To: Department of Justice and Constitutional Development
Director-General: Justice and Constitutional Development
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Endorsing organisations:
Johannesburg Child Advocacy Forum (JCAF)

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SUBMISSION TO THE DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT ON THE DRAFT REGULATIONS RELATING TO SEXUAL OFFENCES COURTS: CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT, 2007 (ACT NO.32 OF 2007)

1. Particulars of parties making this submission

ProBono.Org

ProBono.Org is a non-profit organisation based in Braamfontein (with offices in Pretoria and Durban) that enables pro bono legal services to be provided to thousands of impoverished people living in South Africa through its network of law firms and members of the bar. ProBono.Org's One Child a Year Campaign provides legal representation for children in need, as well as victims of abuse and/or domestic violence in terms of its other programmes.

The One Child Campaign not only aims to provide legal representation for children but also to promote and realise children's rights by getting volunteer attorneys and advocates overseeing the entire court-, removal- and/or

placement process. In this way, various constitutional rights of children are realised (the right to a name, the right to proper alternative care, the right to basic health and social services and the right to be protected from violence and abuse, along with the right to access to justice). Many of the cases ProBono.Org deals with, involve incidents of physical abuse, sexual assault, neglect, rape, sexual grooming and/or exploitation.

The Centre for Applied Legal Studies

The Centre for Applied Legal Studies (CALS) is a civil society organisation based at the School of Law at the University of the Witwatersrand. CALS is also a law clinic, registered with the Law Society of the Northern Provinces. As such, CALS connects the worlds of both academia and social justice. CALS' vision is a socially, economically and politically just society where repositories of power, including the state and the private sector, uphold human rights. CALS practices human rights law and social justice work with a specific focus on five intersecting programmatic areas, namely Basic Services, Business and Human Rights, Environmental Justice, Gender, and the Rule of Law. It does so in a way which makes creative use of the tools of research, advocacy and litigation, adopts an intersectional and gendered understanding of human rights violations, incorporates other disciplines (such as film and social work) and is conscious of the transformation agenda in South Africa.

In particular, CALS' work explores the intersection of socio-economic rights issues and gender rights and the Gender Programme has worked on projects facilitating dialogue and heightened awareness of gender issues among lawyers and activists working within various socio-economic rights sectors.

CALS' recent work around violence against women includes a partnership with the Medical Research Council (MRC) tracking rape attrition from the time of reporting the incident to conviction, the publishing of research on sexual violence in schools, conducting workshops with schools in the east of Johannesburg on sexual violence perpetrated by educators against learners and preparing workshops to deliver to members of NUM on sexual violence at the mines, the recourse and prevention thereof.

Johannesburg Child Advocacy Forum

As a direct result of the plight of unaccompanied migrant children, who were living under abusive conditions at the Central Methodist Church in the inner City of Johannesburg, members of the Sophiatown Community Psychological Services, together with Luke Lamprecht (a long standing advocate for child protection) initiated the Johannesburg Child Advocacy Forum (JCAF) in 2009. JCAF addresses a wide range of children's issues to monitor how children's constitutional rights are being met. It consists of a number of non-profit organisations working towards realising children's rights, which organisations continue to engage with issues arising out of the implementation of the Children's Act.

JCAF has been a major role player in the drafting of the Family, Child and Sexual Offences Strategy for the South African Police Services, which has specialised units within its various stations.

JCAF protects and advocates for the rights of children through a continuum of advocacy interventions on various levels.

2. INTRODUCTION

In South Africa, vulnerable groups (such as children, women, LBGT individuals, refugees to name but a few) continue to be at extreme high risk of sexual violence and other related crimes. In addition, the justice system currently presents added barriers to complainants in need of relief for sexual violence crimes. Sexual abuse, (specifically rape) remain dominant in South African communities and children are a particular target for sexual violence and abuse.

Within this context, we commend the Department of Justice and Constitutional Development on preparing and proposing draft Regulations, focusing on the efficiency and effectiveness of these courts. However, the implementation of these Regulations might prove problematic as our comment sets out below.

In this submission, we will consider the format of the Draft, as it presently stands and provide comment to each relevant section individually. The sections are numbered under their respective chapters for ease of reference.

3. GENERAL OBSERVATIONS

The present draft format of the Regulations leads to duplication and confusion. It is proposed that a re-categorisation of sections, as to the functionaries and parties, form the basis of the Draft's framework. Sections should deal exclusively with a regulated topic at hand. For example, disabled persons should be dealt with in a singular section, as should the training of persons attached to that position. As it currently stands, the provisions for disabled persons and training are found in a multitude of sections, despite clear attempts by the legislators to circumvent this.

