LEGAL ASSISTANCE CENTRE
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ProBono

INFORMATION ABOUT NAMIBIA'S LAW ON ...

ABORTION IN THE CASE OF RAPE

ProBono is a monthly column by the Legal Assistance Centre designed to inform the public about Namibian law on various topics. You can request information on a specific legal topic by sending an SMS to 081-600-0098. Note that we will not be able to give advice on specific cases in this column, only general legal information.

It is possible to get a legal abortion where a rape results in a pregnancy. The Abortion and Sterilisation Act 2 of 1975 provides for legal abortions in cases of rape (as well as in a few other circumstances).

The Act sets out what must happen before a legal abortion can be performed. Two doctors must each provide a written certificate stating that they think the pregnancy is the result of a rape. One of the doctors must be a district surgeon (a doctor employed by the state). If a charge of rape has been laid, the state-employed doctor should be the doctor who examined the woman for purposes of medical evidence.

Either the district surgeon or the other doctor must have been practising as a doctor in Namibia for at least four years. If the two doctors are part of the same partnership or working for the same employer, the certificate will not be valid. Neither of the two doctors who gives a certificate may perform the abortion, meaning that another doctor must do so.

In addition to the medical certificates, a legal abortion in the case of rape requires a certificate from a magistrate saying that the pregnancy is the result of a rape. The rape survivor must make a statement under oath or swear in an affidavit that the pregnancy is the result of a rape. The magistrate can ask her questions to decide if she is telling the truth. The magistrate may also question other people or request information about the case from the police.

The magistrate does not have to be 100 percent sure that the woman was raped. The magistrate only has to believe that it is *more probable than not* that she was raped. This is called the "balance of probabilities".

It is not necessary for a rape survivor to lay a charge of rape with the police in order to get permission for a legal abortion. But if the rape survivor has not laid a charge, she must give the magistrate a good reason why she has not gone to the police.

Even if the woman has laid a charge with the police, it is not necessary for the rapist to be convicted before she can get permission for a legal abortion – in any event, an abortion must be done in the early stages of a pregnancy, and it is very unlikely that the criminal trial would be completed in time.

The abortion must be performed at a state-controlled institution (such as a public hospital). The Minister of Health and Social Services can also designate other institutions where legal abortions can be performed.

The medical practitioner in charge of the state institution, or a medical practitioner that he or she designates, must give written authority for the abortion. If the abortion is taking place at another institution, a person designated by the manager of that institution must give written authority for the abortion.

The person giving authorisation for the abortion to proceed will need both doctors' certificates and the magistrate's certificate. If all the steps outlined in the Act are followed, this medical practitioner or designated person *must* give authority for the abortion – they do not have any discretion to refuse it.

The Act does not place a time limit on an abortion in the case of a rape. In South Africa, one court case ruled that a teenager who was 19 weeks pregnant because of rape could still legally have an abortion. However, abortions become more traumatic and dangerous as the pregnancy advances, so it is important to act quickly.

If a rape survivor is too young to give consent to the abortion, her parent or guardian must consent to the abortion. Currently the relevant law on this issue is the Children's Act 33 of 1960. This legislation allows a person to give consent to medical treatment or an operation from age 18, while parental consent is required in the case of younger persons.

However, if a medical officer believes it is necessary to perform an abortion on a child under age 18 but the parent or guardian refuses to give consent, cannot be found, is unable to give consent due to mental illness or is deceased, the Minister of Gender Equality and Child Welfare may give consent in the place of the parent or guardian.

The current consent provisions will soon be replaced by the Child Care and Protection Act 3 of 2015. This law will allow children to give consent to medical treatment if they are at least 14 years old and mature enough to understand the benefits, risks and implications of the medical intervention. But if the medical intervention involves a surgical operation, consent must also be given by a parent or guardian of the child (or the child's care-giver if there is no parent or guardian).

This law will allow the Minister of Gender Equality and Child Welfare or a children's court to give consent in the place of a parent who is incapacitated, cannot readily be traced, or is deceased. The Minister or the children's court may also override a refusal by a parent or a competent child to give consent if the abortion is in the child's best interests. Anyone with an interest in the child's well-being can apply to the Minister or to the children's court for consent.

No medical practitioner, nurse or other staff member can be obligated to participate in an abortion. This rule is designed to respect the convictions of persons who may oppose abortion even where it results from a rape.

It is important to know the rules about legal abortion in the case of rape so that action can be taken quickly to assist any rape survivor who does not want to continue a pregnancy in such traumatic circumstances.