

WRITTEN SUBMISSION TO THE
PORTFOLIO COMMITTEE ON JUSTICE AND CORRECTIONAL SERVICES:
JUDICIAL MATTERS AMENDMENT BILL [B14-2016]

15 MARCH 2017

Rape Crisis Cape Town Trust
and
Women's Legal Centre

Request to make further oral presentations

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1. Executive Summary

The Report on the Re-Establishment of Sexual Offences Courts found that in terms of South Africa's international, domestic and constitutional obligations the legal framework governing sexual offences must provide for the progressive realisation of specialised services to victims of sexual offences and therefore recommended the re-establishment of sexual offences courts¹.

The Report distinguished between sexual offences courts and hybrid sexual offences courts and Minister Radebe accepted the recommendation that there must be a progressive establishment of the hybrid sexual offences courts into sexual offences courts.² Based on this recommendation, the Office of the Chief State Law Advisor advised that the establishment of sexual offences courts be authorised by enabling legislation.

The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, after the amendment by the Judicial Matters Second Amendment Act 43 of 2013, made provision (section 55A) for the designation of sexual offences courts exclusively for purposes of the trial of any person or other proceedings arising out of sexual offences in terms of the common law, the Sexual Offences Act or any offence in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. This amendment gives effect to the recommendations of the above Report.

¹ Ministerial Advisory Task Team on the Adjudication of Sexual Offence Matters, *Report On The Re-Establishment Of Sexual Offences Courts*, 2013, The Department of Justice and Constitutional Development (MATTSO) p10

² Ibid at p14.

Despite this amendment being passed in 2013 (four years ago) these provisions have still not commenced. We note our concern in the delay and record that participating in this parliamentary process we do not condone the *status quo*.

Section 37 of the Judicial Matters Amendment Bill 14 of 2016 seeks to amend section 55A of SORMA. The most significant aspect of the proposed amendment is the removal of word “exclusively” and we submit that this is in direct conflict with the recommendations of the Report.

The Explanatory Notes on the Amendment Bill explains there were concerns regarding the use of the expression “exclusively” as it gives rise to interpretation problems of the section, however we submit that it is not necessary to remove the word “exclusively” to address any of the concerns.

The removal of the word “exclusively” will give rise to hybrid sexual offences courts. As stated above this offends against the recommendations of the Report. The recommendations made by MATTSO in the Report were based on in-depth research and expertise of the Task Team. The reasons for recommending the progressive realisation from hybrid sexual offences courts to sexual offences courts compliant with the sexual offence court Model³ were founded on said research and expertise, and with the knowledge that although the intention is to prioritise sexual offences on a mixed court roll, the fact that the court hears other matters continues to compromise the objectives of sexual offences court and a victim centred approach to the management of these matters.

³ MATTSO at p76

We are therefore submitting the section 37 of the Judicial Matters Amendment Bill 14 of 2016 will not provide for the progressive realisation of specialised services to victims of sexual offences. Please find our summarised recommendations on page 15 of this document.

2. Introduction

Both Rape Crisis Cape Town Trust and the Women’s Legal Centre work in the area of violence against women and specifically sexual offences. The South African Police Crime Statistics released in September 2016 stated that in 2015/2016 a total of 51895 sexual offences were reported in South Africa.⁴ However, studies estimate⁵ that sexual offences are under reported with as few as one in thirteen survivors reporting the sexual offence to officials. Clients accessing services at both organisations experience barriers to accessing the criminal justice system due a range of factors. These factors include the secondary victimisation experienced by victims who access the system resulting in high levels of attrition of cases.

We believe that a strong and specialised criminal justice system is key to addressing high rates of sexual offences.

⁴ <https://www.saps.gov.za/services/crimestats.php>.

⁵Institute for Security Studies Fact Sheet, September 2015: <https://issafrica.org/media-resources/videos-and-infographics/sa-crime-stats-2015-assault-and-sexual-offences>.

For the convenience of the Committee, we have included an Executive Summary of our arguments as well as a summary of our recommendations.