However, having established this position, the comments to follow, flow from the present draft's framework.

The categorising of requirements into ‘basic’ and ‘advanced’ is also likely to lead to confusion. It is not clear why certain ‘advanced requirements’ in the draft are not deemed basic, while other more ‘basic’ requirements seem superfluous. It is further foreseen that the allocation of resources in this regard will likely jeopardise requirements currently categorised as ‘advanced’.

It is proposed where made mention in the Draft, mandated and facilitate co-operation within the state, (not only between the Department of Justice and Constitutional Development and National Prosecuting Authority), but also the Department of Social Development, as various government levels must be made. The rationale is that organs of state should not exist or operate in isolation but provide cohesive but complimentary services available to complainants.

4. THE REGULATIONS

Chapter 1: Definitions

Section 1

The proposed definition of “court preparation officer” is largely inadequate and a more comprehensive definition is suggested. In this definition, reference should be made to the considerations, responsibilities, and functions of the National Director of Prosecutions in appointing such a person, which would aid in defining this role.

The definition of a “*person with (a) disability*” in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ought to be included under this section.

The present definition of a “*person supporting a witness*” is vague at best and ought to have a more encompassing definition.

The same could be said for the current definition of a “*victim empowerment volunteer*.”

Chapter 2: Requirements for Designated Court

Section 3

(1) The purpose of subsection 1 is in need of clarity. If it is to be understood that a sexual offences court is not deemed a properly constituted court; unless requirements (a) to (e) are met, a conflict arises with subsection (2).

However, should it allude to the responsibility as to the enforcement of these listed requirements, it becomes redundant, especially read with subsection (3).

(3) An adequate and specific schedule ought to demarcate the authority to whom mentioned functionaries and persons are to report to.

(4) There exists a disjuncture in tone between the necessity of 'basic' and 'advanced requirements', as mentioned above. The urgency implied in this section does require practical consequences but at the same time, it is suggested that the Draft should establish formalities and procedures in cases of non-compliance.

Chapter 3: Facilities at Designated Court

Section 4

The inclusion of the current provision of the requirements regarding facilities at a court seems superfluous, as section 3(2) does not preclude a designated court from dealing with sexual offence cases.

Section 6

The use of the word “must” ought to be immediately succeeded with “when possible.” The mandating of requirements in subsections (1) to (5) is inherently subject to section 3(2).

(2) As said, a provision ought to be inserted to promote the interests of differently-abled persons, given its repetition throughout the Draft.

(3) The term “needs” of older persons ought to be specific to prevent an exhaustive interpretational list. The suggestion is that these needs could be established in conjunction with the Older Persons Act 13 of 2006. Should the intention of the legislature be to secure the subjective needs of older persons, this must be done expressly.

Section 8

This section is problematic as it oversteps and exceeds its mandate by not taking relevant social factors into account. This section appears to direct Courts as to how they should be constructed. In this regard, practical considerations within the South African context, (such as resource allocation, available finances, nature of existing structures, rural conditions, etc.) are but

some of the considerations, that could provide parameters in which this Draft is to operate. Argument could be made that existing resources and capacity could be allocated to upgrade and improve existing court structures and facilities, circumventing the need for this Draft altogether.

(4) See our note at section 6(2)

Section 9

See our note at section 1, "*person supporting a witness*".

(1)(a)(ii) The maximum limitation of three persons accompanying a witness seems arbitrary as no limitation is extended to persons with a disability for example. Furthermore, should the witness be a child, it is more likely that more than the required or suggested number of parties such a witness.

Section 11

The requirements listed in this section should be seen as 'basic'.

Section 12

(1)(a) The advanced requirement regarding the promotion of privacy in the consulting rooms should be a basic requirement and accordingly be included under section 11 instead.

(2) The necessity for this provision is deemed redundant. The standard as to what may distract a witness is subjective and will unreasonably burden the Director-General.

Section 13

(a) The part that reads, "without compromising the prestige of the Court" ought to be removed. The protection of the prestige of the Court is implied.

Section 14

(2) See our note at section 6(2).

Section 15

(1) See our note at section 12(1)(a); privacy should be basic requirement and not an advanced requirement.

(3) and (4), see our note at section 6(2).

