SUBMISSION TO THE PORTFOLIO COMMITTEE ON JUSTICE AND CONSTITUTIONAL DEVELOPMENT ON THE STRATEGIC PLANS AND BUDGET OF THE DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND THE NATIONAL PROSECUTING AUTHORITY

Submitted: 13 April 2013

Submission compiled by the following on behalf the Shukumisa Campaign:

Community Law Centre, University of the Western Cape (Ms Samantha Waterhouse)
Gender Health and Justice Research Unit (GHJRU), University of Cape Town (Prof Lillian Artz)
Independent Expert (Ms Lisa Vetten)
Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN) (Ms Vivienne Lalu and Blanche Rezant)
Tshwaranang Legal Advocacy Centre (Ms Bianca Valentine)
Childline South Africa (Ms Joan Van Niekerk)

The contents of this submission were based on the direct inputs of members of the Shukumisa Campaign.

For queries contact:
Samantha Waterhouse: swaterhous@uwc.ac.za or
Lisa Vetten: lisavetten@gmail.com

Members of the Shukumisa Campaign include: Adapt, Childline SA, Community Law Centre Parliamentary Participation Unit, Gender Health and Justice Research Unit (GHJRU), Greater Rape Intervention Project (GRIP), Justice and Women (JAW), Legal Resources Centre, Lethabong Legal Advice Centre, Lifeline/Rape Crisis Pietermaritzburg, Limpopo Legal Advice Centre, Masimanyane Women's Support Centre, Mosaic, Nisaa Women's Support Centre, Peddie Women's Support Centre, People Opposing Women Abuse (POWA), Project Empower, RAPCAN, Rape Crisis Cape Town Trust, Remmoho, Teddy Bear Clinic, Sonke Gender Justice Network, Sex Worker Education and Advocacy Taskforce (SWEAT), Thohoyandou Victim Empowerment Programme, Thusanang Advice Centre, Tipfuxeni Community Counselling Centre, Tshwaranang Legal Advocacy Centre, Western Cape Network on Violence Against Women,Women on Farms Project, Women's Legal Centre.

SUMMARY OF KEY POINTS

- The epidemic nature of sexual offences in South Africa and the need to combat these crimes as a matter of priority is well recognised.
- However, the policy framework addressing sexual offences is inadequate. Policies on the DoJ&CD and NPA's responses, the sexual offences courts and TCCs, are absent altogether.
- This has resulted in the reversal of policy decisions over the years, inconsistencies and inadequacies in responses, as well as insufficient budgeting and operational planning.
- Statistics on the performance of the CJS in relation to sexual offences are limited. It is thus difficult to assess the impact of the changed legislative and policy framework – are these interventions making the difference hoped for, or are we pursuing policies that do not actually address the problem?
- Despite being noted as a priority, the absence of concrete, detailed planning to address sexual offences throughout DoJ&CD and NPA strategies makes it unlikely that effective prioritisation can be achieved in practice. This translates into inadequate budgeting and thus few practical gains to address the long-standing, oft-noted weaknesses in the CJS response to the prosecution of sexual offences.
- There is hidden subsidisation of the CJS response to sexual offences by CSOs. This includes that some CSOs are not compensated for the services they provide in the TCCs, or the psychological assessments and other reports they prepare for courts. In the current economic climate, this will lead to the disappearance of these services as NGOs are forced to close or reduce their services. The DoJ&CD Budget does not allow for such compensation.
- It is crucial that the DoJ&CD consult in a meaningful manner with NGOs providing these services around the development of policies and operational plans addressing sexual offences.
- We propose the revision of the Draft National Policy Framework (NPF) to address the range of policy gaps in the DoJ&CD response to sexual offences, including detailed description of the duties and obligations imposed upon all role players in managing sexual offences.
- We recommend the development of comprehensive policy around the prosecution of sexual offences generally and not only in relation to sexual offences courts. This needs to address questions of court preparation, psycho-social services, the competencies and training of personnel working in this field, the infra-structure and resources required to make policy a material reality, the adequate payment of services rendered (as well as identification of which Department is responsible for such payments).
- We recommend that the Portfiolio Committee on Justice and Constitutional Development undertake a number of essential activities to strengthen oversight of the implementation of legislation and policy relating to sexual offences prior to the last session of the Fourth Parliament.

CONTENTS

1. Introduction

This submission has been compiled by members of the *Shukumisa Campaign*, a coalition of 28 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.

The submission is divided into three sections:

- SECTION A: This section begins with an overview of existing policy and its implementation, noting where policy is lacking. Because the Budget is the expression of policy, this overview forms the basis of our comments around the Budget and Departmental Strategic Plans.

- SECTION B: This section comments on specific responses to sexual offences outlined in the strategic plans (2013 - 2018) of the Department of Justice and Constitutional Development (DoJCD) and the National Prosecuting Authority (NPA, as well as *Budget Vote 24: Justice and Constitutional Development.*

- SECTION C: In response to the recent announcement by the DoJCD that a strategy is being developed for the reinstatement of the Sexual Offences Courts, we conclude the submission with detailed recommendations regarding the prosecution of sexual offences.

We recognise the important role of legislatures to influence legislation and ensure accountability and oversight over the executive. As such this submission is targeted both at the DoJCD and the NPA as well as the Portfolio Committee on Justice and Constitutional Development.

SECTION A

2. The Legal and Policy Framework Applicable to Sexual Offences

It is the chief purpose of any criminal justice system to ensure that laws are applied and justice served in manner that upholds the rights of all parties. In pursuit of these goals a range of laws and policies specific to sexual offences have been developed in South Africa over the last two decades to address lacunae in policy, improve the performance of the courts and reduce the secondary victimisation of rape survivors. At the legislative level these developments include:

- The 1997 Criminal Procedure Act (amended to revise issues of bail)
- The 2007 Criminal Law (Sentencing) Amendment Act
- The 2007 Criminal Law (Sexual Offences and Related Matters) Amendment Act

In addition there exist specialised measures to protect witnesses in court, prosecutorial directives applicable to all courts, Thuthuzela Care Centres (TCC) and specialised sexual offences courts.

2.1.Special Measures to Protect Sexual Offences Complainants

Special measures to protect sexual offences complainants are largely provided for through the 1977 Criminal Procedure Act and include intermediaries, closed circuit television (CCTV), anatomical dolls and and in camera hearings. In 2011 the Shukumisa campaign monitored 28 courts in the provinces of Gauteng (5), the Western Cape (4), Limpopo (11), the Eastern Cape (7) and KwaZulu-Natal (1) to assess the availability of these services. We found that 64% of courts had witness waiting rooms; 88% of courts had CCTV facilities; and 36% of courts had a room/office for NGO use.

A second development, initially piloted by civil society organisations and later institutionalised by DoJ&CD/NPA, was the provision of court preparation services to adult and child witnesses in sexual offences cases. Because these court preparation services were originally funded by donors, their reach was limited to a handful of courts nationally, with most being situated in urban centres. The Department's adoption of these services was welcomed by civil society. However, the monitoring referred to earlier found that all courts had not been reached with this service, 56% of courts having court preparation officers. Further, in establishing court preparation services the Department had broadened the service to all victims of crime, thus challenging the specialisation required in sexual offences and child abuse matters. The absence of policy, norms and standards in this regard thus potentially results in secondary victimisation and undermine the integrity of evidence.

