

# CHAPTER FIVE

## BAIL

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### 1. PROPOSALS BY LAW COMMISSION

The Commission does not propose any provisions for inclusion in the Bill. However, in its 'Evaluation and Recommendation',<sup>1</sup> the Commission lists a number of issues for discussion or comment:

1. The Commission recommends that victims and state witnesses be informed of bail applications and participate in them if they choose to. Where the witness is the complainant in the matter of a person below the age of 18 years and such witness is called to or wishes to participate in the bail application, such witness must be declared a vulnerable witness and be afforded such protective measures as the court may deem necessary.<sup>2</sup>
2. As knowledge surrounding a bail application is often integral to the ability of the victim to prevent being re-victimised, the Commission recommends that this aspect be included in SAPS National Instruction 22 of 1998 as well as the Policy Guidelines for the National Director of Public Prosecutions.<sup>3</sup>
3. The Project Committee expresses its concern that although the existing legislation regulating bail seems theoretically sound, the theory does not meet with the experience of complainants. The Committee suggests that a possible solution would be to include legislative provision similar to those set out in s 18 of

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<sup>1</sup> . Par 11.4.  
<sup>2</sup> . Par 11.4.2.  
<sup>3</sup> . Par 11.4.5.

the Domestic Violence Act 116 of 1998 that require *inter alia* that the SAPS and prosecuting authority formulate detailed instructions on how to deal with bail in sexual offence cases. These measures could be accompanied by a requirement that statistics should be kept regarding bail applications. Comment is invited on this point.<sup>4</sup>

4. The Commission further recommends that irrespective of whether the recommendation in (3) above is followed, training and guidance should be given to all officials dealing with bail applications so as to enhance the implementation of the amended legislation (which the Commission deems to be adequate).<sup>5</sup>
5. Submissions are invited on whether the newly created sexual offences should be classified as Schedule 5 or 6 offences.<sup>6</sup>
6. The Commission elected not to make any recommendations regarding bail hostels pending the findings of the Commission on Gender Equality.<sup>7</sup>

## 2. DISCUSSION:

This submission is limited to Recommendations 1 to 4 above.

### Informing victims of bail proceedings

We endorse the Commission's observation that the substance of existing legal provisions regarding bail is at odds with the experience of complainants in sexual offence cases.<sup>8</sup> This disparity extends beyond the issue of being informed of bail proceedings.<sup>9</sup>

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<sup>4</sup> Par 11.4.6.

<sup>5</sup> Ibid.

<sup>6</sup> Par 11.4.7 – 11.4.8.

<sup>7</sup> Par 11.4.9 – 11.4.14.

<sup>8</sup> Par 11.4.6.

<sup>9</sup> See in this regard *Carmichele v Minister of Safety and Security and Another* [2001] JOL 8613 (CC); H Combrinck and R Barday 'Carmichele v Minister of Safety and Security: The development of state liability for failure to protect women against sexual assault' Paper

A brief survey of comparable international and foreign jurisprudence provides guidance on the nature of the rights of complainants in sexual offence cases.<sup>10</sup>

The Declaration of Basic Principles of Justice for Victims of Crime states that the responsiveness of judicial and administrative processes to the needs of victims<sup>11</sup> should be facilitated by the following:<sup>12</sup>

- (a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information;
- (b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;
- (c) Providing proper assistance to victims throughout the legal process;
- (d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation; and
- (e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.<sup>13</sup>

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<sup>10</sup> . The following section is an extract from H Combrinck “He’s out again”: The role of the prosecutor in bail for persons accused of sexual offences’ ***Law, Democracy and Development*** Vol 5 2001(1) 31-44. The article is attached to this submission(see appendix B); however, this section is reproduced here for ease of reference.

<sup>11</sup> . According to article A(1) of this Declaration, ‘victims’ means ‘persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, emotional loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member states’.

<sup>12</sup> . Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the General Assembly Res 40/34 of 29 November 1985.

<sup>13</sup> . Article A(6).

It is clear that compliance with these standards will have specific practical implications for police and the prosecuting authority. In this regard, it is instructive to note that in a number of comparable jurisdictions, positive duties have been concretised in the form of either statutory provisions or policy guidelines.

Section 12 of the ***Combating of Rape Act***<sup>14</sup> recently passed in Namibia affords rape complainants the right to attend bail hearings and to request the prosecutor to present relevant information to the court. In addition, this section also imposes a duty on the police to inform complainants of the place, date and time of first appearance of the accused. If the complainant is not present at the subsequent hearing, the prosecutor has a duty to inform the complainant of the outcome of the hearing and the conditions of bail, if any.

Significantly, section 13 of the Act imposes an obligation on the presiding officer, where the accused in a rape case is released on bail, to add conditions to ensure that the accused will not make contact with the complainant.

The ***US Attorney General Guidelines for Victim and Witness Assistance***, a compilation of guidelines for Department of Justice personnel on how to treat crime victims states that victims (*inter alia*) have the following rights:<sup>15</sup>

- (a) The right to be reasonably protected from the accused offender;
- (b) The right to be notified of court proceedings;
- (c) The right to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial; and
- (d) The right to information about the conviction, sentencing, imprisonment, and release of the offender.<sup>16</sup>

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<sup>14</sup> . Act 8 of 2000.

