

woman

know your rights



**A SIMPLIFIED GUIDE TO YOUR RIGHTS
AGAINST SEXUAL VIOLENCE**

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WOMEN'S LEGAL CENTRE

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1 INTRODUCTION


1.1 WHAT TO USE THIS BOOKLET FOR


You can use this booklet to:


- Learn about your legal rights against sexual violence.
- Learn what to do when sexual violence is committed against you.
- Learn about the duties that the state owes you when sexual violence is committed against you.
- Assist other women in learning about their legal rights against sexual violence, what they can do when sexual violence is committed against them and the duties owed to them by the state when sexual violence is committed against them.


1.2 HOW TO USE THIS BOOKLET


 **VIOLENCE:** When somebody is aggressive towards you and/or uses force against you which is painful or hurtful towards you or when somebody does something brutal or cruel to you.


 **RIGHTS:** What you are entitled to or what you can do about something that has been done to you.


 **LEGAL:** What the law of South Africa allows or permits or does not allow or permit or what the law says you and other individuals or the state must or must not do.


 **LEGAL DUTY:** When the law dictates that something must be done.

 **PUNISH:** To hold somebody responsible for wrong doing or abuse that they have committed against you.


 **OFFENDER:** The abuser, perpetrator or person who commits a criminal offence. The offender has done something that the law says should not be done.

 **CONTRAVENED:** When somebody does something that the law says should not be done or when somebody does not do something that the law says should be done.


 **VICTIM:** A person who is being, has been or was abused or subjected to sexual violence. A victim is also referred to as a survivor.


 **EMPOWER:** to assist you in making decisions to stop acts of violence from being committed against you or to take action or steps to stop acts of violence from being committed against you.

 **OCCURRENCES:** Something that happens or takes place.

 **CRIMINAL JUSTICE SYSTEM:** The legal system that is in place in South Africa to address and deal with offenders or people that commit criminal offences. A person only becomes a criminal once the court says that she or he has committed the criminal offence.

 **UPHOLD:** Enforce or give effect to.

 **COMMENTS:** We use comments when information is very important or easy to misunderstand. **Important information will be highlighted by this icon of a pencil.**

 **DEFINITIONS:** You will find definitions of legal or difficult words on the far right or left-hand side of each page. If a word is unfamiliar to you, please read the explanation. **Definitions will be highlighted by this icon of a light bulb.**

1.3 THE PURPOSE OF THIS BOOKLET

You have a range of rights in relation to sexual **violence**, including the **right** not to have acts of sexual violence committed against you. The state and individuals have duties or obligations that they owe to you, including the duty to follow certain **legal** procedures when an act of sexual violence is committed against you. The state has a **legal duty** to protect you from violence and to take the necessary steps to **punish** the **offender** who committed an act of sexual violence against you.

Many women have approached the Women's Legal Centre for assistance and we have learnt that women are often not aware of their rights or do not know what to do when their rights are **contravened**. This lack of awareness has led to women choosing not to report violence and ultimately offenders are not arrested, convicted and punished.

The purpose of this booklet is to inform you of your rights in order to **empower** you to exercise your rights and to prevent further acts of violence from being committed against you and other women. If more women stand up for their rights this may reduce the many **occurrences** of violence against women in South Africa.

We acknowledge that many **victims** of violence have lost faith in the law and the **criminal justice system** because victims have reported that state departments often:

- Fail to treat women sensitively and respectfully when they speak out about violence.
- Fail to do the work that they must do.
- Fail to fulfill their duties to protect and take steps to punish offenders.

If women know what rights they have then they are in a better position to demand that their rights are respected and protected. We have included a section on what you can do in situations where the state fails to **uphold** your rights and/or fails to carry out its duties at the end of this booklet.

South Africa has extremely high sexual violence statistics and the majority of victims of sexual violence are women. This booklet is aimed at informing the woman victim of her rights. We do however acknowledge and accept that men can be victims of violence as well.

This booklet is also aimed at specifically informing adult women of their rights and not children (a child is any person under the age of 18 years). It is accordingly not drafted for children to understand and does not cover many of the rights that are relevant to children.

The abuser is often referred to as a man and the survivor as a woman in this booklet. We have opted to do so as this booklet is aimed at women and statistics have informed us that the majority of perpetrators of violence against women are men.

It is important for you to know that if you are in a same-sex relationship and you are being abused by your spouse or partner most of the rights in terms of sexual violence that will be explained to you in this booklet can be used against your abusive spouse or partner.

The following words will be used interchangeably:

- “victim”, “survivor” and “complainant”
- “sexual offence” and “sexual violence”
- “perpetrator”, “abuser”, “offender”, “accused” or “alleged perpetrator”, “alleged abuser”, “alleged offender”
- “her” and “him” and “herself” and himself” where the context permits

Finally, please note that this booklet contains a summary of most, but not all, of your rights in relation to sexual violence.

2 THE LAW AND POLICY

THE CONSTITUTION

2.1 INTRODUCTION TO THE CONSTITUTION

The Constitution Act 108 of 1996 (‘the Constitution’) became law soon after South Africa became a **democratic state**. Chapter 2 of the Constitution contains the Bill of Rights which vests all South Africans with **fundamental human rights** which South Africans did not have under **apartheid**. All of these human rights must be respected, protected, promoted and fulfilled by the state and individuals. The Constitution is supreme law which means that it is the highest law in South Africa. Any law that is **inconsistent** with the Constitution is **invalid**.

WHAT CONSTITUTIONAL RIGHTS EXIST AGAINST SEXUAL VIOLENCE?

- **The right to equality and the right not to be unfairly discriminated against on the basis of your sex or gender**


Often, women are subjected to violence because they are women. Violence against women has come about due to women and men not being equal in society.


The right to equality, contained in the Constitution, means that women are equal to men and women should not be **unfairly discriminated against** because they are women. Section 9 of the Constitution specifically states that you cannot be unfairly discriminated against on the basis of your **gender** or **sex**. In other words, you are equal to any man, including your husband or partner and no-one has the right to harm you by raping or sexually abusing you in any way.


The right to equality also means that the law must treat you equally to everybody else. You have the right to the same protection and benefit of the law and can enjoy all rights and freedoms that other South Africans have.

- **The right to human dignity**

The Constitution states that all people have **inherent** dignity and have the right to have this dignity respected and protected. This is one of the most important rights in the Constitution and it cannot be separated from the other rights in the Bill of Rights. Human dignity goes to the core of who you are as a human being. This right means that other people have to respect you as a human being and cannot violate your integrity, pride or self-worth.


 **DEMOCRATIC STATE:** A free and independent state. South Africa became a democratic state after the apartheid system was taken away and everyone was given the right to vote.


 **APARTHEID:** System of separation of people according to race.


 **FUNDAMENTAL HUMAN RIGHTS:** Basic and important rights that you are entitled to as a human being.

 **INCONSISTENT:** Contradictory, opposite or conflicting.

 **INVALID:** Not valid, null, void, not legitimate.

 **UNFAIR DISCRIMINATION:** Treated differently and badly in comparison to men because you are a woman. For example, you are not given the same entitlements, benefits and advantages as a man because you are a woman.

 **GENDER:** The roles prescribed to women and men by society and culture.

 **SEX:** The biological or physical differences between women and men.

 **INHERENT:** Natural or something we are born with.

- **The right to life**
This right means that you have the right to human life. In other words you have the right to live your life as part of humanity. This right is also closely linked to the right to human dignity above. So the right to life includes the right to be treated with dignity. Accordingly, acts of sexual violence should not be committed against you.
- **The right to freedom and security of the person including the right to be free from all forms of violence from public or private sources**
This right means that you have the right to make choices and not be forced to do something that you do not want to do. It also means that you have the right to be safe and protected. In other words, you have the right not to be harmed. This right specifically provides that you have the right not to be subjected to violence by individuals or the state. This means that nobody, including the state, can subject you to violence of any kind including sexual violence.
- **The right to bodily and psychological integrity including the right to security in and control of the body**
This right means that others must respect your body and mind and cannot harm them. For example, survivors of rape have reported that the rape affected them psychologically by making them feel worthless as human beings. This right also specifically provides that only you have power and control over your body and that no other person can take control of your body by for example making you perform sexual acts that you do not want to perform. It also provides that you have the right to feel that your body is safe and protected from harm.

2.2 THE SEXUAL OFFENCES ACT

INTRODUCTION TO THE SEXUAL OFFENCES ACT

The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 came into operation at the end of 2007 (“The Act”). The Act recognises the fact that the occurrence of sexual violence in South Africa is very high and that women and children are particularly vulnerable to sexual violence. The purpose of this Act is to provide survivors of sexual violence with better legal rights and protection than the rights and protection that was afforded to them prior to the coming into operation of the Act. Ultimately, the Act aims to do away with sexual violence in South Africa.

The new Act has made various changes to the laws on sexual violence and has also created new laws. The state must act in accordance with these changes. The current legal position in regard to sexual offences is discussed below.

CONSENT

WHEN DO YOU CONSENT TO A SEXUAL ACT?

You consent to a sexual act when you willingly and without force or pressure engage in a sexual act with another person. You can indicate that you do not want to engage in a sexual act verbally, through body language or in another way that tells the other person that you do not want to engage in the sexual act.

You have not consented to a sexual act if:

- You agreed to a sexual act with somebody because you were afraid of what they would do if you did not agree to the sexual act. For example, the person threatens to hurt or harm your children or kill you if you do not engage in the sexual act.
- You agreed to a sexual act but you did not know that you were agreeing to a sexual act. For example, you agree to a medical doctor touching your breasts and vagina not

knowing that it is not necessary for him to touch your breasts and vagina in order to establish whether you have a heart problem.

- Somebody commits a sexual act with you while you were under the influence of drugs or alcohol.
- Somebody commits a sexual act with you while you are unconscious or sleeping.
- Somebody commits a sexual act with you and you are **mentally disabled**.

WHO CAN CONSENT TO A SEXUAL ACT?

- Children under the age of 12 are unable to consent to any sexual acts. Committing a sexual act with a child under the age of 12 years amounts to statutory rape or sexual assault. For example, if Nomphele is 10 years of age and Sipho, who is older than 18 years, engages in a sexual act with her, he has committed a sexual offence.
- Committing a sexual act with a child of 12 years of age or between the age of 12 and 16 years, with the child's consent, amounts to the offence of consensual sexual **penetration** with a child. For example, if Babalwa is 14 years of age and agrees to have sex with Vuyo, who is older than 18 years, Vuyo has committed a sexual offence.
- Committing a sexual act with a child of 12 years of age or between 12 and 16 years of age, without the child's consent, amounts to statutory rape or sexual assault. For example, If Tania is 13 years of age and Benjamin, who is older than 18 years, forces her to have sex with him, Benjamin has committed a sexual offence.
- Non-penetrative sexual acts (sexual violation) of a child of 12 years of age or between 12 and 16 years of age with the consent of the child amounts to the offence of having committed an act of consensual sexual violation of a child. For example, If Anne is 15 years of age and agrees to John, who is older than 18 years, touching her genital organs John has committed a sexual offence.
- The sexual violation of a child of 12 years of age or between the age of 12 and 16 years of age without the consent of the child amounts to statutory sexual assault. For example, If Farieda is 13 years of age and Abdul, whom is older than 18 years, forcefully fondles her breasts Abdul has committed a sexual offence.
- Children who are 16 years of age and older can consent to sexual acts. For example, If Zinzi is 16 years of age and agrees to have sex with Shuaib, who is also 16 years of age, no sexual offence has been committed.

