



## Gender-based Violence

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## Introduction

This chapter looks at the law regarding sexual and domestic violence, including reporting sexual offences and how to get a Protection Order. Despite the National Strategic Plan adopted by the country in 2020 to address gender-based violence and femicide, the number of reported cases continues to rise. Between April 2022 and March 2023, there were 53 498 sexual offences reported to the SAPS, with rape accounting for 42 780 of these cases. It is very important for communities to understand the legal processes available to deal with GBV situations.

## Rape, incest and sexual assault

### **The Sexual Offences Act**

The *Criminal Law (Sexual Offences and Related Matters) Amendment Act* (No 32 of 2007) – usually referred to as the *Sexual Offences Act* – has changed the definition of rape and various other offences linked to sexual violence. The objectives of the Act are to give victims of sexual offences the maximum and least traumatising protection that the law can provide and to introduce measures which will allow the state to give full effect to the provisions of this Act. The Act aims to do this by:

- Bringing together all matters and/or offences relating to sexual offences in a single Act
- Making all forms of sexual abuse or exploitation a criminal offence
- Replacing some common law sexual offences, such as incest, with new offences that will apply to both men and women
- Protecting complainants of sexual offences and their families from secondary victimisation
- Promoting the spirit of Batho Pele ('the people first') in respect of service delivery in the criminal justice system dealing with sexual offences
- Providing certain services to victims of sexual offences, including affording victims of sexual offences the right to receive Post Exposure Prophylaxis in certain circumstances
- Establishing a National Register for Sex Offenders

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## Rape

The *Sexual Offences Act* changed the definition of rape so that it now includes penetration of the mouth, anus and genital organs of one person with the genital organs of another person, penetration of the anus and genital organs of one person with any other body part of another person, or any object including any part of the body of an animal, or penetration of the mouth with the genital organs of an animal. In other words, if a man puts his penis into the mouth or anus of another person, male or female, without their consent, this will constitute rape under the law. This means men and boys may now file complaints of rape with the police. Under the old Act, rape was defined only as vaginal penetration and excluded anal and oral penetration. Perpetrators accused of anal or oral penetration were charged with indecent assault, seen as a lesser offence than rape.

The main issue that needs to be determined in a rape trial is whether the person gave their consent. If the person said 'yes' to sex, then the court will find that it was not rape. So, the prosecutor has to prove to the court that the person said 'no'. Often it is the complainant's word against the perpetrator's word because no one else saw the crime.

In terms of the *Criminal Law Amendment Act*, a minimum sentence of life imprisonment is prescribed in the following situations:

- The offender injured the victim, and grievous bodily harm was inflicted
- More than one man was raping (multiple offenders)
- The victim was raped several times by the same man (multiple rapes)
- The offender has more than two prior convictions for rape
- The offender has knowledge of their positive HIV/AIDS status
- The victim is under 16 years old, physically disabled or mentally ill

### NOTE

*Minimum sentences in terms of the Act are not mandatory, but the court will have to show that substantial and compelling circumstances existed, which is why the minimum sentence was not applied.*

*Rape carries a minimum sentence of 10, 15 and 20 years for first, second and subsequent offenders, as per the Criminal Law Amendment Act. (See page 601: Problem 1: Reporting rape or assault and going to court; See pg 605: Problem 3: Getting a Protection Order)*

## WHEN DOES A PERSON CONSENT TO A SEXUAL ACT?

A person consents to a sexual act when they willingly and without force or pressure engage in a sexual act with another person. A person can indicate that they do not want to engage in a sexual act verbally, through body language or in another way that tells the other person that they do not want to engage in the sexual act.

A person has not consented to a sexual act if:

- They agreed to a sexual act with somebody because they were afraid of what the other person would do if they did not agree to the sexual act. For example, the person threatens to hurt or harm children or kill the person if they do not engage in the sexual act
- They agreed to a sexual act but did not know that they were agreeing to a sexual act. For example, Mary agrees to allow a medical doctor to touch her breasts and vagina, not knowing that he doesn't need to touch her to find out whether she has a heart problem
- They are under the influence of drugs or alcohol
- They were unconscious or sleeping

## WHO CAN CONSENT TO A SEXUAL ACT?

- Children under the age of 12 are unable to consent to any sexual acts. Committing a sexual act with a child under the age of 12 years amounts to rape or sexual assault, even if the partner is a minor. For example, if Nomphele is 10 years of age and Sipho, who is older than 18 years, engages in a sexual act with her, he has committed a sexual offence.
- Committing a sexual act with a child of 12 years of age or between the age of 12 and 16 years, **with the child's consent**, amounts to the offence of 'statutory rape' if the partner is older than 18 years. For example, if Grace is 14 years of age and agrees to have sex with Vuyo, who is older than 18 years, Vuyo has committed a sexual offence. The *Sexual Offences Act (2007)* and the *Sexual Offences Amendment Act (2015)* have provided for a change in the approach to **consensual, underage sex between adolescents** as follows:
  - Previously, in terms of the *Sexual Offences Act (2007)*, consensual sex or sexual activity with children between the ages of 12 and 16 years was a crime and had to be reported to the police. This was challenged in court in the *Teddy Bear case*, which held that it was unconstitutional and caused more harm than good for children of these ages
  - The Constitutional Court held that adolescents have a right to engage in healthy sexual behaviour and that criminalising consensual sex or sexual

activity between adolescents of 12 and 16 years violated their rights to privacy, bodily integrity and dignity

