SUBMISSION

CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT, 2007 (ACT NO. 32 OF 2007): REGULATIONS RELATING TO SEXUAL OFFENCES COURTS

AND

DRAFT NATIONAL STRATEGIC IMPLEMENTATION PLAN FOR THE RE-ESTABLISHMENT OF SEXUAL OFFENCES COURTS

Members of the Shukumisa Campaign include: Agisanang Domestic Abuse Prevention and Training (ADAPT), AIDS Legal Network, Childline SA, CINDI Network, Community Law Centre (UWC), Coping Centre, Dept of Social Responsibility - Anglican Church, Ekupholeni Mental Health and Trauma, Epilepsy SA, FAMSA Pietermaritzburg, GRIP, Ikhwezi Womens Support Centre, WISER Wits University, Justice and Women, Legal Resource Centre, Lethabong, Lifeline Durban, Lifeline PMB, Limpopo Legal Advice Centre, Masimanyane Women's Support Centre, MOSAIC, NISAA, Peddie WSC, POWA, Project Empower, RAPCAN, Rape Crisis Cape Town Trust, Rape Crisis Port Elizabeth, REMMOHO Women's Organisation, SANAC Women's Sector/ WC Network on Violence Against Women, Sexual Assault Clinic, Sonke Gender Justice, SWEAT, Teddy Bear Clinic, Thohoyandou Victim Empowerment Project, Thusanang Advice Centre, Tipfuxeni, Triangle Project, Tshwaranang Legal Advocacy Centre, Gender Health and Justice Research Unit (UCT), Voice Movement Therapy Eastern Cape, Women and Men Against Child Abuse, Women on Farms Project, Women's Legal Centre.

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1. About the Shukumisa Campaign

The Shukumisa Campaign welcomes the opportunity to make submission on these critical regulations that will operationalise and set norms and standards for Sexual Offences Courts. The Shukumisa Campaign is a national coalition of organisations working to prevent and address sexual offences. The organisations in the Campaign provide counselling, court support, training to service providers, legal services, research and advocacy in the area of sexual offences. We therefore have a strong interest in the development and implementation of the law, policies and services in relation to sexual offences.

This submission was compiled with substantive inputs by a range of members of the Shukumisa Campaign.

2. Introduction

We recognise the commitment of government and in particular the Department of Justice (DoJ) and the Parliamentary Committee on Justice to develop the legal framework and service models to address sexual offences over the past 15 years. This has resulted in a framework and models with the potential to address many of the underlying issues that bedevil access to justice for survivors of sexual violence. However, to date, the impact of these developments is not evident. Survivors and organisations working to support them in the criminal justice system continue to report alarming rates of secondary victimisation, and the reporting to conviction rates appear to be unchanged over the past 15 years.

The Shukumisa Campaign assesses that there are two primary reasons for this. The first has been the lack of investment in a national plan to ensure court and provincial leadership to implement and ensure staff accountability to the standards established in the framework.

The second relates to failure to commit resources to ensure their implementation at scale. We recognise that this failure is contextualised by budget constraints and competing priorities. However

we believe that the profound impact on individuals and society necessitates that spending on sexual offences be prioritised to signal the state's commitment to effectively address this pervasive violation of women's rights and to realise the vision of the legal framework.

The draft regulations to the Judicial Matters Second Amendment Act 43 of 2013, read with the draft National Strategic Implementation Plan (NSIP) can ensure scaling up of effective models that have been shown to work in the past by improving convictions and reducing secondary victimisation.

We commend the department for drafting these regulations and the Strategic Implementation Plan, which in the main, are responsive to the infrastructural and systemic barriers to justice faced by survivors. They clearly show that the National Department knows what can be done, however they are not as clear at indicating how this will be done with the limited resources allocated.

3. CHAPTER II: REQUIREMENTS FOR A DESIGNATED SEXUAL OFFENCE COURT

3.1 Enforceability

We are generally satisfied with the mandatory language used in **Chapter II, Regulation 3** of the draft regulations. The repeated use of the word "must" makes it clear that sexual offences courts (SOCs) are absolutely to comply with prescribed infrastructure requirements, victim care, and service standards.

