

a summary of the criminal law

sexual offences

amendment act 32 of 2007

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TSHWARANANG
LEGAL ADVOCACY CENTRE
TO END VIOLENCE AGAINST WOMEN



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Introduction

The *Criminal Law (Sexual Offences) Amendment Act* (called 'the Act' in this booklet) has been in effect since 16 December 2007 and affects the punishment of sexual crimes committed after this date.

The Act replaces some common law provisions on sexual offences and some sections of the old law, the *Sexual Offences Act 23 of 1957*. The Act also creates new sexual crimes.

The main aims of the new Act are to:

1. Include all sexual crimes in one law;
2. Define all sexual crimes;
3. Make all forms of sexual abuse or exploitation a crime;
4. Make sure that both men and women can use the law with regard to sexual crimes;
5. Make sure that government departments work together to protect complainants from unfair treatment or trauma;
6. Improve the way the criminal justice system (the courts and police) works;
7. Make the age when both men and women can give permission (consent) to have sex, 16 years;
8. Make sure that rape survivors get post-exposure prophylaxis (PEP), which is medical treatment that can reduce their chances of getting HIV from the rape;
9. Allow rape survivors to find out if the person who raped them has HIV; and to
10. Establish a National Register (a list of names) for Sex Offenders.

This booklet summarizes the key provisions in the new Act and related laws. The booklet does not analyse the effectiveness of these provisions.

Notes on terminology:

11. The complainant is sometimes referred to as 'Mpho', the perpetrator or accused as 'Lee' and a third person as 'Jabu'.
12. The Act and other Department of Justice documents refer to 'victims' or 'complainants' and not 'survivors' – the booklet reflects the terminology used in the Act.
13. Where reference in the booklet is made to 'he' or 'she' this should be read to include either sex.

Sexual Offences

Two key elements of sexual offences in this section are:

- The intention of the perpetrator (Lee) to commit the offence and
- The absence of consent from the complainant (Mpho).

'intention' – deliberately or on purpose, decide and set out to commit a crime

'coercion' – using force or authority to get someone to do something

Sexual acts are offences (crimes) if they are committed without the consent (permission) of one of the people involved in the sexual act. The court must decide if Mpho gave consent to the sexual act.

'Consent' means voluntary or unforced agreement. This means that Mpho must freely, willingly and deliberately agree to the sexual act; and Mpho must be able to understand what she is consenting to.

The Act gives examples of when Mpho could not consent (agree) to a sexual act:

- When Mpho submits (gives in) to a sexual act because Lee forced, intimidated or threatened Mpho or Jabu or threatened to damage Mpho or Jabu's property
 - Example: Lee says he will kill Mpho's baby if she does not have sex with him. Mpho, therefore, is scared and does not resist the sex as a result of this threat.
- When Lee abuses his power or authority and Mpho is not able to show that she does not consent to the sexual act
 - Let's say that: Lee is Mpho's teacher. Lee says Mpho must have sex with him. Mpho is afraid of what will happen at school if she refuses to have sex with Lee, perhaps he might fail her.
- When Mpho is deceived into agreeing to the sexual act
 - Let's say that: Lee is Mpho's doctor. Lee informs Mpho that he needs to massage her genital area as part of a medical procedure. Mpho agrees but she does not know that Lee is actually massaging her for his own sexual pleasure.
- Where Mpho is not able to think properly or understand the nature of the sexual act at the time because Mpho is –

- asleep,
- unconscious,
- unable to think properly because of drugs or alcohol
- a child below 12, or
- a person with a mental disability.

This means that even if Mpho agreed to the sexual act, she could not give proper consent because of the above circumstances.

Example where consent is absent

Egglestone v the State, Supreme Court of Appeal, 2008

Egglestone offered N a job as a receptionist at his escort agency. As part of the training, he touched her breasts and genitals and had sex with her. N first refused to have sex but later gave in because she was told she cannot otherwise get a job as a receptionist at the escort agency. The court stated that, because Egglestone was much older than N and in a position of power over her because she needed the job, N was not able to give proper consent to the sexual acts.

Rape (section 3)

Rape occurs when Lee intentionally commits an act of **sexual penetration** with Mpho, without Mpho's consent.

'Sexual penetration' includes any act which causes penetration by –

- The genital organs of Lee into the genital organs, anus or mouth of Mpho;
- Any other part of Lee's body or, any object, into the genital organs or anus of Mpho; or
- The genital organs of an animal into the mouth of Mpho.

For example, Lee is committing the crime of rape if Lee sexually penetrates Mpho by inserting his penis into Mpho's vagina, anus or mouth, without Mpho's consent.

The Act also creates a new offence called '*Compelled rape*' (section 4). This is when Jabu is forced by Lee to sexually penetrate Mpho without the consent of either Mpho or Jabu.

'penetration' – to insert something

'compel' – force somebody to do something

Sexual Assault (section 5)

This crime replaces the previous crime of *Indecent Assault*.

Sexual Assault occurs when Lee intentionally *sexually violates* Mpho without the consent of Mpho.

Sexual Assault is also committed where Lee threatens to sexually violate Mpho.

