

**SECTION27 submission on the  
Criminal Procedure Amendment Bill, B 2 – 2017**

**Submitted to the Department of Justice and Correctional Services**

**8 March 2017**

## Introduction

1. On 9 December 2016, the Department of Justice and Correctional Services (DOJ) released the Criminal Procedure Amendment Bill (Bill). The Bill followed an order handed down by the Constitutional Court in *De vos v Minister of Justice and Constitutional Development & others*,<sup>1</sup> in which the Court declared certain provisions of section 77(6)(a) of the Criminal Procedure Act 51 of 1977 (Act) inconsistent with the Constitution and invalid.

2. The relevant part of the Constitutional Court's order, dated 26 June 2015, reads as follows:

*2. Section 77(6)(a)(i) of the Criminal Procedure Act 51 of 1977 is declared to be inconsistent with the Constitution and invalid to the extent that it provides for:*

*(a) compulsory imprisonment of an adult accused person; and*

*(b) compulsory hospitalisation or imprisonment of children.*

*3. The declaration of invalidity is suspended for a period of 24 months from the date of this judgment in order to allow Parliament to correct the defects in light of this judgment.*

*4. Section 77(6)(a)(ii) of the Criminal Procedure Act 51 of 1977 is declared to be inconsistent with the Constitution and invalid. From the date of this order section 77(6)(a)(ii) is to read as follows:*

*'(ii) where the court finds that the accused has committed an offence other than one contemplated in subparagraph (i) or that he or she has not committed any offence –*

*(aa) be admitted to and detained in an institution stated in the order as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act 17 of 2002;*

*(bb) be released subject to such conditions as the court considers appropriate; or*

*(cc) be released unconditionally.'*

3. SECTION27 appreciates the opportunity to submit comments on the Bill. SECTION27 represented Down Syndrome South Africa (DSSA) as amicus curiae in the proceedings before

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<sup>1</sup> 2015 (2) SACR 217 (CC), hereinafter referred to as "Constitutional Court judgment".

the High Court,<sup>2</sup> in which section 77(6)(a) was declared to be constitutionally invalid. As required by section 167(5) of the Constitution, the order of constitutional invalidity was referred to the Constitutional Court for confirmation.

4. While the Bill seeks to amend several provisions of the Act, in this submission, we address only the proposed amendments to section 77, in line with the DSSA's submissions in the High Court. A copy of our submission is attached as annexure "A".
5. SECTION27 welcomes the steps taken by the DOJ to bring the Act in compliance with the provisions of the Constitution and to protect accused persons with mental illnesses and intellectual disabilities, who are particularly vulnerable groups, when they find themselves in conflict with the criminal justice system.
6. Section 77(6) of the Act implicates several fundamental rights, including the rights to freedom and security of the person,<sup>3</sup> human dignity<sup>4</sup> and equality.<sup>5</sup> As we discuss in further detail below, a decision in terms of section 77(6) may also have an impact on an accused person's right to health.<sup>6</sup>
7. As well as addressing the substance of the proposed amendments, we also highlight certain consequential amendments that will be required to bring other legislation in line with the Act once amended.

#### **Submissions on the proposed amendments to the Act**

8. Overall, we welcome the amendments to the Act in order to bring it in line with the spirit and purport of the Constitution, as well as the rights identified by the Constitutional Court. In particular, we welcome the following:

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<sup>2</sup> *De Vos NO and another v Minister of Justice and Constitutional Development and others* 2015 (1) SACR 18 (WCC).

<sup>3</sup> Section 12 of the Constitution.

<sup>4</sup> Section 10 of the Constitution.

<sup>5</sup> Section 9 of the Constitution.

<sup>6</sup> Section 27 of the Constitution.

