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**SOUTH AFRICAN WOMEN IN DIALOGUE (SAWID) WRITTEN SUBMISSION
TO THE PARLIAMENTARY PORTFOLIO COMMITTEE ON JUSTICE AND
CORRECTIONAL SERVICES ON THE REVIEW OF THE CRIMINAL LAW
(SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT
AMENDMENT BILL (B16-2020); DOMESTIC VIOLENCE AMENDMENT BILL
(B20-2020) AND THE CRIMINAL MATTERS AMENDMENT BILL (B17- 2020)**

(“GBV Bills”)

09 October 2020

Compiled by
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Supported by
UN Women, Gender Links, Women Voice & Leadership South Africa

TABLE OF CONTENTS

A. SAWID's MANDATE	4
B. DOMESTIC VIOLENCE AMENDMENT BILL (B20-2020)	5
1. Introduction on Domestic Violence	5
2. Literature Review on Domestic Violence	6
3. Stakeholder Consultation on Domestic Violence	9
Submission on SAWID's position on Domestic Violence Amendment Bill	
4. (B20-2020)	11
4.1 Definitions	12
4.1.1 Courts	12
4.1.2 Domestic Relations	12
4.1.3 Elder Abuse	12
4.1.4 Harassment	12
4.2 <i>General Observations</i>	13
4.2.1 Preamble / Application	13
4.2.2 Training and Skilling	13
4.2.3 Binary Language	14
4.2.4 Discretionary Language	14
4.3 Clause 3 Obligation to report domestic violence	15
4.4 Clause 6 Application for protection order	15
4.4.1 Online Applications	15
4.4.2 Availability of Data for GBVF cases	16
4.5 Clause 10 Variation of Protection orders / withdrawal	17
4.6 Clause 17 Offences	17
4.7 Directives to other departments S18A and 18B	18
C. CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS)	
AMENDMENT ACT AMENDMENT BILL (B16-2020)	19
5. Introduction on Sexual Offences	19

6.	Literature Review on Sexual Offences	20
7.	Stakeholder Consultation on Sexual Offences	23
8.	Submission on SAWID's position on the Sexual Offences and Related Matters) Amendment Act Amendment Bill	26
8.1	General Observations	26
8.1.1	Binary Language	26
8.1.2	Resourcing	26
8.1.3	Training and Skilling	26
8.2	Clause 1	27
8.3	Clause 2	27
8.4	Clause 3 & 19	28
8.5	Clause 4	28
8.6	Clause 5	28
D.	CRIMINAL MATTERS AMENDMENT BILL (B17- 2020)	29
9.	Introduction on Criminal Matters	29
10.	Literature Review on Criminal Matters	29
11.	Stakeholder Consultation on Criminal Matters	31
12.	Submission on SAWID's position on the Criminal Matters Amendment Bill (B17- 2020)	31
12.1	General Observations	31
12.2	Bail	31
12.3	Sentencing	32
12.4	Parole	32
E.	CONCLUSION	33
F.	REFERENCES	35

A. SAWID's MANDATE

South African Women in Dialogue is an independent, impartial, non-profit, non-partisan organisation committed to improving the status of women by engaging national government, the private sector, civil society organisations (NGOs; CBOs and FBOs) and forming partnerships to shape developmental agendas and respond to issues affecting women socially, economically and otherwise.

This initiative to inform women, seek their inputs and consolidate their views on the GBV Bills is driven by SAWID's vision of South African women uniting in their diversity to act together for a better future. This is supported by its mission to stand together for women's participation on issues of national, regional, continental and international importance and to, through dialogues, seek to establish a common agenda for the development of women and to ensure that women's views are taken into consideration.

B. DOMESTIC VIOLENCE AMENDMENT BILL (B20-2020)

1. Introduction on Domestic Violence

- 1.1** As South Africa is known to be one of the most violent societies, the government has demonstrated political will in being rigorous in responding to the call of making the fight against the scourge of gender-based violence a national agenda. The radical activism by South African women in their heterogeneity across the country in 2018, in one voice, brought about the current visible change within the gender sector.
- 1.2** The Presidential summit elevated the gender-based violence agenda to one of the key national priorities in the country. The outcome of the 2018 Presidential summit was the Declaration which is one of the key tools that is intended to guide the approaches, strategies and initiatives on how to fight the scourge of gender-based violence. One of the key elements achieved thus far is the National Gender Based-Based Violence Strategy that was adopted by cabinet in March 2020. The establishment of the National Structure that will oversee the implementation of the National Strategy is underway. As SAWID, we wish to commend government in making these visible strides of putting in place these mechanisms as key instruments of fighting the pandemic of GBV in the country.
- 1.3** This process would not be complete if our policy and legislative framework would be left (un)revamped. South Africa is broadly known and recognized as a poster child in terms of our progressive Constitution and good legislative framework. However, the challenge of lack of implementation has been one of the handicaps hindering progress in the country. SAWID therefore in this instance wishes to commend government on the good initiative that they are undertaking of reviewing the GBV related legislative framework for ease of implementation and enforcement by the duty bearers for the protection of the beneficiaries.

1.4 The consultative nature of the process is also commended as consultation with the beneficiaries when crafting legislations is one of the key regulatory tools and elements promoting transparency of the process, efficiency and effectiveness among other elements. This also promotes accountability arrangement for both duty bearers and beneficiaries. The importance of this process is that it notifies the public of the process of the review of the law and sensitizes them on what the law entails. This entails a threefold process including communication of information about the law, which creates a solid foundation for the law within the public. The process secondly creates the platform for the public to convey their opinion and perspectives so that such critical information informs the law, hence promoting its efficiency and effectiveness. Lastly, participation of the public is key as it creates ownership by the beneficiaries and ease of access by them hence ensuring ease of implementation by the duty bearers.

