

**Directives issued in terms of section 66(2)(a) and (c) of the
*Criminal Law (Sexual Offences and related matters) Amendment Act,
2007 (Act 32 of 2007)***

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SEXUAL OFFENCES

A. General

1. These directives are issued in terms of the requirements of section 66(2) of the Criminal Law (Sexual Offences and related matters) Amendment Act, 2007 (Act 32 of 2007) (in this Part referred to as “the Act”). In terms of section 66(4) of the Act, these directives, and any new or amended directives, are required to be submitted to Parliament before publication in the Gazette.
2. The Act came into operation on 16 December 2007. However, the anal rape (anal penetration by a penis) of a female person may be prosecuted as common law rape if committed after 10 May 2007 (but before 16 December 2007 when the common law of rape was repealed), in terms of the decision of the Constitutional Court in *S v Masiya* 2007(2) SACR 435 (CC).
3. Regard must at all times be had to the preamble and objects of the Act, in particular to afford the maximum protection to victims, and recognition of their needs through timeous, effective and non-discriminatory investigation and prosecution.
4. Note should be taken of Chapter 2 of the Children’s Act, 2005 (Act 38 of 2005), since it guides the implementation of all legislation dealing with children.

B. The manner in which sexual offence cases are to be dealt with

1. Specialist, dedicated prosecutors selected on the basis of their experience, interest, skills and levels of sensitisation should deal with such matters. Preferably the same prosecutor should prosecute a matter from beginning to end.
2. Prosecutors should endeavour to reduce the trauma caused by the complainant’s contact with the Criminal Justice System by following a sensitive, victim-centred approach. Prosecutors have a protective role towards these complainants and their views and concerns should be considered. Prosecutors should ensure that complainants are kept informed of the status of their cases at all relevant phases throughout the criminal justice process.
3. In the case of child complainants, their individual age, developmental stage and level of maturity should be taken into account.
4. The investigation and prosecution of sexual offence cases can be enhanced by following a coordinated, multi-disciplinary approach with relevant departments and civil society.
5. Prosecutors must keep sexual offence case dockets in a secure place and shall provide access to the information in the docket only to persons who, by reason of their participation in the proceedings, are legally entitled to such access.

6. Information regarding the complainant's address, work details and telephone number should not be disclosed to the defence and should be removed from copies of statements prior to handing these over. Should the defence wish to have access to this information they must apply to court for these details to be disclosed and show cause why this information is necessary to the defence of the accused. This applies particularly to private matters such as the HIV status of the complainant and any other witness(es).
7. With regard to dockets that contain visual images of child pornography, prosecutors need only allow the defence access thereto and should not provide copies thereof unless so ordered by the court. Dockets containing child pornography must at all times be kept at the official workplace and stored in a secure locked location.
8. Prior authorisation is necessary before the utilisation of an expert who is not a government employee.
9. Persons with mental disabilities may and do engage in consensual sexual activity, therefore any decision to prosecute in such matters should be carefully considered.
10. In order to prove that a complainant is mentally disabled and unable to consent to a sexual act, an expert's report is generally required. Depending on the severity of the mental disability, this may be a social worker, psychologist or psychiatrist. This report should detail the nature and extent of the mental disability that resulted in the complainant being unable to consent.

C. Pre-trial phase

1. The investigation of the case should be closely guided from receipt of the docket and all decisions should be made at the earliest opportunity. Special attention should be given to aspects which require immediate attention, such as crime scene inspection, forensic evidence collection, collection of any other possible corroborative evidence including securing of cameras and computers, and the documentation of injuries of the complainant.
2. A thorough and comprehensive consultation should be held with the complainant as soon as possible (preferably within 21 days of receipt of the docket). Initial decisions concerning further investigation, referrals and withdrawals with the possibility of later reinstatement, (pending the outcome of investigations / referrals) should be made immediately following this consultation.
3. Prosecutors should inform a complainant of the possible protective measures available in terms of existing legislation, where applicable. These include sections 153, 154, 158, 161, 170A and 227 of the Criminal Procedure Act, 1977 (Act 51 of 1977). Especially in the case of a child complainant, the possibility of a support person need also be considered. The exercise of these measures is subject to the court granting the application for their use.
4. All relevant information should be obtained prior to the bail hearing. This may include—

