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COMMENTS ON THE THIRD ANNUAL REPORT ON THE IMPLEMENTATION OF THE CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT 32 OF 2007

1. PURPOSE OF THE PAPER

December 2014 marks **seven years** since the passing of the Criminal Law [Sexual Offences and Related Matters] Amendment Act 32 of 2007.

The purpose of this paper is to evaluate the **Third Annual Report on the Co-ordination and Implementation of Activities Relating to the Criminal Law [Sexual Offences and Related Matters] Amendment Act 32 of 2007 (Sexual Offences Act)**. Although the Sexual Offences Act provides for the tabling of **annual** implementation reports, only three such reports have been tabled in the past seven years.

The paper:

- Outlines the legal and policy framework.
- Provides a brief overview of the Sexual Offences Act and the responsible Departments /Institutions.
- Considers the Third Annual Implementation Report and identify **four key challenges**.
- Briefly outlines several additional challenges for consideration, including ***Constitutional challenges with certain provisions in the Act that need to be addressed by the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill [B18-2014]***, currently before the Portfolio Committee on Justice and Correctional Services.

2. LEGAL AND POLICY FRAMEWORK

Over the past twenty years South African has developed a strong legal and policy framework to promote access to justice in sexual offences.

The foundation was laid by the **Sexual Offences Act** and the **National Policy Framework for the Management of Sexual Offences (NPF)** that was developed in compliance with this Act.

The **Protection from Harassment Act 17 of 2011** and the **Prevention and Combating of Trafficking in Persons Act 7 of 2013** (the commencement date is still pending) also form part of this framework.

In January 2014 the **Judicial Matters Second Amendment Act of 2013** was promulgated. This Act establishes a legal framework for the re-establishment of sexual offences courts.¹ In 2013 the Justice Minister established a **Ministerial Advisory Task Team on the Adjudication**

¹Report of the Ministerial Advisory Task Team on the Adjudication of Sexual Offence Matters (August 2013) p10 <http://www.justice.gov.za/reportfiles/other/2013-sxo-courts-report-aug2013.pdf>.



of Sexual Offence Matters (MATTSO). The MATTSO comprised a range of stakeholders from government, civil society and academic institutions that undertook a thorough investigation into the possible re-establishment of sexual offences courts. The 2013 MATTSO report **supported the re-establishment of sexual offences courts in South Africa and provided detailed recommendations to improve the management of sexual offences at court.**² One of these recommendations was the need for legislation to support the re-establishment of these courts.

3. BRIEF OVERVIEW OF THE ACT

The primary objective of the Sexual Offences Act is to provide victims of sexual offences the “maximum and least traumatising protection that the law can provide”.

THE SEXUAL OFFENCES ACT

Provides for:

- **A new expanded statutory offence of rape** (applicable to all forms of sexual penetration without consent irrespective of the gender of the perpetrator);
- **A gender neutral definition of rape** (anyone irrespective of gender can be a victim of rape);
- **A new statutory offence of sexual assault**, applicable to all forms of unlawful and intentional sexual violation without consent;
- **Specific offences against children** (statutory rape and sexual assault; sexual exploitation and grooming) and **people who are mentally disabled**.
- **Specific services to victims of sexual offences**, including affording victims the right to receive post-exposure prophylaxis (PEP) to prevent the possible transmission of HIV after rape and for HIV testing of an accused.¹

Includes requirements for:

- Governance structures to encourage **coordinated planning, resourcing, implementation, monitoring and evaluation** of all initiatives aimed at uprooting sexual offences
- A **National Policy Framework** to guide implementation
- **Directives and national instructions and training programmes** (from the NPA, SAPS and DOH)
- A high level of Parliamentary oversight through **annual reporting** on implementation.
- A **National Register for Sex Offenders (NRSO)**.

Successful implementation of the Act requires:

- Provision of specialist personnel (intermediaries³, court preparation officers⁴, forensic social workers, forensic nurses, police officers, doctors, prosecutors and judicial officers)

² Report of the Ministerial Advisory Task Team on the Adjudication of Sexual Offence Matters (August 2013) p10 <http://www.justice.gov.za/reportfiles/other/2013-sxo-courts-report-aug2013.pdf>.