- In response to this, the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 5 of 2015* was passed. These Amendments to the Act mean that it is no longer a criminal offence for adolescents to engage in consensual sex with other adolescents if they are 12 years or older and under the age of 16 years. It will also not be a criminal offence if one adolescent is between the ages of 12 and 16 and the other is 16 or 17, provided there is not more than a 2-year gap between the two people. For example, a 13-year-old and a 15-year-old can legally have sex if it is agreed to by both partners and not forced in any way. However, if anyone older than 16 years has sexual contact with someone younger than 16 years and the age gap is bigger than 2 years, they are committing statutory rape
- Committing a sexual act with a child of 12 years of age or between 12 and 16 years of age **without the child's consent** amounts to rape or sexual assault. For example, if Tania is 13 years of age and Benjamin forces her to have sex with him, Benjamin has committed a sexual offence
- Non-penetrative sexual acts (sexual violation) of a child of 12 years of age or between 12 and 16 years of age **with the consent of the child** amounts to the offence of having committed an act of consensual sexual violation of a child if the partner is older than 18 years. For example, if Anne is 15 years of age and agrees to John, who is older than 18 years, touching her genital organs, John has committed a sexual offence
- The sexual violation of a child of 12 years of age or between the age of 12 and 16 years **without the consent of the child** amounts to rape or sexual assault. For example, if Farieda is 13 years of age and Abdul, who is older than 18 years, forcefully fondles her breasts, Abdul has committed a sexual offence
- Children who are 16 years of age and older can consent to sexual acts. For example, if Zinzi is 16 years of age and agrees to have sex with Shadrack, who is 32 years of age, no sexual offence has been committed. Therefore, any person who is 16 years of age or older can consent to a sexual act

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## Incest

The law says that people may not get married to each other because they have a blood relationship or an adoptive relationship.

In terms of the *Sexual Offences Act* and the *Sexual Offences Amendment Act*, people who have a blood or adoptive relationship may not engage in acts of sexual penetration with

each other or sexual violation. Sexual violation refers to an act where one of the parties is a child, and the action of the adult was so bad (reprehensible) that even if there was mutual consent, the adult would be guilty of the crime of incest.

The rules about incest are generally the same as the rules for rape, except with incest, the law states that mutual consent is not a defence, whereas consent can be used as a defence in rape. The definition of incest has also been extended to include sexual violations where one of the parties who is violated is a child. In cases of adult/child incest, only the adult is charged with the crime. Like rape, there must be sexual penetration as defined in the *Sexual Offences Act*. (See pg 583: *Rape, incest and sexual assault*).

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## **Sexual assault**

The *Sexual Offences Act* repealed the common law definition of 'Indecent Assault' and replaced it with 'Sexual Assault'. Sexual assault is when a person unlawfully and intentionally sexually violates another person without their consent. This includes, amongst other things, direct or indirect contact of the genital organs (for example, through clothing), the anus or, in the case of a female, the breasts, the mouth of one person with the genital organs, anus or breasts of another person or masturbation of one person by another person – but it does not include the act of sexual penetration. (See pg 601: *Problem 1: Reporting rape or assault and going to court*)

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## **Sexual violence and HIV testing**

A victim of sexual violence can apply to court for an order to have the person who committed the sexual violence have an HIV test and for the results of the test to be given to the victim. This application can also be brought by any person who has an interest in the victim's well-being or the investigating officer investigating the case. The application must be brought within 90 days after the act of sexual violence was committed.

If the person is successful with the application, the investigating officer must take the person who committed the act of sexual violence for an HIV test. The HIV test results must then be given to the victim in writing. The HIV test results are private and confidential and should not be disclosed to others.

### **PROBLEMS WITH COMPULSORY HIV TESTING**

The provision for HIV testing was introduced to protect victims of sexual violence. There are, however, some problems with this. If the person who committed an act of sexual violence was tested for HIV during the window period, their body would not

indicate that they had contracted HIV yet. This means that the test results can indicate that they are HIV negative even though they are HIV positive. The negative result could, therefore, be false. The false test results can lead to the victim believing that they did not contract HIV and, therefore do not need to practice safe sex or use antiretrovirals. The window period can last for up to 4 to 6 weeks.

### **POST-EXPOSURE PROPHYLAXIS (PEP)**

PEP is an antiretroviral treatment that is used to prevent a person from contracting HIV after having possibly been exposed to the virus.

PEP is, however, not effective in all instances. It must be taken within 72 hours after contracting the virus and can have better results if taken 48 hours after possible contraction of the virus.

It is very important to ask for the PEP as soon as possible but within 72 hours of the sexual assault or rape.

### **WHAT DOES THE LAW ALLOW IN TERMS OF PEP?**

A victim is entitled to:

- Receive PEP free of charge at a designated public health establishment
- Free medical advice on PEP before using it
- The list with the names, addresses and contact details of designated public health establishments providing PEP

If the victim (or a person who has an interest in the victim's well-being) laid a charge with the police regarding a sexual offence or reported the sexual offence to a designated public health establishment within 72 hours after the sexual offence took place, the police member, medical practitioner or nurse to whom the sexual offence was reported must inform the victim of:

- The importance of getting PEP within 72 hours of having been exposed to HIV
- The fact that a victim can obtain PEP free of charge from a designated public health establishment

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## **Reporting sexual offences**

The *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007* (also known as the *Sexual Offences Amendment Act (SOAA)* was introduced to protect victims, especially women, children and people living with mental disabilities who have been raped or who have experienced sexual crimes. The Act requires that support services be provided



to victims of sexual abuse to reduce and remove secondary trauma in the criminal justice system.