Chapter 4: Devices and Equipment available at Court

Sections 16 and 17

Subsections (2) of both of these sections should read “must be efficient and effective.” It is assumed that all devices and equipment are to be in a sound-working manner, coupled with good quality in all court facilities.

Section 18

The part, which reads “The National Director of Public Prosecutions” ought to be replaced with “Director-General of the Department of Justice and Constitutional Development”.

The responsibility falls within the scope and of the authority primarily tasked with the functioning of the Courts, as recognised in section 19(3)(b). The present authority that of the Public Prosecutions directorate, should they require such facilities, should have them made available, (not necessarily be responsible for it). This will also preserve the neutrality of the Sexual Offences Court.

Section 19

(1)(c) In this regard, please see section 1, “*victim empowerment volunteer*”. A victim empowerment volunteer, as it presently stands, is a person that volunteers at a designated Family Violence Child Protection and Sexual Offence Unit (FCS Unit), usually within a South African Police Services station or cluster. The nature of this position remains unclear and one, which involves little training, expertise, and/or knowledge of anatomical dolls. However

cognisance is taken of the fact that the Draft mentions "appropriately qualified victim empowerment volunteer".

(2)(a) to (f) The objective of subsection (2) is to account for diversity within the South African society. Provision for such anatomical dolls must be in accordance with the national specification determined by the Regulations as determined by the Department of Social Development. This would also ensure cooperation between the relevant departments in cases involving sexual violence as well as possibly adding to the uniformity in dealing or approaching these cases, while supporting victims.

(3)(a) In line with section (18), a distinction needs to be drawn between the responsibility as to the availability of anatomical dolls and the use thereof by prosecutors at a designated Court. The responsibility should ultimately vest with the National Director of Public Prosecutions.

In this section, “National Director of Public Prosecutions” must therefore be substituted with “Director-General of the Department of Justice and Constitutional Development."

(3)(c) The insertion of “as determined and facilitated by the Department of Social Development” ought to follow “training in the use thereof.” This incorporation mandates the inclusion of the Department of Social Development and bridges the gap experienced in practise between the various stakeholders, particularly the police.

(5) In accordance with subsection (2), subsection (5) is then redundant.

Chapter 5: Services available at Designated Court

Section 27

As said, "persons with disabilities and older persons” should be removed, it will be referred to in a cover-all section under the Definitions page.

Section 28

A complaint mechanism should not be an advanced requirement in the context of sexual offences cases. There must be a complaint system in place. This ensures the proper running of courts and highlighting problematic areas.

28(1)-(3) Should different groups of persons who can submit complaints be included? This should surely include all individuals involved in a sexual offences matter or even those from the public who see that there is something amiss. This should include any person who notes that the processes set out in the regulations are not being followed and/or standards set out in the regulations are not being met.

We suggest that if there is an external body that will be set up to deal with complaints then perhaps posters or pamphlets giving details of this institution should be available at the court.

The institution established to deal with the complaints should also give detailed, written acknowledgment of receipt to a complainant after a complaint has been lodged. This should include the date the complaint was received and particulars of the individual who received the complaint.

Chapter 6: Training of Persons involved in Trials of Sexual Offences

Section 29

General aspects in relation to training should for the most part be a basic requirement. This section could potentially be split into basic and advanced general requirements. Note that section 29 is very poorly set out.

(1)(a)-(p) These elements are not necessary for general training and some should only fall into the category of a specific official. For example s29(1)(o) “witness profiling” is not relevant to every official, such as a interpreter and s29(1)(i) “offender management” is not relevant to an intermediary. There must be a whittling down of this list to include only those elements that do apply generally and these must become the basic requirements.

Section 29(1)(l) uses the phrase “mentally retarded witnesses”. This is not politically correct and is unacceptable. This should be changed to a phrase along the lines of a “witnesses with a mental disability”.

Section 30

This section is problematic in two ways. The first is the idea of “sufficient experience.” This term needs to be clarified, in some cases working one year dealing with sexual offences may be seen as sufficient experience whereas others may deem at least five years experience sufficient. The second issue is that the decision of whether a presiding officer can preside over a case, and if that individual’s experience is sufficient, is left solely to the discretion of the Judge President, Regional Court President or Chief Magistrate. A caucus of individuals should make this decision.

Section 31

Training should not be an advanced requirement. It is integral to the success in sexual offences cases that the presiding officers are well trained in both the law and the specialised handling of sexual offences matters. Refresher courses that are relevant and frequent must be a basic requirement.