2.2.Sexual Offences Courts

The first specialist sexual offences court (SOC) was established in 1993 in Wynberg, Cape Town. This remained the only specialised court facility for rape survivors in South Africa until 1999 when, following an evaluation of the court, the DoJ&CD, in its *Gender Policy Statement*, stated that a decision to roll out the courts nationally had

been taken, with the full roll out to be accomplished by 2003. However, it was only in 2003 that the NPA and the DoJ&CD agreed on a national strategy to roll out specialised sexual offences courts dealing with both adult and child victims. In terms of this agreement, the NPA was responsible for the appointment of victim assistants, case managers and court preparation officials while the DoJ&CD was to facilitate the appointment of dedicated magistrates. A "blueprint" for the management of the courts was also developed by the SOCA Units in 2005. However, in the same year, the Minister of Justice & Constitutional Development called for a moratorium on the establishment of all dedicated courts (including sexual offences courts) on the basis that dedicated courts placed too great a demand on resources and forced magistrates to specialise. A reversal of this decision followed in late 2012 when an investigation was launched into the courts, followed by the announcement in 2013 that they were to be re-established.

The lack of a coherent policy relating to court structures has created some unevenness in the provision of services for rape survivors. For example Shukumisa's monitoring project found that 15 courts claimed to be sexual offences courts, but only five of these qualify as 'specialised courts' because they provide dedicated sexual offences courts, specialised prosecutors and magistrates who hear only sexual offences matters.

Specialist or otherwise, the performance of the courts generally in relation to the processing of rape cases is discouraging. For example, a conviction rate of 4% of all rapes reported in Gauteng was recorded in 2003.[1] Data from one rural police station in Mpumalanga for the period 2005 - 2007 found that one (0.8%) of 120 adult women's matters resulted in a conviction for rape, while four (4.1%) of the 98 children's matters resulted in convictions for rape.[2] These data all derive prior to 2007 and thus provide a baseline against which to assess the extent to which the 2007 Sexual Offences Amendment Act has improved the circumstances of rape survivors.This though, is dependent upon the D0J&CD/NPA making such data available.

Data provided by the NPA suggest a 4.5% conviction rate for 2007/08, increasing to 5.0% in 2008/09. No data are available for 2009/10 and 2010/11 but figures for 2011/12 point to a conviction rate of 6.98%. All these figures apply to sexual offences generally, of which there are 59. We therefore do not know the conviction rate for rape specifically and, as Vetten et al's 2008 study shows, the conviction rate for rape tends to be lower than that for other sexual offences. These data are also not disaggregated by province, thus disguising important variations. Apart from the absence of reliable report-to-conviction statistics, the SAPS, the NPA and the DoJCD have used different categories for reporting statistics resulting in incongruous figures and statistics across departments.

2.3.The Thuthuzela Care Centres

The first TCC was established in the Western Cape at GF Jooste Hospital in Manenburg in 2000. Many more TCCs have been established since in public health facilities serving localities where high rates of rape are recorded.

[1] Vetten L, Jewkes R, Fuller R, Christofides N, Loots L and Dunseith O. (2008) *Tracking Justice: The attrition of rape cases through the criminal justice system in Gauteng.* Johannesburg: Tshwaranang Legal Advocacy Centre, South African Medical Research Council and the Centre for the Study of Violence and Reconciliation.

[2] Vetten, L, van Jaarsveld F and Riba, P. (2012). *A Criminal Injustice System? The attrition of rape cases in one rural locality, Mpumalanga.* Research Brief 5, Tshwaranang Legal Advocacy Centre.

The Centres aim to unite policing, health and psycho-social services under one roof and are intended to reduce secondary victimisation, reduce case cycle time and improve conviction rates. The number of TCCs is steadily increasing such that by 2013, 52 Centres had been established (51 of these were fully functional). Their establishment has been extensively supported by funding from USAID. TCCs aim to provide a range of services to victims, including:

- initial reception of the victim, followed by information outlining the services and procedures;
- history-taking and a medico-legal examination;
- prophylaxis and treatment for pregnancy and sexually-transmitted infections, including HIV;
- bath/shower, refreshments and a change of clothing;
- transportation home (or to place of safety), referrals and follow-up support.

Notably the provision of psycho-social services does not feature prominently in this list and, not unsurprisingly, only a minority of the TCCS would appear to currently provide NGO-facilitated counselling services to rape survivors. At the most recent count there appeared to be fewer than 10 TCCs with such services.

Like the sexual offences courts, no formal policy is in place guiding the establishment and managing of such centres. Their effectiveness is therefore difficult to assess, especially when so few documents evaluating their functioning are available in the public domain.

But one very apparent indicator of an absence of policy is the lack of clarity around the provision of psychosocial services, as well as who should fund these services. No NGO currently receives funding from the Department of Justice and Constitutional Development (DoJ&CD) to render services, with some supported by the Department of Social Development, others the Global Fund to Fight AIDS, TB and Malaria and still others international aid agencies. The decline in funding internationally has led Lifeline in KwaZulu-Natal to withdraw services and it is very likely that other organisations will follow suit. No model can claim to be truly comprehensive where it does not include good psychosocial support. In addition, organisations dealing with children also provide different sorts of evidence for the courts, including mental age assessments, as well as other types of psychological assessments. These are not compensated for by the courts.

Even if they function as centrepieces of the Department's response to sexual offences, the TCCs, and now the sexual offences courts, are not contained within a policy framework, leaving them vulnerable to the vagaries of personal interpretation. In theory, both interventions, as well as court preparation and the other policy silences identified, could have been addressed through the National Policy Framework (NPF). This framework is discussed below.

2.4. The National Policy Framework

The National Policy Framework was originally envisioned as the operational framework of the Sexual Offences Act, guiding both the administrative and procedural implementation of the Act. However, there is little within the policy that sets out how the objectives of the NPF (set out below) are to be articulated in practice. It lacks

substantive content, doing little to assist prosecutors with implementing specific processes and procedures set out in the Act and accompanying regulations.

Chapter One of the NPF sets out the four key principles of the NPF, most of which are relevant to the (re)establishment and maintenance of specialised sexual offences courts:

1 *The Adoption of a Victim-Centred Approach to Sexual Offences*: A victim-centred approach is understood in the policy as keeping the victim of a sexual offence central in the management of sexual offence cases.

2 *The Adoption of a Multi-disciplinary and Intersectoral Response to Sexual Offences*: At the core of this principle are the tenets of coordination, shared services and resources, and the collective monitoring and evaluation of integrated services.

3 *Provision of Specialised Services to the Victims of Sexual Offences*: The third principle promotes the adoption of specialised services when dealing with victims of sexual offences. Here the NPF argues 'that Act itself requires the introduction of "certain services to certain victims of sexual offences" which we presume includes specialised courts.

4 *Equal and Equitable Access to Quality Services for Victims of Sexual Offences*: The final principle relates to the accessibility of services. By accessibility, the NPF refers to physical and geographical accessibility to services as well as non-discrimination.

Chapter Two of the NPF then sets out the objectives of the NPF. It positions the policy as an instrument which:

1 establishes uniform norms, standards and mechanisms for the coordination of the implementation of the Act;
2 develops and strengthens integrated and coordinated services; and
3 provides resources for the effective implementation of the Act and the NPF

In relation to strengthening coordination and the integration of services, the NPF holds that it has two central obligations: a support obligation and a prevention obligation. The former is most relevant to courts and 'requires that support services be provided in a manner that would instills the confidence of the victim in the CJS'. Of importance is that these services and responses are meant to include: (i) court reform initiatives to improve the rate of success in prosecution; (ii) improving reporting, investigation, evidence collection, court preparation, case flow management and prosecution; (iii) capacity of the CJS personnel; and (iv) public education and outreach programmes to empower communities to use the Act to respond to and prevent sexual offences incidents.