The *Sexual Offences Amendment Act* protects any person who has experienced the following sexual crimes:

- **Rape:** where a person has sexual penetration with a victim without their consent; it is also a crime where a person forces another person to rape a victim (this is called compelled rape)
- **Sexual assault:** where a person sexually abuses a victim by, for example, touching their genital organs or causing them to touch their genital organs. It is also a crime for a person to force another person to sexually violate a victim (this is called compelled sexual assault)
- **Compelled self-sexual assault:** when a person forces the victim to masturbate or engage in any form of self-sexual arousal or stimulation
- **Flashing:** where a person shows their private parts to a victim without their consent
- **Sexual exploitation (child prostitution):** where a child or person who is mentally disabled is forced to engage in sexual services with or without their consent and is paid to do this
- **Sexual grooming:** making a child or person who is mentally disabled sexually ready to commit sexual acts
- **Child pornography:** where a child is used to make pornographic material for payment or a reward with or without the consent of the child

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## Steps to follow when reporting sexual offences (crimes)

Anyone can be a victim of sexual crimes regardless of their gender.

### FOLLOW THESE STEPS IF YOU ARE A VICTIM OF A SEXUAL OFFENCE:

#### **Step 1: Go to the nearest Police station or a Thuthuzela Care Centre (TCC) to report the matter**

Do not take a bath or change your clothes after a sexual crime. Your body and clothes will be used as important DNA evidence. A TCC is a one-stop victim-support service centre located at the hospital/clinic to facilitate the speedy collection of evidence in a victim-friendly environment. You can ask a friend or family member to go with you.

#### **Step 2: Make a statement**

At the police station/TCC, you will be taken to a private victim-friendly room where the police officer will take your statement. You will need to provide details of people who

witnessed the crime or have information concerning your case. Read your statement before signing it. The police will issue a case number, which must be kept safe.

**Step 3: Go for a medical examination**

Immediately go for a medical examination at the nearest hospital/clinic. The findings of the medical examination will be included in the police docket as evidence.

If the sex offender did not use a condom or any protection, you are entitled to receive Post-Exposure Prophylaxis (PEP) for HIV infection within 72 hours after the sexual offence. The PEP services are available at the public health centres managed by the Department of Health.

You may also be referred for trauma counselling to a local social worker for free.

**Step 4: Police investigation**

The police will investigate the case and may arrest the suspect.

**Step 5: Work with the police and prosecutor**

The district court prosecutor may consult with you to find out if there is enough evidence to prosecute the accused person. The prosecutor is your lawyer, so they need to be informed of all the details.

The law allows the accused to apply for bail. You will be told by the investigating officer when your application will come to court. If you feel you will be in danger if the accused is given bail, you need to tell the prosecutor about this. The prosecutor may use this information to oppose the bail application.

When the police investigation is completed, the case will be handed to the Sexual Offences Court for trial.

**Step 6: On the date of trial, go to the Sexual Offences Court**

Arrive on time and bring along friends and family who can support you.

If the regional court prosecutor is satisfied that there is enough evidence to prosecute the accused, the date of trial will be set for the case. You will be informed of this date by the investigator or prosecutor.

**Step 7: Appearing in court**

If you are a child, a mentally disabled person or a traumatised adult victim, you may testify in a private testifying room using closed-circuit TV.

**Step 8: The verdict is given by the magistrate**

If the accused is convicted, the magistrate will give them a sentence that is set by the law.

If the accused was convicted of a sexual crime involving a child or mentally disabled person, the court will order that the particulars of the accused be entered in the National Register for Sex Offenders to prevent them from repeating the same offence.

## SEXUAL OFFENCES COURTS

Since April 2022, 116 Regional Courts have been upgraded to Sexual Offences Courts to deal with cases of sexual offences.

The Sexual Offences Courts aim to:

- Reduce secondary victimisation often suffered by the victims when they engage with the criminal justice system, particularly the court system
- Reduce the turnaround time in the finalisation of sexual offences cases
- Improve the conviction rate in sexual offence cases

The *Sexual Offences Amendment Act* requires all criminal justice officials (police, prosecutors, magistrates and court clerks) to deal with all reported sexual crimes without discriminating against victims because of race, nationality, sex, age, sexual orientation or any other reason.

Sexual Offences Courts are required to provide these services to support victims of sexual crimes:

- **Court preparation services:** preparing people with information on the court procedures, services and benefits and providing support by the Court Preparation Officer (CPO) on the day of the trial
- **Intermediary services:** The prosecutor will apply to court to allow a child victim or a person with mental disability to testify in a private testifying room with the help of an intermediary who will explain the questions in a simple manner
- **Private waiting room** for adult and child victims
- **Pre- and post-trial trauma counselling**
- **Private testifying room** and closed court services
- **Witness fee services:** this covers return travelling costs and food while in court

## Domestic violence

Most victims of domestic violence are women and children. Domestic violence happens when a person gets hurt physically or is abused mentally or emotionally by someone who has a domestic relationship with them. It can include a partner, an ex-partner, a parent, a child, a caregiver, etc.

One out of every six women is battered by her husband or boyfriend. But domestic violence is still not talked about openly. It is generally believed that what goes on in a person's home is their own private affair, and people, including the authorities, should not intervene. This leads to a lot of abuse in the home going unpunished. It also makes it hard for battered women and children to look for help.

There are, however, options available to battered women and a number of organisations that can assist you if you are in such a situation. Getting a Protection Order under the *Domestic Violence Act* is one of the most important steps that a person who has been abused can take to stop the violence. (See pg 604: *Problem 2: Using the law against domestic violence*; See pg 605: *Problem 3: Getting a Protection Order*)

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### **The Domestic Violence Act (No. 116 of 1998)**

The *Domestic Violence Act* (No 116 of 1998), the 'old' *Domestic Violence Act*, recognised that domestic violence is a serious crime against society and aimed to give greater protection to people in domestic relationships who have been abused. The 'new' *Domestic Violence Act* (No 14 of 2021) has amended the previous Act by introducing new definitions like coercive and controlling behaviour and broadening existing definitions to include, for example, spiritual abuse and elder abuse. Another change is that victims of domestic violence can now apply for a protection order electronically without having to go to court. So an application for a protection order can either be lodged with the clerk of the court, or can be submitted by sending the application to an email address of the Magistrate's Court that will hear the case. This will help people who need urgent protection and can't get to a court.

