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Government Notice

OFFICE OF THE PRIME MINISTER

No. 114 2000

**PROMULGATION OF ACT
OF PARLIAMENT**

The following Act which has been passed by the Parliament and signed by the President in terms of the Namibian Constitution is hereby published in terms of Article 56 of that Constitution.

No. 8 of 2000: Combating of Rape Act, 2000

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COMBATING OF RAPE ACT, 2000**EXPLANATORY NOTE:**

	Words underlined with a solid line indicate insertions in existing provisions.
[]	Words in bold type in square brackets indicate omissions from existing provisions.

ACT

To provide for the combating of rape; to prescribe minimum sentences for rape; to provide for the abolition of the rule that a boy under the age of fourteen years is presumed incapable of sexual intercourse; to provide for the modification of certain rules of evidence applicable to offences of a sexual or indecent nature; to impose special duties on prosecutors in criminal proceedings relating to sexual offences; to impose special duties on members of the police in respect of certain bail applications; to amend the Criminal Procedure Act, 1977, so as to insert a certain definition; to make provision for the rights of a complainant of rape in bail proceedings; to further regulate the granting of bail to persons charged with rape; to further regulate the circumstances in which certain criminal proceedings shall not take place in open court; to extend the prohibition of the publication of certain information relating to certain offences; to further regulate the admissibility of evidence relating to similar offences by an accused; and to further regulate the admissibility of evidence relating to the character of a complainant of rape or an offence of an indecent nature; and to provide for matters incidental thereto.

(Signed by the President on 19 April 2000)

BE IT ENACTED by the Parliament of the Republic of Namibia, as follows:-

Definitions

1. (1) In this Act, unless the context otherwise indicates –

“complainant”, in relation to an offence of a sexual or indecent nature, means a person towards or in connection with whom any such offence is alleged to have been committed, irrespective of whether or not that person has actually laid a complaint or gives evidence in the criminal proceedings in question;

“perpetrator” means a perpetrator as referred to in section 2(1);

“sexual act” means –

- (a) the insertion (to even the slightest degree) of the penis of a person into the vagina or anus or mouth of another person; or
- (b) the insertion of any other part of the body of a person or of any part of the body of an animal or of any object into the vagina or anus of another person, except where such insertion of any part of the body (other than the penis) of a person or of any object into the vagina or anus of another person is, consistent with sound medical practices, carried out for proper medical purposes; or
- (c) cunnilingus or any other form of genital stimulation;

“vagina” includes any part of the female genital organ.

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(2) Any reference in any other law to rape shall, subject to the provisions of this Act, be construed as including a reference to rape under this Act.

Rape

2. (1) Any person (in this Act referred to as a perpetrator) who intentionally under coercive circumstances –

- (a) commits or continues to commit a sexual act with another person; or
- (b) causes another person to commit a sexual act with the perpetrator or with a third person,

shall be guilty of the offence of rape.

(2) For the purposes of subsection (1) “coercive circumstances” includes, but is not limited to-

- (a) the application of physical force to the complainant or to a person other than the complainant;
- (b) threats (whether verbally or through conduct) of the application of physical force to the complainant or to a person other than the complainant;
- (c) threats (whether verbally or through conduct) to cause harm (other than bodily harm) to the complainant or to a person other than the complainant under circumstances where it is not reasonable for the complainant to disregard the threats;
- (d) circumstances where the complainant is under the age of fourteen years and the perpetrator is more than three years older than the complainant;
- (e) circumstances where the complainant is unlawfully detained;
- (f) circumstances where the complainant is affected by -
 - (i) physical disability or helplessness, mental incapacity or other inability (whether permanent or temporary); or
 - (ii) intoxicating liquor or any drug or other substance which mentally incapacitates the complainant; or
 - (iii) sleep,

to such an extent that the complainant is rendered incapable of understanding the nature of the sexual act or is deprived of the opportunity to communicate unwillingness to submit to or to commit the sexual act;

- (g) circumstances where the complainant submits to or commits the sexual act by reason of having been induced (whether verbally or through conduct) by the perpetrator, or by some other person to the knowledge of the perpetrator, to believe that the perpetrator or the person with whom the sexual act is being committed, is some other person;
- (h) circumstances where as a result of the fraudulent misrepresentation of some fact by, or any fraudulent conduct on the part of, the perpetrator, or by or on

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the part of some other person to the knowledge of the perpetrator, the complainant is unaware that a sexual act is being committed with him or her;

- (i) circumstances where the presence of more than one person is used to intimidate the complainant.