The NPF also maintains that for the Act to be effective, financial resources must be made available to support physical spaces (such as victim-centred facilities, court equipment and operational equipment), human resources to support services at every service point and to ensure that human resources matches the volume of

work at these points and, through skills development and training, 'build the requisite knowledge, skills and sensitivity amongst the personnel placed at sexual offences service points'.

We analyse the NPF in more detail below under our recommendations for policy. We now consider the Budget and Strategic Plans against the backdrop of this short commentary.

SECTION B

3. Comment on the Budget and Strategic Plans

The necessity of addressing violence against women is noted in the National Development Plan which recognises that gender-based violence (including violence against women; children; girl-children specifically; and gay, lesbian and transgendered people) is 'unacceptably high'[3] and that violence such as 'domestic violence and rape, has not been arrested significantly... '.[4]

In examining how this critical issue has been addressed we will examine the five objectives in the DoJCD plan under Programme 2: Court Services. These refer, *inter alia,* to "developing policies for protecting the rights of vulnerable groups and victims in society; Prioritising access to justice services for people in poor and rural areas; and promoting access to Justice by the finalisation of court cases...".[5]

In the NPA Strategic Plan our submission addresses the priorities relating to the focus on "prosecution of serious and priority crimes" to "improve prosecutor capacity and efficiency", to "increase the finalisation of criminal cases" including to "reduce case backlogs and average length of time persons spend in remand detention" and finally to "Improve support to victims of crime...".[6] Our submission is thus concerned with three of the four strategic objectives of the NPA namely: Increased successful prosecution of serious and priority crime; Improved collaboration with JCPS partners; and to improve justice services for victims of crime.[7]

3.1. Prioritisation of Sexual Offences

We recognise the inclusion of sexual offences in the list of priority crimes in the strategic plan of the NPA[8] and that the DoJCD plan includes in strategic objective of increased promotion and protection of vulnerable groups in objective 9.[9] The plans for re-establishing sexual offences courts and extending Thuthuzela Care Centres are encouraging.

However, there is an absence of substantive detail and concrete planning. For instance, it is difficult to establish what else besides the re-establishment of sexual offence courts and the expansion of TCCs is the budget agenda and development programme. Not only are the actual plans and resourcing requirements relating to these two areas notably absent, but we also note the absence of a range of other essential interventions required to improve the prosecution of sexual offences. While the Annual Report (2011/12) of the NPA provides slightly more detail regarding activities relating to sexual offences, the information contained within this relates more to

[3] National Planning Commission. 2013. *National Development Plan 2030. Our Future - make it work*. P395
[4] National Planning Commission. *ibid* P385
[5] Department of Justice and Constitutional Development. 2013. *Strategic Plan 2013 - 2018*. p10.
[6] National Prosecuting Authority. 2013. *NPA Strategic Plan 2013 - 2018*. p11.
[7] National Prosecuting Authority. *ibid.* p22
[8] National Prosecuting Authority. *ibid.* p14.
[9] Department of Justice and Constitutional Development. *ibid.* p40.

the work of a handful of individuals in developing training and resource documents and undertaking expert exchanges. We are told very little about actual prosecution performance in sexual offences cases.
The NDP calls for a 'gender perspective' to be taken in the development of strategies. By the same token we believe that responses to sexual offences must be explicitly addressed across various departmental strategies and objectives. For example all strategic objectives under *Programme 2: Court Services* are relevant to sexual offences, and should include, if these matters are in fact a priority, specific plans and strategies to address sexual offences. For instance:

- Strategic objective 8: reduce backlog roll
- Strategic objective 9: promotion and protection of vulnerable groups
- Strategic objective 10: increased protection of the best interests of children
- Strategic objective 11: increased access to justice to historically marginalised communities and
- Strategic objective 12: improved delivery of services at courts.

Of these, only strategic objective 9 makes specific mention of sexual offences by focussing on the National Register for Sex Offenders and the re-establishment of Sexual Offences Courts. By way of example, clearing case backlogs is an important target for the National Prosecuting Authority. We do not have any indication if backlogs in sexual offences are being prioritised within this. Understandably there are a number of factors to consider and arguably, to meet targets it may make sense to focus on less serious crimes which can be finalised more quickly first. But strong consideration must be given to the fact that complainants in sexual offences, having often experienced profound trauma, are living for extended periods of time with the weight of unresolved cases affecting their well-being. We also recommend that matters where the accused is a child should be prioritised. Throughout the plans sexual offences must be articulated in this manner.

Recommendations:

- The absence of policy noted previously must be addressed and coupled with broad strategic plans to improve the prosecution of sexual offences across a range of dimensions. These policies and plans must be developed in consultation with state and civil society stakeholders in a manner that is participatory and actually incorporates what civil society organisations recommend into the objectives, plans and targets of the DoJCD and NPA.
- Priority offences, particularly sexual offences, must be treated as priority in respect of clearing case backlogs.

3.2. Statistics

Making sexual offences a priority in budget considerations, means that statistics relating to sexual offences must be properly collected, documented, framed and reported. Official statistics are also an important way of meaningfully tracking the incidence and prevalence of sexual offences as well as the state's performance in the prevention and management of sexual offences over time. Most Importantly, proper statistical documentation and reporting ensures that adequate resources are allocated to state systems managing sexual offences cases.

Recommendations:

- The police, prosecuting authority, health systems and courts must agree to a coherent method of data collection, using similar categories or variables to ensure statistics are compatible across departments. This is critical for the analysis of budgets, performance and prevalence.
- In consultation with other relevant state and civil society stakeholders the DoJCD, NPA and SAPS must come to agreement on the performance indicators to be used and the statistics to be monitored. This extends beyond statistics on prevalence and reporting rates, investigations outcomes, referrals for prosecution and prosecution outcomes and must also include disaggregation by age, gender, rural/urban split, cases heard in sexual offences courts vs those heard in ordinary courts and cases emanating from TCCs.
- It is essential that this data must be made publicly available for the purpose of monitoring.

3.3. Analysis of Budgets and Priorities

Undoubtedly, priorities and plans only stand a chance of being realised when backed up with resources to achieve these goals. The costs and budgets relating to improving prosecution of sexual offences are completely invisible in the budgets of the DoJCD and NPA. Even planned items such as the re-establishment of sexual offences courts and expansion of TCCs do not have figures provided.

National Prosecuting Authority

It is unclear from the strategy documents what sexual offence related costs are covered under the categories National Prosecutions and Specialised Prosecutions. In addition specialised prosecutions includes three categories of specialisation namely: priority crimes litigation, sexual offences and community affairs; and specialised commercial crime. The budgets for these different categories is not provided.

It is thus impossible to ascertain the allocations for prosecutions of sexual offences. The key question regarding this is to ascertain if the allocations for spending on sexual offences is reflective of the proportion of sexual offences matters entering the courts system.

In the event that spending on sexual offences prosecutions is undertaken from the specialised prosecutions line item we see a slight proportional increase of 1.5% in allocation to specialised prosecutions from 2012/13 to 2013/14.[10] However it is not clear if this increased allocation is for the purpose of spending on Sexual Offences prosecutions. It would be instructive to know how allocations for sexual offences compares to allocations for specialised commercial crime for example.

