prisons Act, 1998 (Act No. 17 of 1998), a convicted person sentenced under section 2 of this Act who was 18 years of age or older at the time of the commission of the offence shall be eligible for remission or parole only after serving two-thirds of such sentence.”.

### **Insertion of sections 3A, 3B and 3C in Act No. 8 of 2000**

3. The following sections are inserted after section 3 of the Combating of Rape Act, 2000 (Act No. 8 of 2000):

“3A. The minimum penalties which shall be imposed upon any conviction of rape under section 3 of this Act shall also be imposed upon any conviction of the common law crime of rape.

3B. When imposing a sentence in respect of a conviction for the offence of rape, the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:

- (a) the complainant’s character, sexual reputation or previous sexual conduct or experience;
- (b) an apparent lack of physical injury to the complainant apart from the rape itself;
- (c) an accused person’s cultural or religious beliefs about rape; or
- (d) any relationship between the accused person and the complainant prior to the offence being committed.

3C. A sentence of imprisonment imposed in respect of a conviction for an offence under section 2 of this Act shall, notwithstanding anything to the contrary contained in any other law, not run concurrently with any other sentences of imprisonment imposed on the convicted person under this Act, or with any part of such sentences, unless the presiding officer finds that the cumulative effect of requiring such sentences to run consecutively would be so harsh and unreasonable as to constitute cruel, inhuman or degrading punishment.”.

**Amendment of section 9 of Act No.8 of 2000**

4. Section 9 of the Combating of Rape Act, 2000 (Act No. 8 of 2000) is amended by the substitution for subparagraph (b) of the following subparagraph:

“(b) to provide all such information to the complainant as will be necessary to lessen the impact of the trial on the complainant, including without being limited to ensuring that the complainant receives an orientation to court procedures and information about special arrangements for vulnerable witnesses in advance of the trial.”.

**Insertion of section 8A in Act No. 8 of 2000**

5. The following section 8A is inserted after section 8 of the Combating of Rape Act, 2000 (Act No. 8 of 2000):

“8A. In criminal proceedings at which an accused is charged with an offence of a sexual or indecent nature, the court shall not draw any inference only from the absence of evidence of semen or other bodily fluids on or within the body of a complainant, or from the absence of evidence of rupture of a complainant’s hymen.”.

**Insertion of section 18A in Act No. 8 of 2000**

6. The following section 18A is inserted after section 18 of the Combating of Rape Act, 2000 (Act No. 8 of 2000):

“18A. (1) The minister responsible for justice may make any regulations relating to –

- (a) the procedure for notification regarding bail hearings in terms of section 60A of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), as amended by section 12 of this Act;
- (b) guidelines for orientation of the complainant to court procedures and vulnerable witness provisions under section 9(b);
- (c) guidelines for service providers who deal with rape complainants; and

- (d) any other matter aimed at furthering the objectives of this Act.

**Amendment of section 60A of the Criminal Procedure Act, 1977, as inserted by section 12 of Act 8 of 2000**

7. Section 60A of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) is amended –

- (a) by the substitution for subsection (3) of the following subsection:

“(3) If an accused who is in custody on a charge of rape intends to apply to the court for bail on a date or at a time of which the complainant has not been otherwise informed in terms of this section, the prosecutor in the proceeding shall ensure that the complainant is informed accordingly.”; and

- (b) by the substitution for subsection (8) of the following subsection:

“(8) If a complainant is not present, as contemplated in subsection (7), the prosecutor in such proceedings shall inform the complainant, or ensure that the complainant is informed by the investigating officer in the case –

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

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

**Amendment of section 62 of the Criminal Procedure Act, 1977 as inserted by section 13 of Act No. 8 of 2000**

8. Section 62 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) is amended by the substitution for subsection (2) of the following subsection:

“(2) If an accused who is in custody of a charge of rape is released on bail, the court shall, notwithstanding the provisions of subsection (1), add such further conditions of bail as will, in the opinion of the



court, ensure that the accused does not make contact with the complainant concerned: Provided that the bail conditions may allow contact if this is in the interests of the complainant, in which case the court may impose any conditions on contact or any other conditions which may be necessary to protect the complainant from intimidation or harm.”.