(3) No marriage or other relationship shall constitute a defence to a charge of rape under this Act.

Penalties

3. (1) Any person who is convicted of rape under this Act shall, subject to the provisions of subsections (2), (3) and (4), be liable-

- (a) in the case of a first conviction -

(i) where the rape is committed under circumstances other than the circumstances contemplated in subparagraphs (ii) and (iii), to imprisonment for a period of not less than five years;

(ii) where the rape is committed under any of the coercive circumstances referred to in paragraph (a), (b) or (e) of subsection (2) of section 2, to imprisonment for a period of not less than ten years;

- (iii) where -

(aa) the complainant has suffered grievous bodily or mental harm as a result of the rape;

(bb) the complainant -

(A) is under the age of thirteen years; or

(B) is by reason of age exceptionally vulnerable;

(cc) the complainant is under the age of eighteen years and the perpetrator is the complainant's parent, guardian or caretaker or is otherwise in a position of trust or authority over the complainant;

(dd) the convicted person is infected with any serious sexually-transmitted disease and at the time of the commission of the rape knows that he or she is so infected;

(ee) the convicted person is one of a group of two or more persons participating in the commission of the rape; or

(ff) the convicted person uses a firearm or any other weapon for the purpose of or in connection with the commission of the rape,

to imprisonment for a period of not less than fifteen years;

- (b) in the case of a second or subsequent conviction (whether previously convicted of rape under the common law or under this Act) -

(i) where the rape is committed under circumstances other than the circumstances contemplated in subparagraphs (ii) and (iii), to

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imprisonment for a period of not less than ten years;

- (ii) where the rape in question or any other rape of which such person has previously been convicted was committed under any of the coercive circumstances referred to in paragraph (a), (b) or (e) of subsection (2) of section 2, to imprisonment for a period of not less than twenty years;
- (iii) where the rape in question or any other rape of which such person has previously been convicted was committed under any of the circumstances referred to in subparagraph (iii) of paragraph (a), to imprisonment for a period of not less than forty-five years.

(2) If a court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the applicable sentence prescribed in subsection (1), it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.

(3) The minimum sentences prescribed in subsection (1) shall not be applicable in respect of a convicted person who was under the age of eighteen years at the time of the commission of the rape and the court may in such circumstances impose any appropriate sentence.

(4) If a minimum sentence prescribed in subsection (1) is applicable in respect of a convicted person, the convicted person shall, notwithstanding anything to the contrary in any other law contained, not be dealt with under section 297(4) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977): Provided that, if the sentence imposed upon the convicted person exceeds such minimum sentence, the convicted person may be so dealt with in regard to that part of the sentence that is in excess of such minimum sentence.

No rule as to incapacity of boy under fourteen years to have sexual intercourse shall operate

4. (1) If, in any legal proceedings, the question is in issue whether a male person has had sexual intercourse or has performed an act of a sexual nature with another person or is the father of any child, such question shall be determined as a question of fact, and no presumption or rule of law to the effect that a boy under the age of fourteen years is incapable of sexual intercourse, shall operate.

(2) The criminal capacity of an accused under the age of fourteen years who is charged with an offence of a sexual nature shall be determined in the same manner as the criminal capacity of an accused under the age of fourteen years who is charged with any other offence.

Abolition of cautionary rule relating to offences of a sexual or indecent nature

5. No court shall treat the evidence of any complainant in criminal proceedings at which an accused is charged with an offence of a sexual or indecent nature with special caution because the accused is charged with any such offence.

Evidence of previous consistent statements

6. Evidence relating to all previous consistent statements by a complainant shall be admissible in criminal proceedings at which an accused is charged with an offence of a sexual or indecent nature: Provided that no inference may be drawn only from the fact that no such previous statements have been made.

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COMBATING OF RAPE ACT, 2000**Evidence of period of delay between commission of sexual or indecent act and laying of complaint.**

7. In criminal proceedings at which an accused is charged with an offence of a sexual or indecent nature, the court shall not draw any inference only from the length of the delay between the commission of the sexual or indecent act and the laying of a complaint.

