

Protecting survivors of sexual offences



The Legal Obligations of the State With Regard to Sexual Offences in South Africa

First published by the Women's Legal Centre in
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Funded by the Embassy of Finland

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Please note that all names used in examples in this publication are fictitious.

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Executive Summary

Statistics for South Africa, from both local and international bodies, demonstrate the epidemic level of sexual violence against women in our country. A recent report by People Opposing Women Abuse and AIDS Legal Network concluded that “on all levels, from the highest office in the country through to local service points such as police stations and health facilities, there is a lack of a sense of urgency and a failure to take these cases seriously and to give them the kind of priority attention they deserve.”¹ In another report, Amnesty International concludes that the quality of policing and justice response may decline even further if key reforms to response frameworks to violence against women (including legal, medical, policing, and criminal justice frameworks) are not brought about.²

In order to advocate for the necessary reforms in the response framework, the Women’s Legal Centre and the Rape Crisis Cape Town Trust collaborated as partners to produce a report on women’s experience of the criminal justice system when reporting sexual offences, rather than on the legislation, policies, guidelines and directives on the issue.

The study comprises a review of relevant policies and legislation regarding the protection of survivors of sexual offences, a review of recent research reports on implementation of the laws and policies, and primary data collection from a sample of rape survivors who had used services provided by the Rape Crisis Trust. These various levels of research were then collated to identify gaps in the law, gaps between the law and implementation, gaps experienced by victims of sexual offences. Recommendations for addressing these gaps and challenges were then formulated.

The findings of the review of law and policy, the review of current research, and the review of the experiences of survivors accessing services within the criminal justice system showed similar and intersecting results. Detail is given in the report to problems with a lack of legislation, with how legislation has been drafted, with how policies have been formulated, with a lack of oversight and accountability, with a lack of resource allocation, with a lack of training and with poor implementation. These all culminate in a burden on victims of sexual offences to carry the trauma of the assault; furthermore, the system as a whole fails to recognise that a reduction in secondary trauma would not only lighten the burden placed on survivors, but would also serve to strengthen the state’s case against the alleged offender. Detailed recommendations and the outline of a potential advocacy strategy that focuses on the key issues of specialised sexual offences courts, finalising the National Policy Framework on Sexual Offences, and developing norms and standards for service delivery bring the report to a close.

1 People Opposing Women Abuse & AIDS Legal Network, “*Criminal Injustice: Violence Against Women in South Africa, Shadow Report on Beijing +15*”, March 2010, p 9.

2 Amnesty International, “*South Africa: ‘I am the lowest end of all’ Rural women living with HIV face human rights abuses in South Africa*”, March 2008, Chapter 2.

1. Introduction

The prevalence of sexual violence in South Africa is extraordinarily high. In April 2012 Interpol estimated that a woman is raped in South Africa every 17 seconds. A South African Medical Research Council study indicates that 27% of South African men have raped a woman or girl, and 14% have raped a current or ex-girlfriend.³

The most recent statistics released by the South African Police Force (SAPS) indicate 31 299 reported incidents of sexual assault against adult women alone, for the period 2011 to 2012.⁴ According to the National Prosecuting Authority's annual report for the same period, a total of only 6 913 sexual offence matters were finalised (22% of those reported) with a conviction rate of 65.1%.⁵

The 65.1% conviction rate is significantly reduced when one takes into account the extremely low rate at which sexual offences are reported. Research suggests that the majority of rape survivors do not report the offence to the police. According to a household survey by the Department of Health (DOH), only 15% of rape survivors aged 15 to 49 years reported the offence to the police.⁶ Accordingly, the actual number of rapes in South Africa would be 6.6 times higher than the number suggested by police statistics.

High levels of sexual assault may be influenced by the high prevalence of rape myths. According to a Cape Town study, 20% of South Africans believe that rape results from something that the female victim says or does, 18% believe that - in some cases - rape involves a woman who does actually want sex, and 29% believe that rape is often a woman's fault.⁷ Together with extremely low overall conviction rates of rape perpetrators, these rape myths contribute to the notion that rape and violence against women and girls ("VAW") is a normal part of life in South African society.⁸

Although so few survivors report sexual assault, many who do encounter unsympathetic and hostile treatment from health services, police, prosecutors and judicial officers within the criminal justice system. These survivors experience unreasonable bureaucratic delays, and poorly conducted investigations and medical examinations.⁹

In order to advocate for the necessary reforms in the response framework, the Women's Legal Centre and the Rape Crisis Cape Town Trust (the partners) collaborated to produce a report that shows women's experience of the criminal justice system when reporting sexual offences rather than examining the legislation, policies, guidelines and directives on the issue. This study highlights the gaps in implementation of the law by testing a desktop review of the law and research findings over a two-year period against the experiences of a sample of survivors. These study participants shared their experiences of the criminal justice system with the staff at Rape Crisis Cape Town Trust.

3 R Jewkes et al, *Understanding men's health and use of violence: interface of rape and HIV in South Africa*, South African Medical Research Council, 2009, pg 24.

4 Available at http://www.saps.gov.za/statistics/reports/crimestats/2012/downloads/crime_statistics_presentation.pdf

5 National Prosecuting Authority of South Africa, Annual Report 2011/12, pg 22.

6 South African Demographic and Health Survey (Pretoria: Department of Health, 1999) as quoted in R. Jewkes and N. Abrahams, "The Epidemiology of Rape and Sexual Coercion in South Africa: An Overview," *Social Sciences and Medicine* 55 (2002):1235.

7 *Journal of Sex Research*, 2005, http://findarticles.com/p/articles/mi_m2372/is_4_42/ai_n15929174/

8 Human Rights Watch, *World Report Chapter: South Africa*, 2009, available at <http://www.hrw.org/en/world-report-2009/south-africa>

9 People Opposing Women Abuse & AIDS Legal Network, "Criminal Injustice: Violence Against Women in South Africa, *Shadow Report on Beijing +15*", March 2010, p 9.

This report:

1. Gives an overview of the research methods used
2. Sets out the existing overarching legal frameworks
 - 2.1 Summarises existing research on the overall implementation of the state's mandate
3. With regard to the police:
 - 3.1 Looks at the specific laws relating to sexual offences and policy, including relevant case law.
 - 3.2 Summarises the existing research on the implementation of these laws and policies by the South Africa Police Service (SAPS)
 - 3.3 Discusses the lived experience of the participating sample of survivors
4. With regards to medical and forensic practitioners:
 - 4.1 Looks at the specific laws relating to sexual offences and policy, including relevant case law
 - 4.2 Summarises the existing research on the implementation of these laws and policies by the South Africa Police Service (SAPS)
 - 4.3 Summarises the existing research on the implementation of these laws and policies by the South Africa Police Service (SAPS)
5. With regard to the courts:
 - 5.1 Looks at the specific laws relating to sexual offences and policy, including relevant case law
 - 5.2 Summarises the existing research on the implementation of these laws and policies by the South Africa Police Service (SAPS)
 - 5.3 Discusses the lived experience of the participating sample of survivors
6. Lists the areas in the system that need to be improved.

More information on the partners is available in Appendix A.

The project was made possible by funding from the Embassy of Finland.

2. Research Overview

2.1 LITERATURE AND POLICY REVIEW

A comprehensive literature and policy desktop review was undertaken to identify the obligations of the state (at police, health care and court levels) in terms of legislation, policy, guidelines and directives regarding sexual offences. Prior independent studies that have examined the implementation of these obligations were also identified. Prior independent studies that have examined the implementation of these obligations were also identified.

2.2 PRIMARY DATA COLLECTION

Primary data were collected from survivors of sexual offences who consulted with the Rape Crisis Trust between 1 February 2011 and 31 December 2012. This information was collected by Rape Crisis, using its standard processes and data collection forms, including counselling forms and court support forms (see Appendix D for an example of each form). Both quantitative and qualitative data were collected in this manner. A sample of 816 sexual offence survivors completed the court support forms and 75 completed the counselling forms.

2.2.1 Profile of respondents

A large majority of respondents in the sample were female (more than 90% of participants who completed the court support and counselling forms), as shown in the diagrams below:

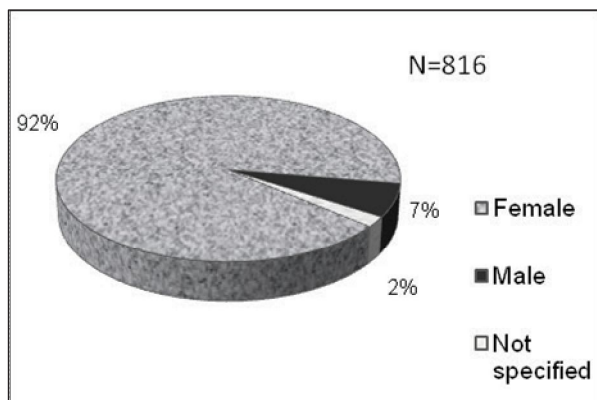


Figure 1: Gender breakdown for court support form respondents

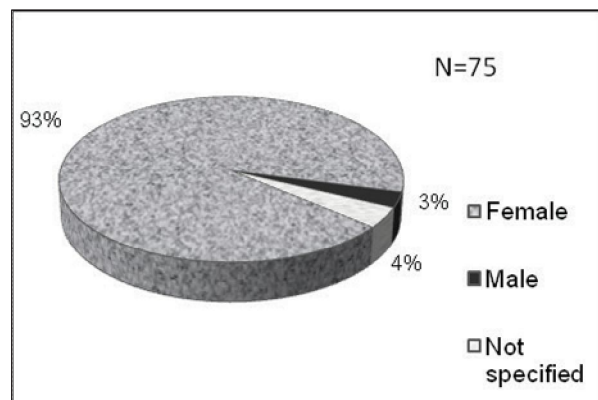


Figure 2: Gender breakdown for counselling form respondents

Over 90% of respondents for who completed either type of form marked their race group as black or coloured. The age of respondents ranged from 12 years to 83 years with the average (mean) age being 26 years for counselling cases and 30 years for court support cases. Respondents' age profiles for the two forms are illustrated in the figures below.

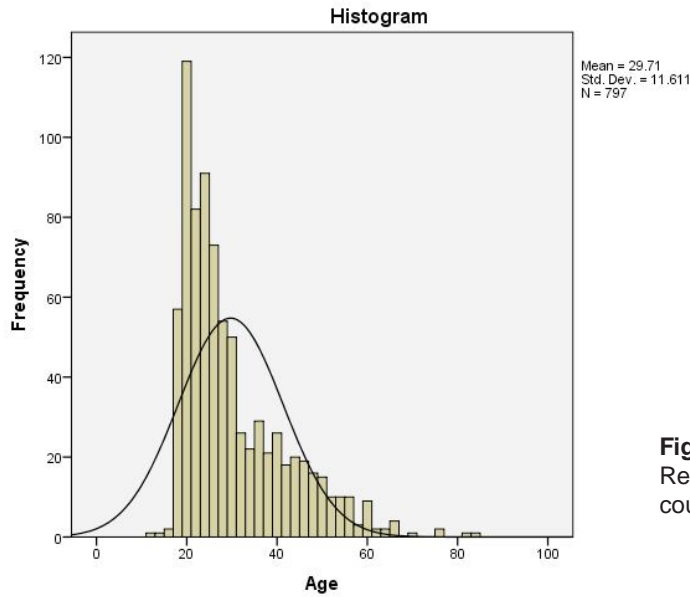


Figure 3: Respondent age for court support forms

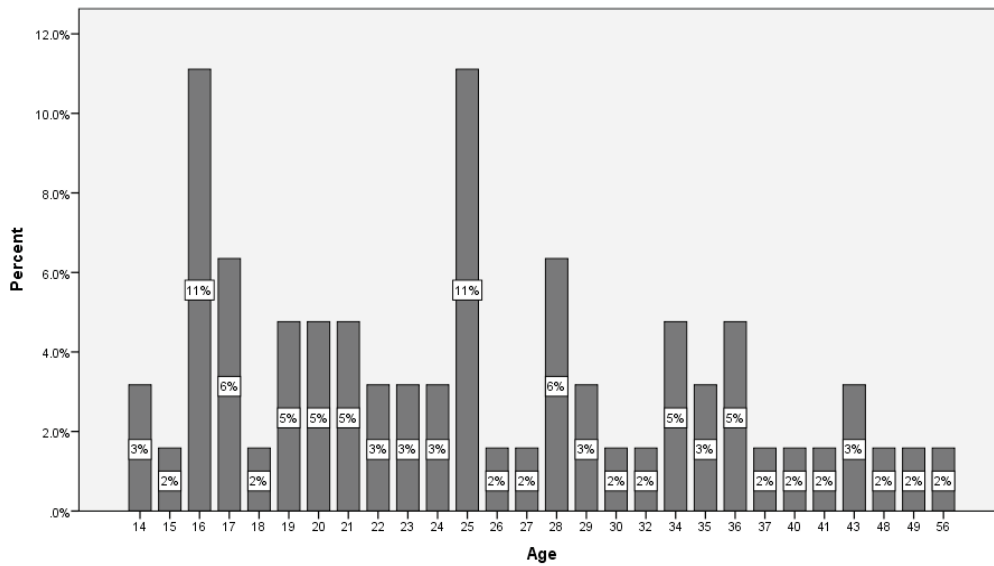


Figure 4: Respondent age for counselling forms

2.3 DATA ANALYSIS

Data from all forms were captured by Rape Crisis into an Excel database and then recaptured by Impact Consulting to ensure minimal capturing error. The data were analysed and interpreted to gauge perceptions and experiences of the survivors during their interactions with the police and health care facilities, and in courts. These findings were then linked back to the findings from the literature and policy review to identify gaps in implementation, and to formulate recommendations for the state.

2.4 LIMITATIONS OF THE RESEARCH

The data quality was not high as many of the forms were incomplete. Rape survivors are often hesitant to speak in detail about their experiences as it forces them to relive the trauma of those experiences. Rape Crisis counsellors are trained to work at the pace of the survivor and not to push them for additional information. Rape Crisis court supporters are hesitant to inquire into details as this could be seen as going into the merits of the case, which they are expressly forbidden to do. Past experience has shown, and this study confirmed, that even survivors who had been willing to return for a more in-depth interview changed their minds when called upon to do so. Of the 300 respondents that said they were willing to do an in-depth interview, only 14 actually did return. Such a small sample is adequate for qualitative research but not for quantitative analysis.

The sample size (n=75) for the information from the counselling forms was also low, which was unfortunate as most of the relevant data was captured in this form. This has meant that the data was not able to be disaggregated according to the individual courts, police stations and health facilities (due to the low sample size). In addition, data validity is unknown as the information was initially captured with the objective being to provide adequate counselling or court support, rather than for research purposes. This must be noted as a limitation of the study.

Rape survivors are often hesitant to speak in detail about their experiences as it forces them to relive the trauma of those experiences.

3. THE SOUTH AFRICAN LEGAL FRAMEWORK AS IT RELATES TO SEXUAL OFFENCES

3.1 STATE OBLIGATIONS

3.1.1 THE CONSTITUTION

The South African Constitution's Bill of Rights outlines a host of "rights for all". A number of these rights are particularly relevant for survivors of sexual offences, including the right to equal protection and benefit of the law. Furthermore, legislative and other measures have been designed to protect people who might be disadvantaged by unfair discrimination, for example that based on gender. In terms of obligations to survivors of sexual offences, the South Africa government and civil society organisations should be guided by the following parts of this legal framework:

- ❑ The right to human dignity and to have one's dignity respected and protected
- ❑ The right to freedom and security of person
- ❑ The right to privacy
- ❑ The right to have access to health care
- ❑ The right to have access to information
- ❑ The right to just administrative action
- ❑ The right to access to courts.

A comprehensive list of these rights can be found in Appendix B to this report.

3.1.2 SOUTH AFRICA'S INTERNATIONAL OBLIGATIONS

In addition to our own Constitution, South Africa is a signatory to or has ratified numerous other international and regional instruments that include declarations, conventions, and protocols; these include the United Nations Convention on the Elimination of Discrimination Against Women (CEDAW). These instruments place further obligations on the state in respect of survivors of sexual offences, including positive obligations to enact legislation and other measures to deal with violence against women. South African courts are obliged to consider these instruments in their judgements. A comprehensive list of these instruments can be found in Appendix C to this report.

In accordance with its obligations in terms of international and regional human rights instruments, South Africa also has the duty to periodically report on its progress regarding the implementation of these instruments. For example, South Africa has submitted four period reports to date with regard to its obligations under CEDAW, the last report having been a "combined" second, third and fourth report covering the period 1998 – 2008. The submission of this report was well overdue, as was noted by the Committee on the Elimination of Discrimination against Women during its 48th session (which took place between 17 January and 4 February 2011). The Committee welcomed progressive legislative developments, programmes, and plans of action, such as the adoption of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.

However, the Committee expressed concern regarding the “inordinately high prevalence of sexual violence against women and girls, and widespread domestic violence.”¹⁰ The Committee was also concerned that such violence appeared to be “socially normalised, legitimised and accompanied by a culture of silence and impunity.” It was further concerned by the low levels of prosecution and conviction, and at reports indicating that some police officers fine rape perpetrators instead of reporting the cases. The Committee concluded that the South African report lacked sufficient information on the impact of the measures and programmes in place to reduce violence against women and girls; furthermore, the Committee noted that social support services, including shelters, were inadequate because of inappropriate budgetary allocations.

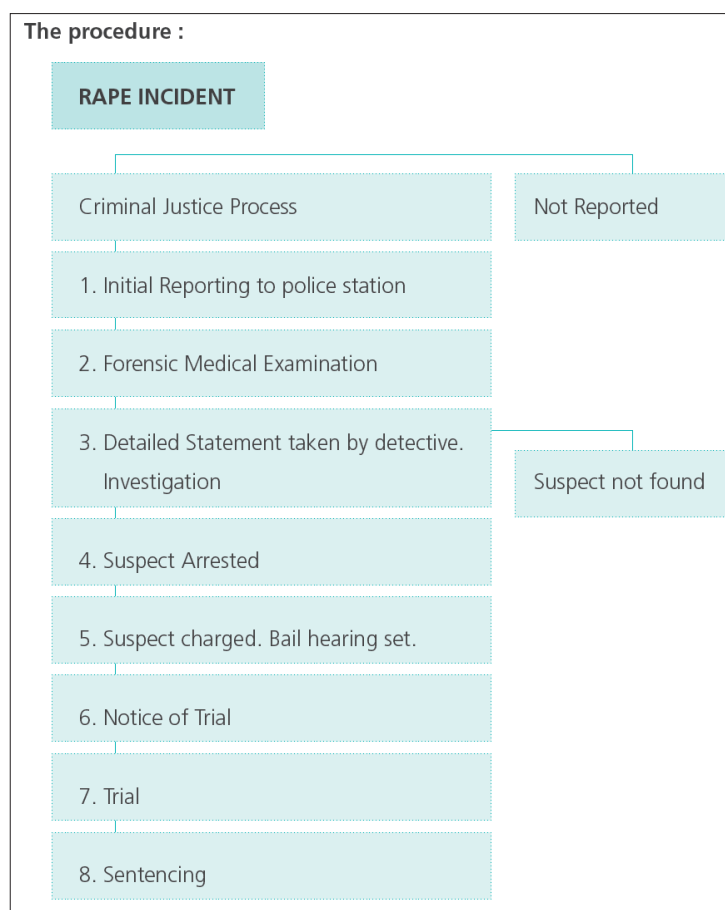
The Committee requested that South Africa’s next period report should provide detailed information on:

- ❑ The causes, scope, and extent of all forms of violence against women, disaggregated by age and area of residence (urban and rural);
- ❑ Impact of measures taken to prevent such violence, investigate occurrences, and to prosecute and punish perpetrators; and
- ❑ The provision of protection, relief and remedies, including appropriate compensation, to victims and their families.

South Africa is expected to provide its next period report in February 2015.

3.1.3 THE CRIMINAL JUSTICE SYSTEM

In making his or her way through the criminal justice system, a survivor of a sexual offence (for example, rape) can expect to participate in the following process: .



10 Concluding observations of the Committee on the Elimination of Discrimination against Women, South Africa, upon its 48th session held between 17 January and 4 February 2011, published on 5 April 2011.

A lack of information about the criminal justice system and how it works leaves ordinary citizens unclear about the role of that system; survivors of crime are often also unsure of what role they are expected to play in bringing offenders to justice, and what services they can rightfully expect to receive.

The South African criminal justice system as it relates to survivors of sexual offences includes three key state role-players:

1. The police (the national South African Police Service)
2. The health care system (state health care providers such as hospitals and clinics)
3. The courts (administered by the Department of Justice and Constitutional Development, together with the NPA).

The state's own evaluation of the South African criminal justice system can largely be gleaned from the National Development Plan (NDP).¹¹ The current report does not discuss the NDP in any detail but notes that the NDP has made sound recommendations, which if implemented would improve the conditions faced by rape survivors. However, the NDP lacks the gender perspective required for effective long-term planning generally and the combating of crime specifically.

3.2 RESEARCH ON THE STATE'S IMPLEMENTATION OF ITS OVERALL OBLIGATIONS

In order to meet its obligations the state must first enact legislation that upholds the rights enshrined in the Constitution, and then ensure that such legislation is properly implemented and administered. The partners reviewed two recent studies: one that examined overall legislation on violent crime, of which sexual offence is type; and another that looked specifically at the implementation of legislation including sexual offences legislation. These two studies are discussed briefly here.

Study 1: Dey, K., Thorpe, J., Tilley, A. and Williams, J. (2011) The Road to Justice: Victim Empowerment Legislation in South Africa, Cape Town: the Rape Crisis Cape Town Trust, the Women's Legal Centre and the Open Democracy Advice Centre

This study looked specifically at gaps in South African legislation with regard to victims of violent crime, as identified by a survey of 25 experts in the field. It found that legislation was piecemeal, with many specialised laws for 'special victims' or 'special crimes', which overlooked the needs of ordinary victims or crimes; and that, overall, the survivor's essential role in assisting the state to prosecute offenders was poorly recognised. There were significant gaps in the legislation that apply equally to victims of sexual offences, as follows:

- ❑ A lack of information on the criminal justice system and how it works leaves ordinary citizens unclear about the role of that system; survivors of crime are often also unsure what role they are expected to play in bringing offenders to justice, and what services they can rightfully expect to receive.