The 'new' Act also states that exposing a child to domestic violence constitutes an act of domestic violence. This provision protects children when perpetrators intentionally make them witness or experience acts of domestic violence.

The *Domestic Violence Act* includes people who are married according to any law, custom or religion, living together whether they are of the same or of the opposite sex, dating or ex-partners. Also included are parents and children, people sharing homes, or caregivers to children or older people.

The Act says:

- A person can be charged and convicted of marital rape whether the parties are married according to civil, customary or religious law
- When police arrive at a scene of domestic violence, they must inform victims that they have a right to ask for police assistance to protect themselves and their children. Police are allowed to seize firearms and other weapons

- Victims can ask the police to help them find a place of safety and for help to move them there
- Police have to explain to victims how to get a Protection Order. The order is issued by a court and will specify conditions that the abuser must stick to. The court will also issue a warrant for the arrest of the abuser if they break any of the conditions
- The Act gives police the right to arrest an abuser at the scene of an incident of domestic violence without a warrant of arrest if the police reasonably suspect that the abuser has committed an offence involving physical violence
- A person who is subject to domestic violence can also ask for emergency money relief

## DOMESTIC VIOLENCE

The Act says domestic violence includes:

- Physical abuse
- Sexual abuse
- Emotional, verbal and psychological abuse
- Economic abuse
- Intimidation
- Harassment
- Spiritual abuse
- Damage to property
- Elder abuse
- Coercive behaviour
- Controlling behaviour
- Exposing or subjecting children to any domestic violence behaviours
- Entering a person's home without consent where people do not share the same home, workplace or place of study, without consent, where they don't share the same workplace or study place
- Any other controlling or abusive behaviour that harms or may cause harm to a person

## LEGAL REMEDIES IN DOMESTIC VIOLENCE CASES INCLUDE:

- Laying a criminal charge, for example, assault, against the abuser (*See pg 206: Laying a criminal charge against another person*)
- Getting a Protection Order against the abuser under the Domestic Violence Act, including, if necessary, getting an order to have the abuser's gun removed if the abuser has used a gun to threaten the victim and/or an order that the abuser be evicted from the common home. (*See pg 604: Problem 2: Using the law against domestic violence; See pg 605: Problem 3: Getting a Protection Order*)

- Making a civil claim against the abuser to claim compensation money for pain and suffering and any medical costs

## PHYSICAL ABUSE

Physical abuse is defined as any act or threatened act of physical violence towards someone or to a child. In the case of physical abuse of children, it includes any form of deliberate harm or ill-treatment of a child and includes assault, sexual abuse, bullying by another child, a labour practice that exploits a child, or exposing or subjecting them to any behaviour that could harm the child psychologically or emotionally.

## SEXUAL ABUSE

The *Domestic Violence Act* says sexual abuse is ‘any conduct that abuses, humiliates, degrades, or otherwise violates the sexual integrity of the complainant’. Sexual abuse can, among other things, be the following:

- Forcing sex on a person (rape)
- Sexually assaulting them in other ways
- Sodomy
- Touching someone in a way that makes them uncomfortable
- Forcing oral sex on a person
- Incest (where a child’s parent/brother/sister sexually abuses them)

Legal remedies in sexual abuse cases include:

- Laying a criminal charge against the abuser, for example, for rape or sexual assault (*See pg 206: Steps in laying a criminal charge against another person*)
- Getting a Protection Order against the abuser under the *Domestic Violence Act* (*See pg 605: Problem 3: Getting a Protection Order*)
- Making a civil claim to claim compensation for pain and suffering (*See pg 236: Civil claims*)

## ECONOMIC ABUSE

Economic abuse is when the abuser doesn’t pay a woman maintenance out of spite towards her, withholds money to control her or takes her salary away from her.

Legal remedies in economic abuse cases include:

- Getting a protection order under the *Domestic Violence Act* for emergency monetary relief, which can include:
  - Compensation for loss of earnings
  - Medical and dental expenses
  - New accommodation expenses

- Household or family necessities (*See pg 605: Problem 3: Getting a Protection Order*)
- Claiming for maintenance under the Maintenance Act. (*See pg 570: Problem 4: Getting maintenance through the Maintenance Court*).

The Maintenance Court process can take some time, so if money is needed urgently, it is best to apply for a Protection Order for emergency monetary relief. You must still claim maintenance in the Maintenance Court as well, because the Protection Order will only give emergency monetary relief for a temporary time because maintenance is supposed to be dealt with by the Maintenance Court. When the Maintenance Court makes an order, this will replace the part of the Protection Order that gives emergency monetary relief.

### **EMOTIONAL, VERBAL AND PSYCHOLOGICAL ABUSE**

The Domestic Violence Act says emotional, verbal and psychological abuse is ‘a pattern of degrading or humiliating conduct towards a complainant’ including:

- Repeated insults, ridicule or name-calling
- Repeated threats to cause emotional pain
- Repeated exhibition of obsessive possessiveness or jealousy, which is a serious invasion of a person's privacy, liberty, integrity or security
- Creating fear

### **LEGAL REMEDIES IN EMOTIONAL AND PSYCHOLOGICAL ABUSE CASES INCLUDE:**

- Laying a criminal charge against the abuser, for example, for kidnapping, abduction, crimen injuria (*See pg 206: Laying a criminal charge against another person*)
- Making a civil claim for compensation for pain and suffering (*See pg 236: Civil claims*)

### **ELDER ABUSE**

Elder abuse refers to the abuse of an older person, which is a punishable offence. The new Domestic Violence Act (2021) has extended protection from domestic violence to older people as well.