³ The role of the intermediary is to convey the evidence related questions from the prosecution or the defence to the child in a manner which is understandable to the child. In carrying out this duty, the intermediary has two specific functions: To protect the child against hostile cross-examination; and to assist the child in understanding the questions posed. The child will, therefore, only talk to the intermediary during the court proceedings.

⁴The National Prosecuting Authority (NPA) Court Preparation Programme, “Bona Lesedi,” or “I see the light,” was developed to help prepare witnesses to testify in court.



- Provision of services and infrastructure (police stations with victim friendly waiting rooms; sexual offences courts provided with anatomically correct dolls, two-way mirrors; CCTV cameras; separate waiting rooms); health and forensic services for medical examinations for completion of J88 forms⁵ and DNA samples respectively; psycho-social services for counselling)
- Training of personnel (collection of evidence (rape kits), completion of J88 forms, giving expert evidence)
- Information management (systemic collection and management of data across the criminal justice system chain).

3.1 Governance Structures and Inter-sectoral role players

The key Departments/institutions responsible for the Acts implementation are:

- Departments of Justice and Correctional Services (which is **the lead Department in the intersectoral implementation** of the Sexual Offences Act and the National Policy Framework for the Management of Sexual Offences (NPF));⁶
- South African Police Services (SAPS);
- National Prosecuting Authority (NPA);
- Correctional Services (DCS);
- Health (DOH); and
- Social Development (DSD)

In addition, co-opted departments/institutions are: the Departments of Women, Children and People with Disabilities (now Ministry for Women in the Presidency), Basic Education (DBE), Cooperative Governance and Traditional Affairs (COGTA), and Legal Aid South Africa (Legal Aid SA).

Governance structures:

Political governance structures: JCPS Inter-ministerial Committee; Inter-ministerial Committee on the Root Causes of Violence Against Women and Children⁷; National Council on Gender-based Violence⁸, Ministerial Advisory Task Team on the Adjudication of Sexual Offences Matters.

Administrative governance structures: The Director – General Intersectoral Committee for the Management of Sexual (DG-ISC) offences is chaired by the Director-General: Justice and co-ordinates the intersectoral monitoring of the implementation of the Act and the NPF; National Intersectoral Operational Committee on Sexual Offences (OPS ISC); Regional Heads Forum; National Intermediary

⁵ The J88 form documents the medico-legal examination that the healthcare practitioner performs on a victim and highlights findings that are potentially relevant for legal purposes.

⁶Section 63 of the Sexual Offences Act establishes the Directors-General Intersectoral Committee on the Management of Sexual Offences Matters under the leadership and chair of the Director-General of the Department of the Justice. Representation on this Committee includes the Directors General of the Departments of Justice, Social Development (DSD) and Health (DoH), as well as the Heads of the National Prosecuting Authority (NPA), Correctional Services (DCS), and the South Africa Police Service (SAPS). This Committee must develop and compile a National Policy Framework which must be tabled in Parliament by the Justice Minister. The Justice Minister must also table annual reports on the implementation of the Act.

⁷ Chaired by Minister of Social Development and comprising Ministers of Justice, Health, Home Affairs, Police, Basic Education and Women Children and Persons with Disabilities.

⁸ Described as a high-level multi-sectoral national response to the scourge of gender-based violence. The Council will be chaired by the Deputy President of the Republic of South Africa. The Council has been charged with the following responsibilities: to drive the implementation of the 365 Days Action Plan; to advise government on policy and intervention programmes; strengthen national partnerships in the fight against gender-based violence; and monitor and report progress on initiatives aimed at addressing gender-based violence.



Committee; National Task Team on LGBTI issues and various Chief Directorates (including Chief Directorate: Promotion of Rights of Vulnerable groups.⁹)

Role players:

SAPS: The Station Commander must ensure SAPS members handle the report of a sexual offence at a police station or telephonic report correctly; provide victim assistance at a police station; informing victim of services offered to victims; medical examination of victim; victim friendly rooms (VFR's) at police stations; assisting the victim during court proceedings. SAPS is responsible for application for HIV testing of alleged offender by the victim, by investigating officer; or in the execution of a court order; recordkeeping of results of HIV test; medical examination of suspect; securing and preserving the crime scene and exhibits; investigation of offence; taking of in-depth statement from victim and preparation for court proceedings. Specialised Family Violence Child Protection and Sexual Offences Unit (FCS) were re-established in 2011. Currently there are 176 FCS Units nationally with 2631 investigators.