[10] In the 2013/2014 R294 286 000 is allocated to specialised prosecutions and R1 968 248 000 to national prosecutions. Thus approximately 13% of the combined budget for Specialised Prosecutions and National Prosecutions services is allocated to Specialised Prosecutions (covering the three categories). This proportion has increased from 11.5% of the combined budget for these two categories being allocated to Specialised Prosecutions in 2012/2013. National Prosecuting Authority. *Ibid.*

Human Resources and Compensation of Employees

We expect that spending on prosecution for sexual offences is also undertaken from the *compensation of employees* general budget line item. We note the grave concerns that are raised at different points by the NPA with regard to the issue of vacant posts and the increased costs relating to salary increases. The NPA plan frankly indicates that the "severe stress" on the compensation budget will not improve in the MTEF period.[11]

This is a significant threat to the prosecution of these priority matters. Improving prosecution of sexual offences requires adequate budget for human resources, prosecutors in particular, but also court preparation officers and other support staff. Failure to ensure adequate staffing will perpetuate the situation of gross injustice experienced by many complainants in these matters. We remind the Committee of the profoundly traumatic nature of these offences and the greater harm caused by injustice to complainants in these matters in comparison with a complainant in a common assault or theft matter for example.

The figures provided amount to an increase of approximately 20% in the line item over the four years 2012/13 to 2015/16.[12] It is difficult to ascertain whether this is sufficient for the range of services and the required infrastructure required for the effective management and prosecution of sexual offences cases.

We recognise that the NPA strategy refers to the development of a Human Resources Plan[13] as well as to a 'reprioritisation process' regarding the compensation budgets. [14] It is uncertain whether there are sufficient human resources to prosecute these priority matters addressed in the HR plan and in the reprioritisation, but recommend that this is considered in more detail.

With specific reference to the NPA strategy we are interested to see that "The NPA structure has been re-aligned to improve service delivery in identified areas through specialist units and an integrated prosecution service".[15] Again, it is important to establish how sexual offences are explicitly addressed in this.

It is entirely unclear as to which line item Court Preparation Officers salaries are paid. We are unable to ascertain through the plans or the budgets the numbers of Court Preparation Officers planned for the period. We discuss in more detail below our recommendations regarding the provision of court preparation services.

Department of Justice and Constitutional Development

Again, in this document, there is no disaggregation of information regarding the budgets. The allocations of the DoJCD towards improved prosecution of sexual offences and the sexual offences courts is not apparent in the document. We note too that approximately two employees have been allocated to work on sexual offences matters within the DoJ&CD's Vulnerable Groups Directorate. This is grossly inadequate to what is required in terms of policy development and monitoring.

[11] National Prosecuting Authority. *Ibid.* p24
[12] The *compensation of employees* category increases from R2 227 293 000 in 2012/12 to R2 723 790 000 in 2015/16
[13] National Prosecuting Authority. *Ibid.* p20
[14] National Prosecuting Authority. *Ibid.* p24.
[15] National Prosecuting Authority. *Ibid.* p3

Understandably budget for sexual offences will be spread across the various departmental line-items ranging from human resources to infrastructure and equipment. The strategy being developed by the department on the re-establishment of sexual offences courts, must in our view be re-defined as a strategy for improving services in sexual offences. (This is discussed further below). This strategy must clearly set out the resources and costs required and this must in turn be reflected as proportions of the various overall budget line items.

Ensuring that the Department has the capacity to effectively prosecute sexual offences across the board requires infrastructure. Infrastructure to promote victim support and effective prosecution of sexual offences is no clear in this budget. Sexual offences specifically require consideration to be given to the issue of maintaining privacy and ensuring that complainants are not exposed to the accused and his/her supporters prior to the trial commencing. This requires consideration to be given to entrances to buildings and courts, to separate waiting rooms, to rooms for private court preparation sessions and intermediary rooms.

Finally we note that the National Register for Sex Offenders features as the second component of the Department strategy relating to sexual offences. We wish to highlight that the priority for the Department should be to obtain convictions, given the great scope for improvement in this regard. We make this comment in the context of the Child Protection Register that has been established under the Children's Act no 38 2005. The NRSO duplicates this effort and is diverting justice funding away from improving prosecutions while Government funds are already being spent on a similar protective measure in a different Budget Vote.

Recommendations:

- We note again the absence of particular policies. Where there is silence there can be no adequate budgeting and we reiterate once more the need for policy development and operational planning to allow for budgeting. In addition, it is very clear that NGOs are subsidising the DoJ&CD/NPA services in a range of hidden ways. It is essential that these services be compensated for, whether through the DoJ&CD or DSD. If they are not, they are likely to disappear, given the current economic climate. This cannot be good for either individual victims or the courts. We also wish to bring to the Committee's attention the fact that the budgetary increase to the TCCs do not cover the costs of the counselling and other services provided by NGOs in the TCCs. Again, this requires clear policy as to who is responsible for these costs.
- Allocations for sexual offences must reflect the proportion of sexual offences matters that entering the court system.
- Throughout the budgets, the allocation to sexual offences in all relevant line-items must be clear, sexual offences should not simply be lumped in with 'vulnerable groups' or 'Specialised Prosecution Services'. For oversight purposes, the allocations to priorities should be easily identifiable.
- The NPA Human Resources strategy and re-alignment of structure processes must safeguard improved service with regard to priority crimes, and sexual offences in particular. This question must be explicitly addressed in these processes.
- More detail is required regarding the budgets for Court Preparation Officers.
- Infrastructure development budgets and plans must always take sexual offences into account.

- The SOA must be amended to rationalise the two child protection registers currently legislated for. We recommend that the NRSO be incorporated into the Child Protection Register via amendment to the Children's Act no 38 of 2005.

3.4. Civil Society as Stakeholders

Civil society organisations undertake a significant amount of service delivery, particularly regarding victim support services. Reading the strategic plans raises some questions of the envisaged role of civil society stakeholders by the DoJCD and the NPA.

The DoJCD strategic plan lists civil society as stakeholders.[16] Strategic objective 17 includes '*enhancing participatory democracy through public policy dialogue and strengthening the capacity of community-based organisations'* and includes '*engage in wide consultation with civil society and relevant departments to ensure acceptance, as well as coordinated planning and execution*." under its risk management section.[17]

But this approach to civil society engagement has generally not been the case. There are a number of processes, including the development of the strategy for re-establishing sexual offences courts, in which civil society has not been engaged. Interestingly the NPA strategy explicitly refers to the mobilisation of stakeholders in the re-establishment of sexual offences courts.[18] However as will be noted from the paragraph below its unclear if the NPA include civil society in their categorisation of stakeholders.

The NPA strategic plan does not refer to civil society as possible stakeholders, it refers to working with "its CJS partners" to address inefficiencies in the system and ensure better collaboration.[19] Similarly in its section on risks and risk management, the high risk associated with poor stakeholder management systems is noted by the NPA, however once again this refers only to stakeholders within the JCPS cluster.[20]

In respect of the DoJCD strategic objective 8 "*improved finalisation of activities in support of Outcome 3"* one of the 'risk mitigation' strategies noted is to "ensure continuous case flow management meetings". At local level this is an important forum to ensure effective services and address blockages, however civil society organisations working directly with sexual offences are seldom invited to these.[21]

In contrast, the National Development Plan recognises that access to justice extends beyond an efficient criminal justice system to include effective, coordinated partnerships with civil society and the private sector. Here these partnerships are considered to be key components of a sustainable strategy for citizen safety.[22]

[16] Department of Justice and Constitutional Development. *Ibid.* p27
[17] Department of Justice and Constitutional Development. *Ibid.* p48
[18] National Prosecuting Authority. *Ibid.* p26
[19] National Prosecuting Authority. *Ibid.* p2
[20] National Prosecuting Authority. *Ibid.* p26
[21] Department of Justice and Constitutional Development. *Ibid.* p40
[22] National Planning Commission. *Ibid.* p386

Recommendation:

- Civil society organisations that work directly with sexual offences have valuable experience and add important perspectives to the development and implementation of policy and programmes. As such civil society stakeholders must be consulted in the development of these. This is relevant in terms of national processes as well as local oversight and implementation forums.