- 8.1. The removal of the out-dated term, 'mental defect' in favour of the more appropriate and dignified term, 'intellectual disability' throughout the Act. This is in line with the language adopted by the Constitutional Court.
  - 8.2. The provision for a magistrate's discretion to determine the placement of an accused person who is unable to plead to a serious criminal charge as a result of a mental illness or intellectual disability. As recognised by the Constitutional Court, the existence of this discretion allows a presiding officer to consider all relevant circumstances and ensure that the exercise of its powers under section 77(6)(a) is best suited to the circumstances of the accused, and achieves the appropriate balance between the accused's rights and the protection of the community.
  - 8.3. The elimination of the use of prisons to detain accused persons who are unable to plead to a serious criminal charge as a result of a mental illness or intellectual disability. This is in line with the judgment of the Constitutional Court, which held that imprisonment of an accused person in these circumstances could only possibly be justified by resource constraints, and then only as a temporary measure for as long as those resource constraints exist.<sup>7</sup>
9. We submit, however, that the amendments do not fully achieve the purpose as set out by the Constitutional Court. Its reasons for finding the detention of accused persons in correctional facilities inconsistent with the Constitution were the following:
- 9.1. Detention in prison constitutes a limitation of the rights not to be subjected to cruel, inhuman and degrading punishment and to freedom and security of the person.<sup>8</sup>
  - 9.2. In order to pass constitutional muster, the detention must be for a just cause and follow a fair procedure.<sup>9</sup>
  - 9.3. In these circumstances, the purpose of detention in prison is not to punish; it is to assist the accused in providing care, treatment and rehabilitation.<sup>10</sup>

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<sup>7</sup> Constitutional Court judgment above n 1 at paras 40 – 48.

<sup>8</sup> Id at para 40.

<sup>9</sup> Id.

<sup>10</sup> Id at paras 41 – 42.

- 9.4. Prisons do not have the facilities to provide appropriate treatment and care to accused persons with mental illnesses or intellectual disabilities.<sup>11</sup>
- 9.5. As such, *“the only reason imprisonment may be necessary appears to be due to resource constraints; for example due to the shortage of beds in psychiatric hospitals”*.<sup>12</sup>
- 9.6. Given the obligations arising from the Constitution, and the particular vulnerability of accused persons with mental illnesses and/or intellectual disabilities, imprisonment can only be used as a stop-gap measure in order to protect the public, only if the accused person is likely to cause serious harm to himself or to others.<sup>13</sup>
10. The Court was aware of the discrimination faced by people with mental illnesses and intellectual disabilities in our society. The Court stated the following in regard to detaining them in prisons:

*Further, accused persons with mental illnesses or intellectual disabilities have been historically disadvantaged and unfairly discriminated against. The use of prisons to “house” these vulnerable members of our society perpetuates hurtful and dangerous stereotypes. The right to dignity is not only a basic tenet of our Constitution; it is a value that is central to the interpretation of the section 12 right to freedom and security of the person. Imprisonment reinforces the stigma and marginalisation that people, like the accused in this matter, are subjected to on a routine basis. This impairs the human dignity of persons with mental illnesses or intellectual disabilities. The tenets of our constitution dictate that accused persons, who are not considered dangerous, should not have their freedom curtailed in a manner that is tantamount to inhuman and degrading punishment in a way that impinges on their dignity and breaches their right not to be deprived of their freedom without just cause.*<sup>14</sup>

11. The proposed amendment seeks to address these concerns by providing that a person may be temporarily detained in a correctional health facility of a prison where a bed is not

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<sup>11</sup> Id at para 43.

<sup>12</sup> Id at para 44.

<sup>13</sup> Id at paras 45 – 48.

<sup>14</sup> Id at para 46.

immediately available in a psychiatric hospital if a court is of the opinion “that it is necessary to do so on the grounds that the accused poses a serious danger or threat to him or herself or to members of the public or to any property belonging to him or her or any other person”.

12. We are concerned about the above proposed amendment in three respects:

12.1. First, the imprisonment of accused persons in a correctional health facility in circumstances where the person poses a danger or threat to property.

12.2. Second, the failure to clearly state which government institution is responsible for establishing the availability of a bed in a psychiatric facility and for the transfer thereafter.

12.3. Third, the severe shortage of mental health care services, including beds in psychiatric facilities, for accused persons with mental illnesses means that it is unlikely that there would ever be space in a psychiatric hospital for a person with an intellectual disability, effectively sentencing these accused to life in a correctional facility.

Imprisonment of accused persons in a correctional health facility in circumstances where the person poses a danger or threat to *property*

13. Detention in a correctional health facility of a prison is tantamount to imprisonment. A person so detained will have the same restrictions on his or her liberty and freedom as any prisoner who is located in that facility following a criminal conviction. According to the Constitutional Court, and in order to strike the appropriate balance between the rights of the accused and the protection of the community, *‘imprisonment is only viable as a “stop-gap” measure if the presiding officer is of the opinion that the State patient is likely to cause serious harm to himself or others.’* These instances are permissible as they serve the constitutionally mandated purpose of protecting the public’.<sup>15</sup> The Court, correctly in our submission, made no mention of *‘danger or threat’* to property.