Accordingly, any person who is older than 16 years of age can consent to a sexual act.



MENTAL DISABILITY: A mental problem that prevents somebody from developing mentally normally. Sometimes mentally disabled people cannot make proper decisions because they do not understand something properly and cannot distinguish right from wrong.



PENETRATE: to enter or go into an opening. For example entering the vagina, anus or mouth with a sexual organ or object.

SEXUAL OFFENCES

INTRODUCTION

The Act sets out the various sexual acts that qualify as sexual offences. All of these offences must be treated equally by the state on the basis that these offences are serious and have had a negative impact on the survivor's physical, sexual and psychological integrity.

WHAT QUALIFIES AS A SEXUAL OFFENCE IN TERMS OF THE ACT?

Some of the sexual offences contained in the Act are set out in the table below.

The table must be read from left to right as follows:

For example -

One of the changes to the law on sexual offences brought about by the Act relates to rape. Previously, only a man could rape a woman by forcefully penetrating her vagina with his penis without the woman's consent. At present people of the same sex can rape each other by use of genital organs or objects. The description of the current legal position on rape will be explained in the table as:

DESCRIPTION OF SEXUAL ACT	NAME OF SEXUAL OFFENCE	EXAMPLE
Forced sexual penetration of men or women's genital organs, anus, mouth or any other part of the body with a penis or an object that can be used for sexual penetration	Rape	Zoliswa's partner forcefully penetrates her anus with an object without her consent

DESCRIPTION OF SEXUAL ACT	NAME OF SEXUAL OFFENCE	EXAMPLE
Any act that takes place which causes direct or indirect contact with the genital organs, anus, mouth, women's breasts or any other part of a person's body which could be used for purposes of sexual penetration, sexual arousal or stimulation without consent but where sexual penetration does not take place.	Sexual violation = sexual assault	Suraya's husband touches her vagina and breasts without her consent
Forcing a person to rape (sexually penetrate) another person	Compelled rape	Sandile forces Thando to rape Nomhle. Sandile threatens to kill Thando if he does not rape Nomhle
Forcing a person to sexually assault (sexually violate) another person	Compelled sexual assault	Steven forces Angela to masturbate Samantha's genitals. Steven threatens to harm Angela's children if she does not masturbate Samantha's genitals


DESCRIPTION OF SEXUAL ACT	NAME OF SEXUAL OFFENCE	EXAMPLE
Forcing a person to masturbate herself/himself, to penetrate herself/himself or to perform any other sexual act with herself/himself	Compelled self-sexual assault	Shiehaam forces Jason to penetrate his anus with an object. Shiehaam holds a gun to Jason's head while she forces him to penetrate his anus
Forcing or causing a person over 18 years of age to witness a sexual offence or to commit a sexual act without consent	No specific name	Bradley forces Karriema, who is 25 years of age, to watch him rape Zuleiga OR Bradley forces Karriema to rape Zuleiga. Bradley threatens to stab Karriema if she does not rape Zuleiga
Paying for sexual services from a person over the age of 18 years	No specific name	Thandiwe is a sex worker. Michael pays Thandiwe R150 to perform oral sex on him. Michael has committed a sexual offence
Providing sexual acts for pay	No specific name	Thandiwe is a sex worker. Michael pays Thandiwe R150 to perform oral sex on him. Thandiwe has committed a sexual offence
Paying for sexual services from a person who is mentally disabled, whether or not the sexual act is actually committed	Sexual exploitation	Gillian is mentally disabled. Craig paid Gillian R80 to have anal sex with her OR Gillian is mentally disabled. Craig paid Gillian R80 to have anal sex with her but they did not have anal sex because Craig had to leave because of an emergency
Offering a mentally disabled person to another person for purposes of the commission of a sexual act	Sexual exploitation	Mogamat is mentally disabled. Mogamat's brother Junaid reaches an agreement with Abdul to have sex with Mogamat

 **MASTURBATE:** Sexually arousing yourself by touching or penetrating yourself sexually.

DESCRIPTION OF SEXUAL ACT	NAME OF SEXUAL OFFENCE	EXAMPLE
Knowingly allowing a sexual act to be committed with a mentally disabled person as the caregiver of the mentally disabled person	Sexual exploitation	Surita is mentally disabled. Anna Marie takes care of Surita. Anna Marie allows Cobus to sexually assault Surita. Anna Marie has committed an offence.
Providing immovable or movable property where a sexual act can be committed with a mentally disabled person	Sexual exploitation	Sanjay is mentally disabled. Aesha allows Abdul to rape Sanjay at her house OR Sanjay is mentally disabled. Aesha allows Abdul to rape Sanjay in her car
Receiving payment for the commission of a sexual act with a mentally disabled person	Sexual exploitation	Surita is mentally disabled. Anna Marie is the manager of the hospital where Surita is taken care of. Abdul works at the hospital as a cleaner. Abdul pays Anna Marie R100 after he has sex with Surita
Supporting or assisting with the commission of a sexual act with a mentally disabled person	Sexual exploitation	Karrien is mentally disabled. Louie kidnaps Karrien and takes her to Jaco's home where Jaco sexually assaults Karrien
Making, giving, owning, possessing or displaying articles or material to a person to assist her or him to commit a sexual act with a mentally disabled person	Sexual grooming	Felicity is mentally disabled. Carlo is Felicity's brother. He takes photographs of Felicity and gives Ryan the photographs so that Ryan can identify Felicity at a later stage. One month later Ryan rapes Felicity
Assisting a person to communicate with a mentally disabled person for purposes of committing a sexual act with a mentally disabled person	Sexual grooming	Terence is mentally disabled. Anthony is Terence's father. Anthony sets up a meeting between Terence and Claude and gives Claude Terence's cellphone number so that arrangements can be made for when Terence and Claude will have sex



DESCRIPTION OF SEXUAL ACT	NAME OF SEXUAL OFFENCE	EXAMPLE
Giving or showing a mentally disabled person articles or material to encourage the person to commit a sexual act	Sexual grooming	Adnan is mentally disabled. Zulpha is Adnan's cousin. Zulpha shows Adnan pornographic videos to encourage him to masturbate her
Committing a sexual act or describing the commission of a sexual act to a mentally disabled person in order to encourage the person to commit a sexual act	Sexual grooming	Lynn is mentally disabled. Natasha masturbates her genitals to show Lynn how to masturbate so that Lynn will masturbate herself when Mark takes pornographic photographs of her OR Lynn is mentally disabled. Natasha masturbates Lynn's genitals to show Lynn how to masturbate so that Lynn will masturbate herself when Mark takes pornographic photographs of her
Exposing or displaying child pornography to a mentally disabled person	No specific name	Joseph is mentally disabled. Tarique shows Joseph pornographic photographs of children
Using a mentally disabled person to produce pornography and/or receiving payment for the production of pornography	No specific name	Rushda is mentally disabled. Peter makes pornographic videos of Rushda. Peter gives John a video and receives R50 payment for it

 **PORNOGRAPHY:** sexually explicit photographs or other materials of a person or sexual acts.

RULES OF EVIDENCE: The proof or confirmation that the court can take into account in considering whether the claim or allegations that you have made against the accused are true.

COURT PROCEEDINGS: The processes or procedures that the court follows in addressing and dealing with a sexual offence case.

COMPLAINANT: The person who opened the case against somebody or accuses somebody of committing a sexual offence against her.

CONVICT: The person that the court finds guilty of committing the sexual offence.

LEGAL REPRESENTATIVE: Lawyer, attorney or advocate.

PROMISCUOUS: sexually immoral or has many different sexual partners.

RULES OF EVIDENCE

INTRODUCTION

The Act has also changed the rules regarding the evidence that the court can take into account, during sexual offence **court proceedings**, in order to make a decision on whether the accused should be convicted of the crime that he or she has been charged with.

WHAT RULES OF EVIDENCE ARE IMPORTANT TO KNOW ABOUT?

The rules of evidence that can be applied in sexual offence cases include the following:

- **Previous Consistent Statements:**

If the **complainant** made statements about the sexual offence before giving evidence in court and makes the same or similar statements during the court proceedings, the statements made before the court proceedings can be taken into account by the court, in favour of the complainant, when it is deciding whether or not to **convict** the accused. The court cannot hold it against the complainant if there are no previous consistent statements or if there are previous statements that are different to what is said in court.

Before the Act came into operation the court was allowed to hold inconsistent statements against the complainant. This was detrimental for complainants as victims of sexual offences are traumatised by the sexual offence and can make inconsistent statements because of the trauma that they are experiencing. An inconsistent statement does not necessarily mean that the complainant is not telling the truth.

- **Delayed Reporting:**

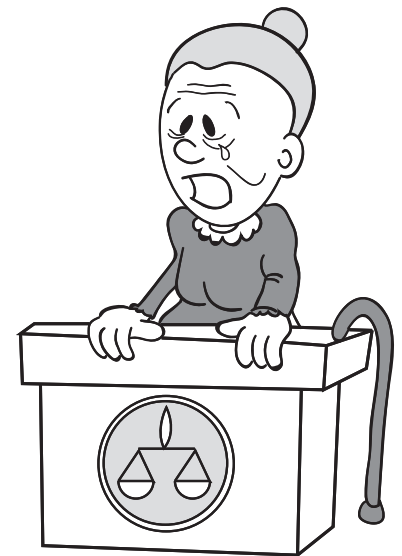
The court cannot view the fact that a sexual offence was reported long after the date that it took place in a negative light or in favour of the accused. In the past the courts were less likely to believe a complainant the longer she took to report the case. Now the law recognises that the trauma related to sexual offences many cause delays in reporting and should not be held against the complainant.

The Cautionary Rule:

In the past, the courts were allowed to treat the evidence given by the complainant suspiciously or as likely to be untrue on the basis that the complaint related to a sexual act. This implied that complainants in sexual offences cases were likely to be lying. This rule unfairly discriminated against women and was disadvantageous to women as mainly women were the complainants in adult sexual violence cases. The court may no longer treat the evidence of a complainant with caution due to the fact that the alleged offence is of a sexual nature.

- **Character Evidence & Evidence of Previous Sexual History:**

The court cannot accept evidence of the complainant's previous sexual history or character unless the accused's **legal representative** obtains permission from the court to lead such evidence or if the prosecution has introduced such evidence. This means that the complainant's sexual history (such as her sexual relationships with other people in the past or to prove that the complainant is or was a **promiscuous** woman) cannot be taken into account by the court unless the court allows the accused's legal representative to submit such evidence by applying to the court to do so.



Before the court allows the accused's legal representative to lead evidence on the complainant's previous sexual history or character, the court must be satisfied that such evidence is

relevant to the sexual offence proceedings. In determining whether the evidence is relevant the court must consider whether it is in the interests of justice and society to admit the evidence. The court cannot allow the evidence if it is of the opinion that it will support an assumption that because of the sexual nature of the complainant's experience or conduct it is likely that she consented to the sexual act or is less likely to be telling the truth.