2. Literature Review on Domestic Violence

2.1 The DVA was intended to combat and prevent violence against women. According to Smythe (2009), DVA is a progressive and inclusive piece of legislation which:

- a) Recognizes a wide range of VAW
- b) Acknowledges that VAW can occur in a variety of familial and domestic relationships.
- c) Gives magistrates power to serve abusers with court orders and extend this to workplace as well.
- d) Compels the perpetrator to maintain the victim's finances while not studying in the same house or accommodation.
- e) Disarm the perpetrator and offers police protection to the victim.
- f) Outline the obligatory duties of the police.
- g) Lays down penalties for the failure to execute such duties (Smythe, 2009).

2.2 Even though the Act takes all the above issues into consideration, it has been inefficient and not effective as it failed to provide detailed strategies that need to take

into consideration dynamics related to cultural, social and economic factors which are key elements that perpetuates violence against women.

2.3 Violence against women is considered as one of the remnants inherited from the apartheid system, which was characterised by violence, during the fight for a democratic dispensation (Jewkes, Penn – Kekana & Rose – Junius, 2005). Violence is associated with masculinity and characterised as one of the traits that promote male supremacy in all spheres of life within the South African Society. The heteronormative belief-system and normalised violent culture has contributed immensely in promoting violence against women and tolerating gender-based violence (Wall Strom, 2010). This as a result has presented men with the power to control and own women. Power is associated with positioning and income within the society and most women are unemployed or earn much lower salaries than their male counterparts, hence putting them in a vulnerable position where they are reliant and dependent on their partners and husbands.

2.4 Cultural and traditional practices prioritizing men's rights over women's rights has exacerbated women's vulnerability within the social space. It is important, as the country is grappling with building the economy, to take into cognizance the factors that derail development. The World Economic Forum has noted violence against women as one of the factors that hinder and derail women's participation in development activities, hence the scourge of GBV in the country is by default hampering the economic development in the country. KPMG in its study on costing GBV, demonstrated that R28 Billion, which constitutes a significant percentage of the country's GDP, is used to fight the scourge of GBV in the country.

2.5 While the positive aspects of the legislation were articulated above in the discussion, there were also the tremendous gaps that created more vulnerability of women in both the public and private spheres, hence making it difficult to adequately protect the beneficiaries of this legislation. These gaps entail four (4) thematic areas which include:

2.5.1 *Government and legal responsibilities*

- a) There have been inadequate guarantees of government institutions' accountability in implementing the Act due to rigid norms, prejudicial practices and precedent cases that prevail within the Criminal Justice System (Matthews, et, al., 2004; Smyth 2004).
- b) Weakness in management of the legislation by the relevant line departments responsible for its enforcement and implementation (Moore, 2005).
- c) Lack of appropriate transformation in reproductive health policy and service delivery, resulting in denial and ongoing transgressions against women's reproductive health rights (Cooper et, al., 2004)
- d) Lack of adequate budget and other resources to appropriately implement and monitor the Act (Smyth, 2004; Vetten, 2005).

2.5.2 *Public agenda and considerations*

- a) It was realised that there was a need for public education in sex education and preventative strategies, gender inequalities, physical violence as well as mental or emotional abuse (Jewkes, 2003).
- b) Impact of GBV on the health sector and the society at large.
- c) Risks of transactional sex especially to women as its being unregulated exposes women to vulnerability of physical violence including femicide and human trafficking.

2.5.3 *Prevailing cultural attitudes*

- a) Unfair biases and prejudices in convicting and sentencing cases of violence against women and the norms within the criminal justice system that are rooted in culture and traditional beliefs (Smythe, 2004).
- b) It has also been eminent that the laws compete with cultural beliefs and prescribed social norms and values that are not supportive of appropriate legal actions to address the issues related to violence against women.

2.5.4 *Ethical issues concerning the impact or effectiveness, evaluation or research.*

- a) There have been ethical challenges in researching the issues related to violence against women, for both the researchers and the participants as it is a study that is detrimental to the wellbeing of the subjects in terms of creating secondary victimization while reopening the traumatic emotional wounds. This has created a challenge of ensuring adequate protection especially to the participants who are relevant in unleashing the experiences by the beneficiaries of the legislation.
- b) The reduction of domestic violence levels may therefore not be possible, given the nature of the violations which happen within the private sphere, where the known and reported cases represent only the tip of the iceberg of the actual problem within the general South African society in its heterogeneity.

2.6 Noting these mentioned challenges that have been limiting adequate implementation of the Domestic Violence Act since its enactment, SAWID echoes in commending government in their response to addressing the handicaps of this legislation and initiating the process of its review in response to the fight against GBV//VAW in the country.

3. Stakeholder Consultation on Domestic Violence

3.1 Some of the gaps that the public have identified about the DVA is that there was no accountability within the family setting, which is the key structure that promotes the relational principles that promotes violence. It was echoed, as relayed in the literature, that GBVF is rooted in the patriarchal social norms, gender inequalities, and socio-economical inequalities entrenched within the society in a multifaceted nature, including family dysfunctions, the low social values attached to women and girls, and lack of accountability, among other issues. Most of these elements cannot be addressed by the law, but they need solid inbuilt social cohesion within the society which currently seem to be lacking with the members of the society at all levels of the social ecosystem. It came out strongly that the fight against domestic violence

requires a collective initiative as it cannot only be fought by the law and that the law is but just one element and the external constituent in the equation which is just a catalyst. The discussion demonstrated that there is an urgent need to create a platform of collective initiative within the family sector as well as the public sector to adequately succeed in the efficient and effective implementation of this piece of legislation.