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<sup>15</sup> Id at para 47.

14. In its decision in *Carmichele v Minister of Safety and Security*<sup>16</sup> the Constitutional Court noted the special obligations on the state to respect, protect, promote and fulfil the right of the public to safety and security. The Court highlighted the obligations owed to women in particular, as a specially vulnerable group, holding that “*few things can be more important to women than the freedom from the threat of sexual violence.*”<sup>17</sup>
15. The Court made these comments in relation to a claim for damages arising from the brutal attack of the applicant, Ms Carmichele, by an accused awaiting trial for the attempted rape of another person. In particular, Ms Carmichele argued that in supporting the accused’s application for bail despite a history of sexual violence, the police and prosecutor had breached a duty of care to keep the community, and particularly women in the community, safe.
16. The Court’s discussion of these obligations in that context make clear why, in certain circumstances, detention may be justifiable to protect the personal safety of members of the public. In other words, the deprivation of the accused’s liberty would be justified in order to protect the freedom and security of members of the community.
17. We submit, however, that depriving an accused person of his or her liberty in order to protect property would not be so justified.
18. The placement in a correctional health facility of a prison should be limited to cases in which the accused ‘poses a serious danger or threat to him or herself or to members of the public’ and where, on a balance of the rights to dignity, equality and freedom and security of the person, detention is justified.

Responsibility for establishing the availability of a bed in a psychiatric facility and for the subsequent transfer

19. The proposed amendment does not state who is responsible for finding and transferring the accused to a psychiatric hospital when a bed becomes available. Is it the responsibility of the correctional facility detaining the accused; the psychiatric hospital whose beds become

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<sup>16</sup> 2001 (4) SA 938 (CC).

<sup>17</sup> Id at para 62.

available; the DOJ; the magistrate who made the order detaining the accused; the Department of Health of the relevant province; the accused's representative?

20. The lack of clarity in this regard could result in the indefinite detention of accused persons in this position in prisons, which would undermine the Court's finding that detention in a prison can only be justified as a stop-gap measure for as long as there is no available bed in a psychiatric hospital. In our view, the mental health authorities within the provincial departments should have the responsibility and must work in conjunction with the DOJ to ensure that an accused person is transferred to an available bed in a health facility within the province as soon as possible.
21. SECTION 27 recommends that this be set out clearly in the Bill, as without clear responsibility, there is a risk that those who are mentally ill or have an intellectual disability and who are detained on a "temporary" basis in a correctional facility are likely to remain in an untenable position indefinitely.

#### The shortage of beds in psychiatric facilities

22. As we discussed above, the purpose of the amendment to section 77(6)(a)(i) is to make detention in prison a temporary measure, pending the availability of space in a psychiatric hospital. In the above section, we highlighted that without clarity as to who is responsible for the relevant assessments and determinations, there is a risk that an accused person could be held in detention indefinitely. This would undermine the decision of the Constitutional Court.
23. The severe shortage of beds in psychiatric facilities also creates the risk that accused persons with mental illnesses or intellectual disabilities will be detained in prisons indefinitely. In this regard we draw your attention to the following:
  - 23.1. A report published by the Rural Mental Health Campaign, a copy of which is attached as annexure "B", records that according to the World Health Organisation, up to 75% of people who require mental health care services do not receive them. Indeed, an estimated 28% of South Africans with severe mental health disorders and 24% of mild to moderate mental health disorders receive treatment.