### **SPIRITUAL ABUSE**

Spiritual abuse is now a category of abuse in terms of the Domestic Violence Act (2021). It is defined as:

- Ridiculing or insulting the complainant's religious or spiritual beliefs
- Preventing the complainant from practising their religious or spiritual beliefs

- Utilising the complainant's religious or spiritual beliefs to control, manipulate or shame them, including using religious texts or beliefs as a reason to justify abusive behaviour

### **ENTERING A VICTIM'S WORKPLACE OR RESIDENCE WITHOUT CONSENT**

It is an act of abuse (which can be included in a Protection Order application) if a person enters a victim's workplace or home without their consent.

### **HARASSMENT**

Harassment means behaving in a way that makes a person afraid they will be harmed. It includes stalking (where someone follows you around or hangs around your home), repeatedly making unwelcome telephone calls, or sending unwelcome emails, packages, texts, photos or videos.

### **SEXUAL HARASSMENT**

Sexual harassment means sexual attention from a person in a domestic relationship with the complainant who knows or ought to know that the attention is unwelcome. It includes the promise of a reward for complying with the request linked to sexual behaviour or a threat of harm for refusing to comply with a request linked to sexual behaviour.

### **COERCIVE AND CONTROLLING BEHAVIOUR**

Coercive behaviour is abusive conduct using intimidation or pressure to make a person behave in a certain way against their will and where they believe they will be harmed. Controlling behaviour is forcing a person to be dependent on another person by:

- Isolating them from sources of support
- Exploiting their resources for their own gain
- Depriving them of the support needed to resist or escape
- Regulating their behaviour

### **REPORTING DOMESTIC ABUSE**

It is compulsory for an adult who knows, believes or suspects that an act of domestic violence has been committed against a child, a person with a disability or an older person to report this to a social worker or a member of SAPS. If they fail to do this, they will be guilty of a criminal offence.

The report must be made on **FORM 3** available from the Department of Justice website: [https://www.justice.gov.za/forms/form\\_dva.htm](https://www.justice.gov.za/forms/form_dva.htm).



The report must give reasons why the person reporting the matter believes domestic violence is taking place.

It is also compulsory for a functionary, who could be a medical practitioner, social worker, an official employed at public health establishments, health care personnel, educator or caregiver, who has a belief or suspicion on reasonable grounds, that a child, or a person with a disability or an older person, may be a victim of domestic violence, to immediately report this to a social worker or a member of the SAPS. They must complete **FORM 2: Report and Risk Assessment** available on the Department of Justice website: [https://www.justice.gov.za/forms/form\\_dva.htm](https://www.justice.gov.za/forms/form_dva.htm)

## **DUTY OF THE POLICE TO ASSIST AND INFORM PEOPLE OF RIGHTS IN DOMESTIC VIOLENCE CASES**

When a person reports a case of domestic violence to the police, the police must:

- Assist the person who is laying the complaint, including getting them medical treatment and finding shelter
- Hand **FORM 1** (available from the Department of Justice website: [https://www.justice.gov.za/forms/form\\_dva.htm](https://www.justice.gov.za/forms/form_dva.htm)) to the complainant, which contains a list of their rights and the responsibilities of the police in domestic violence cases
- Explain to the complainant or to the person acting on their behalf that the SAPS will assist, that they have a right to make a criminal complaint and to apply for a Protection Order even if no criminal complaint has been made, and the right to apply for a Domestic Violence Safety Monitoring Notice
- Inform the complainant of the option of applying for a Protection Order and for a Domestic Violence Safety Monitoring Notice online and how the online portal can be accessed
- Read and explain the notice to the complainant if they can't read it, and advise them to go to the clerk of the court for more information and help

## **DOMESTIC VIOLENCE SAFETY MONITORING NOTICE**

A person (the victim) who shares any type of residence, like a house or flat, with someone (the abuser) who has committed an act of domestic violence against them can apply to the court to issue a Domestic Violence Safety Monitoring Notice. This can be done at the same time as an application for a Protection Order or even where a Protection Order is in force.

The purpose of the Safety Monitoring Notice is to provide a victim with added protection if they live with someone who is a threat to their safety. The Safety Monitoring Notice orders the station commander at the local police station to appoint a police officer to:

- Contact the complainant at regular intervals electronically to find out if they are safe
- Visit the joint residence where the victim and the abuser live at regular intervals to check on the complainant

The application can be made by going to the court or electronically by submitting the application to an email address at the Magistrate's Court, where the case will be heard. The email address list is available on the Department of Justice website:

<https://www.justice.gov.za/forms/dva/20230417-DV-Court-Emails.pdf>.

The application must be done using **FORM 9**, available from the Department of Justice website: [https://www.justice.gov.za/forms/form\\_dva.htm](https://www.justice.gov.za/forms/form_dva.htm) and must include any supporting affidavits of people who know about the domestic violence and who will support the application.

When the clerk of the court has issued the Safety Monitoring Notice, it will be sent to the complainant and to the local SAPS station commander, who must assign a police officer to serve the notice on the perpetrator within 24 hours. The police officer must contact the complainant immediately after serving the Notice on the perpetrator. If the Notice couldn't be served, they must ask the complainant for details on where to find the perpetrator. The police officer must submit a return of service or non-service (if they couldn't find the complainant) to the clerk of the court by hand or electronically within 12 hours of serving the Notice on the perpetrator.