Evidence of psychological effects of rape

8. (1) Evidence of the psychological effects of rape shall be admissible in criminal proceedings at which an accused is charged with rape (whether under the common law or under this Act) in order -

- (a) to show that the sexual act to which the charge relates is likely –
 - (i) to have been committed towards or in connection with the complainant concerned;
 - (ii) to have been committed under coercive circumstances;
- (b) to prove, for the purpose of imposing an appropriate sentence, the extent of the mental harm suffered by that complainant.

(2) In estimating the weight to be attached to evidence admitted in terms of subsection (1), the court shall have due regard to -

- (a) the qualifications and experience of the person who has given such evidence; and
- (b) all the other evidence given at the trial.

Special duties of prosecutor where accused is charged with sexual offence

9. In criminal proceedings at which an accused is charged with an offence of a sexual nature, it shall be the duty of the prosecutor to consult with the complainant in such proceedings in order -

- (a) to ensure that all information relevant to the trial has been obtained from the complainant, including information relevant to the question whether the accused should be released on bail and, if the accused were so released, whether any conditions of bail should be imposed; and
- (b) to provide all such information to the complainant as will be necessary to lessen the impact of the trial on the complainant.

Special duties of member of police in respect of bail applications where accused is charged with sexual offence

10. In criminal proceedings at which an accused is charged with an offence of a sexual nature, it shall be the duty of the member of the Namibian Police Force in charge of the investigation -

- (a) to forthwith inform the prosecutor in such proceedings of any reason to believe that the complainant would be at risk if the accused is released on bail and of any other investigations involving the accused (if any); and
- (b) if bail has been granted to the accused, to forthwith, after becoming aware thereof, inform that prosecutor of any failure by the accused to comply with his or her conditions of bail.

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COMBATING OF RAPE ACT, 2000**Amendment of section 1 of Act 51 of 1977**

11. Section 1 of the Criminal Procedure Act, 1977 (hereinafter referred to as the principal Act), is hereby amended by the insertion in subsection (1) after the definition of "charge" of the following definition:

"complainant", in relation to an offence of a sexual or indecent nature, means a person towards or in connection with whom any such offence is alleged to have been committed, irrespective of whether or not that person has actually laid a complaint or gives evidence in the criminal proceedings in question;".

Insertion of section 60A in Act 51 of 1977

12. The following section is hereby inserted in the principal Act after section 60:

"Rights of complainant in bail application where accused is charged with rape

60A. (1) A complainant of rape shall have the right -

- (a) to attend any proceedings where the question is considered whether an accused who is in custody on a charge of rape should be released on bail or, if bail has been granted to the accused, whether any further conditions of bail should be imposed under section 62 or whether any such conditions of bail should be amended or supplemented under section 63; and
- (b) to request the prosecutor in proceedings referred to in paragraph (a) to present any information or evidence to the court that might be relevant to any question under consideration by the court in such proceedings.

(2) If an accused is in custody on a charge of rape, the person in charge of the police station or any other place where the accused is detained in terms of section 50 (1), or any other person designated by such first-mentioned person, shall as soon as possible inform the complainant concerned of -

- (a) the place, date and time of the first appearance of the accused in court; and
- (b) the rights of the complainant under subsection (1).

(3) If an accused who is in custody on a charge of rape intends to apply to the court for bail on a date or at a time of which the complainant has not been otherwise informed in terms of this section, the accused or his or her legal representative shall request the person referred to in subsection (2) to inform the complainant accordingly, whereupon such person shall so inform the complainant.

(4) The person who informs, or who is required to inform, the complainant in terms of subsection (2) or (3), as the case may be, shall prepare an affidavit stating -

- (a) whether the provisions of subsection (2) or (3), as the case may be, have been duly complied with and, if they have not been so complied with, the reasons for not complying with any such provision;
- (b) the manner in which the complainant has been so informed; and

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(c) the date and time when the complainant has been so informed.

(5) An affidavit prepared in terms of subsection (4) shall be handed to the judge or judicial officer presiding at the proceedings at which bail is considered, and such affidavit shall form part of the record of such proceedings.