- 3.2** The public emphasized the urgency of redefining the ‘relationship’ as a phenomenon, to be inclusive of more entities such as elderly people so that they can also be covered under the provisions of this piece of legislation as they also fall under the vulnerable groups that are preyed upon in terms of their victimization within the family structures and the public sphere. During the deliberations it was revealed that within the financial year 2019/2020, that 240282 cases of GBV were lodged and 184473 were finalised and that 55809 applications fell through the cracks due to the inadequacies within the system. This demonstrates that there are 55809 victims who continue to be vulnerable and are prone to more victimization, not ruling out loss of life.
- 3.3** It is therefore empirical that as the legislation is reviewed, that the relevant structures within the criminal justice system are also strengthened and adequately resourced to ensure ease in terms of implementation of the legislation. There is a need to include guidelines for the victims from their entry into the criminal justice system to the end and assist them in terms of their role within the justice system to ensure that they receive justice. It is also important that they are also sensitized to the process of restorative justice for them to receive restitution and the opportunity for healing.
- 3.4** It came out strongly that there is a need to create safety plans to initiate opportunities for the victims to be ready or able to exit the abusive ‘relationship’. This is one element that needs collective initiatives and an inclusive strategy to fight gender-based violence/ GBVF as it is all persons’ responsibility to fight the scourge of GBV/DV.

3.5 With the digitization of the services across the board in the Fourth Industrialization Revolution era, there should be provision for online applications for protection orders aligned to Article 1 of the GBVF Summit Declaration. This will assist those victims who have access to digital platforms to apply online hence easing the pressure within the respective police stations and courts for applications, hence promoting efficiency. This will as a result assist in conceiving the relevant data on the applications and issuance of protection orders, which will assist in detecting the cases where the counter protection orders are made.

3.6 It is noted that the Bill continues to reflect the gender binary and does not take into consideration the diversity and complexity of gender beyond heteronormative ideology. It is therefore important to show clear diversity of gender and sex in terms of language.

3.7 The discussion also demonstrated that one of the challenges that lead to some cases falling between the cracks within the system is the fact that the Court Clerks who are the first point of entry within the judiciary system are not trained in law and its principles and fail to extract critical information from the complainants that can assist the presiding officers to make informed decision on a respective case. As a result, it is recommended that the Department of Justice should consider appointing trained legal practitioners as Clerks of the courts to ensure successful convictions.

4. Submission on SAWID's Position on The Domestic Violence Amendment Bill

SAWID appreciates efforts that have been made by the Department of Justice and Constitutional Development to strengthen various provisions of the DVA in order to safeguard the rights of victims of domestic violence. As part of safeguarding these rights, the bill seeks to expand and allocate some of the obligations and give them to other sectors so that it goes beyond merely being administered by SAPS and Courts.

4.1 Definitions

4.1.1 Courts

We note that the definition of court is as contemplated by the Magistrates' Court Act, 1944 (Act 32 of 1944)

Recommendation: SAWID is aware that there are processes in place to get traditional courts bill promulgated and would therefore propose that the definition of Court explicitly indicates that traditional courts will not have jurisdiction on matters related to domestic violence.

4.1.2 Domestic Relations

It is important to ensure harmonious integration of legislation for effective implementation. S (1) (f) domestic relationship is defined "... they share premises or recently shared the same residence within a preceding year ..."

Recommendation: SAWID encourages the drafters to remove reference to '*within the preceding year*' because domestic violence in many instances does not stop just because a year has lapsed. In a lot of cases it actually occurs even years after the parties have separated especially in instances where parties have children.

4.1.3 Elder Abuse

Elder abuse is defined as "... conduct or lack of appropriate action..." (for consistency it should read Older Person abuse)

Recommendation: SAWID proposes that the 'elder abuse' is substituted with "abuse of older person" to maintain consistency with the Older Persons Act 13 of 2006. Further we recommend that there will be no harm in taking the definition of abuse of older person in toto as highlighted in s30 of the Older Persons Act 13 of 2006 to replace the current formulation.

4.1.4 Harassment

The Principal Act, included the term "stalking" which seems to have now been removed in the new formulation.

Recommendation: SAWID suggests that the term ‘stalking’ be retained in the proposed bill. Studies have shown that a lot of victims get stalked first, prior to physical violence taking place.

4.2 General Observations

4.2.1 Preamble / Application

The preamble of the bill highlights the purpose of the Act as to afford victims with maximum protection from domestic abuse. This is done through introduction of new measures that will ensure that relevant organs of State give full effect to the provisions of the Act. As much as this according to the drafters will convey that the State is committed to the elimination of domestic violence. SAWID would like to caution that previously many reports highlighted secondary victimization as a weakness within the system when victims tried to get redress and so we hope that the potential of further victimization will be guarded against with introduction of these new measures.

Recommendation: SAWID proposes that with further sectors being included and given responsibilities, that training and skilling on the DVA be prioritized. Further that protocols, guideline, norms and standards should be put in place prior to the Act coming into effect.

4.2.2 Training and Skilling

Functional literacy of the clerks of court is important in order to ensure that court systems do not undermine access to justice of complainants and/ or survivors of domestic violence. Interpretation and knowledge of the primary purpose of DVA is important for outcomes, as one of our magistrate participants indicated ‘interpretation becomes the crucial point in the journey of the complainants, in terms of who receives them, how they are received, how the complaint is taken down, what relevant questions to ask’. All these facts are important for the approach to be followed on the case.

Recommendation: Clerks and SAPS play a crucial role as far as this Act is concerned and therefore proper periodic and/ or ongoing gender transformative training is required to ensure that role players keep up with the victim-centric approach as espoused by the objects of the proposed amendment bill.