11 "National Development Plan 2030 – our future, make it work", National Planning Commission, available at <http://www.npconline.co.za/MediaLib/Downloads/Downloads/NDP%202030%20-%20Our%20future%20-%20make%20it%20work.pdf>

- ❑ A lack of information on the progress of individual cases; linked to this is the absence of an integrated information management system across departments and service providers. This informational deficit leaves victims uncertain about the progress of their case, what more is expected of them, and when to anticipate events.
- ❑ A lack of psychosocial care for victims leaves people who have been traumatised suffering mental anguish, which often impedes their ability to play the roles expected of them in bringing the offender to justice.
- ❑ The lack of a centralised mechanism to hold officials accountable makes it difficult for victims to complain when they do not receive the services they can rightfully expect; people do not know where to direct their complaints, and have little faith that their complaints will be dealt with effectively.
- ❑ The lack of intersectoral collaboration and service coordination means that the many government departments involved in investigating and prosecuting crimes, and in offering support to victims of crime, do not synchronise their planning. As a result, efficiency and cost-effectiveness are compromised in a system that is already often disorganised and generally poorly resourced.

Study 2: Vetten, L., Le, T., Leisegang, A. and Haken, S with van der Westhuizen, C. (Ed) (2010) The Right and The Real: A Shadow Report Analysing Selected Government Departments' Implementation of the 1998 Domestic Violence Act and 2007 Sexual Offences Act, Johannesburg: Tshwaranang Legal Advocacy Centre

South Africa's Constitutional Court makes it clear that "few things can be more important to women than freedom from the threat of sexual violence." So important is this right to be free from all forms of violence that, along with the rights to life and dignity, it imposes two main duties on the state:

1. The state is obliged to refrain from acting in any way that infringes on these rights
2. The state is compelled to develop legislation and structures guaranteeing those rights.

This report examines government's compliance with these constitutionally mandated duties. Our point of departure was two pieces of legislation that are key in combating violence against women: the Domestic Violence Act 116 of 1998 (DVA) and the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SOA). Our study found that the implementation of the DVA has stagnated, and the SOA was largely stillborn. Officials are neither routinely expected to justify or explain their (in)action, nor are they held accountable for adverse consequences following from their non-implementation of the legislation. These failures occur at multiple levels and across a range of dimensions:

This report shows implementation of the DVA to have stagnated and the SOA to be largely stillborn, with officials neither routinely expected to justify or explain their (in)action, nor consequences following from their non-implementation of legislation. These failures occur at multiple levels and across a range of dimensions:

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violence

- ❑ Administrative: problems at this level manifest in absent or highly inappropriate performance indicators, which in turn encourage perverse incentives or make it impossible to hold under-performing departments and officials to account. The interpretations that departments offer of their statistical data are also debatable.
- ❑ Fiscal: problems at this level are illustrated by the absence of budgets to effectively implement the DVA and SOA. Whatever shortcomings were introduced into the DVA in the early years of its implementation by the absence of a budget have now been institutionalised and entrenched. The SOA seems destined to meet a similar fate.
- ❑ Legal: problems at this level are evident in the following areas: police reluctance to exercise legal power or to comply with mandates; the courts' unwillingness to make specialised services available to women, coupled with the parsimonious provision of "protection;" and departments' failures to comply with the letter of the law.
- ❑ Political: while departments' efforts to meet their legislative mandates remain mediocre, weak parliamentary supervision has allowed such ineffectiveness to continue. Indeed, our study showed that the legislation of such supervision is not a sufficient condition for its practice.

3.3 CONCLUSIONS ON THE STATE'S IMPLEMENTATION OF ITS OVERALL OBLIGATIONS

The Constitution is progressive in nature, and the South African government has made its international obligations clear; the correct systems are in place, and suitable laws have been enacted. Nonetheless, several themes emerge that create obstacles to the implementation and administration of the law. These include the lack of proper resource allocation, poor management of the extent of budgets and how budgets are spent, a lack of accountability for poor performance by departments and by officials, a lack of collaboration between departments, a lack of coordination between service providers, a lack of access to information for service users, and a lack of services.

It will be interesting to see if these themes continue to unfold as we look in detail at the various structures within the criminal justice system set up to implement law and policy, and to deliver services to survivors of sexual offences.

4. The Police

The South African Police Service has the responsibility to prevent, combat, and investigate crime; to maintain public order; to protect and secure the inhabitants of the Republic and their property; and to uphold and enforce the law.

Since the introduction of the Sexual Offences Act in 2007, SAPS has not collected specific data on rape. Instead, publicly accessible police statistics now summarise all types of sexual offences such as rape, sexual assault, and sexual grooming under a single overall category, “sexual offences”. These statistics are not useful in exploring the nature and extent of rape.

In the year 2009/2010, police statistics show a total of 68 332 sexual offences. It is unclear how many of these offences were rapes, but a comparison with earlier statistics suggests that rape made up a high proportion of reported sexual offences. In 2006/2007, the SAPS received 52 617 reports of rape alone; the number was similarly high in preceding years, with reports of rape repeatedly exceeding 52 000 cases pre year.¹²

Police statistics must be used carefully as they reflect only cases where a survivor has decided to report the offence to the police; research has shown that the majority of offences are not reported. Reasons for under-reporting are complex and may include:

- ❑ Survivors’ fear of not being believed
- ❑ Difficulties in accessing the police
- ❑ Structural problems within the SAPS (such as unsympathetic attitudes or corruption)
- ❑ Fear of retaliation by the perpetrator
- ❑ Lack of trust in the criminal justice system.

A further complication for tracking the number of sexual offences and related conviction rates is that the SAPS statistics reported to the public annually are not disaggregated according to the specific type of sexual offence. More than thirty different types of sexual assault have been described, but this diversity is not reflected in the South African statistics. Similarly, the NPA conviction rates are not disaggregated by type of crime.

12 S. Roehrs, “Half-Hearted HIV-Related Services for Rape Victims,” in *Should We Consent? Rape Law Reform in South Africa*, ed. L. Artz and D. Smythe, (Cape Town: Juta Law, 2008), 175. For the 2009/2010 statistics, see SAPS, *The Crime Situation in South Africa*, (Pretoria: SAPS, 2010), 3. Available on the SAPS Website, accessed April 5, 2011, http://www.saps.gov.za/statistics/reports/crimestats/2010/crime_stats.htm

The South African Police Service has the responsibility to prevent, combat and investigate crime, maintain public order, protect and secure the inhabitants of the Republic and their property, and uphold and enforce the law.

SAPS stations across South Africa generate a large amount of data through their incident books, dockets, and other management systems. However, these systems are not integrated with each other or with NPA systems. Consequently, despite the epidemic levels of violence against women in South Africa, there is no coordinated data collection that allows for an assessment of service delivery or programmes aimed at assisting survivors.

In the course of the research for this report, staff at the Women's Legal Centre gained first-hand experience of problems with police data. In May 2011, the Women's Legal Centre requested disaggregated conviction and withdrawal statistics per sexual offence from the NPA. The NPA stated that it held no such records, and the Centre was referred to the SAPS to obtain this information. On 12 May 2011, SAPS acknowledged receipt of the Centre's request, but in June 2011 declined to provide the information, stating that the request had not been specific enough. After an internal appeal process, SAPS again declined to provide the information on 27 June 2011, stating that the records requested do not exist. The Centre insisted that the SAPS draw the necessary data from existing police databases. The police then provided the necessary information. This experience shows that the SAPS has access to crucial disaggregated information, but is not recording and collating it in an accessible format; they would not have provided the data if not for the Centre's specific and repeated requests.

4.1. LAW AND POLICY THE GUIDING POLICE

4.1.1. CONSTITUTIONAL OBLIGATIONS

In addition to the constitutional rights of all persons as described above, the Constitution sets out the objectives of the Police Service as follows:

- ❑ To prevent, combat, and investigate crime; to maintain public order; to protect and secure the inhabitants of the Republic and their property; and to uphold and enforce the law.
- ❑ The function of providing safety and security for the people of South Africa is the responsibility of the South African Police Service (SAPS).

4.1.2 RELEVANT CASE LAW ON THE ROLE AND DUTIES OF THE POLICE

In the following cases, the courts have considered the role and duty of the police in relation to other human rights described in the Constitution. This point is particularly relevant to women's right to freedom from all forms of violence.

Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as amicus curiae) 2003 (1) SA 389 (SCA):

The Applicant, Van Eeden, sued the state for damages after she was sexually assaulted and robbed by a dangerous criminal and serial rapist who had escaped from police custody two-and-a-half months prior to the attack.

The Applicant initially instituted the proceedings in the High Court. She alleged that the state owed her a duty to take reasonable steps to ensure that the attacker did not escape and harm her, and that the state failed to fulfil this duty through negligence. The High Court held that the state did not owe her a duty to take steps to protect her against harm.

The Applicant then appealed to the Supreme Court of Appeal. That court held that the police owed the Applicant a duty to take steps to prevent the attacker from escaping from police custody and harming her, in terms of the Applicant's constitutional right to freedom and security and the state's constitutional duty to protect the Applicant by taking steps to prevent violations of this right. The court further held that the state

has a constitutional duty to protect and fulfil all rights described in the Bill of Rights in the Constitution, which places a duty on the state to recognise its international law duty to protect women from violent crime as a form of gender-based violence. The court also held that the police owed the Applicant a duty to protect her on the basis that the Police Service Act (which governs the police) requires the police to maintain law and order and to protect women from violent crime. The court identified the police as one of the main state departments through which the constitutional duty to protect must be executed.

K v Minister of Safety and Security 2005 (6) SA 419 (CC)

The Applicant, K, had been brutally raped by two uniformed policemen who gave her a lift.

In the Supreme Court of Appeal, the court held that the Minister of Safety and Security (“the state”) was not liable for the actions of the policemen because they were not acting in the course and scope of their employment with the state when they committed the offence.

The Applicant then appealed the case to the Constitutional Court. The Applicant argued that the Minister of Safety and Security (“the state”) should be held liable for the actions of the policemen, because the law must be developed in accordance with the principles of the Constitution, and that the state should be held responsible for failing to protect her from harm. She said that the Supreme Court of Appeal’s decision was inconsistent with the Bill of Rights in the Constitution.

The Constitutional Court held that the state was liable for the actions of the policemen on the basis that the law had to be developed in terms of the principles of the Constitution. The court further held that the policemen failed to fulfil their duty to protect members of the public both in terms of the Constitution and the Police Act, and that such failure was closely connected to the policemen’s employment as members of the police service.

F v Minister of Safety and Security and Another (the Institute for Security Studies, the Institute for Accountability in Southern Africa Trust and the Trustees of the Women’s Legal Centre as Amici Curiae)

Ms F had brought a claim for damages against the Minister of Safety and Security (Minister) arising from the assault and brutal rape committed by a policeman against the plaintiff when she was 13. At the time of the attack, the policeman was on standby duty. The central question in both courts was whether the Minister was vicariously liable for the damages flowing from the delictual conduct of the policeman. The answer to this question depended on whether a sufficiently close link could be established between the policeman’s wrongful conduct and the business of the police service.

The Supreme Court of Appeal (SCA) held against Ms F. This was challenged in the Constitutional Court (CC). In the past, in a series of ground-breaking cases, the CC had interpreted the right to freedom from violence as imposing a corresponding duty on the state to actively protect women from gender-based violence. Thus, the state is held vicariously liable for rape committed by police officers while on duty. In this case, the SCA decided that the principle does not apply to a police officer who raped a 13-year-old girl while on “stand by”.

The CC reversed the decision of the SCA. In a majority judgment written by Mogoeng J, the CC held that the facts gave rise to a sufficiently close link between the police detective’s employment and the assault and rape of Ms F. This link was founded on the basis that the police vehicle facilitated the commission of the rape; that Ms F placed her trust in him because he was a police official; and that the state has a constitutional obligation to protect the public against crime. Consequently, the Minister was held vicariously liable for the damages suffered by Ms F as a result of the rape and assault.

Victims
must be
treated with
respect,
empathy
and
professionalism.

4.1.3 RELEVANT LAW AND POLICY THAT GUIDES THE POLICE

The police are obliged to act according to the following pieces of legislation with regard to sexual offences:

South African Police Services Act 68 of 1995

The SAPS Act sets out the powers, duties, and functions of the national and provincial Police Commissioners as well as those of all members of the police service. The National Commissioner must develop an annual plan before the end of each financial year, to set out the priorities and objectives for policing in the following financial year. A report on the plan must then be submitted in writing to the minister within three months of the end of the financial year. The National Commissioner must establish and maintain relevant training institutions as well as institutions for the management, control, and maintenance of the police service.

The National Commissioner may issue national orders and instructions regarding all matters which fall within his or her responsibility in terms of the Constitution or this Act. These national orders and instructions describe the manner in which members of the SAPS must handle crimes reported to them. These instructions must be presented to Parliament and then later published in the Government Gazette.

Sexual Offences Act (The Criminal Law Sexual Offences and Related Matters Amendment Act 23 of 2007)

In addition to the Police Act, the Sexual Offences Act (SOA) also describes the duties of the National Commissioner of SAPS in terms of issuing national instructions, specifically those relevant to sexual offences. Additional policies and justice-promoting instruments describe how survivors must be treated in order to respect their constitutional rights and in order to prevent any secondary trauma to the survivor of a sexual offence. A summary of these orders, instructions, and policies follows after a summary of the other relevant laws.

The National Instructions issued by the Police Service include instructions on:

- ❑ The manner in which the reporting of a sexual offence must be dealt with by police officials
- ❑ How these cases must be investigated
- ❑ Circumstances under which an investigation may be discontinued
- ❑ Circumstances under which a police official may apply for the HIV testing of an alleged offender
- ❑ The manner in which police officials must execute court orders
- ❑ The manner in which police must deal with the outcome of applications for compulsory HIV testing made and granted, to ensure confidentiality
- ❑ The manner in which they must hand over to the victim or interested person the alleged offender's test results.

A comprehensive list of police National Instructions and Standing Orders appears in Appendix E of this report.

Further, the SOA states that the National Commissioner must develop training courses to ensure that as many police officials as possible are able to deal with sexual offence cases in an appropriate, efficient, and sensitive manner. These training courses must cover the national instructions, social context training, and training on the use of uniform norms, standards, and procedures.

The National Policy Guidelines on Sexual Offences

These guidelines are intended to codify and clarify the functions and duties of the police in dealing with sexual offence cases in the criminal justice system. These policy guidelines do not have the status of an Act of Parliament, but officials must follow them unless there is good reason not to do so. The purpose of the guidelines is to set out the police officials' duties when handling survivors of sexual assault, and to inform them of the requisite level of professional service when dealing with victims of sexual violence. A full set of the Policy Guidelines appear as Appendix F to this report. The guidelines state that:

- ❑ Victims must be treated with respect, empathy and professionalism.
- ❑ The police must give the case immediate attention.
- ❑ The police must accept and acknowledge the allegations that have been made by the victim when she personally reports it at the police station.
- ❑ The police must deal with all sexual offence reports even if the victim does not live in the area of the police station or if the offence was committed outside of the area where the police station is located. There are no time restrictions on when a victim may lay a charge, so the police cannot turn victims away unassisted.
- ❑ When a sexual offence is reported, the police member must do all of the following: introduce him or herself, explain his or her role, assist the victim confidentially and privately, request her (or his) name and address, assess whether she needs medical assistance and refer her if necessary, open a docket, contact an investigating officer, and stay with the victim until the next step in the process has begun. The investigating officer must take a statement from the victim. This should only be done when the survivor is in a strong enough state (psychologically, emotionally, and physically) to make a statement.
- ❑ There are further guidelines for victims who report a sexual offence via the telephone.
- ❑ When responding at the scene of a crime, there is also a specific procedure that the police must follow with particular reference to offering appropriate support to the victim.

4.1.4 JUSTICE-PROMOTING INSTRUMENTS

The Service Charter for Victims of Crime (or Victims' Charter)

The Victims' Charter is a justice-promoting instrument that consolidates the rights of survivors of crime to services in terms of the criminal justice system. The Victim's Charter is in line with Section 234 of the Constitution, which states, "[i]n order to deepen the culture of democracy established by the Constitution, Parliament may adopt Charters of Rights consistent with the provisions of the Constitution".

The rights and services provided in the Victims' Charter include:

- ❑ All state departments that form part of the criminal justice system must treat victims with fairness and respect for their dignity and privacy in order to avoid secondary victimisation. This means that victims should be attended to promptly and courteously and that steps must be taken where necessary to prevent the victim from experiencing any type of inconvenience.
- ❑ State departments must provide victims with information and allow victims to participate in any criminal justice processes or proceedings. The police, prosecutor, and correctional services should take note of any information provided by the victim and allow participation in the processes and proceedings as far as possible.
- ❑ State departments must provide victims with all and any information relating to the criminal justice system process or proceedings. This information should be communicated to the victim in the language that she understands.
- ❑ State departments must protect victims when their safety is threatened. This particularly relates to situations where the victim is a witness in criminal justice system proceedings.
- ❑ State departments must provide victims with the support that they require, including social, health, and counselling support and any other support that the relevant state department can provide.
- ❑ State departments must assist victims in obtaining compensation orders and in enforcing such orders.
- ❑ State departments must inform victims of restitution procedures and must assist victims in enforcing their rights to restitution.

Minimum Service Standards for Victims of Crime

The Minimum Service Standards (Minimum Standards) for Victims of Crime, 2004, was developed as part of the Victims' Charter and it sets out duties of government departments. The Minimum Standards provides a definition of victims, an explanation of what each right means, and the duties of each department towards victims.

The Minimum Standards are divided into four parts. Part I provides brief background information on a person's rights, and outlines who can access the rights. Part II briefly explains the processes in the criminal justice system and what will happen if a person falls prey to a crime and reports it to the police. Part III contains the minimum standards for services that can be expected from various role-players in the criminal justice system, with reference to each right explained in the Victims' Charter. Part IV outlines various complaint mechanisms that can be used by victims of crime who are unsatisfied with the level of service they receive from various role-players in the criminal justice system.

4.2 RESEARCH FINDINGS ON POLICE IMPLEMENTATION OF RELEVANT LAWS

The following studies have investigated certain policy implementation issues at the police level regarding sexual offences.

Study 3: Artz, L., & Smythe, D. (2007) Case Attrition in Rape Cases: A Comparative Analysis

This paper reported on two attrition studies that examined the disposition of approximately 1 600 rape cases across six urban police stations in South Africa. The objective of these studies was to examine the processing, investigation, and prosecution of sexual offence cases and to analyse possible reasons for the high attrition rate.

At each stage of the criminal justice process there are multiple opportunities for discretion to be exercised and incentives for exercising them in a particular way. There is also considerable variance from station to station. The study by Artz and Smythe showed that police used poor discretion in the following areas: deciding what type of charge to lay against the perpetrator; refusing to allow women to lay charges; not allowing complainants to make their statement in privacy; making her repeat her statement to numerous officers; not carrying out arrests; not allowing complainants to make supplementary statements; not proceeding with an investigation of a rape case; not informing the complainant of an arrest, bail conditions, or what to do in the case of breaches; and not allowing a complainant to make her statement in the language of her choice. The police also closed cases when a complainant could not be found after reporting the matter, without documenting the required substantiation such as statements from neighbours witnessing that the complainant could not be located. The quality of investigations by the police is poor due to the lack of accessibility of investigating officers, high case loads, and the extent to which investigating officers are qualified to investigate rape cases.

*Study 4: Artz, L., Smythe, D., Leggett, T. (2004) **Reflections on Integrated Rape Case Management**. Institute of Criminology, University of Cape Town: South Africa.*

This study reported the following findings: a substantial delay existed between rape reporting and arrest; police were often very inaccessible; the detective service was severely understaffed and under-resourced; statement-taking was often poor; there were language barriers; and contact information for victims and witnesses was inadequate, with temporary addresses frequently being recorded. Cases proceeded far more smoothly when a prosecutor was involved in guiding the police investigation..

*Study 5: Sigsworth, R., Jewkes, R., and Christofides, N. (2009) **Tracking Rape Case Attrition in Gauteng: The Police Investigation Stage**. The Centre for the Study of Violence and Reconciliation: South Africa.*

This study noted that the police often did not examine the scene of the crime, even though international best practice and SAPS National Instructions advocate visiting the scene of the crime. Because rape cases are difficult to prove, it is crucial to examine the scene of the crime and to collect physical evidence. There were delays in police taking the statement from a survivor; no contact details were recorded for victims in many instances; in a significant number of instances, police did not take statements from witnesses identified by the complainant; and the police did not facilitate the victim's access to a forensic examination after the crime was reported. The researchers also noted that the arrest rate for suspects of child rape was low.

*Study 6: Vetten, L., Jewkes, R., Sigsworth, R., Christofides, N., Loots, L., Dunseith, O. (2008) **Tracking Justice: The Attrition of Rape Cases through the Criminal Justice System in Gauteng**. Johannesburg: Tshwaranang Legal Advocacy Centre, the South African Medical Research Council and the Centre for the Study of Violence and Reconciliation.*

In this study, more than half the dockets examined showed that an instruction to arrest the suspect had to be issued twice or more before the investigating officer complied with it. Corruption was shown to contribute to the loss of cases, with 37% of police officers interviewed for the CIET Africa study claiming that one or more of their rape cases had been mishandled due to corruption. There was also a lack of coordination between investigating officers and prosecutors regarding the evidence required to prosecute a rape case. Contact details for victims were poorly recorded, which contributed to victims being untraceable, and this impeded the course of the police investigation.

*Study 7: **Monitoring the Implementation of Sexual Offences Legislation and Policy: Findings from the Shukumisa Campaign conducted during the 16 Days of Activism 2009 – 2011**, Tshwaranang Legal Advocacy Centre, Rape Crisis Cape Town Trust, Resources Aimed at the Prevention of Child Abuse and Neglect, Women on Farms Project, Positive Muslims, Mosaic Training, Service and Healing Centre for*

Women, Justice and Women and Tohooyandou Victim Empowerment Programme

This series of three reports detailed the findings of the annual monitoring of the infrastructure implied in the SOA, which was carried out during the 16 Days of Activism in 2009, 2010, and 2011 respectively. The findings cover aspects such as physical accessibility, access to information, and the availability and quality of various specialised services.

Only 17% of police stations possessed copies of all the relevant documents stipulated in the SOA; the remaining stations possessed limited documentation. This scenario indicates a serious problem in accessing information at police stations, which means officials are likely to have trouble informing survivors accurately and would easily make errors. Twenty-six per cent of police stations did not yet have a Victim Friendly Room managed by a local NGO service provider to offer psychosocial support to victims. A general lack of norms and standards was noted across police stations, particularly with regard to what is required in the SAPS Victim Friendly Rooms and the training and supervision of the community-based volunteers that staff these facilities.