- 23.2. In the National Mental Health Policy Framework and Strategic Plan 2013 – 2020, a copy of which is attached as annexure “C”, the National Department of Health records that mental health care facilities are underfunded and under-resourced, despite neuropsychiatric disorders being the third highest contributor to the burden of disease in South Africa.
- 23.3. There are only 1.2 psychiatrists for every 100 000 people in the public sector health system. Against this background, it is not surprising that only 16% of people requiring mental health care services receive them. There are 18 beds in psychiatric health care facilities for every 100 000 people in the public health system, with the number of beds being decreased rather than increased. These statistics are recorded in the attached journal article marked annexure “D”.
24. The shortage of mental health care facilities has also been highlighted through the ongoing tragedy relating to the discharge of more than 1 300 mental health care users from the Life Esidimeni mental health care facilities. In litigation in 2015 that sought to interdict the discharge of these mental health care users and placement in alternative facilities, Dr Mvuyiso Talatala, the President of the South African Society of Psychiatrists, cautioned as follows:
- 24.1. The mental health care users could not be discharged to acute mental health care facilities because these facilities are already unable to discharge mental health care users fast enough to accommodate new admissions. This is even worse in the forensic psychiatry system, which deals with mentally ill accused persons, and is, according to Dr Talatala *“already overloaded with patients waiting in prison for beds.”*
- 24.2. Later in his affidavit, Dr Talatala noted that psychiatric hospitals in both the public and private sectors are ill-equipped to meet the needs of mental health care users. In many cases, there is simply not enough space to accommodate people requiring mental health care services.
25. A copy of Dr Talatala’s affidavit is attached marked annexure “E”.
26. With the reality of the availability of mental health care services in mind, we submit that it is clear that using detention as a temporary solution pending the availability of a bed in a

psychiatric hospital is, with respect, unrealistic. It seems likely that accused persons who are placed in detention as a temporary measure pending the availability of space in a psychiatric hospital could be detained indefinitely, thus undermining the judgment of the Constitutional Court.

27. We therefore submit that this option should be removed from the options available to the presiding officer in terms of section 77(6)(a)(i).

28. Alternatively, we submit that there should be a time limit of 30 days imposed, so that an accused person with a mental illness or intellectual disability cannot be held for longer than this period.

**Recommendations for further law reform**

*Mental health terminology in existing legislation*

29. The Constitutional Court used the term ‘intellectual disability’ throughout its judgment rather than the out-dated term ‘mental defect’. SECTION27 made several arguments in the High Court, of particular relevance was the evidence concerning the use of the out-dated term, “mental defect” and recommending that it be replaced with the more appropriate term, “intellectual disability”. We acknowledge that this has been embraced in the Bill’s proposed amendments.

30. In order to extend the commitment of the state to respect, protect, promote and fulfil the rights of people with mental illnesses and intellectual disabilities, SECTION27 recommends that the Department of Justice and Correctional Services and other relevant government departments remove the terms ‘mental defect’ and ‘mentally disabled’ from other existing legislation, and replace it with ‘intellectual disability’ as is done in this amendment, including in respect of the following:

	<b>Statute</b>	<b>Provision</b>	<b>Proposed Amendment</b>
<b>1.</b>	<b>Health Professions Act 56 of 1974</b>	S 3(f) - objects and functions of Health Professions Council S 16 - deals with education,	Amend ‘mental defect’ to ‘intellectual disability’

		training and registration	
2.	<b>Medical Schemes Act 131 of 1998</b>	S 1 definition of 'relevant health service'	Amend mental defect to 'intellectual disability'
3.	<b>Allied Health Professions Act 63 of 1982</b>	S 16(1) - Allied professions S 32A offences and penalties	Amend mental defect to 'intellectual disability'
4.	<b>Criminal Law Amendment Act 32 of 2007</b>	S 50 (2) & 51 - reference to sections 77 & 78 of Criminal Procedure Act	Amend mental defect to 'intellectual disability'
5.	<b>Child Justice Act 75 of 2008</b>	S 48(5)(b) & Schedule 5 - reference to sections 77 & 78 of Criminal Procedure Act	Amend 'mental defect' to 'intellectual disability'
		Schedule 3, item 12	Amend 'mentally disabled' to 'person with an intellectual disability' or 'intellectually disabled'
6.	<b>Traditional Health Practitioners Act 22 of 2007</b>	S 43(1)(f) - false representations, false registration and impersonation	Amend 'mental defect' to 'intellectual disability'
7.	<b>Occupational Diseases in Mines and Works Act 78 of 1973</b>	S 133 - Service gratuity payable to certain persons	Amend 'mental defect' to 'intellectual disability'
8.	<b>Childrens Act 38 of 2005</b>	S 120 - reference to sections 77 & 78 of Criminal Procedure Act Reg 45(2)(ii) of General Regulations Regarding Children	Amend 'mental defect' to 'intellectual disability'
9.	<b>Choice on Termination of Pregnancy Act 92 of 1996</b>	S5(4)(a) – consent	Amend 'severe mental disability' to 'severe intellectual disability'