However, we are concerned about the future practical impact of **subregulation (2),** which reads as follows:

> "*Subregulation (1) does not preclude a designated court from dealing with a sexual offences case if it, after its designation, does not comply with any of the basic requirements referred to in subregulation (1)*."

The inclusion of this subregulation appears self-defeating. In practice it would constitute justification for non-compliance with the norms and standards these very regulations seek to set. In the schema of

the Chapter, it is stated on the one hand that a designated SOC "must" comply with certain standards, but at the same time condones non-compliance by allowing non-compliant designated courts to hear sexual offences while still being designated as sexual offence courts.

3.2 Ensuring uniform quality services

Shukumisa Campaign members repeatedly explain that the strongest indicator of successful services in any court, designated or otherwise, is quality on-site leadership and management staff who understand the psycho-social context of sexual offences as well as the legal framework, and will effectively hold personnel accountable to these standards. Commitment at this level invariably affects the services rendered by all personnel at the court.

Thus while we support the plan to implement local, provincial and national intersectoral stakeholder coordination structures, and the requirements in the plan to improve monitoring and evaluation systems, we believe that a national programme to strengthen and build the capacity of court-level management and accountability is essential and should be included in the NSIP as a priority.

3.3 Rollout of SOCs and standards for non-designated courts

The draft NSIP establishes the rollout plan for SOCs, indicating that 57 designated courts will be established by March 2016 and a further 106 designated courts by March 2026.

We respect the Department's commitment to rolling out good quality services for sexual offences. The proposed pace of roll out is, however, concerning. We are of the view that the rollout should be prioritised within a five and not ten year period.

The standards described in the regulations would only apply to designated courts, however the slow pace of rollout proposed means that many sexual offence survivors will continue to be exposed to the low standards generally applied to these cases.

As a result we are of the view that the regulations must include some basic minimum standards for non-designated courts that hear these cases. These basic minimums for non-designated sexual

offences courts must include management standards, intersectoral stakeholder forums, training standards, intermediaries and separate waiting rooms.

3.4 Complaints mechanisms

We are encouraged by approach adopted by the draft regulations, which places a responsibility on functionaries and persons employed at SOCs to report any non-compliance with the regulations. However, any monitoring and reporting mechanisms should be extended to members of the public, in particularly complainants and witnesses, who are best placed to provide feedback and criticism on the efficacy and manner which the SOCs deliver services.

There is also no clarity in the draft regulations regarding the exact functionary to whom non-compliance should be reported. This, in practice, will cause confusion and a lack of accountability. Given the importance of on-going compliance and accountability in this regard, and the assessment of such compliance by those working in, and making use of the SOC system, we believe that **subregulation 3(4)** could be stated in stronger and less vague terms. The subregulation states that:

> *"The functionary, person or institution receiving the report referred to in subregulation (3), must take immediate steps to ensure compliance with the requirement in question."*

However, there is no indication what, practically, would constitute "steps" to ensure compliance. More detail is required here to operationalise the true aim of this subregulation, which is practical action to remedy non-compliance.

4. CHAPTER III: FACILITIES AT DESIGNATED COURT

With regards to the basic facilities for which **Regulation 4** provides, we make the following comments:

Subregulation		Comments
1(a)	A waiting room for child complainants as provided for in regulation 7;	It is our submission that regulations should stipulate for separate waiting room facilities for children and adult complainants.
1(b)	a waiting room for adult complainants as provided for in regulation 7;	
1(f)	restrooms for complainants;	We believe that the restrooms of SOCs should be separate from the restrooms used by the rest of court building.
1(m)	an office for the case manager of a Thuthuzela Care Centre .	We wish to alert you to the well-documented problem of old court buildings that do not have room to accommodate such an office, and where renovation is not being effected. Some thought on how to address this challenge is required. If left as is, the implementation of this particular subregulation will be affected.
(2)(a)	The facilities referred to in subregulation (1)(a), (c), (d), (e), (f) and and (k) must be child-friendly .	We wish to point out that the term “child-friendly” is not currently defined in the regulations. This leaves the term open to interpretation. It is in the best interest of children who are to become end users of SOCs that this term be defined at the outset, and included in Chapter I under definitions, thus providing an objective indicator.
(4)	The court manager must ensure that water is available for the complainant and the complainant's witnesses during court hours at the facilities referred to in subregulation	Past submissions have raised the problem of hungry child complainants who are expected to testify in court. Hunger exacerbates the already-difficult task of testifying in court, and can result in poor testimony which jeopardises a successful prosecution.