(6) If a complainant is present at proceedings at which bail is considered in respect of an accused who is in custody on a charge of rape, and such proceedings are postponed, the court shall inform the complainant of the date and time to which such proceedings have been postponed and of the complainant's rights under subsection (1).

(7) If a complainant is not present at proceedings referred to in subsection (6), the court shall enquire into the question whether the complainant has had knowledge of such proceedings, and -

(a) shall, if it is satisfied that it is likely that the complainant has had knowledge of such proceedings, direct that the matter be dealt with in the absence of the complainant; or

(b) shall, if it is not so satisfied, postpone such proceedings in order to obtain the presence of the complainant: Provided that, if it is in the interests of justice (with due regard to the interests of the complainant) that the matter be dealt with forthwith, the matter may be dealt with in the absence of the complainant.

(8) If a complainant is not present, as contemplated in subsection (7), the prosecutor in such proceedings shall inform the complainant -

(a) where bail has been granted to the accused, of the granting of bail and the conditions of bail imposed;

(b) where such proceedings have been postponed, of the date and time to which such proceedings have been postponed and of the complainant's rights under subsection (1).

(9) The provisions of subsections (4) and (5) shall, with the necessary changes, apply in respect of a notification given in terms of subsection (8)(b)."

Amendment of section 62 of Act 51 of 1977

13. Section 62 of the principal Act is hereby amended by the addition of the following subsection, the existing section becoming subsection (1):

"(2) If an accused who is in custody on a charge of rape is released on bail, the court shall, notwithstanding the provisions of subsection (1), add such further conditions of bail as will, in the opinion of the court, ensure that the accused does not make contact with the complainant concerned."

Amendment of section 153 of Act 51 of 1977

14. Section 153 of the principal Act is hereby amended -

(a) by the deletion of paragraphs (a) and (b) of subsection (3);

(b) by the insertion after subsection (3) of the following subsections:

"(3A) Notwithstanding the provisions of subsections (1), (2), (5) and (6) but subject to the provisions of subsection (3B), in criminal proceedings

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relating to a charge that the accused committed or attempted to commit-

- (a) any sexual or indecent act towards or in connection with any complainant; or
- (b) any act for the purpose of procuring or furthering the commission of a sexual or indecent act towards or in connection with any complainant,

the court before which such proceedings are pending shall, to the extent authorized thereto by the provisos to Article 12(1)(a) and (c) of the Namibian Constitution, direct that any person whose presence is not necessary at such proceedings, shall not be present at such proceedings, unless the complainant in such proceedings, or, if he or she is a minor, his or her parent or guardian or a person *in loco parentis*, otherwise requests.

(3B) Any person whose presence is not necessary at criminal proceedings referred to in paragraphs (a) and (b) of subsection (3A), shall not be present at such proceedings while the complainant in such proceedings is giving evidence, unless such complainant, or, if he or she is a minor, his or her parent or guardian or a person *in loco parentis*, otherwise requests.”;

and

- (c) by the addition of the following subsection:

“(7) To the extent that the provisions of this section provide for a limitation of the fundamental right to a public hearing and to the giving of judgment in criminal proceedings in public contemplated in paragraphs (a) and (c), respectively, of Sub-Article (1) of Article 12 of the Namibian Constitution, in that they authorize the exclusion of the public from criminal proceedings or any part thereof, such limitation is enacted on authority of the said paragraphs (a) and (c).”.

Amendment of section 154 of Act 51 of 1977

15. Section 154 of the principal Act is hereby amended-

- (a) by the substitution for subsection (2) of the following subsection:

“(2) (a) Where a court under section 153(3) directs that any person or class of persons shall not be present at criminal proceedings, no person shall publish in any manner whatever any information which might reveal the identity of any complainant in the proceedings: Provided that the presiding judge or judicial officer may authorize the publication of such information if he or she is of the opinion that such publication would be just and equitable: Provided further that such information may be published with regard to any complainant in the proceedings if that complainant is eighteen years of age or older and has authorized the publication of such information.

