

## NATIONAL INSTRUCTION 3/2008

### SEXUAL OFFENCES

#### 1. Background

The Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007) creates a framework which will ensure the provision of adequate and effective protection to *victims of sexual offences*. The purpose of this National Instruction is to ensure that members render a professional service to *victims* in respect of the investigation of offences of this nature and to assist *victims* in this regard.

#### 2. Definitions

In this instruction, unless the context otherwise indicates, –

- (a) **“child”** means a person below the age of 18 years;
- (b) **“crime scene”** means the place, including, where applicable, the vehicle or vessel at or in which an alleged *sexual offence* took place;
- (c) **“health care professional”** means the district surgeon or a person appointed by the Department of Health to conduct a medical examination of a *victim* of a *sexual offence*;
- (d) **“interested person”** means any person who has a material interest in the well-being of a *victim*, including a spouse, same sex or heterosexual permanent life partner, parent, guardian, family member, care giver, curator, counsellor, *medical practitioner*, health service provider, social worker or teacher of such *victim*;
- (e) **“investigating officer”** means a member of the Service designated to investigate the complaint of a *sexual offence*. If no member has yet been designated as such, the member or detective on standby. If the *victim* of the offence is a *child*, only a member trained by the FCS unit may be designated as *investigating officer*;
- (f) **“medical practitioner”** means a person registered as a medical practitioner in terms of the Health Professions Act, 1974 (Act No. 56 of 1974), and who, for purposes of section 33 of *the Act*, is authorised to take blood samples as contemplated in Chapter 5 of the *Act*;
- (g) **“nurse”** means a person registered as such in terms of the Nursing Act, 2005 (Act No. 33 of 2005) and who, for purposes of section 33 of *the Act*, is authorised to take blood samples as contemplated in Chapter 5 of the *Act*;
- (h) **“PEP”** means Post Exposure Prophylaxis, which is medical treatment to minimize the risk of HIV infection;

- (i) **“public health establishment”**, means a place designated by the Minister of Health (set out in Annexure A) to provide *PEP* to *victims* and to carry out compulsory HIV testing;
- (j) **“sexual offence”** means any offence contained in Annexure B;
- (k) **“the Act”** means the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007); and
- (l) **“victim”** means a person, irrespective of gender or age, alleging that a *sexual offence* has been perpetrated against him or her.

### 3. Responsibility of Station Commissioner

- (1) Every station commissioner must liaise with local representatives of the Departments of Health (including representatives of *Public Health Establishments*, referred to in Annexure A, that are within the station area), the Department of Social Development, the local Community Police Forum and any other relevant local institution, to identify local organisations which are willing and able to provide counselling and other support services (including medical services) to *victims*.
- (2) After having identified the organisations referred to in subparagraph (1), the station commissioner must liaise with the said organisations to determine
  - (a) the specific services that are rendered by each;
  - (b) whether the services are rendered after hours, during weekends and on public holidays, and, if so, the after hour contact numbers that may be used to access the services;
  - (c) whether the services are rendered free of charge or at a fee; and
  - (d) the contact particulars of each.
- (3) The station commissioner must compile a list of the relevant organisations and include in it, in respect of each organisation, at least the information referred to in subparagraph (2) as well as information relating to hospitals, ambulance services and *health care professionals* that may be contacted to provide medical treatment to *victims*.
- (4) The original list referred to in subparagraph (3) must be kept by the station commissioner who must update it at least once every six months.
- (5) The station commissioner must ensure that a copy of –
  - (a) *the Act*;
  - (b) the Regulations promulgated in terms thereof;
  - (c) this National Instruction;
  - (d) the station orders issued by him or her in terms of subparagraph (6); and
  - (e) the list referred to in subparagraph (3);

are at all times available in the Community Service Centre and that a copy of the list referred to in subparagraph (3) is at all times available in each police vehicle at his or her station which is utilized to attend to complaints.

- (6) The station commissioner must, taking into account the unique circumstances prevailing in his or her specific station area, available resources, etc., issue station orders –
  - (a) requiring a member under his or her command to inform a *victim* of the services rendered by organisations mentioned in the list and how to inform the *victim* thereof (e.g. by providing the *victim* with a copy of the list or allowing the *victim* to peruse the list or reading the information from the list to the *victim*);
  - (b) setting out the steps that must be taken by such member to assist the *victim*, when requested thereto by the *victim*, to gain access to any service rendered by an organisation mentioned in the list or to obtain medical treatment should this be required; and
  - (c) in general, instructing members under his or her command on any other matter relating to the treatment of *victims* which he or she deems necessary to determine in respect of his or her specific station area.
- (7) Where a police station area forms part of a larger area consisting of more than one police station area and a radio control unit has been established to patrol and attend to complaints in such larger area, every station commissioner of a station in such larger area must, for information purposes, provide the commander of such radio control unit with a copy of –
  - (a) the list referred to in subparagraph (3) and, when he or she has updated the list, a copy of the updated version thereof; and
  - (b) a copy of the station orders issued in accordance with subparagraph (6) and, if he or she amends the orders, a copy of the updated version thereof.
- (8) The station commissioner must see to it that all functional members at his or her station receive in-service training (also at station meetings) on *the Act*, the Regulations, this Instruction and the station orders issued by him or her.

#### 4. Receiving a report of a sexual offence at a police station

- (1) The alleged commission of a *sexual offence* is usually reported by –
  - (a) the *victim* of the offence;
  - (b) a family member, friend or colleague of the *victim*; or
  - (c) a person who witnessed or received information about the commission of the offence.
- (2) The person reporting the alleged commission of the offence, normally does so voluntarily (except in the circumstances referred to in

subparagraph (3)) and is accordingly normally willing to provide all the information at his or her disposal to the police.

- (3) (a) In terms of section 54(1) of *the Act*, any person who has knowledge that a *sexual offence* has been committed against a *child*, must report such knowledge to a police official. A failure to do so, constitutes an offence, and a person convicted of such offence, may be sentenced to five years' imprisonment.
- (b) In terms of section 54(2) of *the Act*, any person who has knowledge or a reasonable belief or suspicion that a *sexual offence* has been committed against a mentally disabled person, must report such knowledge to a police official. A failure to do so, constitutes an offence, and a person convicted of such offence, may be sentenced to five years' imprisonment.
- (4) A person reporting his or her —
- (i) knowledge that a *sexual offence* has been committed against a *child* or mentally disabled person; or
- (ii) reasonable belief or suspicion that a *sexual offence* has been committed against a mentally disabled person,
- as a result of the legal duty to do so in terms of section 54 of *the Act*, may sometimes do so out of fear of being prosecuted if he or she fails to do so.
- (5) If a person (referred to in subparagraph (4)) reports such knowledge or his or her belief or suspicion to a police official, the member receiving the report may under no circumstances turn such a person away. Such a member must consider the information and
- (a) if the member is satisfied that there are reasonable grounds to believe that such an offence was indeed committed, take an affidavit from the person setting out the information provided by that person, open a docket for the investigation of the offence that was allegedly committed and register the docket on the CAS system; or
- (b) if the member is not satisfied that there are reasonable grounds to believe that such an offence was indeed committed, consult with the Community Service Centre Commander who must make a comprehensive OB entry of the report and the reasons why the Commander is not satisfied that there are reasonable grounds to believe that such an offence was indeed committed and provide the number of the OB entry to the person who made the report. The entry must include sufficient particulars of the person that made the report to enable him or her to be located and be interviewed if this turns out to be necessary.
- (6) Any person who reports the alleged commission of a *sexual offence* to a member must be treated in a professional manner and must be reassured



that the report is viewed in a serious light and will be thoroughly investigated.

