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Submission

to the

The Director-General: 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)**

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1. Introduction

1.1. 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.

1.2. CALs operates across a range of programs including: rule of law, business and human rights, environmental justice, basic services, and gender. A specific focus of the gender program is the interrelation of violence and gender with other rights in the Bill of Rights.

1.3. Historically CALs has engaged in gendered issues through numerous submissions to parliament. Some of CALs' submissions include submission to the Department of Women on the United Nations, Convention on the Elimination of Discrimination Against Women (CEDAW)¹, the Speaker of the National Assembly on the Choice on Termination of Pregnancy Amendment Draft Bill², as well as the previous call for comments on the Draft Regulations to the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ('SORMA') made in 2015.³

¹ <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/CALS%20submission%20CEDAW%20Final-Oct%202015.pdf>.

² <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/gender/CALS%20Submissions%20on%20the%20Termination%20of%20Pregnancy%20Amendment%20Bill%20.pdf>.

³ <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/Sexual%20Offences%20Court%20November%202015.pdf>.

1.4. In light of the above CALS feels it is well placed to participate in the dialogue around the Draft Regulations relating to SORMA and welcomes the opportunity to submit comments on the Draft Regulations in response to a call by the Director-General of the Department of Justice and Constitutional Development.

2. Reflections on specific regulations of the Draft Regulations

2.1. CALS would like to take this opportunity to commend the Department of Justice and Constitutional Development on its inclusion of many suggestions made by individuals and organisations dealing with gender based violence in the previous round of comments on the Draft Regulations of 2015.

2.2. In what follows CALS will set out the regulations of the Draft Regulations which we submit require further possible reflection, whilst taking into consideration the Department's call to have regard to current financial constraints.

2.2.1. Regulation 1 – Definitions

2.2.1.1. **“Court preparation officer”** – the definition of a court preparation officer is described in the Draft Regulations as ‘the incumbent of a post of court preparation officer’, this is a circular definition and is rendered meaningless as one cannot define something by using it to define itself. It is thus submitted that the definition must be clear and unambiguous and avoid circularity.

2.2.2. Regulation 3(2)

2.2.2.1. This regulation deals with the capability of an established court to deal with a sexual offence when it ‘does not comply

with any of the requirements' referred to at regulation 3(1). Two issues arise from this regulation. The first is whether those courts that comply with some of the requirements set out in regulation 3(1) may proceed with sexual offence matters in the absence of complying with all requirements? The wording of regulation 3(2) excludes these cases by referring only to those courts not complying 'with **any** of the requirements'. The second issue that arises is the clarity around the wording of this regulation in relation to when a court may proceed with hearing a sexual offence matter. As it stands the regulation states that a court not complying with any requirements of regulation 3(1) may hear a sexual offence matter pending the outcome of the steps being taken in regulation 3(4). The steps referred to in regulation 3(4) are that the functionary, person or institution in which a report has been made relating to the non-compliance with the requirements, must take immediate steps to ensure compliance. The issue with this is that it is unclear whether 'taking immediate steps' to comply is the requirement under regulation 3(2) or alternatively as regulation 3(2) states one must look at the outcome of the steps referred to in regulation 3(4). If the latter is the requirement, as it appears that regulation 3(2) implies, then this would mean that either the requirements of regulation 3(1) have been met or they have not, and since the regulation does not state that 'pending the **positive** outcome' of the steps referred to in regulation 3(4) two problematic readings of this regulation emerge. The first is that if the outcome of the steps taken in regulation 3(4) is positive and all requirements have been met then the court would not fall under regulation 3(2) and could continue to hear sexual offences as they requirements

of regulation 3(1) would be met. This means that regulation 3(2) truly can be read to state that all courts must comply with regulation 3(1) requirements. Yet, the second possible meaning is that it would be sufficient for the steps to have been initiated yet the requirements have still not been met. This would then allow for courts to proceed without complying with any of the requirements of regulation 3(1) so long as the steps to ensure compliance have been completed. The question is whether steps to ensure compliance will result in actual compliance and if actual compliance should be the aim of the regulation. An example for clarity is that if an individual under regulation 3(4) is required to procure the services of a technician to fix a microphone in the court and takes immediate steps to contact a technician yet the technician would not be available for two weeks, would this be considered as taking steps to ensure compliance, or would actual compliance be required? Furthermore, would the immediacy attach to the steps taken to ensure compliance or to the actual compliance? The example above shows that steps may be taken immediately yet actual compliance can be delayed and will have dire effects on the case.

2.2.3. **Regulation 3(4)**

2.2.3.1. This regulation requires each functionary, person or institution to whom non-compliance is reported to take immediate steps to ensure compliance with the specific requirement in question. A problem arises when considering the wording of regulation 3(2) in the case where courts that do not comply with any of the requirements can hear a

sexual offence matter if the requirements of 3(4) are met. Due to the problematic wording of regulation 3(3) by referring to courts which do not comply with **any** of the requirements of regulation 3(1), the question is whether these courts can only hear a sexual offence matter once **all** the persons mentioned in regulation 3(4) have followed steps to ensure compliance with **all** the requirements of regulation 1? If one individual has failed to act will the court be barred from hearing a sexual offence case? This regulation thus requires further clarity.