4. Recommendations for Oversight

In light of the above discussion, we have specific recommendations relating to the role of the legislatures and in particular the Portfolio Committee on Justice and Constitutional Development (PCJCD). These recommendations relate to the committee's overall legislative, oversight and accountability mandates.

The SOA sets out a numbers of different aspects of implementation in which it stipulates parliamentary oversight. These include:

- That the executive must adopt '*and table in parliament*' the National Policy Framework within a year of the implementation of the SOA, that would have been the end of 2008.[23]
- That the Minister of Justice and Constitutional Development must (after consultation), submit reports by a number of different departments which are set out in section 63(2) of the SOA to parliament '*within one year after the implementation of this Act*'.[24] It also requires that such reports must be submitted to Parliament '*Every year thereafter'.*[25]
- That the national instructions and directives that are developed by various departments must be submitted to parliament within six months, this also applies to any amendments to these instructions and directives.[26]
- That various cabinet members listed must submit reports on the implementation of training courses to Parliament '*within a year after the commencement of this Act and every 12 months thereafter*.[27]

Recommendations:

We therefore recommend that:

- The PCJCD schedule time on the committee agenda to examine the status of the various policy and training documents stipulated in sections 62, 65 and 66 of the SOA. The announcement of the re-introduction of sexual offences courts begs for Parliament's and public engagement.
- The PCJCD must ensure that these meetings and hearings take place before the end of the final session of the fourth Parliament. Failure to do this, could result in significant loss of institutional memory with the advent of the fifth Parliament in 2014.

[23] SOA Section 62(2)(a)
[24] SOA Section 65(3)(a)
[25] SOA Section 65(3)(b)
[26] SOA Section 66(4)(a) and (b)
[27] SOA Section 66(5)(b)

- The PCJCD should request disaggregated planning, performance and budget data relating to sexual offences from the DoJCD and the NPA.
- Ideally the PCJCD should seek to host a joint meeting with the Committees responsible for policing, social development, health and correctional services on all aspects relating to the implementation of sexual offences law and policy.
- We've provided detailed input on possible means of strengthening the prosecution and management of sexual offences in Section C of this submission, we encourage the members of the PCJCD to consider this and take issues raised in that section up with the DoJCD and NPA.
- The PCJCD engage with the possibility of amending the requirements for the National Register for Sex Offenders in the SOA.

SECTION C

5. Recommendations to Strengthen the Prosecution of Sexual Offences

5.1. Legislation and Policy

There will always be a tension between establishing the principles of rape case management directly in the substantive law or through policy directives. In her legal submission to the Justice Portfolio Committee on the *Criminal Law (Sexual Offences) Amendment Bill 50-2003*, Helene Combrinck argued persuasively that it was necessary to include duties in legislation, instead of in policies or instructions, because often criminal justice personnel are unaware of their existence, let alone the contents of these documents. More importantly, there is some uncertainty of the legal status of 'policy' documents, which has some consequence should personnel fail to comply. Statutory duties, on the other hand, carry the force of legislative injunction. In terms of what the inclusion of specific legal duties in legislation means for victims, Combrinck argues that:

> The inclusion of duties in legislation also serves the important function of informing victims and service providing NGO's of what is expected from state officials. Policy documents setting out 'directives' or 'guidelines', such as the SAPS National Instructions, are generally not accessible to members of the public. While it may be possible for a victim to eventually gain access to such documents by invoking the Promotion of Access to Information Act, this may be a laborious and time-consuming endeavour. The cornerstone of claiming the constitutional protection of one's rights is an awareness of those rights, and the exposition of the nature and extent of state duties in sexual offence legislation will go a long way towards informing victims of what their rights are. [28]

In absence of a comprehensive review of the substantive law on sexual offences, it is imperative that policies for the management of sexual offences matters are created. These policies need to be clear, realistic and enforceable. There are two foundational documents for this, including: the *Blueprint of the Sexual Offences Courts*, *National Management Guidelines for Sexual Assault October (2003)* and the *Draft National Policy Framework* (2012) of the Sexual Offences Act.

As an overarching policy document, the Draft National Policy Framework falls short of any substantive, detailed or operational offerings in relation to how the Sexual Offences Act *ought* to be implemented. While the principles of the NPF are laudable enough, they offer little, if anything, to give the police, prosecutors, healthcare practitioners, social workers and other stakeholders any meaningful content from which to develop coherent departmental policy frameworks. Of critical importance are clear policies in relation to the actual reporting, investigation and prosecution of cases as well as concrete legal and practical measures relating to the protection and support of rape survivors.

[28] Combrink H. 2003. *Submission to the Portfolio Commitee on Justice and Constitutional Development on the Criminal Law (Sexual Offences) Amendment* Bill B50 - 2003. p2

If sexual offences law and criminal justice reforms are to be effective they must be vigorous in addressing basic procedural issues such as the case processing and police investigations. It is imperative to ensure that adequate procedures and practices are put in place to govern these aspects.

Recommendations:
We therefore recommend that the NPF should inform the development of individual and inter-departmental policies, which should include detailed policy guidelines in relation to:

- the specific legal duties on each department in managing sexual offences matters, including reference to non-compliance measures for officials who fail to comply with the duties prescribed to them in the law;
- the duties of police, prosecutors, healthcare practitioners, social workers and other stakeholders, when sexual offences matters are reported;
- Investigations, including evidence collection (including medico-legal procedures), chain of evidence procedures and victim support and protection during investigations;
- Information that must be provided to sexual offences complainants, by all stakeholders, including rights and measures available to them (such as information on services, the criminal justice or legal process and on-going feedback about the process of their case);
- all protective measures that must be available to sexual offences complainants in both 'regular' and 'specialised' courts; and
- accessible complaints mechanisms for complainants who are dissatisfied with services rendered by the state (or any party contracted by the state to render services to rape survivors).

5.2. Dedicated and/or Specialised Courts

There has been some contestation about whether Sexual Offences Courts ought to be called "specialised courts" or "dedicated courts". This debate has been on-going for a number of years and remains unresolved. Several years ago, the Department of Justice and Constitutional Development moved away from the term 'specialised' courts and renamed these courts 'dedicated' courts.

The question of what the courts are called is not a simply a matter of semantics. The term specialised courts denotes a specific, structural space in which *only sexual offences cases* are heard and where special protective measures – like CCTV cameras and intermediary systems – are in place. While these specialised courts have been met with some degree of success, they have been criticised for being inaccessible, particularly in rural areas where (human) resources and court space do not permit the establishment of specific courts, offering 'specialised' court services, for rape survivors. They have also been criticised for structural differences across courts as well as inconsistencies in the kind of 'specialised' services offered to rape complainants. This terminology – and seemingly the court structure – was later replaced with the notion of 'designated' courts which would try cases of rape, *but not exclusively*. They are therefore designated to hear sexual offences cases, but may hear other matters. Presumably, these designated courts are equipped with the same protective measures as the specialised courts but this does not seem to be consistently the case throughout the country. Most importantly, this 'dedicated' space has been obstructed as other matters are put on the rolls of these

courts resulting in sexual offences matters being heard in other court-rooms as well (which are not equipped with measures to adequately protect victims).