## 5. Victim assistance

- (1) During the commission of a *sexual offence*, the *victim* suffers severe trauma. It is difficult to conceive of any other offence during the commission of which the bodily and psychological integrity, privacy and dignity of a *victim* is simultaneously violated more severely than during the commission of a *sexual offence*. Furthermore, the commission of a *sexual offence* not only affects the *victim* alone, but also his or her family and personal life. A member must continuously be mindful of this fact during his or her interaction with the *victim* and the family or friends of the *victim*.
- (2) During the commission of a *sexual offence*, the *victim* normally experiences feelings of powerlessness, helplessness and of being exposed. When reporting the offence to a police official, the *victim* re-lives the event and, in so doing, experiences secondary trauma. The secondary trauma is exacerbated if the member conducts the interview in an insensitive manner or unnecessarily touches the *victim*. On the other hand, the secondary trauma is lessened if the *victim* is permitted to have a person of his or her choice present to support and re-assure him or her during the interview and if the interview is conducted in surroundings that are either familiar to the *victim* or are re-assuring to the *victim* (inducing in him or her a sense that he or she is safe and that what he or she says cannot be heard by others and is treated in confidence).
- (3) In view of the above, it is imperative that the member to whom a *victim* reports the commission of a *sexual offence* at a police station, —
  - (a) immediately requests the *victim*, to accompany him or her to an appropriate area which is away from the main duty desk in the community service centre and which is out of sight and hearing of persons in the community service centre;
  - (b) reassures the *victim* that he or she is now safe and will be protected. If the *victim* and the alleged offender are in a domestic relationship, the member must advise the *victim* in accordance with the National Instruction on Domestic Violence;
  - (c) determines whether the *victim* requires medical assistance and if so, make arrangements for the *victim* to obtain medical assistance as soon as possible;
  - (d) asks the *victim* whether he or she would prefer to have another person present to support him or her during the interview and, if the *victim* prefers that such person be present, allow such person to be present to support him or her during the interview;
  - (e) reassures the *victim* that he or she did the right thing to report the matter to the police and that the matter will be dealt with sensitively and that he or she will not unnecessarily be exposed to further traumatization;

- (f) listens to what the *victim* says, without interrupting him or her and put him or her at ease; and
  - (g) writes down everything that the *victim* says, as it may be evidence that may assist the police in the investigation (make investigative notes).
- (4) Any member receiving a report that a *sexual offence* has allegedly been committed against any person, must always view the report in a very serious light and must pay immediate attention thereto, irrespective of how long ago (before the report) the offence was allegedly committed or in which station area it was allegedly committed. No *victim* may be turned away simply because the alleged offence took place a long time ago or was allegedly committed in the station area of another police station.
- (5) While taking statements from the *victim* and his or her family, the member must at all times act in a professional manner and be sensitive towards the emotions of the *victim* and his or her family. The member must be patient with the *victim* to allow him or her to explain what happened during the alleged commission of the offence without unnecessarily interrupting the *victim*. A member may never be judgmental while interacting with the *victim* irrespective of the circumstances surrounding the offence.
- (6) Once sufficient particulars have been obtained from the *victim*, a docket must be opened, registered on the CAS and an affidavit must be made in which the following must be clearly specified:
- (a) the time and date on which the offence was allegedly committed;
  - (b) the place where the offence was allegedly committed;
  - (c) the nature of the alleged offence;
  - (d) the manner in which it was allegedly committed;
  - (e) the first person to whom the *victim* has reported the alleged commission of the *sexual offence* before he or she reported it to the police;
  - (f) any details regarding the alleged offender(s) that may assist in identifying and finding them; and
  - (g) any details regarding possible witnesses that may assist in identifying and locating them.
- (7) If the *victim* is unable to make a coherent statement, a skeleton docket must be opened, a statement must be obtained from any person that may be accompanying the *victim* and the *victim* must be allowed time before a statement is obtained from him or her.
- (8) The member must, as soon as possible after the incident has been reported, inform the *victim* of —
- (a) the case number; and
  - (b) the details of the *investigating officer*.

- (9) The member must inform the *victim* of the processes that will follow next and why the processes need to be followed, to enable the *victim* to understand the procedure and to instill confidence in the *victim* that the police deal with the matter in a professional manner.
- (10) The *victim* must be informed of the importance of undergoing a medical examination as soon as may be reasonably possible. The *victim* must be informed that the examination will be conducted at state expense and that he or she is entitled to ask the *health care professional* that conducts the examination for medical advice on how any aspect of his or her health may be affected as a result of the alleged *sexual offence*.
- (11) The member must also inform the *victim* of available services as contemplated in paragraph 11(2)(b) (below) as well as information on the witness protection programme. The *victim* must also, on a regular basis be informed on the progress of the investigation.

## 6. Telephonic report of a sexual offence

If a *sexual offence* is reported by phone, the member receiving the complaint must determine whether the caller is the *victim* and —

- (a) if so, attempt to keep the *victim* on the line and reassure the *victim* that a police vehicle has been despatched and provide the *victim* with appropriate advice while he or she waits for the vehicle to arrive; and
  - (b) if not, instruct the person to stay with the *victim* and not to disturb the *crime scene*; and
- in both cases, immediately dispatch a police vehicle to the scene to assist the *victim*.

## 7. Responsibility of the first member on the crime scene

- (1) The first member arriving at a scene where a *sexual offence* has allegedly been committed, must deal with the *victim* professionally and must safeguard the *crime scene* until an *investigating officer* is available to take charge of the investigation.
- (2) The member on the scene must enquire from the *victim* whether the suspect could possibly still be in the vicinity and, if so, obtain a description of the suspect. The description of the suspect must immediately be relayed to all police vehicles in the area.
- (3) A member who comes into contact with a *victim* of a *sexual offence* must, as far as possible, avoid touching the *victim* unnecessarily. The member interviewing the *victim* must —
  - (a) reassure the *victim* that he or she is now safe and will be protected;
  - (b) obtain a brief explanation of the events that took place (take investigative notes, not a statement);
  - (c) listen to what the *victim* says, without interrupting him or her and put him or her at ease;



- (d) write down everything that the *victim* says, as it may be evidence that may assist the police in the investigation; and
  - (e) later make a comprehensive statement concerning the interview and the investigative notes taken and file the notes in the docket under part A of the docket.
- (4) The member must avoid unnecessary or uncomfortable questions about the intimate details of the alleged *sexual offence* at this stage. Since a *victim* is often worried that everyone will know the intimate facts of the case, it is important that the member explain to the *victim* that the exact details of the incident will only be disclosed to the necessary role players and that it will not be necessary for intimate details to be told repeatedly.
- (5) It is of utmost importance that the member on the scene safeguard the *crime scene*. Members must take note that in most cases of *sexual offences*, there are three basic *crime scenes*, namely the bodies of the *victim* and the suspect and the place including, where applicable, the vehicle or vessel at or in which the incident took place and where the *victim* and offender moved to. Important evidence in the case will often be that contained on the person of the *victim* and at the *crime scene*.

