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# NATIONAL COUNCIL ON GENDER-BASED VIOLENCE AND FEMICIDE BILL

*Commission for Gender Equality Comments*

**MAY 2023**

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## 1. Introduction

The Commission for Gender Equality (CGE) wishes to express its gratitude for the opportunity to make written submissions on the publication of the National Council on GBVF Bill: b31-2022.

The CGE, as an independent statutory body created in terms of Chapter 9 of the Constitution of the Republic of South Africa, 1996 (the Constitution), is mandated to promote and protect gender equality in government, civil society, and the private sector.

The Commission for Gender Equality Act 39 of 1996, as amended (the CGE Act), gives the Commission the power to:

- Monitor and evaluate policies and practices of organs of State at any level.
- Monitor and evaluate statutory bodies and functionaries.
- Monitor public bodies and authorities and private businesses, enterprises, and institutions to promote gender equality.
- Make any recommendations that the CGE deems necessary.

The CGE welcomes the opportunity to make inputs into the Bill and shall reiterate the proposed sections under review in the Bill and respond thereto.



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## 2. Background

The 2018 Presidential Summit on Gender-based Violence and Femicide (GBVF) declaration for the development of the National Strategic Plan on Gender-based Violence and Femicide (NSP on GBVF) set in motion the establishment of the National Council on Gender-Based Violence and Femicide. The NSP on GBVF is one of the government's strategies to tackle the scourge of GBVF in South Africa. The strategy has a ten-year life cycle (2020 to 2030) and was developed in 2019 by the Interim Steering Committee (ISC) on GBVF.

The NSP provides a multi-sectoral, coherent strategic policy and programming framework to strengthen a coordinated national response to the crisis of GBVF by the South African government and the country in general. The NSP pillars include (1) Accountability, Coordination and Leadership, (2) Prevention and Rebuilding Social Cohesion, (3) Justice, Safety and Protection, (4) Response, Care, Support and Healing, (5) Economic Power, and (6) Research and Information Systems.

Even though significant milestones had been achieved regarding bringing the legislation that supports the creation of the council into fruition, the target deadline of the 2020/2021 financial year had not been met. This also meant that the establishment of the council could not have been achieved in the absence of the legislation that informs its governance, powers, and functions. The National Council on Gender-Based Violence and Femicide (NCGBVF) Bill is a significant milestone in the establishment of the multi-sectoral national coordination structure on GBVF as this has been a major setback in the country's attempt to strengthen accountability architecture to address GBVF adequately.



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It is common cause that GBVF is a common offence that is widespread in South Africa. It impacts on every aspect of life and it predominantly affects women and girls disproportionately. The CGE views GBVF as a systemic issue that is entrenched in workplaces, cultures, and traditions in South Africa. To address and eliminate GBVF there is a need for a concerted effort by all key role players in South Africa. Without a concerted effort the Council may not be able to achieve its objects to prevent and respond to GBVF. It is therefore critical that this Bill resonates with the practical challenges that are brought about by GBVF.

### **3. The CGE's Submission on aspects of the Bill**

#### ***3.1 General use of the terminology 'may' versus 'must'***

Throughout the Bill, it is noted that the use of "may" versus 'must' is prominent. In light of this, the CGE argues that such terminology is problematic as it leaves room for non-compliance and discretion as well as limits the Council's ability to hold the state accountable. There is a possibility that the Council may use this section to justify its inaction in the work it plans to undertake.

It is proposed that the word "may" be replaced by the word "shall," which is generally used to indicate a mandatory requirement. As the word "may" *is an expression of possibility, a permissive choice to act or not, and ordinarily implies some degree of discretion. This contrasts with the word "shall," which is generally used to indicate a mandatory provision – Cornwall University*



### 3.2 Definitions

#### **“gender-based violence”**

In respect of the above the CGE notes that the Bill defines Femicide as “the killing of a female person or perceived female person on the basis of gender identity, whether committed by a person within a domestic relationship, interpersonal relationship or by any other person, or whether perpetrated or tolerated by the State or its agents and private sources”. Although the Bill does not define the concept domestic relationship, The Domestic Violence Amendment Act, 2021 defines it as

“a relationship between a complainant and a respondent in any of the following ways:

- a. *They are or were married to each other, including marriage according to any law, custom or religion.*
- b. *they (whether they are of the same or of the opposite sex) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other;*
- c. *they are the parents of a child or are persons who have or had parental responsibility for that child (whether or not at the same time);*
- d. *they are family members related by consanguinity, affinity or adoption;*
- e. *they are or were in an engagement, dating or customary relationship, including an actual or perceived romantic, intimate or sexual relationship of any duration; or*
- f. *they are persons in a close relationship that share or [recently] shared the same residence”.*



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It is therefore important to recognise that if femicide is defined to include a domestic relationship, there are existing elements in the domestic relationship that may amount to gender-based violence. These elements have not been included in the proposed definition of gender-based violence. These include amongst others harassment and sexual harassment as defined in the Domestic Violence Amendment Act. Failure to include these elements in the definition of gender-based violence neglects the practical understanding that harassment and sexual harassment in a domestic relationship leads to femicide.

