



## MEDICINE AND THE LAW

### Assisting victims of sexual offences: Ensuring a professional service by the SAPS – how it affects medical practitioners

David McQuoid-Mason

The Criminal Law (Sexual Offences and Related Matters) Amendment Act<sup>1</sup> (SOA Act) requires the National Commissioner of Police to publish a National Instruction (the Instruction) to ensure that the South African Police Service (SAPS) provide a professional service to assist victims of sexual offences.<sup>2</sup> This has been issued<sup>3</sup> and defines medical practitioners and nurses as persons registered respectively in terms of the Health Professions Act<sup>4</sup> and the Nursing Act<sup>5</sup> who are authorised to take blood samples.<sup>6</sup> However, the term 'health care professional' is narrowly defined by the Instruction and means the district surgeon or a person appointed by the Department of Health (DoH) to conduct a medical examination on a victim of a sexual offence.<sup>6</sup>

The Instruction primarily refers to when the victim has reported the alleged sexual offence to the police, and not to when he or she goes to a designated health establishment without contacting the police. Where the victim reports the crime to a designated health establishment but not to the police, the provisions of the SOA Act<sup>7</sup> apply and the victim must be treated accordingly.<sup>8</sup>

The Instruction deals with: (i) responsibilities of station commissioners;<sup>9</sup> (ii) reporting of sexual offences to the police;<sup>10</sup> (iii) provision of assistance to the victim by the police;<sup>11</sup> (iv) how the police should deal with the crime scene (including the victim's body if he or she is dead);<sup>12</sup> (v) the role of the investigating officer;<sup>13</sup> (vi) steps to be taken regarding medical examination of the victim;<sup>14</sup> (vii) information that must be provided to victims by the police;<sup>15</sup> (viii) duties of investigating officers regarding applications for compulsory HIV testing of offenders;<sup>16</sup> (ix) duties of investigating officers regarding the carrying out of court orders for compulsory HIV testing;<sup>17</sup> (x) steps to be taken regarding the medical examination of the alleged offender;<sup>18</sup> (xi) duties of the police regarding keeping of the results of HIV testing;<sup>19</sup> (xii) preventing of contamination of exhibits;<sup>20</sup> (xiii) taking of statements from the victim by the police;<sup>21</sup> (xix) procedures for victim after-care;<sup>22</sup>

(xx) requirements regarding identity parades;<sup>23</sup> (xxi) how the police must ensure that the victim is prepared for the court proceedings;<sup>24</sup> (xxii) how the police must assist the victim during the court proceedings;<sup>25</sup> and (xxiii) what must be done if the investigation is discontinued.<sup>26</sup> The Instruction contains an Annexure with the designated public health establishments that provide post-exposure prophylaxis (PEP).<sup>27</sup>

#### Counselling and support services

The Instruction provides that station commissioners must compile and keep a list of local organisations that provide counselling and other support services (including medical services) to victims of sexual offences at the Community Service Centre in their police station, and ensure that the list is also available in police vehicles used to respond to sexual offence complaints.<sup>9</sup> They must ensure that police officers under their command inform victims of the services provided by such support organisations and of the steps they should take to access such services.<sup>9</sup>

In cases where the victim of a sexual assault consults a private practitioner and has not yet decided to report the matter to the police, the practitioner may therefore contact the nearest police station for the addresses of local organisations that provide counselling and other support service for such victims.

In terms of the SOA Act<sup>1</sup> free PEP and medical advice are also available to victims who decide not to report the matter to the police – provided they have reported the alleged sexual offence as prescribed to a designated public health establishment.<sup>8</sup> A list of such establishments annexed to the Instruction<sup>27</sup> should be available at all police stations. Private medical practitioners who are approached by victims of sexual offences, and who do not have the Instruction and its Annexures, may contact the nearest police station to obtain a list of the local designated public health establishments that provide free PEP or advice, should their patients prefer to be referred to such an establishment, without contacting the police.<sup>8</sup>

#### Police to inform victims of available services

Where the victim of a sexual offence has been exposed to the blood, semen or vaginal fluid of an alleged offender the police