We therefore recommend the following:

- That there is absolute clarity about what constitutes a "specialised" or a "dedicated" court. A clear policy should be in place to discern what constitutes a specialised court, including what infrastructure, protective measures and staffing (type and experience) ought to be in place for it to be considered specialised. Courts that do not comply with these criteria should not be considered specialised or dedicated. This will not only give clarity to what the DoJCD considers to be specialised in nature, but it provides clear indicators for compliance, oversight and monitoring of these courts.
- That even where courts are not designed to be special courts, designated for sexual offences matters, similar policies must be developed to ensure that the DoJCD commits to delivering consistent, effective and professional services in all sexual offence matters, regardless of what type of court these cases are heard in.

5.3. Victim Centred Policy and Victim Support

The South African Constitution has been built around the fundamental principle of human dignity. This principle must be carried through to practice in the prosecution of sexual offences. The majority of victims of sexual violence do not pursue criminal prosecution. There are a vast range of reasons for this, significant amongst these reasons are victims' fears of privacy and confidentiality being breached and fear of poor and even abusive treatment by officials in the system. Policy must be centered on certain fundamental principles in which the constitutional rights to dignity),[29] privacy,[30] and freedom and security of the person[31] are central. An approach to prosecution and case management that does this stands a stronger chance of minimising secondary victimization and addressing these prevalent fears about the criminal justice system. Through this some reasons for low reporting can be addressed.

Importantly section 7(2) of the Constitution specifically imposes a duty on the state to respect, protect, promote and fulfil these rights. This duty is further included in the draft national directives for the prosecution of sexual offences where prosecutors are required to ensure that all victims of sexual violence must have their dignity and privacy protected. However this duty to protect the dignity and privacy extends to all court personnel including presiding officers in sexual offences matters.

Victim support requires intervention at a number of different levels. Working from principles set out in the Victim Service Charter, understanding basic victim's rights and practicing respect for victims is the responsibility of all people working at a court, this extends from the security staff through to people directly involved in managing the case. Failure to pay attention to this can result in complainants turning away from the system before they even get into the court. Ensuring this approach, requires strong standards and management.

[29] The Constitution of the Republic of South Africa. 1996. section 10
[30] *ibid.* section 14
[31] *ibid.* section 12 - with particular emphasis on sub-section 12(1)(e)

Issues central to the prosecution that may have any bearing on the complainant's rights must be explained to the complainant. What may be perceived as common knowledge to prosecutors may not be to complainants. All decisions relating to sexual offences prosecutions (and investigations for that matter) must be discussed with the complainant, explained in detail and the complainant should be ultimately responsible for decisions which may have significant consequence on the case. Such as withdrawal, plea bargaining or alternative sentencing.

The National Development Plan recognises the critical role of civil society in the criminal justice system and calls for 'support to non-governmental organisations who engage in citizen safety' to be 'stepped up' (p 398). This is important. Civil society organisations dealing with violence against women and children and victim support services have the skill and knowledge-base to successfully assist all role-players in the system to improve on victim support as well as improving the quality of prosecution.

Recommendations:

- All policy adopted in respect of the Sexual Offences courts must take a victim centered approach which is located within the broader Constitutional framework. Furthermore, professional resistance to shifts that place the rights of victims more centrally must be addressed.
- Policy must address the role of stakeholders to respect, protect, promote and fulfil the various rights of victims, in particular the rights to dignity, privacy and freedom from harm.
- Collaboration with civil society organisations that provide services to survivors and complainants is essential to promote victim support at all stages of investigation and prosecution. To this end local networks must be established and civil society engaged in court forums that focus on case flow management or management of sexual offences generally.

5.4.Court Preparation

Court preparation is an essential service to witnesses within the criminal justice system. The NDP recognises this and recommends that the programme for training and placing Court Preparation Officers to be increased so as to 'assist in effective victim preparation to secure convictions' in sexual offences. We note the specific reference to sexual offences victims in the NDP and support this prioritisation while also urging the Department of Justice to make future plans to ensure quality court preparation is available to all victims of crime.

It is essential that court preparation services are consistently and uniformly provided by the DoJCD. Current standards for court preparation are low. Court preparation officers receive basic training on court facilities and court procedures, but specialised training in sexual offences, trauma and working with children is mostly absent. In line with our recommendations regarding magistrates and prosecutors we feel that court preparation officers must also specialise in sexual offence matters. This will require that they receive specialised training. Specialised court preparation officers can provide a valuable resource to specialised sexual offences prosecutors.

Recommendations:

- Prioritisation of court preparation officers in sexual offences matters.
- Specialised training of court preparation officers for victims in sexual offences matters.

5.5. Management and Accountability

The effectiveness of policy, directives, programmes and resources for prosecution of sexual offences is ultimately dependent on the quality of implementation at local level. Thus effective management of sexual offences prosecutions and services to complainants is essential to improve access to justice for in these matters.

Recommendations:

- Management systems and requirements to ensure good quality implementation must be prescribed in policy or subordinate legislation.
- Management systems must monitor the range of indicators contained in policy directives, in particular: The issue of diversification of matters on court rolls in specialised/dedicated courts; decisions not to prosecute (in light of strong concerns about the prosecution in some courts only of more easily winnable cases which boosts conviction rates but results in failure of justice in many others); ensuring the maintenance and functioning of critical infrastructure and resources; and ensuring co-ordinated engagement with a range of stakeholders.
- Regarding stakeholder engagement, we recommend the project oversight committee model that has been implemented in sexual offences courts in the past, these committees focus specifically on sexual offences. Failing that, as a second, less attractive option. civil society stakeholders who work on sexual offences should participate in case flow management meetings.

5.6. Human Resources

Prosecuting sexual offences requires a range of different human resources, these include presiding officers, prosecutors, intermediaries, court preparation officers, interpreters, court security and other service providers such as civil society or department of social development staff who provide victim support on-site. All of these must be selected and skilled to manage sexual offences in a professional manner.

Recommendation:

- All policy and plans for prosecution of sexual offences must recognise this range of staff and address the various requirements for different categories of staff to function optimally. This will ensure that the 'chain' of people with whom a complainant comes into contact in a particular court implement the law and policy appropriately and will help to minimise secondary victimisation.

5.6.1. Prosecutors

To ensure better quality prosecution, two prosecutors are required in any court that hears sexual offences matters (designated or not). This is consistent with the "blueprint" that was developed for sexual offences courts and with good practice as it has developed. This enables prosecutors to prepare adequately for trial.

Thus in many courts, there are two prosecutors, however there are concerns about the manner in which this is implemented. Shukumisa members working in courts indicate that in some courts, these prosecutors are frequently rotated, only spending a few months working on sexual offences. The result of this is that the

complainant deals with 2 to 3 different prosecutors for the duration of their case. This has significant implications for secondary victimisation and for the likelihood that the complainant will feel secure enough with the prosecutor to provide the court with the best quality evidence. In addition, this rotation results in inappropriate, untrained and inexperienced prosecutors managing these cases.

In other courts the practice has developed in which one prosecutor undertakes consultations with witnesses while the other appears in court this is not an effective solution to adequate preparation and once again shows a failure to register the importance of building relationships and trust in order to strengthen the quality of evidence provided by traumatised complainants.

Recommendations:

- The standard of two prosecutors per court dealing with sexual offences must be maintained.
- Importantly court management systems must improve to ensure that the aspects of this standard that can strengthen a complainant's testimony and promote victim support aren't lost.
- We refer also to our earlier concerns and recommendations on the budget constraints and prioritisation in the NPA strategic plan. Sexual offences must be prioritised in NPA plans on human resources.