COMPULSORY HIV TESTING

WHAT IS COMPULSORY HIV TESTING?

The Act provides that a victim of sexual violence can apply to court for an order that the person who committed the sexual violence has to have an HIV test and for the results of the test to be given to the victim. This application can also be brought by any person that has an interest in your well-being or the investigating officer investigating your case. The application must be brought within 90 days after the act of sexual violence was committed against you.

If you are successful with the application, the investigating officer must take the person who committed an act of sexual violence against you for an HIV test. The HIV test results must then be given to you in writing. The HIV test results are private and confidential and should not be disclosed to others.

WHAT ARE THE PROBLEMS WITH COMPULSORY HIV TESTING?

Providing for HIV testing was introduced with a view to protecting your interests as a victim of sexual violence. There has however been some controversy around this issue. If the person who committed an act of sexual violence against you was tested for HIV during the **window period** his body will not indicate that he has contracted HIV yet. This means that the test results can indicate that he is HIV negative even though he is HIV positive. The negative result could be false in such a case. The false test results can lead to you believing that you did not contract HIV and you could stop practicing safe sex and using **anti-retrovirals**. The window period can last for up 4 to 6 weeks.



COMMENT: You should take an HIV test both immediately after the occurrence of the sexual violence as well as after a period of 6 weeks. During the window period you should practice safe sex and continue the use of anti-retrovirals.

POST EXPOSURE PROPHYLAXIS ("PEP") & THE ACT

WHAT IS PEP?

PEP is an antiretroviral treatment that is used to prevent you from contracting HIV after you have possibly been exposed to the virus.

ALERT!!! WHY IS PEP PROBLEMATIC?

PEP is not effective in all instances. PEP must be taken within 72 hours after having contracted the virus and can have better results if taken before 48 hours have passed after possible contraction of the virus.

NB: You should ask for the PEP as soon as possible but within 72 hours of the sexual offence.



DESIGNATED PUBLIC HEALTH ESTABLISHMENT:

In terms of the Act, the state will appoint specific hospitals, clinics or other healthcare providers to make PEP accessible to survivors of sexual offences.



SEXUALLY TRANSMITTED

INFECTION: Disease, virus or illness that can be contracted through sex.

WHAT DOES THE ACT PROVIDE FOR IN TERMS OF PEP?

The Act provides that you will be entitled to:

- Receive PEP free of charge at a **designated public health establishment**.
- Free medical advice on PEP before using PEP.
- The list containing the names, addresses and contact details of designated public health establishments providing PEP.

if you or a person who has an interest in your well-being laid a charge with the police in respect of a sexual offence or reported the sexual offence with a designated public health establishment within 72 hours after the sexual offence took place.

The police member, medical practitioner or nurse to whom you report the sexual offence must inform you of:

- The importance of obtaining PEP within 72 hours of having been exposed to HIV.
- The fact that you can obtain PEP free of charge from a designated public health establishment.
- The need to obtain medical advice and assistance on the possibility of having contracted a **sexually transmitted infection**.

WHY IS THE PROVISION FOR PEP IN THE ACT PROBLEMATIC?

- You will not be entitled to receive PEP if you do not report the sexual offence.
- You can only obtain PEP from designated health establishments.

2.3 THE NATIONAL POLICY GUIDELINES TO THE SEXUAL OFFENCES ACT

The relevant government departments have put in place policy guidelines for the police, health workers and prosecutors. These guidelines are intended to codify and clarify their respective functions and duties in dealing with sexual offence cases in the criminal justice system. These guidelines do not have the status of the Sexual Offences Act, but the officials must follow them unless there is a good reason not to do so. You should know about them as they will inform you of what you may ask for when interacting with these state officials in relation to a sexual offence. Summaries of these guidelines are provided below.

THE NATIONAL POLICY GUIDELINES FOR THE POLICE

The purpose of the guidelines is to set out the police's duties to survivors of sexual offences and to inform the members of the police of the level of professional service expected of them when dealing with survivors of sexual violence. The guidelines provide as follows:

- You must be treated with respect, empathy and professionalism.
- When you report a sexual offence, the police must give the case immediate attention.
- The police must accept and acknowledge the allegations that you have made when you report it at the police station personally.
- The police must deal with all sexual offence reports even if you do not reside within the area of the relevant police station or where the sexual 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 you reside or where the sexual offence was committed).

- There are no time restrictions on when you must lay a charge in respect of a sexual offence so the police cannot turn you away unassisted. Even if you lay a charge long after the date that the alleged sexual offence took place, the normal police procedures must be followed.
- Upon the reporting of the offence, the police member concerned should do the following:
 - a. Introduce herself/himself to you and must explain his or her role in the investigation.
 - b. Assist you confidentially and privately.
 - c. Request that you provide him or her with your name and address.
 - d. Assess whether you need medical assistance and if so, must arrange such assistance.
 - e. Establish whether you are capable of laying a charge. In other words, you must be in the physical, psychological or emotional condition to lay a charge.
 - f. Open a docket containing your basic details.
 - g. Contact the investigating officer and must offer to stay with you until the investigating officer arrives.
 - h. Attend to any medical injuries as far as possible.
 - i. Refer you for a medical examination as soon as possible. The medical examination takes priority over taking a statement from you.
 - j. The investigating officer must take a statement from you. This should only be done once you are in the psychological, emotional and physical state to make a statement.

If you report a sexual offence to the police by telephone, the police must do the following:

- i. Obtain the address of where you are phoning from.
- ii. Establish whether you are in any danger.
- iii. Send a patrol vehicle to where you are as soon as possible to secure the crime scene and assist you. Often a police station only has a certain number of patrol vehicles available to them and all the patrol vehicles may be in use at the time that the sexual offence is reported.
- iv. Inform you that you should not change your clothing or wash yourself as evidence will be lost if you do so.
- v. Ascertain whether you require an ambulance and if so, an ambulance must be sent to you 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 her clothing.

When responding to the scene of a crime, there is a specific procedure that the police must follow. There are two main types of police members who have particular duties namely, the first officer to arrive at the scene and the investigating officer.

- The first officer 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 you, listen to what you have to say without interrupting you, show empathy towards you, explain what is being done and make sure that you are not left alone.
- The investigating officer must register a case docket, arrange any medical examinations that must take place, take a detailed statement from you and must offer you support. The police must also help the survivor identify where counselling services can be obtained and must assist in obtaining such services.
- During the court proceedings, the police must keep you informed of any progress with the case and must explain the court proceedings to you.


SECONDARY VICTIMISATION:

Where the survivor is re-victimised or subjected to further trauma over and above the trauma that she has experienced due to the sexual offence.

THE NATIONAL POLICY GUIDELINES FOR THE DEPARTMENT OF HEALTH

The guidelines recognise that the Department of Health plays an important role in the criminal justice system with regard to sexual offences. The Department accordingly needs to develop processes in order 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.

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.

THE NATIONAL POLICY GUIDELINES FOR PROSECUTORS

The guidelines highlight the need to respect, protect, and improve the treatment of survivors by the courts and the need to value the role that survivors play in the criminal justice system. The prosecutor's duties to survivors are set out as follows in the guidelines:

- The prosecutor who takes the case to trial must ensure that the docket is fully investigated to avoid any delays in the finalisation of the trial.
- The prosecutor must consult the survivor thoroughly before the trial commences. The consultation must include an explanation of the court proceedings and must serve the purpose of lessening any fears that the survivor may have about the court proceedings.
- In instances where medical evidence is available from health care professionals, the prosecutor must consult the health care professional and ensure that she or he fully understands the evidence so that it can be put before the court properly.
- If possible, the prosecutor must consult the police officer who investigated the case, especially when she or he will give evidence in court, to ensure that all the necessary documents and **exhibits** are available so that the case can run smoothly.
- The prosecutor must assist witnesses, try to minimise inconvenience for the survivor, protect the survivor's privacy, try to assist with witness fees, and notify the witness' employer that the witness needs to give evidence in court, if needed and requested.
- Prosecutors must inform survivors of the availability of proceedings **in camera**, especially when a child testifies.
- The general position is that applications for bail must be opposed. However, if it is granted, the prosecutor must make efforts so that the offender does not come into contact with the survivor. Further, the prosecutor must inform the survivor of any result of a bail application.
- Prosecutors should not hesitate to call for a sentence of imprisonment for the perpetrator. When doing so, the prosecutor must highlight the shortcomings of other sentencing options.


2.3 NATIONAL INSTRUCTIONS/DIRECTIVES TO THE SEXUAL OFFENCES ACT


The Act mandates the police, Department of Health and the prosecution authority to issue national instructions/directives on how sexual offences should be dealt with. To date, the police and Department of Health have issued these instructions. The prosecution authority has not issued final instructions as yet. Summaries of the police and Department of Health's national instructions are provided below:

NATIONAL INSTRUCTIONS: THE POLICE


These instructions were issued to ensure that survivors 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 survivor that reports a sexual offence, responding to the scene of an offence, investigating an offence, and assisting the survivor during court proceedings. These instructions provide that:


- 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 survivors.

 **EXHIBITS:** The evidence used in court by the prosecutor or the perpetrator's legal representative to prove the survivor or perpetrator's case. An exhibit can include documents, articles or objects. For example, the results of the medical examination or the object that was used to rape the state with can be used as an exhibit in court.

 **IN CAMERA PROCEEDINGS:** Proceedings where the witness does not testify in open court but testifies in a room separate from the court in private. The testimony of the witness will be seen by the court in the courtroom while she testifies by means of a camera. Only certain witnesses are allowed to testify in camera.

 **OPEN COURT:** A public court, a court where the public is allowed to sit in on the proceedings and where a witness is required to testify before those present in the courtroom.

 **COMMENTS:** Please note that the Criminal Procedure Act provides that a survivor can, by means of an application made by the prosecutor on her behalf, testify in camera if it is in the interests of justice and there is likelihood that testifying in an open court will cause the survivor harm. The Criminal Procedure Act also provides that the survivor's identity does not need to be revealed until a certain stage of the proceedings and that certain people or the public at large are not allowed to sit in during the proceedings if their attendance is not necessary.

 **COMMENT:** Please note that the Act also mandates the police, Department of Health and prosecution authority to train their staff on the guidelines, sexual offences generally and on uniform standards for delivering services to survivors with a view to ensuring that sexual offences are dealt with appropriately, efficiently and sensitively.

