

# BAIL IN SEXUAL ASSAULT CASES: VICTIMS' EXPERIENCES

## Second Research Report: 2002 - 2003

**Based on research conducted by the Consortium on Violence**

**Against Women:**

Gender Project, Community Law Centre, University of the Western Cape  
Institute of Criminology, University of Cape Town  
Rape Crisis Cape Town

Heléne Combrinck and Zukiswa Skepu



**COMMUNITY LAW CENTRE**

Published by the Gender Project, Community Law Centre  
University of the Western Cape  
Private Bag X17  
Bellville  
7535  
South Africa



© 2003 Community Law Centre  
All rights reserved.

ISBN 1-86808-596-1

No part of this publication may be reproduced or transmitted in any form or by any means, without prior permission.

**To be cited as:**

Combrinck, H. and Skepu, Z. (2003) *Bail in Sexual Assault Cases: Victims' Experiences*. Gender Project, Community Law Centre, University of the Western Cape: South Africa.

The views of the authors expressed in this publication do not necessarily reflect those of the Community Law Centre or the Open Society Foundation.



# ACKNOWLEDGEMENTS

The Consortium on Violence Against Women would like to acknowledge the role of the following persons or organisations in completing this research project:

- Celia Devlin, intern at the Gender Project during 2001, who contributed information on the operation of victim advocate services in the United States, and Raygaanah Barday, former researcher at the Gender Project, who participated in the earlier stages of the research project;
- Jill Claassen, documentalist at the Community Law Centre, for assistance in locating resources, and Zulpha Geyer, administrator at the Gender Project, for general administrative support;
- Members of the Consortium on Violence Against Women: Lillian Artz, Tanya Jacobs, Nolitha Mazwayi, Kelley Moulton, Penny Parenzee and Dee Smythe for information, comments and ongoing support;
- Samantha Waterhouse, advocacy coordinator at Rape Crisis Cape Town, for information, assistance and helpful, incisive comments on an early draft of Chapter 3;
- Kathleen Dey, Shariefa Goliath, Ntombomzi Tinto and other staff members of Rape Crisis Cape Town, for assistance in developing the interview questionnaires and organising victims' interviews as well as focus group discussions with counsellors; and
- Yandisa Mavela, Bernedette Muthien and Zanele Ntambo for facilitating the focus group discussions with Rape Crisis counsellors.

We would specifically like to express our appreciation to the victims of sexual assault and the counsellors at Rape Crisis Cape Town who shared their experiences with researchers.

Finally, we are greatly indebted to the Open Society Foundation and the Ford Foundation for their generous financial support and consistent encouragement.



# TABLE OF CONTENTS

## CHAPTER 1

### INTRODUCTION ..... 1

1. Background to this Research Report.....1
2. The Research Design .....2
  - 2.1 Development of a Conceptual Research Framework .....2
  - 2.2 Research Methodologies .....4
  - 2.3 Identification of Interviewees .....4
  - 2.4 Research Instruments .....5
  - 2.5 Workshop on Research Results.....6
  - 2.6 Limitations of the Study .....6

## CHAPTER 2

### OPERATIONAL CONCEPTS..... 7

1. Introduction .....7
2. The Role of the Victim in Criminal Proceedings .....7
  - 2.1 The Adversarial Criminal Justice System .....7
  - 2.2 Victim Participation in Criminal Proceedings .....8
3. The Purpose of Bail.....9
4. Sexual Assault as a Traumatic Event .....9
5. Post-Traumatic Stress Disorder and Rape Trauma Syndrome..... 10
6. Secondary Victimization ..... 11
7. Recovery from Sexual Assault ..... 13

## CHAPTER 3

### PERCEPTIONS AND EXPERIENCES OF RAPE VICTIMS AND COUNCELLORS ..... 14

1. Introduction ..... 14
2. Case Attrition ..... 14
3. Victims' Expectations ..... 15
4. Contact between the Victim and the Investigating Officer ..... 16
5. Relationship between the Victim and the Investigating Officer ..... 18
6. Relationship between the Victim and the Prosecutor ..... 20
7. Access to Information..... 21
  - 7.1 At the time of Reporting the Case ..... 21
  - 7.2 During the Course of Investigation..... 21
  - 7.3 Information Regarding Bail..... 22
  - 7.4 Trial Proceedings ..... 22
  - 7.5 Outcome of the Case..... 22
8. The Victim's Participation in Bail Proceedings ..... 23
9. Specific Concerns Noted by Victims ..... 24
  - 9.1 Safety ..... 24
  - 9.2 Perceptions of Police Corruption or Complicity ..... 25
  - 9.3 Intimidation by the Perpetrator and Others..... 26

**CHAPTER 4  
EVALUATION OF RESEARCH OBSERVATIONS ..... 28**

1.	Introduction .....	28
2.	Therapeutic Jurisprudence and Restorative Justice .....	28
2.1	Expectations of Victims .....	28
2.2	Establishing and Maintaining Contact with the Investigating Officer.....	28
2.3	Secondary Victimization .....	29
2.4	Failure to Provide Victims with Information .....	29
2.5	Consultation with the Victim Regarding Bail .....	30
2.6	Intimidation by Perpetrator .....	30
2.7	Conclusions .....	31
3.	Standards for Case Management: Police Officials .....	32
3.1	SAPS National Instruction No 2/1998 .....	32
3.2	Evaluation.....	34
4.	Standards for Case Management: Prosecutors .....	34
4.1	National Prosecutors' Directives .....	34
4.2	Evaluation.....	35
5.	Conclusions .....	36

**CHAPTER 5  
TOWARDS SOLUTIONS..... 38**

1.	Introduction .....	38
2.	Enhancing Compliance with Positive Duties resting on State Officials.....	38
2.1	Positive Duties in Legislation .....	38
2.2	An Example: The Namibian <i>Combating of Rape Act</i> .....	41
3.	Victim Advocates .....	43
3.1	Background .....	43
3.2	Evaluation.....	44
4.	Multi-Disciplinary Centres .....	45
4.1	Background .....	45
4.2	Staff Component .....	45
4.3	Procedures Followed at TCC .....	46
4.4	Evaluation.....	47
5.	Proposals by Workshop Participants .....	47

**CHAPTER 6  
RECOMMENDATIONS ..... 50**

1.	Introduction .....	50
2.	Different Levels of Intervention.....	50
3.	Legislation .....	51
3.1	Assigning Responsibility to Specific State Officials.....	51
3.2	Nature of Provisions .....	51
3.3	Resource Allocation .....	53
4.	Training .....	53
4.1	SAPS.....	53
4.2	Prosecutors .....	54
4.3	Magistrates.....	54

5.	Policies .....	55
5.1	SAPS.....	55
5.2	Prosecutors .....	55
6.	Role of Civil Society Organisations.....	56
7.	Implications for Research and Monitoring Initiatives .....	56
8.	Further Exploration .....	57
9.	Conclusion .....	58

**REFERENCES..... 59**

**APPENDICES..... 63**

1.	Interview Questionnaire .....	63
2.	Bail Recordkeeping Form .....	67





# STRUCTURE OF THE REPORT

This report consists of 6 chapters. These chapters include:

## **Chapter 1: Introduction**

This chapter sets out the background to the research project, and revisits the central questions that the project aims to answer. It also sets out the research design, including the development of a conceptual research framework and research methodologies.

## **Chapter 2: Operational Concepts**

In line with the research framework outlined in Chapter 1, this chapter explores the role of the sexual assault victim in the South African criminal justice system. This is done with the view of understanding the notion of victim participation as envisaged within a framework of restorative justice. Secondly, it examines certain concepts associated with the psychological recovery from trauma, in order to gain a better understanding of the key questions posed by a model of therapeutic jurisprudence.

## **Chapter 3: Perceptions and Experiences of Rape Victims and Counsellors**

In this chapter, researchers report on the experiences of victims and counsellors regarding bail as these emerged from the interviews and focus group discussions.

## **Chapter 4: Evaluation of Research Observations**

This chapter evaluates the research observations set out in Chapter 3. In this evaluation, researchers make use of the operational concepts outlined above with reference to restorative justice and therapeutic jurisprudence. Based on the conclusions drawn from this evaluation, we subsequently analyse current policy documents guiding the conduct of police officials and prosecutors, and we also examine whether the standards set in these documents are adequate to address the needs and concerns of victims that have become apparent from our research observations.

## **Chapter 5: Towards Solutions**

In this chapter, we examine a number of measures that may serve to address the main concerns outlined in Chapter 4. We firstly look at enhancing compliance with standards of case management, and then investigate a model aimed at addressing certain of the drawbacks inherent to the adversarial criminal justice system as well as the realities of limited resources in South Africa. We also explore the potential benefits of introducing multi-disciplinary centers, and finally, we list proposals put forward by magistrates, prosecutors, police officials and representatives from non-governmental organisations to address current shortcomings.

## **Chapter 6: Recommendations**

In this chapter, we formulate recommendations based on our observations during the second research phase as well as our brief investigation in Chapter 5 of certain promising practices. We also refer back to the recommendations formulated during the first research phase.



# CHAPTER 1

## INTRODUCTION

### 1. BACKGROUND TO THIS RESEARCH REPORT

In March 2000, the Consortium on Violence Against Women<sup>1</sup> initiated a research project into the implementation of bail legislation in sexual offence cases. This project had its origins in a number of research, education and advocacy initiatives around the pre-trial disposition of accused persons in sexual assault cases. These initiatives had been undertaken since 1997 by member organisations of the Consortium.

At the outset of this research project, researchers formulated two key research questions:

- 🔑 How is the law on bail currently applied in cases of sexual assault?
- 🔑 What are the needs and concerns of victims of sexual assault around the pre-trial disposition of the accused?

It was decided that once these two questions had been answered, it would be possible to formulate recommendations on how the legislation ideally **ought** to function and to identify the nature of interventions that would be required to ensure this ideal operation.

The research was accordingly conducted in two phases. The first phase, aimed at establishing how the law on bail is currently applied in cases of sexual assault, focused on the response of the criminal justice system, and was reported on in a research report published in 2002.<sup>2</sup> This **second** phase of the research focused on the perspectives and experiences of victims of sexual assault around bail, and forms the main subject matter of this report.

The purpose of this report is therefore to examine the second of the two key research questions formulated by researchers, and also to draw together our observations from the first and second phases into practical recommendations. The fashioning of recommendations will be done within the broad over-arching aims of the research. These twin aims were articulated at the inception of the research as firstly, to give effect to the intention of the legislature by ensuring that persons accused of sexual assault are detained where the interests of justice demand. The second aim is to reduce secondary victimisation and intimidation of sexual assault victims by ensuring that their interests are adequately represented during bail hearings.

---

<sup>1</sup> . The Consortium on Violence Against Women consists of the Gender Project, Community Law Centre (University of the Western Cape), the Gender, Law and Development Project, Institute of Criminology (University of Cape Town), Rape Crisis Cape Town Trust, and the Women on Farms Project.

<sup>2</sup> . R Barday and H Combrinck **Implementation of Bail Legislation in Sexual Assault Cases: First Research Report** (2002) Community Law Centre, University of the Western Cape (hereinafter referred to as the 'First Research Report').

## 2. THE RESEARCH DESIGN

### 2.1 Development of a Conceptual Research Framework

The methodology for this phase of the research project was developed within a specific theoretical framework. Bearing in mind the central research question, i.e. to establish the needs and concerns of victims of sexual assault regarding bail, this framework draws on the concepts of **therapeutic jurisprudence** and **restorative justice** in an attempt to focus specific attention on the role and experiences of such victims of sexual assault in the criminal justice system.

#### a) Therapeutic jurisprudence

Therapeutic jurisprudence, an interdisciplinary approach to legal scholarship,<sup>3</sup> has been explained as follows:

'Therapeutic jurisprudence is the study of the role of the law as therapeutic agent. It looks at the law as a social force that, like it or not, may produce therapeutic or anti-therapeutic consequences. Such consequences may flow from substantive rules, legal procedures, or from the behaviour of legal actors (lawyers and judges). The task of therapeutic jurisprudence is to identify - and ultimately to examine empirically - relationships between legal arrangement and therapeutic outcomes.'<sup>4</sup>

Feldthusen et al explain that therapeutic jurisprudence has come to be recognised as an important model for assessing the impact on participants of various aspects of the legal system.<sup>5</sup> It is particularly useful to inform and shape policies and procedures in law,<sup>6</sup> and operates with a specific law reform agenda.<sup>7</sup>

Wexler further notes that therapeutic jurisprudence focuses on the law's impact on emotional life and on psychological well-being, areas that have not received very much attention in the law until now.<sup>8</sup> This approach -

'... wants us to see whether the law can be made or applied in a more therapeutic way so long as other values, such as justice and due process, can be fully respected.'<sup>9</sup>

In designing the second phase of the research study, we were accordingly led by the objective of establishing the nature of the relationship between the 'legal arrangement' of bail and its therapeutic<sup>10</sup> outcomes (or lack thereof) for victims of sexual assault. To this end, we examine certain basic concepts relating to sexual assault as a traumatic event (with specific emphasis on the

---

<sup>3</sup> . B Winick 'Therapeutic jurisprudence defined' (undated) [Internet website].

<sup>4</sup> . D Wexler and B Winick (eds) **Essays in Therapeutic Jurisprudence** (1991) cited in B Feldthusen et al 'Therapeutic consequences of civil actions for damages and compensation claims by victims of sexual abuse' **Canadian Journal of Women and the Law** (2000) at 68.].

<sup>5</sup> . Feldthusen et al (op cit) at 67.

<sup>6</sup> . W Schma 'Therapeutic Jurisprudence' (undated) [Internet website].

<sup>7</sup> . Winick (op cit).

<sup>8</sup> . D Wexler 'Therapeutic jurisprudence: an overview' (undated) [Internet website].

<sup>9</sup> . Ibid. See D Carson 'Therapeutic jurisprudence and adversarial justice: questioning limits' **Western Criminology Review** (2003) at 125-126 for a critique of therapeutic jurisprudence.

recovery from sexual assault) in the exposition of operational definitions below.<sup>11</sup> We then subsequently make use of the key principles thus identified in our evaluation of the research observations.<sup>12</sup>

## **b) Restorative justice**

A second perspective that provides a useful lens through which to examine the experiences of sexual assault victims in the criminal justice system is that of restorative justice. Throughout history, restorative justice approaches were used in order to solve conflicts between parties and to restore peace in communities.<sup>13</sup> In recent years, dissatisfaction with the retributive and rehabilitative approaches to crime has given rise to a renewed interest in restorative justice.

This concept can be explained as follows:

'... [T]he process of restorative justice seeks to redefine crime, interpreting it not so much as breaking the law, or offending against the State, but as an injury or wrong done to another person. It encourages the victim and the offender to be directly involved in resolving conflict and thereby becoming central to the criminal justice process with the State and legal professionals becoming facilitators, supporting a criminal justice system which aims at offender accountability, full participation of both the victim and the offender and making good or putting right the wrong.'<sup>14</sup>

The notion of restorative justice is therefore essentially concerned with restoring the balances upset by crime and other forms of anti-social behaviour.<sup>15</sup>

Restorative justice programmes have a number of elements in common, including:

- Crime is regarded as an injury to victims and community peace;
- The victim, community and offender are active role-players in the process;
- Empowering victims in their search for direct involvement in the criminal justice process;
- Assisting victims to regain a sense of control in the areas of their lives affected by the offence; and
- Holding offenders responsible for their behaviour.<sup>16</sup>

---

<sup>10</sup> . Feldthusen et al propose that the notion of 'therapeutic' should be understood as 'any outcomes that assist in the psychological recovery of the victim' - (op cit) at 68.

<sup>11</sup> . See Chapter 2.

<sup>12</sup> . See Chapter 4.

<sup>13</sup> . United Nations Office for Drug Control and Crime Prevention [UNODCCP] **Handbook on Justice for Victims** (1999) at 42. Interestingly, reconciliation, restoration and harmony lie at the heart of African models of adjudication - see South African Law Commission **Project 106: Juvenile Justice Report** at Par 1.11.

<sup>14</sup> . South African Law Commission **Issue Paper 7 (Project 82) Sentencing: Restorative Justice** at Par 2.7.

<sup>15</sup> . Carson (op cit) at 126.

<sup>16</sup> . South African Law Commission **Issue Paper 7 Sentencing** at Par 2.6.

While certain of the initiatives traditionally associated with restorative justice may not be appropriate in the context of sexual assault (for example, 'victim-offender mediation' schemes),<sup>17</sup> there are aspects of this approach that may be of use in an evaluation of victim's experiences with the criminal justice system. These aspects include -

- The acknowledgment of the victim as an active role-player in the criminal justice process, and empowerment of victims to be directly involved in this process; and
- Assisting victims to regain a sense of control in the areas of their lives affected by the sexual assault.

We accordingly also examine the role of the victim in the criminal justice process, with specific reference to the notion of victim participation, in the chapter setting out the operational definitions below. This is similarly used in our evaluation of the research observations.

## **2.2 Research Methodologies**

During the second phase of the study, researchers relied on qualitative research methods in the form of interviews with victims as well as focus group discussions with counsellors. We also revisited the literature review conducted during the early stages of the project.<sup>18</sup>

## **2.3 Identification of Interviewees**

Researchers made an initial decision that potential participants in the study would be identified and approached through Rape Crisis Cape Town, one of the Consortium partners. This organisation provides counselling and other services to adult victims of sexual assault at its three offices in Observatory, Heideveld and Khayelitsha.

In designing the interview process, researchers recognised the importance of balancing two sets of interests, i.e. on the one hand the need to obtain information and on the other hand the need to do this in the way that would be least invasive to victims. After consultation with the counselling coordinators at Rape Crisis, researchers decided on the following method. Firstly, the counselling departments at the Observatory and Khayelitsha offices would identify potential research participants.<sup>19</sup> This would be based on the broad criterion of whether the victim had reported the sexual assault to the police. (While we initially contemplated selecting cases where the case had been reported and the perpetrator was arrested, it soon transpired that this selection criterion would result in a negligibly small number of potential participants.)

The identification of potential research participants was done by the counselling department with reference to the internal Rape Crisis records; in order to protect confidentiality, the personal details of potential participants were not supplied to researchers. The list of potential interviewees was compiled starting with current clients, and then working 'back' in time to previous clients. A cut-off point was set, since it was felt that it could potentially be traumatic for former clients who

---

<sup>17</sup> . See in this regard eg UNODCCP (op cit) at 42.

<sup>18</sup> . See Chapter 3.

<sup>19</sup> . At the time of designing the research model, the Heideveld office was not yet providing counselling services.

had concluded their counselling sessions with Rape Crisis some time ago to be contacted 'out of the blue' and returned to the point of crisis.

Secondly, researchers identified counsellors who were willing to assist with the research and held briefing sessions with them. These counsellors then contacted the clients identified as potential participants to establish whether they were willing to participate in the research. Efforts were made for current and former clients to be contacted by their 'own' counsellors; however, this was not always possible in the case of clients whose counsellors were not participating in the research project.<sup>20</sup> The interviews were then conducted by the counsellors during a special session arranged for this purpose.

Although the initial screening of the case records indicated a fair number of potential interviewees, this number was rapidly reduced once the counsellors started making efforts to contact these victims. Especially in 'older' cases, the contact details were not necessarily still current, and the victims were therefore no longer contactable. A number of victims who were contacted indicated that they were not prepared to participate in the research. This process eventually yielded a total of eight victims who were willing to take part in the interviews.

Because this constituted a small sample group, researchers subsequently decided to conduct focus group discussions with Rape Crisis counsellors to obtain further information about the experiences of their clients.<sup>21</sup> Two facilitated focus group discussions were held, with a total of thirteen counsellors (both full-time workers and volunteer counsellors) participating. One focus group discussion was conducted in English, the other in Xhosa.