3. Ministerial Advisory Task Team on the Adjudication of Sexual Offence Matters (MATTSO)

- a. The recommendations of the Ministerial Advisory Task Team on the Adjudication of Sexual Offence Matters (MATTSO) and the resultant Report on the Re-Establishment of Sexual Offences Courts (hereinafter the “MATTSO Report”) were accepted by the then Minister of Justice and Constitutional Development, Mr J Radebe, in 2013. The Report found that in terms of South Africa’s international, domestic and constitutional obligations the legal framework governing sexual offences must provide for the progressive realisation of specialised services to victims of sexual offences⁶. The report makes a clear finding that

.....there is a need for the re-establishment of Sexual Offences Courts in South Africa. However, the Blueprint would have to address the gaps that have been identified. In view of this finding, the Department has therefore initiated the process of amending the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 to provide for an enabling provision which will allow for the reestablishment of Sexual Offences Courts⁷

⁶ Ministerial Advisory Task Team on the Adjudication of Sexual Offence Matters, *Report On The Re-Establishment Of Sexual Offences Courts*, 2013, The Department of Justice and Constitutional Development (MATTSO) p10

⁷ Ibid at p11

- b. The Report found that research studies indicated that sexual offences courts were found to be successful in ensuring the establishment of a victim-centred criminal justice system, reduction of secondary victimisation, improvement of court personnel skills, the reduction in cycle time of the finalisation of cases, and *'have generally contributed to the efficient prosecution and adjudication of these cases'*⁸
- c. The Report recommends the establishment of two types of sexual offences courts:⁹
- i. Sexual offences courts: a regional court that deals exclusively with cases of sexual offences
 - ii. Hybrid sexual offences court: a regional court dedicated for the adjudication of sexual offences in any specified area that is established to give priority to sexual offences cases. The hybrid sexual offences court is considered an interim measure where space is a challenge in some court buildings or the number of sexual offences cases do not justify an exclusive court roll for sexual offences
- d. A hybrid court, whilst giving priority to sexual offences cases, operates on a mixed or hybrid court roll to ensure the continued operation of the court after the finalization of the sexual offences cases. In other words, as soon as the sexual

⁸ Ibid at p96

⁹ Ibid at p14

- offences court roll collapses or the sexual offences matters on the court roll are finished (finalised or part-head), these courts will draw cases involving other offences ('stopper cases').
- e. While in principle priority is given to sexual offences on a mixed roll, this does not happen in practice, resulting in long delays in the finalisation of sexual offences matters.
 - f. The Minister accepted the recommendation that there must be a progressive establishment of the hybrid sexual offences courts into sexual offences courts¹⁰
 - g. Based on this recommendation, the Office of the Chief State Law Advisor advised that the establishment of sexual offences courts be authorised by enabling legislation. This decision was informed by the MATTSO Report that found that because of the lack of enabling statutory provisions the establishment of sexual offences courts in the past discouraged uniformity in the process of their establishment and operation, and received less or no support from other stakeholders¹¹. Sexual offences courts legislation seeks to realise the sentiments expressed in the preamble to the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ("SORMA") which commits to affording complainants of sexual offences the maximum and least traumatising protection

¹⁰ Ibid at p14

¹¹ Ibid at p96

that the law can provide, to introduce measures which seek to enable the relevant organs of state to give full effect to the provisions of this Act, and to combat and, ultimately, eradicate the relatively high incidence of sexual offences committed in the Republic.

4. Judicial Matters Second Amendment Act 43 of 2013

- a. The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, after the amendment by the Judicial Matters Second Amendment Act 43 of 2013, made provision (section 55A) for the designation of sexual offences courts exclusively for purposes of the trial of any person or other proceedings arising out of sexual offences in terms of the common law, the Sexual Offences Act or any offence in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
- b. It is submitted that the this formulation of section 55A, providing for sexual offences courts exclusively for proceedings of sexual offences trials, gives effect the recommendations made by MATTSO and accepted by the Minister.
- b. Despite this amendment being passed in 2013 (four years ago) these provisions have still not commenced. We note our concern in the delay and record that participating in this parliamentary process we do not condone the *status quo*.