2.2.4. **Regulation 4(a)**

2.2.4.1. Regulation 4(a) reads that a waiting area for child complainants must have the facilities as set out in regulation 10. There is an issue of consistency when one refers to regulation 10(1)(a) as it states that waiting rooms must be furnished in such a manner aimed to set 'a complainant and witness at ease'. It must be made clear whether waiting areas for children include both child complainants and child witnesses or as regulation 4(a) states only child complainants.

2.2.5. **Regulation 5**

2.2.5.1. Regulation 5 is a much needed regulation in achieving the aim to decrease possible secondary traumatisation of complainants in sexual offence matters yet understandably due to financial limitations this requires progressive realisation. However, interim measures must be taken to deal with the possible secondary traumatisation a complainant

may experience in encountering her accused in the corridors and restroom facilities of a court. This thus also extends to the need for a waiting room for both child and adult complainants and thus regulation 10. In our experience in cases where the accused has been granted bail and there is no allocated waiting room for the complainant (where this includes teenage complainants who are not accommodated in the children's waiting area) the complainant and accused are likely to encounter each other in the corridors or restrooms of the court. Interim measures must be made as progressive realisation of these regulations will take time, as they require infrastructural changes in many instances. A waiting area of some form and a bathroom separated from the public facilities need to be mandatory in courts that deal with sexual offences, as the psychological and physical well-being of the complainant is paramount for achieving strong testimony and thus achieving convictions and furthermore the complainant in sexual offence cases has right to protection which is required under regulation 4 of the Service Charter and ultimately under regulation 12 of the Constitution.⁴

2.2.6. Regulation 18

2.2.6.1. Intersex anatomical dolls must be included in the set of anatomical dolls available at courts. There must be research into the preferred representation of intersex individuals in the form of anatomical dolls and then the inclusion of such in the set of anatomical dolls available at courts. The lack of such

⁴ Service Charter for Victims for Victims of Crime in South Africa. Available at <http://www.justice.gov.za/VC/docs/vc/vc-eng.pdf>.

dolls to represent either complainants or the accused is problematic as it may lead to the complainant being confused due to this lack of representation. Excluding such dolls can have the effect of further marginalising intersex complainants.

2.2.6.2. There must be research into the preferred representation of transgender individuals in the form of anatomical dolls and then the inclusion of such in the set of anatomical dolls available at courts. The failure to represent transgender individuals as anatomical dolls becomes a hurdle for the child complainant to represent what had happened to her during her offence either by being unable to properly represent how she identifies herself, if she is transgender individual, or the accused if that person is transgender.

2.2.6.3. The unintentional consequence of not including a transgender and intersex anatomical dolls in the sets is that there is the erasing of transgender and intersex individuals, both victims and accused persons, from public consciousness and public acceptance that these individuals are also victims of sexual violence and thus the further exclusion of transgender and intersex individuals from what is perceived as normative in society.

2.2.7. **Regulation 21(3)**

2.2.7.1. Regulation 21(3) states that psychological services for complainants and witnesses must be provided by a social worker in the employment of the Department of Social Development. Psychological support for both complainants

and victims in sexual offences cases is extremely important and the effort to provide such is commended, however we feel that although the fields of social work and psychology are related, they are not identical and thus there is a need for individuals trained in psychology to provide psychological services.

2.2.8. Regulation 21(10)

2.2.8.1. Regulation 21(1) states that '[t]he National Director of Public Prosecutions or any other person delegated by him or her, must ensure that the persons involved in the criminal justice system' are aware of the criteria set out in sections 10(a) to (e). It is not clear who 'persons involved in the criminal justice system' would include, would it encompass all staff such as stenographers, court clerks and court orderlies or adopt less expansive definition? Further explanation of who these individuals are is needed for this section to be clear and unambiguous.

2.2.9. Regulation 45(2) and 45(4)

2.2.9.1. Regulations 45(2) and 45(4) relate to the prosecutorial decision not to prosecute a sexual offence. Regulation 45(4) states that no sexual offence charge may be withdrawn without 'consideration of the consequences if it is withdrawn'. A non-exhaustive list of considerations should be given to prosecutors providing basic considerations which should be considered before coming to a decision on whether or not to proceed with prosecution. Of importance is that the 'winability' of the case should not be of paramount

importance in such a decision, and an exercise of weighing up all factors should take place, for example the likelihood of success, the right of the victim to justice and the public need to have accountability for sexual offences in a country such as South Africa where there is a scourge of such offences should all be considered and balanced in a prosecutorial decision on whether to proceed with prosecution.

3. Further recommendations

3.1. Ratios of staff to complainant's, equipment, facilities and other staff members

3.1.1. The ratio of certain staff to equipment and facilities available as well as other staff members is crucial in operating an effective victim-centered sexual offences court. For example, regulation 7 deals with the duty of court preparation officers to accompany complainants to restrooms if there is no private restroom available. Although this is extremely important the issue that arises is the actual number of court preparation officers in relation to complainants and the duties they are required to perform. If there is only one court preparation officer per sexual offence court the likelihood of this individual being able to perform all her duties is limited. One must bear in mind that the regulations require these officers complete numerous tasks yet with the number of sexual offence cases being heard in the court each day and the need for preparation of each complainant, one court preparation officer per sexual offences court is not sufficient and is likely to result in burn out of the individual and/or result in the individual not being able to give her full attention and effort to

every task. The example of court preparation officers is but one that highlights the need to consider the ratios of staff to equipment, facilities, and other staff members and look at the expected workload and duties of these individuals in comparison to the number of cases that are heard in sexual offences cases and the number of hours required to perform the required tasks.