The data obtained from counsellors during the focus group discussions firstly derived from the information that victims conveyed to their counsellors during the counselling process. Secondly, counsellors also related their own experiences, for example, in attempting to make contact with investigating officers or prosecutors on behalf of clients.

## **2.4 Research Instruments**

Researchers designed a structured questionnaire to guide the interviews with victims.<sup>22</sup> [The questionnaire is attached as **Appendix A.**] This questionnaire was translated into Afrikaans and Xhosa. The victim questionnaire also served as the basis for the focus group discussions, although these discussions were conducted in a slightly less structured format than the victim interviews. Interviews and focus group discussions were recorded on tape, with the permission of interviewees, and these tapes were subsequently transcribed and translated into English, where applicable.

The questions put to victims approximately followed the course of the criminal justice process, and attempted to examine victims' experiences at each stage of this process. Specific emphasis was placed on the nature of information they received at each stage, as well as on what additional information would have been useful.

---

<sup>20</sup> . In some cases, the 'original' counsellors were no longer at Rape Crisis; in other instances, current counsellors were not available for participation in the research.

<sup>21</sup> . Due to time and resource constraints, it was not possible to explore alternative strategies to identify and contact potential research participants.

## 2.5 Workshop on Research Results

On 8 March 2003, the researchers conducted an information workshop with criminal justice personnel (magistrates, prosecutors and police officials) as well as representatives from various non-governmental organisations [NGO's] working in the area of sexual assault.<sup>23</sup> A total of 57 persons participated in the workshop.

The purpose of the workshop was firstly to disseminate the results of the first research phase to criminal justice personnel who had participated in the research, and secondly to invite comments on the findings of the second phase. The second phase research results were presented to workshop participants in preliminary format.

Workshop participants were then requested to share strategies they have developed to overcome current obstacles regarding bail in sexual assault cases, and to formulate practicable recommendations to address shortcomings identified through the research. A summary of these 'promising practices' and recommendations put forward by workshop participants has been incorporated in Chapter 5 of this report.

## 2.6 Limitations of the Study

The principal limitation of this study is the small sample group of victims who participated in the interview process. The experience of researchers in this respect is not unique: other analogous studies have reported similar difficulties.<sup>24</sup> (Bacik et al point out that when empirical research focuses on emotionally charged and potentially traumatic experiences of individuals such as sexual assault, recruitment of research participants is difficult.)<sup>25</sup>

In order to balance the small size of the sample group, researchers firstly conducted additional focus group discussion as set out above; where appropriate, we also made efforts to correlate our research observations with the findings from the first research phase as well as with findings from comparable studies.

A second limitation lies in the inherent conditions of obtaining information from transcribed interviews. This method of analysis does not necessarily always accurately reflect punctuation or voice inflection, thus circumscribing the integrity of the information. This may have been exacerbated where the interviews and focus group discussions took place in Xhosa and were subsequently translated into English, resulting in the loss of subtle nuances in the translation. With these potential pitfalls in mind, researchers made concerted efforts to render the information as accurately as possible.

---

<sup>22</sup> . The group who developed the questionnaire consisted of Heléne Combrinck, Raygaanah Barday, Kathleen Dey and Samantha Waterhouse.

<sup>23</sup> . The non-governmental organisations present at the workshop covered a broad range of interests. In addition to organisations providing services to sexual assault victims, the workshop was also attended by representatives from research institutes, university-based Law Clinics as well as the Commission of Gender Equality.

<sup>24</sup> . See eg S Stanton et al *Improved Justice for Victims of Sexual Violence?* (1997) at 38-40.

<sup>25</sup> . I Bacik et al *The Legal Process and Victims of Rape* (1998) at 64.



# CHAPTER 2

## OPERATIONAL CONCEPTS

### 1. INTRODUCTION

In keeping with the research model outlined above, we firstly explore the role of the sexual assault victim in the South African criminal justice process. This is done with the view of understanding the notion of victim participation as envisaged within a framework of restorative justice. Secondly, we examine certain concepts associated with the psychological recovery from trauma in order to gain a better understanding of the key questions posed by a model of therapeutic jurisprudence.

### 2. THE ROLE OF THE VICTIM IN CRIMINAL PROCEEDINGS

#### 2.1 The adversarial criminal justice system

The South African criminal justice system is predominantly adversarial in nature.<sup>26</sup> Criminal trials are seen as two-sided 'battles' between the state (represented by the public prosecutor) and the accused, who has a constitutionally guaranteed right to legal representation.<sup>27</sup> The presiding officer acts as an impartial umpire who decides the guilt or innocence of the accused based on the evidence adduced by both sides. The role of the judicial officer is an essentially passive one - she or he should 'intervene only to ensure that each party plays according to the rules'.<sup>28</sup>

In South African law, as in other legal systems, sexual assault is prosecuted as an offence against the state or social order, and not as a dispute between the victim and the accused.<sup>29</sup> The immediate effect of this is that the complainant in a sexual assault case is not a party to the criminal trial. Despite the intensely personal nature of the crime, she is no more than a state witness. This implies, for example, that she does not have a right to legal representation at any stage of the proceedings.<sup>30</sup> (The prosecutor does not act as the victim's representative; the prosecutor's primary role is to assist the court in arriving at a just verdict and, in the event of a conviction, a fair sentence based upon the evidence presented.<sup>31</sup>)

In addition, the limited role of the victim implies that she does not have the right to -

- Contest any interlocutory findings, for example, a decision to release the accused on bail;

---

<sup>26</sup> . For a more detailed discussion, see B Pithey et al *The Legal Aspects of Rape in South Africa* (1999) at 35 et seq. See also South African Law Commission *Discussion Paper 96 (Project 73) Simplification of Criminal Procedure* (2001) at Par 2.6.

<sup>27</sup> . Sec 35(3)(g) of the Constitution of the Republic of South Africa Act 108 of 1996 [hereinafter referred to as 'the Constitution'].

<sup>28</sup> . South African Law Commission *Discussion Paper 96 Simplification of Criminal Procedure* at Par 2.11.

<sup>29</sup> . In addition to laying criminal charges against the perpetrator, a victim of sexual assault may choose to pursue a civil claim in delict against him or her.

<sup>30</sup> . Members of the Consortium on Violence Against Women have compiled a number of proposals aimed at addressing the restrictions imposed on the victim by the adversarial nature of the South African criminal justice system as it currently stands. See eg Pithey et al (op cit) at 35 et seq; L Artz et al *Submission to the South African Law Commission Project 107 Sex Offences Act Discussion Paper 102* 85 et seq. Unfortunately, the scope of this document does not permit a more detailed discussion of this aspect.

<sup>31</sup> . See the National Prosecution Policy (1999) at 3.

- Call witnesses, adduce evidence or challenge evidence presented by the prosecution or the defence at the criminal trial or related proceedings such as the bail hearing; or
- Appeal against an acquittal or, in the event of conviction of the accused, against the sentence imposed.

The reality is however that victims experience sexual assault and the subsequent criminal justice process (where they elect to lay charges with the police) as intensely personal. This is evidenced by the fact that victims often refer to the incident as 'my rape', to the investigating officer as 'my detective' and the criminal investigation and trial as 'my case'.<sup>32</sup> This is not only contradicted by the fact that she is not a party to the criminal trial, but also by the fact that prosecutors in turn may also often claim a sense of 'ownership' by similarly referring to the trial as 'my case'.<sup>33</sup> This subtle (but real) distinction in perceptions may affect the expectations of the victim, as well as the eventual outcome of the case.

It is therefore not surprising that victims generally experience a sense of alienation and exclusion from the criminal justice process, as expressed in the following observation:

'Even if the offender is apprehended and brought to trial, the experience of victims in many jurisdictions is that they have been marginalized and do not have the opportunity to express their views and concerns in the criminal justice process...'<sup>34</sup>

## 2.2 Victim participation in criminal proceedings

Given the inherent limitations of a predominantly adversarial system, the possibility of direct victim participation in the criminal trial as envisaged by the notion of restorative justice may be perceived as problematic. However, it is useful here to make a distinction between **active** and **passive** involvement in decision-making.<sup>35</sup> An example of active participation would be the preparation by the victim of a victim impact statement; an example of passive participation is victim notification, which entails authorities keeping victims informed of the developments in their case.<sup>36</sup>

Significantly, researchers have found that victim participation in the criminal justice process, whether active or passive, is important for the victim's conception of fairness.<sup>37</sup> Victim involvement and the opportunity to voice concerns are necessary not only for victim satisfaction with justice but also for psychological healing.<sup>38</sup> The reason for this may be found in the fact that since victims have limited control over the process following their reporting of the sexual assault, knowing that they have been heard by 'the system' is essential for victims, as it allows them the comfort of knowing that they did everything possible to promote their desired outcome.<sup>39</sup>

---

<sup>32</sup> . See Pithey et al (op cit) at 35-36.

<sup>33</sup> . Based on informal observations made by researchers.

<sup>34</sup> . UNODCCP (op cit) at 1.

<sup>35</sup> . *Idem* at 37.

<sup>36</sup> . *Idem* at 35.

<sup>37</sup> . Bacik et al (op cit) at 53.

<sup>38</sup> . *Idem* and authorities cited there

<sup>39</sup> . DG Kilpatrick et al 'Chapter 10: Sexual Assault' in A Seymour et al (eds) *National Victim Assistance Academy* (2000) [Internet website].

### 3. THE PURPOSE OF BAIL

The purpose of bail has traditionally been formulated as follows: to strike a balance between the **liberty of the accused** (who, pending the outcome of the criminal trial, is presumed to be innocent) and the **interests of society** (the accused should stand trial and there should be no interference with the administration of justice).<sup>40</sup> In *S v Dlamini*<sup>41</sup> the Constitutional Court stated that the main objective of bail is to minimise the prejudice suffered by awaiting trial prisoners, or put slightly differently, to maximise personal liberty.<sup>42</sup>

It is accordingly important to bear in mind that a refusal of bail does not imply the imposition of a penalty: a refusal of bail is 'completely non-penal in character'.<sup>43</sup> This principle has certain practical implications:

- The discretion to allow or refuse bail may never be influenced by punitive notions;
- The amount set for bail may not be based on the consideration that a high amount may have a deterrent effect on possible future perpetrators; and
- Bail is not a means to be employed in order to deter offenders. The approach of the court should always be to grant bail where it is at all possible.<sup>44</sup>

Against this background, it is clear that the parameters of so-called 'preventive detention' (where an accused person is in effect refused bail in order to prevent the commission of further offences or acts of intimidation against victims) are relatively narrow in South African law.<sup>45</sup> An accused person may not be detained merely on the basis of the fact that he or she is charged with sexual assault. This can be contrasted with the oft-voiced opinion that persons arrested for sexual assault should not get bail at all.<sup>46</sup>

### 4. SEXUAL ASSAULT AS A TRAUMATIC EVENT

In order to fully appreciate the consequences of sexual assault for the victim, it is important that rape and other forms of sexual assault should be understood as a **traumatic event**. Rape is not just unwanted sex, it is a highly traumatic experience.<sup>47</sup> It is usually experienced as life-threatening and as an extreme personal violation.<sup>48</sup>

The essential element of rape is the physical, psychological, and moral violation of the person... The purpose of the rapist is to terrorize, dominate and humiliate his victim, to render her utterly helpless. Thus rape, by its nature, is intentionally designed to produce psychological trauma.<sup>49</sup>

---

<sup>40</sup> E du Toit et al *Commentary on the Criminal Procedure Act* (Revised 2003) at 9.2. See also J Van der Berg *Bail: A Practitioner's Guide* (2001) at Par 9.

<sup>41</sup> *S v Dlamini*; *S v Dladla*; *S v Joubert*; *S v Schietekat* 1999 2 SACR 51 (CC).

<sup>42</sup> At Par 9 fn 17.

<sup>43</sup> Van der Berg (op cit) at Par 6.

<sup>44</sup> *Ibid.*

<sup>45</sup> See H Combrinck "'He's out again": the role of the prosecutor in bail for persons accused of sexual offences' *Law, Democracy and Development* (2001) at 38.

<sup>46</sup> See South African Law Commission *Project 107: Sexual Offences Report* (2002) at 338 n 15.

<sup>47</sup> D Hansson *What is Rape Trauma Syndrome?* (1992) at 1.

<sup>48</sup> *Ibid.*

<sup>49</sup> J Herman *Trauma and Recovery* (1997) at 57-58. See also K Dey *Reasons Why Women Delay or Avoid Reporting or Disclosing Rape* (2002) at 1.

Current literature emphasizes that the rape victim's main emotional reaction at the time of the rape is **fear**.<sup>50</sup> victims experience fear of mutilation and death.<sup>51</sup> In addition, many victims express the fear of accidentally seeing the perpetrator again after the sexual assault.<sup>52</sup> It is therefore understandable that a major psychological consequence for victims is that they no longer feel safe.<sup>53</sup>

## **5. POST-TRAUMATIC STRESS DISORDER AND RAPE TRAUMA SYNDROME**

Hansson explains that many people who suffer a serious trauma like losing someone they love or being disabled in a car accident experience physical, psychological and behavioural problems.<sup>54</sup> These problems have been termed 'Post-Traumatic Stress Disorder'. This condition is a normal reaction to 'abnormal' stress or trauma, and is not a form of mental illness.<sup>55</sup>

In 1972, two researchers, Ann Burgess and Lynda Holmstrom, embarked on a study of the psychological effects of rape.<sup>56</sup> Their study included interviews conducted with 129 rape victims (92 women and 37 children) at a hospital emergency room. The researchers found that immediately after the assault, every woman interviewed had symptoms of post-traumatic stress disorder.<sup>57</sup>

Burgess and Holmstrom observed a pattern of psychological reactions that they termed 'Rape Trauma Syndrome'. They noted that in the aftermath of rape, victims complained of insomnia, nausea, startle responses, and nightmares, as well as dissociative or numbing symptoms. The researchers also commented that some of the victims' symptoms resembled those previously described in combat veterans.<sup>58</sup>

Rape Trauma Syndrome as a special case of Post-Traumatic Stress Disorder has subsequently been accepted as a referring to a cluster of emotional responses to the extreme stress experienced by the victim during the rape.<sup>59</sup> Adverse mental and psychological health outcomes include: phobias, depression, sexual difficulties, failure to resume previous social or sexual relationships, failure to return to work, substance abuse and suicidal ideation.<sup>60</sup>

Rape victims appear to experience different symptoms of Rape Trauma Syndrome over time.<sup>61</sup> Ledray distinguishes the following four general phases of response:<sup>62</sup>

---

<sup>50</sup> . B Te Paske **Rape and Ritual** (1982) at 22 and authorities cited there. See also S Brownmiller **Against Our Will** (1975) at 358.

<sup>51</sup> . Ledray notes that well over half of the victims included in her research did not expect to live through the rape - LE Ledray **Recovering from Rape** (1994) 2<sup>nd</sup> ed at 88.

<sup>52</sup> . Idem at 89.

<sup>53</sup> . This fear is not necessarily limited to victims of sexual assault only: it may be experienced by victims of crime generally. See UNODCCP (op cit) at 51.

<sup>54</sup> . Hansson loc cit.

<sup>55</sup> . Ibid; Ledray (op cit) at 98.

<sup>56</sup> . Herman (op cit) at 31.

<sup>57</sup> . Idem at 57.

<sup>58</sup> . Idem at 31.

<sup>59</sup> . Bacik et al (op cit) at 27. Rape Trauma Syndrome is categorised as a special case of PTSD in the 4<sup>th</sup> edition of the American Psychiatric Association's **Diagnostic and Statistical Manual of Mental Disorders [DSM-IV]** in 1994.

<sup>60</sup> . Bacik loc cit. See also Dey (op cit) at 2-4.

<sup>61</sup> . Hansson (op cit) at 3.

<sup>62</sup> . Ledray (op cit) at 81-82.

- Phase 1: Shock and disbelief.
- Phase 2: Confusion, fear (including fear of seeing the rapist again),<sup>63</sup> depression and anger.
- Phase 3: Resolution and coping.
- Phase 4: Long-term adjustment.

The author points out that the length of these periods varies considerably depending on individual circumstances. However, it can be said that the first phase typically lasts a few days and the second phase six to twelve weeks.<sup>64</sup>

## 6. SECONDARY VICTIMISATION

'Rape does not end with the departure of the assailant. Instead, the institutional processing that occurs can be equally devastating for the victim.'<sup>65</sup>

The phenomenon of 'secondary victimisation' can be described as the unsympathetic, disbelieving and inappropriate responses that victims of sexual assault experience at the hands of society in general and at each stage of the criminal justice process.<sup>66</sup> These responses, often based in stereotypical perceptions of rape and of how rape victims should behave, serve to exacerbate the effects of sexual assault upon victims.

It has been noted that secondary victimisation through the process of criminal justice may occur because of difficulties in balancing the rights of the victim against the rights of the accused.<sup>67</sup>

'More normally, however, it occurs because those responsible for ordering criminal justice processes and procedures do so without taking into account the perspective of the victim.'<sup>68</sup>

Stanton and Lochrenberg note the following indicators of secondary victimisation by state officials at different stages of the criminal justice process:<sup>69</sup>

### Police:

- Disbelieving and insensitive responses when women report sexual assault;
- Discouraging or preventing women from laying charges;
- No immediate access to private waiting or report taking facilities;

---

<sup>63</sup> . Idem at 87.

<sup>64</sup> . Idem at 82.

<sup>65</sup> . L Holmstrom and A Burgess *The Victim of Rape: Institutional Reactions* (1978) at vii cited in Bacik et al (op cit) at 31.

<sup>66</sup> . S Stanton and M Lochrenberg *Justice for Sexual Assault Survivors?* (1994) at 1. See also UNODCCP (op cit) at 9; Bacik et al (op cit) at 30 et seq.

<sup>67</sup> . UNODCCP (op cit) at 9.

<sup>68</sup> . Ibid.

<sup>69</sup> . Stanton and Lochrenberg (op cit) at 2-3. The authors also list instances of secondary victimization experienced by victims during the medical examination; however, due to the specific focus of this report, these instances are not listed here. See also Bacik (op cit) at 31.

- Insensitive treatment;
- Lack of time and effort put into an investigation;
- Not providing victims with information on procedures or updating victims on the investigation progress;
- Not returning phone calls;
- Not providing protection from the perpetrators;
- Biased criteria which are used when deciding whether a charge is unfounded or needs to be closed;
- A lack of women police officers; and
- Not providing victims with copies of their statements.<sup>70</sup>

**Prosecutors:**

- Not consulting with complainants before the trial;
- Biased criteria used by prosecutors in deciding whether to prosecute or withdraw a case;
- Not involving complainants in or informing them about decisions that are taken;
- Not ensuring police have thoroughly investigated cases;
- Inadequate preparation for court cases;
- Not making use of expert witnesses;
- Little or no information on court procedures on the progress of cases being given to victims; and
- Not objecting to inappropriate cross-examination of the complainant.<sup>71</sup>

**At court:**

- Lack of private waiting facilities;
- Long time delays between reporting an incident and appearing in court; and
- Perpetrators being released on bail without adequate protection being provided to the victim.<sup>72</sup>

---

<sup>70</sup> . Stanton and Lochrenberg (op cit) at 2.

<sup>71</sup> . Idem at 3.

<sup>72</sup> . Idem at 3.

