

6 October 2020

SECTION27 SUBMISSION ON VICTIM SUPPORT SERVICES BILL, 2019

Introduction

1. SECTION27 welcomes the opportunity to comment on the Victim Support Services Bill (VSS) B791-2019. Our submission on the Bill is informed by the insights and experiences of our work in relation to good governance and accountability, Sexual and Reproductive Health Rights (SRHR), HIV/AIDS, and Comprehensive Sexual Education. We focus on key changes to the Bill that will render it implementable and in line with the Constitution and the National Strategic Plan on Gender-Based Violence and Femicide.

Definition and interpretation

2. According to the Bill, “**service provider**” means any registered facility as contemplated in section 39, and “**facility**” means a physical structure irrespective of the nature of its construction, which is established by any person and from which any service to victims is rendered.
3. This definition of ‘service provider’ excludes electronic communications service providers, which are recognised under the Protection from Harassment Act 17 of 2011 (“the Harassment Act”). The Harassment Act acknowledges the varying forms of violence perpetrated against victims, including online abuse or through electronic mechanisms. The Harassment Act enables individuals who are subjected to harassment to obtain protection and for the electronic communication service providers to assist courts or law enforcement in identifying the perpetrators responsible for the harassment.

4. We recommend that definition of 'service provider' not be limited to those entities with physical structures, but include electronic communications or virtual service providers, who offer both victims and the criminal justice system additional and indispensable support.

Section 2: Objects of Act

5. This section is appropriately comprehensive in providing a framework for the nature of support required for the victims of violent crime. Section 2(1)(c) directs that all service providers dealing with a victim should be treated with dignity and respect, regardless of their "citizenship, race, gender, culture, religious and *personal circumstances*" (own emphasis).
6. Although this provision attempts to be inclusive, the use of 'personal circumstances' is confusing, particularly because a definition is not offered in the Definition and Interpretation section.
7. We recommend the use of the all-inclusive language and category of persons recognised in section 9(2) of the Constitution. The equality clause expressly states the various grounds upon which unfair discrimination is outlawed, namely: race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

Section 4: Application of the Bill

8. Clause 4 of the Bill states:

8.1.1. "In the event of a conflict between a provision of this Act and a provision of another Act of Parliament, or where any other Act of Parliament provides for specific services to a victim, the provision of such Act will prevail."

9. Whilst we agree that the Bill must be subservient to legislation that provides for specific services to a victim, we are concerned about circumstances where the Bill is in conflict with other legislation. In our view, such a provision is likely to render the Bill ineffective. For instance, clause 5(g) read together with clause 19 of the Bill provides that a victim is entitled to legal

representation, at state expense, in a claim for damages. However, the general policy of Legal Aid South Africa is that legal aid may be provided in a civil matter to a person who qualifies for legal aid in terms of the Regulations passed in terms of the Legal Aid South Africa Act 39 of 2014, and who is a citizen or permanent resident of the Republic.¹ Legal aid is therefore not available to non-citizens in civil cases. In this instance, if the Legal Aid South Africa's policy is to prevail over this Bill, it would mean that victims who are not citizens of South Africa, would not receive legal aid for their damages claims.

Section 5: Rights of the victim

10. We recommend that the clause be amended as follows:

“5(1) The victim has a right to receive assistance, which includes the right to be informed of his/her rights to:

10.1.1. ...

(e) Delete this clause

(h) Exercise the right to provide an account of the violent crime when he or she is ready to do so and to be informed promptly of the consequences of not providing such an account.”

11. In light of clause 19(b), where the entitlement to legal representation at the state's expense for civil proceedings is dependent on the fulfilment of certain legal requirements, clause 5(g) should read as follows:

“...to have a legal practitioner assigned to him or her by the state and at state expense, in line with the policies of Legal Aid South Africa, in the event the victim decides to claim for damages and to be informed of this right promptly;”

Chapter 3: Roles and Responsibilities of Service Providers and Relevant Departments

¹ Regulation 2(3)(b) of Regulation R745 Government Gazette No. 41005 of 26 July 2017.

12. We commend the Bill for clearly setting out the roles of each government department. Below we set out some concerns and recommendations.

Section 8: Services rendered to a victim

13. We recommend the inclusion of a clause that provides that victims must be able to choose the gender of the service provider, as well as the language of communication they would feel comfortable to report the incident and consult with. Service providers must further ensure access support for victims with special needs e.g. access to sign language interpreters.

Section 9: Implementation of Act

14. Clause 9(2) places an onus on the relevant department and service providers to ensure that they have adequate human and financial resources to meet their obligations. However, it is unclear what systems of monitoring and accountability would be in place to ensure this. We hope this critical function is expressly articulated in the corresponding policy frameworks.

Section 10: Minister responsible for social development

15. Clause 10(f) states that the Minister responsible for social development must provide support to victim in court. It is not clear what support is envisaged by the Bill and how this will be implemented.