- (a) previous convictions;
 - (b) the complainant's views on the issue of bail; and
 - (c) whether the complainant requires protection.
5. A condition that the accused has to remove him- or herself from the home where the complainant is currently residing, should be requested where appropriate (refer to the provisions of section 153 of the Children's Act, 2005).
 6. The complainant should be informed of the procedure to be followed if the accused contravenes any of the bail conditions.
 7. Prosecutors should determine whether any expert evidence will be required. This may include medical evidence, psychological evidence or evidence regarding the dynamics of violence or of grooming and the effect of the sexual offence on the victim and on relevant others. Care should, however, be taken to ensure that the complainant is not subjected to unnecessarily repetitive consultations or interventions.
 8. The prosecutor should arrange an initial case planning session or telephonic contact with the appropriate stakeholders as soon as possible after the decision to prosecute. These stakeholders may include *inter alia* the Asset Forfeiture Unit, Witness Protection Unit, Investigating Officer, medical officer, social worker, and probation officer, depending on the circumstances of the case.
 9. Where DNA analysis appears to be necessary the request should be done immediately in the prescribed manner. A request for a semen screen and then DNA should be done for all rape cases involving children under the age of 12 years where such test has the likelihood to produce a positive result so as to corroborate the evidence of the child or prevent the child from having to testify.
 10. In the absence of court preparation programmes, the prosecutor should assist by familiarising the complainant with the court environment and the proceedings.

D. Decision to prosecute

1. Prosecutors may not draw a negative inference from the evidence of a complainant simply based on, for example, on his/her race, gender, sexual orientation, character or late reporting.
2. When a decision is taken not to institute a prosecution, the matter should be referred to the Control Prosecutor, Senior Public Prosecutor or DPP for final decision/confirmation of decision, as the case may be.

E. Trial

1. Prosecutors should seek to ensure that proceedings are expedited and that sexual offence cases receive priority especially those cases where the complainant is particularly vulnerable, a child, mentally disabled, has AIDS or is elderly.

2. Where possible, efforts should be made to ensure that the complainant and other witnesses wait in a comfortable and private victim-friendly environment where contact with the accused can be avoided.
3. Prosecutors should object to questions being asked with regard to evidence of character and the previous sexual history of the complainant (in line with section 227 of the Criminal Procedure Act, 1977). The prosecutor should request the court to deal with the issue in a formal application. If such evidence is to be introduced by the prosecution, this should only be done after careful consideration of the implications, including the complainant's views.
4. Complainants often receive counselling to assist them with the trauma experienced as a result of the offence. Although the information and records are not protected by legal privilege, the introduction of this evidence should be objected to by the prosecution whenever constitutional rights may be infringed.
5. The court may not draw any inference only from the length of delay between the alleged commission of a sexual offence and the reporting thereof (section 59 of the Act). The general cautionary rule applicable to complainants simply because it is a sexual offence has also been abolished (section 60 of the Act).
6. The complainant should be informed of the outcome of the trial in a manner enabling him or her to understand the reason for the judgement and, in the case of a conviction, the sentence.

F. Withdrawal or stopping of proceedings

1. In the event of the complainant wishing to withdraw, extreme care is required and a withdrawal should only be agreed to in exceptional circumstances and where the interests of justice so demand. Para D above also finds application.
2. Should the stopping of a prosecution be considered, Part 5 of the Policy Directives applies.

G. Witness competency to testify

1. Should there be an enquiry into the witnesses competency to testify, the prosecutor should be pro-active and apply to assist the court in the inquiry by putting appropriate questions to the complainant and / or other relevant witnesses or by placing other relevant evidence on record.
2. In the event of a finding of incompetence of a witness to testify, prosecutors should, where appropriate, apply for a re-opening of the issue so as to put further questions to the complainant and / or other witnesses or to lead further evidence since this is an interlocutory matter.

3. Where the prosecutor is of the view that the presiding officer erred in declaring the witness incompetent, the DPP should immediately be contacted for purposes of taking the matter on review.