*David McQuoid-Mason is Professor of Law at the Centre for Socio-Legal Studies, University of KwaZulu-Natal, Durban, and publishes and teaches in medical law.*

Corresponding author: D J McQuoid-Mason (mcquoidm@ukzn.ac.za)



must provide him or her with a copy of a SAPS 580(a) form – ‘Notice of services available to victims’. The victim must be informed by the police officer: (i) of the importance of obtaining PEP for HIV infection within 72 hours after the alleged sexual offence was committed; (ii) that PEP will be administered and medical advice and assistance regarding its use provided at state expense at designated public health establishments; (iii) of the need to obtain medical advice and assistance regarding the possibility of other sexually transmitted infections; and (iv) that the victim or an interested person may apply for an order at the magistrate’s court compelling the alleged offender to undergo an HIV test at state expense.<sup>15</sup> If the victim cannot read or understand the Notice, the police officer, or other person willing to assist, must explain the contents of the Notice to the victim in a language the victim understands. The victim must also be given a list of public health establishments in the province that can provide PEP.<sup>15</sup>

The victim must also be asked by the police whether he or she would like to apply for a court order for the compulsory HIV testing of the offender at state expense once the person has been arrested or located within 90 days from the date of the alleged offence.<sup>15</sup> If so, the victim must be provided with a SAPS 580(b) form – ‘Application by victim or interested person for HIV testing of alleged offender’ and assisted to complete it under oath by the police officer.<sup>15</sup> If the victim does not immediately apply for such compulsory testing, he or she must still be given a copy of a SAPS 580(b) form and told that it must be completed within 90 days from the commission of the alleged offence if the victim or an interested person wishes to apply.<sup>15</sup>

## Medical examinations of victims when reported to the police

Victims must be taken by the police for a medical examination by a district surgeon or a person appointed by the DoH to conduct a medical examination on the victim.<sup>14</sup> This must be done as soon as possible, even if more than 72 hours after the incident and even if the victim has already washed and may have destroyed the evidence, because some evidence may still remain.<sup>14</sup> However, health care professionals will not conduct a medical examination before a case docket has been registered and an SAPS 308 form and J 88 form have been completed.<sup>14</sup> If there are allegations of drugs or alcohol use, whether voluntary or not, by either the victim or the alleged offender, the health care professional must be requested by the police to obtain a urine and blood sample from the victim, and to do so within 24 hours after the commission of the offence if possible.<sup>14</sup>

The investigating officer must prepare the victim for the medical examination by informing the person of the need for HIV testing and PEP; of the purpose of obtaining samples; of the reasons why SAPS 308 and J 88 forms must be completed and the following process; that he or she may request the

return of articles seized as evidence after the conclusion of the criminal case – but with the warning that the articles may be damaged during the forensic process; that he or she will be allowed to wash or have a bath once the medical examination is complete; and that the health care professional will answer questions relating to the medical treatment or services available if further treatment is needed and may refer the victim to a public health establishment.<sup>14</sup>

The investigating officer is required to: (i) complete an SAPS 308 form stating all the relevant details of the sexual offence, or attach a short description of the incident to the form; (ii) supply a J 88 form and the relevant evidence collection kit to the health care professional; (iii) record precisely which medical samples are required and ensure that they are taken; and (iv) ensure that the samples are forwarded to the Forensic Science Laboratory within 7 days. If it appears from the J 88 that the victim had sexual contact less than 72 hours prior to the commission of the alleged sexual offence, samples must be obtained from the sexual partner/s concerned and clearly marked as such. In cases involving fetuses, the fetus must be taken to the Forensic Science Laboratory as soon as possible.<sup>14</sup>

Annexure C to the Instruction lists the procedures to be followed when samples are taken involving: (i) swabs of the posterior fornix; (ii) glass smears of swabs; (iii) anal, vaginal or oral swabs or smears; (iv) control hair samples from the victim’s head and pubic area; and (v) nail scrapings. Control blood samples of the victim and other persons may be required if the victim has had intercourse with such other persons within 72 hours of the alleged sexual offence. However, if DNA analysis is required details and guidance may be sought from the Forensic Science Laboratory.