- When a survivor reports a sexual offence, the police member must:
 - Request that the survivor relocate to another area of the station that is out of sight of other person.
 - Re-assure the survivor of her safety and that the matter will be dealt with professionally and sensitively.
 - Determine if the survivor is in need of medical attention and make arrangements for it, if needed.
 - Ask the survivor if she would like to have another person present during the interview and allow for such person to be present.
 - Listen to and write down what the survivor says without interrupting her or being judgmental.
 - Take all reports seriously, regardless of when or where the offence occurred.
 - Open a docket for the case. If the survivor cannot make a clear and logical statement at the time, open a skeleton docket with a statement from any person accompanying the survivor. The survivor may make a statement at a later stage.
- After the survivor has reported the offence, the police member must:
 - Inform the survivor of the case number and investigating officer's details.
 - Inform the survivor of the processes that will follow and regularly update the survivor on any progress with the investigation.
 - Inform the survivor of the importance of a medical examination and that she may ask the health care professional for medical advice.
- At the scene of an offence, the police member must:
 - Deal with the survivor professionally.
 - Re-assure the survivor of her safety.
 - Obtain a brief explanation of the events that took place.
 - If the suspect could still be close by, obtain a description of the suspect and relay that information to the police in the area.
 - Listen to the survivor and write down what she says.
 - Safeguard the crime scene to preserve evidence while also protecting the survivor's privacy. Take further steps to avoid the spoiling or loss of evidence.
- An investigating officer will be assigned to each case. The investigating officer is in charge of the investigation and must:
 - Instruct police members at the scene of the offence.
 - Refer the survivor for a medical examination.
 - Take an initial statement from the survivor and, later, an in-depth statement. The investigating officer should be sensitive to the survivor'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 survivor so desires, and advise the survivor of the importance of giving intimate details and not hiding information.
 - Keep the survivor informed of any progress with the investigation.
 - Before trial, take an additional statement from the survivor with regard to how the incident has affected her life and relationships.
 - On the day of the trial, provide the survivor with copies of her statements and explain the proceedings to the survivor, including that media in the court may not publicise details of the case without authorisation to do so.
- If a survivor 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.
- An HIV test of the alleged offender may be ordered if the survivor, a person with an interest in the well-being of the survivor 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 till the court makes a decision on the application.
- 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.
- After the incident, the police are responsible for providing care to the survivor. This includes:
 - If the offence is a result of domestic violence, advise the survivor of her right to apply for a protection order and lay a criminal charge against the offender.

- Provide the survivor with information about medical and counselling services that are available.
- 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 survivor or offender.

NATIONAL INSTRUCTIONS: THE DEPARTMENT OF HEALTH


The purpose of these instructions is to provide uniform and standard procedures for health establishments in South Africa that conduct medical examinations on survivors of sexual offences.


The health establishment must provide the survivor with support and a full range of relevant services by:


- Meeting the immediate needs of the survivor through crisis intervention and support services.
- Dealing with survivors in a sensitive and effective manner.
- Providing the police with medical evidence to assist in prosecuting the perpetrator.

The instructions provide as follows in terms of PEP:

- PEP must be provided to all survivors (even where the survivor's HIV test results are negative) who have been in contact with the perpetrator's blood, semen or vaginal fluid within the last 72 hours.
- HIV testing must be provided to the survivor. The following process must be followed:
 - The survivor must receive counselling prior to the HIV test.
 - A rapid HIV test must be performed on all survivors who opt to use PEP:
 - ▶ The survivor 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 survivor is HIV positive, a second rapid test must be performed.
 - ▶ If the results of the second rapid test is negative, a laboratory test must be performed. The survivor must be given additional information on HIV and AIDS at this stage.
- The survivor must use PEP within 72 hours of having possibly been exposed to HIV.
- A 3 day starter pack must be provided to survivors 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 survivor tests negative, the remainder of the treatment must be given to the survivor.
- Survivors 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 survivor to return to the health establishment.
- Survivors who test HIV positive should be referred for long-term HIV and AIDS care.
- Health care professionals should provide the survivor with information on available health care services and should encourage the survivor 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 survivor.
- The health care professional must advise the survivor 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 survivor to continue attending counselling sessions, being able to identify the different tablets and knowing when to take them, referring the survivor to support groups and non-profit organisations providing relevant services and assistance.
- The health care professional must inform the survivor that the effectiveness of oral **contraception** is reduced and where the survivor is not using condoms during sexual intercourse, a stronger contraceptive should be used.
- All survivors using PEP must be encouraged to practice safe sex until the 3 month HIV test is conducted and the results have been confirmed.

 **AZT AND 3TC:** These are anti-retrovirals. The definition of anti-retrovirals is provided above under the section dealing with the Sexual Offences Act and PEP.

 **ADHERENCE:** To ensure that the survivor does not stop using the drugs and following other instructions provided by the health care professional to ensure best results for the survivor.

 **LACTATION:** The period following birth during which milk is secreted from the breasts

 **CONTRACEPTION:** means to prevent pregnancy.



TETANUS: An infectious disease that can be deadly. It is caused when bacteria enters the body through a cut or open wound.



IMMUNISE: Also called vaccinate. This is when one is given medication to prevent one from getting ill.



HEPATITIS: Inflammation of the liver caused by a virus or a toxin

- 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 survivor presents herself for treatment after 72 hours of possibly having been exposed to HIV, the survivor 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 survivor presents herself for treatment after 72 hours of possible exposure to HIV. Counselling should be provided both before and after testing. The survivor must be informed of the problems with the window period and testing and survivors 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 survivor.
- Other treatment that the survivor can be provided with includes:
 - Anti-tetanus toxoid (ATT) if the survivor was last **immunised** against **tetanus** more than 10 years ago.
 - Treatment for sexually transmitted infections.
 - All female survivors should be provided with emergency **contraception** who present themselves for treatment within 5 days of the sexual offence.
 - **Hepatitis** immunisation to survivors who have not been completely **vaccinated** or who were previously infected.
- Survivors must be given clear and simple instructions on how to use medication.
- Survivors 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 survivor 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 are 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 survivor must be counseled 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 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.
- If the survivor is hesitant about reporting the sexual offence, the health care professional should address the survivor's fears and concerns.
- The survivor must be encouraged to report the sexual offence within 24 hours of the commission of the offence.
- The survivor should 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. The survivor 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 survivor 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 survivor's right to decide on whether to report the sexual offence or to undergo a medical examination must be respected.

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

- 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 survivor 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 Department of Justice and Constitutional Development. 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.

2.5 THE VICTIMS' CHARTER

The Department of Justice and Constitutional Development created the Victims' Charter with the objective of:

- Creating one document that summarises all your rights as a victim of crime in general (not just in terms of sexual offences) and the state services available to you or the services that you are entitled to legally.
- Prohibiting state departments that form part of the criminal justice system from subjecting you to secondary victimisation.
- Ensuring that your rights, interests and needs are taken into account and considered as essential in your dealings with the criminal justice system.
- Creating a uniform standard of service that you are entitled to when dealing with the criminal justice system.
- Providing you with recourse when the state fails to meet these service standards.

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 of the victim. 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.




COMMENT: Please note that the Act mandates the Minister of Justice and Constitutional Development to develop a National Policy Framework for the management of Sexual Offences. The policy framework is meant to ensure a uniform and co-ordinated approach by state departments and institutions dealing with sexual offences, to guide the implementation, enforcement and administration of the Sexual Offences Act and to enhance service delivery for victims of sexual offences. The Act required the Minister to have the policy framework adopted and tabled in parliament within 1 year of the coming into operation of the Act but the Minister has not done so to date.




COMMENT: Please note that the Department of Social Development together with the United Nations Office on Drugs and Crime and the European Union have issued National Policy Guidelines for Victim Empowerment which aim to advance the rights and needs of victims of crime and violence through the provision of services. The guidelines acknowledge that women and victims of sexual violence are particularly vulnerable groups in need of empowerment.

 **APPLICANT:** The complainant or the person who sues somebody or who institutes legal proceedings against somebody.

 **DAMAGES:** Monetary Compensation or the payout of money for harm suffered.

 **DISMISSED:** Stopped or ended the case or kicked the case out.

 **APPEALED:** Referred the case to a higher court.

 **NEGLIGENTLY:** Neglectfully or carelessly.

 **EXECUTE:** Carry out or perform.

- State departments must provide victims with the necessary 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. (**Please have regard to the section on monetary compensation under remedies and procedures below**).
- State departments must inform victims of restitution procedures and must assist victims in enforcing their rights to restitution.

3 COURT JUDGMENTS

IMPORTANT CASES ON SEXUAL VIOLENCE AND THE STATE'S DUTY TO PROTECT

The following 3 case summaries are important because they deal with your constitutional rights against violence and what they mean. They can help explain the duties owed to you by the state in terms of these rights:

- In the case of *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 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 fulfill 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 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 fulfill that duty.

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

Legal experts hail Carmichele judgement

May 15 2002 at 09:03PM - iol.co.za
By Lindiz van Zilla

Legal experts have welcomed a landmark judgment that found the ministers of safety and security and of justice negligent after an attack on Alix Carmichele by a sex fiend with a history of violently assaulting women.

The Cape High Court ruled on Tuesday that the departments are liable for damages that she had suffered during a 1995 attack. She had sought damages of R177 000.

Human Rights Commission head Jody Kollapen said the judgment would give greater meaning to constitutional rights, freedom, security and the integrity of a person.

- In the case of *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 negligently failed to fulfill this duty. 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 fulfill all rights in the Bill of Rights in the Constitution and 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, that 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 should be executed.

The Duty to Protect Women from Sexual Violence in South Africa

By Sibongile Ndashe

Abstract - *Van Eeden v Minister of Safety and Security*

In 1998 Ghia Van Eeden was sexually assaulted by a serial rapist who had escaped from police custody due to the negligence of the South African police authorities. Claiming that the State owed a common law duty of care to potential victims to protect them from violent crimes, Van Eeden sought damages for the harm she had suffered. In a path-breaking decision, the Supreme Court of Appeal (S.C.A.) found that a duty of care did indeed exist and that its execution had to be considered in line with the constitutional requirement to protect women's right to be free from violence and the constitutional obligation to develop the common law so as to promote the spirit, purport and objects of the South African Bill of Rights. Examining the Van Eeden decision in terms of its substantial development of the circumstances in which the State may be judged liable for a wrongful omission, this note positions the S.C.A.'s decision in the context of the evolving case law of the Constitutional Court on sexual violence and ultimately questions its practical significance for addressing the prevalent abuse of women in South Africa.



REHABILITATE: to restore, repair or change somebody.



PLAINTIFF: The person who institutes civil proceedings against another person.



DEFENDANT: The person against whom proceedings are instituted against in civil cases.



RESPONDENT: The person against whom proceedings are instituted against in civil cases.

- In the case of *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 in committing 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 as 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 fulfill 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.

[*K v Minister of Safety and Security*]

State is liable for damages for gang rape by cops

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WLC attorney, Hayley Galgut, says the appeal raises important issues of principle. “The case addresses issues of state accountability for the meaningful protection of victims of gender based violence and, more generally, gender rights in the context of a human rights dispensation based on the founding principles of dignity, equality and freedom. The Constitutional Court has consistently adopted a contextual approach to issues of gender based violence and one that has specific regard to the lived reality of women’s lives in the South African context, one with very high levels of sexual violence. The Court also chose to emphasise the constitutional and common law duty on police to prevent crime and protect society from crime, specifically noting the necessity for society to place reasonable trust in the police in order for their mandate to be performed efficiently.”

4 PRESCRIPTION OF SEXUAL OFFENCES

4.1 INTRODUCTION

The law prescribes certain time periods within which a victim of a sexual offence must institute legal proceedings against the alleged perpetrator of the sexual offence. The legal term used for this is “prescription”. If the proceedings are not instituted within the relevant period of time, the victim of the sexual offence cannot institute the proceedings thereafter.

In South African law criminal law and civil law are considered as two different areas of the law.