## PROTECTION ORDER

Under the *Domestic Violence Act*, a person can get a Protection Order to stop another person from abusing them or for the abuser to leave the home.

The advantages of this process under the Act are:

- You do not need an attorney to help you apply for this kind of court order, so the process is practical and cheap
- It is much quicker because you do not have to use the normal court procedure
- The abuser is not charged with any crime but just ordered to stop the abusive behaviour. Many women or children may be reluctant to go so far as to lay a charge against a family member, which could land the person in jail. The abuser only gets into trouble with the law if they disobey the Protection Order.

## **WHAT IS A PROTECTION ORDER?**

A Protection Order is an order from the court telling an abuser to stop abusing someone. You can get a Protection Order against anyone who is abusing you and who is in some form of *domestic* relationship with you, for example, a parent or guardian, a husband or wife, or a romantic partner. You cannot get a Protection Order against your employer or neighbour.

The Protection Order can also order:

- The police to take away any dangerous weapons from the abuser
- A police officer to go with the abused person to collect their things
- The abuser to move out of the home
- The abuser not to prevent the complainant from entering the common home
- The abuser to continue paying the rent or bond to provide housing for the complainant
- The abuser to pay money to help the person survive or for medical costs

Police may arrest an abuser who has disobeyed a Protection Order, using the warrant of arrest given at the same time that the Protection Order is given by the court, if the person that has been abused is in 'imminent harm'. This is a problem because the courts have not said what 'imminent harm' is, and often, the police are reluctant to arrest. They prefer to give the abuser a notice to come to court.

## **WHO CAN APPLY FOR A PROTECTION ORDER?**

Anyone in any of these relationships can apply for a Protection Order:

- A husband and wife married according to civil, customary or religious law
- Gay or lesbian couple
- People living together who aren't married
- People who are engaged
- People who are dating
- People who share the same home (housemates, boarding schools, university residences, and so on)
- Family members of the abused
- Parents of a child or people responsible for a child
- A child under the age of 21, without the help of a parent or guardian
- Any person, including a health service provider, police officer, social worker, teacher, neighbour, friend, relative, or minister, who has a material interest (not just being a busybody) in a victim's well-being,

provided that the victim consents. They must complete **FORM 7: Consent for another person to apply for a Protection Order on behalf of a victim**, which is available on the Department of Justice website: [https://www.justice.gov.za/forms/form\\_dva.htm](https://www.justice.gov.za/forms/form_dva.htm). No consent from the victim is needed if the victim is a child, mentally retarded, unconscious or for other good reason isn't able to consent.

The *Domestic Violence Act* says if a person believes a child is being abused, they don't have to get the child's permission before getting a Protection Order. It is enough to believe that the child is being abused.

### **WHERE CAN YOU GET A PROTECTION ORDER?**

A person can get a Protection Order from a Magistrate's Court or High Court. This court must be close to where the abused person lives or works, where the abuser lives or works or where the abuse took place. The Act says a person can get a Protection Order from a Magistrate's Court at any time of day or night.

You can also make the application for a Protection Order electronically. Instead of going to court, you can submit an application to the email address of the Magistrate's Court, where you would make the application. You must complete **FORM 6** for the application which is available on the Department of Justice website: [https://www.justice.gov.za/forms/form\\_dva.htm](https://www.justice.gov.za/forms/form_dva.htm), and submit it to the correct email address.

The list of email addresses is available on the Department of Justice website: <https://www.justice.gov.za/forms/dva/20230417-DV-Court-Emails.pdf>.

Doing an electronic application makes it easier to apply for urgent protection without having to go to court itself.

### **COSTS OF GETTING A PROTECTION ORDER**

It is not necessary to get an attorney to get a Protection Order. Getting a Protection Order in court is free – the person only has to pay for the Protection Order to be served on the abuser. If they do not have money to pay for the order to be served, then the Act says the court must help with this. (*See pg 605: Problem 3: Getting a Protection Order*)

# Problems

This section deals with the following problems:

- Problem 1: Reporting rape or assault and going to court
- Problem 2: Using the law against domestic violence
- Problem 3: Getting a Protection Order

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## 1. Reporting rape or assault and going to court

*I was raped, and I want to report the rape. How do I do this? What will happen to me when I go to the police? And what will happen in the court case?*

### WHAT DOES THE LAW SAY?

If you make a complaint to the police, the police must investigate the matter. They must arrest the accused and may arrange identity parades for you to point out the criminal. They must collect evidence that will help the court to properly try the person accused of the crime. They must get statements from any witnesses (people who saw the crime). incest and sexual assault) Other rights that you have when reporting a rape are the right to:

- Call the police and have them come to you
- Have a friend or a family member with you to support you
- Give your statement in privacy
- Give your statement to a female officer (if you are female) if there is one available

### WHAT CAN YOU DO?

- **Go to the charge office** at the nearest police station and make a complaint. You can go to any police station. If you report it at a police station that does not cover the area where the assault took place, it will be referred to the appropriate station for investigation. You should try to go within 48 hours of the attack. If you leave it longer, you may have to explain why it took you so long to go to the police. It is advisable to report it to the police or a health facility within 72 hours, and then you can access PEP treatment against a possible HIV infection.
- **Make a statement to the police.** The detective will take a statement from you. You have the right to make the statement in your own language or have

it translated. Because you are making a complaint, you will be called a complainant. You must then swear that you are speaking the truth and sign your statement. If you forget something and think about it later, you can add it to your statement.