4.2.3 Binary Language

Language used in defining terms has to be inclusive of LGBTIQ+ communities in a number of definitions, as s/he is a binary. This, according to stakeholders that were engaged from LGBTIQ+ communities, highlighted that during lockdown, their service points received a lot of complaints of IPV from LGBT persons, which indicates that like any other members of society, persons within this community can also be violent.

Recommendation: SAWID proposes that Parliament requests the drafters of the bill to consider language that is inclusive to all vulnerable populations as there are parts that specifically speak to terms such as s/he in the proposed bill, when it should read **“He/She/Them/They”**. It is further recommended that use of sign language at courts and/or at a point where the clerks of the courts are engaging with complainants gets taken into consideration because issues related to disability remain an issue as far as access to justice is concerned. To this end SAWID welcomes the inclusion of S18A which requires directives to be issued to Clerks which provides for adequate disciplinary steps where failure to comply is picked up.

4.2.4 Discretionary Language

During the dialogue convened by SAWID to discuss the weaknesses and challenges of the principal Act, some of the presiding officers had indicated S8 (4) (c) gave discretion to police not to arrest even when there was a protection order issued by the court accompanied by an authorized warrant of arrest. And this according to them granted SAPS veto power over the order of court. And in the current formulation, proposals which have similar discretionary language embedded, for example, we see use of ‘reasonably suspects’ under the clause that deals with Arrest by peace officers,

Recommendation: SAWID submits that there is a wealth of information that indicates that complainants, especially women, die at the hands of their intimate partners, and as such there should be a limit to language that gives police discretionary powers.

4.3 Clause 3 Obligation to report domestic violence

Section 2B imposes a duty to report where one bears knowledge or reasonably suspects that an act of domestic violence has been committed against a child, a person with disabilities or older person and SAWID welcomes this. However, subsection (b) extends to adults and SAWID is concerned that this may take away the agency of complainants. In as much as we as society may want to assist the complainant, it is important that such assistance does not take away the ability of a complainant to exercise a choice and act in their own best interest. During the dialogue with various stakeholders on this proposal, the Commission for Gender Equality highlighted that in December 2019, they held a conversation on IPV, with an objective to ascertain why women withdrew their cases from court. This process highlighted that complainants and/ or victims are not willing to proceed with cases due a variety of reasons and what could be seen as just to one person may not be just to the next person. One of the survivors during the dialogue¹ stated “***what does justice look like and who determines what justice is? Justice is personal, what might be justice for one person might not be justice for another. Society must never take away women’s freedom to choose because that in itself is a form of violence against women***”

Recommendation: SAWID has reservations on the mandatory reporting clause as it relates to adults and suggests that the autonomy and agency of complainants be respected. The likelihood of a person who fails to report being criminally charged, may well go against the objects of doing away with ‘by-standerism’ and deter members of the community, family members, friends and colleagues from assisting the complainants.

4.4 Clause 6 Application for protection order

4.4.1 Online Applications

SAWID welcomes the new inclusion that allows applications to be submitted online through electronic means, this will allow for applications to be submitted outside of

¹ December 2019 dialogue held by the Commission for Gender Equality on Attrition of IPV Cases held in Parktonian hotel

ordinary court hours. However, having said that, it will be important to ensure that the applications are translated in all official languages to ensure accessibility.

Recommendation: SAWID, therefore proposes that all applications, online and physical copies be translated into all the official languages to ensure accessibility. The State has created institutions such as PANSALB together with the Department of Arts and Culture, who should be requested to translate materials for services provided by the State. In terms of the proposed bill, the application referred to in subsection (1A) "...may be brought outside ordinary court hours..." SAWID is concerned that there is no firm indication on whether magistrates will be available outside of the said ordinary court hours. The Commission for Gender Equality in its Monitoring report has highlighted that magistrates are not always available to assist complainants outside of normal court hours and raised a concern that issuance of protection orders during emergencies limits accessibility and remains a challenge to many complainants.

Recommendation: SAWID recommends that the proposed change includes a firm indication that magistrates will be available to assist complainants that may want to apply for protection orders after hours.

4.4.2 Availability of Data for GBVF cases

Adequate data collection that allows an objective assessment of how pervasive gender-based violence and femicide is in the country is key for planning and developing future interventions to eradicate the problem. In its unpublished report², the CGE recognises the need for all stakeholders to work together to create a capability as well as a hub for GBVF related data. This is in line with the recommendations by the United Nations Committee on the Elimination of Discrimination against Women (CEDAW) which called upon member states to "establish a system to regularly collect, analyse and publish statistical data on the number of complaints related to gender-based violence against women"³.

SAWID therefore, *welcomes* the introduction of the 'integrated electronic repository' as this will go a long way in reducing the administrative burden of the SAPS and the Courts

² June 2020 Commission for Gender Equality: GBV Covid-19 Review

³ CEDAW General recommendation 35

and do away with the notion of 'misplaced/lost documents'. This will hopefully alleviate the current situation the country finds itself in as far as lack of data is concerned on gender-based violence matters and in turn comply with CEDAW Committee recommendations.

4.5 Clause 10 Variation of Protection orders/ withdrawal

There is literature that advocates not allowing complainants to withdraw their cases, whilst the other school of thought advocates for the agency of complainants which should not be taken away. The proposed bill as it stands should have a balance.

Recommendation: SAWID recognizes that there has to be a balance in allowing complainants to withdraw cases where their circumstances have changed and where the agency of a complainant is not taken away. However, it may be important for the court to probe and further satisfy itself that the withdrawal is not due to undue pressure. There has been a lot of cases where family members put pressure on complainants to withdraw cases against perpetrators and it would therefore be prudent for the court to make sure there is no undue influence and further satisfy itself that the circumstances of the complainant have changed for the better.

