



TERMS OF REFERENCE FOR CONSULTANCY

RESEARCH ON THE PRACTICE OF PROSECUTION OF WOMEN AND MEDICAL PROVIDERS POST ENACTMENT OF ARTICLE 26(4) OF THE CONSTITUTION OF KENYA, 2010

1. Introduction

KELIN is a human rights NGO working to protect and promote health-related human rights in Kenya. We do this by: providing legal services and support, training professionals on human rights, engaging in advocacy campaigns that promote awareness of human rights issues, conducting research and influencing policy that promotes evidence-based change.

Sexual and reproductive health and rights is one of KELIN's thematic areas. In this thematic area, KELIN seeks to advance the full enjoyment of sexual and reproductive health and rights for all. As part of implementing this strategy, KELIN seeks to engage in research that informs evidence-based interventions, which include advocacy and litigation.

2. Background

The Constitution of Kenya, 2010 recognises the right to reproductive health as a core component of the right to health (Article 43(1) (a) of the Constitution). Additionally, due to the Constitution, Kenya's international obligations form part of our law and therefore sexual and reproductive health and rights as recognised in instruments Kenya has ratified form part of Kenyan law. Kenya has ratified and is bound by the International Covenant of Economic, Social and Cultural Rights, the Convention for the Discrimination of all Forms of Violence Against

Women and the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (The Maputo Protocol).

However, despite the recognition that sexual and reproductive rights are fundamental rights, these remain largely illusory. Unsafe abortion accounts for over 13% of all cases of maternal mortality on Kenya,¹ with a 2012 study revealing that an estimated 464,000 induced abortions occur annually.²

While Article 26(4) of the Constitution allows for safe abortion on specified grounds, the practice continues to be stigmatised and perceived as illegal. Safe abortion is highly stigmatised and criminalised by outdated legislation, namely Sections 158-160 of the Penal Code. This has resulted in those seeking abortion services resorting to crude and unsafe methods, often with dire consequences. Equally, this has led to medical providers refraining from offering the service, even to deserving women for fear of harassment and imprisonment. Recent cases in court against medical providers also show a general trend of 'entrapment' by police officers that often 'stage' pregnant clients in medical clinics suspected of offering abortion services. The result has been police raids at clinics that often end up with the clinical officers offering a bribe to secure their liberty. These factors prevail against the backdrop of the myriad international and regional human rights frameworks and commitments that Kenya is a party to and the national legal, policy and institutional frameworks that are aimed at enhancing maternal health.

3. Purpose of consultancy

The criminal provisions that govern abortion have formed part of Kenyan law for over five decades and were part of our law before independence. However, the Constitutional context of

¹ Mohammed S.F et al "The Estimated Incidence of Induces Abortion in Kenya: A Cross-Sectional Study" BMC Pregnancy Childbirth. 2015; 15: 185.

² This study was conducted by Ministry of Health in collaboration with the African population and Health Research Centre (APHRC) undertook a study titled '*Incidence and complications of unsafe abortion in Kenya*' This Study is available at https://www.gutmacher.org/sites/default/files/report_pdf/abortion-in-kenya.pdf The analysis indicates that an estimated 464,690 induced abortions occurred in Kenya in 2012, corresponding to an induced abortion rate of 48 abortions per 1000 women of reproductive age (15-49 years), and an induced abortion ratio of 30 abortions per 100 births in 2012. it also estimated that 157,762 women received care for complications of induced and spontaneous abortions in health facilities in the same year.

Kenya drastically shifted in 2010, and legal reform, perception and attitude around contentious issues such as abortion have been slow to follow. The Constitution is an aspirational document and its promise can only be achieved in a conducive legal environment, which includes taking cognisance of constitutional rights and duties.

Thus the aim of the proposed research is to ascertain the practice of prosecution of both women and girls and medical providers under Sections 158-160 of the Penal Code. In particular the research aims to answer the following questions:

- a) How many cases prosecuted in Kisumu, Mombasa and Nairobi Courts that have relied on Sections 158-160 of the Penal Code post enactment of the Constitution;
- b) What were the circumstances under which the prosecution took place;
- c) The Identity of the accused particularly to determine which of the sections were relied on; the socio-economic status of women and girls prosecuted under these provisions; and the qualification (if any) of the providers prosecuted under these provisions;
- d) What was the outcome of the prosecution of such cases (and in particular in instances where prosecutions have resulted in acquittals or withdraw to nuance the reasons for the same);
- e) What is the judicial interpretation of Sections 158-160 of the Penal Code and how have these sections been applied in the development of jurisprudence around criminalisation of abortion;
- f) What is the judicial interpretation of Section 240 of the Penal Code in instances where a prosecution has been mounted against a medical provider offering safe abortion or post abortion care? In line with this, does the judicial interpretation of Section 240 take into account the provisions of Article 26 (4) of the Constitution as read with Section 6 of the Health Act on who a qualified medical provider is in the context of abortion? (By extension is there a purposive judicial inquiry to distinguish between the provision of safe vis-à-vis unsafe abortion?)