If the victim requires immediate medical attention and the investigating officer is not present, all possible steps must be taken to ensure that a thorough medical examination is conducted and the correct samples are obtained without delay.<sup>14</sup> Health care professionals must therefore ensure that they have the necessary Crime Kits available. It is submitted that if the SAPS 308 and J 88 forms are also not available the health care professional should proceed as if the case had not been reported to the police (see below).

A male police officer may not be present during a medical examination of a female victim and *vice versa*, and a police officer of the same gender may only be present with the consent of the victim.<sup>14</sup>

## Consent to medical examinations by children or mentally incompetent persons

If the victim is a child, i.e. a person under 18 years of age, the investigating officer must explain the necessity of the examination to the parents or guardian, obtain their consent for



the examination, complete an SAPS 308 form and inform them that they may accompany the child during the examination.<sup>14</sup>

It is submitted that the above only applies where the child victim does not have the legal capacity to consent to the medical examination for the purposes of treatment (i.e. a child below 14 years of age under the Child Care Act,<sup>28</sup> which will change to 12 years with provisions of the new Children's Act<sup>29</sup>). At present child victims over the age of 12 years, or below 12 years of age who are 'sufficiently mature', may consent to HIV tests – provided they are capable of giving informed consent.<sup>30</sup> Where children have the legal capacity to consent to a medical examination or HIV test their parents or guardians may only be present with their consent.

Where child victims do not have legal capacity, and their parent or guardian: (i) cannot be traced within a reasonable time; (ii) cannot grant consent in time; (iii) is suspected of having committed the alleged offence; (iv) unreasonably refuses consent; (v) has a mental disorder and cannot consent; or (vi) is dead, an application must be made to a magistrate in terms of the Criminal Procedure Act<sup>31</sup> for consent to conduct the medical examination. In such cases where a magistrate is not available, a commissioned police officer or the local station commissioner, may consent provided they are presented with: (i) an affidavit from the investigating officer or another police officer from the station stating that a magistrate's consent cannot be obtained within a reasonable time; and (ii) an affidavit from a health care professional stating that the purpose of the medical examination will be defeated if it is not conducted forthwith.<sup>14</sup>

The Instruction<sup>14</sup> provides that for victims not capable of consenting to medical treatment because of mental illness, consent for a medical examination must be obtained as set out in section 32 of the Mental Health Care Act.<sup>32</sup>

## Medical examinations of victims when not reported to the police

The restrictions regarding the use of the SAPS 308 and J 88 forms do not apply where the victim decides not to report the alleged sexual offence to the police, and is examined by a private or public sector doctor. In such cases, the medical practitioner must record the examination and collect and preserve any evidence as if the victim had been examined at the request of the police, and in the capacity of a health care professional as defined in the Instruction. Such practitioners should try to have a stock of Crime Kits provided by the police. This should be done in case the victim changes his or her mind and decides to lay a criminal charge some time after the alleged offence was committed. Annexure C of the Instruction contains valuable guidance on how to examine and collect forensic evidence from the victim.

It is recommended that all public and private health establishments and private sector medical practitioners who are

likely to be consulted by the victims of sexual offences (whether or not they are likely to be reported to the police) should ensure that they have copies of the Instruction and its Annexures.

The Annexures include: A – a list of the public health establishments in each province providing PEP treatment; B – a list of sexual offences under the Sexual Offences Amendment Act; C – possible samples to be taken from the victim; D – possible samples to be taken from the suspect; E – a sexual offence statement checklist; and F – guidelines to taking a statement from a child victim. Unnumbered Annexures have copies of the SAPS 308(a) and 308(b) forms.