'Sexual violation' includes any act which causes –

- Direct or indirect contact between the
 - Genital organs, anus or female breasts of one person, and any part of the body of another person, an animal, or object;
- Mouth of one person and-
 - Genital organs, anus or breasts of another;
 - Mouth of another person;
 - Any other part of the body of another person which causes sexual arousal;
 - Any object resembling genital organs, an anus or breasts;
 - Mpho's mouth and the genital organs or anus of an animal;
 - Masturbation of one person by another; or
 - The insertion of any object similar to the genital organs of a person or animal into or beyond Mpho's mouth.

For example, when Lee touches Mpho's breasts or kisses Mpho, without Mpho's consent.

'genital organs' – includes the whole or part of the male and female genital organs and surgically created or recreated genital organs.

Related crimes are *Compelled (forced) sexual assault* (section 6) and *Compelled (forced) self-sexual assault* (section 7).

Compelled sexual assault occurs when Lee forces Jabu to sexually violate Mpho without the consent of Mpho or Jabu.

Compelled self-sexual assault occurs when Lee compels or forces Mpho –

1. to engage in masturbation,
 2. to commit an act that is sexually arousing or degrading, or
 3. to penetrate his or her own genital organs or anus,
- without Mpho's consent.

Note:

Lee cannot use his marriage to Mpho as an excuse to rape or sexually assault Mpho (section 56).

Other sexual offences against adults

- Compelling/forcing/causing an adult to witness (watch) a sexual crime, sexual acts or self-masturbation without consent (section 8)
- Exposure or display of genital organs, anus or female breasts to adults (flashing) without consent (section 9). Legitimate cultural practice can be a defence to this crime.

Similar crimes are created when such acts are committed against children or persons with a mental disability.

The Act cancels the common law crimes of *incest*, *bestiality* and *sexual violation of a corpse* and replaces them with new statutory provisions.

'incest' - sexual intercourse between persons too closely related to marry
'bestiality' - sexual activity between a person and an animal

Incest (section 12)

Persons who have *consensual* sex with each other may be committing the crime of incest if they are related to each other by:

- **Blood relationship**
 - Ascendants (ancestors) or descendants (children) in the direct line (e.g parent and child, grandparent and grandchild);
 - Blood relatives, if one of the parties is related to a common ancestor in first degree of descent (one generation) [e.g brother and sister, uncle and niece]. This does not apply to first cousins because they are not related to each other in the first degree.
- **Affinity (in-laws)**
 - Relations by a recognised marriage in ascending and descending line when the marriage ends in divorce or death (e.g a man and his former mother-in-law or daughter-in-law). This does not apply to an ex-spouse's sibling.
- **Adoptive relationship**
 - A parent may not have sex with an adopted child but an adoptive child may have sex with a blood relation of the adoptive parent.

In incest cases, both parties can be charged with incest but if one of the parties is under 18, such a charge against the child must be authorised by the National Directorate of Public Prosecutions.

Bestiality (section 13)

Lee commits the crime of bestiality if –

- Lee puts his genital organs into the mouth, genital organs or anus of an animal;
- Lee inserts the genital organs of an animal into his own mouth, genital organs or anus or
- Lee masturbates an animal. This is not considered a crime if the masturbation is committed for breeding or scientific reasons.

Sexual act with a corpse (section 14)

No person is allowed to commit any sexual act with a human corpse (a dead body). It is also a crime to violate a corpse or a grave (e.g kicking a corpse or destroying a tombstone).

Sexual offences against children

A child under the age of 12 is too young to give permission to any sexual act (section 57). A sexual act with a child under 12 is automatically a crime and is defined as rape or sexual assault.

The age of consent over which individuals can give permission to a sexual act is 16 years for both girls and boys. This means that a child who is 16 years or older, can actually give consent to a sexual act. Where they did not give consent, a case of rape or sexual assault should be opened.

In the case of children between the ages of 12 and 16, there are two ways to address this:

1. If the child willingly gave consent to the sexual act, the other party can be charged with consensual sexual penetration of a child or the consensual sexual assault of a child.
2. If the child did not consent to the sexual act, the perpetrator must be charged with rape or sexual assault.

Consensual sexual penetration with a child between 12 and 16 (section 15) (also defined as the crime of Statutory rape)

This crime is committed when Lee commits an act of sexual penetration with a child between the ages of 12 and 16 (Mpho), where the child has given 'consent' but is too young to engage in consensual sex.

This section of the Act replaces section 14(1) of the old *Sexual Offences Act*, includes males and females and removes the different ages of consent for boys and girls.

Where both parties are children, both could be charged with a crime – such a charge must be authorised by the National Directorate of Public Prosecutions. Where both parties are children, they should not be arrested and should instead be summoned to appear in court after the case is properly investigated and the National Director has said the case must proceed.

A possible explanation or defence to the crime is that Mpho deceived Lee and that he reasonably believed Mpho was over 16.

Note:

Even though Mpho might have agreed to the sexual act, consent may be absent because of the extended definition of giving permission (consent) for the sexual act (see page 3). In such cases, Lee should be charged with rape and not the crime of consensual sex with a child between 12 and 16.

Consensual sexual violation with a child between 12 and 16 (section 16)

This is a new crime. This crime is committed when Lee commits an act of sexual violation with a child (Mpho) with that child's 'consent'.

Because of the wide definition of sexual violation (see page 5), this particular provision has been referred to as the "kissing law". In theory, two children under 16 who kiss with mutual consent could be charged under this section.

Where both parties are children, they can be charged but only if this is authorised by the National Directorate of Public Prosecutions, guided by National Directives.

