

**CHAPTER FOUR**  
**POLICE INVESTIGATION**  
**A Special Focus On Unfounded Cases**

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**1. INTRODUCTION**

The high incidence of rape in South Africa has had an enormous impact on police work and the prosecution authority. Even with the establishment of specialised sexual offences courts across the country, the investigation and prosecution of rape yields unsatisfactory results and jurisprudential developments remain impoverished.

The Commission makes a number of non-legislative proposals around the development of inter-sectoral protocols for the management of sexual offences cases and for streamlining the interaction between investigating officers and prosecutors. As far as substantive legal reform goes, the proposed amendments are innovative and thorough. The lack of positive legal duties embodied in the proposed Bill to enforce police to comply with their duties in managing and investigating cases of sexual assault is, however, a major omission in the Bill.

CIETafrica's study (cited in s.8.3.3) on the attrition rates between reported rapes and 'founded' (recorded) cases is alarming and serves as sufficient empirical evidence to support proposals attempting to close the gap between reported and founded (investigated) cases. While the new definition of rape may reduce attrition rates to some extent, the proposed Bill must reduce police discretion in more substantive terms.

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<sup>1</sup> The author would like to acknowledge the contribution of Dee Smythe, particularly in relation to the sections relating to non compliance and codes of good practice.

The reported “station to station variability” (s.8.3.4) should also serve as evidence that despite national instructions, standing orders and directives, the Commission should provide clear provisions in the Act to reduce variability and discretion.

The imposition of enforceable positive duties not only limits the discretionary power of police to unfound cases, but it provides a comprehensive and consistent set of legislative guidelines for the management and investigation of rape cases. Imposing specific duties on police will not only reduce discretion, but improve the evidentiary standards of investigations and instill ‘quality control’ of the information imparted to the prosecutor.

## **2. LESSONS FROM THE DVA**

If rape law reform is to be effective it must be vigorous in addressing the basic procedural issues such as the case processing and police investigations. It is imperative to ensure that adequate procedures and practices are put in place to govern these aspects. We believe that this is best achieved through the imposition by the legislature of positive duties. The Domestic Violence Act provides both a model and precedent for this approach.

Our experience with the Domestic Violence Act has shown that the promise of good legislation is often not borne out in practice. Over a two year period, our monitoring research<sup>2</sup> of the Domestic Violence Act has shown that a major blockage in terms of delivery lies with the SAPS. A number of factors were implicated, including low resource levels, heavy caseloads, poor training and the tenacity of myths around violence within the home. Prosecutors were implicated to a lesser extent, because domestic violence matters only become criminal when protection orders are breached. Because of its criminal nature, rape cases will involve both these players from the outset, with resource and attitudinal issues remaining an acute problem.

Our study found that the police based their decision on whether to arrest respondents (and investigate cases) on the following –

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<sup>2</sup> Parenzee, P., Artz, L., & Mout, K. (2001). Monitoring the Domestic Violence Act: First Report. Institute of Criminology, University of Cape Town.

- a) Only if there was obvious physical harm to the complainant or if the complainant was in imminent danger of further harm.
- b) On the basis of personal assessment of the situation, including “fairness” to the accused where there appears to be a lack of evidence. Gauging the extent to which the investigation of the case would impact on “caseloads” also featured prominently.
- c) Because of the legal ramifications of not arresting or investigating the case (i.e. non-compliance with duties imposed by the Act). The fear of an investigation by the ICD and disciplinary action was a major impetus to pursue the arrest and/or investigation of a case of domestic violence.

Both investigating officers and prosecutors inevitably approach a rape complaint from a cost–benefit perspective that is ultimately focused on the convictability of the case. That is, given the resources to hand will the time, energy and money spent on investigation and preparation for trial result in a realistic possibility of conviction. The content of the substantive law and procedural rules and the way in which this is interpreted by judicial officers must necessarily inform this exercise. The focus on the “convictability” of a case is understandable, considering the number of reported offences and the limited resources and capacity of the police fully investigate a matter. Convictability, however, has been used as the bedrock for decisions surrounding the investigation of cases, instead of a discretionary factor.