<sup>15</sup> . This document is based on federal victims' rights laws and Department of Justice policy.

<sup>16</sup> . Article III.B.

The guidelines further state that during the course of the investigation, an official from the investigating agency must provide the victim at the earliest possible opportunity with information concerning the status of investigation of the crime and the arrest of a suspected offender.<sup>17</sup>

During the prosecution of a crime, an official from the prosecutorial authority must notify the victim as soon as possible of the release or detention status of an offender or suspected offender.<sup>18</sup> Where if the victim has provided a current address or telephone number, an official is expected to provide the victim with general information, preferably in writing, about the criminal justice process, in particular –

- a) The role of the victim in the criminal justice process, including what the victim can expect from the system as well as what the system expects from the victim; and
- b) The stages in the criminal justice process of significance to a crime victim and the manner in which information about such stages can be obtained.<sup>19</sup>

In cases of interstate domestic violence, violation of a protection order or stalking, a member of the investigative agency must inform the victim that he or she has the right to make a statement regarding the danger posed by the defendant for the purposes of determining pretrial release of the defendant or conditions of such release.<sup>20</sup>

We accordingly recommend the formulation of specific provisions setting out the rights of complainants as well as the concomitant duties of state officials.<sup>21</sup>

Regarding the inclusion of a duty to inform the complainant of developments around bail proceedings in the SAPS National Instructions and NDPP Directives, our

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<sup>17</sup> . Article IV.A.3.a.3(a) and (b).

<sup>18</sup> . Article IV.B.2.a.1(a).

<sup>19</sup> . Article IV.B.2.a.3(a) and (b).

<sup>20</sup> . Article IV.A.3.a.1(f).

<sup>21</sup> . See Recommendations below.

comments above in respect of the imposition of statutory duties rather than reliance on 'guideline' documents apply here *mutatis mutandis*.

### **Measures to ensure effective implementation**

We strongly support the inclusion in the Bill of measures analogous to those set out in s 18 of the Domestic Violence Act, and we specifically recommend the proposal that the relevant state agencies should be required to compile and report on statistics regarding bail proceedings.<sup>22</sup>

### **Training of state officials**

We support the proposal regarding training and guidance of state officials.<sup>23</sup>

## **3. RECOMMENDATIONS:**

We accordingly recommend the inclusion of the following provisions in the Bill:

### **Section 1 Rights of complainants**

The complainant in a sexual offence case has the right to:

- a) be reasonably protected from the accused;
- b) be notified of all court proceedings, including bail hearings;
- c) attend all public court proceedings relating to the offence, unless the court determines that the evidence of the complainant would be materially affected if he or she heard the evidence of other witnesses either during the bail hearing or the trial;

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<sup>22</sup> . The Gender Project is currently in the process of finalizing a research project on bail in sexual offence cases. One of our preliminary findings is the fact that it is difficult, if not impossible, to track the progress and outcome of bail proceedings due to shortcomings in current record-keeping practices at courts.

<sup>23</sup> . Another startling preliminary research finding is that few police officials or prosecutors have received training or instructions on the legislative amendments that came into operation on 1 August 1998.

- d) make a statement regarding the potential danger posed by the accused for the purposes of determining the pre-trial release of the accused or the conditions of such release;
- e) request the prosecutor to present information relevant to pre-trial release of the accused, conviction or sentencing to the court; and
- f) be kept informed about the pre-trial release, conviction, sentencing, imprisonment and release of the accused.

## **Section 2 Duties of police officials**

During the course of the investigation, the investigating officer must provide the complainant at the earliest possible opportunity with information regarding–

- a) the status of the investigation;
- b) the arrest of the suspect;
- c) the place, date and time of the first appearance of the accused; and
- d) the rights set out in section 1 above.

## **Section 3 Duties of prosecutors**

During the course of the prosecution, the prosecutor must –

- a) take steps, including the presentation at the bail hearing of evidence in the form of affidavits or *viva voce* evidence, to ensure the reasonable protection of the complainant;
- b) where an accused is released on bail or warning, request the imposition of appropriate conditions to ensure the reasonable protection of the complainant;
- c) make efforts to consult with the complainants prior to the bail hearing;
- d) notify the complainant about the outcome of the bail hearing if he or she is not present at such hearing;
- e) where the accused is conditionally released on bail or warning, take steps to ensure that the complainant is informed of the procedure to follow if the accused were to contravene any of these conditions; and
- f) inform the complainant, preferably in writing, of –
  - i) his or her role in the criminal justice process, including what the complainant can expect from the system and what is expected from the complainant; and
  - ii) the stages of the criminal justice process of significance to the complainant and the manner in which information about such stages can be obtained.



#### **Section 4    Contravention of bail conditions**

Prosecutors must take immediate action against accused who allegedly contravene the conditions of bail or who harass, threaten, injure or intimidate the complainant or other witnesses in sexual offence matters.