A possible explanation or defence to this crime is:

- That Mpho deceived Lee and that he reasonably believed Mpho was over 16 or
- That both parties are children and their age difference is less than 2 years.

Note:

The Department of Justice has stated that sections 15 and 16 are mainly aimed at criminalising sexual acts that adults commit with children. The Department states that these sections are aimed at identifying sexual abuse, and not intended to criminalise normal teenage sexual experimentation.

Sexual exploitation of children (section 17)

This is a new crime and applies to all children under 18 years. It does not matter if the child (Mpho) consented to the sexual act or not.

'*exploitation*' - the misuse or abuse of someone for personal gain.
"*for financial or other reward, favour or compensation*" – to do something in exchange for money, gifts or some benefit

This crime is committed under various circumstances:

1. *Sexual exploitation of a child*: If Lee intentionally *engages the services of a child* (Mpho) for financial or other reward, favour or compensation to Mpho or Jabu to commit a sexual act with Mpho.

Example: Lee wants to have sex with a child (Mpho) and pays Mpho or his caregiver (Jabu) money for this.

2. *Involvement in the sexual exploitation of a child*: Lee intentionally *offers the services of a child* (Mpho) for sexual exploitation to another person (Jabu) for financial or other reward, favour or compensation to Lee, Mpho or another person:

- For the purposes of buying sex with Mpho, Jabu pays money to Lee:
- By Lee inviting or persuading Mpho to allow Jabu to commit a sexual act with Mpho;
- By Lee participating in, encouraging or promoting a sexual act with Mpho by Jabu;
- By Lee making available, offering or engaging Mpho for the purpose of the commission of a sexual act with Mpho by Jabu or
- By detaining, through the use of threats, force, coercion, lies, abuse of power, Mpho so that Jabu can commit a sexual act with Mpho.

Example: Lee is drinking in a bar. He says that anyone can have sex with his child (Mpho) for money. Lee then orders Mpho to have sex with Jabu.

3. *Furthering the sexual exploitation of a child*: A person who –
 - Intentionally allows a sexual act by Jabu with Mpho while being Mpho's primary care-giver, parent or guardian;
 - Owns, leases or occupies property and intentionally allows the property to be used for Jabu to commit a sexual offence with Mpho.

Example: Lee is unemployed and receives money from her boyfriend for her basic needs. She knows that her boyfriend is having sex with her child but she does not do anything to stop him.

4. *Benefiting from the sexual exploitation of a child*: Lee intentionally receives

financial reward, favour or compensation when Jabu commits a sexual act with Mpho.

Example: Lee knows that her child is having sex with Jabu in exchange for money. Lee encourages this because she gets some of the money from her child.

5. *Promoting child sex tours:* A person or company who –
 - Makes travel arrangements for Jabu with the intention of making it easier for Jabu to commit a sexual act with Mpho or
 - Prints or publishes any information that promotes sexual acts with Mpho.

Sexual grooming of children (section 18)

This is a new crime and aims to protect children under 18 years from sexual exploitation. *Sexual grooming* refers to the process of preparing or making a child ready to engage in a sexual act. Grooming usually takes place over a period of time. Often, the perpetrator first tries to be the child's friend and plays secret games with the child to see if the child will disclose the crime or not. The friendship can then become more affectionate, progressing to sexual acts. Sometimes grooming includes showing the child pornography and buying the child gifts.

1. *Promoting the sexual grooming of a child:* Where Lee –
 - Manufactures, produces, possesses or distributes an article, publication or film which aims to promote a sexual act with Mpho;
 - Supplies or displays child pornography or a film or publication to Jabu with the aim of helping Jabu to perform a sexual act with Mpho; or
 - Arranges a meeting or communication between Jabu and Mpho by any means with the aim that Jabu will perform a sexual act with Mpho.

Example: Lee hosts an internet website where adults can meet children and prepare them for sexual relationships.

2. *Sexual grooming of a child:* Where Lee –
 - Supplies or displays to a child (Mpho) –
 - An article intended to be used in the sexual act;
 - Child pornography or pornography;
 - A publication or film with the intention to encourage Mpho to perform a sexual act.
 - Commits or describes an act with or in the presence of Mpho with the intention to encourage or persuade Mpho to –
 - Perform a sexual act with Lee or Jabu;

- Perform an act of self-masturbation in presence of Lee or Jabu;
 - Be in Lee or Jabu's presence while they perform a sexual act or self-masturbation;
 - Be exposed to child pornography or pornography;
 - Be used for pornographic purposes;
 - Expose his or her body to Lee or Jabu in a manner that offends Mpho's dignity.
- Arranges a meeting or communication with Mpho, by any means, anywhere in the world, with the intention that Lee will commit a sexual act with Mpho.
 - Invites, seduces or coerces Mpho to travel to meet Lee with the intention to commit a sexual act with Mpho.

Compelling or causing children to witness sexual acts (section 21)

It is a crime to intentionally let a child watch a sexual act without the child's consent. This is an offence even if the act was not committed for Lee's sexual pleasure.

Exposure of genital organs, anus or breasts to children (section 22)

It is a crime for Lee to intentionally expose or display the genital organs, anus or female breasts of Lee or Jabu to a child (Mpho). This is a crime even if the act was not committed for Lee or Jabu's sexual pleasure. It is a defence to the crime or a possible explanation if such an act was committed to carry out a legitimate cultural practice.