#### 8. Steps to be taken to safeguard the crime scene

- (1) A member or members arriving at the scene first, must emphasize the importance of the preservation of evidence of the *sexual offence* to the *victim* and all other persons who may be present and who support the *victim* (eg the parents of the *victim*). It is very important that a *victim* realises that his or her body is regarded as a *crime scene* and that he or she should, as far as possible preserve any possible evidence until the medical examination has been conducted.
- (2) In order to preserve evidence on the body of the *victim*, the member must inform the *victim* to—
- (a) retain any toilet paper and other sanitary material if the *victim* needs to use the bathroom (toilet paper and other sanitary material must be air dried and be placed in an envelope or brown paper packet and despatched to the Forensic Science Laboratory);
  - (b) refrain from drinking any liquid, if the *victim* has been forced to perform an oral sexual act, as evidence may be lost in the process. (This restriction is applicable only if the *victim* has not already rinsed his or her mouth.) An oral swab must be taken as soon as possible after the incident;
  - (c) retain the clothes that he or she was wearing at the time of the commission of the *sexual offence*, since the clothing may be needed for forensic testing; and
  - (d) if possible, arrange for additional underwear and other clothing when he or she goes for the medical examination.



- (3) The member must ensure that the *crime scene* is guarded and protected from contamination until the *investigating officer* can take charge of the scene. Nothing on the *crime scene* should be touched or moved.
- (4) The member must take steps to protect the privacy and dignity of the *victim* and must ensure that the *victim* is removed from the *crime scene* to a nearby private place. If there is no suitable private place nearby, the *victim* should be screened from public view. It is important that a member must remain with the *victim* until the *investigating officer* arrives.
- (5) If the suspect is still on the scene, the member must keep him or her away from the *victim* and take appropriate steps to remove the suspect from the scene to prevent allegations of contamination of evidence or intimidation of the *victim* or other witnesses.
- (6) The member must identify any person at the scene that may assist in the investigation and obtain sufficient particulars of that person to enable the *investigating officer* to contact him or her afterwards.

## 9. The role of the investigating officer

- (1) The *investigating officer* is responsible to conduct a thorough and professional investigation in every case.
- (2) The *investigating officer* must, as soon as possible after he or she has been informed that he or she has been designated to investigate a *sexual offence*, —
  - (a) take charge of the investigation. If the *investigating officer* cannot attend to the investigation immediately, he or she must give instructions by cellular or telephone or radio to a member attending to the *victim* and the *crime scene*, to inform the *victim* of procedures that the *victim* will have to undergo and explain to the *victim* the role of the *investigating officer* and how he or she will assist the *victim*;
  - (b) if the *victim* is a *child*, ensure the safety of the *child*. This includes, determining whether the *child* is in need of care and protection and, if so, taking appropriate steps to ensure the safety and protection of the *child*.
  - (c) obtain information from the *victim*. Initially, the *investigating officer* should only take a statement from the *victim* that sets out what happened (this is only a preliminary statement). The *investigating officer* must take this statement in private although a person of the *victim*'s choice may be present;
  - (d) obtain the in-depth statement of the *victim* as soon as the *victim* has recuperated sufficiently from the ordeal (depending on circumstances, ideally within 24 - 36 hours). The reason for this is that a better statement can be obtained from the *victim* once the trauma he or she has experienced is less intense and a better rapport has been established with the *investigating officer*;

- (e) keep the *victim* informed of the progress of the investigation (eg if the suspect is arrested, released on bail, dates of appearance in court). The details of all contacts by the *investigating officer* with the *victim* must be recorded in the investigation diary, mentioning *inter alia* date, time and place of contact and whether this was in person, telephonically or in writing. The *victim* must also be informed of the contact details of the *investigating officer* and be invited to contact the *investigating officer*, and
- (f) submit a statement with regard to the *crime scene* irrespective of how long ago the incident occurred.

## 10. Medical examination of the victim

- (1) The purpose of the medical examination of the *victim* is to examine the body of the *victim* to establish whether there is any evidence relating to the alleged *sexual offence* on or in the *victim's* body and to ascertain the mental and emotional state of the *victim*.
- (2) The *victim* must, as soon as possible, be taken for the medical examination. Even if the *sexual offence* was only reported more than 72 hours after it had been committed, and even if the *victim* has already washed and may possibly have destroyed evidence in the process, the *victim* must nevertheless be taken for the medical examination. The possibility of still obtaining evidence can never be discounted.
- (3) When taking the *victim* for the medical examination, the following points must be taken note of:
  - (a) The medical examination must be conducted as soon as possible.
  - (b) The medical examination must be done by a trained *health care professional*.
  - (c) The *investigating officer* must take the *victim* to the *health care professional* for the medical examination.
  - (d) A male member may not be present during the medical examination of a female *victim*, and *vice versa*. Even a member of the same gender as the *victim* may only be present during the medical examination if the *victim* agrees thereto.
  - (e) The *health care professional* will not conduct the medical examination before a case docket has been registered and an SAPS 308 form and J 88 form has been completed.
- (4) If there are allegations of drugs or alcohol usage, whether voluntary or not, by either the *victim* or the alleged offender, the *health care professional* must be requested to obtain a urine sample as well as a blood sample from the *victim*. These samples must, if at all possible, be obtained within 24 hours after the commission of the offence.
- (5) The *investigating officer* must inform the *victim* —
  - (a) of HIV testing and *PEP*, as provided for in paragraph 11;
  - (b) of the purpose of obtaining the samples;

- (c) the reasons why the forms (SAPS 308 and J 88) must be completed and the process that will be followed;
  - (d) that he or she may request the return of all articles seized as evidence after the conclusion of the criminal case, (the articles may, however, be damaged by the forensic process);
  - (e) that he or she will be allowed to wash or bath once the medical examination is completed; and
  - (f) that the *health care professional* will be able to answer questions relating to medical treatment or services available if the *victim* needs further treatment and will be able to refer the *victim* to a *public health establishment*.
- (6) The *investigating officer* must —
- (a) complete a form SAPS 308 stating all the relevant details of the *sexual offence* or attach it to the form (ie a short description of events);
  - (b) supply a form J 88 and the relevant evidence collection kit to the *health care professional*;
  - (c) record precisely which medical samples are required and ensure that they are taken (see Annexure C);
  - (d) 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 partner(s) concerned;
  - (e) mark samples clearly; and
  - (f) ensure that the samples are forwarded to the Forensic Science Laboratory within 7 days. In cases involving fetuses, the fetus must, as soon as reasonably possible, be taken to the Forensic Science Laboratory.
- (7) 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.
- (8) (a) If the *victim* of the alleged *sexual offence* is a *child*, the *investigating officer* must explain the necessity of the examination to the parents or guardian of the *child* and obtain their consent for the examination to be performed and complete form SAPS 308.
- (b) The *investigating officer* must also inform the parents or guardians of the *child victim* that they may accompany the *child* during the examination.

IF ...	THEN ...
<p>a parent or guardian of a <b>child victim</b> —</p> <ul style="list-style-type: none"> <li>▶ cannot be traced within a reasonable time;</li> <li>▶ cannot grant consent in time;</li> <li>▶ is a suspect in respect of the offence in consequence of which the examination must be conducted;</li> <li>▶ unreasonably refuses consent;</li> <li>▶ has a mental disorder and cannot consent to the examination; or</li> <li>▶ is dead</li> </ul>	<p>an application must be made to a magistrate in terms of section 335B of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) for consent to conduct the medical examination.</p>
<p>a magistrate is not available</p>	<p>a member who is a commissioned officer, or the local station commissioner, may give consent when presented with the following two affidavits:</p> <ul style="list-style-type: none"> <li>▶ One by the <i>investigating officer</i>, or another member from the station dealing with the matter, which states that a magistrate's consent cannot be obtained within a reasonable period.</li> <li>▶ One from a <i>health care professional</i> which states that the purpose of the medical examination will be defeated if it is not conducted forthwith.</li> </ul>



- (9) If a *victim* is not capable of consenting to medical treatment on account of his or her mental illness, consent for a medical examination must be obtained in writing in terms of the procedure as set out in section 32 of the Mental Health Care Act, 2002 (Act No. 17 of 2002). This section deals, *inter alia*, with the care and treatment of mental health care users who are incapable of making informed decisions.