“National Strategic Plan”

The Commission recommends that the concept to be clearer and read as follows:

*“National Strategic plan refers to the National Strategic Plan on Gender-Based Violence and Femicide developed by the Interim Steering Committee, [led by Department of Women Youth and Persons with disability] established in terms of Article 3 of the Presidential Summit Declaration against Gender-Based Violence and Femicide of 2018;”*

### **3.2 Section 4 - OBJECTIVES OF THE COUNCIL**

*“ The objects of the Council are to—*

*facilitate a co-ordinated and structured multi-sectoral approach between relevant stakeholders for the prevention and elimination of, and response to, gender-based violence and femicide;”*



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In light of the fact that GBVF is considered a pandemic in South Africa, what is more concerning is that the Council appears to be playing a facilitative role in implementing the NSPGBVF. As a result, if the Council does not have specific powers, it may not be able to compel any structure or entity to comply with any aspirations contained in the NSPGBVF. It is imperative that the Council be given the authority to enforce compliance in order to address GBVF.

As the Council will be centralized at national level, the obligation and enforcement of the work of the Council should be vested at local level, where the survivors of GBVF are found.

Notably the Bill states that one of the objectives of the Council is to (d) ensure the establishment and maintenance of a platform for sharing of information and best practices on the prevention of, and response to, gender-based violence and femicide. This is largely the function of the Government Communication Information System (GCIS). Unless persuading reasons exist for these platforms to be established and maintained outside the GCIS, to save resources this function should ordinarily be left to GCIS.





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### 3.2.1 Section 5 - FUNCTIONS OF THE COUNCIL

#### Section 5 "The Bill states that the Council must develop an action plan

*"for the implementation of the National Strategic Plan, (b) set indicators, and (c) monitor and evaluate the implementation.*

*The Council is mandated to: (a) ensure that resources are equitably distributed for a comprehensive response to gender-based violence and femicide; (b) ensure the development of programmes and measures for education and training concerning the prevention and combating of gender-based violence and femicide; (c) encourage co-ordination between all structures established in terms of this Bill.*

*The Council may advise the Minister, Inter-Ministerial Committee on GBVF and other relevant stakeholders on matters falling within the purpose of this Act. The Council must review the National Strategic Plan every five years."*

According to the Bill, no mention is made as to whether each organ of State that is responsible for enforcing the NSPGBVF at the national, provincial and local levels should incorporate GBVF into their annual budgets with clear indicators and targets that are aligned with the NSP. In this way, the monitoring and evaluation of the GBVF programs can be made more effective.

Moreover, the CGE notes that although the Bill establishes the NCGBVF, it does not adequately address intergovernmental coordination, which is critical to institutionalizing NSPGBVF across national, provincial, and local government levels. Additionally, the Bill fails to establish a multisectoral approach to addressing GBVF, including defining what accountability looks like in the context of the structure.



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### **3.2.2 Section 6 - BOARD OF COUNCIL**

*"The Board must consist of 13 members with 80% women representation, including 7 persons from civil society organisations, 1 representative from each of the following organs of state, and the Chief Executive Officer. (SAPS, COGTA, DWYPWD, DOJCD, DSD, DOH)*

*Members of the board must be appointed in a transparent and open process, ensure participation by civil society, have applicable knowledge and expertise, and reflect the demographics and geographical spread of South Africa. The Minister must appoint one member as Chairperson and another member as Deputy Chairperson, and alternately the positions of Chairperson and Deputy Chairperson. The Board must monitor the implementation of the action plan of the Council, and exercise general control over the Council's powers."*

The CGE welcomes the appointment of Chief Executive Officer and the Secretariat to drive the achievement of the purpose of this Act in alignment with the pillars of the National Strategic Plan; and further establish operational arrangements, including the establishment of multi-sectoral and inter-sectoral technical teams, as and when necessary. It is however unclear what the powers and authority will these multi-sectoral and inter-sectoral technical teams have to in achieving the objectives of the Bill. It may be prudent that these be clearly outlined in the Act or Regulations and not left to the discretion of the Chief Executive officer.