4.3. FINDINGS FROM THE PRIMARY DATA ANALYSIS

The primary research results from this study showed that, on the whole, South African police need to improve their handling of sexual violence/offence cases. Among survivors who completed the court support and counselling forms at Rape Crisis, the majority (60% for counselling forms; 73% for court support forms) indicated that they felt safe at the police station and were treated with respect. However, the relevant data were missing for 25% of the cases we analysed and this finding must therefore be interpreted with caution. The qualitative information that was gathered showed mixed opinions about feeling safe and being treated with respect by police officers. Some women indicated that they felt cared for and comfortable, were treated with patience and empathy, and found the police to be helpful. However, others felt intimidated and ashamed. One respondent even noted that the police laughed at her. Some women were made to wait a long time for the correct police officer or person, or were told to go to another police station.

Reporting to the police

Of the 75 respondents who completed the Rape Crisis Trust's counselling form, a third (33%) first reported the rape to the police. A further third (32%) did not provide responses to this item, and the remainder (20%) mostly reported the rape first to friends or family, or to a doctor or medical facility. These results are shown in the figure below.

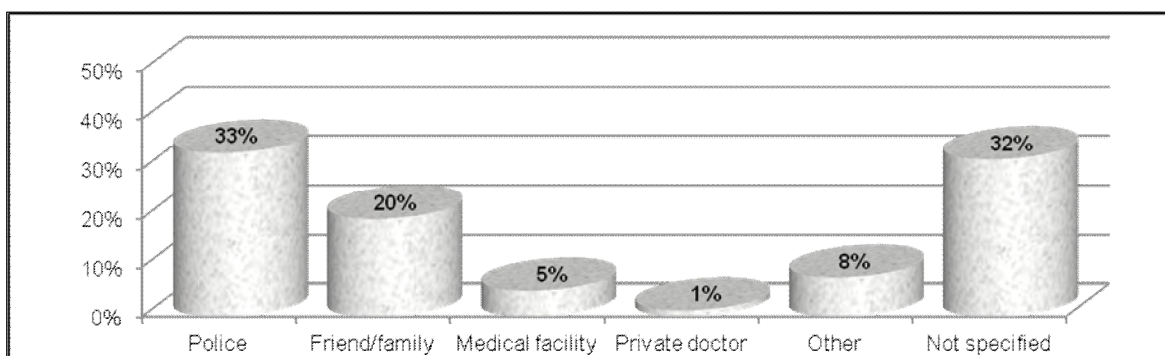


Figure 5: Place of first report of rape (N=75)

As illustrated in Figure 6 below, for the two-thirds of respondents who completed the item about time spent waiting, the majority (39%) had been seen immediately or within half an hour. This was a positive finding, but the implications for those women (30%) who had to wait longer are severe, especially because such

delays can impede medical treatment. A few women were told to go to Childline, Thutuzela, or Simela, or “had to wait a long time for the officer that works with rape - he was at another police station”.

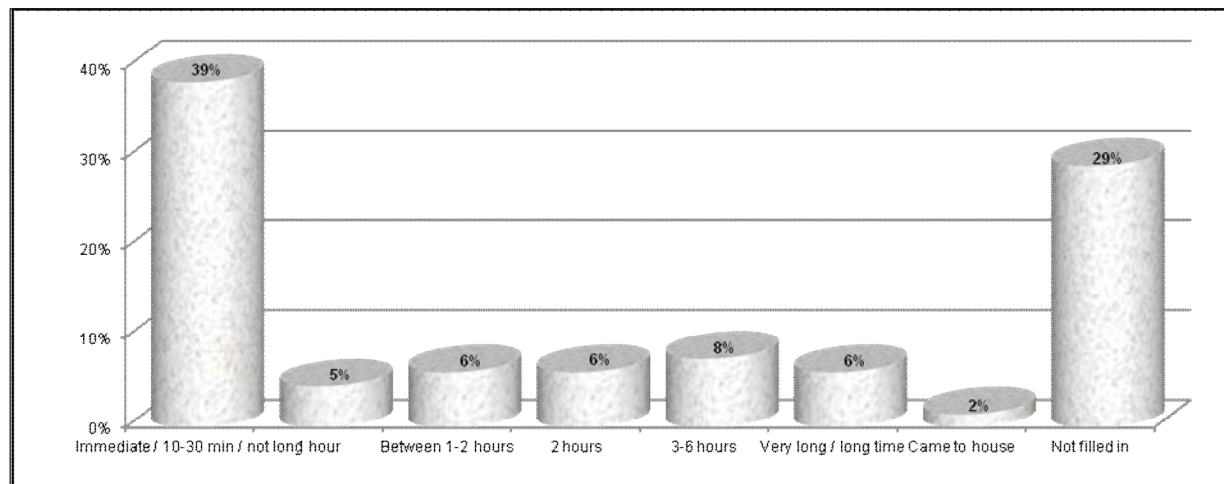


Figure 6: Waiting time at the police station when reporting a sexual offence

For the 65 respondents who completed this item in the counselling form, 84.6% of women had their statements taken by the police. Only 14% of this group were provided with a copy of their statement.

For the item on privacy, 30% of the cases we examined had not responded to the item. Among women who did respond, half of the group indicated that they gave their statement in a private room but a number of participants complained about having to give their statement in front of other people. Some had even been required to make their statement at the help desk, or in front of the perpetrator. One respondent expressed dissatisfaction because the police officer who took her statement was the sister of the perpetrator. Some of the comments read as follows:.

“I did not feel safe when making a statement- someone walked into the room whilst the statement was being taken and just stood there”.

“She went to the police station after the rape; however there were four men at the counter so couldn’t bring herself to report. It was only when she saw the perpetrator on the news about him being a serial rapist, she called the hotline and gave her statement to the police a couple of months after”.

“She felt stupid and that she was not respected. She was not taken to a private room, people could hear what had happened to her. The perpetrator was next to her in the police station. They pointed fingers at her and said girls that come from the area where she lives are actresses and make up stories”

Being informed of the procedure by the police and choosing to participate

Only just over a third (36.9%) of respondents (N=65) had the procedure explained to them and almost a third (32.3%) did not. One respondent discussed the lack of information from the police: “The constable doesn’t return messages. Nobody explained what would happen, just that they would arrest him. But they failed to arrest him”.¹³

Furthermore, fewer respondents (17) were given a choice as to whether or not they wanted to participate in the procedure than those who were (21).

Being informed about HIV treatment and provided with other necessary information by the police

The table below shows that, in most cases, the police did not provide adequate information to the survivor about further health or other necessary services.

Question	Yes		No		Incomplete/missing	
	Count	%	Count	%	Count	%
Were you provided with a list of where to get help?	14	21.5%	31	47.7%	20	30.8%
Did police offer to take you to health facility?	33	50.8%	9	13.8%	23	35.4%
Did the police tell you about PEP?	5	7.7%	34	52.3%	26	40.0%
Were you given a brochure about PEP?	2	3.1%	31	47.7%	32	49.2%

Table 1: Information provided at police station (N=65)

Almost half of the respondents (47.7%) received no information about other service points, and data were missing in 30.8% of the cases so this percentage was probably higher in reality. Encouragingly, at least half the survivors were offered to be taken to a health facility. However, only 6% indicated that

they received any information about compulsory HIV testing for perpetrators, and only one person in the group of 65 survivors had received a brochure on it. The majority of respondents were not informed about post-exposure prophylaxis (PEP) treatment for themselves or given a brochure or information about it, which is an alarming finding.

4.4 CONCLUSIONS REGARDING THE PROTECTION OF VICTIMS AT POLICE LEVEL

Law and policy: our review identified areas of inadequacy which we (the partners) feel are critical with regard to the police:

- ❑ SAPS statistics reported to the public annually were not disaggregated by the type of sexual offences committed, or by the survivors' sex or age.
- ❑ No existing statutes address the establishment of sufficient Family Child Abuse and Sexual Offences Units at the SAPS and their ongoing sustainability.

Current research: the main findings were as follows: in a substantial number of instances, police use poor discretion with regard to decision making; they do not always substantiate their decisions as required; they do not always comply with instructions and directives; they do not always deal with victims of sexual offences appropriately; the quality of their investigations is often poor; they do not always have sufficient resources at their disposal, which results in unacceptable delays; they do not always have the documentation at police stations that would allow them to be better informed and to inform survivors; and their Victim Friendly Rooms are often poorly managed

Primary data gathered in our study showed that the problems at police level negatively affected rape survivors. Some women felt unsafe reporting a rape to the police, and some felt they were not respected by the police; a scenario that was frequently cited as leading to feelings of not being respected was when the survivor was not able to give her statement in private. Access to information was a problem, with survivors not being given a copy of their statement, not being informed of the processes and procedures to be followed, not being informed of the progress of their case, and not being given information with

regard to HIV and PEP. They were also not given choices at key points; furthermore, the inadequacy of the information would have meant that their choices were not properly informed anyway.

These factors are significant in disempowering victims of sexual offences. Although the majority of our respondents reported that they were happy with the service they had received from the police, this finding is undermined by the fact that their responses to other items on the questionnaires showed that they had not received all the services required by law and by policy. Clearly, not knowing which services they have a right to receive is a problem for victims dealing with the criminal justice system.

5. The Health Care System

Health care is particularly important for survivors of sexual violence, with a specific need for HIV treatment for survivors of rape.

Health care is extremely important for survivors of sexual violence, with a specific need for HIV treatment for survivors of rape. Young women and girls are particularly vulnerable to rape, as shown by statistics from the Thuthuzela Care Centre at the Karl Bremer Hospital in Cape Town. In that report, almost 90% of 1 132 patients were female, and almost half of the patient group (48.9%) was younger than 18 years.¹⁴ Only 10.5% of patients seen at the centre were male, with this “substantial minority”¹⁵ being “considerably younger” than the female survivors; 70.6% of the male patients were younger than 12 years. Male survivors “present[ed] with more genital and anal injuries, indicating the importance of age and gender specific clinical management”.¹⁶ Therefore, young boys are also vulnerable to sexual abuse and have an increased risk of anal injuries, which facilitate the transmission of HIV. Simelela, a one-stop centre for rape survivors in Khayelitsha in the Western Cape, reported that 94% of patients presenting at the facility were female and 41% were younger than 14 years.¹⁷

Aside from the psychological effects of sexual violence—particularly rape, the physical health risks include injury, sexually transmitted diseases (STDs), and pregnancy. In South Africa, one of the most concerning physical risks of rape is HIV infection. The risk of HIV transmission is relatively high during forced sexual intercourse because of the increased risk of injury, including micro-injury, to the genital organs. Such injuries provide entry points for the virus¹⁸. If a person is raped repeatedly, the risk of injury and therefore infection is even higher. In South Africa many women are raped by more than one offender during a single incident, which further increases the risk of injury and multiple exposures to HIV.¹⁹ In 2009, an estimated 5.6 million people were living with HIV/AIDS in South Africa²⁰ and a recent study found that the HIV prevalence among men who admitted to having committed one or more rapes was 19.6%.²¹ These statistics illustrate the considerable infection risk for rape survivors.

When an individual has been possibly exposed to HIV, taking PEP can prevent the transmission of disease. PEP can be used after occupational exposure to HIV (needle-stick injuries, blood-splash and so on in health care settings) and after possible sexual exposure to HIV. PEP comprises a 28-day course of

14 K. Lammers, L. Martin, D. Andrews, and S. Seedat, “*Reported Rapes at a Hospital Rape Centre: Demographic and Clinical Profiles*,” *South African Medical Journal* 100, 6 (2010):363.

15 Ibid.

16 Ibid.

17 Simelela and Medecins Sans Frontieres, “*Surviving Rape – An Integrated Service for Rape Survivors in Khayelitsha, South Africa*” (Cape Town: Simelela, 2006), 17.

18 S. Maman, J. Campbell, M. D. Sweat, and A. C. Gielen, “*The Intersections of HIV and Violence: Directions for Future Research and Interventions*,” *Social Sciences and Medicine* 50 (2000):466.

19 L. Martin, “*Violence against women: An analysis of the epidemiology and patterns of injury in rape homicide in Cape Town and in rape in Johannesburg*” (Unpublished M. Med. Forensic Pathology Thesis, Cape Town: University of Cape Town, 1999).

20 UNAIDS, accessed May 19, 2011, <http://www.unaids.org/en/regionscountries/countries/southafrica/>.

21 R. Jewkes, Y. Sikweyiya, R. Morrell, and K. Dunkle, “*Understanding men’s health and use of violence: interface of rape and HIV in South Africa*” (Pretoria: Medical Research Council, 2009), 3.

antiretroviral drugs that must be started, at the latest, 72 hours after potential exposure to HIV. The efficacy of PEP decreases rapidly over time; for every hour by which treatment is delayed, the drugs are less likely to prevent HIV. It is therefore recommended to start the treatment as early as possible, preferably within the first few hours of exposure.²² After 72 hours, and possibly even earlier, the treatment will not have any effect.

Although PEP has been available at South African health facilities for several years, rape survivors face numerous challenges in successfully accessing treatment. Many citizens still do not know that PEP exists, and those who do may struggle to access a health care facility that offers PEP within 72 hours.²³ In addition, research shows that public health facilities are chronically understaffed, particularly after hours when most rape survivors seek help. Rape survivors' waiting times at the police station and at hospital often amount to several hours, which can directly determine the efficacy of PEP and whether a rape survivor is even eligible for PEP (that is, whether he or she sees a medical professional within the 72-hour cut-off period).²⁴

Few health care professionals have received training in the holistic management of rape survivors, and some health practitioners working in public hospitals do "not consider rape to be a serious medical condition."²⁵ Health care professionals often do not understand the impact of rape and are unwilling or perhaps unable (owing to other emergencies) to prioritise rape survivors.²⁶ Generally, the relationship between health care workers and patients is problematic, and patients complain about rudeness, arbitrary acts of unkindness, physical assault, and neglect by nurses.²⁷ If the patient is a rape survivor, negative attitudes among health care professionals are of great concern because they can exacerbate trauma and increase self-blame.

Even if rape survivors are able to access PEP, adherence to the medication is challenging. The drugs have severe side-effects that are often insufficiently managed by health care professionals.²⁸ Rape survivors might also lack understanding of the drug regimen if they are not counselled by health workers on the importance of treatment compliance.²⁹ Furthermore, the negative emotional association between the treatment and the rape should not be underestimated.

In some instances, health care professionals and/or police officers prevent

In 2009, an estimated 5.6 million people were living with HIV/AIDS in South Africa and a recent study found that the HIV prevalence among men who admitted to having committed one or more rapes was 19.6%.

22 Department of Health, *National Antiretroviral Treatment Guidelines* (Pretoria: Department of Health, 2004), 72.

23 Human Rights Watch, *Deadly Delay: South Africa's Efforts to Prevent HIV in Survivors of Sexual Violence*, (New York: Human Rights Watch, 2004), 29.

24 S. Roehrs, "Post-Exposure Prophylaxis (PEP) for Rape Survivors: Identifying Barriers to HIV-Related Services – Research Report", forthcoming.

25 N. Christofides, R. K. Jewkes, N. Webster, L. Penn-Kekana, N. Abrahams and L. J. Martin, "Other Patients are really in Need of Medical Attention - The Quality of Health Services for Rape Survivors in South Africa," *Bulletin of the World Health Organization* 83, 7 (2005):497.

26 S. Roehrs, *Post-Exposure Prophylaxis (PEP) for Rape Survivors*.

27 H. Coovadia, R. Jewkes, P. Barron, D. Sanders, and D. McIntyre, "The Health and Health System of South Africa: Historical Roots of Current Public Health Challenges," *Lancet* 374, 9692 (2009):829.

28 L. Vetten and S. Haffejee, "Supporting Rape Survivors in Adhering to Post-Exposure Prophylaxis (PEP) to Prevent HIV Infection: The Importance of Psycho-Social Counselling and Support," *Southern African Journal of HIV Medicine* 9, 3 (2008):26; S. Roehrs, *Post-Exposure Prophylaxis (PEP) for Rape Survivors*.

29 Vetten and Haffejee, "Supporting Rape Survivors," 25.

Few health care professionals have received training in the holistic management of rape survivors, and some health practitioners working in public hospitals do “not consider rape to be a serious medical condition”.

rape survivors from accessing PEP.³⁰ For instance, early research by Human Rights Watch suggested that health care workers required rape survivors to file a criminal charge before they were allowed to receive PEP. Roehrs conducted interviews in five provinces of South Africa and found that some health care professionals and police officers required rape survivors to lay a charge before they could receive PEP or a forensic examination.³¹ Roehrs’ study showed that service providers did not necessarily misinterpret the law in requiring a charge to be laid; rather, service providers tended to use the requirement of a charge to test whether a rape survivor was serious about the complaint or merely “cried rape” to access medical treatment.³²

5.1 LAW AND POLICY ON HEALTH CARE

5.1.2 CONSTITUTIONAL OBLIGATIONS

The South African Constitution entitles all people to the right to access health care services. This right is subject to available resources and must be progressively realised. Progressive realisation means that government must continuously strive to amplify health care services and may not reduce the availability of existing health care services. This right, however, does not include an entitlement to health or to “being healthy”. No-one may be refused emergency medical treatment.

5.1.3 RELEVANT CASE LAW ON ACCESS TO HEALTH CARE

In addition to progressive access to health care, Section 27(3) of the Constitution stipulates that no person may be denied emergency medical treatment. Chaskalson J explained in the decision *Soobramoney v Minister of Health (KwaZulu-Natal)* that, “[w]hat the section requires is that remedial treatment that is necessary and available be given immediately to avert [...] harm” caused by an emergency. An emergency is regarded as “a sudden catastrophe which calls for immediate medical attention”.³³ The purpose of the constitutional provision is to ensure that treatment be made available in an emergency,³⁴ and is not delayed or frustrated by “bureaucratic requirements or other formalities”.³⁵ There is currently no case law on whether rape survivors can claim post-rape medical care under Section 27(3) of the Constitution. This would depend on whether the rape is considered an emergency that calls for immediate medical attention. In *Soobramoney*, the Constitutional Court decided that a chronic disease that requires ongoing treatment does not fall under the definition of an emergency even if the condition becomes life-threatening.

30 Human Rights Watch, *Deadly Delay*, 47.

31 S. Roehrs, *Post-Exposure Prophylaxis (PEP) for Rape Survivors*.

32 Ibid.

33 Ibid.

34 Ibid.

35 Ibid.

5.1.4 LEGISLATION GUIDING HEALTH CARE PROVIDERS

The Sexual Offences Act

The SOA speaks to the stipulations regarding the provision of PEP after rape, the designation of health facilities specifically for the forensic examination and medical treatment of survivors of sexual offences, and the compulsory HIV testing of alleged offenders. These stipulations match closely the instructions to police. A more detailed outline of these provisions appears in Appendix G to this report.

Only a survivor of a sexual offence who has been exposed to HIV as a result of the offence may receive PEP at a designated public health establishment.³⁶ Furthermore, the law requires the survivor to either lay a charge with the police or to report the incident “in the prescribed manner” at a designated public health facility. In terms of how sexual offences are described in this section of the Act, relevant exposure to HIV only occurs where a person is anally, orally, or vaginally raped.³⁷

It is important to note that the lawmakers chose the wording of the SOA carefully. The provision stipulates that rape survivors “may” receive PEP, not “must” or “should” receive PEP. Thus, strictly speaking, this provision does not introduce a right to be given PEP. Possibly, the lawmakers chose this wording because not all rape survivors should be given PEP; rape survivors who are already HIV positive or who present more than 72 hours after potential exposure cannot be given PEP because it would be harmful to the former group and non-effective in the latter. However, the lawmakers could have addressed this complexity by saying a rape survivor “must be offered PEP” if they are eligible for PEP under the prevailing treatment norms and standards. Another possible explanation could be that the lawmakers did not want to create a legal entitlement to PEP. But this interpretation would undermine the Preamble of the SOA, which specifies that the law inter alia aims to “provide certain services to certain victims of sexual offences [...] including affording a victim of certain sexual offences [...] the right to receive Post Exposure Prophylaxis in certain circumstances[.]” It is therefore unclear whether rape survivors’ entitlement to PEP is actionable.

With regard to other treatments, the legislation merely provides that rape survivors need to be “informed of the need to obtain medical advice and assistance regarding the possibility of other sexually transmitted infections”. The law therefore does not introduce a “treatment clause” that guarantees rape survivors access to PEP and other medical treatment. However, the law clearly sets out duties for police officials and health care professionals. A police official, medical practitioner, or nurse to whom the sexual offence is reported must provide the correct information to the survivor.

The other HIV-related service for rape survivors is compulsory HIV testing of the alleged sexual offender. According to the law, this procedure would inform the rape survivor whether the alleged offender is infected with HIV,

36 Section 27 of the Sexual Offences Act defines victim as a person who alleges that a sexual offence has been committed.

37 All these forms of sexual abuse constitute a rape under section 3 of the Sexual Offences Act.

The forensic medical practitioner plays a significant role in the criminal justice system with regard to sexual offences.

which would empower the survivor to make informed medical, lifestyle, and other personal decisions and would reduce her secondary trauma. Furthermore, the rape survivor can use the test results as evidence in any ensuing civil proceedings related to the sexual offence.³⁸ The SOA describes how a survivor can apply to have the alleged offender tested for HIV and describes the role of the police and health care professionals in the testing process.

Importantly, lawmakers included many of the duties of police officers and health care professionals in relation to PEP and compulsory HIV testing in the legislation itself, rather than simply restricting them to policy. This means that the duties are binding and may even be actionable. Despite this strength, the relevant role-players—namely police officials and health care workers—might not always be informed of and trained in these additional responsibilities. Given that the duties clearly fall outside routine police work and may also be new to some professionals, information and training for police officials and health care professionals appear vital.

The DOH has also put in place National Policy Guidelines in terms of the SOA. The guidelines recognise that the DOH plays an important role in the criminal justice system with regard to sexual offences. The Department accordingly needs to develop processes to provide the court with physical and psychological evidence on the survivor's condition, and to provide special medico-legal evidence to assist courts in prosecuting the perpetrator successfully. A more detailed description of these National Policy Guidelines can be found in Appendix H.

The DOH has also issued National Instructions and National Directives in terms of the SOA. The Instructions describe the manner in which sexual offences should be handled by forensic experts. The purpose of the Instructions is also to provide uniform procedures for health facilities in South Africa that conduct medical examinations on survivors of sexual offences; this includes offering services, dealing with survivors in a sensitive and effective manner, and providing the police with medical evidence to assist in prosecuting the alleged offender. The full set of National Instructions appears as Appendix I to this report.