Sexual offences against persons who are mentally disabled

The Act tries to protect the interests of people with mental disabilities as a group which is particularly vulnerable to sexual exploitation.

In terms of the Act, a *person who is mentally disabled* means a person affected by any mental disability, including any disorder or disability of the mind, to the extent that she, *at the time of crime*, was –

- Not able to understand the nature and outcomes of the sexual act;
- Able to understand the sexual act but unable to make a proper decision based on this understanding;
- Unable to resist the sexual act; or
- Unable to show that she does not want to take part in the sexual act.

In terms of the Act, persons who are mentally disabled are not able to consent to sexual acts (section 57). This section only applies to persons who are mentally disabled as defined in the Act. Many people might have a mental illness or disability but can still understand the nature and outcomes of a sexual act and can therefore still decide to consent to sexual acts. It must be respected that persons with mental disabilities may and do consent to sexual activity – it will only be a sexual offence if the person does not voluntarily and without coercion agree to the sexual act.

The following crimes that apply to persons with a mental disability are the same as those applying to children:

- *Sexual exploitation of persons who are mentally disabled* (section 23)
- *Sexual grooming of persons who are mentally disabled* (section 24)

It will have to be proved that the complainant is mentally disabled for these offences to apply. This means that a report must be obtained from an expert (a social worker, psychologist or psychiatrist) and must explain the nature and extent of the mental disability and whether the complainant could give consent.

Pornography

'*Pornography*' is any sexually explicit image or written description of an act or person that is intended to sexually arouse.

'*Child pornography*' is any sexually explicit image or written description of an act or person where the person is under 18 years. It does not matter if the image is intended to sexually stimulate.

Pornography includes any image or description of a person –

- Engaged in a sexual crime;
- Engaged in an act of sexual penetration or sexual violation;
- Engaged in an act of self-masturbation;
- Displaying the genital organs or female breasts of such person in a state of arousal or stimulation;
- Unduly displaying the genital organs or anus of such person;
- Engaged in sexually suggestive or lewd acts;
- Engaged in or as the subject of sadistic (deliberately inflicting pain on another individual) or masochistic (deliberately having pain inflicted on yourself) acts of a sexual nature;
- Showing or describing the body of that person in a manner which, in that context, violates or offends the sexual integrity or dignity of that person or another person.

'*Sadistic*' - deriving pleasure or sexual gratification from inflicting pain on another

'*Masochistic*' - deriving pleasure or sexual gratification from being abused or dominated

The Act creates various pornography-related crimes:

- Exposure or display of child pornography to an adult with or without consent (section 10)
- Exposure or display of pornography to children, with or without consent (section 19)
- Using children for or benefiting from child pornography (section 20)
- Engaging or displaying of pornography to persons who are mentally disabled (section 25)
- Using persons who are mentally disabled for pornographic purposes or benefiting from their use (section 26).

The *Films and Publications Act (no. 65 of 1996)* defines 'child pornography' to include any image or any description of a person who is under the age of 18 years -

1. Engaged in sexual conduct;
2. Participating in, or assisting another person to participate in, sexual conduct; or
3. Showing or describing the body, or parts of the body, of such a person in a manner or in circumstances which, within context, amounts to sexual exploitation.

It is a crime to possess, create, import, obtain or distribute a film or publication which contains child pornography or advertises child pornography or the sexual exploitation of children. There is a responsibility on anyone who is aware of, or suspects this crime to report it to the police (section 27 of the *Films and Publications Act*).

Note:

You can report child pornography online at:
<http://www.fpbprochild.org.za/ReportAbuse.aspx>

Adult sex work

Most of the laws relating to adult sex work are contained in the outdated *Sexual Offences Act* 23 of 1957 which criminalizes brothels, procurement and the act of having sex for financial gain. The police also usually arrest sex workers on the basis of municipal by-laws, e.g. loitering.

The new ***Criminal Law (Sexual Offences) Amendment Act*** now also criminalizes the clients who pay for sex. It includes the following crimes:

- *Keeping a brothel (section 2) and related activities*
- *Procurement (section 10)*
 - Lee gets Mpho to have sex with any other person, or he gets her to become a sex worker or inmate of a brothel.
- *Detention for purposes of unlawful carnal intercourse (section 12)*
 - Lee holds Mpho against her will in a brothel or a place so that a man can have sex with her.
- *Assisting sex work (section 12A)*
 - A person who, for reward, helps a person to communicate with another person so that they can have sex or perform an act of indecency for reward.
- *Enticing to commission of immoral acts (section 19)*
 - A person who entices or solicits in a public place for immoral purposes.
 - A person who poses in an indecent dress or manner in any door or window or within view of any public place or place to which the public have access.
- *Persons living on the earnings of sex work (prostitution) or assisting in selling indecent acts (section 20)*
 - Any person who knowingly lives on the earnings of prostitution.
 - Any person who in any way assists or receives a reward for the commission by any person of any act of indecency with another person.
 - Any person 18 years or older who has sex or commits an act of indecency with another person for reward.
 - Any person 18 years or older who in public commits any act of indecency with another person.

The above provisions apply to both men and women.

Engaging the sexual services of adults (section 11)

In terms of the *Criminal Law (Sexual Offences) Amendment Act*, it is now considered a crime for a person to engage the services of a person 18 years or older for financial or other reward, favour or compensation to an individual or to a third person for the purpose of engaging in a sexual act with that individual.