	(1)(a) to (e) and (h).	Provision should be made for some access to basic nourishment for child victims and witnesses who are due to consult with prosecutors, or who are due to appear in court.

Our brief comments in respect of **Regulation 7** are as follows:

Subregulation		**Comments**
(2)	The waiting rooms referred to in subregulation (1) must be designed, furnished and decorated in a manner taking into account the following: (a) The different ages of child and adult complainants ;	As already indicated, the ideal approach would be to expressly segregate the waiting rooms of child and adult complainants.

In respect of **Regulation 10**, we are encouraged by the provision for informal arrangement of the court for the purposes of setting witnesses at ease as per **subregulation (1)(a).** However, it is not clear how this will implemented consistency across all designated courts in the absence of some guidance on what constitutes "informal" arrangement. This similarly applies to **subregulation (1)(c),** which attempts to provide some measure of guidance on the placement of the witness dock, but perhaps fails to take into account that court rooms differ in dimensions and floor space. Some further detail is required here, and sketch examples might be of assistance to functionaries tasked with the implementation of these regulations.

5. CHAPTER IV: DEVICES, EQUIPMENT AND TOOLS AVAILABLE AT COURT

We are pleased with the level of detail outlined in the Regulations contained in this Chapter, and the extent to which especially the needs of child witnesses have been taken into account.

We do, however, wish to point out that **subregulation (4)(a),** which states that the National Director of Public Prosecutions must ensure that a prosecutor at a designated court has a set of anatomically-correct dolls, and that he or she has received training in the use thereof, would require not only training but *specialist* training. Such specialised training processes should ideally be guided by specialised social workers.

6. CHAPTER V: SERVICES AVAILABLE AT DESIGNATED COURT

Our comments on the Regulations contained in this Chapter are outlined in the table below:

Subregulation		Comments
14(9)	A court preparation officer must facilitate the making of an impact statement by a complainant for use by the prosecutor.	Victim impact statements have been critical in Lesbian, Gay, Bi-sexual, Transgender and Intersex (LGBTI) related hate crimes in particular, including so-called "corrective rape" of lesbian and bisexual women. Such cases of sexual violence motivated by prejudice regarding a victim's sexual orientation or gender identity are widely acknowledged in existing research as functioning as "message crimes" in that these crimes communicate intolerance to all LGBTI persons in the broader community in which the offence was committed, thus eroding LGBTI persons' sense of safety

		and belonging. Members of the Campaign report that impact statements are vital in demonstrating this effect during sentencing.
16(1)	The forensic social worker at a police station serving a designated court , must provide trauma counselling services to a complainant or any other witness after the incident is reported and during the investigation of the case.	It is unclear whether such forensic social workers are currently staffing each and every police station, and which designated courts they would serve. It is not known how this service would be performed practically, and where it is envisaged counselling will take place if the social workers are stationed at police stations. It is also not clear whether it would be mandatory for each police station to have a forensic social worker.
16(2)	A specially trained investigating officer from a FSC Unit at a police station serving a designated court must ensure that trauma counselling services are available for a complainant or any other witness after the incident is reported and during the investigation of the case if no forensic social worker at a police station serving a designated court, if no forensic social worker has been	We suggest that the Department of Social Development (DSD) should bear the responsibility of making services available, on request by police officers.