## 7. RECOVERY FROM SEXUAL ASSAULT

Herman explains that the core experiences of psychological trauma are disempowerment and disconnection from oneself and others.<sup>73</sup> Trauma robs the victim of a sense of power and control, and the guiding principle of recovery is therefore to restore power and control to the victim.<sup>74</sup>

'Recovery, therefore, is based upon the empowerment of the victim and the creation of new connections. **Recovery can take place only within the context of relationships**; it cannot occur in isolation. In her renewed connections with other people, the victim re-creates the psychological faculties that were damaged or deformed by the traumatic experience. These faculties include the basic capacities for trust, autonomy, initiative, competence, identity and intimacy.'<sup>75</sup>

Researchers have noted that the criminal justice system may play a role in allowing victims to reconstruct their lives. One study reported that victim participation not only affected potential cooperation by victims within the criminal justice system, but also promoted victims' recovery from the aftermath of crime by helping them to reassert a sense of control over their lives.<sup>76</sup> However, it is pointed out in a cautionary vein that the victim's experience is highly dependent on the quality of contact with key personnel within the criminal justice system and the quality of information received from the system.<sup>77</sup>

In order to gain an understanding of the role of the criminal justice process in the victim's recovery, it is also useful to bear in mind that where a victim chooses to report the sexual assault to the police, thus setting in motion the criminal justice process, this latter process takes its course alongside the victim's personal route of recovery.<sup>78</sup> It may well occur that the points at which key events take place in the criminal justice process are at odds with where the victim finds herself in the therapeutic process. Herman expresses this as follows:

'Even at best, the victim has to expect a marked disparity between her own timetable of recovery and the timetable of the justice system. Her efforts to reestablish a sense of safety will most likely be undermined by the intrusions of legal proceedings; just as her life is stabilizing, a court date is likely to revive intrusive traumatic symptoms.'<sup>79</sup>

One example of this disparity is that at the point where victims are expected to provide the police with a detailed account of the sexual assault, they usually find themselves in a state of acute shock and crisis - hardly conducive to recounting the type of detail that is required.

---

<sup>73</sup> . Herman (op cit) at 132. See also L Leibowitz et al 'A stage-by-dimension model of recovery from sexual trauma' *Journal of Interpersonal Violence* (1993) at 379.

<sup>74</sup> . Herman (op cit) at 159.

<sup>75</sup> . Idem at 132. Emphasis added.

<sup>76</sup> . DG Kilpatrick et al 'Victim and crime factors associated with the development of crime-related post-traumatic stress disorder' *Behaviour Therapy* (1989) at 199-214 cited in Bacik et al (op cit) at 58.

<sup>77</sup> . Ibid.

<sup>78</sup> . See in this regard generally S Waterhouse *Pre-trial Consultation in Rape Cases* (2002) at 11-13.

<sup>79</sup> . Herman (op cit) at 165.

# CHAPTER 3

## PERCEPTIONS AND EXPERIENCES OF RAPE VICTIMS AND COUNSELLORS

### 1. INTRODUCTION

In this chapter, we report on the experiences and perceptions of victims and counsellors regarding bail as these emerged from the interviews and focus group discussions.<sup>80</sup> We recount, without evaluation, the information obtained from interviews and focus group discussions. (The evaluation of researchers' observations follows in Chapter 4 below.)

We firstly look at the phenomenon of case attrition, and then examine the expectations that victims held when they reported the sexual assault to the police. We subsequently explore the levels of contact between the victim and the investigating officer, as well as the nature of the relationship between them. We also look at the relationship between the victim and the prosecutor and further investigate the question of victims' access to information during different stages of the criminal justice process. We examine victims' participation in bail proceedings, and finally look at specific concerns noted by victims, including safety, perceptions of police corruption or complicity and intimidation by the perpetrator or others.

### 2. CASE ATTRITION

Although this phase of the research did not include any quantitative analysis, the anecdotal evidence provided by counsellors suggested high levels of case attrition.<sup>81</sup> One counsellor pointed out that many cases 'don't get to the point where bail becomes an issue'<sup>82</sup> - in other words, where the suspect is arrested. Another participant confirmed this trend, with reference to a specific police station:

'The problem is once the case is reported it doesn't even go to [X] court, they end up here at [Y police station]. If it is at Y [police station] anything can happen.'<sup>83</sup>



#### OBSERVATION:

- ★ Counsellors pointed out that in many of the cases they encountered, bail did not become an issue due to the fact that the perpetrator was not arrested.

<sup>80</sup> . See **Appendix 1**.

<sup>81</sup> . Case attrition can be described as the phenomenon where cases 'drop out' of the system between the point of reporting to the police to the ultimate conclusion of the criminal trial. When examining case attrition, three questions are important: how many cases exit the system, at what point, and why this happens.

<sup>82</sup> . FG1.

<sup>83</sup> . FG2.



### 3. VICTIMS' EXPECTATIONS

In order to establish whether the criminal justice system is meeting the needs and expectation of rape victims, the initial step was to examine what these needs and expectations were. Accordingly, this was the first question put to victims during the interviews.

The majority of respondents answered that they expected the perpetrator to be arrested immediately.<sup>84</sup> They wanted the police to take their cases seriously,<sup>85</sup> and to protect them.<sup>86</sup> One respondent expressed her need for information about the arrest of the perpetrator:

'When I went to report at the police station I thought that I would be seeing the investigating officer who was dealing with my case and also of [sic] when will they arrest the perpetrator because I did not know how do they arrest a person. I was hoping that they would tell me how they are going to arrest the person.'<sup>87</sup>

A counsellor recounted that clients expected the case to be finalized quickly: 'in a month the case must be wrapped up'.<sup>88</sup> She added that she then feels obliged to inform victims of the reality, i.e. that the criminal trial will likely take much longer. She noted that victims are 'put off' when they're told about the length of the process.

In terms of the court process, a counsellor noted that victims expect the rapist to 'own up' - to confess and take responsibility for the offence.<sup>89</sup> (Ironically, anecdotal evidence suggests that the rate of accused pleading guilty is lower for sexual offences than for other comparably serious offences.)<sup>90</sup>

'They're shocked when the rapist lies and blames her in court. This is ironic. She knows he can rape but she doesn't expect him to lie or blame her.'

On another level, a counselor explained that some victims anticipate a sense of 'validation' from the criminal justice process. This means that they expect some form of official recognition of the harm done against them by the perpetrator.

'Until the judge validates her in the eyes of his profession and her community - only then can she start to heal.'<sup>91</sup>

During the interviews counsellors also pointed out that a victim expects to be given an opportunity to participate at court, since decisions taken at court will affect her.

'... [I]n the process the survivor is left in the dark she is not aware that the perpetrator is released on bail in a night court, she was not given an opportunity to participate... because the decision of releasing him on bail is the decision that affects her 'cause this person will harass her after being released, this makes our clients unhappy and they loose hope and see their cases failing.'<sup>92</sup>

---

<sup>84</sup> . SV1, SV2, SV3, SV4, SV5, FG1.

<sup>85</sup> . SV4, FG1.

<sup>86</sup> . FG2.

<sup>87</sup> . SV3.

<sup>88</sup> . FG1.

<sup>89</sup> . FG1.

<sup>90</sup> . Based on researchers' personal experience.

<sup>91</sup> . FG1.

<sup>92</sup> . FG2.



## OBSERVATIONS:

Victims expect -

- ★ that the perpetrator will be arrested immediately;
- ★ information about the arrest of the perpetrator;
- ★ that their cases will be taken seriously;
- ★ that they will be protected;
- ★ that the case will be finalised quickly;
- ★ that the perpetrator will take responsibility for his actions;
- ★ 'validation' from the legal system; and
- ★ an opportunity to participate in decisions that will affect them.

#### **4. CONTACT BETWEEN THE VICTIM AND THE INVESTIGATING OFFICER**

It emerged from the interviews with victims as well as from the counsellors' focus group discussions that victims experience major difficulties in establishing and maintaining contact with investigating officers. One victim reported that she did not meet the investigating officer at all:

'I have not met the investigating officer but I was phoned by the prosecutor a couple of times to inform me about things... I would have liked to meet him so he can feel comfortable telling me what is happening with the case.'<sup>93</sup>

It was apparent that victims were prepared to make an effort to contact the investigating officers,<sup>94</sup> but often these efforts met with little success.

'It was not easy at all as when I called him I was told that he was not at the police station and I would leave a message for him to call me back but he never did, sometimes they would tell me that he did not come to work the whole day.'<sup>95</sup>

'Yes he came to my house a few days after I reported the case. He had some questions to ask me and after that I tried to phone a few times but he was never available and he did not phone back.'<sup>96</sup>

---

<sup>93</sup> . SV4.

<sup>94</sup> . SV2, SV3, SV6.

<sup>95</sup> . SV3.

The unavailability of investigating officers is also apparent from the following interview excerpt, where the interviewer asked the victim what she would have liked the investigating officer to do different:

*Victim:* 'Not that I wanted him to do anything different. I just want to know more about the case, because the last time he phoned, it's the court case. He didn't give us a date or anything, just said that there is a court case. That's all, since then, we were phoning him and then, my mother's trying to contact him...'

*Interviewer:* 'Would it be right to say that you would like him to contact you, more than the other way round?'

*Victim:* 'No. Not that he should contact us - we contact him but he's never around.'<sup>97</sup>

Counsellors confirmed that they encountered similar difficulties when trying to contact investigating officers on behalf of their clients.<sup>98</sup> They expressed their frustration with the lack of cooperation on the side of investigating officers, given the pivotal role of the investigating officer in the progress of the investigation:

'I'm talking about an investigating officer who is not prepared to make any follow up, you can't get the investigating officer even over the phone or any other way they do not care... We are running at a loss because we are dealing with someone who is in a state and with someone who doesn't care and who has powers because this investigating officer is the one who has to make sure that things do happen.'<sup>99</sup>

There was a perception that victims who have an 'inroad' into the system in the form of, for example, a family member in the SAPS, can expect better treatment. The intervention of Rape Crisis counsellors also appeared to improve the quality of service received by victims.

'Whenever my mother phones him to find out if he has got more information for her, he's not in the office or he's, like, busy doing something and he never, like, want to give my mother his cell phone number. And whenever she tries to phone in, he's never there. So my mother, my uncle is also a detective, in Robbery and Murder, she contacted him, and he contacted this detective who is working on my case...'<sup>100</sup>

'When Rape Crisis phones, clients say police are more friendly, even if we have to phone up to three times to get through first.'<sup>101</sup>

---

<sup>96</sup> . SV5.  
<sup>97</sup> . SV7.  
<sup>98</sup> . FG2.  
<sup>99</sup> . FG2.  
<sup>100</sup> . SV7.  
<sup>101</sup> . FG1.

## **OBSERVATIONS:**

Victims and counsellors alike reported major difficulties in establishing and maintaining contact with investigating officers. In particular -

- ★ One victim stated that she never met the investigating officer in her case.
- ★ Victims were prepared to make significant efforts to contact investigating officers.
- ★ The limited availability of investigating officers was compounded when they failed to respond to messages left by victims.
- ★ Researchers noted a perception that victims who had an intermediary to intervene on their behalf (for example, a family member in the SAPS or a Rape Crisis counsellor) could expect better services.

## **5. RELATIONSHIP BETWEEN THE VICTIM AND THE INVESTIGATING OFFICER**

The interviews revealed startling information about the handling of sexual assault cases by certain investigating officers as victims recounted numerous instances of secondary victimisation.<sup>102</sup>

A counselor recounted an incident where the investigating officer, instead of speaking to the victim in person, 'went around' asking for personal information about the victim: 'what she's like, etc'.<sup>103</sup> One victim related that she did not feel that the investigating officer was doing his best in investigating the case:

'He treated me in a way that showed me that he did not care at all what happened to me and he also made me feel that it was my fault that I got raped. He never gave me any information regarding the process of the case instead he recommended that I drop the charges because the case was not going anywhere.'<sup>104</sup>

The following excerpt is a telling example of a breakdown in trust between the investigating officer and the victim:

'... and it feels like he don't want to work on my case, nothing is going to happen, he promised me that man don't got bail - just to cool my nerves, just to make me get right until I get out of hospital. But I' m now out of hospital for 3 months, and I didn't hear from him...so now somehow I think he lied to me.'<sup>105</sup>

---

<sup>102</sup> . Given the narrow focus of this research report, we have selected interview excerpts specifically relevant to the question of bail. However, the interviews contain several other instances of secondary victimisation. For example, one victim recounts in detail how the investigating officer's insensitive handling of the investigation directly led to the rape incident becoming a matter of common knowledge in her community, causing her significant anger and grief [SV7].

<sup>103</sup> . FG1.

<sup>104</sup> . SV5.

<sup>105</sup> . SV6.

Counsellors and victims also noted that investigating officers appeared to lose interest in the case as time passes. This was inferred, for example, from the investigating officer’s failure to provide the victim with updates on the case progress.

‘In the beginning, he contacted me, he told me how far the case was. But not now.’<sup>106</sup>


‘In the first stages the investigating officer handle the cases properly as time goes the investigating officer disappears and the victim loses hope and does not turn up so that case just disappears.’<sup>107</sup>

Another aspect that appeared to cause difficulties was the transfer of cases from one investigating officer to another.

‘Sometimes we know the investigating officers but usually they say they are on leave and they have referred the case to another investigating officer and that we should speak to that investigating officer if there is anything, then that investigating officer will say he is busy with other cases and promise to revert to us in due course.’<sup>108</sup>

On the other side of the coin, victims did report positive experiences as well. One victim reported that she was satisfied with the way her case was investigated because ‘the perpetrator was asked questions and arrested’.<sup>109</sup> A second victim explained that she was satisfied with the way that the investigating officer handled her case, since he would ‘always’ visit her after she laid the charge, and he treated her well.<sup>110</sup> Yet another victim recounted her experience as follows:

‘I do not have any complaints against him, he did not do or say anything wrong to me. I only have one complaint about him is that if [sic] he had told me when the perpetrator would appear in court.’<sup>111</sup>

 **OBSERVATIONS:**

Victims recounted numerous instances of secondary victimisation arising from the conduct of investigating officers, including :

- ★ Blaming the victim for getting raped;
- ★ Displaying a lack of interest in investigating the case;
- ★ Recommending that the victim should drop the case;
- ★ Failure to provide the victim with information; and
- ★ Failure to obtain information from the victim and instead questioning others around her.

<sup>106</sup> . SV6.  
<sup>107</sup> . FG1.  
<sup>108</sup> . FG2.  
<sup>109</sup> . SV1.  
<sup>110</sup> . SV2.  
<sup>111</sup> . SV3.

## **OBSERVATIONS (continued):**

Victims and counsellors reported that investigating officers appeared to lose interest as cases progress. Researchers further noted that the transfer of the case from one investigating officer to another specifically caused difficulties.

The impact of these actions on victims was clearly negative, and included the victim losing trust in the investigating officer as well as in her abandoning the case.

It is significant to observe that where victims reported positive experiences, these experiences appeared to be closely linked to the expectation that the perpetrator would be arrested and with the need to remain in contact with the investigating officer.

## **6. RELATIONSHIP BETWEEN THE VICTIM AND THE PROSECUTOR**

Researchers noted few instances where there had been contact between the victim and the prosecutor during the initial stages of the criminal proceedings (or indeed, at all).<sup>112</sup> In one case, the victim again expressed a strong need for information from the prosecutor:

'... I haven't met her and she phoned me twice. She only gave me information regarding [the] bail hearing after it happened and did not indicate what was going to happen next and I would have liked her to tell me what follows. How long is it going to take for the case, what do they expect me to do and what is it that they still need to investigate? I also would have liked her to tell me what the results of the medical examination were and confirm whether I have a strong case or not.'<sup>113</sup>

Two victims pointed out that their cases were still ongoing, and they had accordingly not yet been called for a pre-trial meeting with the prosecutor.<sup>114</sup>

## **OBSERVATION:**

- ★ Contact between prosecutors and victims during the early stages of the criminal proceedings (including the bail hearing) appeared to be very limited.

---

<sup>112</sup> . SV4, SV5, SV8.

<sup>113</sup> . SV4.

<sup>114</sup> . SV2, SV3.

## **7. ACCESS TO INFORMATION**

A major theme running through the interviews was that victims felt disempowered through a lack of information at various stages of the criminal justice process. In order to explore this aspect further, researchers not only investigated what information victims actually received, but also what information would have been useful to victims. Our observations are discussed below with reference to five stages of the criminal justice process, i.e. reporting the case, during the course of the investigation (including the arrest of the perpetrator), consideration of bail, trial proceedings and final outcome of the case.

### **7.1 At the time of reporting the case**

Victims expected to be informed about the steps that would be taken after their reporting the incident of rape, especially regarding the arrest of the perpetrator.<sup>115</sup>

'They took my statement but did not tell me anything, I had no idea what they were going to do next. I wanted them to tell me what they are going to do and I wanted to know that they would do anything in their power to arrest the rapist.'<sup>116</sup>

'I was given information in the form of a Rape Crisis pamphlet and the Sexual Assault Survivors Guide. I was taken to a trauma room where a woman helped me to talk about it because until I was in shock. I did not know at the time what information I would need to know and received no information on what was going to happen to the perpetrator, who was someone I knew.'<sup>117</sup>

### **7.2 During the course of investigation**

The fact that there was little or no communication between respondents and investigating officers often meant that victims did not receive updates regarding key developments in the cases, for example, the arrest of the perpetrator.<sup>118</sup>

In two instances where the victims did know that the perpetrator had been arrested, one had advised the police as to where the perpetrator could be found. In another case the **prosecutor** informed the victim that the perpetrator had been arrested.<sup>119</sup>

'He was arrested a month after the case had been reported despite the fact that he was known to me and I told them where to find him. I find out he was arrested when his mother phoned my mother to ask her to tell me to drop the charges.'<sup>120</sup>

---

<sup>115</sup> . SV3, SV5, FG1.

<sup>116</sup> . SV5.

<sup>117</sup> . SV4.

<sup>118</sup> . SV2, SV3.

<sup>119</sup> . SV4.

<sup>120</sup> . SV5.

### 7.3 Information regarding bail

In terms of information regarding bail, researchers found it useful to make a distinction between two issues. The first (broad) question is how victims understood the role of bail in the context of the criminal justice process. The second question is whether victims received information on the bail status of the perpetrator once he had been arrested.

Counsellors pointed out that clients are generally uninformed about the nature and purpose of bail.

'... There is a lack of information received, etc. When we're speaking to people [clients], bail is not in their heads. Unless they have prior experience, bail is only heard of from Rape Crisis or the police. This is usually when the offender is back on the street and then they think of bail. Most clients are totally unaware of bail.'<sup>121</sup>

The counsellors added that in most cases the victims are not informed about the status of the perpetrator. It is only when the perpetrator is seen on the streets and the victim makes enquiries that she gets information about the perpetrator's release on bail.<sup>122</sup> In response to a question as to how she found out that the perpetrator was not in custody, a victim explained as follows:

'I saw him in town and asked myself why was he there and if he was out on bail.'<sup>123</sup>

### 7.4 Trial proceedings

Counsellors explained that victims often have insufficient time to prepare themselves for the criminal trial, as they are informed very late of impending trial dates.<sup>124</sup> It is also not unheard of for counselors to have to attempt to trace victims on behalf of investigating officers:

'... [S]ome of them [investigating officers] phone us a day before trial and inform us about the trial date or phone the client a day before, in that case we have to go out and look for our clients in order to inform her about the trial date. We even give them money to go to court. The client will have to go to court without court preparations we offer here at Rape Crisis.'<sup>125</sup>

### 7.5 Outcome of the case

It was disturbing to note the lack of knowledge among victims regarding the status and/ or outcome of the criminal cases. There were instances where the victims did not know whether or not their cases were still going ahead.<sup>126</sup> In other instances, victims were aware that their cases were still

---

<sup>121</sup> . FG1.  
<sup>122</sup> . FG1.  
<sup>123</sup> . SV3.  
<sup>124</sup> . FG1.  
<sup>125</sup> . FG2.  
<sup>126</sup> . SV1, SV3, SV5.



current, but did not know what was going to happen next.<sup>127</sup> In yet another case, the victim knew that her case was not proceeding, but did not know why the case had been discontinued.<sup>128</sup>

## **OBSERVATIONS:**

Researchers noted that victims required the following information at the different stages of the criminal justice process:

- ★ The steps that will be taken by the police after the victim reports the sexual assault, with specific reference to the arrest of the perpetrator;
- ★ Reasons for delays in effecting arrest, especially where the perpetrator is known to the victim and she has given the police sufficient information to find him;
- ★ The nature and purpose of bail;
- ★ Information about the status of the perpetrator where an arrest has taken place (especially where the perpetrator has been released on bail and there is thus a possibility that the victim may encounter him);
- ★ Impending trial dates;
- ★ The status of the case on an ongoing basis and what the next step in the process will be; and
- ★ The outcome of the case when the case is finalised and the reasons for this outcome.