## Medical examinations of alleged sexual offenders

The purpose of the medical examination of the suspected sexual offender is to establish whether there is any evidence relating to the alleged sexual offence on or in the body of the suspect.<sup>19</sup> The investigating officer must take the suspect to a health care professional as defined so that bodily features can be ascertained and bodily samples taken in terms of the Criminal Procedure Act.<sup>31</sup> The officer must ensure that: (i) a form J 88 is available when the suspect is examined and is properly completed by the health care professional; (ii) all the necessary samples are taken; (iii) the samples are clearly marked; (iv) the samples are forwarded to the Forensic Science Laboratory without delay; and (v) visible signs of injury are recorded.<sup>19</sup> Annexure D to the Instruction sets out the procedures when samples are taken that involve: (i) pubic hairs; (ii) control hair samples from the suspect's head; (iii) blood; and (iv) blood for determining alcohol content.

Health care professionals must avoid contaminating the samples by ensuring that the medical examination of the victim and the suspect are done separately and not on the same surface.<sup>20</sup>

## Withdrawal of charges against the alleged sexual offender

If the prosecutor withdraws a charge at the request of the victim of a sexual offence, after a magistrate has issued an order for the compulsory HIV testing of the alleged offender, the order will lapse and the test result may not be disclosed to the victim. The investigating officer must inform the head of the public health establishment of the withdrawal of the charge, and any samples taken or results obtained in respect of the alleged offender must be destroyed in accordance with the instructions of the DoH. The investigating officer in possession of the sealed records of the HIV test result must also destroy such records.<sup>17</sup>

It is submitted that similar principles apply if the court finds that the alleged offender is not guilty of the offence.



## Conclusion

The Instruction supplements the provisions of the SOA Act and provides guidance to police officers, district surgeons and other persons appointed by the DoH to conduct medical examinations on victims of sexual offences. The Instruction mainly applies to cases where the victims have reported the matter to the police. When the victim approaches a private practitioner or designated public health establishment and chooses not to report the incident to the police, the ordinary provisions of the SOA Act apply. Although the Instruction deals primarily with the victim who reports the sexual offence to the police, it also provides valuable information that can be used by medical practitioners who treat victims of sexual offences who do not wish to report the incident to the police. It is therefore recommended that public and private health establishments and private sector medical practitioners who may be consulted by the victims of sexual offences should have copies of the Instruction and its Annexures available for consultation.

1. Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007.
2. Section 66(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007.
3. National Instruction No. 3 of 2008 Government Notice 865 of *Government Gazette* No. 31330 or 15 August 2008.
4. Health Professions Act 56 of 1974.
5. Nursing Act 33 of 2005.
6. Section 1 of National Instruction No. 3 of 2008.
7. Section 28(1) of Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007.
8. See McQuoid-Mason D. Free Provision of PEP and medical advice for sexual offence victims: What should doctors do? *S Afr Med J* 2008; 98: 847-848.
9. Section 3 of National Instruction No. 3 of 2008.
10. Sections 4 and 6 of National Instruction No. 3 of 2008.
11. Section 5 of National Instruction No. 3 of 2008.
12. Sections 7 and 8 of National Instruction No. 3 of 2008.
13. Section 9 of National Instruction No. 3 of 2008.
14. Sections 10 and 16 of National Instruction No. 3 of 2008.
15. Section 11 of National Instruction No. 3 of 2008.
16. Sections 12 and 13 of National Instruction 3 of 2008.
17. Section 14 of National Instruction No. 3 of 2008.
18. Section 15 of National Instruction No. 3 of 2008.
19. Section 16 of National Instruction No. 3 of 2008.
20. Section 17 of National Instruction No.3 of 2008.
21. Section 18 of National Instruction No. 3 of 2008.
22. Section 19 of National Instruction No. 3 of 2008.
23. Section 20 of National Instruction No. 3 of 2008.
24. Section 21 of National Instruction No. 3 of 2008.
25. Section 22 of National Instruction No. 3 of 2008.
26. Section 23 of National Instruction No. 3 of 2008.
27. Annexure A of National Instruction No. 3 of 2008.
28. Section 39 of the Child Care Act 74 of 1983.
29. Section 129 of the Children's Act 38 of 2005.
30. Section 130 of the Children's Act 38 of 2005.
31. Criminal Procedure Act 51 of 1977.
32. Mental Health Care Act 17 of 2002.