The National Directives from the DOH are very similar to the National Instructions; however, the Instructions provide detail on the forensic side whereas the Directives provide detail on PEP and other treatments. The purpose of the Health Directives is to provide uniform and standard procedures for health establishments in dealing with survivors of sexual offences; this includes the various types of treatments for rape survivors (including PEP), and the duties of health care professionals in forensic examination and HIV testing. A more detailed discussion of the Directives can be found in Appendix J.

Regulations on Services for Victims of Sexual Offences and Compulsory HIV Testing of Alleged Sex Offenders

Under section 39 of the SOA, the Department of Justice and Constitutional Development (DJCD) is required to draft regulations on all matters that are necessary in terms of HIV-related services, including any prescribed forms. The DJCD thus drafted the Regulations on Services for Victims of Sexual Offences and Compulsory HIV Testing of Alleged Sex Offenders;³⁹ these documents are intended to guide the drafting of further instructions and directives by the DOH, the Commissioner of the Police, and the NPA. The DJCD Regulations establish procedures for the provision of information and services to the survivors of sexual offences, the compulsory HIV testing of alleged sex offenders, and the creation and upkeep of the National Register for Sex Offenders.

38 The benefits of compulsory HIV testing of the alleged offender have been questioned and the inclusion of this "services" in the legislation was controversial. See, for instance, S. Roehrs, "Positive or Negative? Compulsory HIV Testing of Alleged Sexual Offenders", *SA Crime Quarterly*, 20 (2007): 31-36.

39 Regulations on Services for Victims of Sexual Offences and Compulsory HIV Testing of Alleged Sex Offenders, Government Gazette, May 2008; No. 31076.

In terms of providing information to rape survivors, the Regulations essentially repeat what has already been said in the SOA. Under the Regulations, the police official, medical practitioner or nurse to whom a sexual offence is reported must provide the correct information to the survivor or an interested person (parent, guardian etc.).⁴⁰ This information must be provided both verbally and by way of a notice. The notice on these services must include an attached list of the contact information for accessible health establishments. If the survivor or interested person is not able to read the notice, the contents must be explained to him or her by the police official or another person who is able to assist the police official in this regard, or by the medical practitioner or nurse, as the case may be, in a language that the survivor understands.

Furthermore, the Regulations stipulate that the medical practitioner or nurse to whom the incident is reported must, after having provided these services, advise the survivor or interested person to lay a charge without delay at the police station nearest to the place where the incident occurred. A survivor is entitled to PEP if the offence is reported in the prescribed manner at a designated health establishment to medical practitioner, or if a charge is laid at a police station. Thus, survivors do not necessarily have to lay a charge. The provision of health care services, including PEP, does not depend on the survivor laying a charge.

The Criminal Procedure Act 51 of 1977

Various provisions in the Act relate to the protection of witnesses and complainants and are applicable and relevant to survivors of sexual offences and child survivors. These provisions impose duties on various officials within the criminal justice system, including police, prosecutors, counsel, and the court.

A police officer who believes that a child or mentally disabled person needs to be examined by a forensic health practitioner because of a suspected sexual offence may apply to a magistrate for necessary consent, if the person's parent or guardian cannot be located, cannot grant consent in time or unreasonably refuses consent, is deceased, or is a suspect in the alleged crime. A police officer is not obliged to make this application but may do so and is allowed to act with some discretion in these instances.

The Criminal Law Amendment Act 105 of 1997

This Act prescribes a minimum sentence of life imprisonment in rape cases wherein aggravating circumstances relating to the offender exist or where the survivor has particular vulnerabilities.

Aggravating circumstances relating to the offender include, but are not limited to, the following: the offender has committed multiple rapes, has raped multiple times during the same incident, has had more than two prior convictions for rape, or knows that s/he has tested positive for HIV/Aids.

The particular vulnerabilities of the survivor include, but are not limited to, the following: being a girl under the age of 16, being a woman that is rendered particularly vulnerable through physical disability, being a woman who is mentally ill, or where grievous bodily harm was inflicted on the survivor.

⁴⁰ The term "interested person" is defined in section 27 of the Sexual Offences Act.

5.2 RESEARCH FINDINGS ON HEALTH AND IMPLEMENTATION OF RELEVANT LAW AND POLICY

Study 3: Artz, L., & Smythe, D. Case Attrition in Rape Cases: A Comparative Analysis, 2007

To some extent, competition might arise between the imperatives of medical management related to sexual offences and the legal management of sexual offences. The forensic examination often forms a crucial aspect of rape cases and, therefore, requires detailed attention to injuries and complaints made by the survivor at the time of the examination. From a health care perspective, the primary objective of the medical examination is the comprehensive medical care of the rape complainant. From the criminal justice side, the primary objective of the forensic examination appears to be timely and effective criminal justice management of sexual offences cases. Sometimes these objectives are in conflict.

Study 4: Artz, L., Smythe, D., Leggett, T. (2004) Reflections on Integrated Rape Case Management. Institute of Criminology, University of Cape Town: South Africa.

The Thuthuzela Care Centre (TCC) presents an innovative and multifaceted approach to the care of rape victims and the management of sexual assault cases in general. The centre runs a multi-disciplinary project that involves police investigators, medical personnel, social workers, prosecutors, and volunteers. It aims to improve the investigation and prosecution of rape cases, as well as providing comprehensive and effective services to rape victims.

A disconnect can occur between, on the one hand, providing comprehensive medical care and focusing on the health and safety of the complainant, and on the other, charging the perpetrator. This disconnect sometimes manifests in doctors not treating the J88 with the required seriousness.

Study 5: Sigsworth, R., Jewkes, R., and Christofides, N. (2009) Tracking Rape Case Attrition in Gauteng: The Police Investigation Stage. The Centre for the Study of Violence and Reconciliation: South Africa.

This study found that for 41.6% of cases in which forensic evidence was obtained, the evidence was not sent to the laboratory.

Study 6: Vetten, L., Jewkes, R., Sigsworth, R., Christofides, N., Loots, L., Dunseith, O. (2008) Tracking Justice: The Attrition of Rape Cases through the Criminal Justice System in Gauteng. Johannesburg: Tshwaranang Legal Advocacy Centre, the South African Medical Research Council and the Centre for the Study of Violence and Reconciliation.

This study found that a report from the laboratory containing the results of DNA testing was available in only 2% of dockets. An alarming finding was that in only 16.4% of cases where a suspect was arrested was his blood taken. This low rate prevents the police from comparing the J88 to the suspect's DNA, which severely hinders the investigation. Among cases of child rape, only 39% of young children had a kit completed compared with 61% of teenagers and 77% of adults. The medical results for girls were significantly more likely to be analysed and a report made available compared with adult clients. The presence of injuries (regardless of severity) made no difference to the likelihood of a suspect being arrested. Following an arrest, cases involving children were twice as likely to go to trial if there was a genital injury with a skin or mucosal tear. A conviction for a sexual offence in adults was three times more likely if there was a bodily injury, and more than four times more likely if there was a genital injury. The availability of a report on DNA made no difference to the likelihood of conviction (although DNA reports were available in very few cases).

Study 7: Monitoring the Implementation of Sexual Offences Legislation and Policy: Findings from the Shukumisa Campaign conducted during the 16 Days of Activism 2009 – 2011, Tshwaranang Legal Advocacy Centre, Rape Crisis Cape Town Trust, Resources Aimed at the Prevention of Child Abuse and Neglect, Women on Farms Project, Positive Muslims, Mosaic Training, Service and Healing Centre for Women, Justice and Women and Tohooyandou Victim Empowerment Programme

Few hospitals had forensic nurses available to conduct sexual assault examinations and some hospitals had no PEP medicines available to offer to victims.

5.3 FINDINGS FROM PRIMARY DATA ANALYSIS

Of the three areas investigated in this report (police, health care, and courts), we found the health care services to be the most lacking in terms of meeting policy obligations.

Almost half of the court support data on health was missing and therefore was not included in the analysis. Of the 75 counselling form respondents, 58 people (77%) indicated that they went to a medical centre. Respondents felt fairly positive about their overall experience at the health facilities, with two-thirds (65.5%) saying that they felt respected and safe. However, deeper scrutiny of the responses showed that many survivors were denied essential and possibly life-saving services; thus, in reality the survivors were largely unprotected and disrespected. Additionally, the qualitative responses indicated dissatisfaction with treatment at health care facilities. For example, one person said: “The doctor at [the] Hospital was very harsh and asked silly questions. Everyone was treated very badly that day”. Another noted that the sister on duty was very rude and she was not treated well.

A quarter of the respondents (24.1%) indicated that the procedure was not explained to them, and a third (31%) of the group was not given a choice about whether or not to participate. One person stated: “*She [the rape survivor] wasn’t treated with respect at the medical facility, the doctor didn’t want to explain what happened to her*”⁴¹.

Most clients who responded had received pregnancy and STI testing and medication (the morning-after pill or STI medication). In addition, 72.4% indicated that they had received an HIV test; 19% of respondents did not complete this item and only 8.6% indicated that they had not been tested. However, as shown in Table 2 below, only half of the survivor group received PEP treatment, a third was given information about PEP, and almost no respondents (2 people) were provided with take-home information. Among survivors receiving PEP, only 27.6% were given medication to manage the side-effects of PEP.

The implications of a lack of information is that survivors would be far less likely to adhere to their treatment (for those who received it in the first place) and would therefore be at a high risk of contracting HIV. In addition, almost no respondents (5 of 65) were given information about perpetrator testing.

In terms of receiving referral information for other possibly necessary services, almost half of the group (44.8%) stated that they were not given any information. Only 20.7% were asked to provide a further statement on the assault once the medical examination had been completed.

41 Counselling form

Question	Yes		No		Unsure		Incomplete/ missing	
	Count	%	Count	%	Count	%	Count	%
Did you receive PEP treatment?	30	51.7%	16	27.6%	0	0.0%	12	20.7%
Were you given information on PEP?	20	34.5%	22	37.9%	0	0.0%	16	27.6%
Given a PEP booklet?	2	3.4%	30	51.7%	0	0.0%	26	44.8%
PEP medication for side effects given?	16	27.6%	16	27.6%	0	0.0%	26	44.8%
Were you provided with info about referrals?	15	25.9%	26	44.8%	0	0.0%	17	29.3%
Were you provided with info re testing for perpetrator?	5	8.6%	35	60.3%	0	0.0%	18	31.0%
Was a further statement taken from you after medical examination?	12	20.7%	27	46.6%	0	0.0%	19	32.8%

Table 2: Treatment at medical facility (N=58)

5.4 CONCLUSIONS REGARDING THE PROTECTION OF VICTIMS AT THE HEALTH CARE LEVEL

Law and policy: our research revealed several inadequacies that we (the partners) feel are critical, as follows:

- ❑ The National Directives and Instructions on Conducting a Forensic Examination on Survivors of Sexual Offence Cases (Health Directives) did not highlight the importance of starting PEP as soon as possible. This focus is necessary if health care providers are to prioritise this aspect of the medical management of rape cases.
- ❑ The Health Directives make no provision for health care professionals dealing with sexual offences to be provided with an updated list of referrals to services relevant to survivors of sexual offences, and specific to their local area.
- ❑ The Health Directives are unclear on the role of the health care provider with regard to informing the rape survivor about the possibility of having the alleged offender tested for HIV. The Directives describe the role of the investigating officer in ensuring that pre- and post-test HIV counselling of the rape survivor has taken place, when they have no authority over police.
- ❑ The National Instructions to Medical Practitioners state that forensic examination and medical treatment of rape survivors can occur only after the victim has laid a charge at the police station. This information is incorrect and denies victims of sexual offences the choice of reporting the offence within six weeks, should they change their minds after initially failing to report the crime.
- ❑ The National Policy Guidelines do not state that emergency medical treatment must be prioritised over the forensic examination and other medical treatment of sexual offence survivors.
- ❑ Specific statutes that apply to the establishment of the Thuthuzela Care Centres and their ongoing sustainability have not been developed.

Current research: our study revealed that conflicting imperatives might arise between the medical and forensic requirements for managing victims of sexual assault. We noted that the multidisciplinary model of the Thuthuzela Care Centre works well. Our findings also showed that forensic examiners did not always take the completion of the J88 form seriously enough, and did not always draw blood samples from the arrested suspect; this failure would prevent a comparison with samples taken from a victim. Evidence was not always sent through to the laboratory for analysis, there was a shortage of forensic nurses, PEP medicines were not always available, and there was a bias in favour of cases involving children.

Primary data from our research showed that rape survivors experienced more problems in accessing health care than with the police or the courts. A substantial number of rape survivors were not taken to a health facility for an examination at all. In some instances, medical personnel were rude and insensitive, gave no explanation of the medical procedures to the victim, did not give the victim any choices, gave no information about PEP to the victim, did nothing to improve the survivor's adherence to PEP, gave no information about the option of testing the alleged offender for HIV, and gave no information about additional referral services relating to sexual offences. In some instances, PEP medication was not given, and in others medication to ameliorate the side-effects of PEP was not given.

6. Courts

The present arbitrary or haphazard approach to victims of sexual assault has proved to be ineffective and in most cases leaves the victim with a sense of betrayal by the courts (often referred to as ‘secondary victimisation’).

The Department of Justice and Constitutional Development, together with the National Prosecuting Authority, are responsible for the successful prosecution of perpetrators of sexual offences. In its National Guidelines for the Prosecution of Sexual Offence Cases, the DJCD recognises that the “present arbitrary or haphazard approach to victims of sexual assault has proved to be ineffective and in most cases leaves the victim with a sense of betrayal by the courts (often referred to as ‘secondary victimisation’).” The guidelines further acknowledge that survivors and people tasked with helping the state prove its case against perpetrators are left feeling that they are not a part of the criminal justice process, despite their invaluable role in that process.

Despite these acknowledgements, survivors continue to experience secondary victimisation as they make their way through the courts of South Africa. Very few survivors are sufficiently prepared for what they will experience in court, and what their role will be as a complainant—and therefore the state’s main witness in the case.

Furthermore, in deciding whether to prosecute, there is precious little transparency and accountability to ordinary members of the public. Many people are simply informed after reporting an incident to the police that the matter will not be prosecuted in court, without hearing any reasons for the decision. Only a small proportion of sexual offence matters are in fact successfully finalised in court annually. As already indicated, the NPA makes no effort to publicise disaggregated statistics or conviction rates related to sexual offences.

The NPA established the Sexual Offences and Community Affairs (SOCA) Unit in October 1999. The unit’s main objective was to eradicate all forms of gender-based violence against women and children. The SOCA mandate includes the reduction of victimisation of women and children through enhancing the state’s capacity to prosecute sexual offences and domestic violence cases. SOCA is also mandated to reduce secondary victimisation of complainants and to raise public awareness of the scourge of sexual offences and domestic violence. One of the objectives of the Sexual Offences Section of the SOCA is to reduce secondary victimisation within the criminal justice system, specifically by establishing multi-disciplinary care centres and adopting a victim-centred approach. This objective finds expression in the establishment and management of Thuthuzela Care Centres.

Thuthuzela Care Centres are one-stop facilities that have been introduced as a critical part of South Africa’s anti-rape strategy; they are aimed at reducing secondary victimisation, improving conviction rates, and reducing the cycle

time for finalising cases⁴². The Thuthuzela project is led by the NPA's SOCA in partnership with various departments and donors, as a response to the urgent need for an integrated strategy for preventing sexual offences and providing support to rape survivors.

According to the NPA,

Once at the Thuthuzela Care Centre, the victim is ushered to a quiet, private space and welcomed by the site-coordinator. A doctor is immediately summoned to conduct a medical examination. The victim is then given Information on the procedures to be performed. The victim (patient) signs a consent form for medical examination and blood specimens. If the medical examination happens within 72 hours of the rape, DNA and PEP is conducted, after which the victim is offered the opportunity to take a bath or shower and to change into clean clothes. After that, the investigating officer on call at the centre takes the victim's statement. Thereafter, the victim receives appropriate medication and is given a follow-up date for further medical treatment, before being transported home.⁴³

To date, however, only thirty Thuthuzela Care Centres have been implemented across South Africa, and their funding remains uncertain. Initial funding was provided by international donors but the state was supposed to take over the role of core funder; however, little progress has been made in the state assuming this funding role. No mention has been made of Thuthuzela Care Centres in the relevant laws and policies, which puts their sustainability in the current rapidly changing political and economic environment into question.

6.1 LAW AND POLICY RELATING TO COURTS

6.1.2 CONSTITUTIONAL OBLIGATIONS

The National Director of Public Prosecutions may review a decision to prosecute or not to prosecute, after consulting the relevant Provincial Director of Public Prosecutions and after taking representations from the accused, complainant or any other relevant person. The prosecuting authority:

- ❑ Has the power to institute criminal proceedings on behalf of the state
- ❑ Must ensure appropriately qualified prosecutors are responsible for and carry out the necessary functions
- ❑ Must determine policy, issues policy directives and intervene when these are not complied

with. The National Director of Public Prosecutions may also review decision to prosecute or not to prosecute.

A more detailed list of these obligations appears as Appendix K to this report.

6.1.3 RELEVANT CASE LAW ON DUTIES AND OBLIGATIONS OF THE COURT

Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening) 2002 (1) SARC 79 (CC)

The Applicant, Carmichele, sued the Minister of Safety and Security (“the state”) for damages for the harm that she suffered due to being brutally attacked by a man who was awaiting trial for the alleged attempted rape of another woman. Despite his history of sexual violence, the police and prosecutor had

42 Thuthuzela Brochure, available at <http://www.npa.gov.za/ReadContent395.aspx>

43 Ibid.

recommended his release without bail.

In the High Court the Applicant alleged that she had been attacked due to the police and prosecutor failing to fulfil the duty of care that they owed her as state officials in terms of her constitutional rights to life, equality, dignity, freedom and security of the person and privacy. The High Court dismissed the Applicant's case on the basis that she did not prove that the police or prosecutor owed her these duties in terms of the law.

The Applicant appealed to the Supreme Court of Appeal, which also held that the police and prosecution did not owe her a duty of care and could not be held responsible for the harm that she suffered.

The Applicant then further appealed to the Constitutional Court. The court held that the other courts who heard the matter were under a general duty to develop the law in accordance with the principles of the Constitution and the state's constitutional duty to protect the rights of women. The court further held that the state is obliged by the Constitution and International law to prevent gender-based violence and to protect the dignity, freedom and security of women. Finally, the court held that prosecutors, who are under a general duty to place information relevant to the refusal or grant of bail before the court, may reasonably be held liable for negligently failing to fulfil that duty.

The Constitutional Court referred the case back to the High Court for trial which held that the state owed the Applicant a constitutional duty of care to protect her against violent crime in terms of her constitutional rights.

6.1.4 OBLIGATIONS OF THE COURT IN TERMS OF LEGISLATION

The Criminal Procedure Act 51 of 1977

There are various provisions in the Act that relate to protection of witnesses and complainants that are applicable to and relevant for survivors of sexual offences and minor survivors. A more comprehensive list of these provisions appears as Appendix L to this report. The Act also contains an important provision that expressly prohibits the citing of evidence relating to a sexual offence complainant's sexual history as proof of consent or to show that the complainant is less believable. In addition, the Act contains several provisions that entitle the complainant in a criminal proceeding to be heard with respect to plea agreements, sentencing, and parole hearings. These provisions impose duties on various officials within the criminal justice system including police, prosecutors, counsel, and the court.

Sexual Offences Act

The SOA Act does away with certain evidentiary rules that previously impeded successful prosecution of sexual offences, and greatly prejudiced complainants in the criminal trial process. Section 58 of the SOA now provides that evidence relating to previous consistent statements by a complainant shall be admissible in sexual offence proceedings, provided that the court may not draw any inference from the absence of such previous consistent statements. Section 59 further provides that the court may not draw any inference from the length of any delay between the alleged commission of a sexual offence, and the reporting thereof. This provision take into account that fact that survivors have various emotional and psychological responses to sexual offences, such as denial, fear, shame and anger, and that not every survivor will report such an offence immediately after it occurs, for these very reasons. According to Section 60 of the SOA, a court may also not treat the evidence of a complainant in a sexual offence matter with caution, effectively doing away with the "cautionary rule" that previously formed part of South Africa's law.

The SOA provides for the implementation and periodic review of a National Policy Framework (NPF) to ensure the uniform and coordinated administration of the Act to be adopted and published within

one year of the implementation of the SOA and also to be reviewed within five years of publication, and then once every five years thereafter. The NPF would guide the implementation, enforcement and administration of the SOA and enhance the delivery of services as envisaged in this Act by the development of a plan for the progressive realisation of services for survivors of sexual offences within available resources.

In terms of Section 62 of the SOA “the Minister must, after consultation with the cabinet members responsible for safety and security, correctional services, social development and health and the National Director of Public Prosecutions, adopt a national policy framework, relating to all matters dealt with in the SOA, to ensure a uniform and co-ordinated approach by all Government departments and institutions in dealing with matters relating to sexual offences;”

The SOA was implemented in 2007, therefore the national policy framework should have been adopted during 2008 and the initial five-year review of the SOA conducted in 2013. The DJCD is responsible for the implementation of the SOA NPF, and is inordinately delayed in the execution of this particular provision. It only recently presented its draft national policy framework during June 2011, three years after the national policy framework should have been implemented. Almost 5 years after the promulgation of the SOA, the NPF has yet to be finalised and gazetted. This is clearly problematic.

One of the key objectives of the National Policy Framework is the development of a plan for the progressive realisation of services for survivors of sexual offences within available resources. This has yet to be articulated. It is therefore critical that the National Policy Framework be adopted as soon as possible so that the SOA can fully realise its purpose of providing a uniform mechanism for ensuring sexual offence survivors’ rights and preventing their secondary victimisation. Moreover, while the draft NPF recognises the importance of the involvement of intersectoral organizations and civil society in the on-going monitoring and evaluation of the implementation of the SOA, it has yet to engage in a wider, consultative manner about the substance of the framework.

An Intersectoral Committee must be established in terms of the SOA consisting of:

- ❑ Director-General: Justice and Constitutional Development, who shall be the chairperson of the Committee;
- ❑ The National Commissioner of the South African Police Service;
- ❑ The National Commissioner of Correctional Services;
- ❑ The Director-General: Social Development;
- ❑ The Director-General: Health; and
- ❑ The National Director of Public Prosecutions.

The Committee is responsible for developing and compiling the draft NPF which must include guidelines for the implementation of the priorities and strategies contained in the framework. It is also responsible for measuring

Survivors have various emotional and psychological responses to sexual offences, such as denial, fear, shame and anger, and not every survivor will report such an offence immediately after it occurs, for these very reasons.