## 11. Inform the victim of a sexual offence of services available and hand over a Notice to the victim

- (1) From the contents of the affidavit made by the *victim*, the member must form an opinion on whether the *victim* may have been exposed to the risk of being infected with HIV as a result of the commission of the offence. The *victim* will have been exposed to the risk of being so infected if the offence is a *sexual offence* that resulted in the *victim* coming into contact with the **blood, semen or vaginal fluid** of the alleged offender.
- (2) A *victim* of a *sexual offence* who has been exposed to the risk of being infected with HIV as a result of the commission of the offence, must be —
- (a) provided with a copy of the Form SAPS 580(a) (Notice of services available to *victim*) in English or Afrikaans (if the *victim* is able to read and understand the Notice in English or Afrikaans); and
  - (b) informed by a member, in accordance with the Notice referred to in (a), —
    - (i) of the importance of obtaining *PEP* for HIV infection without any delay, but within 72 hours after the alleged *sexual offence* has been committed against him or her;
    - (ii) that *PEP* will be administered at state expense at *public health establishments* in accordance with the state's prevailing norms and standards;
    - (iii) that the *victim* will receive free medical advice and assistance on the administering of *PEP* prior to the administration thereof;
    - (iv) of the need to obtain medical advice and assistance regarding the possibility of other sexual transmitted infections; and
    - (v) that the *victim* or *interested person* may apply for an order at the magistrate court compelling the alleged offender to undergo an HIV test at state expense.
- (3) If the *victim* is unable to read and understand the Notice in English or Afrikaans, the member, or any other person who may be willing and able to assist the member to explain the contents of the Notice to the *victim* in a language that the *victim* understands, must explain the contents of the Notice to the *victim*. The *victim* must also be provided with the list of *public health establishments* in the province that are able to provide *PEP* to the *victim*. A list of such establishments is attached hereto as Annexure A.

- (4) Once a *victim* has been informed as set out in subparagraph (2)(b) above, the *victim* must be asked whether he or she prefers to apply that the alleged offender, once arrested or located, be tested for HIV at state expense. The *victim* must be informed that he or she does not have to make the decision immediately, but must be aware that, if he or she should later decide to apply that the alleged offender be tested as set out above, he or she is only entitled to apply for such a test to be undertaken **within 90 days** from the date of the alleged commission of the offence.
- (5) If the *victim* prefers to immediately apply that the alleged offender be tested for HIV, he or she must be provided with a copy of the Form SAPS 580(b) (Application by *victim* or *interested person* for HIV testing of alleged offender) and be requested to complete the application form. If the *victim* needs assistance to complete the application, the member must assist the *victim* and, if necessary, complete the application on behalf of the *victim*. Once the application has been completed, the *victim* must either attest under oath to the truth of the content of the application or solemnly declare that it is true, and the member must complete the relevant part of the application and sign that this was done.
- (6) If the *victim* prefers not to immediately apply that the alleged offender be tested for HIV, he or she must be provided with a copy of Form SAPS 580(b) (Application by *victim* or *interested person* for HIV testing of alleged offender) and be informed that, if he or she later decides to apply that the alleged offender be tested for HIV, he or she must complete the application form and hand the completed application form to the *investigating officer* **within 90 days** from the alleged commission of the offence. If the *victim* hands the completed application form to the *investigating officer* within the 90 days, the *victim* must either swear to the truth of the content of the application or solemnly declare that the information provided in the application is true, and the member must sign that this was done by completing the relevant part of the application.
- (7) Any steps taken in accordance with this paragraph must be recorded in the investigation diary of the docket.

## 12. Handling of application for HIV testing of offender

- (1) The *investigating officer* must place the application in a sealed envelope marked "Confidential/Vertroulik" and write on the envelope —
  - (a) "Application by *victim* or *interested person* for HIV testing of alleged offender" or "Application by *victim* or *interested person* to access HIV test result already obtained by *investigating officer*", as the case may be; and
  - (b) the case number and name, rank and Persal number of the *investigating officer*,and must submit it to the clerk of the court as soon as is reasonably practicable, but not later than two working days, after the application has

been received by the *investigating officer*. The *investigating officer* must file a copy of the application under part "B" of the docket.

- (2) If the magistrate who considers the application requires additional evidence, either in the form of oral evidence or by means of an affidavit, the clerk of the court will inform the *investigating officer* personally telephonically and will confirm it in writing.
- (3) If the magistrate requires further evidence by means of an affidavit, the *investigating officer* must obtain the affidavit(s) as soon as reasonably practicable or within the period determined by the magistrate and place the affidavit(s) in a sealed envelope —
  - (a) marked "Confidential/Vertroulik"; and
  - (b) reflecting the case number and name, rank and Persal number of the *investigating officer*,and hand it over to the clerk of the court.
- (4) If the magistrate requires further oral evidence, the *investigating officer* must —
  - (a) inform the *victim, interested person* or other witness in writing on an official police letterhead (SAPS 21) to appear before the magistrate on the arranged date and time as conveyed by the clerk of the court and obtain his or her signature on the copy of the written notice as proof of the fact that he or she was informed as aforesaid;
  - (b) if the alleged offender is required to testify, and he or she —
    - (i) is in the custody of the Police, bring him or her on the arranged date and time to appear before the magistrate; or
    - (ii) is not in the custody of the Police, provide the alleged offender with a written notice on an official police letterhead (SAPS 21) informing him or her of the arranged date and time to appear before the magistrate and obtain his or her signature on the copy of the written notice as proof of the fact that he or she was informed as aforesaid; and
  - (c) attend the hearing on the arranged date and time and, if the *victim, interested person*, other witness or the alleged offender is absent, provide the magistrate with the copy of the written notice handed to the *victim, interested person*, other witness or the alleged offender and on which he or she has acknowledged receipt by means of his or her signature.
- (5) Once a magistrate has decided on the application, the clerk of the court will hand the sealed decision to the *investigating officer* who must acknowledge receipt thereof in the register kept by the clerk of the court.
- (6) The *investigating officer* must, as soon as is reasonably practicable or within the period determined by the magistrate, hand a Form SAPS



580(d) (Notice to alleged offender in respect of order for HIV testing) informing him or her of the order issued by the magistrate.

- (7) Any steps taken in accordance with this paragraph must be recorded in the investigation diary of the docket.

### 13. Application for HIV testing of offender by investigating officer

- (1) An *investigating officer* may, if he or she finds it necessary for the purposes of an investigation into a *sexual offence*, in terms of section 32 of *the Act*, himself or herself apply, as soon as is reasonably practicable after a docket has been opened in respect of the alleged *sexual offence*, on the Form SAPS 580(c) (Application by *investigating officer* for HIV testing of alleged offender) to a magistrate of the magisterial district in which the *sexual offence* is alleged to have been committed, in chambers, for an order that —
- (a) the alleged offender be tested for HIV; or
  - (b) the result of the HIV test in respect of the alleged offender that was already obtained on application from the *victim* or *interested person*, be made available to the *investigating officer* or the prosecutor who needs the result for purposes of the prosecution of the case or any other court proceedings.
- (2) The procedure set out in paragraph 12 must also be followed in a case in which an application for the HIV testing of the alleged offender is made by the *investigating officer*.