5. Judicial Matters Amendment Bill 14 of 2016, Amendment of section 55A of Act 32 of 2007, as inserted by section 2 of Act 43 of 2013, Section 37

Ad section 37(a)

- a. Section 37 of the Judicial Matters Amendment Bill 14 of 2016 seeks to amend section 55A of SORMA. The most significant aspect of the proposed amendment is the removal of word “exclusively”. It is submitted that is in direct conflict with the recommendations of MATTSO.

- b. The Explanatory Noted on the Amendment Bill explains there were concerns regarding the use of the expression “exclusively” as it gives rise to interpretation problems of the section. The concern is that it does not empower the Minister to designate a court room but only a court. It is submitted that that the current formulation of the section can be rectified to avoid this problem of interpretation by adopting the proposed amendment without the removal of the word ‘exclusively’.

- c. In section 37(a)(1) the addition of the words ‘at which’ allows for the Minister to designate any court (High Court or Magistrate’s court) at which a sexual offences court (room) must be established. The retention of the word “exclusive’ does not limit the Minister to the designation of a court, as opposed to a court room, as stated in the Explanatory Note. The problem with the current section s55A is that

is does indeed limit the Minister (as it relates to the concern of the designation of a court, as opposed to a court room) and this is remedied by the proposed amendment. The word “exclusively’ is not the cause of this interpretation problem but rather the wording of the section; there is no need for the removal of the word “exclusive” to remedy the section

- d. The removal of the word “exclusively” will give rise to hybrid sexual offences courts. As stated above this offends against the recommendations of MATTSO. The recommendations made by MATTSO were based on in-depth research and expertise of the Task Team (with representatives from the Regional Court Presidents Forum, the Department of Justice and Constitutional Development, the National Prosecuting Authority, Legal Aid South Africa, the Justice Sector Strengthening Programme and the Foundation for Human Rights). The reasons for recommending the progressive realisation from hybrid sexual offences courts to sexual offences courts compliant with the sexual offence court Model¹² were founded on said research and expertise, and with the knowledge that although the intention is to prioritise sexual offences on a mixed court roll, the fact that the court hears other matters continues to compromise the objectives of sexual offences court and a victim centred approach to the management of these matters. Practically, if a court has both sexual offences and non-sexual offences (either enrolled on that court roll because there are not enough sexual offences to justify a full court roll, or a matter is drawn from another court when the court roll of the

¹² MATTSO at p76

sexual offences court is completed for the day) many of these non-sexual offences cases will become part heard. These part heard non-sexual offences cases must be heard at some stage; the mere fact that the non- sexual offence matter is being heard means that a sexual offence matter is not on the roll for that day.

- e. In order to give effect to the recommendations of MATTSO, South Africa's international obligations and constitutional imperatives, it is submitted that sexual offences courts must be established exclusively for the purposes of trial of sexual offences matters.
- f. The further concerns detailed in the Explanatory Notice are addressed as follows:
 - i. *Concerns were also raised that it is not practical to limit the use of well-equipped courts to cases involving sexual offences only.*

It is submitted that the proposed amendment allowing the Director of Public Prosecutions, having jurisdiction, if she or he deems expedient or necessary for the administration of justice in a particular case to dispose of a case together with a sexual offence matter militates against this concern. The amendment requires the DPP to consider each matter on a case by case basis, avoiding the placement of non-sexual offences in a sexual offences court where the specialised equipment (and expertise of personnel) is not needed. Where the equipment is needed, for example in a murder case where a witness may be a child, the use of the

intermediary and CCTV systems in the sexual offences court may be justified. It is not necessary to remove the word “exclusively” to achieve this objective.

- ii. Court facilities and court-time must be maximised in order to prevent a further backlog in the finalisation of cases*

While it is supported that facilities and court time must be maximised, it is submitted that the proper implementation of case flow management will militate against wasted court time. Sufficient provision must be made to ensure that court rolls run effectively, negating the need for sexual offence courts to draw matters from other court rolls. If there are insufficient sexual offences matters to justify a full court roll, it is submitted that a sexual offences court may be established for certain weeks of the month, or days of the week. The court may then be used to hear non- sexual offences matters on the remaining days. This will ensure maximization of court facilities and court time.