- In criminal law the state steps into the shoes of the complainant after a charge is laid against the alleged perpetrator. The function of criminal law is to punish the perpetrator after he is found guilty in a court of law. The usual punishment in criminal cases is

imprisonment, a fine or both. In appropriate cases alternative punishment can be given such as community work or an order forcing the perpetrator to join a group or organisation so that he can be **rehabilitated**.

- In civil law the applicant or **plaintiff** institutes civil proceedings against the **defendant** or **respondent**. The function of civil law is compensatory. In other words the defendant or respondent must compensate the applicant or plaintiff for the harm suffered, damage caused or impact that the defendant or respondent's actions had on the applicant or plaintiff. For example, Ntombizanele sues Joshua for R100 000 for the cost of the medical expenses that she incurred and the pain and suffering that she experienced when he raped her and shot her in the leg.



COMMENT: If another law besides the Criminal Procedure Act provides that a victim of sexual assault cannot lay a charge after 20 years after it took place that law will take precedence over the Criminal Procedure Act.

4.2 PRESCRIPTION OF CRIMINAL CASES

Section 18 of the Criminal Procedure Act 51 of 1977 provides that rape in terms of the Sexual Offences Act never prescribes. In other words a victim of rape can lay a charge of rape against the perpetrator any time after the rape took place. For example, if Zulfa was raped by Amon in 1980 she can still lay a charge of rape against Amon in 2010.

The Criminal Procedure Act further provides that sexual assault charges can be laid against the perpetrator up till 20 years after the date that the alleged sexual assault took place, unless it is prohibited to do so by another law. For example, Zanile can lay a charge of sexual assault against Zoliswa in 2010 if she was sexually assaulted by Zoliswa in 1990. Zanile will only not be able to lay the charge if another law prohibits her from doing so.

Survivors of sexual offences can also institute private prosecutions against perpetrators of sexual offences. A private prosecution is where a criminal case is instituted against the perpetrator but where the state does not prosecute the case on behalf of the survivor. The survivor employs the services of a legal representative to prosecute a criminal case against the perpetrator. The same criminal laws in cases where the state prosecutes the perpetrator applies. In situations where the survivor was sexually abused as a child, the survivor is not prohibited from instituting a private prosecution after a long period of time has lapsed (namely, when she is an adult) between the date that the child sexual abuse took place and the date that the survivor institutes the private prosecution against the perpetrator on the basis that sexual abuse brings about trauma that could cause the victim to delay in instituting proceedings against the perpetrator. For example, Faiza was sexually abused by Tariq when she was 5 years old in 1970 but did not institute legal proceedings against Tariq until 2010 because she suffered trauma and humiliation for what she had experienced. She was only ready psychologically and emotionally to institute the proceedings in 2010. (See the article on the *Bothma v Els* case below in this regard)

Media release from the Women's Legal Centre

12 October 2009

Constitutional Court allows for private prosecution of child abuse despite 39 year delay

On Friday, the Constitutional Court has allowed a claimant to pursue a private prosecution on allegations of child sexual abuse despite the 39 year delay in instituting legal proceedings.

After the Prosecution Authority declined to prosecute, the claimant instituted a private prosecution, in the Kimberley Regional Magistrates' Court, against a family friend who allegedly sexually abused her 39 years ago when she was 13 years of age.

The accused, nearly 80 years of age, denied the allegations and made an application, in the Kimberley High Court, for the permanent stay of the private prosecution on the basis that it infringed his constitutional right to a fair trial. The High Court issued the stay of the private prosecution

on the grounds that the claimant unreasonably delayed the institution of the proceedings and that such delay would cause the accused irreparable trial prejudice.

The claimant then made an application to the Constitutional Court for leave to appeal to have the High Court's decision set aside. The High Court's decision was set aside by the Constitutional Court. The Constitutional Court held that the High Court erred in making its decision as it failed to take into account the nature of the alleged wrongdoing and the claimant's claim that the trauma associated with the alleged sexual abuse resulted in the delay in instituting the legal proceedings. The Court also held that the High Court would only be in the position to test prejudice during the trial and that the accused's right to be presumed innocent before found guilty in court would have protected him.

Cherith Sanger an attorney at the Women's Legal Centre, who acts as consultant for the claimant, said: "The decision has developed the law from a women's rights perspective. It recognises the seriousness, gravity and impact of child sexual abuse and guarantees women access to the courts in order to address injustices that they suffered as children."

The claimant, lead by her legal representative, Steven Groenewald of Towell Groenewald attorneys in Kimberly, will proceed with her case in the Kimberly Regional Magistrate's Court at the end of October 2009.



4.3 PRESCRIPTION OF CIVIL CASES

The Prescription Act 68 of 1969 sets out the prescription periods for instituting civil cases. This Act covers all civil cases including civil cases relating to sexual offences. It provides that civil cases must be instituted within 3 years from the date that the incident which gave rise to the civil case took place. For example, Fazlin was raped by a policeman during January 2010. She can sue the police for harm suffered due to the rape up and until January 2013.

If the survivor was subjected to a sexual offence when she was a child she can institute a civil case against the abuser within 3 years from the date that she appreciates that the abuse constituted a wrongdoing on the part of the abuser. For example, Jane was sexually abused by Jacobus when she was 10 years old in 1980. Jane realised the wrong that Jacobus did to her when she was 27 years old in 2007. Jane is 30 years old (2010). She can institute the civil case against Jacobus during 2010. (See the article on the **Van Zijl v Hoogenhout case below in this regard**).

MEDIA STATEMENT - CASE HEARING IN SUPREME COURT OF APPEAL Van Zijl v Hoogenhout

Supreme Court of Appeal -34803

Hearing date: 30 August 2004

Judgment date: 27 September 2004

Summary: Prescription - Act 18 of 1943 s 5(1)(c) - claim by adult survivor of child abuse against perpetrator - as-

saults committed between 1958 and 1967 - plaintiff attaining majority in 1973 - effect of abuse on ability to attribute blame to abuser - plaintiff not having knowledge of the wrong until able to do so.

Media Summary of Judgment

From: The Registrar, Supreme Court of Appeal

This media statement is released for informational purposes only. It does not form part of the Court's judgment.

On 27 September 2004 the Supreme Court of Appeal handed down judgment in *Esmé van Zijl v I M Hoogenhout*. It held that a victim of sexual abuse as a child who only in adulthood acquired an appreciation of the responsibility of the abuser for the abuse may sue the abuser within three years of acquiring that appreciation.

The appellant suffered gross sexual abuse at the hands of her uncle, the respondent, during eight years of her childhood. When, at the age of 48, the appellant sued him for damages he pleaded that her claim had prescribed within one year of her attaining her majority in 1973. The Cape High Court upheld the plea and dismissed the claim. It found that the appellant had knowledge of the wrong upon which her claim was based from the dates on which the assaults were committed.

The Supreme Court of Appeal has now set aside that order and substituted for it one that dismisses the special plea and remits the case to the High Court for consideration of the remaining issues.

In reaching this conclusion the Court found that

- the effects of sexual abuse on children and adult survivors are very different from those suffered by the usual plaintiff in a delictual action;
- there has been a change in public awareness of child sexual abuse; increased knowledge and a better-informed public are more conducive to disclosure than was the case during the appellant's childhood and early adulthood;
- the Prescription statutes were drafted in ignorance of the special problems afflicting victims of such abuse;
- peculiar sensitivity is required in applying statutory time limits to proceedings arising from sexual abuse of a child during any period prior to about 1980.
- when the 1943 Prescription Act speaks of prescription beginning to run when a wrong is 'first brought to the knowledge of the creditor' it presupposes a creditor who is capable of appreciating that a particular person is responsible for that wrong.

The Court's examination of the evidence established that known psychological consequences of chronic child abuse are a distancing of the victim from reality and transference of

blame by the victim on to himself or herself. Such effects can and do sometimes persist into middle age. The appellant's history was one of chronic abuse and her personality possessed many of the characteristics which are found in adult survivors including transference of blame on to herself. Her evidence that only in late 1996 did she begin to appreciate that the respondent, and not herself, was responsible for the abuse was, in the circumstances, credible and probable. The process was progressive. It only led to meaningful appreciation ('knowledge of the wrong' committed by the respondent) sometime during 1997. She then instituted action within the three years allowed her by the statute.

5 RECOURSE FOR SEXUAL OFFENCES

5.1 CRIMINAL PROCEDURE AND SEXUAL OFFENCES

REPORTING OF A SEXUAL OFFENCE

In terms of the law of criminal procedure you must report the sexual offence to the police or a health care professional, preferably as soon as possible after the act of sexual violence was committed against you. When you report the sexual violence, you will be required to make a statement including details on your identity, if possible, details on the identity of the perpetrator of the sexual violence and details of the actual criminal offence. This statement will be used by the court if the case goes to court. You must ensure that all the information in your statement is exactly what you experienced and is true and correct. See the section on the police and Department of Health's duties in terms of the National Policy Guidelines and Instructions above in this regard.

THE MEDICAL EXAMINATION

You must go for a medical examination with a healthcare professional. The results of the medical examination are very important as it will be used as evidence during the court proceedings that may take place at a later stage. It is also preferable that you do not bath or wash yourself after the sexual offence as that will remove important physical evidence of the sexual offence from your body that could be picked up in the medical examination and can be used during the court proceedings in support of your case. **See the section on the Department of Health's duties in terms of the National Policy Guidelines and Instructions above in this regard.**

THE POLICE INVESTIGATION

After you report the sexual offence the following process should be followed:

- The police will open a **docket** containing your statement and all other important information and documentation relevant to your case
- The police will appoint an investigating officer to investigate your case. The investigating officer will try to obtain statements from **witnesses** and the perpetrator and will collect other evidence.



PRELIMINARY COURT PROCEDURES

- Once the case has been investigated sufficiently, the docket will be sent to the National Prosecuting Authority (“the NPA”) to decide whether or not the state will prosecute the **alleged** perpetrator.
- The NPA may decide not to **prosecute** because it is of the view that it appears that an act of sexual violence was not committed against you from its assessment of your allegations and the information, evidence and witness statements on the docket. The NPA may also make this decision if it thinks that there is a lack of evidence and that more evidence cannot be obtained.
- If the NPA decides to prosecute the case, the case will be presented to the court to decide whether or not the alleged perpetrator should be convicted of the sexual offence.

THE BAIL APPLICATION

- The perpetrator will appear in court a few times before the actual hearing or trial. This is to apply for bail, get legal representation and for the prosecution and the perpetrator’s legal representative to prepare their cases.
- The alleged perpetrator has the right to apply for **bail** and the complainant has the right to attend the bail hearing. The prosecutor can argue against the court granting the bail application and must raise aggravating factors and circumstances in doing so. For example, the prosecutor must raise the fact that the alleged perpetrator is facing other charges of sexual offences and the seriousness and extent of the sexual offence. The **presiding officer** must make the decision on whether the alleged perpetrator should be granted bail.
- The presiding officer will not grant a bail application if she or he believes that granting the application will not be in the interests of **justice** :
 - because the alleged perpetrator is likely to pose a danger to the public or will commit a serious criminal offence, or
 - that the alleged offender will try to **evade** the trial, or
 - that the alleged perpetrator will interfere with witnesses or destroy evidence, or
 - if the release of the alleged perpetrator on bail would **undermine** the purpose of the criminal justice system.
 - Bail will also be refused if the release of the alleged perpetrator on bail will disturb public order, peace or security.
- Bail is granted on condition of the payment of a certain amount of money.
- You can also ask the prosecutor that bail be granted only on certain conditions. The court can attach conditions such as that the accused must not interfere with witnesses (such as yourself), must reside somewhere or with someone specific etc.
- If the alleged perpetrator fails to comply with the bail conditions bail can be terminated. Failure to comply with bail conditions can result in the alleged perpetrator being fined or imprisoned for a period up to 1 year. If you are aware of the alleged perpetrator contravening the bail conditions you should report it to the investigating officer immediately.