DOJCD / NPA / Courts. The NPA's National Prosecuting Services offers a Court Preparation Programme for victims and witnesses. The NPA established Thuthuzela Care Centres (TCC's) that provide one-stop multidisciplinary, integrated medico-legal social services to victims of sexual offences. Dedicated Sexual Offences Courts were reinstated in 2012 for the prosecution of sexual offences. The court can order that an alleged perpetrator undergo compulsory HIV testing on application by a victim, interested person or the investigating officer. The application is lodged with the clerk of the court by the investigating officer. The Magistrate may ask for additional evidence which must be confirmed in writing. The court order and notice of compulsory HIV testing must be served on the alleged offender, setting out the procedure and applicable time-frames. Failure to comply with the order and notice will be ground for arrest to obtain specimens. The DOJCD is responsible for establishing sexual offences courts; employing intermediaries and maintaining the National Register for Sex Offenders containing names of convicted sex offenders i.r.o children and mentally disabled victims.

DSD: Co-ordinate the implementation of the Victim Empowerment Programme; provide access to psycho-social services; provide a funding framework and support NGO's. The department has appointed a number of victim empowerment co-ordinators and has established eight Khuseleka One Stop Centres that offer a continuum of services to victims at a single service point.

DOH: The DOH renders clinical forensic medicine services. The Act defines a public health establishment designated by the Minister of Health to provide Post Exposure Prophylaxis (PEP) treatment to victims and to carry out compulsory HIV testing. A health care professional (district surgeon or a person appointed by DOH) must conduct a medical examination of a victim of a sexual offence. Blood samples are taken by an authorised medical practitioner, including a registered nurse.

DCS: Develop and implement a strategy to manage sexual offences within correctional facilities. The department has not established any special facilities for victims of sexual offences. The feasibility and legality of an integrated surveillance system, including the surveillance of cells, are being investigated.

⁹ Budgetary Review and Recommendation Report of the Portfolio Committee on Justice and Constitutional Development, dated 5 November 2013 <http://www.pmg.org.za/atc131105-budgetary-review-and-recommendation-report-portfolio-committee-justice-and-constitutional-development>. The understaffing of the Department of Justice and Correctional Services Vulnerable Groups Directorate where apparently only two officials were employed to work on sexual offences matters was noted as a grave concern by the previous Portfolio Committee.



4. FOUR KEY IMPLEMENTATION CHALLENGES

Various challenges have impacted the effective implementation of the Sexual Offences Act:

CHALLENGE 1: FAILURE TO COMPLY WITH STATUTORY OBLIGATIONS

Failure to table Annual Implementation Reports

Section 65(3) of the Sexual Offences Act requires that the Justice Minister **must** (after consultation with the Ministers responsible for Police, Social Development and Health, as well as the National Director of Public Prosecutions) **table in Parliament annual implementation reports** from each department/institution responsible for the implementation of the Act.¹⁰

Three reports have been submitted since the Acts implementation:

1. Consolidated Annual Report for the period **January 2008 - December 2011** (tabled in August 2012.)
2. Consolidated Annual Report for the period **January 2012 - March 2013** (tabled in July 2014.)
3. A Departmental /Institutional Annual Report for the period **April 2013 - March 2014**. (This report was originally tabled in May 2014 but was withdrawn to reconsider the statistics.¹¹ Manual re-counting was required. It was re-tabled in September 2014.)

Comment/Questions

- Three Departments have **NOT** submitted their Annual Implementation Reports for the 2013/14 period – the Departments of Basic Education, Social Development and Health.¹² **NO** explanation is provided for this in the Third Annual Implementation Report. These Departments should be asked for an explanation, especially Health and Social Development which are important stakeholders. (Note further that the NPA Report is missing a page.¹³)
- The Justice Department reports that delays in the submission of Annual Implementation Reports by some implementing Departments leads to delayed compliance with section 65(3) of the Act by the Minister.¹⁴ In response the Department has proposed in the Judicial Matters Amendment Bill [B2-2015] an amendment to **remove the obligation to provide a separate annual report on the implementation of the Act** and instead provide that each Department/institution submit a section on the implementation of the Act in their Annual Reports submitted in terms of the PFMA. ***This is of concern as the separate annual implementation reporting requirement is critical to monitoring intersectoral co-operation and effective implementation of the Act.***

¹⁰ The Departments of Justice, Correctional Services, Social Development, Health and the SAPS and NPA.