4.6 Clause 17 Offences

Many people are reluctant to report violations because legal consequences have their own success rate and it has been proven that harsher sentences do not deter respondents from violating complainants/ victims. In the dialogue held by the CGE on IPV and attrition it became apparent that some victims/ complainants prefer Restorative Justice instead of following a full penal criminal prosecution process.

Recommendation: SAWID proposes that Parliament explores the possibility of adding restorative justice elements to the proposed bill so that those victims interested in it know the steps to be followed. It is important to have a criminal justice system that is functional and victim-centric.

4.7 Directives to other departments S18A and 18B

As indicated above, SAWID welcomes the fact that there is inclusion of other key actors as this will advance a multi sectoral response to domestic violence. The newly adopted National Strategic Plan highlights the need for a multi-sectoral approach to eradicating gender-based violence & femicide. This further is important for compliance with CEDAW Committee general recommendation 19 and 35.

Recommendation: SAWID submits however, that it is important for Parliament to engage with all the departments to whom directives have been given under S18A and 18B to check on their state of readiness. We have a history of good legislation being developed which then pose problems at implementation level. It is therefore important to gauge the state of readiness which will include checking whether there are resources allocated to ensure that the said directives become a reality.

Recommendation: SAWID further recommends inclusion of the Department of Cooperative Governance and Traditional Affairs (COGTA) in order to ensure that Local Municipalities come up with plans to respond to gender based violence and femicide. This will be in line with the current suggested model for a Council on GBVF and the NSP which presupposes inclusion of local government for integrated planning.

C. CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT AMENDMENT BILL (B16-2020)

5. Introduction on Sexual Offences

5.1 It is important to begin the conversation about sexual violence by reflecting on the origin of the atrocity from the international perspective and bringing it home as the issue of rape or sexual violence is not unique to South Africa, but affects the general global community in the same manner. Rape of women during times of war and conquest sadly blights the historical record, including examples of systematized rape and sexual violence during the second world war, where Korean and Chinese women were abducted by Japanese Soldiers and kept in the war camps where they were used as 'comfort women' and sexually assaulted and raped by more than fifty (50) soldiers every day and being unable to escape in fear of their lives as well as fear of stigmatization by the outside world. In this instance these women were dehumanized and turned into sex machines where they had to endure rape by a large number of men every single day of their lives. There are many other contexts where rape was also used as a weapon of war, whether perpetrated against the civilians of the attacked groups during conflict situations, or whether perpetrated against female soldiers within the camps.

5.2 These few cases alluded to are a few of many which led to rape being recognized as one of the international crimes and being deliberated on within the international platforms. The predominance of the practice of rape, especially against Muslim women in some countries at war, was recognized as more than a consequence of war; but also, an instrument of war intended on destroying the cultural fabric of a targeted group (European Institute for Gender Equality, 2016).

6. Literature Review on Sexual Offences

- 6.1** Rape is often included in the broader spectrum of sexual violence or sexual assault. The Istanbul Convention defines sexual violence, including rape as: “a) engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object; b) engaging in other non-consensual acts of a sexual nature with a person; c) causing another person to engage in non-consensual acts of a sexual nature with a third person” . The Convention also specifies that consent must be given voluntarily and that sexual violence in intimate relationships needs to be recognized in the national legal frameworks.
- 6.2** The International Classification of Crime for Statistical Purposes (ICCS), on the other hand defines rape as a “sexual penetration without valid consent or with consent as a result of intimidation, force, fraud, coercion, threat, deception, use of drugs or alcohol, abuse of power or of a position of vulnerability, or the giving or receiving of benefits”.
- 6.3** South Africa is also not an island in terms of the scourge of sexual violence as it is considered as one of the criminal violations related to gender-based violence that has engulfed the country, leading to a series of events responding to the scourge and devising strategies of curbing and preventing the scourge. South Africa has had the legislation on addressing sexual violations since 1957 when the Sexual Offences Act Number 23 of 1957 was enacted under the apartheid regime. Prior to that legislation, the sexual crimes were prosecuted under both common and statutory law (National Sexual Assault Policy, 2005).
- 6.4** The Sexual Offences Act 2007 was comprehensive and borrowed from the international definition of rape and sexual violence to ensure inclusivity as indicated. Vetten (2014) indicates that there are fifty-nine (59) sexual offences covered under the current legislation and that it is inclusive of the crimes that were not repealed under Sexual Offences Act 1957. This Act is under the auspices of the Department of

Justice and Constitutional. Development and its key objective is to address the legal aspects related to sexual offences, including to:

- a) Regulate procedures, defenses and evidence rules in prosecution and adjudication of all sexual offences.
- b) Criminalizes any form of sexual penetration, sexual violation without consent irrespective of the gender of the victim.
- c) Criminalizes exposure or display of child pornography and situations where an individual is coerced to watch/ witness certain sexual conduct.
- d) Criminalizes sexual exploitation of children and mentally disabled persons.
- e) Provides a demarcation between the age of consent for consensual sexual acts between children aged between 12 and 16 years.
- f) Provides special provision in relation to prosecution and adjudication of consensual sexual acts involving children aged up to 16 years old.
- g) Criminalizes any attempts, conspiracy or incitement to commit a sexual offence.
- h) Provides the courts with extra territorial jurisdiction when hearing matters related to sexual offences.
- i) Abolishes secondary traumatization of victims.
- j) Compels the offender to be tested for HIV//AIDS.
- k) Gives the victim the right to receive post exposure prophylaxis (PEP) 72-hour window treatment for HIV/AIDS.
- l) Urges for the establishment of one national register for sexual offenders against children (SOA, 2007).