H. Application of section 158 of the Criminal Procedure Act, 1977

1. The use of closed-circuit television or similar electronic media in court is not limited to child complainants or witnesses, but is available to assist any traumatized complainant or witness to give evidence, regardless of his or her age. The prosecutor should consider this measure in all sexual offence cases, and should as a rule bring such application where the complainants or witnesses are under the biological or mental age of 14 years.
2. The circumstances that should be considered when bringing an application in terms of section 158 include, but are not limited to—
 - (a) where the witness is unwilling or unable to testify in the presence of the accused due to fear of the accused;
 - (b) where the nature of the offence involved violence;
 - (c) when the complainant is acquainted or related to the accused;
 - (d) where the court room environment intimidates the witness;
 - (e) fear of being intimidated as a witness by the accused and or members of the public;
 - (f) where the witness may be part of a witness protection programme in terms of the Witness Protection Act, 1998 (Act 112 of 1998);
 - (g) where the impact of the offence is so severe on the witness that he/she is unable to testify in open court;
 - (h) that the quality of the testimony of the witness would be compromised should he/she testify in the presence of the accused; and
 - (i) the mental age of the witness.
3. If an application for a child complainant under the age of 14 years old is refused and the court fails to provide the reasons as required in terms of the Act (section 158 (5) of Criminal Procedure Act, 1977), the prosecutor should remind the court to do so.
4. The views of the witnesses should be taken into account and given due weight. Applications need not be made where a witness does not wish for the measure to be applied and where this will not be in the interests of justice.
5. If the application of the measure will cause unnecessary delay, for instance, due to unavailability of intermediaries or CCTV equipment, careful consideration should be given to proceeding without such protective measure.
6. Timeous application should be made to the court to consider the request and where necessary, expert testimony should be adduced on the potential trauma on a complainant/witness, should a closed-circuit television not be used and the complainant/witness be forced to face the accused person.
7. If the required CCTV equipment is not available or not in working order, the prosecutor must take immediate steps to report the situation to the DOJCD court

manager. If it cannot be resolved at court level it should be reported to DOJCD Regional Office and also the DPP.

I. Application of section 170A of the Criminal Procedure Act, 1977

1. The prosecutor must consider the application of this measure in all sexual offence matters involving complainants or witnesses under the biological or mental age of 18 years, and should as a rule bring such application where the complainants or witnesses are under the biological or mental age of 14 years.
2. If an application for a child complainant under the age of 14 years old is refused and the court fails to provide the reasons as required in terms of the Act (section 170A(7) of Criminal Procedure Act, 1977), the prosecutor should remind the court to do so.
3. The circumstances that should be considered when bringing an application in terms of section 170A include, but are not limited to—
 - (a) Where the witness is unwilling or unable to testify in the presence of the accused due to fear of the accused;
 - (b) Where the nature of the offence involved violence;
 - (c) When the complainant is acquainted or related to the accused;
 - (d) Where the court room environment intimidates the witness;
 - (e) Fear of being intimidated as a witness by the accused and or members of the public;
 - (f) Where the witness may be part of a witness protection programme in terms of the Witness Protection Act, 1998;
 - (g) The impact of the offence is so severe on the witness that he/she is unable to testify in open court;
 - (h) That the quality of the testimony of the witness would be compromised should he/she testify in the presence of the accused;
 - (i) The mental age of the witness; and
 - (j) The youthfulness of the witness.
4. Given the similarity of the relevant provisions, para H above finds application with the necessary contextual changes.

J. The application of sections 153 and 154 of the Criminal Procedure Act, 1977

1. The prosecutor should make application to the court for testimony of the complainant to be held *in camera* unless the complainant indicates in consultation that he or she wants to testify in open court.
2. The circumstances that should be considered when bringing an application in terms of section 153 include, but are not limited to—
 - (a) the sensitive nature of the evidence;
 - (b) where the dignity of the witness would be compromised; and
 - (c) to prevent the details of the offence becoming public knowledge.

3. This protective measure may also be applied to witnesses other than the complainant. The prosecutor should consider requesting the application of section 153 in relation to the evidence of other key witnesses such as the forensic medical evidence and that of the first report witness as this might further promote the protection of the complainant's rights to dignity and privacy.
4. Prosecutors may apply to court to allow a 'support person/s' of the complainant's choice to remain in court as part of the section 153 application.
5. Prosecutors must ensure that no information regarding the identity of the complainant or that of the complainant's family, or information of the complainant which may lead to the identification of the complainant or the complainant's family, is provided to anyone which may result in publication (section 154). Prosecutors should generally object if anyone applies to have the said identity published.
6. If information which leads to the identification of the complainant is unlawfully published, the prosecutor should initiate steps to have the offence investigated (section 154(5)).
7. Compensatory orders are provided for in sections 154(6) and 335A. In the event of a conviction, the complainant should be consulted with regard to obtaining a compensatory order and the necessary evidence regarding injury or loss be presented.