### 14. Execution of order for HIV testing of offender

- (1) As soon as an order for the HIV testing of the alleged offender has been handed to an *investigating officer*, he or she must —
- (a) make the alleged offender available to ensure that two blood samples are obtained from him or her;
  - (b) request any *medical practitioner* or *nurse* to take two blood samples from the alleged offender; and
  - (c) deliver the blood samples to the head of a *public health establishment* or person designated by the head of the *public health establishment*.
- (2) The *investigating officer* may, if the alleged offender is not being detained, and —
- (a) there is reason to believe that he or she may avoid compliance with an order; or
  - (b) he or she has avoided compliance with an order,
- for the compulsory HIV testing of an alleged offender, apply on form SAPS 580(f) (Application for Warrant of Arrest) to the magistrate who issued the said order, to issue a warrant for the arrest of the alleged offender to collect blood samples from him or her for HIV tests. If the



magistrate who issued the order is not available or able to consider such application, the application may be submitted to any other magistrate.

- (3) The *investigating officer* must, when arresting the alleged offender in terms of a Warrant of Arrest referred to subparagraph (2), take reasonable steps to verify the identity of the alleged offender and must, without delay after the arrest, take the alleged offender to a *public health establishment* for the taking of the blood samples. The alleged offender must be released as soon as the samples have been taken.
- (4) Once the *investigating officer* has obtained the duplicate sealed records of the test results from the *public health establishment* and has acknowledged receipt of the duplicate sealed records, he or she must —
  - (a) if the application was made by the *victim* or *interested person*, hand a sealed record of the result together with a copy of Form SAPS 580(e) (Notice containing information on confidentiality of and how to deal with HIV test results) to each of the *victim* or *interested person* and alleged offender; or
  - (b) if the application was made by the *investigating officer*, hand a sealed record of the result together with a Form SAPS 580(e) (Notice containing information on confidentiality of and how to deal with HIV test results) to the alleged offender, and retain the other record of the test results (as provided for in paragraph 15(3)) and make the record of the test results available to a prosecutor who needs to know the results for purposes of the prosecution or any other court proceedings.
- (5) If an order had been issued in terms of which an HIV test was conducted on an alleged offender as a result of an application made by an *investigating officer*, the *investigating officer* may inform the *victim* or an *interested person* whether or not the alleged offender in the case in question is infected with HIV with the view to —
  - (a) reduce secondary trauma and empower the *victim* to make informed medical, lifestyle and other personal decisions; or
  - (b) use the test results as evidence in any ensuing civil proceedings as a result of the *sexual offence* in question.
- (6) If the prosecutor withdraws a charge on the request of the *victim* after a magistrate, on application by the *victim*, has issued an order for a HIV test 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 sample taken or results obtained in respect of the alleged offender must be destroyed in accordance with the instructions of the Department of Health. If the *investigating officer* is in possession of sealed records of the HIV test result in such a case, he or she must likewise destroy the records containing the result.

- (7) Any steps taken in accordance with this paragraph must be recorded in the investigation diary of the docket.

## 15. Record keeping of results of HIV testing

- (1) Every commander of the detectives at a station or of a detective unit must keep a register in his or her office in which the particulars relating to every application for a compulsory HIV test must be recorded. A B16 book must be utilised as a register until further notice. The information (set out in Annexure G) relating to every such application must be recorded in that register. One full page of the register must be utilized to record the particulars (including the outcome of the application and the results of any tests) for every application. The pages of the register must be numbered and a table of contents of all applications containing the CAS number and the corresponding number of the page in the register containing the particulars of the application, must be recorded on the first pages of the register.
- (2) The relevant commander is personally responsible to ensure that access to the register is only granted to —
- (a) a member investigating a case in which an application for HIV testing was made;
  - (b) the *victim*;
  - (c) a person who has a material interest in the well-being of a *victim*, including a spouse, same sex or heterosexual permanent life partner, parent, guardian, family member, care giver, curator, counsellor, *medical practitioner*, health service provider, social worker or teacher of such *victim*;
  - (d) the alleged offender;
  - (e) a prosecutor;
  - (f) a person who is required to execute the court order to conduct the HIV testing; and
  - (g) the Station Commissioner or an officer attached to provincial or national level for the purposes of inspecting the register.
- (3) The record containing the result of an HIV test conducted on an alleged offender, must be filed in a file which is kept in the office of the commander of the detectives at the relevant station or in the office of the commander of the relevant detective unit (together with the register referred to in subparagraph (1)) and may not be filed in the docket. The said commander may only grant access to the record to the persons mentioned in subparagraph (2) above. Appropriate entries must be made in the investigating diary of the docket concerning all steps taken in respect of the HIV testing of an alleged offender. However, the result of an HIV test may not be disclosed in the investigating diary.
- (4) An *investigating officer* may disclose the result of an HIV test of an alleged offender to the prosecutor that is responsible to conduct the prosecution of the alleged offender. If the prosecutor requests that the

record containing the result be provided to him or her for the purposes of the prosecution of the alleged offender, the *investigating officer* must request the prosecutor to complete an Form SAPS 580(g) - Application for access to HIV test result of alleged sexual offender and comply with the request. The *investigating officer* must also make an appropriate entry in the investigating diary of the docket and request the prosecutor to sign at the entry to acknowledge receipt of the record.

## 16. Medical examination of the suspect

- (1) The purpose of the medical examination of the suspect is to examine the body of the suspect to establish whether there is any evidence relating to the alleged *sexual offence* on or in the body of the suspect. Samples obtained from the body of a suspect are utilized to link the suspect with the offence and to ensure that the perpetrator is prosecuted for the offence.
- (2) The *investigating officer* must ensure that a suspect is taken for a medical examination, if this is necessary for the proper investigation of the case. In terms of section 37 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), a member has the power to request a *health care professional* to establish certain bodily features of the suspect and to take bodily samples of the suspect and provides for the circumstances in which the bodily features may be established and the samples may be taken.
- (3) If it is necessary for the proper investigation of the case that bodily samples be taken from the suspect, the *investigating officer* must, once the suspect has been identified and located, take the suspect to a *health care professional* to establish the bodily features of the suspect and to obtain the necessary blood samples (including a control sample) from the suspect. Upon receipt of a control sample, the sample must be handed over to the Forensic Science Laboratory as soon as possible. A letter must then be obtained from the prosecutor concerned in which the prosecutor requests that a DNA analysis be conducted on the samples. This letter must be handed over to the Forensic Science Laboratory as soon as possible and a copy of the letter must be filed under part "B" of the docket.
- (4) The *investigating officer* must ensure that —
  - (a) a form J 88 is available when the suspect is examined and that the form is completed properly completed by the *health care professional*;
  - (b) all the necessary samples are taken (see Annexure D);
  - (c) the samples are clearly marked;
  - (d) the samples are forwarded to the Forensic Science Laboratory without delay; and
  - (e) any visible injuries of the suspect are noted.