Based on the information conveyed in the interviews, it appeared that victims generally did not receive this information.

## **8. THE VICTIM'S PARTICIPATION IN BAIL PROCEEDINGS**

One victim recounts that although she was informed about the outcome of the bail proceedings (the perpetrator in case had been granted bail), neither the investigating officer nor the prosecutor consulted with her to give them information before the decision about bail. She felt that she had information that the court should have been aware of:

'... [B]ecause we lived in the same house and he used to beat us. We are afraid of [sic] the child that we're living with because if he could do it to me he would surely try and do it to the child who is five years old.'<sup>129</sup>

---

<sup>127</sup> . SV2, SV4.

<sup>128</sup> . SV1.

<sup>129</sup> . SV3.

A second victim explained her response to being excluded from the decision-making process around bail conditions:

'The prosecutor phoned me to tell me that he was arrested and then he was let out on bail. Nobody contacted me to ask if any bail conditions should be set and I am very angry that they did not do that because he kept on calling me and sending me SMS's.'<sup>130</sup>

## OBSERVATIONS:

- ★ A participating victim indicated that she had not been consulted by either the investigating officer or the prosecutor regarding the perpetrator's bail. In this instance, this omission had potentially grave implications, since the perpetrator lived in the same house as the victim.<sup>131</sup> She also noted her concern for the five-year old child living in the same house.
- ★ A victim who had been excluded from the decision-making process, and was only informed about the perpetrator's release on bail ex post facto, expressed her anger at this exclusion.

## 9. SPECIFIC CONCERNS NOTED BY VICTIMS

### 9.1 Safety

Participating victims were deeply concerned about their safety in the event of the perpetrator being released on bail. One victim explained how she felt when she was contacted by the perpetrator after reporting the cases:

'Scared. And I felt like he is going to come after me, and that fear came over me again.'<sup>132</sup>

Another victim recounted her response to her concerns about safety:

'I withdrew charges. I was too scared to go on with the case and I know that I will not be able to handle it. He is still out there and I live in fear.'<sup>133</sup>

One of the participating victims pointed out that an initial refusal of bail could leave the victim with a false sense of security:

'Sometimes the police or detective or the court only tell you he don't have bail. But after six, five months his family... may come to court and tell the judge he want, they want bail, and that they got a lot of money. And afterwards the judge give them the bail and out that man goes and then he done it again. So bail is not

---

<sup>130</sup> . SV4.

<sup>131</sup> . The exact nature of the relationship between the perpetrator and the victim is not clear from the interview.

<sup>132</sup> . SV7. Emphasis in the original.

actually that safe, where can they say to the victims he don't get bail. Because after six months, they come out on good behaviour, and then they just done it again.<sup>134</sup>

An additional consideration that emerged was that where the perpetrator is released on bail, there are strong community perceptions that the perpetrator has 'won' the case and is accordingly now free. His release on bail therefore creates the perception that the victim's case was heard by the police but not believed.<sup>135</sup>



## OBSERVATIONS:

- ★ Victims expressed their fear of the perpetrator and concern for their safety in the event of his being released on bail.
- ★ One victim withdrew the charges against the perpetrator as a result of her fear of the perpetrator.
- ★ Another victim pointed out that an initial refusal of bail could leave victims with a false sense of security if the accused is subsequently granted bail without the victim being aware of this.
- ★ Counsellors explained that the perpetrator's release on bail also occasionally leads to a perception among community members that the perpetrator has won the case.

## 9.2 Perceptions of police corruption or complicity

Participating counsellors were concerned about the relationship between certain police officials and gangsters, and attributed the fact that some cases do not even go to court to this perceived relationship between police and gangsters.<sup>136</sup>

'Also [a] gangster who is friends with SAPS threatened the victim's family. SAPS said there was lack of evidence and the case didn't go to court.'<sup>137</sup>

Counsellors also recounted the following harrowing example of police complicity:

'One cop attempted to rape a girl in overnight police custody, and the family laid a charge with the ICD. She was gang raped the day after her release... [In this case] the police set up a meeting with the perpetrator and the victim. The perpetrator offered her family R5000 for her to drop the charge.'<sup>138</sup>

---

133 . SV5.  
134 . SV7.  
135 . FG1.  
136 . FG2.  
137 . FG2.  
138 . FG1.

They explained the resulting breakdown of trust in the criminal justice system as follows:

'There is no hope for people. They go to the PAC office because they believe in Patricia [de Lille] rather than the police.'<sup>139</sup>

### **OBSERVATIONS:**

- ★ Counsellors noted their concerns about police corruption, especially in cases where gangs were involved.
- ★ Counsellors recounted instances of police complicity in attempts to 'buy' victims off to withdraw charges.
- ★ Perceptions of police corruption and complicity lead to a loss of trust in the criminal justice system.

### **9.3 Intimidation by the perpetrator and others**

The interviews revealed high levels of intimidation of victims following the incident of sexual assault.<sup>140</sup> In certain instances, the perpetrator himself contacted the victim.<sup>141</sup>

In other instances, the more difficult problem arose that the victim was contacted or threatened by a party **other than the perpetrator**. (This situation implies that even where the perpetrator is arrested and released on bail with 'no contact' provisions, he would not be liable for violation of his bail conditions unless it could be shown that the person making the threat was acting as a conduit for the perpetrator).

'The perpetrator's wife phoned the victim and threatened her.'<sup>142</sup>

'Yes his friends, I met them at the shop, they asked why I went to report their friend and I told them that he had raped me and it was my right to do so, they told me that I was wrong and I should go and drop the case... I was very upset because I knew they were people who drank and smoked so they could do anything they wanted to.'<sup>143</sup>

'... his mother phoned my mother to ask her to tell me to drop charges (the perpetrator is a friend of my cousin). I did not drop the charges then but I eventually did because I did not have strength to go through with the whole thing. It is not the first time that the perpetrator raped somebody and now he knows he can go and do it again without being caught.'<sup>144</sup>

---

<sup>139</sup> . FG1.

<sup>140</sup> . Due to the fact that interview participants were not always aware of the arrest or bail status of the perpetrator, it was not possible for researchers to establish whether the reported instances of intimidation constituted violations of existing 'no contact' bail conditions.

<sup>141</sup> . FG1, SV4.

<sup>142</sup> . FG1.

<sup>143</sup> . SV3.

<sup>144</sup> . SV5.

Where victims reported instances of intimidation, the official response appeared to be less than satisfactory.<sup>145</sup>

'Our client was supposed to go to court. The accused threatened her with a knife, she went to the prosecutor an hour before the case started to report this in order to add this information to the statement. The prosecutor did not even know about the case even though it was on the list.'<sup>146</sup>

This also emerges from the following interview excerpt:

*Interviewer:* 'What steps did you take and what did you do?

*Victim:* 'I called my investigating officer and told him what happened.'

*Interviewer:* 'What happened then?

*Victim:* 'He said I should go to the police station and report what happened.'<sup>147</sup>

One victim explained how police intervention could enhance the victim's sense of security:

'If the police would try once a week and see how is the person doing, because if the perpetrator stays nearby he would pass by her house even if he is not doing anything. The police should look at that, as the perpetrator would be scared of passing by knowing that the police are watching him. The court must also put a law that says the perpetrator must not go or pass through the street of the victim.'<sup>148</sup>

## **OBSERVATIONS:**

- ★ Victims and counsellors reported high levels of intimidation, not only by perpetrators themselves but also by the perpetrator's friends or family members.
- ★ Where victims did report intimidation, the officials in question did not take action to intervene.

---

<sup>145</sup> . SV1, SV3, SV6.

<sup>146</sup> . FG2.

<sup>147</sup> . SV3.

<sup>148</sup> . SV3.

# CHAPTER 4

## EVALUATION OF RESEARCH OBSERVATIONS

### 1. INTRODUCTION

In this chapter, we evaluate the research observations set out in Chapter 3. In this evaluation, we make use of the operational concepts outlined above with reference to restorative justice and therapeutic jurisprudence.<sup>149</sup> Based on the conclusions drawn from this evaluation, we subsequently analyse current policy documents guiding the conduct of police officials and prosecutors, and we also examine whether the standards set in these documents are adequate to address the needs and concerns of victims as they have emerged from our research observations.

### 2. THERAPEUTIC JURISPRUDENCE AND RESTORATIVE JUSTICE

#### 2.1 Expectations of victims

When one firstly looks at the expectations that victims had when they reported the incident of sexual assault to the police, one observes that these expectations are understandable and realistic when examined from a **therapeutic perspective**. For example, when victims expect that the perpetrator will be arrested immediately and that the police will provide them with protection, this can easily be related to the fear experienced by victims during and after the assault.

However, when seen in the context of a predominantly **adversarial** criminal justice system, victims' expectations may be unrealistic (for example, the expectation of an opportunity to directly participate in all decisions that will affect them). The specific conditions currently prevailing in the South African criminal justice system (for example, the fact that there usually is a fairly lengthy delay in finalising cases) may further broaden the chasm between expectation and reality.

#### 2.2 Establishing and maintaining contact with the investigating officer

The difficulties experienced by victims in establishing and maintaining contact with investigating officers is of concern on two levels: firstly, on a practical level it means that victims do not have access to the information they need regarding the arrest status of the perpetrator, bail conditions and other key events in the criminal justice process. At the same time, investigating officers are not in a position to obtain information from victims that may be crucial to the determination of the accused's bail application. In its extreme form, the lack of contact between victims and investigating officers may result in the charges being withdrawn by the victim or in the case being closed by the police on the basis of the assumption that the victim is no longer interested in pursuing the case.<sup>150</sup> (We noted in the first research phase that one police station had a practice of

---

<sup>149</sup> . See Chapter 2.

<sup>150</sup> . See also Barday and Combrinck (op cit) at 31-32.

warning victims that they should establish contact with the investigating officer within seven days after reporting the case to indicate their interest in continuing with the case.)<sup>151</sup>

Secondly, on a therapeutic level it is important to bear in mind the need for the victim's recovery to take place within the context of relationships - which includes the relationship with the investigating officer and others involved in handling the criminal case. In attempting to establish the impact of persistent unavailability of investigating officers, we also looked at the experience of researchers during the first phase of the research: we have recounted how the difficulties we encountered in securing opportunities to meet with criminal justice personnel were experienced as demoralising and disappointing.<sup>152</sup> If the subliminal message conveyed to the victim through the unavailability (including failure to return messages) of the investigating officer is that her case is not important enough for him to respond and answer her questions, it is clear that this will do little to contribute to a positive therapeutic outcome. Again, the theme of disempowerment and a lack of control is central - especially where victims are prepared to go out of their way to establish and maintain contact and yet do not receive any response.

From a therapeutic perspective it may further be wholly inappropriate to place the onus of establishing and maintaining contact on the victim. It may occur that she is at a point in her personal process of recovery where following the progress of the criminal case is not a first priority for her at all. This does not, however, imply that she has abandoned all interest in the case.<sup>153</sup>

### **2.3 Secondary victimisation**

The prospects for the victim's recovery to take place in the context of relationships where her faculties for trust and exercising autonomy can be restored are clearly eroded when secondary victimisation occurs as described by interview participants. It is distressing to note that the incidents recounted by victims and counsellors literally constitute a 'text book' list of the indicators of secondary victimisation.

Significantly, this secondary victimisation not only occurred through the actions of criminal justice personnel, but also through current popular misconceptions regarding the nature of bail. This is evidenced by the perception in certain communities that an accused person who is released on bail has 'won' the case.

### **2.4 Failure to provide victims with information**

Our observations regarding victims' need to be provided with different forms of information about the criminal justice process (and the failure on the part of criminal justice personnel to provide them with this information) correlate with findings in other analogous studies.<sup>154</sup> Bacik et al,

---

<sup>151</sup> . Idem at 31.

<sup>152</sup> . Idem at 62.

<sup>153</sup> . We argue that the closure of cases due to a perceived lack of interest on the part of the complainant presents an interesting anomaly in a criminal justice system that does not otherwise place a great premium on accommodating the wishes or concerns of the victim.

<sup>154</sup> . See Stanton et al (op cit) at 141-142; Francis (op cit) at 12.

reporting on their research on sexual assault law and procedures in five EU member states,<sup>155</sup> noted a distinct lack of information available to victims about the progress of the investigation and about the pre-trial procedures.<sup>156</sup> The difficulty in accessing information was a significant cause of stress for victims. The victim's lack of access to information and her inability to control the decisions about something that is deeply personal revisit and reflect the lack of control experienced during the sexual assault.<sup>157</sup>

Research indicates that victims who are kept informed by authorities are more likely to judge the justice procedure as fair and to feel that they were treated by authorities with dignity and respect.<sup>158</sup> The prosecution will profit generally from the improved cooperation of victims who feel that they have been protected, assisted and properly informed.<sup>159</sup>

## **2.5 Consultation with victim regarding bail**

The theme of the victim's autonomy (as opposed to a lack of power or control) specifically comes to the fore when we consider the reported experiences around consultation regarding the perpetrator's bail. Where the perpetrator is released on bail without the victim being consulted about her specific concerns (for example, the fact that the perpetrator and the victim share a house), this not only exacerbates her fear for her own safety as well as that of others (such as a five-year old child living in the same house, as recounted by one victim) but also emphasises her disempowerment. It is therefore not surprising that victims express emotions such as anger at such instances of exclusion.<sup>160</sup>

## **2.6 Intimidation by perpetrator**

Where victims' fears do realise, and they are contacted and intimidated by the perpetrators and/ or the perpetrator's friends and family, it is significant to note how the theme of disempowerment continues: not only are victims given insufficient information on how to respond, but when they do attempt to get assistance, the official response is reported to be inadequate.

Against this background, it is hardly surprising, from a therapeutic perspective, that victims often feel that the only way in which they can escape further intimidation (and thus address their fears for their safety) as well as exercise some form of autonomy is to withdraw the charges. (For many victims, this may feel as if this is the only point in the system where they have the power to exercise some form of choice.)<sup>161</sup>

---

<sup>155</sup> . The research focus countries were Denmark, France, Germany, Belgium and Ireland.

<sup>156</sup> . Bacik et al (op cit) at 6 et seq.

<sup>157</sup> . See in this regard also Waterhouse (op cit) at 25.

<sup>158</sup> . UNODCCP (op cit) at 35. See also Bacik et al (op cit) at 42-43 and authorities cited there.

<sup>159</sup> . UNODCCP (op cit) at 66.

<sup>160</sup> . Bacik et al note a similar response: research participants felt angry and fearful where the accused was released pending completion of the trial. See Bacik et al (op cit) at 99.

<sup>161</sup> . We acknowledge that this may not be a conscious decision on the part of the victim.



It is of course conceivable that the prosecution may elect not to withdraw the charges, since this decision ultimately rests with the prosecutor.<sup>162</sup> There are a number of legal measures that can be used against a recalcitrant witness. In the event of the victim's failure to comply with a subpoena or warning to attend court to give evidence, she may be convicted of a criminal offence and sentenced accordingly;<sup>163</sup> she may also under circumstances be regarded as a so-called 'compellable' witness and similarly liable for punishment if she refuses to participate and testify at the trial.<sup>164</sup>

## **2.7 Conclusions**

Our research observations yield several instances where current practices around bail in sexual assault cases are fundamentally at odds with the basic principles of therapeutic objectives and the aims of victim empowerment and participation as required by the notion of restorative justice. We identify three main reasons for this dissonance:

- **Nature of a predominantly adversarial criminal justice system**

Examples include -

- ★ Victims' expectation that they will have an opportunity to participate in decisions affecting them; and
- ★ The fact that the prosecution may decide to continue with the case even where the victim wishes to withdraw the charges. Punitive measures may be employed where the victim does not cooperate with the prosecution.

- **Specific conditions prevailing in the SA criminal justice system**

Examples include the lengthy delays in finalisation of cases and the lack of resources experienced by key criminal justice personnel.

- **Non-compliance by criminal justice personnel with acceptable standards of case management**

Examples include -

- ★ The instances of secondary victimisation as noted in our research observations; and
- ★ The failure to consult with victims regarding bail or bail conditions.

In some instances, it may be possible that the concerns voiced by victims and counsellors (such as the apprehension that investigating officers on occasion appear to lose interest in cases as time goes by) could be addressed relatively easily, for example, by providing clearer information on the operation of the criminal justice process. Given the current realities of long waiting periods from the time of the accused's arrest and first court appearance and the trial date, investigating officers usually move on to new investigations once the investigation has been completed and a trial date

---

<sup>162</sup> . Anecdotal evidence suggests that this rarely happens.

<sup>163</sup> . See ss 179(2), 187 and 188 of the Criminal Procedure Act 51 of 1977.

<sup>164</sup> . See ss 189, 192 and 195 of the Criminal Procedure Act.

has been set. Victims may perceive this as waning interest on the part of the investigating officer; this perception could conceivably be addressed by informing victims from the outset that the investigating officer's role in the case will change over time and that once the investigation has been completed, less contact is to be expected.<sup>165</sup>

However, where the incongruities between current practices and therapeutic and restorative outcomes are attributable to the nature of the adversarial criminal justice system, or structural constraints such as limited resources, these shortcomings are arguably less easily addressed.

In order to establish which practices are attributable to poor case management, and which ones must be ascribed to larger systemic concerns, it therefore now becomes necessary to establish the extent of compliance with current standards for case management. A further question flowing from this is whether these standards are adequate and appropriate to address victims' needs and concerns.

In the next section, we accordingly measure our research observations against the national policy documents that have been issued for police officials and prosecutors regarding management of sexual assault cases.<sup>166</sup> These policy documents are at present the primary instruments setting out the nature and extent of positive duties resting on state officials.

### **3. STANDARDS FOR CASE MANAGEMENT: POLICE OFFICIALS**

#### **3.1 SAPS National Instruction No 2/ 1998**

The First Research Report does not contain details of the contents of the SAPS National Instruction No 22/ 1998 'Sexual Offences: Support to Victims and Crucial Aspects of the Investigation'.<sup>167</sup> For this reason, the relevant provisions are set out here. Although the Instruction does not have a section specifically on bail, it does contain a number of guidelines that are directly relevant to bail:

##### **(a) Victim assistance**

Guideline 3 sets out the basic rules of professional victim assistance, and also gives a description of each rule.<sup>168</sup> These basic rules (with the accompanying description) inter alia include:

- **Provide victim with information:** inform a victim on a regular basis of -
  - ★ the case number;
  - ★ the details of the investigating officer; and
  - ★ information on the progress of the investigation.

---

<sup>165</sup> . Interestingly, the SAPS National Instruction enjoins investigating officers to remain in contact with the victim, even if there is no progress to report. See also Section 4.3.1(b) below.

<sup>166</sup> . Because of the role of the magistrate as an independent judicial officer, it is generally accepted in South Africa that issuing peremptory 'policy directives' for magistrates is not appropriate.

<sup>167</sup> . At the time of writing the First Research Report, researchers did not have access to the Instruction document itself. Instead, reliance had to be placed on the SALRC's discussion of the National Instruction in its Discussion Paper 102. See Barday and Combrinck (op cit) at 24.

<sup>168</sup> . Guideline 3(1).

- **Inform victims of the procedures followed by the Police and the criminal justice system:** inform a victim at each step of the procedure involving him or her, of what will be done and why it needs to be done, eg information on the witness protection programme and general court procedures. 'By doing so the member will ensure that the best possible results are obtained.'