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progress on the achievement of the NPF objectives, ensuring that the different organs of state comply with the primary and supporting roles and responsibilities allocated to them in terms of both the NPF and the SOA, and monitoring the implementation of the NPF and of this Act.

Despite the fact that the SOA was promulgated in 2007, the Committee has failed to date to publish a final national policy framework, as the Act enjoins it to do. The framework remains in a draft format, and is currently not being utilised to perform any of the functions set out for the Committee in terms of the SOA.

The SOA further provides for parliamentary reporting. The Minister of Justice must, after consultation with the cabinet members responsible for safety and security, correctional services, social development and health and the National Director of Public Prosecutions, within one year after the implementation of this Act submit reports to Parliament, on the implementation of the SOA. Such reports are to be submitted annually.

Chapter 6 of the SOA provides for the establishment of a National Sexual Offender Register. In terms of Section 41 prohibits certain types of employment by persons who have committed sexual offences against children and persons who are mentally disabled. A person who has been convicted of the commission of a sexual offence against a child, whether committed before or after the commencement of the SOA, in or outside the Republic, will be recorded in the register and that person will be unable to be employed in any capacity that brings them into contact with children or mentally disabled persons. The DOJCD has described the Register as “the cornerstone” of the SOA, but there is much criticism regarding the manner in which this register is being managed. Furthermore, a similar register exists in terms of the Children’s Act, and it is unclear how the two registers complement one another, alternatively, why the duplication is necessary.

The National Guidelines for Prosecutors in terms of the SOA are intended to codify and clarify the functions and duties of Prosecutors in dealing with sexual offences cases in the criminal justice system. Of course, these policy guidelines do not have the status of an Act of Parliament but prosecutors must follow them unless there is good reason not to do so. The National Guidelines highlight the need to respect, protect, and improve the treatment of survivors by the courts and the need to value the survivor’s role in the criminal justice system. The National Guidelines for prosecutors can be found in Appendix M.

The prosecution authority is yet to publish any National Instructions or Directives for the prosecution of sexual offences in accordance with the SOA.

The Criminal Law Amendment Act 105 of 1997

The Criminal Law Amendment Act prescribes a minimum sentence of life imprisonment in rape cases wherein aggravating circumstances relating to the offender exist or wherein the survivor has particular vulnerabilities as stipulated in Section 51 of The Criminal Law Amendment Act. These circumstances have already been described earlier in this document.

The Act also stipulates a minimum sentence for:

- ❑ A first offender in a rape case, a minimum sentence of 10 years imprisonment
- ❑ A second offender; a minimum sentence of 15 years imprisonment
- ❑ A third or subsequent offender of any such offence; a minimum sentence of 20 years imprisonment.

The sentences mentioned above are not mandatory. A court is obliged to apply the minimum sentences unless there are 'substantial and compelling circumstances' validating a lesser sentence.

6.2 RESEARCH FINDINGS ON COURT-LEVEL IMPLEMENTATION OF THE LAW ON SEXUAL OFFENCES

Research Study 3: Artz, L., & Smythe, D, Case Attrition in Rape Cases: A Comparative Analysis, 2007

Local intervention programmes established by the state (including specialised sexual offences courts and rape care centres), as well as attrition research, have demonstrated that investigations guided by prosecutors not only bridge the historic gap between police investigations and evidence, improving prosecutor preparedness for trial, but ensure that investigating officers are instructed by an informed officer of the court on what evidence is useful and required for the prosecution and conviction of a case.

Research Study 4: Artz, L., Smythe, D., Leggett, T. (2004) Reflections on Integrated Rape Case Management. Institute of Criminology, University of Cape Town: South Africa.

The overall quality of prosecution of sexual offence cases has improved since the decision to contract experienced prosecutors for the TCC Project. Specialised sexual offences courts have higher conviction rates due to their specialised nature.

Ultimately, investigations lead by prosecutors are a successful model because it bridges the historic gap between police investigations and evidences prosecutor preparedness for trial. It also ensures that investigating officers are instructed on what evidence is useful and required for the prosecution and conviction of a case. Furthermore, police are accountable to prosecutors and investigations are more interactive under this model. This model also aids the victim, who only has to go through one process of investigation, easing her mental anguish.

Research Study 5: Vetten, L., Jewkes, R., Sigsworth, R., Christofides, N., Loots, L., Dunseith, O. (2008) Tracking Justice: The Attrition of Rape Cases through the Criminal Justice System in Gauteng. Johannesburg: Tshwaranang Legal Advocacy Centre, the South African Medical Research Council and the Centre for the Study of Violence and Reconciliation.

Only 42.8% of perpetrators arrested were charged in court, only 17.3% of cases resulted in trials, conviction for rape occurred in just 4.1% of cases and 15.6% of rape convictions received less than the mandated 10 year minimum sentence. A lack of coordination between investigating officers and prosecutors in relation to the evidence required to prosecute a rape case was noted. A high caseload was seen to limit the amount of time available to prosecutors to consult with witnesses and prepare for trial. The high caseload, combined with a court backlog and the pressure to secure convictions, can unfortunately create a perverse incentive to withdraw cases. Postponements may have lead to witnesses not coming to court or becoming untraceable. The loss of witnesses obviously has a negative impact upon the strength

of the prosecution’s case. Instances were also recorded of both magistrates and prosecutors failing to adhere to the rules of evidence and procedure applicable to rape during the course of a trial.

Research Study 7: Monitoring the Implementation of Sexual Offences Legislation and Policy: Findings from the Shukumisa Campaign conducted during the 16 Days of Activism 2009 – 2011, Tshwaranang Legal Advocacy Centre, Rape Crisis Cape Town Trust- Resources Aimed at the Prevention of Child Abuse and Neglect, Women on Farms Project, Positive Muslims, Mosaic Training, Service and Healing Centre for Women, Justice and Women and Toheyandou Victim Empowerment Programme

36% of courts did not have a separate waiting facility for victims who are forced to wait in the same area as the alleged offenders, 12% of courts did not have CCTV (Closed Circuit Television) facilities to allow for vulnerable victims to testify away from the presence of the alleged offender, only 36% of courts had space available for NGO service providers to offer psychosocial care to victims, only 25% of courts were specialised Sexual Offences Courts and there was a lack of specialist prosecutors at many other courts as well, which is of great concern as sexual offences law is complex and case management is difficult and demanding, often well beyond the capabilities of inexperienced prosecutors.

6.3 FINDINGS FROM PRIMARY DATA ANALYSIS

Data on respondents’ experience of court was collected via the court support form. Unfortunately, only two thirds of respondents (n=816) completed this data. As seen in the table below, of those who did complete the items, almost all of them felt safe, that they were treated with respect, that they had a choice to participate and that they were informed of the process.

Question	Yes		No		Missing	
	Count	%	Count	%	Count	%
Did you feel safe?	564	69.1%	9	1.1%	243	29.8%
Were you treated with respect?	561	68.8%	5	0.6%	250	30.6%
Choice to participate	541	66.3%	9	1.1%	266	32.6%
Informed	546	66.9%	7	0.9%	263	32.2%

Table 3: Treatment in court (N=816)

This can also be explained by the fact that they were with a Rape Crisis court support counsellor who assisted them to have a positive experience.

The qualitative data from the court support forms did highlight some areas of concern and dissatisfaction. The complaint that was brought up most often was the lengthy duration of court cases. Quantitative data also shows that 62% of cases in the sample (N=679) were postponed. Respondents explained how their cases were dragged out, sometimes over a number of years, and in their opinion just “took too long”.⁴⁴ Due to numerous postponements, respondents have had to appear in court more than once, which results in secondary traumatising and further anxiety, stress, and fear which each court appearance produces. One court supporter at Rape Crisis noted, “a previous case she [rape survivor] was involved in took years and she was traumatised. She doesn’t want that to happen again”.⁴⁵

Another consequence of lengthy court cases is a lack of closure for rape survivors. Respondents explained that they cannot put the incident behind them and continue with their life while the case is still in progress, with one respondent saying she has lost hope because of the case dragging on. In addition, appear-

ing in court often is financially costly as many have to take time off work. One young client mentioned that she had failed Year 11 due to all the time she had to take off for the case.

Other complaints about the court included being treated as a criminal, a lack of communication between the rape survivor and the prosecutor and misinformation regarding testifying in camera and notification of court dates. Others did not enjoy giving testimony while the accused's family was in the courtroom.

6.4 CONCLUSIONS REGARDING THE PROTECTION OF SURVIVORS AT COURT LEVEL

Law and policy with regard to the courts showed on review that certain elements are lacking as follows:

- ❑ Conviction rates reported annually by the NPA are not disaggregated by the type of sexual offences committed, by sex and by age.
- ❑ Prosecutors are not transparent and accountable enough when giving reasons to complainants why they have decided that a matter will not be prosecuted.
- ❑ The Minister of Justice and Constitutional Development has not put regulations in place relating to the provision of services to witnesses in courts even though these would be of great benefit and assistance to sexual offence complainants.
- ❑ Specific statutes that apply to the establishment of sufficient specialised Sexual Offences Courts and their on-going sustainability have not been developed.
- ❑ The National Policy Guidelines on Sexual Offences do not make it a duty that prosecutors consult the counselling practitioner where psychological evidence in support of the complainant's testimony is available and do not set out circumstances where such evidence, if not available, should be sought.

Current research on the role of the courts shows that prosecutors are not involved enough in guiding police investigations, there are not enough experienced or specialised prosecutors, prosecutors' case loads are too high and there are backlogs of cases in the courts. This limits the time available for prosecutors to consult with victims and other witnesses before the trial. It also, when combined with the pressure to deliver convictions, provides a perverse incentive to withdraw cases. Repeated postponements are thought to be a factor in why victims drop out of cases. Both prosecutors and magistrates do not always adhere to the rules of evidence. Many courts do not have separate waiting facilities for victims and offenders, CCTV facilities are not always available at courts and there are no NGO services available at some courts.

Primary data from this study showed that rape survivors suffered over the long duration of court cases, some of which were dragged out over several years. This increased their anxiety, stress and fear, the transport costs were a financial burden to them, they lost income through absenteeism from work and performed poorly academically from absenteeism from school. Prosecutors did not inform them of transport reimbursements, of the option to appear in camera or of their next court date.

7. Recommendations

South Africa has a thorough and comprehensive legal framework that takes into consideration both the broad and in-depth detail of policing and medico legal handling of rape cases as well as some of the psychological factors in terms of encouraging officials to take steps to reduce and minimise secondary

trauma to the survivor. There is an emphasis in policy in particular on treating the survivor in a sensitive manner that respects her or his dignity, explaining all procedures in clear and simple terms, speaking in the language of the victim, having female police and health professionals work with female survivors as far as possible. Social context training is called for all officials, presumably to assist in the elimination of bias and to attempt to address prevailing myths and stereotypes about rape and other sexual offences. Nonetheless it is clear that in spite of this there are still gaps in both legislation and policy, that the implementation of these laws and policy is still lacking in many areas, and that victims of sexual offences are not always dealt with correctly and have little knowledge of their rights. The following recommendations refer to the findings at those three levels for the overall framework, for the police, health care providers and courts as well as a set of more generally applicable recommendations.

7.1 RECOMMENDATIONS FOR OVERARCHING LEGAL FRAMEWORKS

Problems at this level fall into several categories, or themes, including gaps in the legislation itself, a lack of oversight, poor accountability and not enough intersectoral collaboration. Issues such as access to information, a lack of clear training assessment criteria, the lack of psychosocial care for victims of sexual offences and lack of access to information are touched on.

New Legislation

The South African government needs to enact Victim Empowerment Legislation⁴⁶ that addresses current gaps in law. The five areas suggested here do not require that laws be enacted before they can be implemented however legislation drives resourcing and enables oversight and so would be extremely beneficial This legislation should ensure that in South Africa we:

- ❑ Educate children in the Life Orientation curriculum in schools about the criminal justice system and popularise the law for citizens in general through handbooks, newspaper supplements, websites and radio and television programmes. The detailed information outlined in the appendices to this report is incredibly useful to officials dealing with sexual offences and should be summarised as a set of job aids and it is also very useful to victims of sexual offences and should be popularised as a set of handbooks for victim.
- ❑ Develop a single integrated information management system between police, health facilities and courts to be used for tracking cases, updating victims and officials with information on individual cases, investigating complaints about cases and measuring the effectiveness of services in place to address high levels of sexual offences.

46 Dey, K., Thorpe, J., Tilley, A. and Williams, J. The Road to Justice: Victim Empowerment Legislation in South Africa, Cape Town, 2009: the Rape Crisis Cape Town Trust, the Women's Legal Centre and the Open Democracy Advice Centre

- ❑ Formalise the statutes and institutional arrangements that need to be in place for the psychosocial care of victims.
- ❑ Set up effective complaints mechanisms such as an independent Victims Ombud with far reaching powers to handle complaints across sectors. This structure could be tasked with establishing and maintaining the integrated information management system.
- ❑ Put guidelines in place for formalised intersectoral collaboration ensuring coordination between service providers at police stations, health facilities and courts. These guidelines should be adopted by the Intersectoral Committee on Sexual Offences.

*Parliamentary Oversight*⁴⁷

Parliament is the national legislative authority tasked with oversight over the executive and the key democratic body endeavouring to embody the representation of all South Africans, including women. Set out below are recommendations aimed at assisting Parliament to do so suggesting that the relevant Parliamentary Portfolio Committees:

- ❑ Enquire into the extent of departments' budgeting towards these two Acts.
- ❑ Should ask that departments report, as a matter of course, on the full extent and use of donor funding to augment their activities.
- ❑ Ensure that legislated commitments form part of departments' performance indicators.
- ❑ Need to be far more critical of the interpretations offered by departments of their particular statistics and may wish to consider obtaining separate, external analyses of this information.
- ❑ Follow up on their decisions to make sure they are acted on.
- ❑ Ensure that departments table their training courses, as per the SOA. In addition, parliamentarians should ask that these courses be accompanied by multi-year training plans detailing how many public servants are to be trained annually, as well as how competence is to be assessed on conclusion of the training.
- ❑ Ask each department to appear before its respective Portfolio Committee detailing how they propose making good on their legislative mandate.
- ❑ Invite a diversity of NGOs to comment on and engage with all of these processes, particularly where they have knowledge that could enhance a Portfolio Committee's ability to carry out their evaluative functions.

However, it is noted that particular aspects of how Portfolio Committees function dilute parliamentarians' ability to exercise oversight. Firstly, the work load of some committees is an obstacle to the effective exercise of oversight. This is chiefly due to the amount of legislation needing to be deliberated, which limits the time available in which to engage both with departments and with civil society organisations. Further, all committees have less time at their disposal in certain years due to the national elections, local elections and other issues of national importance from time to time.

⁴⁷ Vetten, L., Le, T., Leisegang, A. and Haken, S with van der Westhuizen, C. (Ed) *The Right and The Real: A Shadow Report Analysing Selected Government Departments' Implementation of the 1998 Domestic Violence Act and 2007 Sexual Offences Act*, Johannesburg, 2010: Tshwaranang Legal Advocacy Centre

*Further
Recommendations:*

- ❑ The Intersectoral Committee on Sexual Offences must address the inordinate delays in developing the National Policy Framework and the plan for the progressive realisation of services for survivors within the criminal justice system.
- ❑ There needs to be further research into the manner in which the National Register of Sexual Offenders is being managed particularly with regard to a cost benefit analysis.
- ❑ The NDP should ensure that women's rights are mainstreamed, and expressly mentioned and considered in the NDP particularly in relation to the criminal justice system. A well-functioning criminal justice system cannot be gender blind. The NDP should appropriately refer to the development of a comprehensive, integrated national strategy to end gender-based violence.
- ❑ It is proposed that the policies and directives regulating conduct in gender based violence matters should be legislated into positive duties. These can then be enforced with disciplinary procedures against officials. They can form part of performance management procedures at every level, and there can be sanctions for non-compliance.
- ❑ We support a victim-centred approach to policing, and submit that demilitarising the police force is an appropriate measure in this regard, as it would go a long way to shifting from a perpetrator-centred approach to a victim-centred one.
- ❑ The proposals in the NDP for professionalising and training the police should be actioned, with the rider that they be supplemented from a gendered perspective. The suggested code of conduct should specify that failure to comply with the policies in relation to gender-based violence offences constitutes a disciplinary offence.

7.2 RECOMMENDATIONS FOR THE POLICE

While it was clear that victims of sexual offences do not fully understand their rights to access services within the criminal justice system or know the positive duties placed on police to fulfil certain instructions by law it was extremely encouraging to note that the primary data in this study indicates that the majority of respondents felt they had been well treated by the SAPS.

However given gaps in law and policy as well as the findings in our primary data and the literature review the partners felt the following recommendations to be in order:

- ❑ Where victims did feel unsafe or disrespected and where police did not comply with the National Instructions and Directives it seems that training for officials is one solution but that clear indicators for the effectiveness of such training need to be put in place at the outset.
- ❑ Officials must be held accountable for their non compliance through internal mechanisms put in place for this and victims must be properly informed of these complaints mechanisms and how to use them
- ❑ SAPS statistics reported to the public annually should be disaggregated by the type of sexual offences committed, by sex and by age.
- ❑ Specific statutes that apply to the establishment of sufficient Family Child Abuse and Sexual Offences Units of the SAPS and their on-going sustainability should be developed.
- ❑ Provincial managers must ensure that all stations have the required documentation available at the police station.

- ❑ Minimum norms and standards for service delivery by the police, by victim support volunteers attached to police Victim Friendly Rooms and by NGO service providers must be developed or reviewed where they already exist and their implementation carefully monitored.
- ❑ Budget must be allocated to address the lack of resources available to the police and strategies must be put in place for dealing with high case loads, delays, language barriers and the lack of accessibility of trained police officers

7.3 RECOMMENDATIONS FOR HEALTH CARE PROVIDERS

The problems in law, with how officials implement law and policy and those expressed by the victims surveyed in this study are more numerous than for the other elements in the criminal justice system. The recommendations regarding improvements to the law are as follows:

- ❑ The National Directives and Instructions on Conducting a Forensic Examination on Survivors of Sexual Offence Cases (Health Directives) should highlight the importance of starting PEP as soon as possible in order for health care providers to prioritise this aspect of the medical management of rape cases.
- ❑ The Health Directives should make provision for health care professionals dealing with sexual offences to be provided with an updated list of referrals to services relevant to survivors of sexual offences and specific to their local area.
- ❑ The Health Directives should give greater clarity to the role of the health care provider with regard to informing the rape survivor about the possibility of having the alleged offender tested for HIV.
- ❑ The Health Directives should not speak to the role of the investigating officer in ensuring that pre and post-test HIV counselling of the rape survivor has taken place.
- ❑ The National Instructions to Medical Practitioners must be changed to state that the forensic examination and medical treatment of rape survivors is not dependent on laying a charge at the police station.
- ❑ The National Policy Guidelines must state that emergency medical treatment must be prioritised over the forensic examination and other medical treatment of sexual offence survivors.
- ❑ Specific statutes that apply to the establishment of the Thuthuzela Care Centres and their on-going sustainability should be developed.

With regard to officials and with victims, problems can, as with police, be addressed by a combination of maintaining specialised units, ongoing training and development for officials with a clear set of indicators for measuring the effectiveness of the training and the education of victims both within and before entering the system on their rights to access services and to be treated with respect for their dignity.

7.4 RECOMMENDATIONS FOR THE COURTS

- ❑ Prosecutors need to be more transparent and accountable when giving reasons to complainants why they have decided that a matter will not be prosecuted.
- ❑ The Minister of Justice and Constitutional Development has not put regulations in place relating to the provision of services to witnesses in courts as these would be of great benefit and assistance to sexual offence complainants.
- ❑ Specific statutes that apply to the establishment of sufficient specialised Sexual Offences Courts and their ongoing sustainability should be developed.
- ❑ Prosecutors need to be involved in guiding police investigations as a matter of course since this has proven to significantly increase conviction rates and to minimise the burden on survivors of working with multiple role players.
- ❑ The National Policy Guidelines on Sexual Offences should make it a duty that prosecutors consult the counselling practitioner where psychological evidence in support of the complainant's testimony is available and to set out circumstances where such evidence, if not available, should be sought.
- ❑ Conviction rates reported annually by the NPA should be disaggregated by the type of sexual offences committed, by sex and by age.
- ❑ Resources must be allocated to allow for high case loads, lack of equipment and court backlogs to be addressed and strategies put in place for doing so
- ❑ The issue of lack of funding to NGO service providers needs to be addressed so that these services can become part of the court's services to witness

8. Conclusion

In this report the survivors of sexual offences that were the primary respondents in this research made clear the anxiety, stress and fear they felt as a result of the problems they experienced with the quality of the justice system's response. Yet the plight of the survivor, often cited in the preamble to policy guidelines as an issue in and of itself, should be seen as part of a far more serious problem. That is the problem of law, policy and officials not taking the strengths of the survivors seriously enough. If the survivor is seen as the most important part of the investigation and of the trial then greater efforts will be made to support and empower survivors to display those strengths. It is not simply a matter of treating the survivor with respect for her dignity but of treating her with respect for how she can strengthen the case against the alleged offender and bring that offender to justice.

It is clear that not enough is being done to ensure that what exists on paper is translating into improved experiences for survivors of sexual offences, being the intended beneficiaries of the laws and policies.

If the South Africa government is to take up the recommendations listed in this report, strong political will and attendant flow of resources are critical. The cost of services to survivors, with regards to all three key government role-players, must be calculated and included in budgets in the form of individual line items, so that documents such as the National Guidelines can be implemented as intended. Role-players must have the necessary resources to fulfil their obligations in terms of the legal framework, and to be properly accountable for failure to do so.

Some recommendations are capable of being actioned immediately, in the short term, and some recommendations lend themselves to a more long term plan of action. In planning its response, both short and long term, it is imperative that the state seek out and work together with civil society. Close consultation and joint planning is necessary to achieve a coordinated, multi-sectoral plan of action that truly speaks to the experience of survivors of sexual offences on a day-to-day basis. Civil society can provide valuable insight in this regard, without which government planning cannot be truly responsive to survivors of sexual offences. .