31. We submit that a thorough audit should be done to ensure the uniform use of the more dignified terms.

*Recommendations for further law reform in respect of people with mental illness or intellectual disability holding office in statutory bodies*

32. Some of our laws continue to treat people with mental illness and/or intellectual disability as incapable of carrying out certain duties and responsibilities simply by virtue of their mental health status. The Constitutional Court judgment held that South Africa's international law obligations reinforce our constitutional obligations to ensure that the rights and freedoms of persons with disabilities are promoted. These include the United Nations Convention on the Rights of Persons with Disabilities.<sup>18</sup> At paragraph 30 the Court stated in part:

*it is clear from article 14 that one cannot remove person with mental illnesses or intellectual disabilities from society for the mere fact that they have mental illnesses or intellectual disabilities.*

33. The Court also asked whether there is a rational connection between the deprivation of liberty and the objective to treat and care for the accused as well as to secure the safety of the accused in relation to the fair treatment of people with mental illnesses and intellectual disabilities when they come in conflict with the law. In our view, the analysis should apply in relation to those who serve in positions of trust in statutory bodies. If a person who has a mental illness or intellectual disability is capable of managing the affairs of a statutory body, then the reason for their removal is not rationally connected to the good governance purpose. The disqualification or removal may impair the individual's dignity and right to equality.

34. The statute books frequently disqualify or remove people from office on the grounds that the person is mentally ill or intellectually disabled, having little regard to their ability to carry out the functions and responsibilities of that office.

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<sup>18</sup> At paragraph 29.

- 34.1. Traditional Health Practitioners Act 22 of 2007 provides that a person serving on the Traditional Health Council must vacate his or her office if he or she is diagnosed as having a mental illness or becomes a mental health care user as defined in section 1 of the Mental Health Care Act.<sup>19</sup> The Traditional Health Practitioners Act goes on to state that any person in the same position is automatically disqualified from serving on its Council.<sup>20</sup>
- 34.2. The National Health Act requires a person sitting on the Statutory Health Professional Councils to vacate his or her office if 'he or she becomes mentally ill to such a degree that it is necessary that he or she be detained, supervised or controlled'.<sup>21</sup>
- 34.3. The National Arts Council requires that a person vacate his or her office if he or she 'is according to law detained as a mentally ill person'.<sup>22</sup>
- 34.4. Similarly, the National Film and Video Foundation Act 73 of 1997 provides that a person who 'is according to law detained as a mentally ill person' shall vacate his or her office.
- 34.5. A member of the South African Pharmacy Council must vacate his or her office if 'he becomes a patient as defined in section 1 of the Mental Health Act, 1973 (Act No. 18 of 1973)' (this refers to the legislation superseded by the Mental Health Care Act 17 of 2002).
- 34.6. The Allied Health Professions Act takes a more balanced approach. Section 30 provides that a person shall be restricted or suspended from practise when the Council determines that the person:

*has become mentally or physically disabled to such an extent that it would be detrimental to the public interest to allow him to continue to practise any profession in respect of which he is registered or to perform any act specially pertaining to any profession in respect of which he is registered'.*

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<sup>19</sup> Section 8 of the Traditional Practitioners Act.

<sup>20</sup> Section 9 of the Traditional Practitioners Act.

<sup>21</sup> Section 50(1) (3)( iii) of the National Health Act.

<sup>22</sup> Section 5(3)(b) of the National Arts Council Act 56 of 1997.

35. SECTION27 recommends that the DOJ conducts a comprehensive audit of legislation that automatically disqualifies people with mental illnesses and intellectual disabilities from holding office in governance structures of statutory bodies. While we recognise that in some circumstances it may be justified to exclude people with mental illnesses and intellectual disabilities from holding office in legislation, this is not always the case. A blanket exclusion is therefore an overbroad encroachment on the rights to dignity and equality, and should be replaced with a more qualitative approach.

## **Conclusion**

36. SECTION27 thanks the DOJ for the opportunity to make these submissions. Please contact Umunyana Rugege at [rugege@section27.org.za](mailto:rugege@section27.org.za) or 011 356 4120 with any questions.