### **3. NATIONAL INSTRUCTIONS**

National Instructions are, by definition, intended to establish and maintain uniform standards of policing (s25(1)(b) of the South African Police Service Act 68 of 1995). As such they set out policy guidelines for processing and management of certain offences (see, for example, National Instruction 22 of 1998, Sexual Offences: Support to Victims and Crucial Aspects of the Investigation). We believe that making the SAPS policy explicit will ultimately serve to inculcate a systemic change in the approach taken at individual member and at station level to dealing with specific offences. They cannot serve to force or enforce immediate changes in practice. This is not least because the sanction for non-adherence to National Instructions is limited to internal disciplinary action. The Commission's assessment of compliance with NI 22/1998 at 3.2.6 is also reflective of poor compliance levels in practice. By imposing positive duties on the SAPS through legislation, the State's expectations of the quality of service to be delivered by the SAPS is made explicit. Likewise the threat of sanction for non-compliance. Furthermore, legislation being far more accessible than an internal police document, citizens are better apprised of their rights in respect of police conduct. The seriousness with which individual members of the SAPS view such legislatively imposed positive duties is apparent from our research on the Implementation of the Domestic Violence Act. It is our view that National Instructions, Standing Orders and other regulations should act to clarify and expressly implement duties imposed by legislation.

### **4. IMPOSING LEGAL DUTIES IN THE INVESTIGATION OF RAPE CASES**

The National Instructions for police (no 22/1998) on sexual offences ("Support to Victims and Crucial Aspects of the Investigation") has been in place since 1998. It claims to provide step-by-step guidelines on how to manage a victim and an investigation and to ensure that police follow these instructions. These instructions, however, have not been implemented adequately.

The Commission recognizes that the National Instructions were not distributed widely to SAPS members or stations and even that "very few members of SAPS comply

with or seem to be aware of its existence” (s. 3.2.6.1). The Commission also acknowledges the “unwritten rules” in the management and investigation of rape cases (s. 3.2.6.6). The instructions also do not contain guidelines relating to information sharing, consultation with and collection of evidence for the trial between the investigating officers and the prosecuting authority prior to the trial. (s. 3.2.5.6) BIG GAP. Most importantly, it does not provide any guidance as to what constitutes an “unfounded” case or what to do when a victim wishes to withdrawal her case (s. 8.4.4).

The Commission also acknowledges that despite the development of a number of national strategies and programmes, as well as provincial and regional protocols (2.5.1) no official uniform standardised procedures, guidelines or management protocols exist for dealing with victims of sexual offences or with sexual offenders (2.5.1). By the Commission’s own account existing services are mostly fragmented and under-resourced. (2.5.1). The Commission correctly concludes that ‘(t)here is therefore no guarantee that a victim of a sexual offence entering the system will be dealt with in terms of acceptable procedures or be protected from further harm.’ (2.5.1).

The recommendation by the Commission that the National Instruction No22/1998 be revisited and amended where necessary (s. 3.2.9.2) is therefore not sufficient to ensure the integrity of police interventions in rape cases.

We strongly support the views of the Commission (at 2.5.7) that ‘a national strategy which includes legislation that supports and enforces all aspects of a national framework on sexual offences, *and which is accompanied by specific accountability and measuring mechanisms for enforcement*, is vital to the effective management of sexual offence cases.’ (our emphasis)

Experience with the National Policy Guidelines for Victims of Sexual Offences (2.5.8) shows clearly the need for more than good intentions as a basis for proper implementation and application of the necessary rules and procedures. We need to reconcile ourselves to the reality that critical duties to which we are strongly committed must be embodied in legislation and accompanied by strong enforcement

mechanisms. Internal protocols and regulations can act to effect structural and systemic changes, where they are well conceived, by inculcating a specific approach to the work in question. We believe that if implemented over a sustained period such protocols have the promise of bringing about a change in work ethic. However, certain duties are so critical to the immediate management of and investigation of sexual offences cases and the crisis that we face in addressing this issue is so acute, that these duties demand the full weight of legislative backing and enforcement.

It is, we believe, important to consider whether the radical changes brought by the new Sexual Offences Act will impact on the nature of police investigations and the exercise of prosecutorial discretion. Despite changes to the law, will these role-players continue to filter out complainants on a basis which approximates the myths underpinning the very laws being reformed, for example, in requiring corroboration or in making subjective assessments about the sexual history of the complainant and, by extension, her credibility. The proposed bill should therefore include clear and specific provisions in the Bill to improve the quality of case processing and the treatment of rape survivors.