	appointed at such police station.	
16(3)	For the purposes of subregulation (2), the Director-General of Social Development must compile a list of persons or institutions in the Republic providing trauma counselling services to complainants of sexual offences and other witnesses which is submitted to the National Commissioner.	It may not be useful to task the Director General of Social Development with simply compiling a list of service providers, but to task other departments with ensuring the availability of counselling services. Regardless of what department is ultimately made responsible, and regardless of the fact that DSD is best placed to ensure access to services, we must remain cognisant of the fact that counselling services often are simply not plentiful enough. We suggest that the regulations make provision for practical steps that can be taken when counselling services are not immediately obtainable. All counsellors must also be properly trained and sensitised to the needs of LGBTI persons, to avoid secondary victimisation and discrimination.
16(8)	The National Director of Public Prosecutions must ensure that there is consistency in the services provided at the Thuthuzela Care Centres	We would encourage the expansion of this subregulation to provide not only for consistency of services, but their standardisation across Centres. This will ensure equality in service delivery and the treatment of complainants, regardless of geographical location (urban/rural).
20	Information — (a) in all the official languages of South Africa; and	We suggest the addition of Braille for the use of sight-impaired persons.

	(b) in South African Sign Language, on court procedures must be available at a designated court in a format which addresses the needs of all persons, including persons with disabilities.	We also suggest that the same emphasis be placed on the availability of information about medical and psycho-social services for complainants and their families. Further to this, as elaborated on in the subsequent section of our submission, the omission of LGBTI persons as a group experiencing high levels of sexual violence is of concern, and we suggest that subregulation 20 make specific mention of information that is inclusive of LGBTI people and concerns, and not restricted to a heteronormative model. This can include information about accessible services through specific state initiatives and civil society organisations.

We wish to commend the Department on the inclusion of the **Regulation 20**, pertaining to the witness complaints mechanism. This is a positive step towards accountability, and excellence in service delivery. Such complaints mechanisms would also go a long way to restoring and maintaining faith in the criminal justice system. However, in order to be effective it is essential that such mechanisms must be truly responsive, and provide feedback to complainants. A frequent complaint by clients who make use of existing mechanisms to lay complaints regarding service delivery in the context of the criminal justice system, is that after they have lodged a complaint, they simply "never hear anything again." This renders a complaints mechanism purely superficial and aesthetic in nature, and complainants will soon become disillusioned. This is dealt with above, under "Complaints Mechanisms".

7. CHAPTER VI: TRAINING OF PERSONS INVOLVED IN TRIALS OF SEXUAL OFFENCES

We wish to commend the Department on the provisions of the regulation, and the wide range of training that has been deemed necessary for the effective functioning of those working in SOCs.

We would, however, encourage some further elaboration on the concept of "inter-sectoral" training, as outlined in **subregulation 22(4),** and specify examples of appropriate service providers, including civil society organisations with relevant expertise.

We are pleased by the inclusion of training for presiding officers, before (s)he may preside in a designated court. However, the provision of **subregulation 23(1)(b)(i)** which essentially allows for "exemption" from training, should in our opinion be amended or omitted. Alarming judgments are handed down on a regular basis, in lower and also in High Courts, that indicate a lack of gender sensitivity and a lack of understanding of sexual offences, even from ostensibly experienced judges and magistrates.

Consequently, we suggest a mechanism whereby the competence and experience of a magistrate or judge in this regard can be measured objectively. At the very least, there should be an indication of the factors that should be considered by the Judge President, Regional Court President, of Chief Magistrate, in deciding whether to exempt a presiding officer from the initial training process. Likewise, there should be some objective measure of what constitutes "sufficient experience". Even then, such exemption should not be granted readily.

Subregulation 23(3) makes reference to refresher courses, but does not indicate how often such refresher courses should be attended, or how long any of the specified training courses should last. We would submit that at least a minimum duration for such courses should be specified in the regulations. These recommendations would likewise apply to the training of prosecutors, and court preparation officers.

A concerning omission in this Chapter (and the NSIP and Draft Regulations more broadly) relates to ensuring competencies of criminal justice officials in responding to cases of LGBTI victims and survivors of sexual offences. LGBTI persons generally and lesbian and bisexual women in particular experience high levels of sexual violence, including targeted homophobic and transphobic assaults (Human Rights

Watch, 2011[1]). We commend the Department for making specific reference to the need to respond to sexual violence against LGBTI persons in the NSIP, including in its opening paragraph:

> "These concerns were triggered to a large extent by the media focus on the high rate of sexual violence perpetrated against women, children, persons with disabilities, older persons and certain marginalized groups, like the LGBTI community."