**(b) The role of the investigating officer**

Guideline 6 sets out a number of actions to be taken by the investigating officer, with a more detailed description of each action. These actions (with the accompanying description) inter alia include:

- **Inform the victim of the procedures:** the investigating officer must explain his or her role in the investigation and the subsequent procedures which the victim will have to undergo to the victim.
- **Always keep the victim informed:** always keep the victim informed of the progress in the case (eg arrest of the suspect, bail applications, courts dates). This Guideline further includes the following statement:

'Even if there is no positive progress to report, the victim will feel reassured that his/her case has not been "forgotten" if regular reports are made to him/her.'

**(c) Victim after-care**

Guideline 11 notes that victim after-care is an important aspect that is often overlooked in sexual offence cases.<sup>169</sup>

'The victim of a sexual offence has undergone a traumatic experience, and most victims of a sexual offence will need some form of counselling to enable them to deal with this.'<sup>170</sup>

This guideline also deals with the safety of victims of sexual offences, and specifies that the SAPS has the duty to take appropriate steps to ensure that a vulnerable victim is protected.<sup>171</sup>

**(d) Questions to guide the taking of the victim's statement**

The Instructions contains a 'checklist' to be used as a guideline in taking the victim's statement.<sup>172</sup> The checklist contains a number of questions that may eventually be relevant in the determination of bail. These include:

- Threats made by the suspect.<sup>173</sup>
- Any specific threats made to victim not to report the offence.<sup>174</sup>

---

<sup>169</sup> . Guideline 11(1).  
<sup>170</sup> . 11(1).  
<sup>171</sup> . Guideline 11(3).  
<sup>172</sup> . Annexure C.  
<sup>173</sup> . Item 23.  
<sup>174</sup> . Item 49.

- Was any of the victim's property taken to assist the suspect in locating him or her again? Was this taken to stop the victim from reporting the incident? Was the specifically mentioned by the suspect?<sup>175</sup>
- Did the suspect suggest they meet again?<sup>176</sup>
- Was the suspect curious about the victim's life, family of previous relationships, sexual or otherwise?<sup>177</sup>
- Describe all the injuries inflicted on the victim.<sup>178</sup>

### **3.2 Evaluation**

When we compare the experiences of participating victims and counsellors regarding bail with the guidelines currently set out in the National Instruction, it is clear that these guidelines were generally not observed by the investigating officers concerned. Significantly, this pattern of non-compliance also emerged from our interviews with SAPS members as reported on in the First Research Report.

Non-compliance with the guidelines is specifically apparent in -

- The difficulties experienced by victims in establishing and maintaining contact with investigating officers;
- The instances of secondary victimisation reported by victims;
- The failure on the part of investigating officers to provide victims with information as required by the National Instruction;
- The failure on the part of investigating officers to consult with victims regarding the perpetrator's bail (which is especially urgent where the victim's safety is at stake); and
- The failure on the part of investigating officers to take appropriate action where victims reported intimidation by the perpetrator or his friends and family.

## **4. STANDARDS FOR CASE MANAGEMENT: PROSECUTORS**

### **4.1 National Prosecutors' Directives**

The National Prosecution Directives are set out in the First Research Report.<sup>179</sup> For the convenience of readers, the relevant Directives are recounted here:

- Prosecutors should not proceed with a bail application until they have all the necessary information.

---

<sup>175</sup> . Item 52.

<sup>176</sup> . Item 53.

<sup>177</sup> . Item 54.

<sup>178</sup> . Item 71.

<sup>179</sup> . Barday and Combrinck (op cit) at 25.

- The decision whether or not to oppose bail must be preceded by thorough consultation with at least the investigating officer.
- Efforts should be made to consult with the victim prior to the bail hearing to ensure that all relevant information is gathered and considered.
- Prosecutors must also request the police to inform the victim of the result of any bail application.
- If bail is granted, special conditions relating to contact with the victim may be necessary.
- The complainant should also be informed of the procedure to be followed if the accused contravenes any of the bail conditions.
- Prosecutors must take immediate action against accused who harass, threaten, injure or intimidate victims of other witnesses in sexual assault cases.

## **4.2 Evaluation**

Due to the fact that the victims reported limited contact with prosecutors, the interaction between prosecutors and victim was less easy to establish than that between victims and investigating officers. However, researchers did note the following points:

### **(a) Obtaining all relevant information before the bail application**

The Directives emphasise that prosecutors should take care to ensure that they have all the relevant information before proceeding with the bail application. The decision regarding bail should be preceded by consultation with at least the investigating officer; prosecutors are also enjoined to consult with victims themselves. From our interviews with prosecutors and investigating officers, it appeared that prosecutors seldom (if ever) consult with victims prior to the bail hearing. Instead, the prosecution relies on the investigating officer to convey the necessary information, initially to the prosecutor and then also to the court as the main state witness in the bail hearing.

However, this is where the difficulty lies: our research observations clearly demonstrate that there is little, if any, contact between investigating officers and victims at this crucial stage of the criminal process. This omission is compounded by the fact that the victims' initial statement may not contain all the information required in order for the prosecution to make an informed decision regarding bail.

### **(b) Imposition of 'no-contact' bail conditions**

Our analysis of the outcome of bail hearings in the First Research Report indicated that conditions other than the accused's returning to court on the next court date were imposed in 78 of the 107 cases where the accused had been released on bail or warning.<sup>180</sup> These additional conditions were not limited to 'no contact' provisions, but also included conditions requiring the accused to report to the police at specific times. While it was not possible to establish from the charge sheets

---

<sup>180</sup> . See Barday and Combrinck (op cit) at 45.

whether these 'no contact' conditions were imposed at the request of the prosecution or whether the court decided *mero motu* to impose these bail conditions, the imposition of 'no contact' provisions is encouraging and appears to be in line with the Directive concerned.

**(c) Informing victims of outcome of hearing; informing victims of steps to take in the event of a breach of these conditions**

The Directive makes it clear that the responsibility of informing victims of the outcome of bail hearings lies with the police (prosecutors should 'request' investigating officers to inform victims of the outcome), and the victim should also be informed of the nature of bail conditions as well as the steps to be followed in the event of a breach of these conditions. However, there is a duty on prosecutors to take immediate action against accused who intimidate or harass victims.

At this point, we do not have sufficient information to explain the disparity between the high levels of intimidation and harassment reported by victims and counsellors and the fact that applications by the prosecution to cancel the accused's bail due to breach of 'no contact' conditions appear to be few and far between.<sup>181</sup> However, the interviews indicate as a major cause of this disparity the fact that victims were not informed of the nature of the accused's bail conditions nor of the steps to take in the event of a breach of these conditions.<sup>182</sup>

**(d) Summary**

Similar to our observation above regarding compliance with standards by police, it appears that there are currently gaps in compliance by prosecutors with the National Directives regarding bail in sexual assault cases.

## **5. CONCLUSIONS**

When one evaluates the existing policies for police officials and for prosecutors, it is interesting to note that these policies currently do not incorporate certain of the key therapeutic and restorative principles. For example, the SAPS National Instruction explicitly recognises rape as a traumatic experience. Both the SAPS National Instruction and the National Prosecution Directives acknowledge the need for the victim to be provided with information regarding the accused's bail. Significantly, the SAPS policy document requires the investigating officer to keep the victim informed of the progress of the case, and links this to the possibility that the victim may feel that the investigating officer is losing interest in her case:

'Even if there is no positive progress to report, the victim will feel reassured that his/ her case has not been "forgotten" if regular reports are made to him/her.'

---

<sup>181</sup> . This disparity could be attributed to a number of possible causes. It is firstly possible that victims did not have sufficient information regarding bail conditions and the possible breach thereof to know that particular acts of intimidation constituted breach of such conditions, or how to respond to such a breach. Secondly, it could be that victims reported acts of harassment to the police, but that the police did not act on such reports and did not convey the information to the prosecutor concerned. A third possibility is that the information was conveyed to the prosecutor, who then failed to bring the necessary application for cancellation of bail.

<sup>182</sup> . A participant in the first research phase also suggested that victims do not always have a clear understanding of the actions that would constitute a violation of 'no contact' provisions.

In addition, the National Instruction specifies that police have a duty to take appropriate steps to ensure that a vulnerable victim is protected. The National Prosecution Directives also require that certain steps be taken to ensure protection of the victim.

Although there may be areas where these policy documents could conceivably be expanded (for example, the checklist of questions to guide the taking of the victim's statement), we therefore conclude that the key limitations of the current standard-setting policy documents lie not so much in their **contents** as in their **implementation**. This observation is in line with findings recently reported by the South African Law Reform Commission.<sup>183</sup> In respect of the SAPS National Instruction, the Commission notes that although this instruction was officially distributed in 1998, very few SAPS members comply with or seem aware of its existence.<sup>184</sup>

Given the fact that our observations indicate unacceptable levels of non-compliance with these standard-setting documents, it appears that one of the measures required to address the concerns of victims is to enhance the enforceability of these documents. We accordingly explore this in Chapter 5 below.

A key question that remains is **why** there is limited compliance with existing policies. While it did not fall within the scope of this project to explore this question in detail, our observations from the first research phase suggest that criminal justice personnel face resource constraints that may make it difficult to comply with existing policies. For example, the high workload of investigating officers may influence their ability to sustain contact with the victim.<sup>185</sup>

---

<sup>183</sup> . Hereinafter referred to as 'the Law Reform Commission', except in footnote references to publications.

<sup>184</sup> . South African Law Commission Discussion Paper 102 **Sexual Offences: Process and Procedure** at Par 3.2.6.1.

<sup>185</sup> . Barday and Combrinck (op cit) at 60-61.

# CHAPTER 5

## TOWARDS SOLUTIONS

### 1. INTRODUCTION

In this chapter, we examine a number of measures that may serve to address the three concerns identified in Chapter 4. We firstly look at enhancing compliance with standards of case management by setting out state duties in legislation, with reference to South African legislation as well as comparable legislation recently enacted in Namibia. Secondly, we investigate a model aimed at addressing certain of the drawbacks inherent to the adversarial criminal justice system as well as the reality of limited resources within the South African criminal justice system, namely the employment of so-called 'victim advocates'<sup>186</sup>. We then explore the potential benefits of introducing multi-disciplinary centres, with specific reference to the Thuthuzela Care Centre based in Manenberg, Cape Town. Finally, we list proposals put forward by magistrates, prosecutors, police officials and representatives from non-governmental organisations. These proposals are mainly aimed at addressing specific conditions currently prevailing in the South African system.

### 2. ENHANCING COMPLIANCE WITH POSITIVE DUTIES RESTING ON STATE OFFICIALS

#### 2.1 Positive duties in legislation

It has now become accepted law that the cumulative effect of constitutional provisions<sup>187</sup> and international human rights law is to place certain positive duties on the South African state to address violence against women.<sup>188</sup> In addition to imposing obligations on the state in the broad sense,<sup>189</sup> the recognition of these duties of necessity also hold obligations for **individual** state officials. This has been clearly illustrated in the series of **Carmichele** cases as well as subsequent judgments handed down by the Supreme Court of Appeal.<sup>190</sup>

---

<sup>186</sup> . It is important to note that there is no relation between the term 'advocate' as used in this context and the term 'advocate' that is used in South African law to denote a specific category of legal practitioner. Victim advocates, as used in the former sense, are not required to have legal qualifications, nor do they represent victims in any court proceedings.

<sup>187</sup> . Most notably, the right to freedom from violence (s 12(1)(c)) as read with section 7(2) of the Constitution, which provides that the State must 'respect, protect, promote and fulfil' the rights in the Bill of Rights.

<sup>188</sup> . See in this regard our discussion of the **Carmichele** judgments in the First Research Report - Barday and Combrinck (op cit) at 19-26. See also **S v Baloyi** 2000 (2) SA 425 (CC).

<sup>189</sup> . We argue that the general duties resting on the state to address violence against women include, for example, the obligation to enact appropriate legislation to address sexual assault (analogous to the duty recognised in **S v Baloyi** (above), which deals with the obligation to enact legislation to effectively address domestic violence). We also contend that these positive state duties include the obligation to allocate sufficient state resources to ensure proper implementation of such legislation. See also H Combrinck 'The right to freedom from violence and the reform of sexual assault law in South Africa.' in J Sarkin & W Binchy (eds) **Human Rights, the Citizen and the State: South African and Irish Approaches** at 187-194.

<sup>190</sup> . See **Minister of Safety and Security v Van Duivenboden** 2002 (3) AllSA 741 (SCA); **Van Eeden v Minister of Safety and Security** 2002 (4) AllSA 346 (SCA).



As noted in Chapter 4 above, the main duties resting on police officials and prosecutors in relation to bail in sexual assault cases are at present set out in policy documents issued on national level.<sup>191</sup> In considering measures to enhance compliance with these duties, an important question to address is whether the inclusion of these standards in legislation (rather than in regulations or 'internal' or departmental directives or guidelines), may lead to greater adherence. While we have examined existing policy documents for police and prosecutors, it should be noted that certain duties for presiding officers are already listed in the Criminal Procedure Act.<sup>192</sup>

Researchers have in recent years argued strongly that the positive duties resting on state officials, specifically police and prosecutors, should be clearly set out in national legislation.<sup>193</sup> This argument is based on the following considerations:<sup>194</sup>

- One of the major apprehensions regarding the existing guideline documents is that many state officials are simply unaware of the existence of these documents, let alone of the nature of their contents.<sup>195</sup> The inclusion of state duties in national legislation should address this concern.
- Secondly, the inclusion of duties in legislation also serves the important function of informing victims and service providers of what is expected from criminal justice personnel. Policy documents setting out 'directives' or 'guidelines', such as the SAPS National Instructions, are generally not accessible to members of the public.<sup>196</sup> While it may be possible for a victim to eventually gain access to such documents by invoking the Promotion of Access to Information Act,<sup>197</sup> this may be a laborious and time-consuming endeavour.
- A further concern about guideline documents is the prevailing uncertainty of the legal status of these documents, i.e. whether the provisions are binding on individual state officials or whether they merely constitute 'good conduct' guidelines. This uncertainty also impacts on the question of how instances of failure to comply with positive duties should be sanctioned.<sup>198</sup> The SAPS National Instruction provides that all members are expected to follow the guidelines set out in the document, and that they may only deviate from the guidelines 'where a compelling reason exists' for doing so.<sup>199</sup> While this is not stated

---

<sup>191</sup> . The Constitutional Court also looked to the [interim] Constitution (Act 200 of 1993) as well as the Police Service Act 68 of 1995 to establish the duties resting on members of the SAPS regarding management of bail in sexual assault cases - see *Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC) at Par 62.

<sup>192</sup> . Act 51 of 1977. For example, s 60(2)(d) of the Criminal Procedure Act, which provides that where the prosecutor does not oppose bail in respect to certain categories of cases, the court must ('shall') require of the prosecutor to place on record the reason for not opposing the bail application.

<sup>193</sup> . Pithey et al (op cit) at 162; Artz et al (op cit) at 20 et seq.

<sup>194</sup> . The following section is based on the arguments set out in Artz et al (loc cit).

<sup>195</sup> . See e.g. South African Law Commission Discussion Paper 102 (Project 107) Sexual Offences: Process and Procedure at Par 3.2.6.1, 3.3.2.17.

<sup>196</sup> . The SAPS National Instruction No 22/ 1998 has not been published in the Government Gazette, and is therefore extremely difficult for persons outside the SAPS to access. The National Instructions on domestic violence, by contrast, have been published and are therefore (at least in theory) more accessible. (National Instruction No 7/ 1999, GNR 1550 dated 30 December 1999.)

<sup>197</sup> . Act 2 of 2000.

<sup>198</sup> . The counterpart of the recognition of positive duties is the question of what the sanction for failure to comply with these duties should be. Two options that may be considered is, firstly, the imposition of criminal liability for individual officials who fail to comply with prescribed duties or, secondly, the institution of internal disciplinary proceedings against individual officials. The scope of this document does not allow more detailed discussion of this aspect - see in this regard further Pithey et al (op cit) at 162-166.

<sup>199</sup> . Guideline 1.

explicitly in the document itself, the Instruction appears to assume that disciplinary steps will be taken against police officials who do not comply with its guidelines.<sup>200</sup> The Law Reform Commission has expressed the opinion that non-compliance with the National Prosecutors' Directives is not sanctionable 'as they do not place a duty on prosecutors to act in accordance with them'.<sup>201</sup>

- On a more fundamental level, it should also be noted that statutory duties carry the force of legislative injunction. As demonstrated by the findings of this research project, the response of criminal justice personnel to sexual assault victims is unfortunately often still disrespectful and inappropriate. The inclusion of state duties in legislation would serve to convey the message that the legislature takes sexual assault seriously, and expects state officials to do so as well.

The draft Sexual Offences Bill proposed by the Law Reform Commission In its report on sexual offences does not specifically address the question of bail.<sup>202</sup> Instead, the Commission deals with bail in its 'non-legislative' proposals.<sup>203</sup> The Commission recommends that the SAPS National Instruction No 22/1988 should be 'revisited, amended if necessary, and brought to the attention of all police officials'.<sup>204</sup> Similarly, it proposes that the NDPP Policy Directives be revisited and reviewed.<sup>205</sup> However, if one looks at the conclusion drawn from our research observations, i.e. that there is a high level of non-compliance with policy instructions or directives, it is clear that more stringent measures will be required.

The Domestic Violence Act<sup>206</sup> contains examples of the imposition of statutory duties on key state officials.<sup>207</sup> Section 2 imposes a duty on any member of the SAPS to assist complainants and to inform them of their rights. This must take place either at the scene of an incident of domestic violence or when the incident of domestic violence is reported. The Regulations issued by the Minister of Justice in terms of section 19 of the Act contains a prescribed form setting out the information that must be conveyed to the complainant by a SAPS member.<sup>208</sup>

---

<sup>200</sup> . This is also the interpretation followed by the Law Reform Commission - see South African Law Commission **Discussion Paper 102 Sexual Offences: Process and Procedure** at Par 3.2.3.

<sup>201</sup> . The Law Reform Commission, for example, has expressed the opinion that non-compliance with the National Prosecutors' Directives is not sanctionable 'as they do not place a duty on prosecutors to act in accordance with them' - South African Law Commission **Discussion Paper 102 Sexual Offences: Process and Procedure** at Par 3.4.3.3. The scope of this submission does not permit an extensive examination of the legal nature of these policy documents.

<sup>202</sup> . The Commission states, without further elaboration, that it regards the current legislation on bail as adequate - South African Law Commission **Project 107: Sexual Offences Report** at 365.

<sup>203</sup> . South African Law Commission **Project 107: Sexual Offences Report** at Par 9.1 et seq. The draft Bill included in the Report requires the Minister of Justice and Constitutional Development to prepare a national policy framework 'to guide the implementation, enforcement and administration' of the Act. This framework must be a coherent policy directive to guide the apprehension and prosecution of offenders and the protection of victims of sexual offences, and must provide for 'uniform accountability and disciplinary mechanisms for all functionaries involved' - see clauses 28(1)(a), 29(1)(a) and (d) of the Bill.

<sup>204</sup> . Idem at 302. For a list of measures specifically on bail, see idem at 354.

<sup>205</sup> . Idem at 311. A list of recommendations on bail follows at 364-365.

<sup>206</sup> . Act 116 of 1998.

<sup>207</sup> . See also s 4(2), which deals with the duties of the clerk of the court.

<sup>208</sup> . See Form 1 of the Regulations under the Domestic Violence Act, 1998 GNR.1311 dated 5 November 1999.