Appendices

- A. Information on the Women’s Legal Centre and the Rape Crisis Cape Town Trust**
- B. Constitutional Provisions Relevant to Survivors of Sexual Offences**
- C. International and Regional Human Rights Instruments**
- D. Counselling and Court Support Forms**
- E. National Instructions and Standing Orders for Police**
- F. National Policy Guidelines for Police on Sexual Offences**
- G. Obligations of Health Care Providers in Terms of the Sexual Offences Act**
- H. National Policy Guidelines for Health Care Providers**
- I. National Instructions to Forensic Health Care Professionals**
- J. Directives to be Followed by All Medical Practitioners when Dealing with Sexual Offence Cases**
- K. Constitutional Obligations with Regard to Courts and the Administration of Justice**
- L. The Criminal Procedure Act 51 of 1977 as it Relates to Survivors of Sexual Offences**

APPENDIX A:

The Women's Legal Centre (WLC)

The WLC is a non-profit law centre that seeks to achieve equality for women, particularly black women, through impact based litigation, the provision of free legal advice to women, legal support to advocacy campaigns by gender and other organizations and training that ensures that people know and understand the impact of the judgments of the courts around women's rights. The WLC also provides legal advice to other non-governmental women's organizations nationally and in Africa. The WLC has won several precedent-setting cases that have improved women's access to justice in South Africa. The WLC is staffed by attorneys and a legal advisor who is a specialist in gender law and has extensive litigation experience. WLC is based in Cape Town and has satellite offices for free legal advice in Khayelitsha in the Western Cape, and the Eastern Cape.

The Rape Crisis Cape Town Trust (RCCTT)

Established in 1976, Rape Crisis is the oldest women's organisation in South Africa offering essential services to adult rape survivors both male and female. We began as a volunteer run feminist women's collective and were compelled by the changing fundraising climate in the early 1980s to develop into a professionally run civil society organisation. We nonetheless maintained an approach that is focused on the empowerment of women and developed a national reputation for replicating unique and innovative best practise models. We are also known for doing work that covers a spectrum of activities that include welfare services, popular education and advocacy as well as work based on the essential components of a well-developed theory of change.

Our relationship with government, particularly at the provincial level, is collaborative (we share spaces at courts and health facilities with government service providers) but also challenging in that we provide well researched information that influences decision makers and that is based on the direct experience of our clients. At the same time our reach into the communities we serve gives us capacity for social mobilisation and our strong network of partners in civil society gives us support for lobbying influential role players at both the national and provincial levels of government. In this way we develop strategies to address flaws in the criminal justice system that disadvantage the rape survivor. Our offices in Khayelitsha, Athlone and Observatory reflect all of the diverse demographics of the clients and communities we serve.

APPENDIX B:

CONSTITUTIONAL PROVISIONS RELEVANT TO SURVIVORS OF SEXUAL OFFENCES

The South African Constitution's Bill of Rights outlines a host of rights for all. A number of these rights are particularly relevant for victims of sexual offences.

7. Rights

1. This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
2. The state must respect, protect, promote and fulfil the rights in the Bill of Rights.
3. The rights in the Bill of Rights are subject to the limitations contained or referred to in Section 36, or elsewhere in the Bill.

9. Equality

1. Everyone is equal before the law and has the right to equal protection and benefit of the law.
2. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
3. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
4. No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
5. Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

10. Human dignity

Everyone has inherent dignity and the right to have their dignity respected and protected.

11. Life

Everyone has the right to life.

12. Freedom and security of the person

1. Everyone has the right to freedom and security of the person, which includes the right –
 - a. not to be deprived of freedom arbitrarily or without just cause;
 - b. not to be detained without trial;
 - c. to be free from all forms of violence from either public or private sources;
 - d. not to be tortured in any way; and
 - e. not to be treated or punished in a cruel, inhuman or degrading way.
2. Everyone has the right to bodily and psychological integrity, which includes the right –

- a. to make decisions concerning reproduction;
- b. to security in and control over their body; and
- c. not to be subjected to medical or scientific experiments without their informed consent.

14. Privacy

Everyone has the right to privacy, which includes the right not to have –

- a. their person or home searched;
- b. their property searched;
- c. their possessions seized; or
- d. the privacy of their communications infringed.

27. Health care, food, water and social security

1. Everyone has the right to have access to –
 - a. health care services, including reproductive health care;
 - b. sufficient food and water; and
 - c. social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
3. No one may be refused emergency medical treatment.

32. Access to information

1. Everyone has the right of access to –
 - a. any information held by the state; and
 - b. any information that is held by another person and that is required for the exercise or protection of any rights.
2. National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

33. Just administrative action

1. Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
2. Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
3. National legislation must be enacted to give effect to these rights, and must –
 - a. provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
 - b. impose a duty on the state to give effect to the rights in subsections (1) and (2); and
 - c. promote an efficient administration.

34. Access to courts

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

APPENDIX C:

INTERNATIONAL AND REGIONAL HUMAN RIGHTS INSTRUMENTS

1. INTERNATIONAL INSTRUMENTS

1.1 *Universal Declaration of Human Rights (UNDHR)* ⁴⁸

South Africa originally abstained from the UN vote to adopt the UDHR in 1948. South Africa has since then not signed or ratified the document.⁴⁹

1.2 *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others of 1949 (The Trafficking Convention)*

South Africa ratified the Trafficking Convention in 1951.

1.3 *International Covenant on Civil and Political Rights of 1966 (ICCPR)*

South Africa ratified the ICCPR in 1998.

1.4 *International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR)*⁵⁰

South Africa signed on 3 Oct 1994 but has not yet ratified the ICESCR.

1.5 *Convention on the Elimination of All Forms of Discrimination Against Women of 1979 (CEDAW)*

South Africa ratified CEDAW on 15 December 1995.

1.6 *Declaration on the Elimination of Violence Against Women of 1993 (The Declaration)*

The resolution is often seen as complementary to, and a strengthening of, the work of the Convention on the Elimination of All Forms of Discrimination against Women.

1.7 *Beijing Declaration, Platform for Action 1995 and Reaffirming Resolution of 2005 (Beijing Declaration)*

Following the United Nations Fourth World Conference for Women, held in Beijing, China in September 1995, the South Africa Government signed the Beijing Declaration and its Platform for Action.

1.8 *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*

South Africa acceded to this optional protocol on 18 October 2005.

48 Available at <<http://www.un.org/en/documents/udhr/#atop>>

49 "Chapter One, The South African Constitution and Bill of Rights: Human Rights in South Africa" paralegal advice. Education and Training Unit. <<http://www.paralegaladvice.org.za/docs/chap01/06.html>>

50 UN Doc A/6316, adopted 16 December 1966, available at <<http://www2.ohchr.org/english/law/cescr.htm>>

1.9 The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children of 2003 (Trafficking Protocol)

South Africa ratified the Trafficking Protocol on 20th February 2004.

1.10 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985)

South Africa is a signatory to this Declaration (signed in 1985).

1.11 United Nations Convention on the Rights of Children ('CRC')

South Africa signed this treaty on 29 January 1993 and ratified it on 16 June 1995.

1.12 The Copenhagen Declaration on Social Development, 1995

South Africa ratified the Copenhagen Declaration in 1995.

1.13 The Rome Statute of the International Criminal Court, 1998

South Africa has ratified the Rome Statute and participated in the second session of the Assembly of States Parties in 2003.

1.14 The Security Council Resolution 1820 of 2008

South Africa has adopted the Security Council Resolution in 2008.

1.15 Resolutions of the International Conference on Population and Development, 1994

South Africa has ratified the ICPD Programme of Action in 1994.

1.16 Millennium Declaration, 2000

South Africa adopted the Millennium Declaration at the Millennium Summit in 2000.

1.17 Millennium Development Goals

2. REGIONAL INSTRUMENTS

2.1 The African Charter on Human and Peoples' Rights of 1986 (African Charter)

South Africa ratified the African Charter in July 1996.

2.2 The Protocol on the Rights of Women in Africa

The Protocol was adopted by the African Union in Maputo on 11 July 2003 and was ratified by South Africa in December 2004. The Protocol came into operation in 2005.

2.3 SADC Protocol on Gender and Development of 2008

South Africa signed the SADC Protocol (“the Protocol”) on 17 August 2008, but has not ratified the Protocol. The Protocol has not come into force, as it is yet to be ratified by sufficient member states.

2.4 The African Platform for Action, (Dakar Declaration) 1994

South Africa adopted this in 1994.

2.5 Constitutive Act of the African Union, 2000

South Africa is a member of the African Union (joined in 1994) and thus subscribes to these principles.

2.6 The New Partnership for Africa’s Development (NEPAD), 2001

South Africa adopted this in 2001.

APPENDIX D:

COUNSELLING AND COURT SUPPORT FORMS

Rape Crisis Cape Town Trust

Counselling Confidential Intake Form



COUNSELLING CONFIDENTIAL INTAKE FORM										
Counsellor:		Date		Case No (Year, Number, Office):						
Referral Source:				Referral Contact No:						
CLIENT INFORMATION										
Name:					Female	Male	Age			
ID No /DOB:				Contact No:						
Race	Black	White	Coloured	Asian	Other					
Religion	Christian	Hindu	Jewish	Muslim	Other					
Address:										
Employment Status:	Employed	Unemployed	Student/Learner	Retired						
Language:	English	Afrikaans	Xhosa	Other						
Disability	Yes	No	If Yes, Specify:							
PRESENTING PROBLEM										
Brief description of the event (specify sexual offence and describe):										
Date:				Time:						
Suburb:				Place:						
No. of Attackers:				Identity:	Known	Unknown				
Threats Used:	Yes	No	If yes	Verbal	Force	Weapon	Abuse of power	Other		
Weapons Used:	Yes	No	If yes specify:							
Injuries:	Yes	No	If yes specify:							
Survivor: drugs or alcohol taken at time of rape?	Yes	No	If yes specify:							
Perpetrator: drug assisted rape?	Yes	No	If yes specify:							
First report witness:										
Where did you first report the rape?	Police Station			Medical Facility			Private Doctor			
Name of Centre				Date Reported	YYYY/MM/DD					
POLICE CONTACT										
Reported?	Yes	No	Who reported?							
If Not reported, reason:										

For office use: Signature _____
Date ____/____/____



If Not reported, do you intend to report?	Yes	No	Reason?		
Date:			Case No:		
Police Station:			Contact No:		
Detective:			Contact No:		
Can you tell me what happened at the station					
How long did the client wait at the police station?			Reason?		
Statement taken?			Private Room?		
Did you get a copy of your statement?			Did anybody at the police station explain what would happen?		
Who?	Police	Volunteer	Other (Specify)		
Did you have a choice about which parts of the process you wanted to participate in?			Yes	No	
Please explain					
Were you treated with respect?			Yes	No	
Please explain					
Did you feel safe?			Yes	No	
Please explain					
Were the people there helpful?			Yes	No	
Please explain					
Did the police give you a list of where to get help?	Yes	No	Did the police offer to take you to the health facility?	Yes	No
Did the police tell you about compulsory HIV testing for the perpetrator?	Yes	No	Did they give you a brochure on compulsory testing for the perpetrator?	Yes	No
Did the police inform you about PEP?	Yes	No	Did the police give you a brochure on PEP?	Yes	No
MEDICAL CONTACT					
Name of Centre if different to where you first reported the rape:				Date	YYYY/MM/DD

For office use: Signature _____
 Date ____/____/____



Can you tell me about what happened at the centre					
How long did you wait? (hours/days)				Reason?	
Did the people there explain what would happen?		Yes	No	Did you understand the process?	
				Yes	No
Please explain					
Did you have a choice about which parts of the process you wanted to participate in?				Yes	No
Please explain					
Were you treated with respect				Yes	No
Please explain					
Please explain					
Please explain					
Doctor's Name				Nurse's Name	
J88 Completed?		Yes	No	Pregnancy Test?	
				Yes	No
M/A Pill?		Yes	No	Tested for HIV/AIDS?	
				Yes	No
STI Test?		Yes	No	STI Medication Given?	
				Yes	No
Did you receive Post Exposure Prophylaxis? (PEP)		Yes	No	If Yes, How Long After the Incident?	
				If No, Why Not?	
Did you receive information about PEP?		Yes	No	Did you receive a booklet on PEP?	
				Yes	No
Did you receive medication for the side effects of PEP?		Yes	No	Did you receive information about referrals?	
				Yes	No
Did you receive information about the compulsory testing of the perpetrator?				Yes	No
Was a further statement taken after		Yes	No	If yes, when?	

For office use: Signature _____

Date ____/____/____



examination?				
Did anyone tell you that you had to lay a charge to receive medical treatment?	Yes	No		
Would you like to say anything about this?				

CONTRACTING				
Is contracting appropriate?	Yes	No	How often?	
Does the client need referral?	Yes	No	Where did you refer the client to?	
Is it ok to post mail to the client	Yes	No	Did you give the client a client satisfaction card?	Yes No

RAPE TRAUMA SYNDROM [RTS] CHECK LIST
Please tick and circle where appropriate

TICK	PHYSICAL SYMPTOMS – Usually immediately after the rape experience
	Bladder infections
	Bleeding or infections from tears or cuts in the vagina or rectum
	Bruises, grazes or cuts
	Cold
	Comfort or overeating
	Disorientated
	Faint
	Hypersomnia
	Insomnia
	Irregular, heavy or painful periods
	Loss of appetite
	Mentally confused
	Nauseous
	Pain in the back or stomach
	Sexually transmitted infections
	Shock
	Tension headaches
	Throat irritations or soreness due to forced oral sex
	Trembling
	Vaginal discharge
TICK	BEHAVIOURAL SYMPTOMS – Behavioural changes that others may also observe
	Avoid anything that recalls the rape

For office use: Signature _____
Date ____/____/____



	Being alert and watchful
	Being restless, agitated or unable to relax
	Changes in lifestyle such as moving house or changing jobs
	Crying more than usual
	Denial, pretending or believing that nothing bad or serious has happened
	Difficulty concentrating
	Increase in obsessive compulsive behaviours e.g. washing, bathing, checking locks (Specify)
	Increased substance abuse
	Isolation from others
	Loss of interest in sex
	Not wanting to be alone
	Relationship problems with family or partners, being more dependant and clingy
	Relationship problems with family or partners, withdrawing more
	Self mutilation
	Stuttering or stammering more than usual
TICK	PSYCHOLOGICAL SYMPTOMS – <i>Emotional effects that might not be visible to others</i>
	Confusion
	Constantly thinking of the rape
	Depression
	Emotional numbness, not feeling anything
	Feeling alone and that nobody understands
	Feeling angry
	Feeling constantly dirty
	Feeling listless and unmotivated
	Feeling Suicidal
	Having flashbacks of the rape or reliving experiences of the rape
	Helplessness, no longer feeling in control of life
	Humiliation and shame
	Increased fear and anxiety
	Losing hope in the future
	Loss of memory
	Lowering of self-esteem
	Nightmares
	Self-blame and guilt

For office use: Signature _____
 Date _____ / _____ / _____



**Rape Crisis
Cape Town Trust**

PLEASE HELP US IMPROVE OUR COURT SUPPORT SERVICES BY FILLING OUT THE FORM BELOW					
COURT SUPPORTER NAME					
DATE OF SESSION	DD/MM/YYYY	SESSION (E.G. 1, 2, 3)			
WHAT WAS THE BEST THING ABOUT COURT SUPPORT?					
WHAT WAS THE WORST THING ABOUT COURT SUPPORT?					
PLEASE RATE OUR SERVICE	VERY POOR	POOR	AVERAGE	GOOD	VERY GOOD
PLEASE ANSWER THE FOUR QUESTIONS BELOW, CHOOSING ONE ANSWER PER QUESTION. PLEASE CIRCLE YOUR ANSWER.					
DID YOU FEEL SUPPORTED BY YOUR COURT SUPPORTER?	YES	DID YOU FEEL THAT THE INFORMATION YOU RECEIVED DURING COURT SUPPORT WAS HELPFUL TO YOU?	YES		
	UNDECIDED		UNDECIDED		
	NO		NO		
DID YOUR COURT SUPPORTER MAKE YOU FEEL SAFE?	YES	DO YOU FEEL LIKE YOUR COURT SUPPORTER TREATED YOU WITH RESPECT?	YES		
	UNDECIDED		UNDECIDED		
	NO		NO		
WHAT COULD WE HAVE DONE TO MAKE YOU FEEL MORE SUPPORTED?					
MAY WE CONTACT YOU FOR FURTHER FEEDBACK?	YES			NO	
IF YES, PLEASE GIVE A CONTACT NUMBER					
THANK YOU SO MUCH FOR TAKING YOUR TIME TO FILL OUT THIS CARD. RAPE CRISIS APPRECIATES YOUR FEEDBACK					

For office use: Signature _____
Date ____/____/____

APPENDIX

E:

NATIONAL INSTRUCTIONS AND STANDING ORDERS FOR POLICE

POLICE NATIONAL INSTRUCTIONS ON SEXUAL OFFENCES

These instructions were issued to ensure that victims of sexual offences receive professional services with regard to investigations and police assistance. This includes detailed guidelines for the police with regard to handling a victim that reports a sexual offence, responding to the scene of an offence, investigating an offence, and assisting the victim during court proceedings. These instructions provide that:

1. The station commissioner must compile and maintain a list of local organisations and relevant information about these organisations that provide counselling and support services to victims.
2. When a victim reports a sexual offence, the police member must:
 - a. Request that the victim relocate to another area of the station that is out of sight of any other person.
 - b. Re-assure the victim of his or her safety and that the matter will be dealt with professionally and sensitively.
 - c. Determine if the victim is in need of medical attention and make arrangements for it, if needed.
 - d. Ask the victim if he or she would like to have another person present during the interview and allow for such person to be present.
 - e. Listen to and write down what the victim says without interrupting her or being judgemental.
 - f. Take all reports seriously, regardless of when or where the offence occurred.
 - g. Open a docket for the case. If the victim cannot make a clear and logical statement at the time, open a skeleton docket with a statement from any person accompanying the victim. The victim may make a statement at a later stage.
3. After the victim has reported the offence, the police member must:
 - a. Inform the victim of the case number and investigating officer's details.
 - b. Inform the victim of the processes that will follow and regularly update the victim on any progress with the investigation.
 - c. Inform the victim of the importance of a medical examination and that she may ask the health care professional for medical advice.
4. At the scene of an offence, the police member must:
 - a. Deal with the victim professionally.
 - b. Re-assure the victim of her safety.
 - c. Obtain a brief explanation of the events that took place.
 - d. If the suspect could still be close by, obtain a description of the suspect and relay that information to the police in the area.
 - e. Listen to the victim and write down what she says.

- f. Safeguard the crime scene to preserve evidence while also protecting the victim's privacy. Take further steps to avoid the spoiling or loss of evidence.

5. An investigating officer will be assigned to each case. The investigating officer is in charge of the investigation and must:
 - a. Instruct police members at the scene of the offence.
 - b. Refer the victim for a medical examination.
 - c. Take an initial statement from the victim and, later, an in-depth statement. The investigating officer should be sensitive to the victim's culture, language, religion, and gender. Further, the investigating officer must adequately prepare for such statements, allow for interested persons to be present if the victim so desires, and advise the victim of the importance of giving intimate details and not hiding information.
 - d. Keep the victim informed of any progress with the investigation.
 - e. Before trial, take an additional statement from the victim with regard to how the incident has affected her life and relationships.
 - f. On the day of the trial, provide the victim with copies of her statements and explain the proceedings to the victim, including that media in the court may not publicise details of the case without authorisation to do so.
6. If a victim may have been exposed to HIV infection, the police member must inform her of the importance of obtaining PEP to prevent HIV infection. The cost of PEP should be covered by the state.
7. An HIV test of the alleged offender may be ordered if the victim, a person with an interest in the well-being of the victim, or the investigating officer requests one. The investigating officer is responsible for taking all the required steps to make the application and to see it through until the court makes a decision on the application.
8. A medical examination of the alleged offender may also be ordered if it is necessary for the investigation of the case. The investigating officer must ensure that such examination is carried out properly.
9. After the incident, the police are responsible for providing care to the victim. This includes:
 - a. If the offence is a result of domestic violence, advise the victim of her right to apply for a protection order and to lay a criminal charge against the offender.
 - b. Provide the victim with information about medical and counselling services that are available.
10. Only Station Commissioners or individuals appointed by the Station Commissioner who occupy the office of Captain or a higher rank may discontinue an investigation and close a docket. In order to close a docket, the police must ensure that the investigating officer has made all possible efforts to trace the victim or offender.

POLICE OBLIGATIONS IN TERMS OF STANDING ORDERS

STANDING ORDER 321

Duties in terms of Investigations:

- ❑ The complainant in a case is to be provided with a Confirmation of Report [SAP 429] after the docket has been registered. This can be done in the charge office, if that was the place of the report, or by the investigating officer visiting the scene and it must be recorded in the Investigation Diary.

- ❑ If the complainant, in a case not sent for trial, requests to be advised of the result of the investigation, he/she shall be informed of the position without disclosing information of a confidential or privileged nature. Care shall be taken not to give offence by discussing the merits of the case, especially where doubt exists as to whether an offence was actually committed. He/she should not be informed that the case was closed as “Unfounded”, or how it was or is likely to be finally disposed of. If the Public Prosecutor declines to prosecute, the complainant shall be informed tactfully of such a decision.
- ❑ Should the case not have been finalised within two months, the parties are to be notified that the investigation has not yet been completed, but that the case is still receiving attention.
- ❑ Although the member in charge of the case is responsible for the proper investigation thereof, his Commander is jointly responsible for the work being efficiently and promptly carried out, that the investigation is conducted properly, that all possible sources of information are exhausted, and that the entries in the investigation diary make this clear.
- ❑ If a case docket has been closed as “Undetected - [Warrant issued]” or an undetected case with regard to a crime which does not prescribe is again received, as prescribed, for further attention, investigations aimed at tracing the accused shall be made.
- ❑ If fresh information relating to any case closed as “Undetected” is received, the relative case docket shall be drawn for the institution of further investigation. This is limited to instances where additional evidence is received.

STANDING ORDER 322

Duties in terms of Investigations

- ❑ If an offence is reported to the Police, it is their duty to trace the offender, to bring him before the court and to produce all the available evidence.
- ❑ In order to ascertain the facts of the case, the complainant, informant, and any witness should be interrogated in detail, after which a separate written statement should be taken from every person questioned.
- ❑ The member in charge of the investigation has the right, and it is his duty, to question any person who can give material evidence, and to take a statement from that person.
- ❑ A statement made in one of the official languages must be taken down in that language, without distorting the meaning of the words. If the member taking a statement is not conversant with the language of the person who is making the statement an interpreter must be obtained.
- ❑ If a statement is taken from any female in connection with a sexual offence, the member taking the statement [if a female member is not available] must, if possible, be accompanied by a police matron or other responsible female who will be present during the entire proceeding.
- ❑ If a statement has been taken down, it shall invariably be read over to the deponent, or be handed over to him/her to be read over personally [if he so desires]. Any amendments or corrections suggested by him shall be made and if he is satisfied that the statement is a true rendition of what he has said or intended to say, he shall be requested to sign it in black ink.
- ❑ A statement shall be taken with regard to all complaints or reports from which it appears that an offence has been committed. Should it transpire on closer investigation that an offence has not been committed, the case will be closed as “Unfounded”.

