

SUBMISSION ON GENDER-BASED VIOLENCE BILLS

1. INTRODUCTION

The scourge of violence against women, children and lesbians, gays, bisexual, queer, transsexual, intersex, disabled and elderly people in this country is out of control. These violent practices may have received media attention in recent times, but have been perpetuated for generations, and are deeply rooted in this country. From the insidious colonial invasion, dispossession and dehumanisation of African people, to the naked brutality of apartheid violence, and now, to the shameless neo-apartheid reality of the post-1994 era, it is women who have had to endure the most heinous of offences.

The vicious circle of triple oppression, based on race, class and gender, has not been broken for black women in particular. As a consequence of pervasive patriarchy and sexism in our society, it is black women in the main who suffer the most from gender-based violence. Up to now, interventions for dealing with violence against women have been superficial, half-hearted and based on the wrong understanding of the root causes of the vulnerability of women.

The violent crimes against women, therefore, are rooted and linked to other social ills in this country, but the brutality of these crimes, the inhumane nature women, girl and boy children are treated at home, in schools and at the workplace, when they access government services at hospitals, post offices, government departments and police stations and the permanent fear of every woman in this country that each time they wake up, they may face a rapist and a murderer at their doorstep, and that each time they sleep, they are not guaranteed that there will be no one who breaks into their home to rape and murder them; makes these crimes deserving of specific attention.

We, therefore, welcome the opportunity to make this submission on what we think are very important legislative mechanisms to hold those who violate the rights of women to account.

2. THE CONCEPTUALISATION OF GENDER BASE VIOLENCE

Gender-based violence (GBV) remains a persistent problem in South Africa. The high levels of GBV that women face also reflect violence against sexual and gender minorities and people with non-normative bodies. In particular, “corrective rape” results in significant harm to lesbian, gay and transgender people as it is not just a sex crime but a hate crime as well. It is estimated that 21% of women over the age of 18 years have experienced violence by a partner.

In the South African and African context, GBV is widely used to refer to the violence waged against women in particular because they are women. Culture and religion have for many decades been used to ensure the continuity of women being subordinates and “objects” of men. GBV manifests in different ways. The most common being women not being afforded agency and/or choice. Women in South Africa are harassed by men every single day. These violations range from verbal insults hurled at women in the streets, to actual physical assault, rape and the murder of women.

Gender struggles go beyond physical GBV. Women are earning less than men and it is a systematic issue across all sectors. Banyana Banyana earning less than Bafana Bafana just because they are women is a form of GBV. Capable women being sidelined from managerial and leadership positions are a form of GBV. Also, unmarried women in rural areas do not qualify for land.

In schools, girls get pregnant and they are removed, bullied and their education is interrupted.

This indicates that laws alone are not enough to fight against gender-based violence, a more thoroughgoing societal pact is needed. The country has been dealing with the phenomenon of GBV for a while, and we have been unable to win this battle because the focus has been too narrow, we submit.

As far back as 1997, the Human Rights Watch reported that a total of 50,481 cases of sexual violence were reported in 1996. Of these, 21,863 cases were prosecuted, but only 4,100 led to a conviction.

In 2008, the South African Police Services informed Parliament that between July 2006 and June 2007, a total of 88,784 incidents of “domestic violence,” as defined by

the 1998 *Domestic Violence Act No 116*, were reported. Between April 2006 and March 2007, a total of 52,617 cases of rape were reported, of which 7% were successfully prosecuted.

We cite this merely to indicate that even though the laws are surely inadequate, but a more serious concern is the inability of the police to investigate and the inability of the NPA to prosecute these crimes successfully.

We participate in this process fully aware of these shortcomings, but we still view the process of legislation making as critical in the fight against these heinous crimes.

The fact that words used in gender-based violence are not criminalised perpetuates gender-based violence.

3. THE CONSTITUTIONAL AND LEGISLATIVE FRAMEWORK.

The Constitution of the Republic provides some far-reaching rights for citizens, at least on paper. . Section 2 of the Constitution affirms that the Constitution is the supreme law of the land and that all law and conduct inconsistent with the Constitution is invalid. Further, Chapter 2 of the Constitution outlines the Bill of Rights, a bundle of fundamental rights that everyone is entitled to in South Africa. Amongst these rights are the right to equality (section 9), the right to freedom and security (section 12), the right to privacy (section 14), the right to freedom of religion, belief and opinion (section 15), and the right to cultural, religious and linguistic freedom (section 31), the right to access courts (section 34), and more contested for our submission, the rights of arrested, detained and accused person (section 35).

All these rights are not absolute and can be limited in terms of Section 36 of the Constitution, but they can only be limited in terms of a law of general application. We, therefore, submit that the Constitution provides sufficient cover for the limitation of the rights of the accused, as we seek to do below with our submission.

For a long time, cases of gender-based violence have been handled via two legislative mechanisms, and these are the *Domestic Violence Act No 116* of 1998 and the *Criminal Law (Sexual Offences and Related Matters) Act No 32* of 2007. Both

these Acts acknowledge the crude violence against women in this country, but in our view, do not go far enough to comprehensively cover the whole range of violent acts committed against women.