- **Ask for a copy of your statement** and the police reference number before you leave the charge office. You have the right to get a copy. The police reference number is called an OB number (Occurrence Book Number) or a VB-nommer (Voorvalleboeknummer).
- **Get a medical report.** If you have any injuries, the police will ask you to get a medical report form filled in. This form is called a J88 medical report. You can go to your own doctor or to a district surgeon (a government doctor) to get this form filled in. This form must go back to the police station where you laid the charge. If you go to a district surgeon, they will send it back for you.
- After you make your statement to the police, they must **open a case docket** and investigate a criminal charge against the person who sexually assaulted you. Then there will be a CR (Criminal Register) or MR (Misdaadregister) number.
- **Check on the progress of your case** a week or two later to see what is happening. **Ask for the name of the investigating officer** so you can speak to them when you contact the charge office.

Sometimes nothing happens because the police investigation is stopped or the National Prosecutions Authority decides not to charge the person who raped or assaulted you. You can ask the investigating officer for reasons. If you are not satisfied, you can ask your lawyer to make the authorities take your case more seriously.

- **Identity parade.** You may have to identify the person who assaulted you by pointing out the person in an identity parade.
- **Evidence.** The police must gather as much evidence as possible to show that the story you have told is the truth, for example, the clothes that you were wearing when the attack happened, etc. They may be needed in the court case.
- **Medical evidence.** The police also need the medical report and samples taken by the doctor. Do not wash yourself after the attack until you have seen the district surgeon or your doctor. Also, do not drink any alcohol or take any other drugs, such as strong painkillers or tranquillisers. You have a right to ask the doctor what they are doing and why. You should also ask the doctor to treat you in case you may be pregnant from the rape. The doctor is not legally obligated to treat you for pregnancy, sexually transmitted diseases or

HIV/AIDS. You may need to see another doctor to be treated for these problems or any other injuries.

- **The court case** (See pg 210: Summary of steps in a criminal court case)
  - If the man who raped you is charged, you must give evidence in court. You will be cross-examined by the accused or their attorney
  - The state prosecutor will present the case against the accused. You will be called as a **state witness** to say what happened to you. Tell the court about the effects the sexual assault has had on you
  - The prosecutor must prove the charge against the accused **beyond a reasonable doubt**. This means there should be no doubt in the magistrate's mind that the man is guilty. The magistrate might decide that the prosecutor has not proved the case well enough and then find the attacker 'not guilty'. This does not always mean that the accused did not do it. It just means there was not enough evidence to prove the case.
  - Even if the magistrate or judge finds the attacker guilty, the **sentence might be light** – a fine or only a short time in jail. You have no say over what sentence the accused gets.
  - If the accused is found guilty, ask the prosecutor if you can submit a Victim Impact Statement or testify how the rape or sexual violation affected you and your life.
  - You can ask for certain damages in terms of the *Criminal Procedure Act*. If you do, then you may not be able to bring a claim for civil damages against the perpetrator.

### BRINGING A CIVIL CLAIM FOR RAPE

A person who has been raped can also bring a civil case against the person who has raped and/or sexually assaulted them. (See: pg 236 Civil claims)

#### EXAMPLE

*In a civil claim, a young girl sued the man who had been raping her for many years for damages in a civil case. The civil claim was made after the man was found guilty of rape in a criminal court. The man was sued for depriving the young girl of freedom of movement and for raping and/or sexually assaulting her. Because of this, she suffered shock, pain, discomfort, mental anguish and humiliation. The damages claimed were:*

- R30 000 general damages for pain and suffering, hurt feelings, anguish and stress

- R10 000 for wrongful deprivation of freedom of movement
- R10 000 general damages for shock, pain and suffering
- R20 000 for disablement in respect of enjoyment of the amenities of life

You can also sue for child sexual abuse many years after it happened if you only became aware and truly understood the impact it had on your life later, for example, after seeing a counsellor.

If the state does not prosecute, you can conduct a private prosecution. The only problem is that this is expensive.

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## 2. Using the law against domestic violence

*"What are all the legal options I can try to stop my partner from using violence against me?"*

### WHAT DOES THE LAW SAY?

Domestic violence is an assault and, therefore, a crime. If a court finds a person guilty of assault, they can get a fine or a prison sentence.

### WHAT CAN YOU DO?

These are the legal options you can try:

- **Call the police** to stop your husband or boyfriend from hitting you. They will probably not take him away or arrest him.
- **Lay a charge of assault against** your partner. (*See pg 601: Problem 1: Reporting rape or assault and going to court*). You must be prepared to make a statement to the police and later to go to court. Many women are scared to do this because they fear that their partner will beat them up even more if they find out. Also, if the man is found guilty, the sentence is usually just a small fine.
- **Get a Protection Order.** This is an order from the court to your partner to stop them hitting you, to tell them to stay away from you or to have them removed from the home. (*See pg 605: Problem 3: Getting a Protection order*)
- If you are married to the man who batters you, you may want to end the violent relationship. You may want to leave him and get a divorce. (*See pg 564: Problem 1: Getting a divorce*)
- **Lay a charge of trespass.** You can do this if you own or rent a house and someone keeps coming onto your property without your permission. It is important that you have told the person before not to enter your property or your house. If he does not obey, you can tell the police he is trespassing.



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### 3. Getting a Protection Order

This is the procedure for getting a Protection Order under the *Domestic Violence Act* to stop abuse or domestic violence.