**Amendment of section 164 of the Criminal Procedure Act, 1977 as inserted by section 2(b) of Act No. 24 of 2003**

9. Section 62 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) is amended by the substitution for subsection (3) of the following subsection

“(3) Notwithstanding anything to the contrary in this Act or any other law contained, the evidence of any witness required to be admonished in terms of the proviso to subsection (1) shall be received unless it appears to the presiding judge or magistrate, on the basis of such informal preliminary questioning by the presiding judge or magistrate as is necessary to assess the child’s maturity, that [such] the witness is incapable of giving intelligible testimony.”.

**Amendment of section 64 of the Criminal Procedure Act, 2004**

10. Section 64 of the Criminal Procedure Act, 2004 (Act No. 25 of 2004) is hereby amended by -

- (a) the substitution for subsection (4) of the following subsection:

“(4) If an accused who is in custody on a charge of rape or a domestic violence offence intends to apply to the court for bail on a date or at a time of which the complainant has not been otherwise informed in terms of this section, the prosecutor in the proceeding shall ensure that the complainant is informed accordingly.”; and

- (b) the substitution for subsection (9) of the following subsection:

“(9) If a complainant is not present as contemplated in subsection (8), the prosecutor in the bail proceedings in question must inform the complainant or must ensure that the complainant is informed by the investigating officer in the case –

- (a) where bail has been granted to the accused, of the granting of bail and the conditions of bail imposed;
- (b) where such proceedings have been postponed, of the date and time to which such proceedings have been postponed and of the complainant's rights under subsection (1)."

**Amendment of section 65 of the Criminal Procedure Act, 2004**

- 11. Section 65 of the Criminal Procedure Act, 2004 (Act No. 25 of 2004) is amended by the substitution for subsection (2) for the following subsection:

"(2) If an accused who is in custody on a charge of rape is released on bail, the court must, notwithstanding section 63(14) and subsection (1) of this section, add such further conditions of bail as will, in the opinion of the court, ensure that the accused does not make contact with the complainant concerned: Provided that the bail conditions may allow contact if this is in the interests of the complainant, in which case the court may impose any conditions on contact or any other conditions which may be necessary to protect the complainant from intimidation or harm."

**Amendment of section 185 of the Criminal Procedure Act, 2004**

- 11. Section 185 of the Criminal Procedure Act, 2004 (Act No. 25 of 2004) is amended by -

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

"(2) Notwithstanding anything to the contrary in this Act or any other law contained, the evidence of a witness required to be admonished in terms of subsection (1) must be received unless it appears to the presiding judge or magistrate, on the basis of such informal preliminary questioning by the presiding judge or magistrate as is necessary to assess the child's maturity, that that witness is incapable of giving intelligible testimony."; and

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

“(4) 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.”.

#### **Amendment of section 187 of the Criminal Procedure Act, 2004**

13. Section 187 of the Criminal Procedure Act, 2004 (Act No. 25 of 2004) is amended by the substitution for subsection (4) of the following subsection:

“(4) Notwithstanding subsections (1) and (2) or anything to the contrary in any other law contained but subject to section 193, the presiding judge or magistrate **[may] must**, during the cross-examination of a witness under the age of 14 years **[, either]** restate **[the questions] any question** put to that witness **[or] if such question is in the view of the presiding officer unclear, confusing or likely to traumatize or intimidate the complainant, and may in his or her discretion, re-state, simplify or rephrase [those] any questions put to such witness in cross-examination.**”.

#### **Amendment of section 245 of the Criminal Procedure Act, 2004**

14. Section 245 of the Criminal Procedure Act, 2004 (Act No. 25 of 2004) is amended by-

- (a) the substitution for subsection (1) of the following subsection:

“(1) Evidence of a 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 who made that statement is **[incapable of giving] unable to give** evidence relating to any matter contained in the statement; and
- (ii) the 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.”;
- (b) by the substitution for subsection (4) of the following subsection:  
“(4) This section does not render inadmissible any evidence that is otherwise admissible under section 244 as hearsay evidence.”.

**Amendment of section 309 of the Criminal Procedure Act, 2004**

- 15. Section 309(3)(c) of the Criminal Procedure Act, 2004 (Act No. 25 of 2004) is deleted.

**Amendment of section 14 of the Combating of Immoral Practices Act, 1980 as inserted by section 2 of Act No. 7 of 2000**

- 16. Section 14(c)(ii) of the Combating of Immoral Practices Act, 1980 (Act No. 21 of 1980) is deleted.

**Short title and commencement date**

- 17. This Act is called the Combating of Rape Amendment Act, 2012.
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