¹¹ Third Annual Implementation Report p21 and 22

¹² The Second Consolidated Annual Report (January 2012- March 2013) noted that 253 health facilities have been designated to provide PEP for HIV infection to victims exposed to the risk of HIV infection as a result of sexual crimes. 3671 victims received such treatment during the Jan2012-March 2013 reporting period. These facilities must also carry out compulsory HIV testing of alleged offenders. Only five of facilities have been designated in the Eastern Cape.

¹³ Third Annual Implementation Report. P7 of the NPA report is missing.

¹⁴ Third Annual Implementation Report p72



Failure to Table Annual Training Reports

The Sexual Offences Act provides that the SAPS, Department of Health and NPA must (i) table training courses within six months of the commencement of the Act; and (ii) **table annual reports on the implementation of the training courses.**¹⁵

Comment/Questions

- The Department of Health, the National Commissioner of the South African Police Service and the National Director of Public Prosecutions should be asked about their tabling of annual reports on the implementation of the training courses.
- Has there been any external evaluation to determine the impact of training on effective management of sexual offences matters?¹⁶
- A key challenge in training is the lack of an inter-departmental documentation system. As a result training reports do not contrast the number of officials trained as against the number of officials responsible for the Act; nor do they address the impact that the training has had on the implementation of the Act.¹⁷ How can this challenge be addressed?

CHALLENGE 2: LACK OF REPORTING ON THE NATIONAL POLICY FRAMEWORK FOR THE MANAGEMENT OF SEXUAL OFFENCES

Section 62 of the Sexual Offences Act requires the Justice Minister to adopt and publish a **National Policy Framework for the Management of Sexual Offences (NPF)**¹⁸ to ensure 'a uniform, co-ordinated and sensitive approach to implementation of the Act.'¹⁹

The NPF provides guidelines for: (i) the implementation of the priorities and strategies contained in the NPF; (ii) measurement of progress on the achievement of the NPF objectives; (iii) ensuring that the different organs of state comply with the primary and supporting roles and responsibilities allocated to them in terms of the NPF and this Act; and (iv) monitoring the implementation of the NPF and of the Act.²⁰

¹⁵ In addition, any new or amended training courses developed under this section must be tabled in Parliament within 14 days of the finalisation thereof.

¹⁶ Consolidated Annual Report on the Implementation of the Sexual Offences Act (Jan 2008 – December 2011) p24

¹⁷ Consolidated Annual Report on the Intersectoral Implementation of the Sexual Offences Act (Jan 2012 – March 2013) p41

¹⁸ Section 62(2) in consultation with the Cabinet members responsible for security, correctional services, health, social development and the NDPP.

¹⁹ Long title of the Sexual Offences Act

²⁰ The National Policy Framework shall be developed and compiled by the Inter-Sectoral Committee for the Management of Sexual Offences.

In terms of section 65. Responsibilities, functions and duties of Committee;

- (1) The Committee shall be responsible for developing and compiling a draft national policy framework, as contemplated in section 62(1), which must include guidelines for -
 - (a) the implementation of the priorities and strategies contained in the national policy framework;
 - (b) measuring progress on the achievement of the national policy framework objectives;
 - (c) ensuring that the different organs of state comply with the primary and supporting roles and responsibilities allocated to them in terms of the national policy framework and this Act; and



The NPF was published in September 2013 and sets out a **Five Year Inter-Departmental Plan for the Management of Sexual offences (2012-2016)**. Specific objectives, annual targets and responsible stakeholders are set out in the plan.