The commitment to LGBTI persons shown in the opening paragraphs is however not reflected in concrete terms in the NSIP and LGBTI persons are not mentioned at all in any of the regulations. There is clear evidence that LGBTI persons (those who are victims of sexual violence motivated by homophobic or transphobic prejudice, as well as in cases where the victim's gender identity/expression or sexual orientation was not considered relevant to the motive for the crime) are frequently subjected to secondary victimisation and institutionalised discrimination in their engagement with the criminal justice system (DOJCD, 2013[2]; Human Rights Watch, 2011[3]). Following from this, it is important to ensure that LGBTI persons are not subject to secondary victimisation at specialised courts and that training of officials addresses required skills and competencies to reduce secondary victimisation. Such training would necessarily include all court officials, South African Police Service (SAPS), the National Prosecuting Authority (NPA), and other persons offering services at SOCs such as social workers and interpreters.

In light of the above submissions, we also consider it important to include the term "LGBTI" in **Chapter 1** under Definitions.

In respect of **Regulation 25**, our comments are as follows:

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[1] Human Rights Watch. (2011). *"We'll show you you're a woman": Violence and discrimination against black lesbians and transgender men in South Africa*. New York: Human Rights Watch.

[2] Department of Justice and Constitutional Development. (2013). *Report on the re-establishment of sexual offences courts: Ministerial advisory task team on the adjudication of sexual offence matters (MATTSO)*. Available from http://www.justice.gov.za/reportfiles/other/2013-sxo-courts-report-aug2013.pdf

[3] Human Rights Watch. (2011). *"We'll show you you're a woman": Violence and discrimination against black lesbians and transgender men in South Africa*. New York: Human Rights Watch.

Subregulation		Comments
(2)	The court manager at a designated court must ensure that there is a pool of interpreters in foreign languages and South African Sign Language available for appointment on an ad hoc basis as interpreters in sexual offences cases.	South Africa is challenged by a great scarcity of sign language interpreters, and skilled court interpreters are likewise in short supply. We suggest that a central, provincial register be created, to facilitate better service delivery and access to appropriately skilled interpreters and sign language interpreters.
(3)	The court manager at a designated court must ensure that every interpreter assigned in terms of subregulation (1) to interpret in sexual offences cases— (a) receives a manual referred to in subregulation (4)	We would strongly encourage that the manual provided to interpreters list not only instructions on what constitutes proper and correct interpretation, but also what constitutes inappropriate and poor interpretation, in the context of sexual offence matters.
(4)	(a) Justice College must develop a manual for interpreters who are assigned in terms of subregulation (1) to interpret in sexual offences cases in order to ensure that the interpreters have a basic understanding of the Act and the relevant aspects referred to in regulation 22(1).	We submit that the perusal of this manual cannot be optional, or dependent on permitting circumstances. The proper perusal of this manual should be mandatory for every interpreter involved in a sexual offence matter. Cases are apt to succeed or fail based on the quality of interpretation, and the often complicated and technical nature of sexual offence criminal court proceedings absolutely require familiarisation with good practice standards and common pitfalls.

	(b) The court manager at a designated court must make available the manual referred to in paragraph (a), to the interpreters referred to in subregulation (2), to give them an opportunity to peruse the manual if circumstances permit.	

With regards to the training of investigating officers, as stipulated in **Regulation 26**, we submit that the wording of Subregulation 1 should be amended to read as follows:

> *"26. (1) Only **specially trained** police officers at Client Service Centres and investigating officers from a FCS Unit may deal with complaints relating to sexual offences cases or investigate such offences."*

This recommendation is based on the fact that a complainant's first contact at a police station will be with the officers staffing the Community Service Centres. The quality of this interaction can be what leads a complainant to abandon charges, and it is often in the course of this interaction that a complaint experiences secondary victimisation. The important role played by these officers cannot be overemphasised. They are the first port of call, and the "face" of the SAPS and criminal justice system in the first moments of a complainant's journey through the system. Where these officers lack training, especially gender sensitisation training, a complainant is likely to have an unsatisfactory or even traumatising experience. It is at this stage of the case that Shukumisa members report significant problems with complainants being turned away and profound secondary victimisation. Reports of problems with SAPS Community Service Centre officials are particularly alarming in police stations where there is weak commitment by leadership to the standards established in the framework, and reported extensively as a problem by Shukumisa members providing services in rural areas.