THE PLEA

- The accused can admit to committing the sexual offence, in which case he or she would plead guilty. The presiding officer will ask the accused “How do you plead?” If the accused admits to committing the crime, then he will tell the court that he is guilty. If the accused has legal representation, then the legal representative can hand in a statement to the court which tells the presiding officer that the accused admits to the sexual offence.
- The presiding officer will ask questions to make sure this is done voluntarily and that the accused is guilty in law (i.e. admits all the required elements of that particular offence). If the plea is accepted then the proceedings move to sentencing stage.
- If the accused pleads “not guilty” or the presiding officer is not convinced that the accused has admitted to committing the offence, the case will then go to a full hearing of all the evidence (a trial).



UNDERMINE: To weaken, destabilise or demoralise



DOCKET: A police case file.



WITNESS: A person who saw or can give information that is relevant to the sexual offence. Witnesses are called to court to testify.



ALLEGE: A claim, not a fact, it has not been proven



PROSECUTE: Take the case to court and try to have the alleged offender convicted of the sexual offence.



PRESIDING OFFICER: The Magistrate or Judge that will hear the case and make a decision on whether the alleged perpetrator should be acquitted or convicted.



ACQUIT: When the court decides that the alleged perpetrator is not guilty of committing the sexual offence after considering all evidence that is presented to it by the prosecutor and the alleged perpetrator’s legal representative.



TESTIFY: To orally give information during the court proceedings on what was seen or what is known about the sexual offence.



POSTPONED: Delayed. The case is put back for hearing for a later date.



BAIL: The alleged perpetrator is released from police custody until the court makes a decision on his guilt or until a specific date.



JUSTICE: Fair, honest, righteous, deserved.



EVADE: Avoid. Escape or run away from.

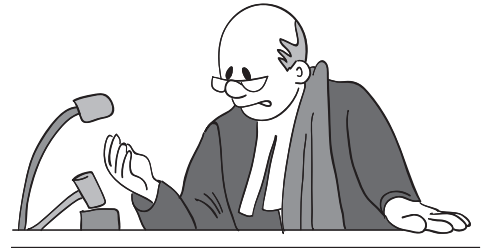


COMMENT: Please note that an offender has the right to appeal the presiding officer's decision of convicting her or the sentence that she was given. If the offender succeeds with the appeal the conviction can be changed to an acquittal or the sentence can be changed to a lesser sentence.

COMMENT: Please note that the Criminal Procedure Act provides that the survivor of a sexual offence can apply for a compensation order after the offender has been convicted. This means that the survivor can apply to the court for the offender to pay her for the costs that she incurred because of the sexual offence. It is important to note that the survivor cannot ask for payment for pain and suffering due to the sexual offence or for the impact that the sexual offence had on the survivor psychologically or emotionally. The survivor can only ask to be paid out for the monetary losses suffered due to the sexual offence. For example, hospital and medical expenses, loss of income, cost of accommodation if the survivor was required to move from her home due to the sexual offence etc. If the survivor asks for the compensation provided for in terms of the Criminal Procedure Act, she cannot also sue for damages in terms of a civil case.

THE TRIAL

- Because the state brings the case against the perpetrator, you are a witness for the prosecutor. You will be required to testify in court as a witness for the state.
- The prosecutor will start by leading evidence that the perpetrator did commit the sexual offence. You will be called as witness and will tell the court what happened. The Doctor (health care professional) who examined you will also testify.
- During the court proceedings the alleged perpetrator's legal representative will present her or his case to the court in an attempt to have the alleged perpetrator **acquitted** of the sexual offence. In doing so, the alleged perpetrator's legal representative will lead evidence and call witnesses to **testify** in favour of the alleged perpetrator. The alleged perpetrator's legal representative will question you, as a witness. Her or his job is to prove that the alleged perpetrator did not commit the sexual offence or to provide a good reason for why the sexual offence was committed. For example, Graham forced Munir to rape Janice or Munir suffers from a mental disability.
- The legal representative of the accused (the name for the perpetrator once charged) can ask you questions about what happened (cross examine you.) If the accused has no legal representative then he may ask you some questions. **See the section on the Sexual Offences Act and rules of evidence above in this regard.**
- The presiding officer (also called the court) hears the evidence for and against the accused. The presiding officer can request that more information be obtained for the prosecution of the case like further statements from witnesses or other evidence such as clothing items or objects used in the commission of the sexual offence. The proceedings can be **postponed** for this purpose.
- After the court has heard evidence from the prosecution and the accused (also called the defence), the presiding officer will decide whether or not the accused is guilty of committing the sexual offence.
- The test that the presiding officer will use is whether the accused has committed the sexual offence "beyond a reasonable doubt". This means that it is not reasonably possible that the accused's version that he is innocent is true and the accused is guilty of the offence.
- It is also possible that the court will convict the offender of a lesser offence if the court is not satisfied that sufficient evidence was presented to prove that the alleged perpetrator committed the sexual offence. For example, the perpetrator could be convicted of sexual assault rather than rape.



SENTENCING

- If the court decides that the accused is guilty of committing a sexual offence, the court must punish the offender (the accused).
- Punishment can include a sentence to imprisonment, the payment of a fine or compelling the offender to attend a sexual offenders' treatment programme.
- The sentence that is given to the offender depends on the nature and seriousness of the sexual offence as well as the personal circumstances of the offender (such as his age, or whether she has previously committed other criminal offences etc) and the interests of the community or society.
- There are prescribed **minimum sentences** for certain sexual offences such as rape. The minimum sentence for rape is 10 years imprisonment. The minimum sentence for a first time offender is 10 years imprisonment, 15 years imprisonment for second time offenders and 20 years imprisonment for third time offenders. Life imprisonment, which



is 25 years imprisonment, can be given to offenders who committed rape in certain circumstances. This sentence can be given to offenders who raped a child under 16 years of age or a mentally disabled person, who committed rape more than once or who committed rape knowing that he is HIV positive and that he could infect you with HIV.

- The prosecutor must raise **aggravating circumstances** in order to influence the court to give the perpetrator a harsher sentence. These circumstances include the fact the perpetrator is not a first time offender and the nature and extent of the sexual offence that he committed. You have the right to bring the prosecutor's attention to any circumstances that you feel should be used to give the offender a harsher sentence (aggravating circumstances). You may want to tell the court about the traumatic effect of the sexual offence on you, what medical costs you have had, etc
- The minimum sentences can only be deviated from in substantial and compelling circumstances. This means that there must be a good reason for deviating from the minimum sentence. The offender **cannot** be given a sentence that is less than the prescribed minimum sentence:
 - because of the victims previous sexual history (for example, if you are a sex worker or if you have had sexual intercourse with many men),
 - if you were not physically injured during the rape (for example, your vagina does not show evidence of forced entry or you were not beaten while being raped),
 - if the alleged perpetrator's cultural or religious beliefs permitted his actions of raping you (for example, certain religions and cultures say that a wife can never refuse to have sex with her husband) or
 - if you were in an intimate relationship with the alleged perpetrator at some time before he raped you (for example, the accused raped you after you ended the relationship with him) etc.
- The presiding officer can give the alleged offender a lesser sentence than the prescribed minimum sentence if she is of the view that sufficient substantial and compelling circumstances exist that justify the lesser sentence. The presiding officer should be satisfied that the prescribed minimum sentence does not fit the crime or that it is too harsh for the crime or would be unfair towards the offender and the needs of society.



PUBLIC INTEREST

ORGANISATION: An organisation that provides services and conducts work in the interest of the public. For example, an organisation that provides victims of domestic violence with free counselling or court support.



NON-PROFIT ORGANIZATION:

Organisations that provide services to the public free of charge. Usually, these organizations conduct public interest work.

5.2 CIVIL PROCEDURE AND SEXUAL OFFENCES

Besides using the criminal justice system, a survivor of sexual violence can also sue an offender for damages in civil law. This means that a survivor can sue an offender for compensation for monetary losses (including hospital and medical expenses, loss of income or earnings, future hospital and medical expenses etc) and for pain and suffering and how the sexual offence affected the survivor psychologically (psychological lesions, trauma and stress etc). In instituting a damages claim against the offender it is important that the offender actually has money to compensate the survivor. If he does not have money there is no use in instituting a damages claim.

A survivor can also institute a claim against the perpetrator in the Equality Court for the violation of her rights or you could sue the perpetrator for money for the harm that you suffered due to the sexual offence. In instituting such a claim the survivor must be able to prove that the sexual offence committed against her amounted to unfair discrimination on the basis of her gender, sex, sexual orientation or on another ground covered in the Equality Act 4 of 2000. If this cannot be proven the case will not succeed. Accordingly, this sort of claim is not suitable in all cases.

It is recommended that legal advice is sought or that the services of a lawyer be sought to assess whether the case will succeed before instituting such a claim. In order to win a case one must be able to prove the allegations that you have made and must comply with the requirements for the type of claim that you want to institute against the offender. Lawyers' fees may be expensive and often survivors cannot afford to pay these fees. It is important to know that free legal advice and assistance is provided by many **public interest** and **non-profit organisations**. A list of organisations and their contact details is provided in the contact list below.



COMMENT: Please note that you have the right to be informed of whether disciplinary action will be or has been taken against an employee of the state.



REGIONAL: Of the same region or from the same continent. For example, African countries fall within the same region.



INTERNATIONAL: Global, worldwide, intercontinental, countries from different continents.



CHARTER: Contract, deed or agreement



PROTOCOL: Set of rules.



RATIFY: Approve, endorse, confirm or consent to.

5.3 STATE LIABILITY

In some circumstances the state fails to do what it is required to do in terms of the law. For example, the police refuses to allow you to lay a charge or the prosecutor did not oppose the perpetrator's bail application and while he was out on bail he raped you again or where a state employee sexually assaulted you when he was meant to assist you after you had been raped. In these situations the state can be sued for damages (**See damages claim explained above under the section on civil law and sexual offences**). Suing the state for damages does not mean that you cannot lay a criminal charge against the individual who committed the sexual offence against you. It is also recommended that legal advice or assistance is sought in instituting such claims.