16. Clause 2 requires the Minister to set-up a 24-hour 7-days toll free line to provide services to victims. Traditionally, a toll-free number is only free of charge from a landline. As access to landline services have increasingly become very limited, the usability and accessibility of toll-free numbers should also include mobiles. Other alternatives should include public hotlines through the various chat messenger applications available, including Unstructured Supplementary Service Data (USSD), which should also be free.

Section 11: Minister responsible for health services

17. The public health establishments should not only be designated for purposes of administering Post Exposure Prophylaxis (PEP), but for all medication and services that are deemed essential for sexual abuse survivors. There is also a need for pregnancy and STI screening. Moreover, female victims of sexual abuse should be given emergency contraception at the same time as they are issued PEP.
18. In the event that the victim has already fallen pregnant as a result of sexual violence, the health practitioner should explain the options available to them, including termination of pregnancy services and giving the child up for adoption.
19. The reading of clause 11(1)(b) suggests that facilities will be designated for two types of services, for PEP and for compulsory HIV testing. In terms of the HIV testing guidelines set by the National Department of Health as part of the country's HIV programme, sexual assault victims are offered PEP if they test negative for HIV within 72 hours of exposure in order to prevent HIV infection. As a country, our approach to HIV testing, treatment and care is one that prioritises consent, confidentiality and counselling. It is however unclear whether the compulsory HIV testing is in line with the PEP administration or whether it applies to all victims, despite the lapse of time after the violent incident.
20. We are concerned that such an approach is not only unconstitutional, but could undermine the objects of the Bill, as such a clause could deter victims from seeking health services— for fear of being forced to take an HIV test. In our view compulsory HIV testing also constitutes secondary victimisation, and is therefore incongruous with the objects of the Bill.
21. Survivors of sexual assault are likely to have experienced a violation of their rights to freedom and security of the person (section 12 of the Constitution) and to dignity (section 10 of the Constitution). The Bill should advance the empowerment of survivors, rather than undermining it by requiring compulsory HIV testing following a sexual assault. In accordance with the best practice on HIV testing as set out by UNAIDS, the United Nations agency responsible for the global HIV/AIDS response, all testing must be voluntary, and mandatory or coerced testing of individuals

is never warranted.² As written, the Bill directs the Department of Health to designate facilities for the purposes of compulsory testing, which is not only regressive, but also contrary to constitutional principles and international best practice on the issue of HIV testing and informed consent. Even the rights of alleged perpetrators are better protected. According to section 30 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, a court order is necessary for mandatory HIV testing should they refuse to give their consent.

22. The appropriate approach is to ensure that service providers are capacitated to empower victims to make informed decisions about their health. This would be in line with public health guidelines, such as the National Department of Health's HIV testing guidelines and the National Strategic Plan on HIV. We strongly recommend that this provision be deleted.
23. Whilst we note that clause 11(2)(c) is a general "catch-all" phrase, we have observed that there are some services that are particularly difficult to access and are stigmatised. These include: Termination of Pregnancy, emergency contraceptives, screening of STI and adoption. We recommend that these services are expressly mentioned as services available to the victim.
24. Lastly, we note that there is a requirement for facilities to be designated in order to provide certain services e.g. designation of health establishments to provide PEP. Our experience with the designation of facilities for the provision of termination of pregnancy services has revealed the following:
 25. A lack of reassessment to determine whether more facilities need to be designated to efficiently meet the needs; and
 26. Disparities in distribution of designated facilities, with most designated facilities being found in the urban areas.
27. Put together, these two have contributed to poor access to termination of pregnancy services. We therefore recommend that measures be put in place to assess the need for designating more

² UNAIDS and WHO. Statement on HIV testing and counselling: WHO, UNAIDS re-affirm opposition to mandatory HIV testing. Geneva: World Health Organization; 2012 (http://www.who.int/hiv/events/2012/world_aids_day/hiv_testing_counselling/en/, accessed 8 April 2014)

facilities, and for ensuring equitable distribution of designated facilities. The needs of people in the rural areas must be given particular attention.

Section 12: Minister responsible for Police

28. Clause 12(1)(b)-(h) sets out the information that must be provided. Whilst the list is comprehensive, it is not clear to whom this information must be provided. We note that a similar provision in relation to the National Prosecuting Authority in clause 18, which specifically provides that the information must be provided to the victim. We are of the opinion that the same should apply to clause 12(1)(b)-(h).

Section 13: Civilian Secretariat for Police

29. The Bill states that the Civilian Secretariat will be responsible for monitoring the implementation of the Bill as it relates to the functions of the Police Service. It further states that the Secretariat must report on its monitoring to national committee on victim support services annually. In our view, an annual report to the national committee for victim support is inadequate. There should be a continuous assessment on the progress and challenges of implementation in order for the responsible bodies to have a timely turn-around time and effective response.