The NPF notes that implementation of the Act and the NPF shall be guided by this Five Year Plan which shall be the basis for reporting to Parliament on an annual basis.²¹ The NPF must be reviewed periodically (at least twice during the five year cycle of the NPF) and NGOs must be consulted.²²

Key indicators and time-frames set out in the Five Year Inter-Departmental Plan plan include:

Table 1: Five Year Inter-Departmental Plan for the Management of Sexual Offences 2012-2016: Key targets and timeframes

INDICATOR	TIMEFRAME FOR COMPLETION
Establish institutional mechanisms to engage civil society in the implementation of the Act and management of sexual offences.	Hold at least two meetings a year.
Develop and implement a five year action plan to improve timeous case preparation for evidence collection, court preparation, prosecution, case management case reporting and conviction rates.	Implementation from 2013
Conduct research of available victim support services in rural areas.	2014
Conduct a skills audit in the cluster to address identified gaps	2014
Develop policy on the use of restorative justice and alternative dispute mechanisms in sexual offences.	2015
Develop an integrated information management system for the management of sexual offences.	2015
Deliver integrated training for JCPS personnel involved in management of sexual offences	2016
Review and Amend the legal framework (review the Sexual Offences Act and table amending legislation.)	2016

(d) monitoring the implementation of the national policy framework and of this Act.

(2) The Committee may make recommendations to the Minister with regard to the amendment of the national policy framework.

²¹ National Policy Framework p39 (Accessed at <http://www.justice.gov.za/vg/sxo/2012-draftNPF-5year-plan.pdf>)

²² Ibid



COMMENT/QUESTIONS

- The MATTSO Report recommended that an **integrated monitoring and evaluation framework must be developed to ensure the effective and efficient intersectoral management of the Sexual Offences Courts.**²³ This framework must set out performance standards for the intersectoral management of sexual offence. **These standards must form part of the National Policy Framework for Sexual Offences.** They must also determine the case cycle time from the time of reporting up to the finalisation of the case in court. The performance of each stakeholder participating in the value chain of sexual offences must be assessed against a quantitative measure of time, calculated from the time the case is received, up to the time the stakeholder function is finalised in relation to such a case. This approach will contribute in the speedy finalisation of the case. Has this recommendation been implemented?
- The Third Annual Implementation Report does not provide any information on the implementation of the Five Year Inter-Departmental Plan set out in the 2012-2015 NPF. It is not clear whether any of the indicators and timeframes set out in the Five Year Inter-Departmental Plan have been met.
- The only reference made to the NPF in the Third Annual Implementation Report is that initiatives to popularise the Policy Framework will unfold in the 2014/15 reporting period.²⁴

CHALLENGE 3: STATISTICS

Key challenges which exist in respect of statistics and sexual crimes include the following:

- **Under-reporting sexual offences:** “[T]he exact prevalence of rape in South Africa is unknown and, to a large extent, unknowable.”²⁵ A national study released in 2002 estimated that only one in nine rapes (11%) were reported to the police.²⁶ The most recent study into reporting rates by the Medical Research Council (MRC) was a provincial study which found that Gauteng, only one in 25 rapes (4%) had been reported to police. (Although this provincial rate cannot be extrapolated to the whole country it does highlight the issue of under-reporting.)²⁷
- **Lack of an integrated information management system:** This creates severe challenges in respect of tracking matters from the time they are reported to SAPS and as they proceed (or not) through the criminal justice system. The Third Annual

²³ Report of the Ministerial Advisory Task Team on the Adjudication of Sexual Offence Matters (August 2013) p10 <http://www.justice.gov.za/reportfiles/other/2013-sxo-courts-report-aug2013.pdf>.

²⁴ Third Annual Implementation Report p20

²⁵ Wilkinson K, Will 74,400 women be raped this August in South Africa? - See more at: [http://africacheck.org/reports/will-74400-women-be-raped-this-august-in-south-africa/](http://africacheck.org/reports/will-74400-women-be-raped-this-august-in-south-africa/#sthash.cYjdVJNu.dpuf)

²⁶ Jewkes R and Abrahams N, The epidemiology of rape and sexual coercion in South Africa: an overview, <http://www.savi.uct.ac.za/wp-content/uploads/2013/11/jewkes-abrahams-rape-.pdf>

²⁷ The Womens Legal Centre's attorney Sanja Bornman says if all rape incidents were reported to police, annual rape statistics may double to exceed 120,000. <http://ewn.co.za/2014/01/29/Rape-stats-deceptive-due-to-under-reporting>



Implementation Report was originally tabled in May and then had to be withdrawn and re-tabled in order to re-consider statistics. Manual counting had to be done to verify the identified discrepancies.²⁸ **Seven years after implementation of the Act, why does the collation of statistics remain such a challenge?**²⁹

- **Lack of disaggregated statistics:** SAPS has been criticised for not disaggregating its statistics (it reports all sexual offences in a single category.)