6.5 It is noted that these first policy guidelines for the survivors of sexual assault, were compiled in 1998 followed by the 2005 guidelines which were an improved version which addressed the gaps that were revealed by the rigorous monitoring process on the implementation of the 1998 guidelines. The guidelines provide a holistic approach towards management of sexual offences and they also enshrine the provisions of CEDAW. This is indicative of the fact that there have been strategies in place to address the issue of sexual offences but failure in terms of implementation at different

levels of the criminal justice system has led to escalation of violations. The literature demonstrates that even though there is widespread alarm due to heightened cases of sexual violence, the inefficiency of the criminal justice system has led to non-reporting of the offence to the police. It is noted that while the numbers are high, the statistics represents just a tip of an iceberg of the problem as victims do not report cases due to a number of factors, which include:

- a) Fear of not being believed or being accused of lying
 - b) Feelings of shame, guilt, humiliation and embarrassment
 - c) Feelings of pity and love towards the offender
 - d) Problems of physical access to police or social workers
 - e) Fear of retaliation or intimidation by the offender, especially when combined with a lack of confidence that the legal process will result in a conviction
 - f) Fear of legal processes, including experiencing rudeness and poor treatment by the police
 - g) Fear of having to relive the trauma in court and during the investigation
 - h) Fear of upsetting the stability of the family
 - i) Fear of the power and authority of the abuser
 - j) Fear of loss of economic support by the abuser
 - k) Preference for cultural means of resolving disputes (such as the payment of damages by the offender)
 - l) Fear of ostracism or ridicule by peers
 - m) Wanting to avoid the stigma attached to being raped (being labelled as 'damaged')
- (Vetten, 2014).

6.6 Most of these factors demonstrates the depth and influence of myths related to the culture of male entitlement and negative forms of masculinity that engulf the process of dealing with sexual offences. Implementation of the SOA has demonstrated some gaps that has led to inefficiency in dealing with sexual offences matters. The literature indicates that most of the reported cases of rape and sexual violations are reported in Community Based Surveys, rather than at the police stations. This for most victims

is due to fear of trauma especially lack of confidentiality and privacy within the police stations. This was corroborated by one of the participants during the consultative session, when she reported experiencing the same dilemma when she had accompanied a 7-year old victim of sexual violence to the police station, where a female police officer who attended to them interviewed the child at the front desk without exercising the principle of confidentiality and privacy, nor empathy. Other factors that are highlighted to be contributing to lack of reporting is stigmatization and fear of not being believed by the health sector officials as well as the police, and fear of “victim-blaming”. Sometimes the victims retract due to the perception that reporting such a crime would be unlikely to lead to punishment and retribution.

7. Stakeholder Consultation on Sexual Offences

7.1 The statistics collected by the police do not assist in determining the frequency and the extent of different age groups that fall prey and are affected by sexual violations across the country. It is also evident that with regard to the LGBTIQ+ community, there is limited research even though the LGBTIQ+ community is also highly targeted. There is also lack of information about rape perpetrated against people with disability and that presents a false picture that people with disability are not vulnerable to sexual offences while that is not a fact. There is also limited information on men as victims of sexual assault by other men as well as the extent of sexual violations against sex workers.

7.2 Some of the gaps that came out of the experts’ discussions revealed that the cases take too long as they are delayed at the forensic labs for DNA analysis and that this is due to the lack of resourcing within those labs.

7.3 Lack of trauma wardrobes within the police stations as well as lack of trauma consulting rooms is widespread, and a shortage of resources in handling cases of people with disabilities leads to delaying processes.

Another gap that was highlighted was that the IPID does not seem to effectively execute their mandate of monitoring compliance within the police service and that there is no SWOT analysis for the implementation of SOA.

Inputs:

- a) There is a need for collection of detailed and nuanced data that is disaggregated with regard to types of sexual violations, age, gender, and other key demographics that will create ease of access for researchers in analyzing the data to establish the trends in terms of different demographic characteristics.
- b) It is also important to advocate for regular community-based surveys as more data related to sexual violations is revealed in such studies, Victimization studies etc.
- c) It is important to roll out training for researchers to adequately collect this kind of data with the sensitivity it requires.
- d) Put strategies in place to prevent the cases from being stricken off the roll to ensure increased convictions which should pose as a deterrence to further violations.
- e) It is recommended that the police should be trained on how to collect information from the victims to ensure that they are traceable during the duration of the case, as research demonstrates that some of the cases are removed from the roll because the victims are untraceable, which in most cases is due to the omission by the investigating police officer of collecting adequate information from the victim.
- f) It is also indicated that most of the cases are disposed due to the fact of *nolle prosequi* decisions due to limited evidence to warrant prosecution.
- g) It was recommended that lack of resources to effectively implement the SOA is due to the fact that the legislation was passed without being costed. The public therefore appeal for legislation to be costed before being enacted for ease of implementation.
- h) It was highlighted that sexual crimes are specialized and need specific expertise to deal with and address them. Such expertise includes specialized police trained to deal with sexual offences cases as well as specialized presiding officers.

- i) It is also recommended that there is a need for specialized doctors to be deployed to deal with sexual offences and to be seconded to the Department of Justice and Constitutional Development.
- j) Administration of sexual intimidation should be included, like the example of an employer who told a woman "...I'm going to rape you till heaven come..." These kinds of utterances should be taken seriously as they sometimes are not just idle threats but get to be inflicted.
- k) It was also recommended that in the wording used to convey threat, physical, verbal and electronic communication like SMSs, text messages etc. should also be included as that is also in line with the sexual harassment laws in the country.
- l) Definition of the employer need to be strengthened and include among others independent contractors. Such relationships should be regulated as well, including the EPWS.
- m) There's a need for training for all these Bills and other related pieces of legislations for ease of implementation and enforcement.
- n) There's a need for intermediaries who are gender trained so that they can understand some social constructs that are affecting GBV cases.
- o) There is a need to revise the wording on the age of vulnerable persons which the Bill indicates as a female aged 25. It is important that age is not used as a determining factor in terms of GBV because women of all ages are susceptible to GBV. It should also not depict females as all genders, since both men and the LGBTQI+ community are susceptible to being victimized i.e. the word 'female' can be substituted with 'person'.
- p) Mandatory reporting should be relooked, and be made to be a choice in GBV but should be mandatory for children and elderly persons.