K. The institution of a prosecution in terms of sections 15 and 16 of the Act where both parties are under the age of 16

1. Where the prosecutor recommends the institution of a prosecution, the matter must be referred to the NDPP (section 15) or the relevant DPP (section 16) for authorisation.
2. No arrests should be affected until the docket is fully investigated and a written instruction from the NDPP or relevant DPP has been received.
3. The criteria and circumstances to be used in which DPP's may or may not authorise a prosecution in terms of section 16(2) include—
 - (a) availability and effectiveness of alternative dispute resolutions; and
 - (b) the interests of justice.
4. Since both parties have to be prosecuted, prosecution will be limited to exceptional circumstances and will rarely be the appropriate action.
5. In the event of the elements of a main charge (other than sections 15 or 16) not being proved, but the elements of sections 15 or 16 have been proved, prosecutors must request a conviction on either section 15 or 16 (as the case may be) as a competent verdict in terms of section 261 of the Criminal Procedure Act, 1977.

L. The institution of a prosecution in terms of section 38(1) of the Act regarding HIV status

1. In cases where a prosecution is recommended by the prosecutor the matter must be forwarded to the DPP for authorisation.
2. A prosecution should normally follow where a false charge was laid or where the disclosure was made with malicious intent or in a grossly negligent manner. The views of the person affected will play a dominant role and, if reluctant to proceed, alternative dispute resolution mechanisms or the withdrawal of the matter should be considered.

M. Sentencing

1. Reference must be made in the charge sheet to any applicable minimum sentence provision as provided for in the Criminal Law Amendment Act, 1997 (Act 105 of 1997).
2. All complainants (or appropriate others such as a parent or guardian in the event of a child) should be informed of their right to provide the prosecutor with relevant information. Should they choose to make a Victim Impact Statement (VIS) or statement regarding sentence, the prosecutor should make an attempt to have this handed in by consent of the accused (complying with the provisions of section 212 or 213 of the Criminal Procedure Act, 1977) or call the complainant / witness to testify thereto. Section 70(3) of the Child Justice Act, 2008 (Act 75 of 2008) is an exception to section 212 and 213, as in terms of this section the prosecutor can hand in a VIS if the accused is a child and the contents are not disputed.
3. Assessments by a professional on the impact of the offence on the victim or family should generally also be called for.
4. The absence of trauma of the complainant cannot be used to the advantage of the accused as a mitigating factor at sentencing. All relevant information should be placed before the court in aggravation of sentence regardless of whether the accused pleaded guilty or not. Take note of section 30(4) of the Older Persons Act, 2006 (Act 13 of 2006), in relation to a sexual offence committed against an older person.
5. Calling expert witnesses, for instance, on the prognosis and treatment of paedophiles, should also be considered.
6. Where no sentence provision finds application, the court will be able to impose any sentence within its ordinary sentencing jurisdiction. Care must be taken to ensure that the matter is tried in a court that will be able to impose an adequate sentence.
7. Applications for compensatory orders in terms of Section 300 of the Criminal Procedure Act, 1977, should also be made wherever possible and appropriate.

N. National register for sex offenders

1. Where applicable, the prosecutor should alert presiding officers to the order that must be made (section 50(2)(a)).
2. Whenever it becomes known that an order had not been made following a relevant conviction after 16 June 2008 (the date of the commission of the offence is irrelevant), prosecutors must take the necessary steps to ensure that the order is made *ex post facto*.
3. Take note of chapter 7 of the Children's Act, 2005, that deals with the National Child Protection Register.

O. Confidentiality in dealing with HIV/AIDS results

1. If a prosecutor requires the HIV test results of an alleged offender for the purposes of the prosecution, the prosecutor must complete a SAPS 580(g) application for access to the HIV test result, and submit it to the relevant Investigating Officer.
2. If the results are not submitted to the court during the proceedings, they should be handed back to the Investigating Officer.
3. Every person has the right to privacy, dignity and respect, and prosecutors should never disclose results unless necessitated by court proceedings.

P. Trafficking

1. A person trafficked may not be tried for any offence committed as a direct result of being trafficked (section 71(5)). In all instances of serious transgressions the matters should be referred to the relevant DPP for decision.
2. Take note of chapter 18 of the Children's Act, 2005, regarding trafficking in children.