- iii. It may not be practical to deal exclusively with sexual offences in such a sexual offences court. An accused may have committed various other offences which do not amount to, or have a bearing on, sexual offences in respect of which he or she is being prosecuted. The proposed amendments also cater for this eventuality and provide that in circumstances such as these, all the matters can be dealt with by the same court and do not have to be prosecuted separately.*

The argument submitted supra at 4(f)(1) applies - the proposed amendment allowing the Director of Public Prosecutions, having jurisdiction, if she or he deems expedient or necessary for the administration of justice in a particular case, to dispose of a case together with a sexual offence militates against this concern. It is not necessary to remove the word “exclusively” to achieve this objective.

g. It is submitted that 37 section be amended as follows:

37. Section 55A of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, is hereby amended—

(a) by the substitution for subsection (1) and (2) of the following subsections, respectively:

“(1) Subject to subsection (2), the Minister may by notice in the *Gazette* designate any—

(a) Division of the High Court of South Africa or the main seat or any local seat of a Division referred to in section 6 of the Superior 10 Courts Act, 2013 (Act No. 10 of 2013); or

(b) Magistrate’s Court, as defined in section 1 of the Superior Courts Act, 2013 **[(Act No. 10 of 2013)]**,

[as] at which a sexual offences court must be established exclusively for the purposes of the trial of any person or other proceedings arising out 15 of—

.....

- h. It is further submitted that an amendment be drafted to ensure that all sexual offences cases in the jurisdiction of an established sexual offences court must be heard in that sexual offences court.
- i. The amendments to s55A(2) are supported
- j. The addition of subsection 55(A)(6) is supported. However, we note our concern regarding the absence of clear time frames
- k. The addition of subsection 55(A)(7) is not supported in so far as it pertains to the issuing of directives to ensure that sexual offences receive priority. We support the issuing of directives by Judge Presidents of the High Courts, the magistrates at the head of a regional division, the head of the administrative region in the case of a district court to the judicial officers presiding in those courts for the effective administration of the adjudication of sexual offences matters in the courts. As submitted above we do not support the implementation of hybrid courts and as such there is no need for directives ensuring the prioritisation of sexual offences by judicial officers.

6. Summarised Recommendations

- a. We recommend that sexual offences courts must be established exclusively for the purposes of trial of sexual offences matters in order to give effect to the recommendations of MATTSO, South Africa's international obligations and constitutional imperatives.

- b. We recommend that an amendment be drafted to ensure that all sexual offences cases in the jurisdiction of an established sexual offences court must be heard in that sexual offences court.
- c. We recommend that there is no need for directives per section 55(A)(7) as we do not support the implementation of hybrid courts.

About the Rape Crisis Cape Town Trust

The Rape Crisis Cape Town Trust was established in 1976, and is the oldest organisation in South Africa supporting the recovery of survivors, seeking justice and making change in communities.

We have a vision of a South Africa in which women are safe in their communities, and where the criminal justice system supports and empowers rape survivors.

Our goal is to promote an end to violence against women – specifically rape. Rape survivors are key to successful convictions and their empowerment is based on safety, respect, support and the ability to make informed choices as they embark on this difficult and challenging journey.

We aim to reduce the trauma experienced by survivors and encourage them to report rape. We support communities in challenging high rape rates and bringing about change in the criminal justice system through our advocacy campaign, the Rape Survivors' Justice Campaign.

About the Women's Legal Centre

The Women's Legal Centre (WLC) is a non-profit law centre that seeks to achieve equality for women, particularly black women, through impact based litigation, the provision of free legal

advice, legal support to advocacy campaigns run by other organisations (which fall within the Centre's objectives) and training that ensures that people know and understand the impact of the judgments of the courts on the subject of women's rights.

The WLC also provides legal advice to other non-governmental women's organisations nationally and in Africa. The Centre has won several precedent setting cases that have improved women's access to justice in South Africa.

The WLC is staffed by attorneys, candidate attorneys, paralegals and a legal adviser who specialise in gender law and have extensive litigation experience. The WLC is based in Cape Town, with an office in Johannesburg and a satellite office in Khayelitsha.