8. Submission on Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill (B16-2020)

8.1 General Observations

8.1.1 Binary Language

South Africa's Constitutional and legislative framework offers comprehensive recognition and legal protection to LGBT people, and is among the most progressive globally. It recognizes multiple forms of VAW, to an extent that it goes beyond the gender exclusion to the gender neutral, it goes beyond partnership but recognises the relations of families as well and how survivors are supported and recognized as vulnerable populations. The South African Criminal Law (Sexual Offences and Related Matters) Amendment Act (herein referred to as the Sexual Offences Act) makes no particular reference to the sex or gender of either the victim or the perpetrator, and defines that "Any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'), without the consent of B, is guilty of the offence of rape." The current formulation of the Bill makes reference to He/She and this does not ensure inclusivity.

Recommendation: SAWID proposes that the following formulation be included "**He/She/Them/They**" in order to ensure inclusivity. This will ensure that we do not ignore the fact that certain LGBTI people are both potential perpetrators and potential victims, especially when considering the IPV pandemic in South Africa. South Africa has attempted to address the Hate Crimes Bill and the gaps that exists in addressing challenges that affect the LGBTI community on protective measures, however the current formulation makes no mention of crimes such as hate crimes

8.1.2 Resourcing

During the dialogue the issue around shortage of resources which hampers handling of offences that affect communities, especially people with disabilities, was raised sharply.

Recommendation: SAWID urges Parliament to engage with various departments that have responsibilities under the current bill to ensure that the amendments are properly costed.

8.1.3 Training and Skilling

Implementation of legislation rests on public servants having requisite skills and competencies. SAWID therefore proposes that relevant public servants are taken through the amendments so that they can ensure access to justice is not undermined.

Recommendation: Because the current amendments have expanded the scope and therefore there will be a need to increase capacity, SAWID proposes that there must be a proper exercise undertaken to cost the bill.

8.2 Clause 1

As much as SAWID welcomes the expansion of the prohibition on sex offenders (convicted of sexual offence) to vulnerable people, which expands from the previous formulation that limited recordal in the National Register of sex offenders who violated children or mentally disabled people, the definition of vulnerable people seems to exclude survivors of sexual violence

Recommendation: SAWID suggests that this defect be cured in the definition section where 'survivors of sexual violence will be included in the listing of vulnerable people. And further proposes that the restriction included in the proposal, to the effect that persons who are vulnerable are females under the age of 25, be amended to include all survivors of sexual violence (without limiting it to females under 25 years of age).

8.3 Clause 2

SAWID welcomes the development for creating an explicit offence where a person contravenes any prohibition, condition or obligation of an interim or final protection order. This development will assist for the purposes of charging by police and the NPA, who may have not always understood the offence under S 5 (b) of the principal Act.

8.4 Clause 3 & 19

SAWID strongly agrees with the clause 3 which expands the offence of incest as well as clause 19 which will do away with a defence that may be raised against the charge of incest where one party is a minor under age 18.

8.5 Clause 4

SAWID welcomes the extended and broad ambit of the Bill, having added a new offence – sexual intimidation, as this will go a long way in prohibiting intimidation or the threat of being subjected to a sexual offence.

8.6 Clause 5

SAWID believes that the definition of employer needs to be extended beyond what is strictly, legally understood to be an employer – employee relationship.

Recommendation: It must be ensured that contracts such as independent contractors; interns etc are included in the definition for purposes of this Act.

D. CRIMINAL MATTERS AMENDMENT BILL (B17- 2020)

9. Introduction on Criminal Matters

9.1 This proposed legislation is aimed to further regulate the granting of bail in respect of offences committed against those defined as vulnerable people. The legislation further regulates the granting of bail placement of persons on parole in respect of offences that have been committed against vulnerable persons. The Criminal Procedure Act, 1977, further regulates the granting and cancellation of bail; the giving of evidence by means of closed-circuit television or similar electronic media; the giving of evidence by a witness with physical, psychological or mental disability; the appointment, oath and competency of intermediaries; and the right of a complainant in a domestic related offence to participate in parole proceedings. The Criminal Law Amendment Act, 1997, further regulates sentences in respect of offences that have been committed against vulnerable persons.

10. Literature Review on Criminal Matters

10.1 While the scourge of GBVF in the country has led to these processes of revamping the related regulative framework, to ensure protection of vulnerable persons to these violations, it is also important to focus on the strategies that will promote deterrence and prevention of revictimization. Research and the discussions during the deliberations on inputting into these Bills revealed that retributive legislation alone will not erode the scourge of violence within the society and that it is important to also strengthen the restitutive strategies that promote social cohesion within the society, as in line with the principles of Restorative Justice, since a crime occurring to a member of the community does not only affect the primary victim, but the whole community.

10.2 Discussions have demonstrated that heightened violence within the South African society prevails despite the progressive Constitution that upholds human rights and

legislative frameworks in place. The brokenness of members of the society due to external socio-economic factors as well as cultural beliefs of perceiving women as secondary citizens and the subordinates of their male counterparts has demonstrated to be some of the contributing factors in this dilemma of VAW/GBVF. It is therefore critical that as government is in the process of tightening the laws to address these issues, that strategies of identifying the root causes must be taken, and imbued with a similar sense of priority.