Section 31(1) might be problematic, as it requires a presiding officer to complete training before being allowed to preside, in terms of section 31(3). Yet, the training period is unspecified, thus there would be a period for which the presiding officer would not be qualified to preside, and thus cases progress will be stalled. If the training can be completed before the act commences then this would not be a problem.

Section 32

This section shares the issues related to section 30.

Section 33

This section shares the issues related to section 31 and section 31(1).

Section 34

There is an issue around the requirements of becoming an interpreter, it has been reported that interpreters require only a matric or NQF Level 4 and proficiency in at least three languages.

Section 34 does not set out any basic requirements for interpreters besides saying they must be 'experienced'. These requirements should adhere to a minimum standard. They need to be in line with something like the South Africa's Translators Institute guidelines, which states that translators must have "a high degree of linguistic proficiency" and "a... knowledge of current affairs, of technical, legal and scientific subjects (specialisation) and of the cultural and political background of the source language speakers and target language audience" (this could include an introduction to law program). Degrees and/or diplomas in translating should be made mandatory.

Section 35

As stated above at both section 31 and section 33 the training requirements of the officials dealing with sexual offences cases must be mandatory and a basic requirement. The use of interpreters is frequent in sexual offences trials and forms an integral part of the presentation of verbal evidence. Interpreters must be well trained in both language and the handling of sexual offences matters. This training must be on going.

35(1) It is not sufficient to have only a training manual available for interpreters. Interpreters must be tested on their ability to translate and this must be on going. They must be given classes on developments in the languages they focus on, for example, developments in slang words used. There should be interactive exercises where interpreters are faced with the difficulties that arise in sexual offences matters and can then discuss how they can handle them.

Chapter 7: Special Arrangements for Hearings by Designated Court

Section 39

The determination and monitoring of cycle times for the finalisation of sexual offences matters are extremely important. Some matters can take more than two years to be completed. With this in mind, this section should be changed from an advanced requirement to a basic requirement.

39(3)(b) The section refers to taking "remedial steps" other than the steps set out in s45 which require issuing guidelines to presiding officers relating to the setting down of matters for trial, what other remedial options are available?

Section 40

40(4) In the past there has been the requirement that the prosecutor must sign a document in order to enable the investigating officer to submit the DNA, the question now is whether this practise will continue? This has been very problematic in the past as investigating officers often could not find time to get this signature as the prosecutors are often in court or the investigating officer is out following upon matters. The investigating officer must be permitted to sign this document herself.

40(8) What would such necessary steps entail?

Section 41

41(3) The investigating officer must inform the complainant of the progress made 'at reasonable intervals'. This should not be part of the advanced requirement; it should be a basic requirement.

Section 42

42(1) This must be a very careful process, not based solely on looking at which matters are most likely to culminate in a conviction. Aiming to achieve a good conviction percentage based on matters that have a high likelihood of resulting in a conviction will not combat the prevalence of sexual violence in the country. Matters should also proceed if they do not have any evidence

and are only based on the account of the complainant (as many are).

42(2)-(3) This is important with regard to deciding not to prosecute and withdrawal of a matter.

42(7) The prosecutor must also ensure, during consultation with the witness, that she/he has read the contents of her statement to the police. In many matters the complainant is unaware of what she said in her statement to police and this is used against her by the defence.

Section 41

(1)(b) The requirement that the presiding officer must be satisfied that the accused or his legal representative is "committed to the expeditious finalisation of the trial" before the matter can be set down would be difficult to ascertain. Furthermore, even if the defence would be likely to protract the length of trial, the matter must be set down. The presiding officer will have to use her discretion in deciding if postponements are given in matters.

Section 45

The issuing of guidelines by the heads of various courts on when matters should be set down for trial is not onerous and should be made a basic requirement and furthermore it should be consistent in all the courts.

Section 46

(2) This should mirror the recommendations to deal with complaints in section 28. The presiding officer should receive written notification of the complaint being lodged with an individual's supervisor as well as the result of the matter. If this is not done then there is no reassurance that an individual's supervisor has looked into the complaint and there may be a lack of accountability.

5. CONCLUSION

Detailed evidence exists that barriers in the justice system exist that frustrate the realisation of many complainants' rights to access to justice. We hope that our input will give a clearer indication to the Department as to how the

Regulations should be implemented to provide for better mechanisms within the system to realise these rights.