Note:

The South African Law Reform Commission is reviewing the current law on sex work. For more information go to their website at <http://salawreform.justice.gov.za>.

Trafficking

South Africa has signed the *United Nations Protocol to Prevent Trafficking in Persons* and the provisions of this international protocol are legally binding in South Africa.¹ This means that South Africa has a responsibility to enforce these international rules on trafficking (the sale of human beings between countries).

Currently, the South African Law Reform Commission is looking at the options for revising the law that addresses trafficking in persons. In the interim, the *Criminal Law (Sexual offences) Amendment Act* has temporary provisions relating specifically to trafficking for sexual purposes. Trafficking in children is dealt with in Chapter 18 of the *Children's Act (no. 38 of 2005)*.

Trafficking for sexual purposes

This is a temporary section in the *Criminal Law (Sexual offences) Amendment Act* which gives effect to the UN Protocol temporarily until the passing of more comprehensive legislation for South Africa.

'trafficking' in this section, includes the supply, recruitment, procurement, capture, removal, transportation, transfer, harbouring, sale, disposal or receiving of a person, within or across the borders of the Republic, by means of –

1. The threat or use of force, intimidation or other forms of coercion;
2. Abduction (kidnapping);
3. Fraud;
4. Deception or false pretences;
5. The abuse of power or a position of vulnerability, to the extent that the complainant is inhibited from indicating her unwillingness or resistance to being trafficked;
6. The giving or receiving of payments, compensation, rewards or advantage for the purpose of any form of exploitation, grooming or abuse of a sexual nature of such person.

The Act forbids -

- *Trafficking in persons for sexual purposes* [section 71 (1)]
- *Involvement in trafficking in persons for sexual purposes* [section 71 (2)]

¹ *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organised Crime, GS res 55.25, annex II, 55 UN GAOR Supp. (No 49) at 60, UN Doc A/45/49 (Vol II) (2001)*

A person who commits a crime because he or she is being trafficked will not be charged [section 71(5)]. For example, if Mpho is trafficked across the border into South Africa and she does not have valid travel documents, she will not be charged with a migration-related crime.

The section also deals with the prosecution of commercial carriers (airplanes, boats) involved in trafficking.

Trafficking in children

In terms of the *Children's Act (no. 38 of 2005)*,

- 'commercial sexual exploitation', in relation to a child, means-
 - Procuring or getting a child to perform sexual activities for financial or other reward, including acts of prostitution or pornography, regardless of whether that reward is given to the procurer, the child, the caregiver of the child, or any other person; or
 - trafficking a child for use in sexual activities, including prostitution or pornography.
- 'trafficking', in relation to a child-
 - means the recruitment, sale, supply, transportation, transfer, harbouring or receipt of children, within or across the borders of the Republic-
 - by any means, including the use of threat, force or other forms of coercion, abduction, fraud, deception, abuse of power or the giving or receiving of payments or benefits to achieve the consent of a person having control of a child; or
 - due to a position of vulnerability, for the purpose of exploitation; and
 - includes the adoption of a child through illegal means.

The *Children's Act* prohibits (forbids) trafficking in children (section 284) and behaviour facilitating trafficking in children (section 285). No person or company may traffic a child or allow a child to be trafficked.

The government has a responsibility to help a child who is a victim of trafficking (section 286). Any parent who is involved in the trafficking of their child can lose their parental rights over that child and the child can be removed from their care (section 287).

The *Children's Act* places a duty on immigration officials, police, social workers or health professionals who come into contact with a victim of trafficking to refer the child to a social worker for investigation (section 288).

Mandatory reporting of sexual offences

Section 54 of the Act says that any person who has knowledge of a sexual crime against a child or a mentally disabled person must report it. Mandatory reporting of sexual crimes may uncover many sexual crimes that are currently hidden within our communities. Mandatory reporting may however also discourage children and others from accessing health care and other services.

When to report?

If there is any knowledge that a sexual crime was committed against a child or person with a mental disability (as defined in the Act).

Who must report?

Anyone.

Who should the report be made to?

The police.

Two other Acts have similar duties to report abuse. The sections below were not yet in force at the time of writing.

Section 110(1) of the Children's Act

When to report?

If you reasonably suspect that a child has been abused in a manner causing physical injury, been sexually abused or deliberately neglected.

Who must report?

A correctional official; homeopath; immigration official; labour inspector; legal practitioner; medical practitioner; dentist; midwife; nurse; minister of religion; religious leader; occupational therapist; physiotherapist; speech therapist; psychologist; social service professional; social worker; teacher; traditional health practitioner; traditional leader; member of staff or volunteer worker at a partial care facility, drop-in centre or child and youth care centre.

Who should the report be made to?

A designated child protection organization such as Child Line, a social worker or a police official.

Section 110(2) of the Children's Act

When to report?

If you reasonably suspect that a child is abused or in need of care and protection.

Who must report?

Any person.

Who should the report be made to?

A social worker, a designated child protection organisation or a police official.

Section 26 of the Older Persons Act 13 of 2006

When to report?

When you suspect that an older person has been abused or suffers from an abuse-related injury.

Who must report?

Any person.

Who should the report be made to?

A social worker or a police official.