- (b) Where a court in terms of section 153(3A) directs that any person shall not be present at criminal proceedings or where any person is in terms of section 153(3B) not permitted to be present at criminal proceedings, no person shall publish in any manner whatever any information which might reveal the identity of any complainant in

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the proceedings: Provided that the presiding judge or judicial officer may authorize the publication of such information if he or she is of the opinion that such publication would be just and equitable: Provided further that such information may be published with regard to any complainant in the proceedings if that complainant is eighteen years of age or older and has authorized the publication of such information.

- (c) No person shall at any stage from the time of the commission of the relevant offence to the appearance of an accused in a court upon any charge referred to in section 153(3) or 153(3A) or at any stage after such appearance but before the accused has pleaded to the charge, publish in any manner whatever any information which might reveal the identity of the complainant towards or in connection with whom such offence is alleged to have been committed.”;

- (b) by the substitution for subsection (5) of the following subsection:

“(5) Any person who publishes any information in contravention of this section or contrary to any direction or authority under this section or who in any manner whatever reveals the identity of a witness in contravention of a direction under section 153(2), shall be guilty of an offence and liable on conviction to a fine not exceeding [five hundred rand] N\$10 000 or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.”; and

- (c) by the addition of the following subsection:

“(6) To the extent that the provisions of this section provide for a limitation of the fundamental rights contemplated in paragraph (a) of Sub-Article (1) of Article 21 of the Namibian Constitution, in that they authorize interference with a person’s freedom to publish information relating to criminal proceedings, such limitation is enacted on authority of Sub-Article (2) of the said Article.”.

Insertion of section 211A in Act 51 of 1977

16. The following section is hereby inserted in the principal Act after section 211:

“Evidence during criminal proceedings of similar offences by accused

211A. (1) Subject to the provisions of subsection (2), in criminal proceedings at which an accused is charged with rape or an offence of an indecent nature, evidence of the commission of other similar offences by the accused shall, on application made to it, be admitted by the court at such proceedings and may be considered on any matter to which it is relevant: Provided that such evidence shall only be so admitted if it has significant probative value that is not substantially outweighed by its potential for unfair prejudice to the accused.

(2) Evidence of previous similar offences by an accused shall not be admissible solely to prove the character of the accused.

(3) The court's reasons for its decision to admit or refuse to admit evidence of previous similar offences shall be recorded, and shall form part of the record of the proceedings.”.

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COMBATING OF RAPE ACT, 2000**Amendment of section 227 of Act 51 of 1977**

17. Section 227 of the principal Act is hereby amended by the deletion of the words "or as to the character of any woman upon or with regard to whom any offence of an indecent nature has been committed,".

Insertion of section 227A in Act 51 of 1977

18. The following section is hereby inserted in the principal Act after section 227:

"Evidence of sexual conduct or experience of complainant of rape or offence of an indecent nature

227A. (1) No evidence as to any previous sexual conduct or experience of a complainant in criminal proceedings at which an accused is charged with rape or an offence of an indecent nature, shall be adduced, and no question regarding such sexual conduct or experience shall be put to the complainant or any other witness in such proceedings, unless the court has, on application made to it, granted leave to adduce such evidence or to put such question, which leave shall only be granted if the court is satisfied that such evidence or questioning -

- (a) tends to rebut evidence that was previously adduced by the prosecution; or
- (b) tends to explain the presence of semen or the source of pregnancy or disease or any injury to the complainant, where it is relevant to a fact in issue; or
- (c) is so fundamental to the accused's defence that to exclude it would violate the constitutional rights of the accused:

Provided that such evidence or questioning has significant probative value that is not substantially outweighed by its potential prejudice to the complainant's personal dignity and right of privacy.

(2) No evidence as to the sexual reputation of a complainant in criminal proceedings at which an accused is charged with rape or an offence of an indecent nature, shall be admissible in such proceedings.

(3) Before an application for leave contemplated in subsection (1) is heard, the court may direct that the complainant in respect of whom such evidence is to be adduced or to whom any such question is to be put, shall not be present at such application proceedings.

(4) The court's reasons for its decision to grant or refuse leave under subsection (1) to adduce such evidence or to put such question shall be recorded, and shall form part of the record of the proceedings."

Short title and commencement

19. This Act shall be called the Combating of Rape Act, 2000, and shall come into operation on a date to be fixed by the Minister of Justice by notice in the *Gazette*.