

# Law Reform Commission hands reports to Justice Department

South African Law Reform Commission chairperson Justice Jody Kollapen says the process of reforming the law to best suit both the country and its constitutional democracy, is not easy nor will it be quick.



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Kollapen was speaking at the handover of four reports on various aspects of the law and legal practise to Justice and Constitutional Development Minister Ronald Lamola on Tuesday, 29 March 2022.

## The reports are:

- Project 107: *Report on Sexual Offences (Pornography and Children)*
- Project 142: *Investigation Into Legal Fees, Including Access To Justice And Other Interventions*
- Project 138: *The Practice of Ukuthwala*
- Project 125: *Harmonisation of Existing Laws Providing For Different Periods Of Prescription*

Justice Kollapen explained that the commission's work was conducted with extensive consultation.

“In much of the work that we’ve done, sometimes there isn’t a definitive answer and sometimes there is but sometimes in the public consultation process, two very viable options may emerge as possible routes to law reform.

Minister Lamola said although a definitive timeline cannot be placed on when the reports will be implemented, government will be working “within reasonable time” as the reports are “top of the mind”.

“These four reports go a long way in analysing systemic problems in our justice system and in society and recommending an appropriate legislative remedy to address these. The reports cover issues which are at the heart of access to justice, the distortion of cultural practices and the ability for claims to be justly adjudicated.

“We welcome the research, investigations and recommendations as set out in the reports as we consider the necessary legislative changes, amendment bills and regulations,” Lamola said.

### ***Report on Sexual Offences (Pornography and Children)***

Justice Kollapen said the report on child pornography covered a “variety of areas” in how the law can protect children from being exposed – as either inadvertent or forced participants or viewers – to pornography.

“The report covers a variety of areas in how the law could best regulate that with the view to protecting children but also recognising that children themselves may be involved in the production of this material.

“Children are naturally curious and [the report deals with] how best to deal with that other than the strict strictures of the criminal justice system but in recognising that we need to deal with children in a way that recognises their youth, their vulnerability and the need not to stigmatise them permanently,” he said.

### ***Report Into Legal Fees, Including Access To Justice And Other Interventions***

*Justice Kollapen highlighted that in South Africa, the ability to access justice largely depends on the ability to gain access to legal representation. As a result of this, high legal fees are becoming a hindrance and undermine the country's constitutional democracy.*

*“Increasingly, the cost of justice has simply put that right beyond the reach of many. So it rings hollow when someone who's lost their home and has been unable to have his/her day in court, not because the doors of the court are closed physically but simply because access to justice is prohibitive from a cost point of view.*

*“It undermines the right to court and in turn, it undermines the very idea of a constitutional democracy that can be held up to say we are all equal before the law. [For] many that would fall within the middle and lower income groups, access to justice is a formidable challenge,” he said.*

*The commission chair explained that the legal fees report suggests carving out a dispensation that ensures that those who can pay high legal fees can do so but also allows for access for others.*

*“The report seeks to find means to reduce legal fees and to place certain caps on the scope and extent of what law firms and legal practitioners may charge to people...but in particular when those services are used in the magistrate's courts, there could be a strong case made for a reduction or at least a set of guidelines that would regulate fees,” he said.*

*Kollapen added that although these reforms are important, the recommendations are made with the knowledge that legal professionals also need to earn a living and that the profession is sustainable.*

*"But ... at the end of the day it's not only about one sector; it's not only about lawyers. It's about all of us as a society... and what is it that ethically, we should be doing to ensure that the reach of the law is not taken beyond the people who seek justice," he said.*

## **The Practice of Ukuthwala**

*The now controversial practise of ukuthwala is defined in the report as "the act of taking a marriage partner in unconventional ways, seemingly forceful, with the aim of forcing the girl's family to enter into negotiations for the conclusion of a customary marriage".*

*Presenting the report, Kollapen said a balance had to be struck between respecting traditional practises and ensuring that these are carried out within the confines of the law.*

*"The report recognises that some features of the practise may have had a benign origin...but over time some features of that practise deteriorated to the extent that the notion of consent in some instances simply lacked. People were taken without their consent [and] in some instances; young children were the subject of the distorted form of ukuthwala.*

*"Following its research...the commission produced a report which seeks to recognise on the one hand the benign and some positive features of the practise but on the other hand to ensure that the practise was not used to force people into marriage or indeed was used to prejudicially impact on the rights and the interests of children," he said.*

## **Harmonisation of Existing Laws Providing For Different Periods Of Prescription**

*The commission chairperson said harmonising prescription time in law requires a balance to be struck between the right to have legal disputes heard and the real concept that if left for many years, those involved in cases can be expected to have distorted memories or lost documents.*

*Prescription is a stipulated time period that an aggrieved person is allowed to bring a case to be heard in court.*

*"The problem with prescription laws is that different laws provide for different periods of prescription. So the idea of regularising prescription periods to ensure equitable access to justice is certainly an important one but...the need to ensure efficiency in litigation is also an important one. So as in many areas of the law, it requires a fine balance," he said.*

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