## 2.2 An example: the Namibian *Combating of Rape Act*

The Namibian *Combating of Rape Act*<sup>209</sup> is an instructive example of the enumeration of statutory duties. This Act contains detailed provisions setting out the duties of police officials, prosecutors and presiding officers in relation to bail in sexual assault matters.<sup>210</sup>

### (a) Rights of the complainant

The Act firstly provides that a complainant of rape has the following rights:<sup>211</sup>

- To attend any proceedings where the question is considered whether an accused who is in custody on a charge should be released on bail or, if bail has been granted to the accused, whether any further conditions of bail should be imposed;<sup>212</sup> and
- To request the prosecutor in such proceedings to present any information or evidence to the court that might be relevant to the question under consideration by the court.<sup>213</sup>

### (b) Informing the complainant of the accused's first court appearance

Where an accused is in custody on a charge of rape, the person in charge of the police station where the accused is detained must as soon as possible inform the complainant of the place, date and time of the accused's first appearance in court, as well as her rights as set out above.<sup>214</sup> The person who has the duty to inform the complainant of the accused's first court appearance or intention to apply for bail must prepare an affidavit stating whether the provisions concerned have been complied with, the manner in which the complainant was informed and the date and time on which the complainant was informed.<sup>215</sup> This affidavit must be handed to the presiding officer at the bail hearing, and forms part of the record of the proceedings.<sup>216</sup>

### (c) The bail hearing

If a complainant is present at the bail hearing of the accused, and the hearing is postponed, the court must inform the complainant of the date and time to which the hearing has been postponed, as well as her rights regarding attendance.<sup>217</sup>

Where the complainant is not present at the bail hearing, the court must enquire whether the complainant was informed of the proceedings. If the court is satisfied that it is likely that the complainant has had knowledge of the proceedings, it must direct that the matter be dealt with in her absence.<sup>218</sup> If the court is not satisfied that the complainant knew about the proceedings, it

---

<sup>209</sup> . Act 8 of 2000.

<sup>210</sup> . Due to the fact that this Act came into operation relatively recently, it is too soon to conclusively establish the impact of these measures.

<sup>211</sup> . Sec 12 of the Act inserts a new s 60A into the Namibian Criminal Procedure Act (Act 51 of 1977). We will hereinafter refer to the provisions of s 60A.

<sup>212</sup> . S 60A(1)(a).

<sup>213</sup> . S 60A(1)(b).

<sup>214</sup> . S 60A(2).

<sup>215</sup> . S 60A(4). Where the complainant has not been informed, the reasons for non-compliance with the provisions concerned must be included in the affidavit.

<sup>216</sup> . S 60A(5).

<sup>217</sup> . S 60A(6).

<sup>218</sup> . S 60A(7)(a).

must postpone the proceedings in order to obtain the presence of the complainant. However, if it is in the interests of justice (with due regard to the interests of the complainant) that the matter be dealt with without delay, the court may proceed with the hearing in her absence.<sup>219</sup>

**(d) Informing the complainant of the outcome of the bail hearing**

If a complainant is not present at the bail hearing, the prosecutor concerned must inform her, where bail has been granted to the accused, of the granting of bail and the conditions imposed. Where the hearing has been postponed, the prosecutor must inform her of the new date and time as well as her rights regarding attendance.<sup>220</sup>

**(e) Consultation with the complainant**

Section 9 of the Act provides that prosecutors in sexual assault cases have a duty to consult with the complainant in order to ensure that all information relevant to the trial has been obtained from the complainant, including information relevant to the question of whether the accused should be released on bail and, if the accused were so released, whether any conditions of bail should be imposed.<sup>221</sup> A further aim of such consultation is to provide 'all such information to the complainant as will be necessary to lessen the impact of the trial of the complainant'.<sup>222</sup>

**(f) Measures aimed at enhancing the complainant's safety**

The investigating officer in sexual assault cases has a duty to inform the prosecutor of any reason to believe that the complainant would be at risk if the accused is released on bail.<sup>223</sup> If bail has been granted to the accused, the investigating officer has the duty to inform the prosecutor of any failure by the accused to comply with his or her conditions of bail.<sup>224</sup> This must be done 'forthwith' after the investigating officer becomes aware of such failure.

Where an accused is released on bail, the court must add such bail conditions as will, in the opinion of the court, ensure that the accused does not make contact with the complainant.<sup>225</sup>

**(g) Evaluation**

The benefit of the Namibian model is firstly that it sets out clearly what the rights of complainants are. It further makes provision for the realisation of these rights by clearly stipulating where the responsibility for certain actions lies, i.e. with police officials or with prosecutors. From the perspective of ensuring the safety of the complainant, the duty imposed on the investigating officer to inform the prosecutor of any reason to believe that the complainant would be at risk if the accused is released on bail is particularly significant. The inclusion of a peremptory clause requiring the court to add 'no-contact' bail conditions is also important in this regard. A further noteworthy provision is the introduction of a duty resting on the presiding officer to ensure that the complainant has been informed of the bail proceedings, as well as of her rights regarding attendance.

---

<sup>219</sup> . S 60A(7)(b).  
<sup>220</sup> . S 60A(8).  
<sup>221</sup> . S 9(a) of the Combating of Rape Act.  
<sup>222</sup> . S 9(b).  
<sup>223</sup> . S 10(a).  
<sup>224</sup> . S 10(b).

It should be noted that because the Namibian legislation came into operation relatively recently, no systematic evaluation of the impact of the Act has yet been conducted. It is therefore not yet possible to assess the effect of the provisions relating to bail.

### **3. VICTIM ADVOCATES**

#### **3.1 Background**

In the US, every state has a network of private, community-based agencies providing services to sexual assault victims.<sup>226</sup> These agencies, typically referred to as 'rape crisis centres', provide a range of services, including those of **victim advocates**.<sup>227</sup> In addition, police departments and prosecutors' offices also occasionally employ victim advocates (also known as 'victim-witness specialists').<sup>228</sup>

The specific duties of victim advocates differ depending on the setting, i.e. whether they operate from a community-based rape crisis centre or from a law enforcement office.<sup>229</sup> In general, services provided by victim advocates include the following -

- Informing the victim of her rights;
- Serving as liaison between agencies, for example, between police and prosecutors;
- Accompanying the victim to or staying with the victim during the police interview, medical examination and court proceedings;
- Offering crisis intervention;
- Conducting safety planning;
- Explaining court procedures and possible case outcomes.<sup>230</sup>

---

<sup>225</sup> . S 62(2) of the Criminal Procedure Act.

<sup>226</sup> . See KA Lonsway 'The Role of Victim Advocates' in **Successfully Investigating Acquaintance Sexual Assault: A National Training Manual for Law Enforcement** Developed by the National Center for Women & Policing (2001) [Internet website]. Although advocacy services are not available in every community, they are becoming increasingly common.

<sup>227</sup> . 'Victim advocates' are also referred to as 'rape crisis advocates'.

<sup>228</sup> . The primary goal of victim-witness specialists is to support the victim in her role as a witness to a crime and to protect her rights as established by State and Federal law - Lonsway (op cit). These specialists generally have immediate access to information about relevant hearings, depositions and court dates. They can also assist the victim in applying for compensation or accompany her to interviews and court proceedings. Victim-witness specialists will concentrate primarily on activities relevant to the police investigation and court proceedings.

<sup>229</sup> . Lonsway (op cit) notes a number of differences between victim advocates and victim-witness specialists. Because of their position within a public agency, victim-witness specialists have to balance the victim's needs with those of the criminal justice system. By contrast, the advantage of victim advocates is that they can maintain an exclusive focus on the safety and well-being of victims. A further distinction between private community-based advocacy and public victim-witness assistance is the degree of confidentiality provided to the victim in her communications.

<sup>230</sup> . See Lonsway (op cit), Kilpatrick et al (op cit) and UNODCCP (op cit) at 18-19 for a more detailed discussion of the victim advocate's role at each stage of the criminal justice process. See also MB Malefyt & AH Walker **Assessing the Justice System Response to Violence Against Women** (1998) [Internet website].

## 3.2 Evaluation

Victim advocates provide an important link between victims and the criminal justice system.<sup>231</sup> For example, the work of prosecutors is enhanced by the ability of victim advocates to explain court procedures, protocols, and possible case outcomes. Prosecutors also rely on advocates to accompany victims to court and provide support.<sup>232</sup>

Kilpatrick et al explains that one of the goals of providing assistance to sexual assault victims is helping them to gain a sense of empowerment.<sup>233</sup> Advocates can assist victims by explaining the justice system process, for example, where an arrest is not made or is made more slowly than a victim would prefer. Sometimes cases are not prosecuted due to insufficient evidence. Victim advocates can help victims overcome these difficulties by giving them accurate information and coordinating meetings with police officials and prosecutors, thus making a significant contribution to the objective of **victim participation**.

From a South African perspective, a major obstacle to the adoption of this system is likely to be one of cost. The fiscal implications of the introduction of victim advocates will largely depend on whether these victim advocates are based at non-governmental organisations or employed by the state (located either at police stations, prosecutors' offices or courts). If the latter, it may be useful to look to the US for examples of generating funding for victim advocate programmes.<sup>234</sup> In practice, non-governmental organisations already provide certain 'victim advocacy' services without necessarily employing this term to describe such services.<sup>235</sup>

Interestingly, the Law Reform Commission suggests in its report on sexual offences that an office of designated Victim Liaison Officer be established and attached to the office of the Director of Public Prosecutions.<sup>236</sup> The Commission unfortunately does not elaborate on what the specific duties of such a Victim Liaison Officer would be.

---

<sup>231</sup> . Malefyt & Walker (op cit).

<sup>232</sup> . Ibid.

<sup>233</sup> . Kilpatrick et al (op cit).

<sup>234</sup> . For example, the amount of Federal funds available through the Crime Victims Fund for victim compensation and assistance has increased substantially, and in 1994 Congress passed the Violence Against Women Act, which funds a variety of measures to combat violence against women. Increasingly, too, States have been funding victim assistance programs on a regular basis from general revenues or by earmarking a percentage of fines imposed on criminal offenders. Since 1980, when California became the first State to enact statewide funding for general victim services, a majority of the States have made some provision for ensuring that general victim services are provided at the local level. Forty-three States have funded compensation programs from fees or assessments against offenders. Thus, while in many cases budgets decreased in the early 1980's as a result of reduced Federal support, since the mid-1980's funding has become increasingly secure and has even increased in some jurisdictions. See JE Tomz and D McGillis *Serving Crime Victims and Witnesses* (1997) at 3, 125 et seq.

<sup>235</sup> . For example, Rape Crisis Cape Town conducts pre-trial consultation sessions at the request of clients, aimed at providing clients with information about how the criminal trial works and what they can expect when giving evidence.

<sup>236</sup> . South African Law Commission **Project 107: Sexual Offences Report** at 363.

## 4. MULTI-DISCIPLINARY CENTRES

### 4.1 Background

In 2000, the National Prosecuting Authority and the Bureau of Justice assistance set up the Thuthuzela Care Centre<sup>237</sup> in Athlone, Cape Town. The aim of this pilot project was the improvement of the investigation and prosecution of rape cases as well as the provision of more comprehensive and effective services to sexual assault victims.<sup>238</sup> Two additional Centres have since been established in Mdantsane and Libode, both in the Eastern Cape, with the opening of further Centres currently in the planning phase.

The TCC model demonstrates the use of a centralised, multi-disciplinary team comprised of police investigators, medical personnel, and prosecutors. Three police stations, viz Gugulethu, Khayelitsha and Manenberg, were selected to participate in the pilot project on the basis of the high number of sexual offences reported in these areas. The Centre is located within a public hospital (GF Jooste Hospital in Athlone), and the cases handled at the Centre are prosecuted in a specialised sexual offences court at Wynberg that also has jurisdiction over these police stations.

### 4.2 Staff component

The TCC is staffed by the following personnel:

- **Investigating officers:**  
Each participating police station has designated specific investigating officers to handle sexual assault matters where the victim is older than 14 years.<sup>239</sup> At Khayelitsha police station these investigating officers only handle sexual assault matters; at Gugulethu and Manenberg the designated investigating officer's also investigate cases other than sexual assault.
- **Health care workers:**  
The TCC employs a full-time community liaison sister, whose role is to meet the victim when she arrives at the Centre, explain the nature and purpose of the medical procedures that she will undergo and generally to assist with the medical examination (for example, by acting as translator). The medical examination of victims is conducted by medical doctors working in the Trauma Unit at GF Jooste Hospital as part of their duties in the Unit.
- **Coordinator:**  
The TCC employs a full-time coordinator. Her duties include meeting with the victim to provide her with information regarding counseling and other services and also to conduct a safety assessment where appropriate. She does follow-up work with the victim and also acts as ongoing point of liaison between the victim, investigating officer and the courts.

---

<sup>237</sup> . Hereinafter referred to as 'TCC'.

<sup>238</sup> . The following section is based on B Pithey **The Thuthuzela Care Centre: A Multidisciplinary Approach to the Management of Rape Cases** Unpublished report: National Prosecuting Authority (2001). Additional information obtained by personal communication with Ms Pithey.

<sup>239</sup> . Where the victim is under the age of 14 years, the case is handled by one of the centralised Child Protection Units rather than by the station concerned.

- **Victim assistant:**  
A full-time victim assistant is also employed at TCC, whose role is to assist victims at court when they are called to testify in the criminal trial.
- **Prosecutors:**  
Two specialist prosecutors are employed at Wynberg Regional Court to handle cases from TCC. Their duties include continuous communication with investigating officers to guide the investigation (in cases where arrests occur as well as where an arrest does not follow). When the suspect is arrested, he initially appears in the relevant district court.<sup>240</sup> Bail hearings are handled here in the district court, with the specialist prosecutors providing the district prosecutor with instructions. When the case goes to trial, the specialist prosecutors handle the prosecution in the designated Thuthuzela court at the Wynberg Sexual Offences Courts.
- **Regional Court Magistrate:**  
A regional court magistrate is allocated to preside in the designated court at Wynberg.
- **Case Manager:**  
A full-time case manager is employed at Wynberg Court. The role of the case manager, who deals with Thuthuzela cases only, is to keep track of every case handled at the TCC, irrespective of whether an arrest has occurred. She works closely with the coordinator at the Centre. Where an arrest does take place, the case manager is tasked with entering the status of the case into the database after each court appearance, and also to ensure that the dockets are returned to the investigating officer. The case manager must also ensure that all cases placed on the role for trial are ready to proceed on the trial date. She therefore checks that witness subpoenas have been issued and served on witnesses, and also arranges pre-trial consultations between the victim and prosecutors for purposes of court preparation.

### 4.3 Procedures followed at TCC

When a victim of sexual assault reports to one of the participating police stations, the charge office personnel do not take the victim's statement (as would ordinarily usually happen). Instead, a docket is opened, a case number is assigned to the docket and the Emergency Medical Services [EMS] are telephonically contacted. The victim waits for the EMS in a private room. Once the EMS receive a call from one of the three participating police stations, they are expected to arrive at the station within twenty minutes. The paramedics working on this project are trained in trauma counselling and are thus equipped to assist victims in this regard if necessary.

The victim is met by the community liaison sister when she or he arrives at TCC. A detailed medical history is taken followed by a thorough medical examination and any additional medical treatment that is needed. Approximately 30 minutes before the end of the medical examination, the TCC coordinator contacts the designated investigating officer at the relevant police station. The investigating officer comes to the TCC and takes a comprehensive statement from the victim in a

---

<sup>240</sup> . Cases from Khayelitsha police station appear in Khayelitsha district court; cases from Manenberg and Gugulethu police stations appear in the district court in Wynberg.



private room. If the victim wishes to have a support person accompany her during the medical examination or whilst she is giving her statement, she is encouraged to do so.

The victim is given the details of the investigating officer, her case number, the date and time of her follow-up medical examination and referral documentation to a community-based organisation for continued counselling and support. The EMS or the investigating officer then transports the victim home or to a place of safety. Where the investigating officer is not available to meet the victim at the TCC to take her statement, she or he is expected to follow up as soon as possible to obtain the statement.

The coordinator is responsible for maintaining a computerised database with the details of each case. She also keeps copies of the victim's statement, the J88 and the medical folder. The coordinator remains in contact with victim, and will remind her of medical follow-ups and inform her about arrest and court processes. She provides information where victims need to contact the investigating officer or want to know what is happening with their cases.

#### **4.4 Evaluation**

When evaluated against the current shortcomings outlined in our research observations, this multi-disciplinary model clearly holds a number of features that would address these shortcomings, including enhanced liaison between the victim and criminal justice personnel, maintenance of a database detailing developments in the case and increased communication between the investigating officer and the prosecution team.

However, it is also clear from the exposition of the staff component set out above that this model is an 'expensive' one, incorporating additional staff members who would not as a matter of course be employed at 'ordinary' courts. In addition, it should be noted that the TCC model is relatively new, and there has accordingly not yet been a systematic evaluation of the model as it operates in practice.

### **5. PROPOSALS BY WORKSHOP PARTICIPANTS**

The recommendations below were put forward by participants in the information workshop presented by researchers during March 2003.<sup>241</sup>

**Magistrates** reiterated that the court needs to be informed of all relevant circumstances in order to make a proper finding. The proposals put forward by magistrates emphasised the powers of the court to require either the prosecution or the accused to adduce additional evidence.<sup>242</sup> For example, the court may require submission of the J88 form (the official form documenting the victim's injuries). Participants stressed that where the prosecutor is inexperienced, the court **must** ask clarifying questions.<sup>243</sup>

---

<sup>241</sup> . See Chapter 1 above.

<sup>242</sup> . See ss 60(2)(d) and 60(3) of the Criminal Procedure Act.

<sup>243</sup> . S 60(10) provides that notwithstanding the fact that the prosecution does not oppose the granting of bail, the court has the duty to weigh up the personal interests of the accused against the interests of justice.

**Prosecutors** listed the following among the steps they have taken to address current shortcomings: providing the investigating officer with detailed instructions in the investigating diary, increasing prosecutors' availability and motivating staff members.

Magistrates and prosecutors also proposed -

- Specialised training for all criminal justice personnel;
- Greater prosecutor involvement in the investigation;
- Encouraging specialisation (through specific incentives) among prosecutors and magistrates who are enthusiastic and committed to working in the area of sexual assault;
- Public education on the operation of the criminal justice system and specifically on the role of bail in the criminal justice process;
- Reducing waiting times at court for investigating officers (for example, by notifying the investigating officer per cell phone 'SMS' that she or he is required at court rather than to expect him or her to wait to testify in the bail hearing); and
- Providing **pro forma** documents for the procedure in bail proceedings.

**SAPS members** pointed out that it is useful for the prosecutor to inform the investigating officer timeously of an impending bail hearing. It was also noted that there is currently a need for written information for sexual assault victims on bail and the operation of the criminal justice system.

Representatives from one station recounted that a policy decision was taken that bail must be opposed in respect of all offences identified as 'core crimes' for this station. This implies that the investigating officer must attend the bail hearing, and there is a person designated at station level responsible for overseeing that this policy is adhered to.

SAPS members also proposed -

- That it would be useful for prosecutors to initial the prescribed bail to indicate that they have noted the information set out in this form);<sup>244</sup>
- That police stations explore strategies (e.g. answering mechanisms linked to individual telephone extensions) to address difficulties experienced in making contact with investigating officers;
- That victims should be informed of the importance of updating the investigating officer on changes in their address or other contact details;
- Decentralised training (for example, on station level);
- Information sessions on bail conditions for community; and
- Closer working relationships between prosecutors and investigating officers.

---

<sup>244</sup> . The National Prosecutors' Directives prescribe a bail form to be completed by the investigating officer in all cases where an arrest had occurred prior to the accused appearing in court. This form aims to provide prosecutors with information relevant to the pre-trial disposition of the accused, including the possibility of intimidation or further harm to the complainant. See Barday and Combrinck (op cit) at 39-40 regarding current use of this bail form.

Representatives from **non-governmental organisations** [NGO's] pointed out that one of the most successful and useful strategies is to build a good partnership between the prosecution and the criminal justice system on the one hand and existing victim support services (both NGO and state) on the other.