STANDING ORDER 324

Checking of Case Dockets

- ❑ Immediate attention shall be given to each case reported.
- ❑ As soon as the preliminary investigation is completed, the docket concerned shall be inspected by the Station Commissioner or the immediate Commander of the section as soon as possible, but in any event not later than the next day following the report.
- ❑ If reasonable doubt exists as to whether the Public Prosecutor will institute criminal proceedings against a particular person and it is deemed necessary to submit the case to him or her for a decision, the submission of such a docket shall only be done on the instructions of an officer, Station Commissioner or Unit Commander.
- ❑ As a Provincial Commissioner is, by virtue of his or her office, responsible for the investigation of crime in his or her province, he or she shall, with the help of the provincial commander (CIS), Area Commissioners and area commanders (CIS), ensure that all current case dockets, queries and post mortem examinations are checked by an officer at least once every three months.
- ❑ The area commander (CIS) must visit every station in his or her area at least once every six months and perform an inspection there. An inspection such as this must be so thorough that it will enable the area commander (CIS) to determine whether the work of investigation is being done properly.
- ❑ The provincial Inspectorate must visit and inspect all stations in the province at least once a year. As the inspection is considered to be a managerial level inspection, it must be of such a nature and extent that it will enable these officers to report objectively about the level of efficiency of all investigation work done in the province to the Provincial Commissioner.

STANDING ORDER 325

Closing of Case Dockets

- ❑ The officers or warrant-officers, who have been appointed station commanders and/or commanders of branches or units attached to the Division of Crime Combating and Investigation, and are closing a case docket is held responsible for ensuring that the case was properly investigated and that all possible sources of information have been explored.
- ❑ A case which cannot be sent for trial shall be closed by an officer or warrant-officers who have been appointed station commanders and/or commanders of branches or units attached to the Division Crime Combating Investigation under one of the following headings:

Withdrawn

- » If an offence has been reported and there is sufficient evidence that the accused has committed it, the Police may not “withdraw” the case simply because they consider a prosecution undesirable. In this situation the police must refer the matter to the Public Prosecutor.
- » A complainant may be allowed to withdraw a case of no consequence, but this is not permitted in serious cases or if it is in the interests of public justice to proceed with the case.
- » Before a complainant can withdraw his/her case the officer or warrant-officers who have

been appointed station commanders and/or commanders of branches or units attached to the Division Crime Combating and Investigation must satisfy himself that there has been no attempt at compounding and the complainant must sign a document requesting the withdrawal of the charge and giving reasons.

- » On no account should the Police suggest to a complainant that he/she should withdraw a charge.

Undetected

- » If a complainant who reported a case cannot later be traced, the case docket shall always be closed as “Undetected - complainant not traced”. This manner of closing shall be substantiated through affidavits by witnesses (neighbours, etc.).
- » If a warrant has been issued for the arrest of a person whose identity is known, the case docket shall be closed as “Undetected - [Warrant Issued]”. The officer or warrant-officers who have been appointed station commanders and/or commanders of branches or units attached to the Division Crime Combating and Investigation closing the docket as “Undetected - [Warrant Issued]” shall, according to the circumstances of each case, determine the month and year when the docket must again receive attention.
- » The cancellation of a warrant of arrest is based on the availability of the complainant, witnesses, etc. An investigating officer cannot have a warrant of arrest cancelled before such an instruction is given by the Station or Unit Commander.

Unfounded

- » This classification shall only be used when the investigation clearly discloses that an offence has not been committed.

APPENDIX F

NATIONAL POLICY GUIDELINES FOR POLICE REGARDING SEXUAL OFFENCES

The guidelines state that :

- ❑ Victims must be treated with respect, empathy and professionalism.
- ❑ The police must give the case immediate attention.
- ❑ The police must accept and acknowledge the allegations that have been made by the victim when she personally reports it at the police station.
- ❑ The police must deal with all sexual offence reports even if the victim does not live in the area of the police station or if the offence was committed outside of the area where the police station is located. If a docket is opened, the police may later refer the docket to the police station closest to where the victim of the sexual offence resides or where the sexual offence was committed.
- ❑ There are no time restrictions on when a victim may lay a charge , so the police cannot turn victims away unassisted.
- ❑ Upon the reporting of the offence, the police member concerned should introduce him or herself, explain his or her role, assist the victim confidentially and privately, request their name and address, assess whether they need medical assistance and refer them as necessary, open a basic docket, contact an investigating officer and stay with the victim until the next step in the process has begun. The investigating officer must take a statement from the victim. This should only be done once the victim is in the psychological, emotional and physical state to make a statement.

If a victim reports a sexual offence to the police by telephone, the police must do the following:

- ❑ Obtain the address of where the victim is phoning from.
- ❑ Establish whether the victim is in any danger.
- ❑ Send a patrol vehicle to where the victim is as soon as possible to secure the crime scene and assist the victim.
- ❑ Inform the victim that she should not change her clothing or wash herself as evidence will be lost if she does so.
- ❑ Ascertain whether the victim requires an ambulance and if so, an ambulance must be sent to her immediately.

The police must also accept telephone reports of sexual offences committed against others. In this situation:

- ❑ The same information set out above should be obtained from the person that is reporting the sexual offence.
- ❑ The police must request that the person reporting the offence should not leave the victim alone or touch any objects that may be able to be used as evidence in court. The police must also request the person to advise the victim not to bath or change his or her clothing.

When responding to the scene of a crime, there is a specific procedure that the police must follow.

- ❑ The first police member to arrive at the scene must be extremely careful and follow detailed guidelines to ensure that evidence is not lost. Further, he or she must talk to the victim, be empathetic, explain the process and reassure the victim.
- ❑ The investigating officer who is subsequently assigned to the case must register a case docket, arrange any medical examinations that must take place, and take a detailed statement from the victim and must offer him or her support. The police must also help the victim identify where counselling services can be obtained and must assist in obtaining such services.
- ❑ During the court proceedings, the police must keep the victim informed of any progress with the case and must explain the court proceedings to him or her.

APPENDIX G

OBLIGATIONS OF HEALTH CARE PROVIDERS IN TERMS OF THE SEXUAL OFFENCES ACT

Provision of PEP

Section 28 (1) of the Sexual Offences Act stipulates the following:

If a victim has been exposed to the risk of being infected with HIV as the result of a sexual offence having been committed against him or her, he or she may—

[...]

(i) receive PEP for HIV infection, at a public health establishment designated from time to time by the cabinet member responsible for health [...], at State expense and in accordance with the State’s prevailing treatment norms and protocols[...].

Accordingly, only a victim of a sexual offence who has been exposed to HIV as a result of the offence may receive PEP at a designated public health establishment.⁵¹ Furthermore, the law requires the victim to either lay a charge with the police or to report the incident “in the prescribed manner” at a designated public health facility (Section 28 (2) of the Sexual Offences Act). Under Section 27 of the Sexual Offences Act, a sexual offence is defined as “a sexual offence in terms of this Act in which the victim may have been exposed to body fluids of the alleged offender”. In terms of this definition, a relevant exposure to HIV only occurs where a person is anally, orally, or vaginally raped.⁵² We therefore use the term “rape survivor” for sexual offence complainants who can receive PEP.

It is important to note that the lawmakers chose the wording of Section 28(1) of the Sexual Offences Act carefully. The provision stipulates that rape survivors “may” receive PEP, not “must” or “should” receive PEP. Thus, strictly speaking, this provision does not introduce a right to be given PEP. Possibly, the lawmakers chose this wording because not all rape survivors should be given PEP; rape survivors who are already HIV positive or who present more than 72 hours after potential exposure cannot be given PEP because it would be harmful to the former and non-effective for the latter group of rape survivors. However, the lawmakers could have addressed this by saying a rape survivor “must be offered PEP” if they are eligible for PEP under the prevailing treatment norms and standards. Another possible explanation for the wording of Section 28(3) of the Sexual Offences Act could thus be that the lawmakers did not want to create a legal entitlement to PEP. But this interpretation would undermine the Preamble of the Sexual Offences Act which specifies that the law *inter alia* aims to “provide certain services to certain victims of sexual offences [...] including affording a victim of certain sexual offences [...] the right to receive Post Exposure Prophylaxis in certain circumstances[.]” It is therefore unclear whether rape survivors’ entitlement to PEP is actionable.

With regard to other treatments, the legislation merely provides that rape survivors need to be “informed of the need to obtain medical advice and assistance regarding the possibility of other sexually transmitted infections” (Section 28(3)(ii) of the Sexual Offences Act; emphasis added). The law therefore does not introduce a “treatment clause” that guarantees rape survivors access to PEP and other medical treatment. Interestingly, though, the law clearly sets out duties for police officials and health care professionals. Section 28(3) of the Sexual Offences Act stipulates that a police official, a medical practitioner, or nurse to whom the sexual offence is reported must provide the following information to the survivor:

51 Section 27 of the Sexual Offences Act defines victim as a person who alleges that a sexual offence has been committed.

52 All these forms of sexual abuse constitute a rape under Section 3 of the Sexual Offences Act.

- ❑ The right to receive PEP for HIV infection in accordance with the State's prevailing norms and protocols;
- ❑ The importance of obtaining PEP for HIV infection within 72 hours after the alleged commission of the offence;
- ❑ The right to receive free medical advice on the administration of PEP;
- ❑ The right to be supplied with a list, containing the names, addresses and contact particulars of accessible public health establishments that provide PEP;
- ❑ The need to obtain medical advice and assistance regarding other sexually transmitted infections; and
- ❑ The right to apply for a compulsory HIV test of the alleged offender.

The legislation thus requires police officials and health care workers to inform victims of available health services. The law highlights the need to inform rape survivors of the importance of accessing PEP within 72 hours thereby stressing the cut-off time for the treatment.

Health Facilities

In terms of Section 29 of the Sexual Offences Act the cabinet member responsible for health must, by notice in the Gazette, designate any public health establishment for the purposes of providing PEP to victims; and carrying out compulsory HIV testing, and may, by notice in the Gazette, withdraw any designation under this section, after giving 14 days' prior notice of such withdrawal in the Gazette. The first notice must be published within two months of the implementation of this section, and at least at intervals of six months thereafter. The Director-General: Justice and Constitutional Development must, within 14 days of publication of each designation or withdrawal thereof provide a copy of the notice to the relevant role-players falling under his or her jurisdiction and the National Commissioner of the South African Police Service, the National Commissioner of Correctional Services and the Director-General of Health.

Compulsory HIV Testing

The other HIV-related service for rape survivors is compulsory HIV testing of the alleged sexual offender. According to the law, this procedure will inform the rape survivor whether the alleged offender is infected with HIV which will reduce secondary trauma and empower the victim to make informed medical, lifestyle and other personal decisions (Section 34(a)(i) of the Sexual Offences Act).⁵³ Furthermore, the rape survivor can use the test results as evidence in any ensuing civil proceedings as a result of the sexual offence (Section 34(a)(ii) of the Sexual Offences Act). The Sexual Offences Act describes how a victim can apply to have the alleged offender tested for HIV and describes the role of the police and health care professionals in the testing process (Sections 30 ff. of the Sexual Offences Act). A brief explanation of the compulsory HIV testing process is as follows:

- ❑ The victim must lay a criminal charge at the police station;
- ❑ The victim or an interested person acting on their behalf can make an application for a compulsory HIV test of the alleged offender within 90 days of the offence being reported at the police station;

53 The benefits of compulsory HIV testing of the alleged offender have been questioned and the inclusion of this "services" in the legislation was controversial. See, for instance, S. Roehrs, "Positive or Negative? Compulsory HIV Testing of Alleged Sexual Offenders," SA Crime Quarterly, 20 (2007): 31-36.

- ❑ The police official will then forward the application to the appropriate magistrate court as soon as is reasonably practicable;
- ❑ The magistrate will grant or refuse the application;
- ❑ If the application is successful, the alleged offender will be taken to a health care facility for HIV testing;
- ❑ The health care facility will provide the police with two sealed envelopes containing the test result;
- ❑ The police hand a sealed envelope with the test result and a written notice on how to deal with the test result to the victim and the alleged offender.

An investigating officer may also apply for HIV testing of an alleged sexual offender by following a procedure similar to the one outlined above.⁵⁴ The aim in this instance is that the HIV status of the alleged offender may be necessary for the investigation, prosecution or sentencing of the alleged offender.

Importantly, lawmakers included many of the duties of police officers and health care professionals in relation to PEP and compulsory HIV testing in the legislation itself (instead of simply restricting them to policy), which means that the duties are binding and may even be actionable. However, in spite of this, it is uncertain whether the relevant role-players—namely police officials and health care workers—have been informed of and trained on these additional responsibilities. Given that the duties clearly fall outside routine police work and may also be new to some professionals, information and training for police officials and health care professionals appear vital.

54 See section 32 of the Sexual Offences Act for further information.

APPENDIX H

NATIONAL POLICY GUIDELINES FOR HEALTH CARE PROVIDERS

The guidelines state as follows:

- ❑ The health care professional should assume that the survivor's allegation that a sexual offence was committed against her is true and should treat survivors with dignity.
- ❑ The health care professional should conduct the medical examination as soon as possible after the survivor presents herself to the health care professional.
- ❑ Prior to the medical examination, the health care professional should introduce herself/ himself to the survivor, advise on her/his qualifications, and obtain information from the survivor on her/his medical history and the alleged sexual offence. **The statement by the survivor regarding the event will not be as detailed as those made by the police and the health care professional's notes should state this.** This is to ensure that the differences in the survivor's statements do not cause issues at trial. Please have regard to the information above under the Sexual Offences Act and evidentiary rules, specifically the section that deals previous consistent statements.
- ❑ The health care professional should explain the criminal procedures to the survivor as well as the survivor's right to lay a charge against the perpetrator. He or she should also explain how the medical examination will be conducted and what the purpose of the examination is. Such information should be explained in the language understood by the survivor.
- ❑ The health care professional should obtain consent from the survivor to collect medical evidence and submit it to court. He or she should then take all necessary samples, record his or findings, and submit the findings to the court.
- ❑ After the medical examination the health care professional should refer the survivor for emergency medical treatment if necessary and for treatment for sexually transmitted infections and pregnancy. The survivor should also be referred for HIV testing and counselling.
- ❑ The health care professional should assist the survivor in regard to referral to hospitals and must ensure that the necessary medical certificates are provided to the survivor for purposes of absenteeism from school or work.
- ❑ Health care professionals who assist survivors need to have specialised training and skills in order to be qualified to assist survivors. Those who do not have these qualifications may still assist survivors, but they must keep comprehensive records so they can give evidence at court during the trial.
- ❑ Medical services should be available to survivors 24 hours a day and the survivor must be assisted with minimal delay.
- ❑ The health care professional should deal with the survivor in a sensitive manner and take steps to ensure that the survivor does not experience **secondary victimisation**.
- ❑ As far as possible, female survivors should be attended to by female medical practitioners.
- ❑ The examination should be conducted in the language that the survivor chooses.
- ❑ The health care professional should conduct the consultation with the survivor in an environment that is private and confidential and respects the dignity of the survivor.

APPENDIX I

NATIONAL INSTRUCTIONS TO FORENSIC HEALTH CARE PROFESSIONALS

The instructions provide as follows in terms of PEP:

- ❑ PEP must be provided to all victims who have been in contact with the perpetrator's blood, semen or vaginal fluid within the last 72 hours (even when the victim's HIV test results are negative).
- ❑ HIV testing must be provided to the victim. The following process must be followed:
 - » The victim must receive counselling prior to the HIV test.
 - » A rapid HIV test must be performed on all victims who opt to use PEP:
 - * The victim must be informed if the test results are negative and must be provided with post-test counselling.
 - * If the first test results reveal that the victim is HIV positive, a second rapid test must be performed.
 - * If the result of the second rapid test is negative, a laboratory test must be performed. The victim must be given additional information on HIV and AIDS at this stage.
- ❑ The victim must use PEP within 72 hours of having possibly been exposed to HIV.
- ❑ A 3 day starter pack must be provided to victims who opt not to undergo an HIV test immediately, who do not want to receive the results of the HIV test immediately or who are unable to consent to an HIV test due to severe injuries or trauma.
- ❑ If the victim tests negative, the remainder of the treatment must be given to the victim.
- ❑ Victims who have financial or logistical problems should be provided with a 28 day treatment supply of PEP and a future appointment date should be given for the victim to return to the health establishment.
- ❑ Victims who test HIV positive should be referred for long-term HIV and AIDS care.
- ❑ Health care professionals should provide the victim with information on available health care services and should encourage the victim to practice safe sex.
- ❑ When a health care professional is in doubt about prescribing AZT and 3TC she or he must seek advice from a physician or referral advice centre.
- ❑ The health care professional must explain the side effects of the drugs to the victim.
- ❑ The health care professional must advise the victim to return to the health establishment if symptoms occur rather than to discontinue the use of the drugs.
- ❑ The health care professional must improve adherence by encouraging the victim to continue attending counselling sessions, being able to identify the different tablets and knowing when to take them, referring the victim to support groups and non-profit organisations providing relevant services and assistance.

- ❑ The health care professional must inform the victim that the effectiveness of oral contraception is reduced and when the victim is not using condoms during sexual intercourse, a stronger contraceptive should be used.
- ❑ All victims using PEP must be encouraged to practice safe sex until the 3rd month HIV test is conducted and the results have been confirmed.
- ❑ PEP, AZT and 3TC can be used during pregnancy and lactation but some other drugs used for the treatment should not be recommended during pregnancy.
- ❑ Where a victim presents herself for treatment after 72 hours of possibly having been exposed to HIV, the victim must be informed of the fact that PEP is known not to have an impact after 72 hours of possible exposure to HIV.
- ❑ HIV testing should be offered when the victim presents herself for treatment after 72 hours of possible exposure to HIV. Counselling should be provided both before and after testing. The victim must be informed of the problems with the window period and testing and victims who test negative in the first test must be advised to take a second test after 6 weeks. The importance of practicing safe sex must also be explained to the victim.
- ❑ Other treatment that the victim can be provided with includes:
 - » Anti-tetanus toxoid (ATT) if the victim was last immunised against tetanus more than 10 years ago.
 - » Treatment for sexually transmitted infections.
 - » All female victims who present themselves for treatment within 5 days of the sexual offence should be provided with emergency contraception.
 - » Hepatitis immunisation to victims who have not been completely vaccinated or who were previously infected.
- ❑ Victims must be given clear and simple instructions on how to use medication.
- ❑ Victims should be given information about local support services that are available to them.
- ❑ Follow-up consultations should be made for after 1 week, 6 weeks and 3 months.

The instructions provide as follows in terms of compulsory HIV testing of the alleged perpetrator:

- ❑ The health care provider must ensure that the victim is aware that, if she wishes to apply for the offender to be submitted for a compulsory HIV test, the application must be made within 90 days of the sexual offence.
- ❑ The results of the HIV test must only be made available to the investigating officer who will give it to the alleged offender.
- ❑ The results of the HIV test of the alleged offender must be dealt with confidentially. It must be communicated to the alleged offender in writing in a sealed envelope.
- ❑ One set of test results should be kept at the health care establishment and must be made available to the prosecutor for purposes of prosecuting the offender for the sexual offence.
- ❑ The health care professional must do the following to ensure the confidentiality of the test results:
 - » Both the conducting of the test and the results of the test must be confidential.

- » The test results must be kept in a locked cupboard or cabinet to which access is restricted to the head of the health care establishment.
- ❑ The victim must be counselled prior to receiving the test results.

The health care establishment must deal with a report of a sexual offence as follows:

- ❑ In instances where the victim does not want to report the sexual offence to the police, there is no legal duty on the health care professional to report a sexual offence if the victim is an adult unless the victim is mentally disabled or is an older person in need of care.
- ❑ If the victim is hesitant about reporting the sexual offence, the health care professional should address the victim's fears and concerns.
- ❑ The victim must be encouraged to report the sexual offence within 24 hours of the commission of the offence.
- ❑ The victim should be encouraged to allow the health care professional to collect medical evidence to be kept at the health establishment in case the victim decides to report the sexual offence at a later stage. The victim must be informed that the evidence will be kept for a period of 6 weeks and that she or he will ensure that it is properly secured.
- ❑ The victim must be offered a range of services including counselling, treatment for sexually transmitted infections, HIV and AIDS, treatment for physical injuries, pregnancy risk evaluation and prevention treatment and other infectious disease treatment and prevention.
- ❑ The victim's right to decide on whether to report the sexual offence or to undergo a medical examination must be respected.

The instructions in regard to the investigation and prosecution of sexual offences are as follows:

- ❑ The sexual assault evidence collection kit must be used when conducting a medical examination in sexual offence cases.
- ❑ The consent form (SAP308) must be completed before the medical examination is conducted.
- ❑ The complete medical history of the victim must be taken.
- ❑ The examination must be performed by a skilled and experienced forensic health care professional.
- ❑ The forensic health care professional must complete the required J88 form.
- ❑ Forensic or medical evidence must be collected immediately after the medical examination is completed. Mismanagement of the evidence can result in the evidence not being admitted in court.
- ❑ Emergency treatment must be prioritised over the medical examination.
- ❑ The information in the J88 can only be disclosed to the investigating officer and the DJCD. This information can only be given to the offender's legal representative if the court orders for the information to be disclosed to her or him.
- ❑ The transfer of forensic or medical evidence from one official to another must be confirmed by signature or a statement by the official receiving the evidence. Failure to do so can result in the evidence not being admitted in court.
- ❑ The forensic health care professional can give expert evidence in court. Both doctors and nurses can give expert evidence in court.

APPENDIX J

DIRECTIVES TO BE FOLLOWED BY ALL MEDICAL PRACTITIONERS WHEN DEALING WITH SEXUAL OFFENCE CASES

The purpose of the Health Directives is to provide uniform and standard procedures for health establishments in dealing with survivors of sexual offences. The Health Directives set out:

- ❑ The different types of treatments for rape survivors, including the provision of PEP;
- ❑ The duties of health care professionals in terms of the forensic examination; and
- ❑ The duties of health care professionals in terms of compulsory HIV testing.

