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Protecting people with Mental Illness and Intellectual Disability in the Criminal Justice System

In the midst of the Life Esidimeni tragedy, in which almost 100 mental health care users died and others were harmed, causing unbearable distress to their families, the Department of Justice quietly published a draft Bill to amend to the Criminal Procedure Act (CPA). The Bill followed the 2015 Constitutional Court judgment in *De vos v Minister of Justice and Constitutional Development*, a case about the treatment of people with mental illness and intellectual disability by the criminal justice system, and in which the court declared certain provisions of section 77(6)(a) of the CPA to be inconsistent with the Constitution and invalid.

SECTION27 was involved in the case at the High Court stage, launching an *amicus curiae* intervention on behalf of Down Syndrome South Africa, and bringing important human rights arguments to the proceedings.

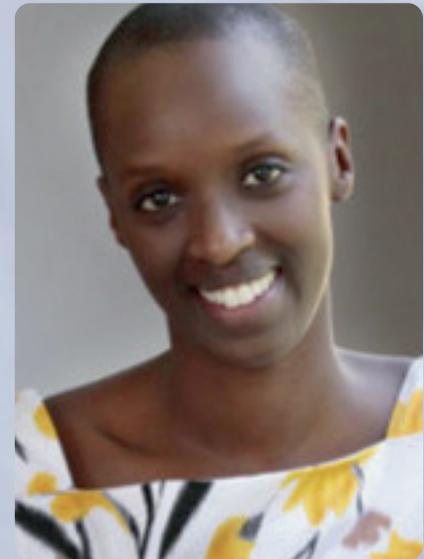
This case exposed the often tragic circumstances in which people with mental illnesses and intellectual disabilities interact with the criminal justice system. It concerned the compulsory detention of people who are mentally ill or intellectually disabled, including in a prison, when they are accused of a serious

crime but are unable to plead due to their mental capacity.

SECTION27 argued that this was an untenable position and that the criminal justice system infringed the rights of people with mental illnesses and intellectual disabilities. We argued that the section failed to properly distinguish between people with intellectual disabilities and those with mental illnesses, each having different needs; that the continued use of the term “mental defect” was a violation of the right to dignity of those with mental health conditions; that the provisions were unconstitutional because of a failure to give the magistrate a discretion, instead simply requiring the magistrate to detain an accused person; and that the use of prisons to detain persons in this position was unconstitutional and contrary to international human rights law.

Simply put, we said that the section infringes the right to access health care services; infringes on the right to dignity and infringes on the right to equal treatment in that it discriminates unfairly against people with mental illnesses and intellectual disabilities.

The Constitutional Court took note of our arguments and decided to promote the use of the



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more dignified terminology and discouraged the use of the term “mental defect”, amongst other derogatory terms. The Court also attempted to distinguish between people with mental illnesses and those with intellectual disabilities and recognised their different medical and psycho-social needs. Importantly, the Court gave magistrates different options to place accused persons in health establishments and other places where they can receive care rather than detaining them as if they were convicted criminals.

While the Department of Justice initially defended the

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original sections in the CPA, saying that people with mental illnesses and intellectual disabilities were a danger to themselves and to society and that their detention served the purpose of protecting society, it has now taken steps to rectify the injustices of the CPA. In publishing the draft Bill, the Department of Justice has attempted to implement the letter and spirit of the Constitutional Court's judgment.

On 8 March 2017, SECTION27 made a submission to Parliament's Portfolio Committee on Justice and Correctional Services. While we welcomed the Bill for the most part, we raised concerns about several amendments, including one providing for the imprisonment of an accused person in a correctional health facility in circumstances where the person poses a danger or threat to property. This position was clearly rejected by the Constitutional Court when it said that 'imprisonment is only viable as a "stop gap" measure if the presiding officer is of the opinion that the state patient is likely to cause harm to himself or others'. While we would have preferred the Court to reject all detention in correctional facilities, the Court was trying to strike the appropriate balance between the rights of the accused and protecting the community.

SECTION27's parliamentary submission raised the concern that correctional facilities don't provide the appropriate treatment and care for people with mental illnesses and intellectual

disabilities. Also, given the severe lack of psychiatric patient beds around the country, accused persons in this position would effectively be detained indefinitely while awaiting a bed in a health facility. This shortage of mental health care facilities was also highlighted through the Life Esidimeni tragedy. In litigation in 2015, in which SECTION27 represented SADAG, SASOP and the affected families of Life Esidimeni, Dr Talatala of SASOP said the following in an affidavit:

'The mental health care users could not be discharged to acute mental health care facilities because these facilities are already unable to discharge mental health care users fast enough to accommodate new admissions. This is even worse in the forensic psychiatry system, which deals with mentally ill accused persons and is already overloaded with patients waiting in prison for beds.'

SECTION27 was pleased to note that a second version of the Bill, taking account of public comments, removed the provision allowing for detention in a prison where the accused poses a danger or threat to property. This significantly limits detention in correctional facilities.

On 11 May 2017, the National Assembly passed the B version of the Bill and transmitted it to the National Council of the Provinces for processing.

SECTION27 took advantage of this legislative scrutiny to ask for further reforms in order to advance the rights of persons with mental illnesses and intellectual

disabilities. We recommended that the Department of Justice review all legislation in order to address laws that continue to treat people with mental illnesses and or intellectual disabilities unfairly and as incapable of carrying out certain duties and responsibilities by virtue of their mental health status. As a society, we must continually advance these rights as guaranteed by our Constitution. As the Constitutional Court said of the United Nations Convention on the Rights of Persons with Disabilities: 'It is clear from article 14 that one cannot remove persons with mental illnesses or intellectual disabilities from society for the mere fact that they have mental illnesses or intellectual disabilities.'

In particular, we drew attention to the laws that frequently disqualify or remove people from office in statutory bodies on the grounds that the person is mentally ill or intellectually disabled, having little or no regard for their ability to carry out the functions and responsibilities of that office. This infringes on their rights to dignity and equality and should be corrected as part of an ongoing law reform process.

SECTION27 is currently engaging with the Department of Justice to make these changes to the law. We feel strongly that mental health can no longer be a source of indignity and inequality and we will continue to work in order to lead the changes to the legal framework that perpetuate the infringement of the rights of people with mental illnesses and intellectual disabilities. **MHM**