Similarly, experience with investigating officers (especially those dealing with child complainants) has shown that these officers often do not appreciate the importance of such processes as, for example, court support. Officers fail to convey complainants to court preparation appointment, or consultations, and this failure appears to stem from a lack of appreciation of the importance of these processes in a successful prosecution, or even the furtherance of an investigation.

8. CHAPTER VII: SPECIAL ARRANGEMENTS FOR HEARINGS BY DESIGNATED COURT

With regards to special arrangements in respect of investigating officers and forensic social workers, as outlined in **Regulation 30**, we are concerned by the provision that allows for a child complainant to be interviewed by a Community Service Centre officer. In the absence of some specification of specialised training for CSC officers to enable them to take statements form child complainants, this provision opens the door to potential secondary victimisation and considerable trauma on the part of child complainants. In our view it is a regression from what is currently set out in the framework and SAPS National Instructions.

In respect of special arrangements for prosecutors, as outlined in **Regulation 31**, we have the following comments:

Subregulation		Comments
(2)	The withdrawal of any sexual offences case must be done at the earliest possible date to prevent an unnecessary postponement.	By making express provision for this manner of withdrawal, we are concerned that it may have unintended consequence of prosecutors encouraging complainants to withdraw charges. We believe that this provision should be omitted.
(4)	A prosecutor at a designated court must consult with a	We suggest that this provision should expressly stipulate that the same prosecutor who conducts the consultation

	witness before he or she testifies.	should also be the prosecutor who conducts the matter in court.

We are pleased by the introduction of disciplinary steps under **Regulation 34(2)**, in respect of special arrangements for cases of negligence by persons involved in proceedings. We suggest that the reporting system in this regard should be linked to the witness complaints mechanism introduced earlier in Regulation 20, to allow for efficient identification of systemic failures.

However, we wish to question the use of the term "vulnerable witnesses" in **Regulation 37**. We consider all witnesses in sexual offence cases to be vulnerable. If there were particular types or categories of witnesses that were envisaged here that may require additional special consideration or arrangements, we suggest that attempts be made to describe these groups more clearly. As it stands, the term is opaque, and suggests a hierarchy of vulnerability that is not made clear in the language of the regulation. However, given that defining vulnerability can be extremely complex, we submit that the regulation could be remedied simply by replacing the term with 'sexual offence complainants'.

It is also essential to note that prosecutor consultation and court preparation should occur well in advance of the complainant's appearance in court, and not on the morning of the day on which the complainant will be required to testify.

In respect of the provisions relating to monitoring, as per **Regulation 38**, and as addressed above, we strongly encourage the inclusion of complainants' and witnesses' feedback as a critical component of monitoring and evaluation of all SOCs. In addition, and considering the high rate of attrition of LGBTI-related cases from the CJS, it is necessary to include a monitoring mechanism in the implementation of SOCs that tracks the impact of the courts on the progress of LGBTI-related cases. This should be conceptualised and implemented in a manner that does not unintentionally increase secondary victimisation of complainants who might not wish to disclose their sexual orientation or gender identity publicly and in some cases might even be at risk of further victimisation or violence in presumably "safe" contexts such as their home, if such information is shared.

9. Conclusion

The Shukumisa Campaign is grateful for the opportunity to make comments on the draft regulations and the NSIP, which we trust will be taken into due consideration.

We commend the Department on the manner in which the findings and recommendations of the *Report on the re-establishment of sexual offences courts: Ministerial advisory task team on the adjudication of sexual offence matters* (MATTSO), and suggestions from previous Shukumisa submissions, have been incorporated and fleshed out.

We look forward to further engagement with the Department on these draft regulations and the NSIP, and assure you of our ongoing support in creating these critical enabling provisions for the best possible SOCs for survivors of sexual offences.

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