5.6.2. Ensuring Capacity for Sexual Offences Prosecutions

Not everyone has the temperament to work with sexual offences cases. Much secondary victimisation is caused to complainants as a result of poorly suited people managing these cases. It is also a result of insufficient levels of knowledge regarding the law and procedures and a failure to grasp the emotionally traumatic impact of sexual offences. These matters are complex, yet too often inexperienced and ill-trained court preparation officers, intermediaries, interpreters, prosecutors and presiding officers are given responsibility to manage them. This contributes to widespread violations of victims rights and to repeated miscarriages of justice by the system tasked with protection and justice.

All staff fulfilling functions relating to sexual offences require competencies that extend beyond legal knowledge and skill. It's critical to ensure that people appointed to work with sexual offences demonstrate an aptitude to effectively manage these emotionally and technically complex cases. This includes basic aptitude to communicate with children and traumatised complainants. This basic aptitude must be further developed through skills development programmes.

The "blueprint" for sexual offences courts required that prosecutors have a minimum of three years experience. We support this standard and recommend that the same be required for presiding officers. However, as noted above experience as a prosecutor or magistrate alone is not sufficient to prosecute sexual offences.

Training

As with legislative and policy development, there is a long history of developing and delivering training programmes relating to prosecuting or presiding over sexual offences. This means that there are a number of lessons already learned regarding this. We recognise that the NPA have developed training for prosecutors on

the sexual offences legislation and that this has recently been updated.[32] However plans for rolling this training our are not articulated, nor is any reference made in the plans for training presiding officers. Furthermore, members of Shukumisa working directly in the courts around the country indicate that all too often new staff appointed to manage these cases have absolutely no training or direction.

Presiding officers who are are trained and up to date on the relevant case-law and legislative requirements relating to sexual offences and relevant aspects of criminal law are essential to ensure that the legislation - which took more than a decade to reform - and recent case-law is properly implemented. Without this many of the measures undertaken by other role players (such as prosecutors or court preparation officers) to prevent further trauma and to improve the quality of evidence placed before the court by complainants are meaningless.

Many training courses are simply exercises in which information is explained to the trainees by a trainer with the relevant knowledge. Courses of a slightly better calibre make use of more interactive methodologies which encourage group problem solving and discussion. Other experiential methodologies have been employed to enhance the grasp of trainees on important psycho-social and social context aspects of sexual offences. It is not clear what methods are being employed in current training programmes.

Of great concern is that for the most part, the quality of learning is not assessed. Trainees may or may not grasp the information. Attending training on its own is not an indicator that a person is fit to prosecute or preside over sexual offences. This failure to assess the impact of learning sets the bar extremely low.

It's well established in most disciplines, including law, that practical training is an essential aspect of skill and capacity development.[33] However there is no formal system to facilitate this critical component regarding prosecuting sexual offences. This is particularly problematic with less experienced prosecutors, who often struggle to protect the rights of victims effectively, particularly in the face of the the onslaught of defence lawyers who are generally more experienced or in matters where presiding officers have not been exposed to developments in law. Formalising a practical element to the training process for prosecutors will enhance the ability of the prosecutor to promote the rights of the complainant in court.

By incorporating observations in sexual offences at earlier stages of prosecutorial training and development, the NPA could help to build stream of eligible candidates, who would be better suited to prosecute sexual offences after gaining some years' experience in prosecuting less serious offences in other courts.

Recommendations:

We have a number of recommendations regarding training and capacity.

- Selection criteria must be developed to establish the basic competencies required by a person who fulfills any professional function relating to sexual offences. This includes presiding officers, prosecutors, intermediaries, interpreters and court preparation officers. Prior to any appointment of this nature, applicants and incumbents must be assessed and rated according to these competency criteria.

[32] National Prosecuting Authority. 2012. *2011/2012 Annual Report.* p40

[33] This refers specifically to norms relating to articleship/clerkship under the Attorney's Act (53 of 1979).

- It is harmful to complainants emotional well-being and often successful prosecutions to place people in positions working with sexual offences when they do not want to work with these matters. Only people who express a desire to work on these matters should be appointed to these positions.
- Prescribed minimum requirements all staff engaged in a sexual offences must be articulated in the policy framework.
- DoJCD target training for presiding officer's to strengthen their engagement with the legislation and case law as well as the rationale for significant shifts in rules of procedure.
- In addition to addressing legislation, policy and case-law, training must incorporate social context issues. This will enhance understanding of the psycho-social impact of sexual offences and how this impact intersects with legal systems and requirements.
- Trainers must not be limited to legal experts. Medical and psychosocial experts must also deliver relevant training content, in particular to legal professionals working in the system who often fail to engage with these contexts.
- Training cannot be limited to once off initiatives, spaces for ongoing skills development must be systematised. These are vital spaces in which staff working on these matters can share experiences regarding complexities and systemic blockages, in addition to ensuring that staff are up to date on legal developments.
- Training must include assessment of competency, attendance is not sufficient.
- Linked to the above recommendation, training must also result in professional advancement and recognition.
- In addition to formal training, we recommend that prosecutors (in particular) first undergo a practical training component. This should at a minimum require that new prosecutors observe in at least 3 trials, including processes relating to case management support prior to taking on cases alone.
- In addition to training and practical experience, a basic information and induction package must be developed for new staff. This must not replace training but would form part of the training process and is absolutely imperative in urgent instances where no training course is available but staff are urgently needed.

5.6.3. Debriefing and Support

Daily exposure to sexual offences cases takes its toll on most individuals, whatever their capacity. Some professions require regular support and debriefing to be incorporated into professional practice. This assists in two ways. Firstly, it provides protection to staff from 'vicarious' traumatisation - the negative impact in their personal and emotional lives; secondly, it helps to minimise further secondary victimisation.

Recommendation:

- Structured support programmes and other appropriate measures must be put in place to manage the impact on court staff of daily exposure to sexual offence matters. This must recognise that formal 'supervision' strategies used in the psychological model are often met with high resistance from legal professionals. Thus the structured support programmes must be delivered by professionals who are trusted by the court staff. These are more likely to be used, experiences show that prosecutors are more likely to request this service.

5.7. The Role of the Prosecutor

5.7.1. Prosecutor Led Investigations

There is ample research to evidence to suggest that a high proportion of sexual offences cases get lost at the early stages of criminal investigations. This is due to a range of factors, including: police designating cases as false reports, police encouraging (or at least not discouraging) complainant withdrawals, poor investigations, lack of investigative capacity, lack of substantive knowledge of the Sexual Offences Act and high case-loads.

We believe that it is therefore a critical need for prosecution services to be involved at all stages of an investigation, particularly in relation to decisions that need to be made regarding whether there is a reasonable prospect for a successful prosecution as well as what criterion is used to decide whether to close a docket or to continue with an investigation. If this criterion is to be put into effect, prosecutors must be placed in a position where they have knowledge of the contents of a docket at the early stages of an investigation.

In practice, prosecutors do tend to issue instructions to the police regarding certain aspects of cases that may require further investigation. Extending this system to include prosecutor-led investigations at the early stages of investigations will not only improve the 'prosecutability' of a sexual offence, but can enhance police investigation skills and knowledge about the Act. In a submission to the Justice Portfolio Committee in 2003, Artz, L., & Pithey argued in favour of prosecutor-led investigations:

> … this system does not in any way infringe upon the powers, duties and functions of either the SAPS or the NPA. It is acknowledged that both structures have specific and separate roles but, belonging to the criminal justice cluster, maintain the same objectives. By working together, from the outset, this can only enhance the quality of investigation and prosecution, rather than undermine the independence of both. The functions of both the police and the prosecution should not be seen as mutually exclusive. It should also be noted that section 24(1)(c) of the National Prosecution Authority Act (32 of 1998) provides that Directors and Deputy Directors of Public Prosecution have the power to … *supervise, direct, and coordinate specific investigations.* It is submitted here that the supervision, direction and coordination of investigations may include police investigations.[34]

They also argued that there is a fine line between 'prosecutor-guided investigations' and 'prosecutor-driven investigations', which essentially amount to 'prosecutorial investigations'.