In light of the above, it is strongly recommended that one of the central objectives of the Bill should be to develop clear and distinct procedures to shift the current methods of pre-trial processing of reported rape complaints. International studies have largely focused on the number of pre- and post-reform reported cases, arrests, prosecutions, convictions and sentencing, making the assumption that 'effectiveness' of legislation can (or should) be measured by an increase in numbers alone. Gender activists in South Africa know all too well that the effectiveness of the criminal justice system in processing sexual assault cases goes beyond the numbers game.

The inclusion of duties to assist the victim in the body of legislation is not unusual, and has been effective in ensuring that the police perform certain primary functions in the Domestic Violence Act. Other jurisdictions, such as Michigan State<sup>3</sup> and New York have prescribed police duties to victims within the body of legislation. Imposing

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<sup>3</sup> See section 812(5) of the New York State Family Court Act

positive duties on the police should not place any additional burden on the South African Police Service, as these duties should form part of their current line function.

We therefore recommend that the following guidelines from the instructions be included as provisions within the Act:

**1. Where a complainant reports a case of rape, the first reporting member of the SAPS must, *except where compelling reasons exist*:**

- a) Inform the complainant that she has the right to report the rape and/or request an investigation into the rape;**
- b) Inform the complainant, if she wishes to lay a charge of rape, that she has the right to make a statement;**
- c) Establish if the complainant is in need of immediate medical assistance and arrange for the complainant to obtain medical assistance;**
- d) Open a skeleton docket and take a basic statement from the complainant before she obtains a medical examination;**
- e) Contact an investigating officer and remain with the complainant until the investigating officer arrives;**
- f) Ensure that the complainant obtains a medical examination.**

**2. The SAPS must inform the complainant of his or her right to:**

- a) Make a supplementary statement at a later stage;**
- b) To make a full statement after his/her medical examination;**
- c) Have his or her statement taken in private;**
- d) Have a female member of the SAPS take the statement, where reasonably possible to do so;**
- e) Have his or her statement taken in the company of a support person;**
- f) Have the statement taken in the language of the complainant's choice and, where the statement is translated, to ensure that the complainant is satisfied with the contents of the statement;**
- g) Lay a criminal charge and to have the matter investigated or to have the incident recorded without an investigation**

**h) *The complainant must sign an affidavit to waive her right to have an investigation of the sexual assault undertaken.***

**3. In the investigation of rape cases, the investigating officer must, *except where compelling reasons exist:***

- a) Register the case docket prior to the complainants medical examination;**
- b) Escort the complainant to the health care practitioner for examination;**
- c) Obtain a brief description of the incident and explain the procedures which will follow the complainants statement;**
- d) Explain the role of the investigating officer;**
- e) Explain the purpose of the medical examination;**
- f) Ensure that the SAP 308 is filled out completely and correctly;**
- g) Ensure that an in-depth statement is taken from the complainant, once the complainant is sufficiently ready to do so;**
- h) Make suitable arrangements to ensure the immediate safety of the complainant;**
- i) Investigate the matter fully;**
- j) Obtain relevant information from the complainant in order to oppose a bail application and/or the imposing of conditions of the accused;**
- k) Inform the complainant:**
  - i) When the accused is arrested;**
  - ii) If the suspect has been released on bail;**
  - iii) The conditions of bail imposed on the accused;**
  - iv) The procedures to follow if the accused has breached the conditions of bail;**
  - v) Whether the complainant is required to attend an identification parade;**
  - vi) On the progress of the investigation of the case;**
  - vii) The date, time and location of the trial;**
  - viii) That she may request assistance to get to court on the day of the trial;**



- ix) **When the complainant will be required to give evidence in court about the sexual assault.**