4. OUR SUBMISSIONS ON THE GENDER-BASED VIOLENCE BILLS

4.1. CRIMINAL LAW(SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT BILL

- (a) We welcome the inclusion of the national register for sex offenders, and the prohibition of having these sex offenders working anywhere they would be in contact with vulnerable people. We feel that this could be more explicit however Section 2 of the Act should be tightened to make it explicitly clear that the National Register for Sex Offenders is for anyone who has committed sexual offences, and that these offenders must be barred from working with women and children, not just vulnerable groups. Merely stating vulnerable groups leaves this section open to various interpretations.
- (b) Further, we submit that there must be an additional subsection which states that there will be an alternative register for people who are accused of sexual offences and there is an active case. This is important in light of the low conviction rate of sexual offences in this country and how sometimes cases take long to reach finality. It means this list serves to give a broader picture of all active cases, their various stages and at finality, the case falls off the list. This will not be subjecting the accused to a trial by unqualified judges, but it will allow prospective employers to decide for themselves on what is in the best interest of their companies.
- (c) We welcome the expansion of the definition of incest, to include cases where a child is sexually violated, even if there was consent. But we submit that people found guilty of this offence must be found guilty of rape too because a child cannot give consent.
- (d) Further, the definition of "a person who is vulnerable" in amended Section 40 (c) of the Bill is very limited. From the list in the Bill, women over the age of 25 are not considered vulnerable. Our submission is that all women, regardless of age and class, are vulnerable to sexual offences. It is for this reason that we proposed above that this term must be replaced with "women and children" generally, but

also inclusive of the mentally disabled. The definition should also include LGBTQI plus and elderly people.

- (e) It is not clear if perpetrators of sexual crimes are ever rehabilitated, and society must not be used as an experimental lab to test if time rehabilitates offenders. For this reason, the provisions for removal from the register of sex offenders provided by Section 51 is not supported. We submit that people must only be removed from the register if a court exonerates them. Offenders must stay in that register for life.
- (f) The amendments to Section 54 are very progressive, but we feel that they should be expanded further to include an obligation to report sexual crimes against women as well, not just children and people who are mentally disabled. Some grown-up women are sexually abused but fear reporting their abusers for one reason or another. Those who know of cases like this must have an obligation to report to authorities too.
- (g) Lastly, we submit that there must be an addition to the list of sexual offences in the Act. These include sexual coercion by a partner, forced marriage (*ukuthwala*), *ukungena* (Where a widow is forced to marry husband's relative after his death, stealing, refusal to pay sex workers for services rendered, sex for jobs. These are violent acts targeted one woman to violate them sexually.

4.2. CRIMINAL AND RELATED MATTERS AMENDMENT BILL

- (a) We welcome the amendment to both the Magistrates Act and the Superior Courts Act, to allow for intermediaries to enable younger witnesses, suffer from a range of conditions that make it inconvenient for them to testify and be cross-examined. This will be a crucial intervention in the quest for justice.
- (b) We note the stringent conditions the amendments to Sections 59, 59A and 60 of the Criminal Procedure Act, concerning the granting of bail for those accused of sexual offences. These amendments however do not go far enough. It still leaves loopholes that offenders can use to get out of jail, and it discounts the toxic nature of society and families in particular, who may coerce victims of these crimes to testify that they have no problems with having perpetrators granted bail. Our submission is that there must be no bail at all for those accused of

these crimes and sexual offences accused should be categorised as Schedule 5 and 6. They must only be released by the court at the end of the trial if found not guilty.

- (c) The amendment of Section 299 of the Criminal Procedure Act must not include provisions for parole for those convicted of sexual offences and murder of women during the commission of a sexual offence. This is important, we submit, anyone found guilty of sexual offences should be sentenced to life in prison without the possibility of parole. The presidential pardon should not include sexual offences.
- (d) The rest of the amendments to the Criminal Procedure Act are supported.

4.3. DOMESTIC VIOLENCE

- (a) We generally welcome the expanded definitions to domestic relationship and domestic violence. We are particularly happy that the definition of domestic violence now includes coercive behaviour and forced entry into places of residence and places of work without approval. The new definition of intimidation, which includes intimidation of people related to a domestic partner. The definition of sexual harassment is comprehensive enough, together with the rest of the definitions.
- (b) The obligations created by amendments to Sections 2A and 2B are comprehensive and will establish a societal pact to report cases of domestic violence to the police.
- (c) We are also happy with the amendments to Section 3 and 3A of the Act, which allows peace officers to effect arrest without a warrant, and to enter premises without a search warrant if there is a reasonable belief that a crime of domestic violence is being committed.
- (d) The sections dealing with protection orders are also comprehensive enough, and we are in support of these amendments.
- (e) If a family has a victim of gender-based violence, the state must carry the financial burden to support members of the family that remains.

5. CONCLUSION

We acknowledge that various interventions must be made to uproot patriarchy, sexism and reaffirm women's position in society, however, matters of Gender-Based Violence are prevalent and need to be addressed immediately. These legislative propositions will go a long way in curbing the violence meted out against women.

But these must be accompanied by other commitments by both the executive and the legislature. There must be a way of holding those responsible for operationalising these laws accountable. Parliament must be an activist parliament against gender-based violence, and take proactive decisions to hold the executive to account on the implementation of these laws.

In principle, we support these Bills, provided the amendments we propose are taken to account.