#### WHAT DOES THE LAW SAY?

The *Domestic Violence Act* protects people (men, women and children) in abusive relationships. (See pg 556: *Reporting child abuse*; See pg 556: *Stopping child abuse using the Domestic Violence Act*; See pg 592: *The Domestic Violence Act*)

#### WHAT MUST YOU DO?

You can apply for a Protection Order by going to the Magistrate's Court and making an application or by applying for it electronically by sending your application to the email address of the Magistrate's Court where the case will be heard. Download a list of email addresses for Domestic Violence Courts in all the provinces on the Department of Justice website:

<https://www.justice.gov.za/forms/dva/20230417-DV-Court-Emails.pdf>.

To make an application, you need to complete **FORM 6: Application for Protection Order**, which you can find on the Department of Justice website: [https://www.justice.gov.za/forms/form\\_dva.htm](https://www.justice.gov.za/forms/form_dva.htm). If you want to submit it electronically, you can attach the application form to the email.

If you want to get a Protection Order, you will have to go to court on two separate days. The first time you go, the magistrate might give you an interim order if they believe there is a threat to your safety. If the magistrate gives you an interim order, they will set a return date when you have to go back to the court. The return date is the second time you have to go to court, and the abuser is also called to appear in court on this day. You do not need an attorney to get a Protection Order.

#### STEPS IN GETTING A PROTECTION ORDER

##### **Step 1: APPLY FOR A PROTECTION ORDER**

You can apply for a Protection Order using **FORM 6: Application for a Protection Order**, available on the Department of Justice website:

[https://www.justice.gov.za/forms/form\\_dva.htm](https://www.justice.gov.za/forms/form_dva.htm).

The completed form can be submitted either electronically or to an email address at the nearest Magistrate's Court (generally in the Family Court section) where your case will be heard. Use the link to the Department of Justice website for email addresses: <https://www.justice.gov.za/forms/dva/20230417-DV-Court-Emails.pdf>. Or you can go to

the Magistrate's Court to apply for a Protection Order. The clerk of the court must explain what your rights are and how to get a Protection Order. Take with you any documents like medical reports, photographs of the injuries, and supporting affidavits from family members, neighbours or children who know about the abuse.

### **Step 2: COURT ISSUES INTERIM PROTECTION ORDER**

The magistrate will listen to your story and read any affidavits that you have brought with you. If the magistrate believes there is enough evidence of abuse, they will give you an interim or temporary Protection Order. The magistrate will also give you a suspended warrant of arrest, which you can use to get the abuser arrested if he disobeys the order.

You can ask the magistrate:

- For protection from domestic violence
- To have a firearm confiscated, if you explain how this has been used to threaten you
- For the abuser to have no contact with the children, if appropriate
- For the police to come with you to collect your belongings at your home
- Not to say where you have moved to, if you are leaving or have left home
- For the abuser to be evicted from the home
- For the abuser not to prevent you from entering the common home
- For emergency monetary relief, for example, for loss of earnings because you can't work, medical and dental expenses, accommodation expenses, money for food or clothes

### **Step 3: PROTECTION ORDER SERVED ON ABUSER**

The Sheriff of the Court or the police will serve the Protection Order on the abuser. You can ask the court to phone you and tell you when the Protection Order has been served. The order is only effective from the time that it has been served on (delivered to) the abuser by the Sheriff or the police.

If you do not hear from the court that the Protection Order has been served within one week, then you should check with the clerk of the court whether it has been served or not. Sometimes, the Sheriff of the Court can't find the abuser.

The Protection Order tells the abuser that he must be at court on a return date written on the Protection Order. He must go to court to tell the magistrate why the Protection Order shouldn't be made final. The return date is usually a few weeks after serving the documents.

### **Step 4: GO BACK ON RETURN DAY COURT**

You must go to court on the return day written on the Protection Order. The abuser will also be there. You can ask the police to protect you if necessary. The court will decide whether to make the temporary order final or to set it aside. If the abuser doesn't come to court, then the court will probably make the order final.



### **Step 5: COURT ISSUES THE FINAL PROTECTION ORDER AND WARRANT**

Once the magistrate has heard all the evidence, they will issue a Protection Order. The magistrate also issues a warrant of arrest, to be used if the abuser disobeys the Protection Order. The Sheriff or police serve the final Protection Order on the abuser. You get a copy of the order signed by the court (certified copy), together with the warrant. The order lasts until you choose to cancel or change it.

### **IF THE ABUSER DOESN'T OBEY THE PROTECTION ORDER**

If the abuser doesn't obey the Protection Order:

- You can go to any police officer with the warrant of arrest, which is attached to the Protection Order
- You tell the police how the abuser has broken the protection order
- The police will charge him with breaking the Protection Order
- The police must arrest the abuser if you are in danger (they can also do this without a warrant), or if they think you are not in immediate danger, they will warn him to appear in court

### **IF YOU LOSE YOUR WARRANT OF ARREST**

If you lose your warrant of arrest and Protection Order, you can go back to the clerk of the court and get another copy.

### **WHAT HAPPENS TO THE ABUSER?**

- If the abuser is arrested, he will be kept in jail until he goes to court within 48 hours
- Besides being charged with disobeying the Protection Order, he can be charged with any other criminal offence he has committed while abusing you, for example, if he assaulted you or pointed a firearm at you
- If he is found guilty in court, he will be fined or sent to jail

### **CHANGING THE PROTECTION ORDER**

If you want to change the Protection Order, you can give written notice to the abuser and to the court to apply to change the order or to withdraw it completely. You must say why you want to change it or withdraw it.

## Checklist

### **Rape and indecent assault**

- Have you been to a doctor for a medical check-up?
- Do you know the name of the person who raped or assaulted you?
- Where does the person live (their address)?
- Have you laid a charge against the person at the police station?
- Have you reported the case to any welfare organisation, for example, Rape Crisis, church welfare organisation, or social work agency?