**4. *Compelling reasons* to unfound a case of sexual assault may not include:**

- a) **Assumption of risk (and reasonability of perceived risk) of further harm**
- b) **Assumption of provocation or consent**
- c) **Characteristics of the victim (race, gender, socio-economic position, known user of substance abuses, community status, 'credibility')**
- d) **Perceived cooperativeness**
- e) **Reporting factors (length of time after assault; reasons for reporting)**
- f) **Caseloads (extent of investigation)**
- g) **Criminogenic or crime related factors which influence the disposition of a case (use of drugs or gang involvement)**
- h) **Corroborating evidence (extent and constitution of, even if not a legal requirement)**
- i) **Likelihood of finding or arresting the offender**
- j) **Level of resistance offered by victim/use of force by perpetrator**
- k) **Absence or extent of Injury to the victim (including what constitutes 'injury')**
- l) **Voluntary vs. involuntary interaction with the accused ("willingness")**
- m) **Results of forensic/medico-legal examination**
- n) **Plausibility of the rape or suspected 'false reporting'**
- o) **Aggravated vs. non-aggravated ("simple rape") circumstances**
- p) **Perceived danger of the accused to the community or to the victim**
- q) **[Nature of] prior relationship with the accused ("claim of right" argument<sup>4</sup>)**
- r) **Perceived intentions for laying a charge of rape**
- s) **Consistency of statement(s)**
- t) **Possibility of 'alternative resolutions' (i.e. victim-offender mediation)**
- u) **Relationship of accused to SAPS member**

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<sup>4</sup> See S Estrich 'Real Rape' at 24

We further recommend that, in order to clarify and codify the issue of jurisdiction, a clause be included to the following effect (taking this issue out of the NI):

**Where the complaint falls outside the jurisdiction of the station at which the crime was reported, the investigating officer shall nevertheless be obliged to open a docket, take a preliminary statement and refer the complainant for a medical examination before forwarding the matter to the station having jurisdiction.**

**It is further recommended that the Bill also include the following provisions, as embodied in the Domestic Violence Act (116 of 1998):**

Failure by a member of the South African Police Service to comply with an obligation imposed in terms of this Act or the National Instructions, constitutes misconduct as contemplated in the South African Police Service Act, 1995, and the Independent Complaints Directorate, established in terms of that Act, must forthwith be informed of any such failure reported to the South African Police Service.

Unless the ICD directs otherwise in any specific case, the South African Police Service must institute disciplinary proceedings against any member who allegedly failed to comply with an obligation referred to in paragraph ...

## **5. INVESTIGATIVE TEAMS**

Section 8.1.2 reiterates the Commission's recommendation for a joint investigation team to conduct the criminal investigation of all 'serious sexual offence cases'. While we endorse the recommendation of such a team, there are a number of considerations that should be examined in further detail:

- The focus on schedule 6 offences.
- The establishment of the investigative team at a national level, as opposed to at a provincial level.

- A schedule of positive duties placed on the investigation teams. Without a decisive investigative team protocol, the proposed structure will not improve the wide discretionary powers afforded to police in the investigation of rape cases.

It is also recommended that the National Directorate of Public Prosecutions, in consultation with the Department of Justice, establish specialised investigative teams, at each sexual offences court within a year of the promulgation of the Sexual Offences Act.

## 6. 'UNCOOPERATIVE' WITNESSES

We support the Commissions recommendation that the police should review procedures for recording and following up unfounded cases and cases in which the complainant requests to withdraw the matter.

It is recommended that the state develop criteria for the withdrawal of cases by complainants, or at least provide guidelines to establish why cases are withdrawn (i.e. threats, duress, socio-economic implications). The criteria should balance the rights of the complainant with the duty of the state to protect the complainant and the community at large. These criteria should be made a matter of public record.

We further support recommendation 8.4.7 in removing the discretion of the police as to whether or not to proceed with an investigation, even when requested not to proceed by the complainant and that this decision should be that of the prosecuting authority. We also support recommendation 8.5.5 (decision not to initiate investigations) as well as recommendation 8.5.6 (informing the victim of her right to ask the DPP to review decision not to proceed with investigation). ***This, however, needs to be embodied within the proposed Bill as well as in the SAPS National Instruction on Sexual Offences.***

Finally, while we endorse the recommendation contained in s26 of the Bill that responsibility for withdrawing an investigation or prosecution should lie with the

Director of Public Prosecutions, but recommend that s26 (b) be added to read as follows:

**(b) Reasons for such a decision must be made available to the victim, where requested, in writing.**

## **7. INFORMATION TO VICTIMS: TOWARDS A CODE OF GOOD PRACTICE**

The Commission recommends (at 8.8.3(a)) that

*A statement of duties of individual police officers in relation to the provision of information to victims should be formulated and incorporated into a police code of good practice.*

We would contend that this provision is inadequate. Access to information is crucial to ensuring that victims are empowered to effectively engage with the criminal justice system, thereby decreasing the extent of secondary victimisation. It is also a critical means of ensuring that victims are apprised of their rights in respect of the investigation and prosecution of what is, despite its classification as a crime against society, a deeply personal and intimate violation.

At best a Code of Good Practice can provide general guidelines for appropriate conduct, giving rise to a presumption that it should be followed. It cannot impose specific duties.<sup>5</sup> We believe that, in order to ensure consistency, specific role-players must be delegated responsibility for ensuring that, at each stage of the process, the victim is adequately informed of certain specified information. Such a right is not only encapsulated in our Domestic Violence Act (s2(b)), but is available to victims in other jurisdictions. See, for example s406(d)(1) of the German *Strafprozessordnung*. Implementation of this section can properly be regulated through secondary means

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<sup>5</sup> See Du Toit et al's (p378) discussion of the Code of Good Practice: Dismissals. This Code has, perhaps even greater significance than that recommended by the Commission in that it is appended and referred to in the text of the LRA (s188(2)).

such as regulations and National Instructions, providing, for example, for publication and dissemination of pamphlets containing requisite information.

## **9. CONCLUSION**

International studies<sup>6</sup> have found that rape law reforms undertaken in - what has been referred to - as a “piecemeal” fashion or incrementally over a period of time, are ineffective changing the reality of women’s experiences with the criminal justice system. Feminist legal scholars such as Henderson (1993) have also argued that the problem with rape law reform is the ‘law in action’. Where legislation is not clear and prescriptive, the impact of statutory reforms becomes largely symbolic, rather than an instrument for law enforcement. Futter et al (2001) concluded that by removing many of the barriers to rape case processing, rape law reform would lead to less unfounded cases and in an increase of arrests. Griffiths (1999) also argues that it is unlikely that legal reform will address attrition rates between reporting and prosecution if the investigation of rape cases is not addressed directly. The risk of poor case processing (as CIETAfrica have shown) is that fewer “rapes” are investigated, and more cases of ‘less serious sexual assault’ are reported because of the lower evidentiary burdens attached to them.

## **10. FORTHCOMING RESEARCH ON UNFOUNDED CASES:**

Once the Sexual Offences Act is promulgated, the Institute of Criminology (Faculty of Law, UCT) will be undertaking a study to investigate the extent to which the new Sexual Offences Act impacts on the pre-trial processing of reported rape complaints.

***The central research question investigates:***

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<sup>6</sup> See S Futter & WR Mebane, *The Effects of Rape Law Reform on Rape Case Processing*, **16 Berkeley Womens’ Law Journal** 72 (2001); L Beinen, *Rape III-National Developments in Rape Reform Legislation*, **6 Women’s RTS L. Rep.** 170 (1980); RJ Berger et. al , *The Dimensions of Rape Reform Legislation*, **22 Law & Society Review** (1988); P Searles & RJ Berger, *The Current Status of Rape Reform Legislation: An Examination of State Statutes*, **10 Women’s’s RTS. L. REP.** 25 (1987).

The modes of discretion used by charge officers, investigating officers and prosecutors in rape cases to “unfound” (drop, because of lack of merit) or to continue (investigate and bring to trial) a rape case.

***The study will specifically examine:***

1. The factors and elements used by police and prosecutors to determine whether the case is 'unfounded' or worthy of investigation and prosecution. That is, what they believe they are expected to do by law in terms of substantive definitions and evidentiary procedures.
2. The factors important to the agents in deciding whether to arrest, investigate or prosecute in a rape case. That is those factors considered to be important in producing successful judicial outcomes.
3. Investigation and prosecutorial methods, strategies or policies applied and considered useful in processing rape cases.

Factors that limit or hamper effective investigation and prosecution of rape cases, including infrastructural/ material, procedural, circumstantial and personal obstacles.