The NGO's also put forward the following proposals:

- NGO's and community-based organisations [CBO's] can provide an interface between the criminal justice system and the victim, for example by following up with criminal justice personnel on the progress of the victim's case;
- NGO's and CBO's can play a role by communicating with investigating officers and prosecutors where they believe that bail should not be granted to a specific perpetrator, and also to suggest particular conditions in case bail is granted;
- Public education campaigns (for example, through radio, pamphlets, newsletters or information booklets) can serve to increase awareness of victims' rights, the operation of the criminal justice system and the nature and purpose of bail;
- Such education and awareness campaigns should be extended to rural areas;
- Monitoring of magistrates' decisions in bail hearings in sexual assault matters (as well as trial judgments and sentencing);
- Training for investigating officers and prosecutors on the expectations of sexual assault victims and their role in meeting these expectations;
- Increased community involvement in bail hearings; and
- Identify existing resources and disseminate this information.

As is evident from the above list, these role-players have identified a number of measures that may be relatively easy to implement and would not hold major resource implications for the state.

# CHAPTER 6

## RECOMMENDATIONS

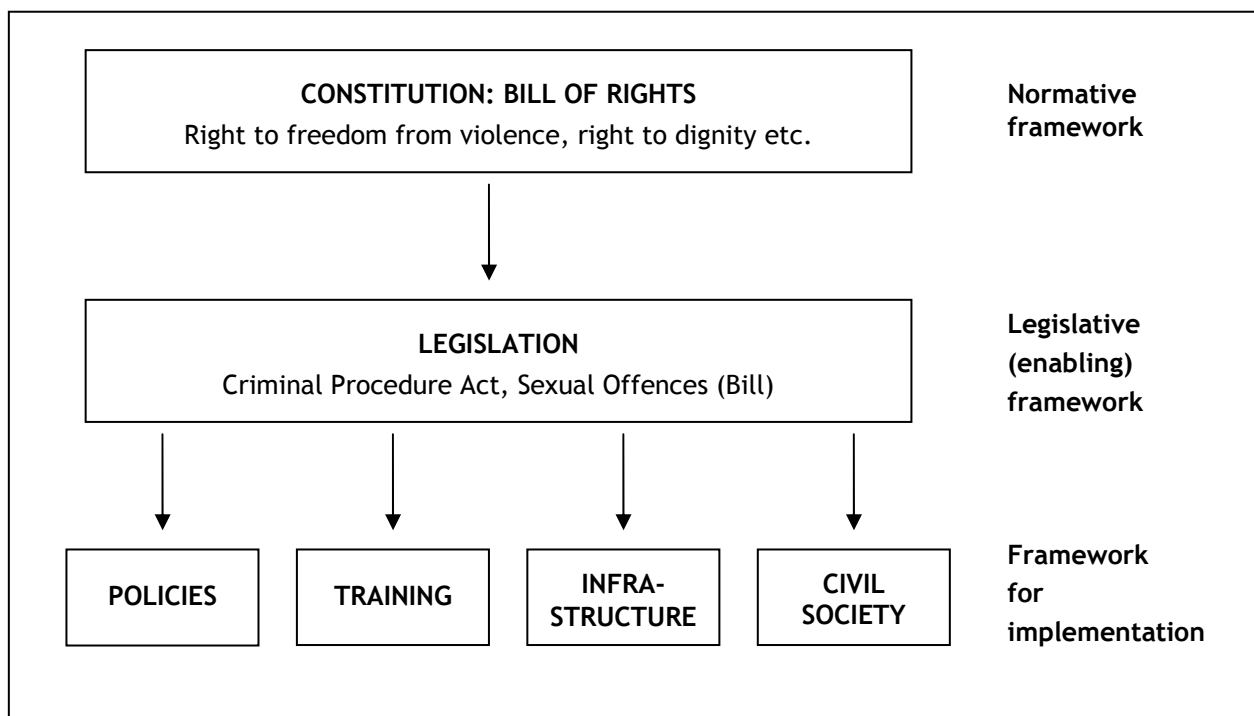
'I just want to know more about my court case.'<sup>245</sup>

### 1. INTRODUCTION

At the conclusion of the first research phase, we formulated a number of recommendations, which are set out in the First Research Report.<sup>246</sup> At this point, we can add further recommendations based on our observations during the second research phase as well as our brief investigation above of a number of promising practices.<sup>247</sup>

### 2. DIFFERENT LEVELS OF INTERVENTION

Before listing our specific recommendations, it is useful to consider the different levels of intervention that may be required in order to address a specific situation. These levels are set out in the following diagram:



<sup>245</sup> . SV6.

<sup>246</sup> . See Barday and Combrinck (op cit) at 65-68.

<sup>247</sup> . See Chapter 5 above.

It should be noted that these different levels do not inevitably operate in isolation. For example, it may necessary to include certain normative (or standard-setting) provisions in legislation. This is what we argue for below: we recommend that certain standards relating to the rights of victims of sexual assault (and concomitant positive duties resting on state officials) should be set out in legislation. In addition, we also make recommendations regarding the implementation framework, including the development of policies, training and infrastructure as well as expanding the role of civil society.

### **3. LEGISLATION**

The Law Reform Commission published its final report on sexual offences in December 2002. This report contains a draft Sexual Offences Bill, which does not specifically address the question of bail.<sup>248</sup> However, we have argued above that legislation should set out the positive duties resting on criminal justice personnel, with specific reference to police officials and prosecutors, and we accordingly recommend that the forthcoming sexual offences legislation would be the most appropriate instrument to accommodate such provisions. In some instances our recommendations may also entail amendment of the relevant provisions of the Criminal Procedure Act.<sup>249</sup>

#### **3.1 Assigning responsibility to specific state officials**

As a point of departure, it will be necessary to make certain policy decisions about which state officials should have particular duties at different stages of the criminal justice process. It has, for example, been pointed out as problematic in a number of jurisdictions that no specific state agency is assigned the responsibility for providing victims with follow-up information after reporting the sexual assault.<sup>250</sup> At present, both the SAPS National Instruction No 2/ 1998 as well as the National Prosecution Directives appear to place the responsibility for keeping the victim informed of key events as well as general progress in the case on the SAPS. However, the Law Reform Commission interestingly recommends that the Office of the Director of Public Prosecutions should formally assume responsibility, from the first appearance of the accused onwards, for directly communicating relevant information to the victim, rather than this being done through members of the police.

#### **3.2 Nature of provisions**

At a minimum, statutory provisions should cover the following aspects:

- The investigating officer must obtain all relevant information from the complainant in order to oppose a bail application and/ or to consider imposing appropriate conditions on the accused, should he be released on bail.
- In a bail hearing in a sexual offence case, the prosecutor must place information regarding the victim's need or perceived need for protection before court.

---

<sup>248</sup> . See Chapter 4 above.

<sup>249</sup> . Act 51 of 1977.

<sup>250</sup> . See Bacik et al (op cit) at 6.

- The victim should be supplied with general information regarding the operation of the criminal justice system as well as specific information relating to the status and progress of her case. This should include (at least):
  - ★ The steps that will be taken by the police after the victim reports the sexual assault, with specific reference to the arrest of the perpetrator;
  - ★ Reasons for delays in effecting arrest, especially where the perpetrator is known to the victim and she has given the police sufficient information to find him;
  - ★ The nature and purpose of bail;
  - ★ Information about the status of the perpetrator where an arrest has taken place (especially where the perpetrator has been released on bail and there is thus a possibility that the victim may encounter him);
  - ★ Impending trial dates;
  - ★ The status of the case on an ongoing basis and what the next step in the process will be; and
  - ★ The outcome of the case when the case is finalised and the reasons for this outcome.
- Where the complainant reports a breach of bail conditions by the accused, the investigating officer must immediately take a statement from the complainant or other witnesses detailing the breach of the bail conditions; approach the prosecutor with the aim of an application to have the accused's bail revoked; and, where necessary, take steps to ensure the safety of the complainant.
- In addition to opposing an accused's bail hearing or arguing for the imposition of appropriate bail conditions, prosecutors must make use of all available legal measures to protect the safety of the victim. Such measures could include -
  - ★ Assisting the complainant in applying for a protection order in terms of the Domestic Violence Act<sup>251</sup> against the perpetrator where there is a domestic relationship between the victim and the accused.<sup>252</sup> The potential benefits of a protection order are firstly, that such an order would extend beyond the finalisation of the criminal proceedings, and secondly, that a breach of such order is arguably easier for the victim to act on than a violation of bail conditions.
  - ★ Prosecuting persons other than the accused who intimidate the victim in terms of the Intimidation Act.<sup>253</sup>

---

<sup>251</sup> . Act 116 of 1998.

<sup>252</sup> . S 1 of the Domestic Violence Act defines a 'domestic relationship' very broadly. The definition includes, for example, a relationship between a complainant and a respondent where 'they are or were in an engagement, dating or customary relationship, including an actual or perceived romantic, intimate or sexual relationship of any duration'.

<sup>253</sup> . See s 1(1) of the Intimidation Act 72 of 1982.

- The investigating officer should inform the complainant of the bail conditions imposed on the accused should he be released on bail and of the procedure to be followed if the accused breaches the bail conditions

### 3.3 Resource allocation

As explained above, the Domestic Violence Act<sup>254</sup> sets a precedent for the imposition of statutory duties on state officials.<sup>255</sup> Due to the relatively recent commencement of this Act,<sup>256</sup> the impact of these provisions is a matter for ongoing evaluation. However, an important lesson is to be drawn from a recent study on the implementation of the Act, viz that it is not sufficient for the legislature to enumerate the duties of state officials and to set out the sanction for non-compliance.<sup>257</sup> Statutory duties should be reinforced by the allocation of sufficient resources and support to enable officials to comply with their duties. Parenzee et al explain this as follows:

'Both police and court personnel expressed a sense of being expected to fulfil the requirements of the Act without the necessary guidance, support or resources to do so. Not only does this set people up for failure, but it creates an environment which becomes hostile to work in, due to unmet expectations both on the part of law enforcement agents and helpless complainants, feelings of disempowerment, and feelings of being implicated in a system that is not performing. It seems obvious to note that an environment such as this is not conducive towards ensuring that law enforcement agents are functional, enthusiastic and caring in carrying out their assigned duties under the Act.'<sup>258</sup>

## 4. TRAINING

We recommend specialised training for all criminal justice personnel tasked with handling sexual assault cases, including police officials, prosecutors and magistrates. Such training should include information relating to the impact of sexual assault on victims and secondary victimization, and should also address stereotypical assumptions about sexual assault and victims' reasons for reporting such cases.

Based on our research observations, we have also identified the following specific issues for incorporation in training initiatives:

---

<sup>254</sup> . Act 116 of 1998.

<sup>255</sup> . Chapter 5 above.

<sup>256</sup> . The Act came into operation on 15 December 1999.

<sup>257</sup> . Parenzee et al *Monitoring the Implementation of the Domestic Violence Act: First Report* (2001) at 86, 114.

<sup>258</sup> . *Idem* at 86.

## **4.1 SAPS**

Training should include:

- All police officials (including reservists) who may be tasked with taking the reporting statements of sexual assault victims should be properly briefed on the inclusion of information that may be pertinent in the event of a bail hearing. This would include questions such as whether there had been specific threats of retaliation against the complainant, whether the accused knows where the complainant stays, whether he is a member of a gang, or has attempted to contact her after the attack.
- Investigating officers should be alerted to the fact that initial ('A1') statements may not contain all the information relevant to a bail hearing.
- Investigating officers should be made aware that in sexual assault cases the possibility of threats or intimidation of the victim exists beyond the so-called 'high risk' situations such as gang rape or where the complainant and perpetrator live together. It is therefore important to involve the complainant in the investigation for purposes of the bail application.
- The importance of establishing and maintaining contact with the complainant prior to the bail hearing should be emphasised in the training of investigating officers.
- Investigating officers should receive training around what is required of them when giving evidence in bail hearings.

## **4.2 Prosecutors**

Training should include:

- In-depth knowledge of the legal provisions relating to bail; and
- Information on making maximum use of evidence presented during the bail hearing in the trial. (This should incorporate aspects such as cross-examination of the accused during the bail hearing.)

## **4.3 Magistrates**

Training should include:

- Guidance around interpretation of the concepts 'exceptional circumstances' and 'interests of justice' as used in section 60 of the Criminal Procedure Act; and
- Emphasis on the fact that presiding officers play a leadership role in ensuring that victims and witnesses are treated with courtesy, respect and fairness.<sup>259</sup>

---

<sup>259</sup> . See in this regard also UNODCCP (op cit) at 69.



## **5. POLICIES**

The policy recommendations set out here are intended to enhance the implementation of the statutory provisions set out above.

### **5.1 SAPS**

- Questions relevant to the determination of bail should be included in the checklist of questions provided in the National Instruction No 22/ 1998.
- The use of the standardised bail recommendation form currently contained in the National Prosecution Directives should be included in the SAPS National Instruction, and police investigating officers and prosecutors should be directed to make use of the form in all cases to construct a written record of their communications regarding bail.
- All police officials should be instructed to obtain an additional contact address or telephone number for complainants when sexual assault is first reported.
- Supervising officers who are requested to close sexual assault cases should scrutinize these dockets carefully and should periodically review the investigating profile of detectives tasked with sexual assault cases.<sup>260</sup>
- Where cases are closed without an arrest, the reasons for such closure should be noted in detail in the case docket. The name and official designation of the person making the decision to close the docket should also be shown legibly in the docket.

### **5.2 Prosecutors**

Given our finding that cases are generally postponed at the first court date for seven days, this provides the investigating officer with an additional opportunity to complete the bail investigation. Prosecutors should therefore check at this point whether the victim's reporting statement (A1) contains adequate information to consider bail. If not, the prosecutor should provide the investigating officer with appropriate instructions.

Prosecutors should guide investigating officers regarding the bail investigation as well as the nature of their evidence in bail hearings. Where possible, attempts should be made for sexual assault cases to be screened by more experienced prosecutors for purposes of the investigation as well as the question of bail.

---

<sup>260</sup> . This recommendation is related to our observation that the history of investigations conducted by individual investigating officers may suggest that the reasons provided by investigating officers for closure of cases deserve closer scrutiny. See Barday and Combrinck (op cit) at 31-32.

Prosecutors conducting bail hearings where evidence is led that may potentially be used in the trial should be directed to -

- Make a request for transcription of the bail record where the hearing is mechanically recorded; or
- Make adequate written notes of this evidence for use by his or her successor handling the 'main' trial

## **6. ROLE OF CIVIL SOCIETY ORGANISATIONS**

Non-governmental organisations and community-based organisations can play an important role in acting as an interface between sexual assault victims and the criminal justice system (analogous to victim advocates in USA). For this purpose, researchers have developed a one-day training course for NGO's aimed at enhancing their capacity to liaise with criminal justice personnel and intervene on behalf of their clients where appropriate. Non-governmental organisations can also play a major role in increasing public awareness of the nature of bail and the general operation of criminal justice system.

In addition, innovative partnerships between NGO's and the State should be explored, such as the following:

- Sponsoring "witness alert" programmes, whereby victims and witnesses are able to continue with their normal daily routines on "stand-by" until they are summoned to court at short notice; and
- Sponsoring victim/ witness information telephone lines to provide up-to-date information after hours to subpoenaed witnesses.<sup>261</sup>

## **7. IMPLICATIONS FOR RESEARCH AND MONITORING INITIATIVES**

The experience gained through this research project has allowed us to note specific recommendations for future research initiatives. These include -

- Our experience in negotiating access to information at police stations has shown that there is no uniform policy in place in the Western Cape regarding access to information for research purposes. It will therefore be useful to engage with senior police management in an attempt to establish a 'research protocol' that will on the one hand capture valid police concerns regarding, for example, the confidentiality of victims and the safeguarding of operational methods while on the other hand allowing for researchers to access essential information from police dockets and records.

---

<sup>261</sup> . UNODCCP (op cit) at 67.

- The difficulties experienced in this study (as well as other comparable studies) in recruiting victims to participate indicate the importance of building in evaluation by victims/ clients when designing new projects. It should be easier to 'debrief' victims regarding their experiences while they are still close to the criminal justice system than to attempt to re-establish contact afterwards.

## **8. FURTHER EXPLORATION**

Strategies should be developed to ensure that a breakdown of communication between the investigating officer and the victim is avoided at all costs. These strategies could include the following:

- The introduction of 'victim liaison services' analogous to the victim advocate system employed in the USA.
- Provision of accessible written information could be provided to complainants setting out their rights in terms of access to information as well as the importance of remaining in contact with the investigating officer.
- Upgrading SAPS computer databases (CAS system) to facilitate access to information in the event of queries by complainants. This would rely on the database being updated regularly.
- In areas where there is a high degree of mobility (for example, informal settlements), specific measures should be developed to ensure that complainants are not 'lost' due to postponements of the case. At the same time, postponements in these cases should be kept to a minimum.

In addition, strategies should be developed to ensure that proper communication between investigating officers and prosecutors is sustained. These strategies could include making use of existing resources, such as the police liaison officer stationed at the larger courts as well as the services of the clerk of the court. Specific attention should be paid to measures to ensure that investigating officers are present for bail hearings.

Strategies should be developed to address current shortcomings in the record-keeping system for bail applications. These strategies could include the use of standard bail application forms to be completed by the presiding officer as well as the development of computerised record-keeping systems. [Example of a bail record form is attached as **Appendix B.**]

The potential benefits of current pilot projects, such as the Thuthuzela Care Centre, in addressing current shortcomings relating to bail should also be evaluated.

## 9. CONCLUSION

Our initial decision to launch this research project was made in the belief that an investigation into the pre-trial disposition of the accused could present us with a microscopic view of what happens in the broader criminal justice process. This has indeed proved to be the case: in spite of the relatively narrow focus of this project, our research observations have provided insights into the operation of the criminal justice system far beyond the boundaries of the bail hearing.

A number of issues remain to be explored in more detail. Our inquiry into the therapeutic impact of current practices relating to bail, as well as the integration of the model of restorative justice, has merely scratched the surface. In addition, the question of HIV/AIDS transmission in the context of sexual assault has only been touched on tangentially.<sup>262</sup>

When considering amendments to legal provisions or to policies, it is important to locate these amendments in the current realities of the criminal justice system. In the context of bail, one of these realities is the impact of the number of awaiting-trial prisoners in South African prisons, especially where such prisoners remain in custody because they cannot afford to pay the amount of bail that has been set.<sup>263</sup> While this issue may require further investigation beyond the scope of this report, it must be noted that measures to reduce the number of awaiting-trial prisoners should be considered with a keen awareness of the concerns of victims of sexual assault, most notably fears around their safety.

In conclusion, it is useful to return at this point to the two broad aims of the research, namely to give effect to the intention of the legislature by ensuring that persons accused or sexual assault are detained where the interests of justice demand, and to reduce secondary victimisation and intimidation of sexual assault victims by ensuring that their interests are adequately represented during bail hearings.

We have come to the conclusion that much remains to be done to meet the latter aim of reduction of secondary victimization and intimidation of victims. A second, and perhaps more important conclusion lies in the recognition that the notion of 'interests of justice', as referring to in the statement of the first aim, goes beyond the boundaries of the criminal trial and indeed extends to the consideration of bail.<sup>264</sup> Where an accused, for example, violates his bail conditions by intimidating or further assaulting the victim, the interests of justice are severely prejudiced by the effect that such intimidation or violence may have on the victim's ability of willingness to participate in the criminal trial as well on the quality of her evidence.<sup>265</sup> The challenge therefore now lies in ensuring that these 'interests of justice' encapsulate the needs and concerns of victims of sexual assault.

---

<sup>262</sup> . See Barday and Combrinck (op cit) at 34.

<sup>263</sup> . Judicial Inspectorate of Prisons **Annual Report 2002/2003** (2003) at 28. See also the recently enacted s 63A of the Criminal Procedure Act.