## 17. Preventing contamination of exhibits

- (1) It is imperative that reasonable steps be taken to secure and protect samples of physical evidence obtained during the investigation of *sexual offences* from contamination. An allegation of any *sexual offence* is often extremely difficult to prove. Generally, the offence is committed in the absence of other witnesses and it therefore becomes the word of the *victim* against the word of the suspect.
- (2) A member who is not trained or experienced in the gathering, handling, storing and transporting of evidence, must not gather, handle, store or transport evidence. Such a member must safeguard the *crime scene(s)* against contamination and request the assistance of a trained member or contact the Local Criminal Record Centre (LCRC) for assistance.
- (3) The contamination of exhibits (including the loss of evidence on the *victim* and the suspect) must be secured by —
  - (a) avoiding contact by the same member of the *victim* and suspect. If a member arrests the suspect shortly after the offence was committed, that member must avoid coming into contact or interviewing the *victim*, before **both** the *victim* and the suspect —
    - (i) have been medically examined;
    - (ii) have dressed in different clothes, and
    - (iii) the clothes worn during the alleged *sexual offence* have been removed for forensic analysis;
  - (b) transporting the *victim* and suspect in different vehicles;
  - (c) avoiding contact by the same member of the clothes of the *victim* and the suspect. Both sets of clothes must not be packaged by the same member unless this is done at different stages of the investigation;
  - (d) ensuring that different tables or work surfaces are used for the packaging of the exhibits, and
  - (e) ensuring that the medical examination of the *victim* and suspect are done separately and not on the same surface.

## 18. Taking an in-depth statement from the victim

- (1) The initial statement of the *victim* must be followed up by an in-depth statement. The *investigating officer* must take or ensure that the *victim's* in-depth statement is taken, once the *victim* has recuperated sufficiently (depending on circumstances, ideally between 24 to 36 hours) after the incident. The *investigating officer* must be sensitive to the cultural, language and religious background and gender of the *victim*.
- (2) A guideline for the taking of the in-depth statement of the *victim* is contained in Annexure E. In the case of a *child victim* of a *sexual offence*, the guidelines contained in Annexure F must be taken into account when the *investigating officer* takes a statement from the *child victim*. The following general guidelines must be adhered to by the *investigating officer* when taking the in-depth statement of the *victim*:



(a) **Preparation for taking the statement**

The *investigating officer* must allow sufficient time to take a statement of this nature. It is important that the *victim* is not rushed. The statement must be comprehensive and contain detail.

The *investigating officer* must take steps to set the *victim* at ease and the statement must be taken in a relaxed, private atmosphere where there are few distractions.

(b) **Presence of an interested person**

The *investigating officer* should enquire from the *victim* whether he or she wishes to have an *interested person* present in support of the *victim*. If the *interested person* identified by the *victim* to support him or her during the taking of the statement is a potential witness to the reported crime, the *investigating officer* must inform the *victim* that such a person is a potential witness and may not be present during the taking of his or her statement.

If the *victim* wishes to have an *interested person* present during the taking of the statement, the *interested person* must be informed that he or she may not —

- (i) comment on the merits of the case;
- (ii) prompt the *victim*; or
- (iii) interfere with the *investigating officer* in any other manner in the process of obtaining the statement from the *victim*.

(c) **Discussion of intimate details**

The *investigating officer* must explain to the *victim* that the taking of the statement will involve the discussion of intimate details of the sexual incident. If the presence of an *interested person* may inhibit the *victim* to disclose these details, the *investigating officer* may suggest to the *victim* that the *interested person* should not be present. However, the decision to allow the *interested person* to be present remains that of the *victim*.

(d) **Victim must be told not to hide anything**

The *investigating officer* must inform the *victim*, with great sensitivity, that if he or she has done something that might put him or her in a bad light when he or she is cross-examined, it is essential that he or she does not try to hide this fact, but state it clearly.

Example 1: If the *victim* had consumed liquor or drugs. Exactly what and how much was used must be included in the statement.

Example 2: If the *victim* had originally found the accused attractive and had allowed the accused to kiss him or her. (The fact that the *victim* acted in this way, does not mean that permission was given for the *sexual offence* to be committed.)

The fact that the *victim* states everything in his or her statement, even information that will reflect negatively on the *victim*, will enhance the credibility of the *victim*.

## 19. Victim after-care

### (1) The importance of victim after-care

The *victim* of a *sexual offence* has undergone a traumatic experience and most *victims* of a *sexual offence* will need some form of counselling to enable them to deal with this. *Victims* of *sexual offences* may also fear that they have contracted AIDS or another sexually transmitted disease during the *sexual offence*.

### (2) Safety of victims of sexual offences

Both in so far as crime prevention in general is concerned, as well as in terms of specific legislation, the Service has the duty to take appropriate steps to ensure that a vulnerable *victim* is protected.

#### (a) Sexual offence as a result of domestic violence

The member at the scene must, in the event of a *sexual offence* during an incident of domestic violence, act in accordance with the National Instruction on Domestic Violence and inform the *victim* of his or her right to —

- (i) apply for a protection order in terms of the Domestic Violence Act, 1998 (Act No 116 of 1998); and
- (ii) lodge a criminal complaint (a criminal case does not have to be made before the *victim* can apply for a protection order).

#### (b) If the victim is a child

If the *victim* is a *child*, a member trained by the FCS Unit or specialised individual must be contacted. Where there are grounds for believing that it will be in the best interest of the *child* to be removed to a place of safe care, the provisions of the appropriate legislation relating to *children* must be applied.

#### (c) Mentally disabled persons

If the *investigating officer* encounters difficulty when dealing with a mentally disabled person, the matter must be discussed with Legal Services as the procedure may necessitate an urgent application to the High Court.

### (4) Investigating officer to assist victims

It is the responsibility of the *investigating officer* to —

- (a) provide a *victim* with the details of medical and counselling services available in the area;
- (b) provide reasonable assistance the *victim* in making use of such services; and

## STANDING ORDER (G) 341

### ARREST AND THE TREATMENT OF AN ARRESTED PERSON UNTIL SUCH PERSON IS HANDED OVER TO THE COMMUNITY SERVICE CENTRE COMMANDER

#### 1. Background

Arrest constitutes one of the most drastic infringements of the rights of an individual. The rules that have been laid down by the Constitution of the Republic of South Africa, 1996, the Criminal Procedure Act, 1977 (Act No. 51 of 1977), other legislation and this Order, concerning the circumstances when a person may be arrested and how such person should be treated, must therefor be strictly adhered to.

There are several legislative provisions authorising the removal and detention of persons without actually arresting such persons, for example, the removal of a child in terms of the Children's Act, 2005 (Act No 38 of 2005) for the purposes of taking such child to a place of safety. Another example is the removal and, in certain specific instances, the detention of a mentally ill person in terms of the Mental Health Care Act, 2002 (Act No. 17 of 2002). It is important to note that the provisions of this Order will not be applicable in those circumstances because, although the person is being detained, such person has not been arrested by a member.

#### 2. Definitions

- (1) In this order, unless the context otherwise indicates, "**First Schedule**" means the First Schedule to the Criminal Procedure Act, 1977 (Act No. 51 of 1977).
- (2) Any reference in this order to "**reasonable suspicion/grounds**" must be interpreted to mean that a person will have "**reasonable suspicion/grounds**" to believe or suspect something or that certain action is necessary if:
  - (a) he or she really 'believes' or 'suspects' it;
  - (b) his or her belief or suspicion is based on certain facts from which he or she has drawn an inference or conclusion; and
  - (c) any reasonable person would, in view of those facts, also have drawn the same conclusion.