10.3 Restorative Justice as part of the justice system is important in ensuring healing, building social cohesion and mending the broken social fabric of the South African society. Restorative Justice can be implemented at three different levels within the Criminal Justice System, namely pre-trial, during trial and during post-trial, after sentencing. This system allows the victim to be in the center of the case hence allowing them the opportunity to be informed about their case, and to ask questions at every level of the trial. This will enable the healing process and empower the victim and also create an opportunity for the perpetrator to learn the impact of their actions upon the victim. This has demonstrated to be a catalyst in the rehabilitation process of the offenders and in preventing reoffending.

10.4 The Department of Justice has developed and adopted the Minimum Standards on Services for victims of crime in South Africa, which is an information document that explains the rights of victims in the country. Victims' rights are clearly articulated in the Victims Charter which guides on the role of victims within the CJS, until the parole level where the offender's parole is determined by the contribution of the victim across all the stages in the process. All these are in line with the provisions of the United Nations' Declaration of the Basic Principles of Justice for Victims of Abuse of Power (GA/Res/40/30) which South Africa is signatory to.

10.5 It is therefore important to strengthen these mechanisms and ensure that retributive and restitutive justice are employed in dealing with cases related to

GBVF/VAW, to also promote building of social cohesion and uprooting the root causes of GBVF.

11. Stakeholder Consultation on Criminal Matters

Refer to Stakeholder Consultation on Sexual Offences (Point 8)

12. Submission on SAWID's position on Criminal Matters Amendment Bill (B17-2020)

12.1 General Observation

SAWID welcomes the intention of the bill in far as it addresses gender-based violence and offences committed against vulnerable persons. The doctrine of Common Purposes has always created anomalies and in the recent case of *Tshabalala v the State* where the Commission for Gender Equality was amicus, the Constitutional Court held that this doctrine applies to rape. This was an important step in legal reform through a victim-centered approach, which broke down structures that enhance patriarchal practices. SAWID therefore welcomes and appreciates the fact that the current formulation in the bill further clarifies the previous anomalies of applying the principle of common purpose to rape cases.

12.2 Bail

SAWID welcomes the fact that offenders of the Domestic Violence Act will no longer get bail easily and that they will be detained instead, being precluded from getting bail before their first appearance. We take note that this may be deemed by others as a limitation to S35 (1) (f) of the Constitution which advocates for accused persons to be released from detention, however South Africa has had alarming rates of gender-based violence and intimate partner killings and in a lot of these cases victims are always in danger. Granting

bail only after their first appearance will protect victims from immediate danger. We have seen women die at the hands of perpetrators that are out on bail.

12.3 Sentencing

SAWID welcomes the fact that tougher sentences will be applied to domestic violence offenders, however we are aware that in a lot of cases, harsh sentences do not deter and therefore appeal for a balance.

Recommendation: Over and above the introduction of harsh sentences, there must be rehabilitative programmes put in place. In some cases, as already indicated in input to the domestic violence bill, there are complainants/ victims of domestic violence who would rather opt for restorative justice – who rather want the perpetrator to get helped and be rid of the abusive behaviour rather than being imprisoned.

12.4 Parole

Under the UN Declaration of Basic Principles of Justice for Victims of Crime, victims have the right to have their personal views and concerns considered in justice proceedings where their personal interests are affected. When dialogues on gender-based violence are held with communities, a lot of times members of society indicate loss of trust in the justice system because victims would just see perpetrators walking among them in communities without having been consulted or just even alerted that the perpetrator will be out on parole.

SAWID therefore, supports the principle that victim's voices must be heard when parole processes unfold. *SAWID* further proposes that clear regulations to guide this process be put in place and proper risk assessments done to ensure that the perpetrator does not re-offend.

E. CONCLUSION

In light of the outcomes of the Declaration of the 2018 Presidential summit on GBV and the National Gender Based-Based Violence Strategy that was adopted by cabinet in March 2020, and which now needs to be implemented, there is an urgent need to revamp policy and the legislative framework, as well as address the cultural, social and economic factors which perpetuate violence against women.

If the Amended Acts are intended to combat and prevent violence against women, they have to address the structural violence of our apartheid past, the immense inequalities between people that resulted from unearned privilege and legislated inequality between the races, and the inequalities between the genders in terms of cultural and traditional practices prioritizing men's rights over women's rights, and tolerating income disparities between men and women for work of equal value, as well as addressing the amount of unpaid work that women have traditionally done to maintain and sustain the family.

Since the laws compete with cultural beliefs and prescribed social norms and values, and given the fact that research shows that perpetrators of violence have often been victims of, or witnesses to violence as children, there is an urgent need for public education regarding preventative strategies, relationship skills, gender inequalities, and addressing the effects of physical violence as well as the mental or emotional abuse that can take place within families.

Since social cohesion within society at large seems to be lacking at all levels of the social ecosystem, there is an urgent need to prioritize initiatives that promote healing and reconciliation from our violent and divisive past, and which prioritize and promote family development. These initiatives need to be taken down to municipal and family levels.

In addition to the specific recommendations above, a focus on restorative justice initiatives, healing of past abuse and training in non-violent relationship skills is suggested to address the dysfunctional relationship skills which lead to GBVF.

SAWID and its sister organization, the WDB Trust, has been advocating for and piloting a family development model (The Development Caravan/*Zenzele* approach) since 2009, which sees the family as the central unit of development of society, and which professionalizes and remunerates the unpaid work of women in family development, recruiting, training and employing paid Family Development Workers or Social Auxiliary Workers, overseen by registered social workers, to enter families with a basket of services, using a social work case study and referral approach, as part of a poverty eradication and micro-credit action learning model, to enhance the productive self-reliance and agency of women and their families, and to begin to address the inequalities that maintain and perpetuate GBVF.

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