Criminal procedure in sexual offence cases

It can be very difficult for victims of sexual crimes to testify in court. The *Criminal Procedure Act (CPA)* allows victims to testify through a video camera in a separate room from the court or to testify through other individuals (called an 'intermediary') in certain circumstances. The Act provides for the drafting of instructions by the National Prosecuting Authority (NPA) aimed at minimising (reducing) secondary victimisation or trauma, which occurs when the victim has to report the crime and experiences the difficulty and trauma of doing this.

Testimony by closed circuit television (CCTV)

A court may, on its own initiative or on application by the prosecutor or witness, order that a witness may give evidence by means of CCTV (a video camera) (section 158 of CPA). The court must look at whether testifying in court will cause harm to the witness. The Act says that if a court refuses a prosecutor's application for a child under 14 years to give evidence through CCTV, the court must immediately give reasons for such refusal.

The use of CCTV or similar electronic media in court is available to help any traumatised complainant or witness to give evidence, no matter what his or her age. Prosecutors must consider using CCTV in all sexual offence cases.

Intermediary

Court proceedings can be very traumatic and intimidating, especially for children. If it appears that a child will be exposed to undue stress if they testified in court, the court can appoint a competent person to act as an intermediary between the child and the court (section 170A of CPA). Intermediaries may be used in the courtroom or the intermediary and the child can be in another room and interact with the court through CCTV.

Prosecutors must tell a complainant or child witness that they can use this measure to help them testify.

Previously only a child under the age of 18 could give evidence through an intermediary. The Act has now been amended to allow a person over 18 years with a mental age that is under 18, to also testify through an intermediary.

The prosecutor must apply to the court for permission to use an intermediary. If the court refuses such an application, the court must give reasons for its refusal. The court can postpone a hearing if an intermediary is not present.

Evidence in sexual offence cases

It is never easy for a complainant in a sexual offence case to testify about the crime. In the past, the courts and defence lawyers often traumatised complainants and ignored their evidence for no good reason. The Act has made certain rules about how the evidence of complainants in sexual crime cases must now be treated by the courts.

Evidence of previous consistent statements (section 58)

Our common law previously allowed evidence that the complainant in a sexual crime case told someone about the sexual crime soon after the offence (the first report). This rule was based on an old belief that if a complainant does not immediately, after the rape, urgently report the assault to someone, they are lying (the hue and cry rule). The Act now states that evidence of previous consistent statements by a complainant is admissible, but the court cannot assume that the complainant is lying if there is no such evidence.

Evidence of delay in reporting (section 59)

The courts often frown upon complainants who do not report a sexual crime as soon as possible, after the sexual act has happened. The Act now states that the court may not draw any conclusion from the length of any delay between the time when the crime was committed and when it was reported by the victim.

Abolishment of cautionary rule (section 60)

Previously, the courts applied caution to the evidence of a complainant in a sexual crime case. The Act now specifically states that the court may not treat the evidence of a complainant in a sexual crime case with caution on account of the nature of the crime.

The Act, however, does not deal with the cautionary rule relating to single witnesses and to children.

Evidence of character and previous sexual history

The Act amends section 227 of the CPA. No evidence of the previous sexual history of a complainant may be presented as evidence in court. If the accused's lawyer wants to bring evidence about the complainant's previous sexual experience, he must apply to court for permission to lead such evidence. The court is further instructed not to allow such evidence if it aims to support a suggestion that by reason of the sexual nature of the complainant's experience, she is more likely to have consented or is less worthy of belief. Prosecutors have also been instructed to oppose any questions about the complainant's sexual history or sexual experience.

Prescription

Civil cases

In addition to pressing criminal charges, a complainant can also sue the perpetrator for damages (compensation). This legal action must be brought within 3 years from the date when the injury (delict) occurred. The *Prescription Act (no. 68 of 1969)* has now been changed so that the 3 year time period for damages to be claimed for a sexual crime, does not begin while the complainant is unable to institute proceedings because of her mental or psychological condition.

Example of prescription

Van Zijl v Hoogenhout, Supreme Court of Appeal, 2004

In this case, the plaintiff was sexually abused by her uncle from 1958 until 1967. As a result of the abuse, the plaintiff was unable to blame her uncle for what he did to her. In 1997, after therapy, she was able to deal with the abuse and realized that her uncle was to blame. She instituted legal action against him in 1999. In 2004 the Supreme Court of Appeal stated that prescription only starts to run once the survivor has a full awareness of the abuse and who was responsible for it.

Criminal cases

For most crimes, unless otherwise stated in the law, criminal prosecution must be instituted within 20 years. For crimes such as murder, kidnapping and child-stealing, there is no such limit.

The following crimes have been added to the *Criminal Procedure Act (no. 51 of 1977)* for which prosecution can be instituted at any time, even after 20 years:

- Rape, compelled rape, trafficking, using a child or person who is mentally disabled for pornographic purposes.

Conviction and Sentencing

Attempt or conspiracy to commit a sexual offence (section 55)

Any person who -

- attempts,
- conspires with another person or
- aids, abets, induces, incites, instigates, instructs, procures, commands, counsels another person

to commit a sexual offence, commits a crime themselves and can receive the same punishment as the person convicted (found guilty) of the crime.

Competent verdicts (section 261 of the Criminal Procedure Act)

Where the accused is charged with one crime, which is not proved during the trial, the court can sometimes find the accused guilty of a lesser crime if such crime was proved. This is referred to as a competent verdict.