Recent statistics on the reporting and prosecution of sexual offences cases that are available from SAPS and the NPA may be considered as follows:

Table 2: SAPS and NPA Annual Report Statistics for 2011/12-2013/14

REPORTING YEAR	SAPS STATISTICS	NPA STATISTICS		
		CASES FINALISED	CONVICTIONS	ACQUITTALS
	SEXUAL OFFENCES REPORTED TO SAPS			
2011/12	64514	6913	4501	2412
2012/13	66387	7092	4669	2423
2013/14	62649	8174	5484	2690

The NPA statistics indicate it has finalised more sexual offences cases and obtained a higher conviction rate in 2013/14 (of 67.1%) than in the previous two reporting periods.³⁰ The challenge, however, is that while 62 649 sexual offence cases were reported in 2013/14 to SAPS, for example, it is not clear how many dockets were submitted to the NPA for prosecution. A significant percentage of reported cases don't reach prosecution stage. In 2013/14 only 8174 cases were finalised by the NPA and convictions were obtained in only 5484 cases.

Critical areas of concern about the sexual offences statistics in the Third Annual Implementation Report are:

- **There is no consolidation of the statistical information. The data provided is inadequate and contradictory:**
 - SAPS does not provide any statistics in the Third Annual Implementation Report on the sexual offences reported in 2013/14 (or for proceeding years for monitoring purposes; there is no breakdown of the type of offences, the victims etc).
 - The NPA does not provide any statistics on the sexual offences cases it has prosecuted in 2013/14. It reports only on cases processed by the Thuthuzela Care Centres, and even then it submits an incomplete report so it is impossible to accurately assess these statistics.³¹

²⁸Third Annual Implementation Report p22

²⁹ Ibid p62

³⁰ National Prosecuting Authority Annual Report 2013/14 p62

³¹ P7 of the NPA Report is missing.



- The DOJ reports a case load of 22092 sexual offences cases for 2013/14. It reports that 8229 cases were finalised and 4698 were guilty verdicts - a 53 % conviction rate. (This, however, is different from the NPA statistics contained in its 2013/14 Annual Report. The NPA reports that 8174 cases were finalised with convictions in 5484 cases which reflects a 61.7% conviction rate.)³²
- The number of cases removed/struck from the roll is a concern.³³ The Department reports that this matter will be investigated in 2014/2015.³⁴
- 5478 cases were withdrawn.³⁵

Comment/Questions

- A serious challenge identified in all three annual reports on the implementation of the Sexual Offences Act is the lack of an integrated IT system. What is being done inter-sectorally to resolve this problem? A clear action plan with targets and timeframes is needed.
- The 2014 Report of the Khayelitsha Commission of Inquiry identified significant inefficiencies at the Khayelitsha Family Violence, Child Protection and Sexual Offences (FCS) unit. Some of the key findings include: (i) many crimes reported to the FCS unit are not investigated properly or at all – cases are often withdrawn or struck off the roll in the Khayelitsha Magistrates' Court because of incomplete police investigation or because dockets are not brought to court; (ii) management at the three police stations, the cluster office and the FCS unit is ineffective.³⁶ What action is SAPS taking to ensure that sexual offences cases processed by FCS Units are investigated properly so that dockets are brought to court and cases are not struck off the roll?
- **What has been the impact of the increase in specialised sexual offences courts and Thuthuzela Care Centres on sexual offences statistics, especially conviction rates?**
- The MATTSO Report recommended that Case Flow Management for Sexual Offences Matters must be explored by the Regional Court Presidents Forum **to address the current flaws in the system.**³⁷ This process must be undertaken in consultation with the relevant stakeholders. Has this recommendation been implemented? If not, why not?