- g) What finding can be made on the efficacy of the provisions vis a vis the mischief the provisions seek to cure and the new constitutional dispensation that protects reproductive rights.
- h) What legal implications exist with prosecutorial practices that infringe on doctor-patient confidentiality (in instances where a provider is forced to testify against their clients)

This research shall support the development of a case strategy around strategic litigation to challenge the constitutionality of Sections 158-160 of the Penal Code and develop an advocacy plan around the decriminalization of the Sections by seeking to demonstrate their efficacy as against the mischief they intend to cure.

4. Specific objectives

The specific objectives of this consultancy are:

- i. Conduct a literature review of the practice of prosecution of women and medical providers under Sections 158-160 of the Penal Code;
- ii. Examine court documents at the Magistrates' and High Court in Kisumu, Mombasa and Nairobi Counties to determine number of cases that have been prosecuted; the identity of the accused persons and the nuanced features around such accused persons; and the outcome of the prosecution including a documentation of the findings in the Court;
- iii. Conduct a review informed by existing literature and the examination of documents at the Magistrates' court and the decisions of other Courts on the judicial interpretation of the scope of Sections 158-160 (pre and post the Constitution, 2010);
- iv. Critically analyse, informed by the sum total of evidence above, the efficacy of Sections 158-160 of the Penal Code and highlight to what extent the use of these Sections to criminalise abortion is a possible violation of the right to reproductive health and to access a safe abortion; and
- v. Provide findings to the above research questions.

5. Scope of work and main tasks

The Consultant shall be required to:

- Participate in an inception meeting and prepare an inception report detailing the methodology to be employed and the work plan.
- Finalise a jointly agreed work plan and map out timelines for activities;
- Develop a template for the final report;
- Conduct research;
- Develop a draft and final report highlighting findings;
- Hold a validation meeting with the think tank and likeminded CSO's.

6. Proposed methodology

The proposed research will use both a desk review and site visits to Magistrates' and High Courts to examine their records as the main tools of data collection. The consultant will then be expected to analyse the findings and draft a report and provide a narrative on the basis of the findings.

7. Deliverables

The Consultant will complete and submit a draft inception report in both hard and soft copy, a draft report of the analysis and a final recital that captures the analysis of the findings. The Consultant will finalize the report and recital in the light of comments/suggestions of stakeholders. The key deliverables for the assessment are as follows:

- i. Inception report, prepared after an inception meeting, detailing the general understanding of the assignment, approach, work plan, budget and deliverables.
- ii. Final work plan with timelines as agreed on with KELIN.
- iii. Maintain a database (physical or electronic) of judgments in the prosecution cases sampled in the research.
- iv. Draft report on findings from the interviews.
- v. Conduct validation meeting to verify findings in draft report.

- vi. Recital highlighting the practice of prosecution of women and medical providers under Sections 158-160 of the Penal Code.

8. Time frame

The assignment should be completed within three months of signing the Agreement. The consultant will be engaged for a period of 40 consultancy days and this shall be spread over the three-month period in accordance with the work plan. 35 days shall be dedicated to the desk review, examination of Court records in Kisumu, Mombasa and Nairobi counties, validation meeting and drafting of the report and recital. The final five days shall be dedicated to the review of the report and recital and the finalisation of both documents by 31 August 2018.

9. KELIN's role

KELIN shall also provide administrative support in relation to the validation meeting and shall cater for all logistical requirements for travel within Nairobi, Mombasa and Kisumu counties to examine court documents. Finally, KELIN shall review the report and recital and avail comments to the consultant for the finalization of the documents. The roles will be further defined at an inception meeting.

10. Qualifications of the consultant

10.1. Functional competencies

- An advocate of the High Court of Kenya;
- Knowledge on human rights, national regional and international legal frameworks and sexual and reproductive health and rights;
- Knowledge on the legal context on sexual and reproductive health rights in Kenya, Africa and internationally; and
- Excellent research and writing skills with demonstrable experience in the development of similar literature.

10.2. Core competencies

- Ability to produce high quality outputs in a timely manner while understanding and anticipating the evolving client needs;
- Strong organisational skills; and

- Ability to work independently, produce high quality outputs.

10.3. **Required skills and experience**

- Education:

Advanced university degree in Law

- Experience:

Minimum of 7 years of relevant experience is required.

- Language: Excellent written and spoken English.

11. Application instructions

An applicant must send in their capability statement detailing their experience and competencies as well as attach a copy of their curriculum vitae that shall be submitted before the application deadline of 11th June 2018 to nwere@kelinkenya.org and copied to info@kelinkenya.org. Applicants must include in their capability statements contacts of organisations previously worked for, relevant experience related to the assignment, bio-data of key staff who will assist with the research and give at least two samples of writings indicating recent and relevant similar work as well as the daily consultancy fees.

The individuals whose CVs are submitted in the proposal will undertake the assignment and work directly with KELIN staff; any attempt at replacement or substitution of the consultants will be treated as breach of agreement.

KELIN will evaluate the proposals and award the assignment based on technical and financial soundness and feasibility. While submitting your application be sure your email subject line is 'Research on the practice of prosecution of women and medical provider under Sections 158-160 of the Penal Code'.