The following are competent verdicts or lesser crimes that can be convicted for, instead of rape, compelled rape, sexual assault, compelled sexual assault or self-sexual assault:

- Assault with the intent to do grievous bodily harm (GBH);
- Common assault;
- Sexual assault, compelled sexual assault, compelled self-sexual assault;
- Incest;
- Consensual sexual penetration or sexual violation (sections 15 & 16).

Treatment programmes as a form of punishment for sex offenders

In terms of section 276A of the *Criminal Procedure Act*, punishment of a convicted person for a sexual crime can now include attendance and participation in a specific treatment programme for sex offenders. The convicted person must be able to show that he has the potential to benefit from treatment and he must pay the cost of the programme.

The *Child Justice Bill*, once it has been officially passed, will allow for the diversion of children who are accused in criminal cases. This means diverting children away from the criminal justice system under certain circumstances and choosing alternatives other than correctional facilities and detention centres. The *Child Justice Bill* differentiates between Schedule 1 offences (such as bestiality or consensual sexual penetration), Schedule 2 offences (such as sexual assault without the infliction of harm), and Schedule 3 offences (such as rape, sexual assault where grievous bodily harm was inflicted, sexual exploitation or grooming). Diversion for Schedule 3 offences will only be allowed if exceptional circumstances exist and permission for such diversion was given by the Director of Public Prosecutions. The Bill outlines a wide range of diversion options, from an apology to injured parties to attendance of a treatment programme and supervision by a probation officer. Where a diversion order has been complied with, prosecution will not be instituted against the child.

The Child Justice Bill states that imprisonment of a child over 14 years will be the last resort and a child under 14 at the time of the sentence may not be sentenced to imprisonment. A child over 14 years who committed a Schedule 3 offence may be sentenced to imprisonment.

Compensation

The court may, in terms of section 300 of the *Criminal Procedure Act* order the convicted person to compensate (pay) the complainant for costs incurred as a result of the crime, including:

- Medical expenses;
- Cost of alternative accommodation if forced to leave home;
- Cost of counselling for the complainant;
- Cost of replacement of destroyed property; and
- Wages lost due to attending court proceedings.

An application for such costs must be made at the end of the criminal proceedings and will have the effect of a civil judgment. The complainant must be able to prove her damages. Once such an order has been granted, the complainant will not be able to approach a civil court afterwards for damages. Section 300 covers only patrimonial damages (financial loss), not damages for pain and suffering which could have been obtained through civil proceedings.

This section will be promoted through public awareness programmes by the Department of Justice as part of the implementation of the Victim's Charter.

Note:

In terms of section 8(a) of the Promotion of Equality and Prevention of Unfair Discrimination Act, no person may unfairly discriminate against any other person on the grounds of gender including gender-based violence. Section 28(1) of the Act states that if it is proved in the prosecution of any offence, that unfair discrimination on the grounds of race, gender or disability played a part in the crime, this must be regarded as an aggravating circumstance for purposes of sentence.

Minimum sentences

Minimum sentences were introduced by the *Criminal Law Amendment Act 105 of 1997*. The Act sets a minimum sentence for rape:

First offence	10 years
Second offence	15 years
Third offence	20 years

Under certain circumstances, rape could lead to a minimum sentence of life imprisonment (25 years). This is for example where the complainant was raped more than once; was gang raped, where she was under 16, physically disabled or mentally ill. It would also apply where the accused has previous rape convictions or knew that he was HIV positive at the time of the rape.

The minimum sentences legislation also applies to a child accused between the ages of 16 and 18 years of age.

The courts are allowed to deviate from the prescribed minimum sentence if *substantial and compelling circumstances* exist to justify a lesser sentence. Courts have interpreted this provision differently.

The *Criminal Law (Sentencing) Amendment Act (no. 38 of 2007)* has been effective from 31 December 2008. It outlines certain factors which the courts may not consider substantial and compelling circumstances to allow them to deviate from the prescribed minimum sentence. These factors include:

- The complainant's previous sexual history;
- The apparent lack of physical injury to the complainant;
- The accused's cultural or religious beliefs about rape; and
- That a relationship existed between the accused and complainant before the rape.

National Register for Sex Offenders

The Act does not allow the employment of persons who have been found guilty (convicted) of committing a sexual crime against a child or person with a mental disability in certain circumstances. Such persons are not allowed to, for example, work with a child or person with a mental disability, or become a foster parent.

The Act establishes a National Register for Sex Offenders, against which prospective employers can check their employees. Such offenders will be included in the National Register and persons are entitled to apply for a certificate showing whether or not a person's name is on the register.

The Register will be kept confidential. It will be possible to apply to remove one's name from the register after 5 or 10 years unless the person was sentenced to more than 18 months imprisonment, in which case his or her name may not be removed from the Register.

In respect of children this register is a duplication of Part B of the Child Protection Register provided for in the *Children's Act*.

Services for victims

Chapter 5 of the Act took effect from 21 March 2008 and regulations were published in May 2008.

After a rape, a victim should urgently access a health facility that provides sexual assault services:

- To have injuries attended to;
- Access medications to prevent HIV, STIs and pregnancy;
- Access other health services needed including counselling; and
- For the J88 form to be completed and medico-legal evidence to be collected.

Post-exposure prophylaxis (PEP) for HIV is anti-retroviral medicines (ARVs) that are given to a rape survivor to reduce the risk of HIV infection from the rape. PEP does not help someone who already has HIV. PEP is most effective the sooner it is provided. PEP must be taken for 28 days and may have some side-effects.