Complaints can be laid against the various state departments in less serious situations:

- If the health care professional or any of the other staff members of the hospital fail to do what they are required to do in terms of the national policy guidelines, national instructions or victims charter, a complaint can be lodged with the relevant Department of Health or the head of the hospital.
- If the prosecutor fails to do what is required of her in terms of the national policy guidelines or victims charter a complaint can be lodged with the relevant Director of Public Prosecutions at the prosecution authority closest to where you are located. If you are dissatisfied with how the Director of Public Prosecutions deals with your complaint, you can lodge the complaint with the National Director of Public Prosecutions.
- If the police fail to do what they are required to do in terms of the Sexual Offences Act, national policy guidelines, national instructions or victims charter you can lodge a complaint with the Station Commissioner of the police station where the police member is based or you can lodge a complaint with the Independent Complaints Directorate ("the ICD") office closest to where you reside. The ICD has specifically been set up to deal with complaints against police members. In cases where a police member commits a sexual offence against you, the ICD will investigate the case against the police member. **The contact numbers of the various ICD offices are included in the contact list below.**

APPENDIX 1

REGIONAL AND INTERNATIONAL INSTRUMENTS

INTRODUCTION

Certain regional and international instruments are in place that protect women from violence and prescribe how the state must address violence against women. These instruments include but are not limited to the African (Banjul) **Charter** on Human and Peoples' Rights ("the African Charter"), the **Protocol** to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ("the Protocol on the Rights of Women in Africa"), the Southern African Development Community Protocol on Gender and Development ("the SADC Protocol") and the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"). South Africa has either signed or **ratified** these instruments. Where South Africa is a signatory to an instrument, it has indicated that it supports the provisions contained in the instrument. Where South Africa has ratified the instrument, it has committed itself to upholding the provisions contained in the instrument. The rights that the instruments mentioned above give you against sexual violence are dealt with below:

THE AFRICAN CHARTER

The African Charter ("the Charter") was adopted by the Organisation of African Unity on 27 June 1981 and came into force on 21 October 1986. The Charter is commonly known as the Banjul Charter.

The aim of bringing the Charter into force was to promote and protect human rights on the African continent.

The Charter sets out the following rights that are relevant to violence against women:

- Party states to the Charter shall recognise the rights, duties and freedoms contained in the Charter and shall undertake to create legislation or take other measures to give effect to the provisions of the Charter.
- All people shall be entitled to the enjoyment of the rights and freedoms recognised in the Charter irrespective of their race sex or other status.
- All people shall be equal before the law and shall be entitled to protection of the law.
- All human beings shall be entitled to respect for life and integrity. No one may be deprived of this right without a valid reason or cause.
- All people shall have the right to have their dignity respected and for their legal status to be recognised. All forms of exploitation and degradation specifically torture, cruel, inhuman or degrading treatment shall be prohibited.
- All people shall have the right to liberty and to the security of the person. No one may be deprived of freedom except for reasons and conditions previously laid down by law.
- All people shall be equal. They shall enjoy the same respect and shall have the same rights. Nothing shall allow the **domination** of one group of people by another.

Article 66 of the Charter provides that special protocols can be created to add to the provisions of the Charter if necessary. The Protocol on the Rights of Women in Africa was created in terms of Article 66.

THE PROTOCOL ON THE RIGHTS OF WOMEN IN AFRICA

- The Protocol on the Rights of Women in Africa (“the Protocol”) was created in terms of the African Charter on Human and People’s Rights (“the African Charter”) to supplement the provisions of the African Charter in respect of the elimination of discrimination against women. The Protocol was adopted by the **African Union** in Maputo on 11 July 2003 and was ratified by South Africa in 2004. The Protocol came into operation in 2005. The Protocol aims to prevent gender based violence in party states. The protocol provides as follows in respect of gender based violence:

Article 3 of the Protocol deals with the right to dignity. It provides that:

- Women should have the right to human dignity and the right to the recognition and protection of their human and legal rights.
- State parties shall adopt and implement appropriate measures to stop the **exploitation** or degradation of women.
- State parties shall adopt and implement appropriate measures to ensure that women’s rights to dignity are respected and that women are protected from all forms of violence, specifically sexual violence.

Article 4 of the Protocol deals with the rights to life, integrity and security of the person. It provides that women shall be entitled to respect for life and the integrity and security of her person. All forms of exploitation, cruel, inhuman or degrading punishment and treatment shall be prohibited. State parties shall take appropriate and effective measures to:

- Bring into operation laws that prohibit all forms of violence against women including unwanted or forced sex.
- Adopt laws and take economic and social measures to ensure that violence against women is prevented, punished and eliminated.
- Identify the causes and consequences of violence against women and take steps to prevent and eliminate such violence.
- Take measures to promote peace to stop cultural and traditional beliefs, practices and **stereotypes** that allow for or promote acceptance of violence against women.
- Punish perpetrators of violence against women and **rehabilitate** women victims of violence.



AFRICAN UNION: An organisation of 53 African states that was established on 9 July 2002. The African Union was created by the Organisation of African Unity. Its head office is based in Ethiopia.



EXPLOITATION: Abuse or maltreatment



STEREOTYPES: Beliefs about or views on a particular group or category of people.



DOMINATION: To overpower or take control over another or others.



COMMENT: In 1998 a protocol to the Charter was adopted in terms of which the African Court on Human and Peoples’ Rights was created. The court came into operation on 25 January 2004. South Africa ratified the protocol on 7 September 1996. The Court is a regional court that makes decisions on African Union states compliance with the Charter. Only state parties can institute proceedings in the court. The state party will need to institute proceedings in the court on behalf of its citizens. This means that only countries that are party to the Protocol can be held liable by the court. Cases can be instituted by the state and non governmental organisations only after all domestic remedies have been exhausted.

-  **ALLIANCE:** Group, coalition or association.
-  **DECLARATION:** Statement, announcement or assertion.
-  **ADDENDUM:** Addition, supplement or appendix.
-  **PREJUDICIAL:** harmful and unfair.
-  **CONDEMN:** Disapprove or against.
-  **CRIMINALISE:** Makes something a criminal offence.
-  **PENALTY:** Consequence for an action such as a fine or imprisonment.
-  **REPARATION:** Compensation or amends.

- Provide accessible services for victims of violence against women to obtain information, rehabilitation and **reparation**.
- Provide sufficient funds and other resources for implementation and monitoring of measures and steps aimed at preventing and eradicating violence against women.

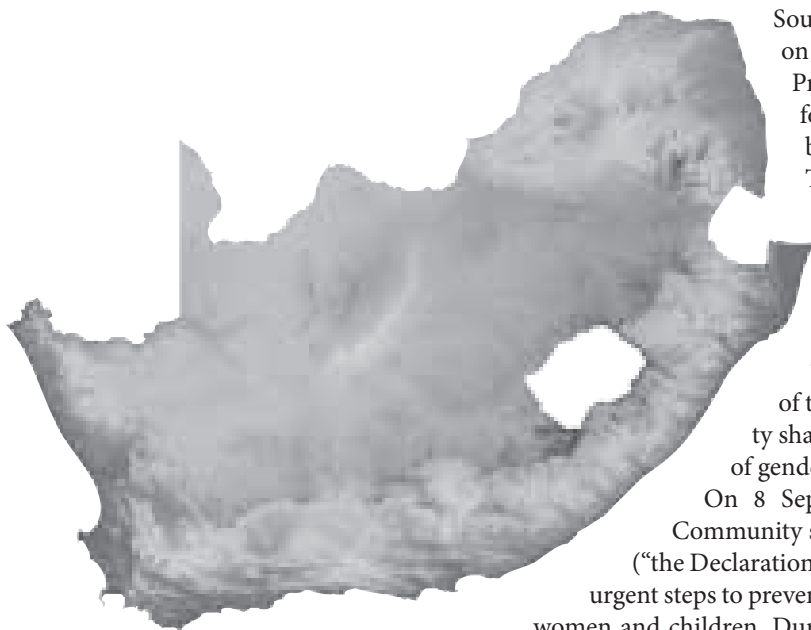
Article 5 of the Protocol deals with the elimination of harmful practices. It provides that state parties shall prohibit all forms of harmful practices that negatively affect the human rights of women and that state parties shall create laws and take other steps to protect women against harmful practices and other forms of violence and abuse.

Article 22 of the Protocol deals with the special protection of elderly women. It provides that the state party must ensure the right of elderly women to freedom from violence, including sexual abuse, and the right to be treated with dignity.

Article 23 of the Protocol deals with the special protection of women with disabilities. It provides that the state must ensure the right of women with disabilities to freedom from violence and the right to be treated with dignity.

The African Commission on Human and Peoples' Rights monitors state compliance with the provisions of the Protocol. The process involves the party state reporting on whether they have complied with the provisions of the Protocol in respect of the legislative and other measures taken to give effect to the provisions of the Protocol.

THE SADC PROTOCOL



South Africa signed the SADC Protocol ("the Protocol") on 17 August 2008. South Africa has not ratified the Protocol. At present the Protocol has not come into force yet as it has not been ratified by enough member states.

The Protocol was created by the Southern African Development Community. The Southern African Development Community is an **alliance** of Southern African states. The Southern African Development Community Treaty ("the Treaty") was adopted in 1992 and came into force in 1993.

The Treaty was amended in 2001 and 2008. Article 2 of the Treaty provides that the member states to the treaty shall not discriminate against any person on the ground of gender.

On 8 September 1997 the Southern African Development Community signed the **Declaration** on Gender and Development ("the Declaration") in terms of which member states undertook to take urgent steps to prevent and address the increasing levels of violence against women and children. During March 1998 the Southern African Development Community decided to create an **addendum** to the Declaration in an effort to enforce member states commitment to preventing and eradicating violence against women.

The addendum to the Declaration provides as follows:

- It recognises that violence against women and children:
 - Reflects the unequal power between women and men in terms of which men dominate and discriminate against women.
 - Amounts to a serious violation of fundamental human rights.
 - Includes physical, sexual, economic, psychological and emotional abuse that takes place in the family and in the community and is perpetrated and condoned by the state.
- It stresses concern for the fact that the levels of violence against women and children continue to increase and that measures that are in place to protect women and children from violence have proven to be ineffective, inadequate and **prejudicial** towards victims of violence.

- It strongly **condemns** violence against women and children and submits that the following measures must be adopted to prevent violence against women and children:
 - The creation of laws that **criminalise** violence against women and children, set out **penalties** for committing acts of violence against women and children and ensure that perpetrators of violence are punished.
 - The creation of legislation that aims to protect particularly vulnerable groups of women such as children, women with disabilities and aged women from violence.
 - To review and change criminal laws and criminal law procedures relevant to sexual violence with a view to eliminating gender discrimination and ensuring justice to the victim of violence and perpetrator of violence.
 - To create access to services for victims of violence including counselling, compensation and other measures to resolve any disputes relevant to the violence that was perpetrated against the victim.
 - Providing women and children victims of violence, including disabled women and children, with information on the services available to them.
 - Ensuring that the police, prosecution authority, health, social welfare and other state department services are accessible and effective.
 - Establishing specific units to deal with violence against women and children.
 - Providing accessible and affordable legal services that are fair and speedy.
 - Providing accessible and affordable social services for the empowerment of women and children who are victims of violence i.e. counselling services or programmes aimed at the empowerment of the victim.
 - Promoting the elimination of tolerance of violence against women and children in traditional religious beliefs, practices and stereotypes that supports violence against women and children.
 - Creating public awareness programmes to eliminate violence against women and children.
 - Creating training programmes for state service providers such as the police, prosecution authority and department of health to create gender sensitisation.
 - Researching and obtaining statistics on gender based violence occurrence and consequences.
 - Encouraging the exchange of ideas of the best practices to eliminate violence against women with other countries.
 - Ensuring the implementation of measures taken to eliminate violence against women and children.
 - Allocating funds for the implementation of measures and programmes in place to eliminate violence against women and children.
 - To encourage the media to support the elimination of violence against women and children by creating guidelines on how the media should present violence against women matters to the public with a view to ensuring that violence against women is not promoted by the media.
 - Creation of regional policies and programmes to support the empowerment of women and children and that the implementation of these policies and programmes are monitored.