<sup>264</sup> . Pithey et al (op cit) at 36.

<sup>265</sup> . Ibid.

# REFERENCES

## BOOKS AND JOURNAL ARTICLES

Brownmiller, S. (1975). **Against Our Will: Men, Women and Rape**. Harmondsworth: Penguin Books.

Burchell, J. & Milton, J. (1997). **Principles of Criminal Law**. 2<sup>nd</sup> ed. Kenwyn: Juta & Co.

Carson, D. (2003). 'Therapeutic jurisprudence and adversarial injustice: questioning limits.' **Western Criminology Review**. 124-133.

Combrinck, H. (2001). 'He's out again: the role of the prosecutor in bail for persons accused of sexual offences.' **Law, Democracy and Development**. 31-44.

Combrinck, H. (2001). 'The right to freedom from violence and the reform of sexual assault law in South Africa.' in Sarkin, J. & Binchy, W (eds). **Human Rights, the Citizen and the State: South African and Irish Approaches**. Dublin: Round Hall Ltd.

E du Toit et al. (Revision Service 30, 2003). **Commentary on the Criminal Procedure Act**. Juta.

Feldthusen, B., Hankivsky, O. & Greaves, L. (2000). 'Therapeutic consequences of civil actions for damages and compensation claims by victims of sexual abuse'. **Canadian Journal of Women and the Law**. 66-116,

Herman, J.L. (1992). **Trauma and Recovery**. London: Pandora.

Ledray, LE. (1994). **Recovering from Rape**. 2<sup>nd</sup> ed. New York: Henry Holt & Co.

Lebowitz, L., Harvey, MR & Herman, JL. (1993). 'A stage-by-dimension model of recovery from sexual trauma'. **Journal of Interpersonal Violence**. 381.

Te Paske, B. (1982). **Rape and Ritual**. Toronto: Inner City Books.

United Nations Office for Drug Control and Crime Prevention [UNODCCP]. (1999). **Handbook on Justice for Victims**. New York.

Van der Berg, J. (2001) **Bail: A Practitioner's Guide**. 2<sup>nd</sup> ed. Lansdowne: Juta Law.

## RESEARCH REPORTS

Artz, L. et al. (2002). **Submission to the South African Law Commission Project 107 Sexual Offences Act Discussion Paper 102**. Community Law Centre (University of the Western Cape), Department of Forensics and Toxicology (University of Cape Town), Institute of Criminology (University of Cape Town) and Women's Legal Centre.

Bacik, I., Maunsell, C. & Gogan, S. (1998). **The Legal Process and Victims of Rape**. Dublin Rape Crisis Centre & School of Law, Trinity College Dublin.

Barday, R and Combrinck, H. (2002). **Implementation of Bail Legislation in Sexual Assault Cases: First Research Report**. Gender Project, Community Law Centre, University of the Western Cape: South Africa.

Francis, V. (2002). **A Rape Investigation in the Western Cape**. Cape Town: Bureau of Justice Assistance.

Hansson, D. (1992). **What is Rape Trauma Syndrome?** Occasional Paper 4-92. Institute of Criminology, University of Cape Town.

Parenzee, P., Artz, L. and Moul, K. (2001). **Monitoring the Implementation of the Domestic Violence Act: First Report**. Institute of Criminology (University of Cape Town).

Pithey, B., Artz, L. Combrinck, H. and Naylor, N. (1999). **The Legal Aspects of Rape in South Africa**. Rape Crisis (Cape Town), Women and Human Rights Project, Community Law Centre (University of the Western Cape), Institute of Criminology (University of Cape Town).

South African Law Commission. (1997). **Issue Paper 7 (Project 82) Sentencing: Restorative Justice**.

South African Law Commission. (2001). **Discussion Paper 102 (Project 107) Sexual Offences: Process and Procedure**.

South African Law Commission. (2001). **Discussion Paper 96 (Project 73) Simplification of Criminal Procedure (A More Inquisitorial Approach to Criminal Procedure - Police Questioning, Defence Disclosure, The Role of Judicial Officers and Judicial Management of Trials)**.

South African Law Commission. (2002). **Project 107: Sexual Offences Report**.

South African Law Commission. (2002). **Project 106: Juvenile Justice Report**.

Stanton, S. and Lochrenberg, M. (1994). **Justice for Sexual Assault Survivors?** Institute of Criminology (University of Cape Town).

Stanton, S. Lochrenberg, M. and Mukasa, V. (1997). **Improved Justice for Survivors of Sexual Violence?** Rape Crisis (Cape Town), African Gender Institute (University of Cape Town), Human Rights Commission.

## **MISCELLANEOUS**

Dey, K. (2002). **Reasons Why Women Delay or Avoid Reporting or Disclosing Rape**. Unpublished paper prepared for Rape Crisis Cape Town.

Judicial Inspectorate of Prisons. (2003) **Annual Report for the period 1 April 2002 to March 2003**

Kilpatrick, D.G., Whalley, A. & Edmunds, C. (2000). 'Chapter 10: Sexual Assault' in A Seymour et al (eds) **National Victim Assistance Academy**. [[www.ojp.usdoj.gov/ovc/assist/nvaa2000/academy/J-10-SA.htm](http://www.ojp.usdoj.gov/ovc/assist/nvaa2000/academy/J-10-SA.htm)]

Lonsway, KA. (2001) 'The Role of Victim Advocates' in **Successfully Investigating Acquaintance Sexual Assault: A National Training Manual for Law Enforcement**. National Centre for Women & Policing. [Website]

Malefyt, M.B. & Walker, A.H. (1998). **Assessing the Justice System Response to Violence Against Women: A Tool for Community-Based Victim Service Programs Developing Effective Responses**. Battered Women's Justice Project, Criminal Justice Centre. [[www.vaw.umn.edu](http://www.vaw.umn.edu)]

Pithey, B. (2001). **The Thuthuzela Care Centre: A Multidisciplinary Approach to the Management of Rape Cases** Unpublished report: National Prosecuting Authority.

Schma, W. (Undated). 'Therapeutic Jurisprudence' [www.ncsc.dni.us/KMO/Projects/Trends/99-00/Articles/Therapeutic\_Jurisprudence.htm#\_edn1]

Tomz, J.E. & McGillis, D. (1997). **Serving Crime Victims and Witnesses**. National Institute of Justice.

Waterhouse, S. (2002). **Pre-Trial Consultation in Rape Cases**. Community Law Centre & Rape Crisis Cape Town Trust.

Wexler, D. (Undated). 'Therapeutic jurisprudence: an overview' [www.law.arizona.edu/depts./uprintj].

Winick, B. (Undated). 'Therapeutic jurisprudence defined' [www.brucewinick.com/Therapeutic%20Jurisprudence.htm]

## **LEGISLATION: SOUTH AFRICA**

Constitution of the Republic of South Africa Act 108 of 1996

Criminal Procedure Act 51 of 1977

Domestic Violence Act 116 of 1998

Intimidation Act 72 of 1982

Promotion of Access to Information Act 2 of 2000

## **LEGISLATION: NAMIBIA**

Combating of Rape Act 8 of 2000

Criminal Procedure Act 51 of 1977

## **CASE LAW: SOUTH AFRICA**

*Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC).

*Carmichele v Minister of Safety and Security and Another* 2002 (10) BCLR 1100 (C).

*Minister of Safety and Security v Van Duivenboden* 2002 (3) AllSA 741 (SCA).

*S v Baloyi (Minister of Justice and Another Intervening)* 2000 2 SA 425 (CC); 2000 (1) BCLR 86 (CC).

*S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).

*Van Eeden v Minister of Safety and Security* 2002 (4) AllSA 346 (SCA).





# **INTERVIEW QUESTIONNAIRE**

## **SECTION 1: INFORMATION ABOUT THE RESEARCH**

- **Explain the purpose of the research**

The purpose of this research is to see if the bail laws protect women who have laid charges of rape with the police. We are therefore trying to see what problems women experience with the police and with the courts when it comes to the arrest and bail of the rapist, and to get suggestions from rape survivors on how to improve the current system. We have already spoken to police, prosecutors and magistrates to see how they understand bail in rape cases, and to get suggestions from them.

At the end of our research, we will put together a report with all the information, as well as suggestions on how to improve gaps and shortcomings, and we will work with parliament, the Department of Justice and the SAPS to make changes to laws or training programmes where necessary. We will try to inform women who take part in the research of the work that we do to change existing problems.

- **How will the interview work?**

I would like to ask you whether it's OK for us to tape the interview. The reason for taping the interview is so that the researchers can listen to the tape and type out what you have said. The other way to do this is for me to take notes while we talk, but that may be a slower way of working.

After typing out what you say during the interview, the researchers will destroy the tapes, which means that no-one else will be able to listen to your tape. If you spoke in Xhosa or Afrikaans, the researchers will translate what you have said into English, and put the information in their report.

- **Explain about confidentiality and anonymity**

The researchers do not have your name, address or any other information that can identify you. You will not be asked for any details about the rape. Your views and comments are therefore completely anonymous.

- **Do you have any questions about the research and the interview?**

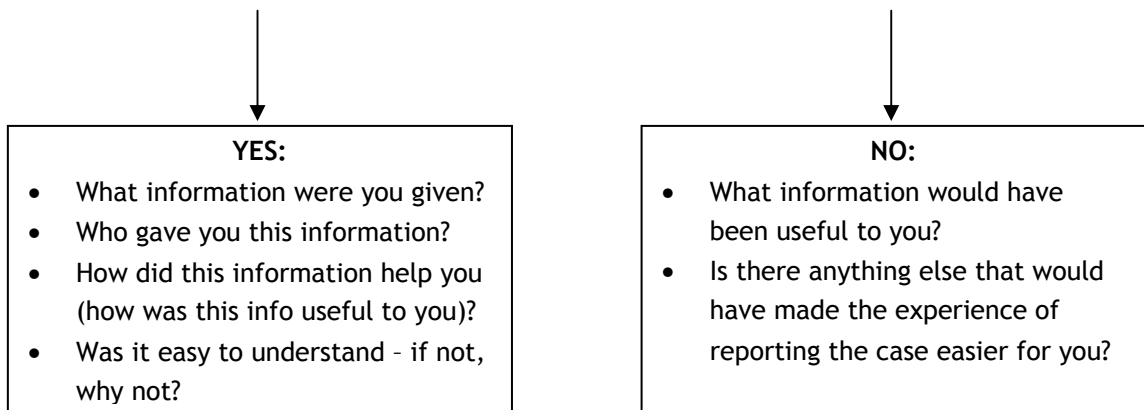
## **SECTION 2: QUESTIONS**

1. **When you decided to report the case to the police, what did you expect from the police and the courts?**

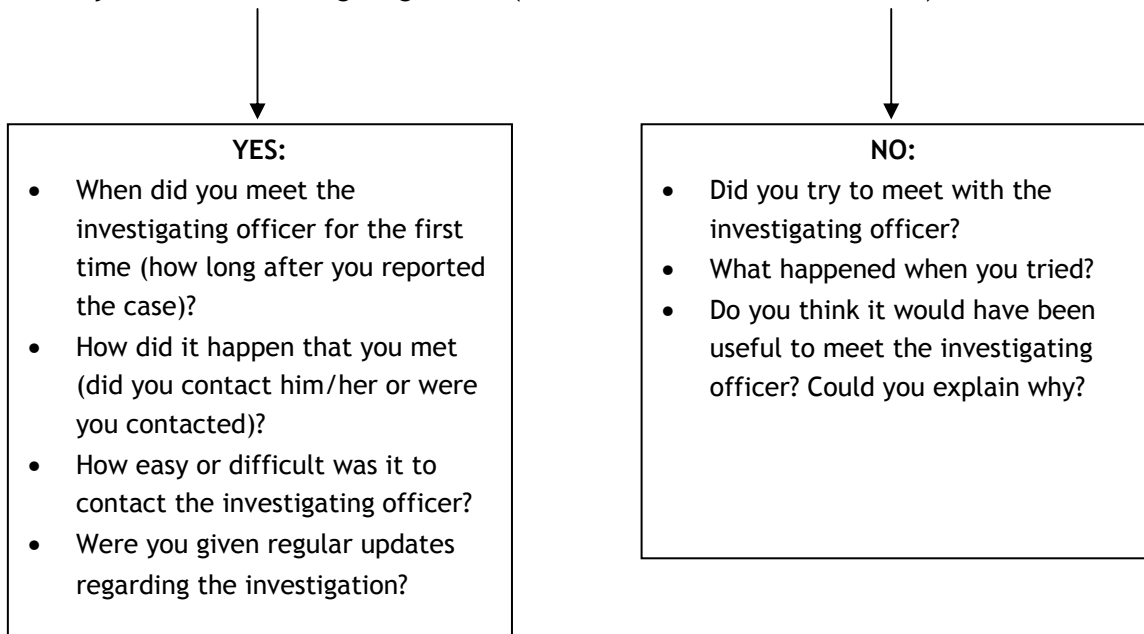
**Issues to explore:**

- What did you think or hope would happen?
- What did you hope to gain from reporting the case?

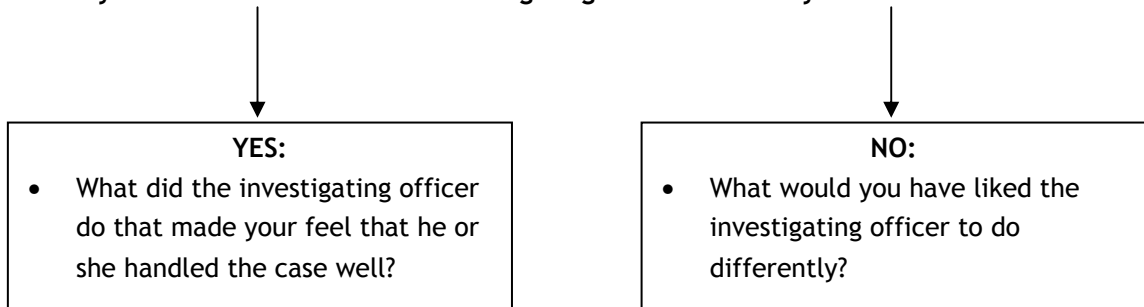
2. When you first went to make the report, were you given any information about what would happen to the case?



3. Have you met the investigating officer (the detective who took the case)?



4. Were you satisfied with how the investigating officer handled your case?



**Issues to explore:**

- Did the investigating officer give you enough information about the case?
- How did the investigating officer treat you?
- Did you feel confident that your case was being investigated properly? Can you explain why?

**BAIL SECTION:**

5. Do you know whether the rapist in your case has been arrested?

**YES:**

- How did you find out that he was arrested?
- Do you know what happened after he was arrested (for example, if he was given bail?)
- Did the police or prosecutor contact you to give them information before deciding if the rapist should get bail?
- Did you feel that you had information that the court should know about before deciding about bail? Can you explain?
- Did anyone contact you to tell you what the court decided about bail?

**NO:**

- Do you expect the police or the court to let you know when the rapist is arrested?
- Why would it be useful for you to know about the arrest?

6. Has the rapist (or his friends or family) contacted you or attempted to contact you or anyone else involved in the case after the rape?

**YES:**

- Explain how this happened.
- How did this make you feel?
- Did you do anything about it (eg call the police)?
- What happened then (did the police respond)?

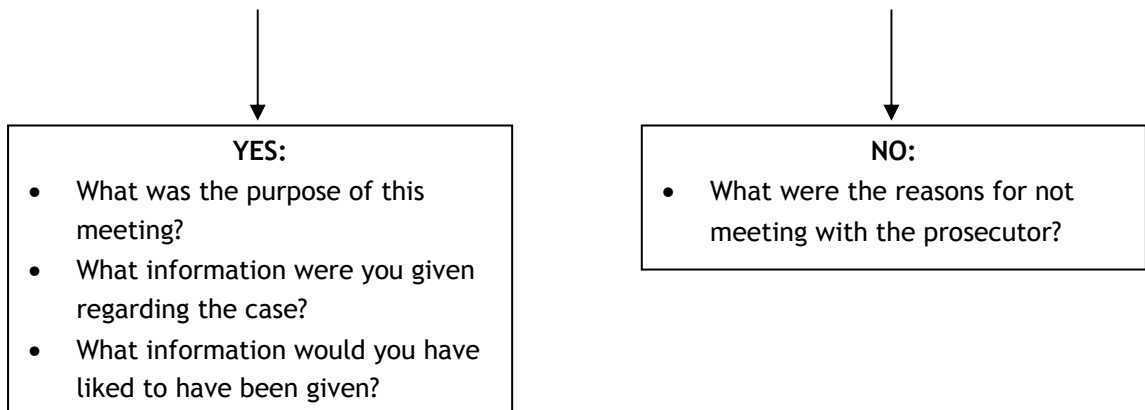
**If client did not respond to contact/ threat:**

Why did you decide not to do anything?

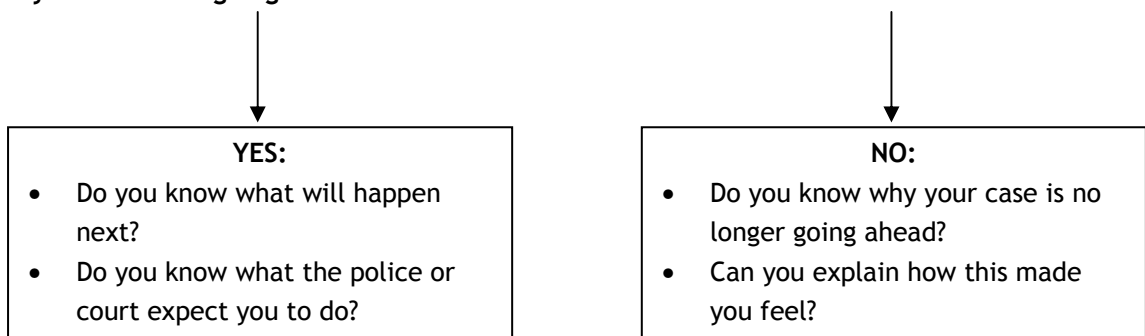
**NO:**

- How would you respond if he were to contact you?

7. Have you met the prosecutor handling your case?



8. Is your case still going ahead?



9. What would you have been prepared to do to make the case go more easily? (For example, phone the police to keep up with what happened.)

10. Do you have any suggestions about how the police or the courts could have done things better (apart from suggestions already mentioned earlier)?

11. Do you need any assistance or information that will make the case easier for you?

### **SECTION 3: CLOSING THE INTERVIEW**

- Find out whether the client has any further comments.
- Thank her for participating in the interview.
- Discuss whether the interview raised any questions or concerns that she would like to address now or during the next counseling session.
- Remind her to complete the travel claim form.

# **RECORD OF BAIL HEARING IN TERMS OF SECTION 64 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977**

STATE v \_\_\_\_\_ CASE NO: - \_\_\_\_\_

Charge/s: \_\_\_\_\_

Date of hearing: \_\_\_\_\_

Hearing mechanically recorded: YES NO

Bail denied: YES NO

Bail granted: Amount: \_\_\_\_\_

Summary of court's motivation for refusing bail:  
\_\_\_\_\_  
\_\_\_\_\_

In terms of Section 62 of the Criminal Procedure Act 51/1977 the following bail conditions are added:

That the accused:

1. Refrains from direct or indirect communication with the State witnesses including the complainant;
2. Presents himself/herself personally to \_\_\_\_\_ police station each and every \_\_\_\_\_ between the hours \_\_\_\_\_ and \_\_\_\_\_ .
3. Refrains from going to \_\_\_\_\_ .
4. Change his place of accommodation to \_\_\_\_\_ for the duration of the trial.
5. Other conditions: \_\_\_\_\_

Investigating Officer ordered to inform complainant of outcome of bail hearing

YES NO

\_\_\_\_\_  
MAGISTRATE

\_\_\_\_\_  
DATE