The Act refers to the provision of post-exposure prophylaxis (PEP) to rape survivors. PEP is available for free to rape survivors who report within 72 hours after the rape. A victim does not have to open a criminal case before being given PEP. If a victim goes to the police first, a police official must inform her of the importance of obtaining PEP and refer her to those facilities where PEP is available. Police stations must have a list of designated PEP facilities at the police station (available at http://www.saps.gov.za/docs_pubs/legislation/sexual_offences.htm) and must give the victim a notice explaining her right to PEP (Form 1 of Regulations).

If a victim accesses a health facility, she must receive a whole range of services in terms of the Department of Health's National Sexual Assault Policy and National Management Guidelines for Sexual Assault Care. (Note: These documents use the term 'sexual assault' when referring to sexual penetration (rape) – this is different from the crime of 'sexual assault' in the Criminal Law (Sexual Offences) Amendment Act.

“The **only** way to **know** your HIV status is to be **tested regularly**”

Compulsory HIV testing of accused

The Act allows for a victim, interested person or investigating officer to apply to a court to have an alleged offender in a sexual offence case tested for HIV. Such an application must be made within 90 days after the rape occurred. This provision only applies to sexual crimes where the victim may have been exposed to the body fluids of the alleged offender.

The Application must be handed to an investigating officer who must make sure that it is considered by a magistrate. Once the order is approved, the investigating officer will take the alleged offender for the HIV test and he will give a sealed envelop with the HIV test results to the victim. The outcome of the test results are confidential and may not be disclosed to other persons.

The National Commissioner of Police must make sure investigating officers treat test results as confidential and must prevent unauthorised access to the records.

If a victim decides to apply for the accused to be tested for HIV, the victim should still be advised to access PEP and to continue taking it, even if the test results are negative. She should also be advised to practice safe sex.

What does the test results mean?

HIV tests detect the presence of HIV antibodies in the person's blood. It could be that the alleged offender tests HIV negative, even though he is HIV positive, because his body has not yet produced antibodies to HIV. If the alleged offender tests HIV negative, there is a chance that he had HIV at the time of the incident but is still in the window period.

If the alleged offender tests HIV positive, it does not mean that the victim has been infected with HIV or are at high risk of HIV infection. It is important that she seeks counselling and medical advice after receiving the offender's HIV test results.

Useful resources

Related legislation:

Note:

Laws and Bills are available on the government website www.info.gov.za under Documents. They are categorized according to their year

- *Criminal Law (Sexual Offences and related matters) Amendment Act 32 of 2007* (effective 16 December 2007), Government Gazette 30599, 14 December 2007. Available at <http://www.doj.gov.za/docs/InfoSheets/2008%2002%20SXOact.htm>
- *Sexual Offences Act 23 of 1957*
- *Children's Act 38 of 2005*, Government Gazette 28944, 14 June 2006.
- *Films and Publications Act 65 of 1996*, Government Gazette 17560, 8 November 1996
- *Older Persons Act 13 of 2006* (not operational by January 2009), Government Gazette 29346, 3 November 2006
- *Criminal Procedure Act 51 of 1977*
- *Prescription Act 68 of 1969*
- *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000*, Government Gazette 20876, 9 February 2000
- *Criminal Law Amendment Act 105 of 1997*, Government Gazette 18519, 19 December 1997
- *Criminal Law (Sentencing) Amendment Act 38 of 2007*, Government Gazette 30638, 31 December 2007
- *Child Justice Bill B49D-2002*.

Regulations, directives and national instructions:

- *Criminal Law (Sexual Offences and Related Matters) Regulations*, Government Gazette 31076, Regulation 8892, 22 May 2008.
- *National Instruction on Sexual Offences* (Department of Safety and Security), Government Gazette 31330, 15 August 2008.
- *Directives on Sexual Offences, 2008* (National Prosecuting Authority)

- *Mind map of the Criminal Law (Sexual Offences) Amendment Act, 2008* (National Prosecuting Authority)
- *National Sexual Assault Policy* (Department of Health) and *National Management Guidelines for Sexual Assault Care*.
- Health instructions (not finalised by January 2009)
- National Policy Framework (not finalised by January 2009)

Policy documents and multi-sectoral plans:

- *National HIV & AIDS and STI Strategic Plan 2007-2011* (Department of Health), Available at <http://www.info.gov.za/otherdocs/2007/aidsplan2007/index.html>
- *365 National Action Plan to End Gender Violence, 2007*, Available at <http://www.doj.gov.za/VC/VCcampaigns.htm>
- *Fourth Draft Integrated Victim Empowerment Policy, 2007* (Department of Social Development), Available at <http://www.doj.gov.za/VC/docs/policy/VEP%20POLICY%20Draft%20fEB%202005%20edited%20in%20May%202007.pdf>
- *Service Charter for Victims of Crime, 2007* (Department of Justice), Available at <http://www.doj.gov.za/VC/VCdocs.htm>
- *Minimum Standards on Services for Victims of Crime, 2007* (Department of Justice), Available at <http://www.doj.gov.za/VC/VCdocs.htm>
- *National Implementation Plan for the Service Charter for Victims of Crime, 2007* (Department of Justice), Available at http://www.doj.gov.za/VC/VCdocs_implplan.htm

Where to get help

Stop Gender Violence Toll-free

Helpline **0800 150 150**

Childline **08000 55 555**