³² National Prosecuting Authority Annual Report 2013/14 p62

³³ Third Annual Implementation Report p66

³⁴ Ibid

³⁵ Third Annual Implementation Report p63

³⁶ Towards A Safer Khayelitsha: Report of the Commission of Inquiry into Allegations of Police Inefficiency and a Breakdown in Relations between SAPS and the Community of Khayelitsha (August 2014) (Accessed at http://www.khayelitshacommission.org.za/images/towards_khaye_docs/Khayelitsha_Commission_Report_WEB_FULL_TEXT_C.pdf)

³⁷ Report of the Ministerial Advisory Task Team on the Adjudication of Sexual Offence Matters (August 2013) p10 <http://www.justice.gov.za/reportfiles/other/2013-sxo-courts-report-aug2013.pdf>



CHALLENGE 4: SLOW IMPLEMENTATION OF THE NATIONAL REGISTER FOR SEX OFFENDERS

The National Register for Sex Offenders (NRSO) came into operation on the 30th of June 2009 in terms of Chapter 6 of the Sexual Offences Act. **The NRSO is a database containing the details of individuals who have been convicted of any sexual offence against a child or mentally disabled person.** The register gives employers in the public or private sectors such as schools; crèches and hospitals the right to check that the person being hired is fit to work with children or mentally disabled people. The register also contains 'historical convictions' i.e. the names of sex offenders found guilty before the Act came into being.

The contents of the National Register will not be made available to the public. **Only those entitled to apply for a clearance certificate will have access to the information contained in the National Register** (such as an employer, licensing authority or a person applying to become a foster parent, kinship care-giver, temporary safe care-giver or adoptive parent.) It is a criminal offence for anyone to disclose or publish information contained in the National Register.

The management of the NRSO is housed within the Promotion of the Rights of Vulnerable Groups Unit, which is located in the Court Services Branch of the Justice Department. The Police, Departments of Correctional Services and Health and the Courts nationwide must submit the relevant information for the registration of a sex offender.

Although there has been some improvement in the numbers of sex offender registered – increasing from **2340 in 2011/12 to 15452 in 2013/14** there are ongoing challenges including:

- Lack of integrated data systems between Justice, SAPS, Health and Correctional Services.
- The slow pace of capturing data in respect of historical records of those convicted of sexual crimes prior to 2007. About 12 000 cases of historic convictions received from SAPS could not be captured in the NRSO due to missing details of the victim.³⁸ The historical data from the Department of Correctional Services and the Department of Health is still pending. Meetings are on-going with these two Departments to try and establish a fast-tracking mechanism.³⁹
- The issuing of clearance certificates has not commenced in respect of someone appointed as a foster parent, kinship care-giver, temporary caregiver, adoptive parent or curator.⁴⁰
- The feasibility of merging the NRSO (managed by the Justice Department) and the National Child Protection Register (managed by the Department of Social Development) has been an ongoing issue since 2012. This has cost and resource implications due to possible duplication of information.

³⁸Third Annual Implementation Report p58

³⁹ Ibid p58

⁴⁰ Ibid



Comment/Questions

- The Department should be requested to elaborate on the challenges it continues to face in populating the Register (especially in relation to obtaining data from the Departments of Correctional Services and Health).
- Can the Department provide an update on the issue of the Clearance Certificates in respect of a person appointed as a foster parent, kinship care-giver, temporary caregiver, adoptive parent or curator? It reports that the issuing of these certificates was suspended by the North Gauteng Court in 2009.⁴¹
- How many clearance certificates has the Department issued to employers?
- Investigations began in December 2012 into merging the Child Protection Register and NRSO. The Justice Department reports it has requested the Department of Social Development (DSD) to amend certain provisions of the Children's Act so as to align it with the Sexual Offences Act, 2007.⁴² In 2013 a Task Team was established and was expected to produce a report on the merging of the registers before the end of September 2014.⁴³ What were the recommendations of the task team? How are these recommendations being taken forward by the Justice Department and DSD?

5. ADDITIONAL CHALLENGES

Constitutional challenges to the Sexual Offences Act

The Constitutional Court declared certain provisions in the Sexual Offences Act invalid. In the case of *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* 2013 (12) BCLR 1429 (CC) the Constitutional Court declared that sections 15 and 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (Act) are inconsistent with the Constitution and invalid to the extent that they impose criminal liability on children under the age of 16 years; and in *J v National Director of Public Prosecutions and Another* 2014 (7) BCLR 764 (CC) (6 May 2014) the court found that section 50(2)(a) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 is inconsistent with the Constitution and invalid to the extent that it unjustifiably limits the right of child sex offenders to have their best interests considered of paramount importance.

The Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill [B18-2015], which seeks to address these issues is currently before the Portfolio Committee on Justice and Correctional Services.

⁴¹ Third Annual Implementation Report p58

⁴² Third Annual Implementation Report p16

⁴³ Third Annual Implementation Report p57



Roll-out of Sexual Offences Courts

5.2.1 Problems with the Judicial Matters Second Amendment Act 43 of 2013

The Judicial Matters Second Amendment Act provides the Justice Minister with the authority to designate a court as a Sexual Offence Court for the purpose of hearing sexual offences cases. This is a positive step as it gives these courts the legislative status and identity that was not there previously.

However, the Department reports on practical challenges with certain provisions of the Judicial Matters Second Amendment Act for instance, section 55 A of the Act needs to state unequivocally whether the designation of a sexual offences court refers to the entire court building or to the courtroom dealing exclusively with sexual offences matters within the court building.

Comment/Questions

- How is the Justice Department resolving the practical challenges identified with the Act?
- Civil society groups have expressed concern that the formulation of the Act does not provide direction on the roll-out of sexual offences courts or include minimum standards or resourcing for these courts. Are there functioning sexual offences courts in all provinces?
- The Justice Department reports it has signed an agreement with UNICEF to develop a National Strategic Plan for the Intersectional Establishment and Management of Sexual Offences Courts.⁴⁴ This is to be finalised in 2014/15. Can the Department elaborate on the plan? How will stakeholders be held accountable for standardisation of services?

5.3.2 Budgets and resourcing

The Justice Department in its Medium Term Strategic Framework and Annual Performance Plan (2014/15) indicated that 22 sexual offences courts were to be established in 2013/14. An additional 12 sexual offences courts will be established in 2014/15 and 23 courts in 2015/16. The long-term plan is to establish 106 sexual offences courts over a period of 10 years.

However, both the NPA and Legal Aid South Africa indicated that they are not in a position to appoint additional prosecutors and legal aid practitioners unless additional funding is provided. The NPA has removed all vacant posts from its staff establishment and is unable to fill any posts going forward. It is unclear if it will be able to provide additional prosecutors for new courts such as the dedicated sexual offences courts.

Comment/Questions

- The MATTSO Report made the following recommendations in respect of the re-establishment of sexual offence courts:⁴⁵

⁴⁴ Third Annual Implementation Report p61

⁴⁵ Report of the Ministerial Advisory Task Team on the Adjudication of Sexual Offence Matters (August 2013) <http://www.justice.gov.za/reportfiles/other/2013-sxo-courts-report-aug2013.pdf>



- The Justice Department is advised to secure a dedicated and adequate budget from the National Treasury to realise the speedy establishment of these courts. Furthermore, since the provision of specialised services is cost intensive, political support is required to ensure appropriate budget allocations.
- An investigation must be undertaken to determine the feasibility of merging the various specialised/dedicated victim support services and one-stop centres, like the Thuthuzela Care Centres, the Khuseleka One Stop Centres and the SAPS Family Violence, Child Protection and Sexual Offences Units (FCS) into a model one-stop centre that will function to optimise the performance of sexual offences courts.
- A feeding scheme for child witnesses must be investigated for possible introduction in these courts and be properly costed.

Lack of victim services surveys

A key element of the Sexual Offences Act is to prevent secondary victimisation of victims. Victims of sexual violence should be given a voice in the criminal justice process. Ideally the annual implementation reports should also include feedback obtained through victim services surveys.

Sources

Criminal Law (Sexual Offences and Related Matters) Act 32 of 2007

National Prosecuting Authority Annual Report 2012/13

National Policy Framework on the Management of Sexual Offences (September 2013)

Report of the Ministerial Advisory Task Team on the Adjudication of Sexual Offence Matters (MATTSO) (August 2013) <http://www.justice.gov.za/reportfiles/other/2013-sxo-courts-report-aug2013.pdf>

Third Annual Report on the Co-ordination and Implementation of Activities Relating to the Criminal Law [Sexual Offences and Related Matters] Amendment Act 32 of 2007 (Sexual Offences Act).

Waterhouse S, Rezant B, Townsend L and Nomdo C, Implementation brief management of child sexual offences in courts: Failing systems, broken promises, RAPCAN (April 2014)