Article 26 of the addendum to the Declaration also provides that steps must be taken to create SADC instruments aimed at preventing and eradicating violence against women and children that commit member states to comply with its provisions legally.

The Protocol aims to empower women, eliminate discrimination and achieve equality between women and men. It also aims for gender equity through the creation and implementation of legislation, policies, programmes and projects that advance women. It is expected that the ratification of the Protocol will strengthen and improve South Africa's laws and the enforcement of laws on gender based violence. The Protocol was created for this purpose.

The Protocol commits states to certain duties aimed at promoting gender equality. Article 20 of the Protocol specifically deals with gender based violence. It includes a number of duties to survivors of gender based violence, including that states must:

- Create legislation that prohibits all forms of gender based violence by 2015.
- Ensure that perpetrators of gender based violence, including rape are brought before a suitable court to decide on the act of violence that was allegedly committed.

- Ensure that laws on gender based violence provide survivors of sexual violence with the following by 2015:
 - Emergency contraception.
 - Access to PEP at all health care facilities to prevent contracting HIV.
 - Access to treatment to prevent sexually transmitted infections.
- Review and change criminal laws and procedures relevant to sexual offences and other forms of gender based violence by 2015 in order to:
 - Eliminate gender discrimination.
 - Ensure justice for survivors of gender based violence ensuring the dignity, protection and respect of the survivor.
- Create psycho-social programmes for the rehabilitation of perpetrators of gender based violence.
- Ensure that gender based violence cases are dealt with in a gender sensitive environment.
- Establish legal, police and counselling services to provide dedicated and sensitive services to survivors of gender based violence.

Article 21 of the Protocol deals with social, economic, cultural and political practices. It provides as follows in respect of gender based violence:

- State parties shall create legislation and take other measures to discourage traditional norms that support tolerance of gender based violence with a view to eliminating gender based violence.
- State parties shall introduce public awareness programmes aimed at changing behavior and eliminating gender based violence.

Article 23 of the Protocol deals with support services. It provides that state parties shall:

- Provide survivors of gender based violence with accessible information on the services that are available to them.
- Ensure accessible and effective police, prosecution authority, health, social welfare and other services aimed at advancing the interests of survivors of gender based violence.
- Provide survivors of gender based violence with accessible, affordable and specialised legal services.
- Provide specialised facilities, including support services, for survivors of gender based violence.
- Provide effective rehabilitation programmes for perpetrators of gender based violence.

Article 24 of the Protocol deals with the training of service providers. It provides that state parties shall introduce, provide and promote:

- Gender education to service providers to survivors of gender based violence including the police, courts, health and social workers.
- Community programmes on services and resources available to survivors of gender based violence.
- Training to service providers to assist them in offering services to people with special needs. For example, mentally or physically disabled persons.

CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

South Africa ratified CEDAW on 15 December 1995. It is an international treaty signed under the **auspices** of the United Nations. CEDAW aims to commit states that are parties to the convention to ensure equality between women and men in their countries. Accordingly, state parties to CEDAW must take steps to stop discrimination against women.

The CEDAW committee has issued general recommendations on the provisions of CEDAW. Article 19 of the recommendations deals with violence against women. It states that:

- Gender-based violence is a form of discrimination that prevents women from enjoying rights and freedoms that men enjoy.
- It defines discrimination that is perpetrated against a woman because she is a woman or violence that mainly affects women as violence against women. It specifically makes reference to acts of physical, mental, sexual violence, threats of such violence, intimidation or any other acts that limit freedom as gender based violence.
- Some of the rights and freedoms that gender based violence violates is:
 - The right not to be subjected to **torture, cruel, inhuman or degrading treatment**.
 - The right to freedom and security of the person.
 - The right to the highest possible standard of physical and mental health.
 - The right to life.
- These rights must be understood in terms of the state's duties to prevent the violation of these rights.

The CEDAW committee also serves as the body that monitors state compliance with the provisions of CEDAW. The process involves the party state reporting on compliance to the committee.



AUSPICES: With the support of somebody or something.



TORTURE: Pain and suffering



CRUEL: Unkind, mean, brutal, malicious or hateful



INHUMAN: Cruel, brutal, merciless or ruthless



DEGRADING TREATMENT: humiliating, undignified

or demeaning

APPENDIX 2

CONTACT LIST

EASTERN CAPE

Independent Complaints Directorate, Bisho

(043) 706-6500
Complaints against the Police

Masimanyane WJC, East London

Tel: (043) 743-9169
Women's Support Centre on sexual and domestic Violence

Rape Crisis, Motherwell

041 462 2371
Sexual violence counselling and support services to survivors and their partners, family and friends.

DG Hospital

041 406 4111

Provincial Hospital

041 392 3911

Thuthuzela Care Centre, Libode

Tel: (047) 568-6247
Sexual Violence, counselling, medical examination
medical testing and legal assistance

Thuthuzela Care Centre, Mdantsane

Tel: (043) 761-2023
Sexual Violence counselling, medical examinations,
medical testing and legal assistance

FREE STATE

Independent Complaints Directorate

Tel: (051) 406-6800
Complaints against the Police

Thuthuzela Care Centre, Tshepong

Tel: (051) 403-9639
Sexual Violence counselling, medical examinations,
medical testing and legal assistance

GAUTENG

Independent Complaints Directorate, Johannesburg

Tel: (011) 220-1500
Complaints against the Police

People Opposing Women Abuse, Katlehong

Tel: (021) 860-2858
Sexual violence support services

People Opposing Women Abuse, Sebokeng

Tel: (016) 988-1421/1154/4151
Sexual violence support services

People Opposing Women Abuse, Soweto

Tel: (011) 936-2333
Sexual violence support services

People Opposing Women Abuse, Tembisa

Tel: (011) 642-4345
Sexual violence support services

People Opposing Women Abuse, Vosloorus

Tel: (011) 906-4259
Sexual violence support services

Thuthuzela Care Centre, Kopanong

Tel: (016) 428-5959
Sexual violence counselling, medical examinations,
medical testing and legal assistance

Thuthuzela Care Centre, Mamelodi

Tel: (012) 801-4504
Sexual violence counselling, medical examinations,
medical testing and legal assistance

Thuthuzela Care Centre, Masakhane

Tel: (011) 923-2106
Sexual violence counselling, medical examinations,
medical testing and legal assistance

Thuthuzela Care Centre, Nthabiseng

Tel: (011) 933-1206
Sexual violence counselling, medical examinations,
medical testing and legal assistance

Thuthuzela Care Centre, Sinakekelwe

Tel: (011) 389-0675
Sexual violence counselling, medical examinations,
medical testing and legal assistance

KWAZULU-NATAL

Independent Complaints Directorate

Tel: (031) 310-1300

Complaints against the Police

Lifeline / Rape Crisis, Pietermaritzburg:

033 394 444

Sexual violence counselling and support services to survivors and their partners, family and friends

Justice and Women

(033) 394-9949

Referrals for counselling and shelter and to monitoring of cases.

Thuthuzela Care Centre, Phoenix

Tel: (031) 502-2338

Sexual violence counselling, medical examinations, Medical testing and legal assistance

Thuthuzela Care Centre, Umlazi

Tel: (031) 907-8496

Sexual violence counselling, medical examinations, Medical testing and legal assistance

LIMPOPO

Independent Complaint Directorate

Tel: (015) 291-9800

Complaints against the Police

Thuthuzela Care Centre, Mangkweng

Tel: 9015) 286-1261

Sexual violence counselling, medical examinations, medical testing and legal assistance

Thuthuzela Care Centre, Tshilidzini

Tel: (015) 964-3257

Sexual violence counselling, medical examinations, medical testing and legal assistance

Thohoyandou Victim Empowerment Programme (TVEP)

Limpopo

Tel: (27) 15 963 1222

Sexual violence support services

MPUMALANGA

Independent Complaint Directorate

Tel: (015) 291-9800/ (013 754 1000

Complaints against the Police

Thuthuzela Care Centre, Kanyemazane

Tel: (013) 796-9412

Sexual violence counselling, medical examinations, medical testing and legal assistance

NORTHERN CAPE

Independent Complaints Directorate

Tel: (053) 807-5100

Complaints against the Police

Thuthuzela Care Centre, Galeshewe

Tel: (053) 830-8900

Sexual violence counselling, medical examinations, medical testing and legal assistance

Thuthuzela Care Centre, Kakamas

Tel: (054) 431-0057

Sexual violence counselling, medical examinations, medical testing and legal assistance

NORTH-WEST PROVINCE

Catholic Justice & Peace Commission

073 508 5151

Sexual violence support services

Ganyesa Advice Office

078 521 7149

Sexual violence support services

Independent Complaints Directorate

Tel: (018) 397-2500

Complaints against the Police

Joberton Legal & Human Empowerment

Tel: 076 456 9135

Sexual violence support services

Lesedi Advice Office

082 853 1011

Sexual violence support services

Orkney Advice Office

079 275 8583

Sexual violence support services

Thuthuzela Care Centre, Mafikeng

Tel: (018) 383-7000

Sexual Violence counselling, medical examinations, medical testing and legal assistance

Tigane Advice Office

082 477 7182

Sexual violence support services

WESTERN CAPE

Independent Complaints Directorate

Tel: (021) 941-4800

Complaints against the Police

Mosaic, Wynberg

Tel: (021) 761-7585

Sexual violence support services

Rape Crisis, Athlone, Cape Town

021 684 – 1180

Sexual violence support services

Rape Crisis, George

044 874 5122

Sexual violence support services

Rape Crisis, Khayelitsha, Cape Town

021 361 – 9228

Sexual violence support services

Rape Crisis, Observatory, Cape Town

Tel: (021) 447-1467

Sexual violence support services

Rape Crisis, Somerset West

021 850 4761

24 hr line: 083 484 9409

Sexual violence support services

Simelela Centre, Khayelitsha, Cape Town

Tel: (021) 361-0543

24 hr toll free line: 0800 33 01 01

Sexual Violence counselling, medical examinations
medical testing and legal assistance

SWEAT, Salt River, Cape Town

Tel: (021) 448-7875

Sexual violence support services for sex workers

Thuthuzela care centre, Karl Bremmer, Bellville, Cape Town

Tel: 021 918 1321

Sexual Violence counselling, medical examinations
medical testing and legal assistance

Thuthuzela Care Centre, Manenberg, Cape Town

Tel: (021) 691-6194

Sexual Violence counselling, medical examinations
medical testing and legal assistance

Women's Legal Centre

(021) 424 5660

Sexual violence legal advice and impact litigation





WOMEN'S LEGAL CENTRE