Recommendation:

- We therefore recommend a model where a more mutual, less ambiguous, engagement between the policing and prosecution services is created and support the concept of prosecutor-guided investigations.

[34] Artz, L., & Pithey B. 2003. Submission to the Justice Portfolio Committee. p5.

5.7.2. Prosecutorial Discretion

Research as well as anecdotal evidence by service providers who support rape survivors throughout the criminal justice process, have also found instances of prosecutorial discretion problematic. While it is incumbent on prosecutors to use their discretion in relation to whether they proceed with the prosecution of a sexual offences matter, there is some evidence to suggest that prosecutors sometimes "cherry pick" cases that proceed to prosecution. It has been suggested that this mainly happens in the so-called "sexual offences courts" where there may be some pressure to reflect high prosecution-to-conviction rates as well as to keep caseloads at manageable levels. This clearly disadvantages complainants whose cases may not, at face value, appear to be "clear cut", prosecutable cases.

Recommendations:

- We therefore recommend that Directives/Instructions for prosecutors contain the following:
- that in every case that is withdrawn by the prosecution authority, there is written notification to the victim about the reasons for withdrawing;
- that the complainant is advised that she may speak to the prosecution about the reasons for the withdrawal of the case;
- that the prosecution assist the complainant with a safety and protection plan, should the complainant still feel she is at further risk of harm by the accused; and that
- the reasons for withdrawing cases are captured, in detail, in the docket before the case is finalised.

5.8. Experts and Assessors

A stronger culture of calling experts and working with assessors must be developed. Psychologists and other professional experts who work with sexual offence survivors can assist the court in understanding complex issues, which can in turn assist the court in making more just decisions regarding the management of cases as well as on the verdict.

As it currently stands, the admissibility of expert evidence hinges on fairly simple rules of evidence that affords judges and magistrates broad discretionary powers in relation to the use of expert witnesses. These rules of evidence do not need further elucidation. It is how they are 'used' that is problematic. We have found in that, in practice, non-medical expert witnesses are rarely used in sexual offences cases. By non-medical we mean psychologists, social workers, criminologists and other experts in field of sexual offences who can assist the court with information surrounding psycho-social and other individual and social effects of rape. Other factors such as evidence surrounding the period of delay between the commission of the offence and laying the complaint of rape, rape trauma syndrome and other symptoms posttraumatic stress effects as well as the reasons for inconsistent statements, the reluctance of complainants to testify and memory lapses, amongst other issues that may affect rape victims.

There are very real concerns by service providing organisations that prosecutors are reluctant to use them as experts, and the use of experts in general, even in 'specialised courts'. It is conceivable that the use of experts may be time-consuming (accessing, briefing and consultation with them), but written reports, in addition to

providing oral evidence, is often used in international contexts. It is it magistrate or judge who decides the weight of this evidence in absence of the expert in the court to provide oral testimony. We therefore recommend that the use of expert testimony should be increased through specific mechanisms such as by sworn affidavit, through research findings or expert reports as well as through oral evidence.

There is also some concern that those who are not formally qualified as psychologists or social workers, but who have extensive experience in the field of sexual offences and with working with victims of sexual offences, are not considered sufficiently "expert" assist the court in understanding the impact of sexual offences. This is disappointing given the number of cases that go through the sexual offences courts and the extent to which non-governmental service process assist victims of sexual offences. The case of *Holtzhauzen v Roodt* (1997 (4) SA 766), however, long ago provided sufficient criteria to ensure that lay counsellors could qualify as experts and should be recognised by the courts as such. If a counsellor or service provider has been deemed 'unqualified' to be an expert (i.e. not competent to testify on conclusions about a person's psychological state), he/she can still describe the complainant's behaviour patterns if he/she has the requisite (i.e. counselling) knowledge about the complainant, thus guiding the court on questions falling within the lay counsellors field.

It is commonly understood that Magistrates may choose to use the expertise of assessors. In matters related to the prosecution of sexual offences it may be prudent to include in policy directives a position that assessors must be used in matters where the determination of guilt in respect of the offender is one that relates to aspects of both a psycho-social and medico legal area and that Magistrates and prosecutors alike must in these circumstances make use of the expertise of an assessor. (Perhaps a specific list of criteria needs to be looked at here and listed)

Recommendations:

- We recommend the active use of lay counsellors and non-accredited experts on sexual offences as expert witnesses, where they can educate the courts on matters outside of the courts expertise or knowledge.
- We encourage the active and deliberate use of lay assessors in sexual offences cases.

5.9.Infrastructure for Prosecuting Sexual Offences

The range of human resources required to properly manage sexual offences matters is discussed above. As noted in the discussion on budgets above, the management and prosecution of sexual offences have particular infrastructural (spacial and equipment) requirements. These have developed through good practice but more specifically through the development of the 'blue-print;' the Policy Directives for prosecutors; the SOA; and case law.[35]

Functioning CCTV systems are essential, this implies not only that the equipent must be on site, but that staff are able to use it and that it is maintained. Working computers (with prosecutors and other staff skilled to use them) enhance the quality of prosecution by encouraging the dissemination of case law and knowledge sharing

[35] Director of Public prosecutions v Minister for Justice and Constitutional Development and Others ([2009] ZACC 8).

between staff in different jurisdictions. Radio's or televisions in waiting rooms can lessen the stress that hours of waiting places on complainants.

In addition to equipment, certain spatial elements are as essential as functioning CCTV systems are. Exposure of the complainant (who has experienced profound trauma at the hands of the offender) to the accused and supporters of the accused can significantly affect the complainant's levels of fear and intimidation, resulting in poorer quality testimony. In some instances complainant's are unable to testify at all as a result of this exposure. In addition, there is a constitutional imperative to respect the complainant's right to privacy. So consideration must be given to these in design and planning of all courts in which sexual offences are heard.

Discrimination against adult complaints by only creating appropriate facilities for children is unacceptable, the different needs of children and adult complainants must also be addressed in spatial and infrastructure planning.

Recommendation:

- The range of infrastructural requirements for efficient management of Sexual Offences must be included in the policy framework and incorporated into broader Departmental plans.

5.10. Special Considerations: Young Sex Offenders

The discussion on management of sexual offences also requires attention to the management of matters involving children accused of committing these offences. This implies some integration of policy relating to the Child Justice Act No. 75 of 2008 with sexual offences policy and programming. Furthermore, as with issues relating to victim support and other services to complainants, integration with the Department of Social Development and civil society service providers is important.

It is critically important to ensure that all children who are alleged, acknowledge or who are placed on diversion or found guilty of sexual crimes are assessed and if appropriate placed in a programme that addresses their behaviour. Childhood and adolescence are phases of development during which behaviour, and particularly sexual behaviour, is still relatively in its formative stages, and so rehabilitation has a greater possibility of success if it is addressed before it becomes a fixed pattern for the young person.

A strong and positive evidence base is developing for appropriately structured rehabilitation programmes for young offenders, particularly those based on cognitive behavioural principles and are sex offence specific, without ignoring other issues in the child's life that may have contributed to the development of the behaviour. It therefore follows that addressing the behaviour of young offenders may not only assist the child him or herself, but constitutes an essential aspect of rape and sexual offence prevention.

Recommendation

- We recommend that consideration be given in all sexual offences policy and programmes to requirements for the management of cases where the accused is a child.