### 3. Securing the attendance of an accused at the trial by other means than arrest

- (1) There are various methods by which an accused's attendance at a trial may be secured. Although arrest is one of these methods, it constitutes one of the most drastic infringements of the rights of an individual and a member should therefore regard it as a last resort.
- (2) It is impossible to lay down hard and fast rules regarding the manner in which the attendance of an accused at a trial should be secured. Each case must be dealt with according to its own merits. A member must always exercise his or her discretion in a proper manner when deciding whether a suspect must be arrested or rather be dealt with as provided for in subparagraph (3).
- (3) A member, even though authorised by law, should normally refrain from arresting a person if -
  - (a) the attendance of the person may be secured by means of a summons as provided for in section 54 of the Criminal Procedure Act, 1977, or
  - (b) the member believes on *reasonable grounds* that a magistrate's court, on convicting such person of that offence, will not impose a fine exceeding the amount determined by the Minister from time to time by notice in the *Government Gazette*, in which event such member may hand to the accused a written notice [J 534] as a method of securing his or her attendance in the magistrate's court in accordance with section 56 of the Criminal Procedure Act, 1977.
- (4) If a member is satisfied that the attendance of the person may be secured by means of a summons as provided for in section 54 of the Criminal Procedure Act, 1977, the member must open a docket and refer it to the public prosecutor for the public prosecutor to have a summons issued. The summons may then be served on the person.

### 4. The object of an arrest

#### (1) General rule

As a general rule, the object of an arrest is to secure the attendance of such person at his or her trial. A member may not arrest a person in order to punish, scare, or harass such person.

#### (2) Exceptions to the general rule

There are circumstances where the law permits a member to arrest a person although the purpose with the arrest is not solely to take the person to court. These circumstances are outlined below and constitute



exceptions to the general rule that the object of an arrest must be to secure the attendance of an accused at his or her trial. These exceptions must be studied carefully and members must take special note of the requirements that must be complied with before an arrest in those circumstances will be regarded as lawful.

**(a) Arrest for the purpose of further investigation**

If a member has a *reasonable suspicion* that a person has committed a *First Schedule* offence but realises that further investigation will be necessary before it will be possible to determine whether the suspect should be charged, such member may arrest the suspect *if the detention of the suspect is necessary to complete such further investigation*. It is thus proper for a member to arrest such a person with the purpose of conducting further investigation and, depending on the outcome of such further investigation, to charge or release the person. A member may only arrest a person for this purpose if such member has reasonable grounds to believe that the investigation will be hampered should the person not be arrested. This will normally be the case if such member has *reasonable grounds* to believe that:

- (i) the person will either abscond, do away with an article required as an exhibit, interfere with a witness or otherwise endeavour to evade or defeat the ends of justice;
- (ii) it is necessary for the purpose of the investigation of the case to establish the bodily features of that person and such person refuses to submit himself or herself voluntarily to the examination of his or her bodily features as provided for in section 37 of the said Act; or
- (iii) such person is an illegal foreigner (a person who is not a South African citizen and is in South Africa in contravention of the Immigration Act (Act No. 13 of 2002)) or a person who is a prohibited person in terms of section 29 of the Immigration Act, 2002. Such person may be arrested without a warrant and be detained for purposes of conducting an investigation in terms of the said Act which may lead to the obtaining of a warrant from the Minister of Home Affairs authorising such person's removal from the Republic.

**(b) Arrest to verify a name and/or address**

In the circumstances provided for in section 41(1) of the Criminal Procedure Act, 1977, a member may request a person to furnish

his or her full name and address. If such a person furnishes a name or address which the member reasonably suspects to be false, such member may arrest the person and detain him or her for a period of twelve hours in order to verify the name and address.

(c) **Arrest in order to prevent the commission of an offence**

In terms of section 40(1)(f) of the Criminal Procedure Act, 1977, a member may arrest a person whom he or she finds at night in circumstances which afford *reasonable grounds* for believing that such person is about to commit an offence. The purpose with the arrest in these circumstances is to prevent the commission of an offence. Such a person may only be detained until the member is satisfied that the person did not commit any offence and will not proceed to commit an offence.

(d) **Arrest in order to protect a suspect**

If a member is authorised by any legislation to arrest a person and such member has *reasonable grounds* to believe that such person may be killed or be seriously injured unless he or she is immediately arrested, such member may arrest such person in order to protect him or her. (This would normally be the case when the suspect is threatened by the victim of the offence or a mob of people that he or she will be assaulted or be killed.) Such person may normally be detained until he or she is brought before a court and the court has decided whether he or she should be released or be further detained.

(e) **Arrest in order to end an offence**

If a person may be arrested in terms of any legislation and a failure to arrest the person will result in the person continuing to commit an offence, such person may be arrested to prevent him or her from continuing to commit an offence. (This would for instance be the case where a person trespasses on property and refuses to leave the property.) Such person must be detained and be taken to court in accordance with the normal procedure.

**5. The requirements for a lawful arrest**

For an arrest to be lawful and for lawful continued detention after arrest, the following four requirements must be complied with:

- (a) **The arrest (with or without a warrant) must have been properly authorised.**

There must be a statutory provision authorising the arrest. (See paragraphs 6(1) and (2) below).

- (b) **The member who effected the arrest must exercise physical control over the person who has been arrested.**

(See paragraphs 7(1) and (2) below).

- (c) **The person who has been arrested must be informed of the reason for his or her arrest and of the rights that he or she has as an arrested person, in terms of section 35(1) of the Constitution of the Republic of South Africa, 1996**

(See paragraph 7(4) below).

- (d) **The person who has been arrested must be brought to the appropriate place as soon as possible.**

(See paragraph 8(7) below.)

For information regarding the period of 48-hours after arrest, within which an arrested person must be brought before a court, refer to Standing Order (G) 361.

## 6. Manner of effecting an arrest

### (1) General rule - Arrest with a warrant

- (a) An arrest should preferably be effected only after a warrant for the arrest has been obtained in terms of section 43 of the Criminal Procedure Act, 1977.
- (b) In order to obtain a warrant of arrest, a member must in writing apply to a magistrate or justice of the peace for the issuing of a warrant in terms of section 43 of the Criminal Procedure Act, 1977. A copy of the application must be filed in the docket. The said section also provides that Directors of Public Prosecutions and public prosecutors may also apply for a warrant of arrest.
- (c) Once a warrant for the arrest of a person has been issued to a member, any member may execute such warrant. It is accordingly not necessary for the warrant to be executed by a particular member.

### (2) Arrest without a warrant

- (a) It is only in exceptional circumstances where a member is specifically authorised by an Act of Parliament (for example, sections 40 and 41 of the Criminal Procedure Act, 1977) to arrest a person without a warrant, that a person may be arrested without a warrant. Any arrest without a warrant, which is not specifically authorised by law, will be unlawful.

- (b) Section 40(2) of the Criminal Procedure Act, 1977, determines that if provision is made in a statute for a member to arrest a person without a warrant, subject to certain conditions or to the existence of certain circumstances mentioned in the Criminal Procedure Act, 1977, those conditions must be present and those circumstances must exist before the arrest is made.
- (c) Section 41 of the Criminal Procedure Act, 1977, provides that a member may call upon any person-
- (i) whom he or she reasonably suspects of having committed any offence or of having attempted to commit any offence; or
  - (ii) who may, in his or her opinion, be able to give evidence in regard to the commission or suspected commission of any offence,
- to furnish his or her full name and address.
- (d) If the person referred to in subparagraph (c), fails to furnish his or her full name and address, or the member reasonably suspects that a false name or address has been given, the member may forthwith arrest him or her. In the event that the person refuses to furnish his or her name or address, or furnishes a false name or address, such person is guilty of an offence and should be charged with the offence in the normal manner.

## 7. Physical execution of an arrest

### (1) Exercise of physical control

The member must confine the freedom of movement of the arrested person. Section 39 of the Criminal Procedure Act, 1977, determines that, unless the person who has been arrested submits to custody, an arrest is effected by actually touching his or her person or, if the circumstances so require, by forcibly confining his or her person.