30. We recommend that the Civilian Secretariat for Police should be delegated with additional responsibilities to provide a progress report with each quarter of the year to the Department of Social Development, Department of Women and Minister of Police, on the status of the implementation of this legislation relating to the South Africa Police Services.

Section 16: Departments responsible for basic and higher education

31. Clause 16(3)(c) refers to 'learner' victims. The consistent use of inclusive terminology should be adopted, as learners are not the only group of persons vulnerable to abuse. The use of the term 'victim' is more appropriate.

32. As part of the supporting policies and practice guidelines, there should be an obligation on the relevant department to support learners, students and employees of the institution who have suffered abuse, whether within or outside the learning institution, to find and move to a new school, institution or place of employment, where necessary.

Section 17: Department responsible for women

33. Unlike the detailed responsibilities designated to the other Ministries of this Bill, the responsibilities of the Department of Women, Youth and Persons with Disabilities are thin and vague. Arguably the most critical stakeholder in leading the implementation of this legislation, due regard should be given and expressly stated to the roles and responsibilities of this Ministry.

34. In line with the vision and mandate of the department, we recommend the specific inclusion of the following legislated key responsibilities:

35. Effective, efficient financial management and supply chain services required for the implementation of this legislation;

36. The development of research, policy analysis and knowledge management for the transformation of victim empowerment and gender equality;

37. Stakeholder engagement, coordination, support and outreach for the creation of initiatives and campaigns to support the national development goals;

38. To coordinate victim support services planning, monitoring, and evaluation of progress on the implementation of this legislation.

Section 19: Legal Aid South Africa

39. There is a typing error in the inclusion of subsection (c), as it reads merely as a continuation of subsection (b).

Chapter 4: Registration of victim support facilities

40. We welcome the efforts to ensure registration of facilities as this will assist in monitoring compliance with norms and standards and ensure safety and well-being of the people using the services. We are however concerned that many of the service providers are small, community

based non-governmental organisations who may struggle to meet the requirements. While this should not get in the way of regulation, we are concerned that an unintended effect may be a reduction in the number of service providers. Having regard to this, the National Department of Health's Guideline For The Licensing of Residential and Day Care Facilities for People with Mental And/Or Intellectual Disabilities states that the guideline applies only to facilities providing services to more than 10 people. We recommend that the Bill also considers a similar threshold.

Section 20: Procedure for registration of victim support facility

41. Clause 20(9) states that in the event of a re-registration application not being approved, or of a registration being cancelled, the provincial head of department and the owner/manager of the facility have an obligation to take reasonable steps to ensure that people admitted in the facility are admitted to another registered facility. In our view, once the registration has been cancelled, the Department must assume sole and full responsibility for the people admitted in the facility and ensure that they are placed in suitable facilities. The clause further states that as an alternative to placing the victim in other registered facilities, victims can be placed in the care of fit and proper persons. It is not clear (i) what criteria is used to determine whether someone is fit and proper and (ii) whether this fit and proper person has to have their facilities registered as well, and if not, whether this would be a temporary emergency measure.

Section 21: Requirements for registration of facility

42. According to this clause, facilities will be registered if they comply with the structural, safety, health and any other requirements of the municipality where the facility is situated. Confusingly, section 27 of the Bill states that the Minister must prescribe national norms and standards for facilities for victims of crime and violence. These national norms and standards must provide for structural construction, size and relevant building regulations for the local municipality. The Bill defines 'Minister' as the Minister responsible for social development. We are doubtful of whether the Minister for Social Development is empowered to issue norms and standards in relation to the building regulations for local municipalities. We understand this to be within the mandate of local government, rather than the Minister of Social Development.

Section 22 and 23: Registers for registered service providers

43. The information of existing service providers and/or services should be widely available and publicised. It should not only be kept in the national and provincial offices, websites and any other additional ways to disseminate this information as widely as possible.

Section 25 and 26: Suspension of registration and deregistration

44. It is unclear who assumes responsibility or the victims where a service provider's registration has either been suspended or cancelled.

Section 27: National norms and standards for facilities

45. There is a typing error at clause 27(2)(a) which should read as "structural *construction*" and not "constriction".

Section 28: Registration and cancellation of registration of facility

46. There is a typing error in the title, it should read cancellation and not "cancelation".

Section 32: Management structure of facility

47. Clause 32(1) provides that the Minister may prescribe the management and control structure of a facility. We submit that this clause is too prescriptive and should be removed from the Bill.

Chapter 5: Service facilities for victims

48. Whilst it might be relatively easy to inspect and monitor compliance with requirements for physical structures, we question how the monitoring and accreditation of some of the programmes will operate on a practical level, for example with spiritual programmes.

Conclusion

49. SECTION27 appreciates the opportunity to have made submissions on this important Bill, which has been long overdue. We commend the comprehensive and thoughtful nature of the contents of the Bill, as well as the efforts to systematically promote and protect the rights of victims of

violent crime and offer the much needed support when those rights have been violated. Should you have any queries, please contact us at:

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