According to the policy document, the Health Directives need to be read with a number of other policies and all relevant legislation.⁵⁵

PEP can only be given to patients who go to the health care facility within 72 hours of the rape (Section 4(a) of the Health Directives). Before PEP can be administered, the rape survivor needs to test for HIV because PEP can only be given to rape survivors who are HIV negative (Section 3 (a), (b) of the Health Directives). The HIV test requires the health care worker to undertake pre- and post-test counselling, which includes obtaining informed consent either from the rape survivor or, if the rape survivor is a child, from their parent or guardian (3(d) of the Health Directives). Reflecting the changes introduced by the Children’s Act 38 of 2005, children over the age of 12 years and younger children with sufficient maturity to understand the benefits, risks and implications of an HIV test, can legally consent to being tested for HIV (Section 3 (g) of the Health Directives).⁵⁶ Furthermore, if the child is too young/immature to give consent and the parent or guardian is unavailable, the hospital superintendent, a court, or a social worker can give consent (Section 3 (f) of the Health Directives).

The Health Directives further make an exception to HIV testing by stipulating that HIV testing can be postponed for patients who prefer not to be tested immediately or those who are unable to consent immediately due to severity of injuries or traumatisation should still receive a three-day starter pack of PEP (Section 4 of the Health Directives). They then need to test for HIV at the follow-up visit after three days.

If the rape survivor agrees to be tested and tests negative, he or she is given a one-week supply of PEP. At the first follow up appointment after one week, the survivor receives the remainder of the drugs. The Directives accept, however, that this kind of drug administration may be impractical for some patients, and therefore stipulate that “[f]or those patients who cannot return for their one-week assessment due to logistical or economic reasons, a 28-day treatment supply with an appointment date must be given” (Section 4 (d) of the Health Directives). This provision takes into account that many rape survivors do not have the financial means to return to the health facility every week.

When administering PEP the health care worker should advise the rape survivor to use condoms while taking PEP and until the three months follow-up visit to protect the rape survivor’s consensual sexual partner from HIV transmission. The health care worker should therefore hand out condoms to the survivor (Section 4 (f) of the Health Directives).

55 The Health Directives list the following documents: National Sexual Assault Policy, National Management Guidelines for Sexual Assault Care, the Victims Charter, National Health Act, 2003 (No. 61 of 2003), Choice on Termination of Pregnancy Amendment Act, 2004 (No. 38 of 2004), and Children’s Act, 2005 (No. 38 of 2005).

56 See Section 130 of the Children’s Act.

The Health Directives recommend the use of a two-drug regimen consisting of Zidovudine (AZT) and Lamivudine (3TC) (Section 5 of the Health Directives).⁵⁷ In “high-risk cases”, a third drug (Lopinavir/Ritonavir) “can be added”. The Health Directives state that the risk of transmission is high if:

- ❑ The rape survivor was raped anally;
- ❑ The rape survivor was raped by more than one perpetrator;
- ❑ There is obvious trauma to the genitalia; and/or
- ❑ The perpetrator(s) is/are known to be HIV positive (Section 7 of the Health Directives).

For children under the age of 14 years,⁵⁸ the Health Directives request the use of paediatric doses according to weight and height. The policy includes a table with calculated doses for specific weights. Although the table sets out the doses in millilitre and milligram, the Health Directives fail to explicitly request health care professionals to use syrup for child rape survivors. Children often struggle to swallow tablets and should therefore always receive the medication as syrup.

Adherence is central to the effectiveness of PEP: each dose missed drastically reduces the treatment’s effectiveness. According to Section 9 of the Health Directives, health care workers should, therefore, try to improve rape survivors’ adherence by:

- ❑ Explaining:
 - » How to identify each tablet;
 - » When to take them;
 - » Side-effects and how to manage them; and
- ❑ *Always* providing an anti-emetic (i.e., anti-nausea medication) with the treatment.

Other adherence strategies mentioned in the Health Directives are offering the patient home visits and follow-up phone calls, advising the survivor to keep a pill diary, and providing referrals to NGOs and support groups.

In addition to PEP and treatment for other sexually transmitted infections, the following treatment options are explicitly outlined in the Health Directives:

- ❑ Treatment for STIs;
- ❑ Emergency contraceptive pills together with anti-nausea medication;
- ❑ Treatment for tetanus and Hepatitis B.

Given that it may be difficult for the survivor to understand and remember the different drug regimens, health care professionals should give them simple and clearly written instructions about taking the medication (s 12 (h) of the Health Directives). Section 13 of the Health Directives provides that rape survivors should receive written referrals on services such as:

57 If the rape victim receives the two-drug regimen, she/he needs to take two AZT pills three times a day (at 6 hourly intervals: morning, midday, evening) and one 3TC tablet twice a day (at 12 hourly intervals: morning and evening).

58 It is unclear why the Directives use the age of 14 years here.

- ❑ NGO support;
- ❑ Rape crisis centres;
- ❑ Shelters or safe houses;
- ❑ Legal aid;
- ❑ Support groups;
- ❑ Social services; and
- ❑ Reproductive health services/ TOP (termination of pregnancy) services for failed contraception.

In terms of the compulsory HIV testing of the alleged perpetrator, the Health Directives are somewhat unclear. The Directives fail to highlight the health care workers' duties in terms of informing the rape survivor about the possibility of having the alleged offender tested for HIV. Instead, they stipulate that, before conducting an HIV test, "[t]he health care professional must ensure that the survivor of the sexual offence or interested person have requested HIV testing of the alleged offender within 90 days of the sexual offence prior to conducting the HIV testing". This, however, is not for the health care professional to decide, but for the magistrate makes the decision regarding the application. Once an order for HIV testing is granted, health care professionals would supposedly have to comply with the court's order. The Health Directives also stipulate that the rape survivor must be counselled before receiving the HIV test result and require that the investigating officer must ensure that such counselling took place. It is, however, doubtful that the Health Directives can introduce additional duties for police officers.

Furthermore, the Health Directives provide for the confidentiality of the test results, for the test result only being made available to the investigating officer, and for one set of test results to be kept at the health care establishment so that a prosecutor may see the test results in order to prosecute the sexual offender (Section 17 of the Health Directives).

The Health Directives only include some rudimentary guidelines in relation to the forensic examination of the rape survivor. The forensic examination is addressed more comprehensively in other policy documents.⁵⁹ Emergency treatment must always be prioritised over the medical examination. According to the Health Directives, the sexual assault evidence collection kit must be used when conducting a medical examination in sexual offence cases and that the consent form (SAP308) must be completed before the medical examination is conducted. The examination must be performed by a skilled and experienced forensic health care professional who must document the findings of the examination on the J88 form.

Furthermore, the Health Directives clarify that:

- ❑ The information in the J88 can only be disclosed to the investigating officer and the DJCD. This information can only be given to the offender's legal representative if the court orders for the information to be disclosed to her or him.
- ❑ The transfer of forensic or medical evidence from one official to another must be confirmed by signature or a statement by the official receiving the evidence. Failure to do so can result in the evidence not being admitted in court.
- ❑ The forensic health care professional can give expert evidence in court. Both doctors and nurses can give expert evidence in court.

59 The National Management Guidelines for Sexual Assault Care provide more detailed information on the forensic examination. See Department of Health, National Management Guidelines for Sexual Assault Care (Pretoria: Department of Health, 2005). However, the Department of Health is currently in the process of drafting a new National Sexual Assault Policy which may include updated guidelines for the management of rape survivors.

The Health Directives also include provisions on how a health care establishment must deal with a report of a sexual offence. The survivor should be encouraged to report the sexual offence to the police within 24 hours of the commission of the offence. However, in instances where the survivor does not want to report the sexual offence to the police, there is no legal duty on the health care professional to report a sexual offence if the survivor is an adult unless the survivor is mentally disabled or is an older person in need of care (Section 18 of the Health Directives). Where the rape survivor is a child, the health care worker has to report the offence to the police (Section 54 of the Sexual Offences Act).

The Health Directives emphasise that the survivor's right to decide on whether to report the sexual offence or to undergo a medical examination must be respected. The survivor should, however, be encouraged to allow the health care professional to collect medical evidence to be kept at the health establishment in case the survivor decides to report the sexual offence at a later stage (Section 18(d) of the Health Directives). This evidence would then be kept at the health facility for a minimum of 6 weeks (Section 18(e) of the Health Directives). Accordingly, the forensic examination as well as the provision of PEP and other medical treatment do not depend on laying a charge at the police station.

APPENDIX K

CONSTITUTIONAL OBLIGATIONS WITH REGARD TO COURTS AND THE ADMINISTRATION OF JUSTICE

Chapter 8 - Courts and Administration of Justice

179. Prosecuting authority

- 2) ... has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.
- 3) National legislation must ensure that the Directors of Public Prosecutions—
 - a. are appropriately qualified; and
 - b. are responsible for prosecutions in specific jurisdictions, subject to subsection (5).
- 5) The National Director of Public Prosecutions:
 - a. must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, prosecution policy, which must be observed in the prosecution process;
 - b. must issue policy directives which must be observed in the prosecution process;
 - c. may intervene in the prosecution process when policy directives are not complied with; and
 - d. may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from the following :
 - i) The accused person.
 - ii) The complainant.
 - iii) Any other person or party whom the National Director considers to be relevant.
- 6) The Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority.
- 7) All other matters concerning the prosecuting authority must be determined by national legislation.

APPENDIX L

THE CRIMINAL PROCEDURE ACT 51 OF 1977 AS IT RELATES TO SURVIVORS OF SEXUAL OFFENCES

There are various provisions in the Act that relate to protection of witnesses and complainants that are applicable to and relevant for victims of sexual offences and minor victims. The Act also contains an important provision that expressly prohibits the citing of evidence relating to a sexual offence complainant's sexual history as proof of consent or to show that the complainant is less believable. In addition, the Act contains several provisions that entitle the complainant in a criminal proceeding to be heard with respect to plea agreements, sentencing, and parole hearings. These provisions impose duties on various officials within the criminal justice system including police, prosecutors, counsel, and the court.

Protections for complainants giving evidence in court

In terms of testifying in court, the Act contains certain provisions that protect complainants of sexual offences who testify as witnesses in criminal proceedings, particularly minors. Section 153(2) provides that a court may order that any witness testify "behind closed doors" rather than in open court if it appears to the court, "that there is a likelihood that harm might result to any person" who testifies at the proceedings. The

More specifically, Section 153(3) provides that, in a criminal proceeding where the accused is alleged to have committed (a) a sexual offence or (b) any act for the purpose of furthering the commission of a sexual offence towards or in connection with any other person, the complainant can request that unnecessary persons not attend proceedings. In short, a request to order a closed court to protect the complainant may be filed, especially when the complainant is giving evidence [section 15(3A)]. In addition, Section 15(5) provides that the court can order a closed court when a witness under the age of eighteen years is testifying.

A related provision, Section 154(2), provides that cases in which an order excluding persons from court has been made under Sections 153(3) or 153(3A), "no person shall publish in any manner whatever any information which might reveal the identity of any complainant in the proceedings". Section 154(5) provides that any person who contravenes the prohibition of publication under this section commits a punishable offence.

In addition, Section 158(2) of the Act allows the court, on its own initiative, or upon application by the prosecutor or witnesses, to order that a witness testify "by means of closed circuit television or similar electronic media". Of the considerations that the court may weigh prior to making such an order, including whether appropriate facilities are readily available, is whether the order would, "prevent the likelihood that prejudice or harm might result to any person if he or she testifies or is present at such proceedings". In addition, Section 158(5) provides further protection to a complainant under the age of 14 years by requiring the court to give reasons for denying an application to give evidence by closed circuit television or similar electronic media:

(5) The court shall provide reasons for refusing any application by the public prosecutor for the giving of evidence by a child complainant below the age of 14 years by means of closed circuit television or similar electronic media, immediately upon refusal and such reasons shall be entered into the record of the proceedings.

With respect to minors who are giving evidence as witnesses, Section 170A provides additional protec-

tion by allowing a minor to give evidence through an intermediary if, “it appears to such court that it would expose any witness under the age of eighteen years to undue mental stress or suffering if he or she testifies at such proceedings”. The section provides further protections for child witnesses at subsection 3:

(3) If a court appoints an intermediary under subsection (1), the court may direct that the relevant witness shall give his or her evidence at any place—

(a) which is informally arranged to set that witness at ease;

(b) which is so situated that any person whose presence may upset that witness, is outside the sight and hearing of that witness; and

(c) which enables the court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through the medium of any electronic or other devices, that intermediary as well as that witness during his or her testimony.

Similar to Section 158(5), Section 170A(7) imposes a duty on the court to give reasons for denying an application for an intermediary in respect of a child aged below 14 years:

(7) The court shall provide reasons for refusing any application or request by the public prosecutor for the appointment of an intermediary in respect of child complainants below the age of 14 years, immediately upon refusal and such reasons shall be entered into the record of the proceedings.

Note that Section 191A authorizes the Minister to make regulations relating to the provision of witness services, such as to provide assistance and support to witnesses at court, establishing reception centres for witnesses at court, and counselling witnesses. Although such services could be of great assistance and benefit to sexual offence complainants in particular, there are presently no regulations in force under this section.

No evidence relating to a female witness’s sexual history to be adduced in court

With regard to sexual offences specifically, Section 227(1) expressly prohibits the adducing of evidence relating to the character of any person against or in connection with whom a sexual offence is alleged to have been committed, while Section 227(2) prohibits the adducing of any evidence “as to any previous sexual experience or conduct of any person against or in connection with whom a sexual offence is alleged to have been committed”. Such evidence may only be admitted with leave of the court, or unless such evidence has been introduced by the prosecution. Thus, counsels have a prima facie duty not to adduce and the court not to allow evidence relating to a complainant’s sexual history.

In considering whether to permit such evidence to be introduced, the court must consider whether it is “relevant”, having regard to a number of factors set out at Section 227(5), including the complainant’s personal dignity and right to privacy, and whether it “is in the interests of society in encouraging the reporting of sexual offences”. Section 227(6) offers further protection to the complainant, as it expressly prohibits an application to permit evidence as to a complainant’s sexual history if the purpose is to “support an inference that by reason of the sexual nature of the complainant’s experience or conduct, the complainant (a) is more likely to have consented to the offence being tried; or (b) is less worthy of belief.” Section 227 reads in full:

227. Evidence of character and previous sexual experience.—(1) Evidence as to the character of an accused or as to the character of any person against or in connection with whom a sexual offence as contemplated in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, is alleged to have been committed, shall, subject to the provisions of subsection (2), be admissible or inadmissible if such evidence would have been admissible or inadmissible on the 30th day of May, 1961.

(2) No evidence as to any previous sexual experience or conduct of any person against or in connection with whom a sexual offence is alleged to have been committed, other than evidence relating to sexual experience or conduct in respect of the offence which is being tried, shall be adduced, and no evidence or question in cross examination regarding such sexual experience or conduct, shall be put to such person, the accused or any other witness at the proceedings pending before the court unless—

(a) the court has, on application by any party to the proceedings, granted leave to adduce such evidence or to put such question; or

(b) such evidence has been introduced by the prosecution.

(3) Before an application for leave contemplated in subsection (2) (a) is heard, the court may direct that any person, including the complainant, whose presence is not necessary may not be present at the proceedings.

(4) The court shall, subject to subsection (6), grant the application referred to in subsection (2) (a) only if satisfied that such evidence or questioning is relevant to the proceedings pending before the court.

(5) In determining whether evidence or questioning as contemplated in this section is relevant to the proceedings pending before the court, the court shall take into account whether such evidence or questioning—

(a) is in the interests of justice, with due regard to the accused's right to a fair trial;

(b) is in the interests of society in encouraging the reporting of sexual offences;

(c) relates to a specific instance of sexual activity relevant to a fact in issue;

(d) is likely to rebut evidence previously adduced by the prosecution;

(e) is fundamental to the accused's defence;

(f) is not substantially outweighed by its potential prejudice to the complainant's personal dignity and right to privacy; or

(g) is likely to explain the presence of semen or the source of pregnancy or disease or any injury to the complainant, where it is relevant to a fact in issue;

(6) The court shall not grant an application referred to in subsection (2) (a) if, in its opinion, such evidence or questioning is sought to be adduced to support an inference that by reason of the sexual nature of the complainant's experience or conduct, the complainant—

(a) is more likely to have consented to the offence being tried; or

(b) is less worthy of belief.

(7) The court shall provide reasons for granting or refusing an application in terms of subsection (2) (a), which reasons shall be entered in the record of the proceedings.

Right of complainant to be heard with respect to parole, sentencing and plea agreements

Section 299A(1) provides that when the accused has been sentenced to imprisonment for certain crimes, including “rape or compelled rape” and “sexual assault, compelled sexual assault or compelled self-sexual assault” the court has a duty to inform the complainant that she has a right “to make representations when placement of the prisoner on parole, on day parole or under correctional supervision is considered or to attend any relevant meeting of the parole board”.

Section 299A(2) provides that a complainant who wishes to exercise this right has a duty to inform the Commissioner of Correctional Services in writing, and to provide his or her address. The parole board shall inform the complainant as to the date and time of the meeting, and to whom he or she may make representations (Section 299A(3)).

In addition, all complainants have a right to be consulted and make representations with respect to a plea agreement entered into by the Prosecutor with the accused, according to Section 105A(1)(b):

105A(1)(b)(iii) after affording the complainant or his or her representative, where it is reasonable to do so and taking into account the nature of and circumstances relating to the offence and the interests of the complainant, the opportunity to make representations to the prosecutor regarding—

(aa) the contents of the agreement; and

(bb) the inclusion in the agreement of a condition relating to compensation or the rendering to the complainant of some specific benefit or service in lieu of compensation for damage or pecuniary loss.

Section 105A(7) further provides that the court may hear evidence, or a statement, by or on behalf of the complainant prior to sentencing following a plea agreement:

(7) (a) If the court is satisfied that the accused admits the allegations in the charge and that he or she is guilty of the offence in respect of which the agreement was entered into, the court shall proceed to consider the sentence agreement.

(b) For purposes of paragraph (a), the court—

(i) may—

(aa) direct relevant questions, including questions about the previous convictions of the accused, to the prosecutor and the accused; and

(bb) hear evidence, including evidence or a statement by or on behalf of the accused or the complainant

Relevant considerations upon bail applications by an accused

Although not a duty owed to a complainant, it should be noted that there are specific restrictions regarding bail for an accused, as set out at Section 60, which potentially offer some indirect protections for complainants. Section 60(4) provides that bail will not be granted to an accused if (a) there is likelihood that the accused would endanger the safety of “any particular person”, or (c) if there is likelihood that the accused will “attempt to influence or intimidate witnesses”. These provisions do not specifically mention the complainant, but could apply in appropriate circumstances.

In addition, Section 60(11) restricts access to bail in cases where the accused is charged with rape (a Schedule 5 offence), unless the “interests of justice” require release, and prohibits bail for Schedule 6 offences. Schedule 6 offences include rape with specified aggravating circumstances, such as if the victim

was raped multiple times, or for cases involving a victim aged sixteen or under, except in “extraordinary circumstances”.

Police officer to apply for consent for medical examination of a complainant who is a minor, in certain sexual offence cases

Section 335B(1) provides that a police officer who “is of the opinion that it is necessary that a minor or a person who is mentally disabled in respect of whom it is alleged that a sexual offence...has been committed be examined by a district surgeon or, if he is not available, by a registered medical practitioner”, may apply to a magistrate for necessary consent that such examination be conducted. This provision applies if the minor or mentally disturbed person’s parent or guardian cannot be located, cannot grant consent in time or unreasonably refuses consent, is deceased, or is a suspect in the alleged crime. Note that this provision is not strictly a duty, as it does not obligate a police officer to apply for consent for medical examination, but rather permits an officer to do so, and a Magistrate’s court to so order.

APPENDIX M

SHUKUMISA CAMPAIGN ACTION PLAN 2013/2014

Vision

We have a vision of a South Africa with well crafted, well implemented sexual offences legislation and a strong criminal justice system that supports rape survivor's access to justice and provides a clear deterrent to rapists.

Mission

Our mission is to ensure the following:

- South African a society takes the problem of rape seriously and does not tolerate stereotyped or prejudicial attitudes about rape
- Civil society organisations are well resourced and engage in joint advocacy initiatives
- Laws, policies and systems are strengthened and improved
- Services to rape survivors are well resourced and well implemented
- Conviction rates for rape are increased and there are more appropriate sentences for rapists
- The rate of rape in South Africa is reduced

Strategic objectives

- The Sexual Offences Act is well drafted
- The Sexual Offences Act is properly implemented
- The public is aware of the prevailing myths and stereotypes about rape and sexual offences
- Civil society organisations have the capacity to deliver high quality services and engage in joint advocacy
- The criminal justice system is strengthened and delivers high quality services that enable vic- tims of sexual offences to access justice

Advocacy Activities:

A sustained campaign by a coalition of civil society organisations that will:

- Develop an evidence base about problems with the implementation of the Sexual Offences Act
- Develop recommendations based on a strong analysis of the evidence gathered
- Identify relevant stakeholders groups in order to present the evidence that can influence decisions that support these recommendations
- Identify platforms for engaging the identified stakeholders and make use of these platforms

- ❑ Develop a media strategy to enhance public awareness and involvement in the influencing these stakeholders
- ❑ Shift the public discourse about rape in order to challenge prevailing myths and stereotypes

Current Key Points for Advocacy Activities:

- ❑ Specialised Sexual Offences Courts – parliamentary advocacy
- ❑ Finalising the National Policy Framework on Sexual Offences and developing norms and standards for service delivery – parliamentary advocacy
- ❑ The current NGO funding crisis – provincial advocacy

The first part of the document discusses the importance of maintaining accurate records of all transactions. It emphasizes that every entry, no matter how small, should be recorded to ensure the integrity of the financial data. This includes not only sales and purchases but also expenses and income. The text suggests that a consistent and thorough record-keeping system is essential for identifying trends and making informed decisions.

Next, the document addresses the issue of budgeting. It explains that a well-defined budget helps in controlling costs and maximizing resources. By setting a clear financial plan, individuals and organizations can avoid overspending and ensure that their financial goals are met. The text provides practical advice on how to create a budget that is realistic and adaptable to changing circumstances.

The third section focuses on the importance of regular financial reviews. It states that periodic assessments of the financial situation allow for the identification of areas where adjustments may be needed. This process involves comparing actual performance against the budget and analyzing the reasons for any variances. The document encourages a proactive approach to financial management, where potential issues are addressed before they become significant problems.

Finally, the document concludes by highlighting the long-term benefits of sound financial practices. It notes that consistent record-keeping, budgeting, and regular reviews contribute to overall financial stability and growth. By following these principles, individuals and organizations can build a strong financial foundation that supports their long-term objectives.