### (2) Amount of force which may be used in effecting arrest

- (a) As a rule there should be no need for the use of force, and, in every case where it may be necessary, only such force as may be reasonably necessary to overcome resistance to the arrest, may be used. No justification whatsoever exists for beating, kicking or otherwise ill-treating an arrested person and there is no excuse whatsoever for a member to act in this manner. Any member found guilty of an offence as a result of the use of force while effecting an arrest where the use of such force cannot be justified, must expect to be dealt with severely.



- (b) Section 49 of the Criminal Procedure Act, 1977, provides for circumstances where the use of force by a member towards a person who is resisting arrest or fleeing from arrest, may be justified. (For further information refer to the Instructions relating to the Use of Force in effecting an arrest set out in the Special Service Order contained in Circular 31/1/5/3 dated 1997-01-07).

**(3) Entering of premises for the purpose of arrest**

- (a) Section 48 of the Criminal Procedure Act, 1977, determines that before any premises are entered with the purpose of arresting any person whom a member has authority to arrest and who is known or suspected to be in/on such premises, such member must first –
- (i) audibly demand entry into such premises; and
  - (ii) notify or announce the purpose for which entry is sought.
- (b) If the member fails to gain entry after complying with the requirements stated in subparagraphs (a)(i) and (ii), such member may break open, enter and search such premises for the purpose of effecting the arrest.

**(4) Information that must be furnished to a person upon arrest**

- (a) In terms of section 35(1) of the Constitution, 1996, the information that must be furnished to a person at the time of or immediately after his or her arrest is as follows:
- (i) the reason for his or her arrest;
  - (ii) that he or she has the right to remain silent and that anything he or she says, may be used as evidence against him or her in a court of law;
  - (iii) that he or she has a right to consult with a legal practitioner of his or her choice or that he or she may, if he or she so prefers, apply to the Legal Aid South Africa to have a legal practitioner assigned to the case at state expense; and
  - (iv) that he or she has the right to apply to be released on bail.
- (b) Section 39(2) of the Criminal Procedure Act, 1977, requires that the person who effects an arrest must, at the time of effecting the arrest or immediately thereafter, inform the person who has been arrested of the reason for his or her arrest. It is not necessary to use the actual words of the charge - mentioning the offence would be sufficient. If the arrest took place by virtue of a warrant, a copy of the warrant must, upon his or her demand, be handed to the person who has been arrested.

this and that the arrested person refused to sign. If a third person is not available, the member must make a recording in the Pocket book to the effect that a third person was not available to certify that the arrested person was informed of his or her rights and that the arrested person refused to sign the Pocket book.

**(2) Presumption of innocence**

- (a) An arrested person has the right to be presumed innocent until proven guilty by a court of law. A member who arrests a person must therefore, at all times, control himself or herself and must never allow his or her belief in the guilt of the arrested person to move him or her to treat the arrested person in a manner which would amount to punishing the person for what the member believes that the person has done.
- (b) Even though an arrested person must be presumed to be innocent, a member must do everything which may legally be done in order to obtain evidence which could be presented in court to prove the guilt of the arrested person. A member must also take every precaution necessary in the circumstances to ensure that the person is not allowed any opportunity to escape.

**(3) Injuries sustained prior to or during arrest**

Upon the arrest of a person, a member is obliged to ensure the safety of such person while in his or her care. The following provisions must be complied with:

- (a) The member concerned must take all reasonable precautions to ensure that the person will not be injured and will not escape before arrival at the police station.
- (b) Should the arrested person show any signs that he or she is seriously ill or is seriously injured, irrespective of whether the injury was sustained during the arrest or not, the member must follow the instructions as set out in Standing Order (G) 349
- (c) The member who effects an arrest which results in the arrested person being injured, must enter the particulars of the injuries, as well as the circumstances under which they were sustained or inflicted, as soon as possible in his or her Pocket book and in due course submit a full statement, for the information of the Public Prosecutor which must be included in the case docket. He or she must also report any injuries which the arrested person had

sustained prior or during the arrest to the community service centre commander upon arrival at the community service centre.

**(4) Search of the arrested person**

In terms of section 23 of the Criminal Procedure Act, 1977, a member may search an arrested person. The purpose of such a search is twofold, namely to find any article that may be in such person's possession and which could be used as evidence, and to find any article which such person could use to injure himself or herself or any other person.

- (a) Every arrested person must always, immediately upon his or her arrest, at least be searched to determine whether he or she has any concealed weapons on him or her.
- (b) The search of an arrested person must be undertaken in a decent manner which displays respect for the inherent dignity of the person as required by section 29 of the Criminal Procedure Act, 1977, and a person may only be searched by a person of the same gender.

**(5) The use of restraining measures**

- (1) In order to curb the increasing number of escapes from police custody, a person must, upon his or her arrest, be placed in handcuffs and/or leg-irons (the latter depends on the circumstances). The circumstances when and the manner in which restraining measures may be used are set out in Standing Order (G) 350.
- (2) Irrespective of whether restraining measures are used to secure an arrested person, members in charge of arrested persons must always remain alert until such persons are safely placed in a cell.

**(6) Informing an employer in the case of arresting an employee**

If a member has to arrest a person while such person is on duty and is in charge of his or her employer's property or business during the latter's absence, the member must take reasonable steps to inform his or her employer of the arrest and take reasonable steps to ensure that the employer's interests are safeguarded.

**(7) Transporting the arrested person**

- (1) In terms of section 50(1) of the Criminal Procedure Act, 1977, a person who has been arrested must as soon as possible be brought to –
  - (a) a police station; or

- (b) in the case of an arrest by warrant, to the place stipulated in the warrant.
- (2) The member, transporting the arrested person must drive carefully and must take the safest and shortest possible route to the police station or any other place specified in the warrant.

#### **9. Handing suspect over to the community service centre commander**

- (1) Upon arrival at the police station, the member must hand the arrested person to the community service centre commander or the member in charge of the detention facilities at an office under the control of the Service, and provide such person with the following information:
  - (a) the name of the member who has arrested the person;
  - (b) the name of the person arrested;
  - (c) the reason for the arrest;
  - (d) the date, time and place of arrest; and
  - (e) whether the person sustained any injuries prior to or during the arrest (see paragraph 8(3)(c) above).
- (2) The member must also, upon arrival at the police station, complete the Arrest Statement (SAPS 3M(i)) referred to in paragraph 10 below.
- (3) If a person has been arrested on suspicion and if subsequently transpires that the suspicion was unfounded, he or she must immediately be released and if he or she has already appeared in court, the Public Prosecutor must be informed forthwith.

#### **10. Completion of Arrest Statement (SAPS 3M(i))**

- (1) The Arrest Statement (SAPS 3M(i)) must be completed after the arrest of every suspect by the member who made the arrest. If the arrest was made by someone other than a member, the member to whom the arrested person was handed to, must complete the statement. In such an event a statement must be taken from the person that effected the arrest.
- (2) Any force used during the arrest to overcome resistance or to prevent an escape, which resulted in injuries being sustained by the person during the arrest, must be recorded in a separate statement made by the member who applied the force. (Read together with paragraph 8(3)(c) above).
- (3) The instructions, printed at the beginning of the Arrest Statement (SAPS 3M(i)), must be strictly adhered to.



- (4) After the Arrest Statement (SAPS 3M(i)) has been completed, it must be filed under part "A" of the docket.