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Furthermore in respect to the composition of the board *under section 6(1)(b) where the Bill states that:*

*"(b) one representative from each of the following organs of state:*

*(i) The Department of Women, Youth and Persons with Disabilities; women & youth are the majority of victims & survivors."*

The representation of departments in the Council is inadequate. The Bill fails to take cognisance that there are more units in the departments cited. For example the Department of Justice includes the judiciary including magistracy, National Prosecuting Authority, Correctional Services are different units within Department of Justice and Constitutional Development. And thus illustrating that it would be insufficient to have only one representative from this particular department. The same could be pointed out to departments such as the Department of Social Development, Health, the Department of Co-operative Governance and Traditional Affairs; and the South African Police Service;

However, considering that it is true that the 80% representation quota is considered progressive; there are concerns that it may contain unintentional discriminatory features that exclude males, who are crucial in the fight against GBVF. Further, it is recommended that other individuals, such as those with disabilities and LGBTQIA+ individuals, should not be excluded from the Council because males and persons with disabilities and LGBTQIA+ individuals, also suffer from GBVF.



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Further, the CGE recommends that the Department of Basic Education be a member of the Council's board. As a department responsible for basic education, it has a critical role to play, particularly in cases where children may be victims and/or survivors of GBVF. Additionally, section 110 of the Children's Act 38 of 2005 imposes a mandatory obligation on educators to report instances of abuse to the appropriate authorities.

*In addition to amending the schooling curriculum to include studies and/or modules that specifically address GBVF within the primary and secondary school curriculum, the Department has the power to do so through its mandate.*

### **3.2.3 DISQUALIFICATION OF A BOARD MEMBER**

*"Section 7 - A person is disqualified from being appointed to the Board or from remaining a member if such person— (a) has been convicted of— (i) a gender-based violence and femicide-related offence; or (ii) any other criminal offence and sentenced to a term of imprisonment without the option of a fine; (b) is or becomes insolvent; (c) is or has been declared by a competent court to be of unsound mind; (d) is directly or indirectly doing business with the Council and fails to declare the interest and the nature thereof in the manner required by this Act; (e) is a person under curatorship; (f) has, at any time, been removed from an office of trust on account of misconduct involving theft or fraud; or (g) fails to disclose an interest in accordance with section 8 or attended or participated in the proceedings of the Board while having an interest contemplated in section."*



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Considering the critical role that this organization will play, it would be vital to conduct background checks on all employees. It is recommended that no person convicted of a GBVF offence or related offence should be appointed to the secretariat, or the Board the Council.

It is additionally recommended that any person who has been 'struck off'/disqualified/removed by their respective professional regulatory body, should not be appointed to the secretariat or the Board of the Council. It is recommended that those who have been declared a delinquent director should be excluded from being appointed to Secretariat and Board.

Additionally, it is recommended that the section should include a subsection which addresses, that there should be a declaration of all previous convictions and pending cases registered against the proposed member of the Board.

### **3.2.4 Section 9. TERM OF OFFICE OF BOARD MEMBER**

*"(1) (a) Subject to sections 11 and 12, a member holds office for a period not exceeding three years, but is eligible for re-appointment for one consecutive term, not exceeding three years, and is also eligible for an extension of office for a period not exceeding six months.*

*(b) A member may resign from office by submitting at least one month's written notice to the Minister.*

*(2) The names of the members and the date of commencement of their term of office must be published by the Chief Executive Officer in the Gazette not later than 30 days after nomination or appointment to the Board."*



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The CGE contends that a six-month appointment period for Board members is reasonable and appropriate, provided that the following sub-section be inserted:

*"to allow for the completion of a potential appointment of a new member to the board. Which must take place within the extension period of six months "*

### **3.2.5 REMUNERATION OF MEMBERS**

10. *"(1) A member of the Board or a member of any committee of the Board, may, from the funds of the Board for that purpose—*  
*(a) in the case of members of the civil society, be paid such an allowance, and be reimbursed for such expenses incurred for services performed by such a member, as the Minister of Finance may determine.*  
*(b) in the case of government employees, be paid subsistence and other allowances in accordance with such member's conditions of service as the Public Service Regulations may determine."*

It is critical to avoid double dipping by employees that are employed by the State as such it is recommended that there should be strict compliance with public service Regulations together with the 2019 remuneration on non-official members; commissions and committees of enquiries and audit committees.



### **3.2.5 Section 11. VACANCIES IN BOARD**

*"(1) A vacancy in the Board occurs— (a) when a member's term of office expires; (b) when a member is disqualified from being appointed to the Board or from remaining a member as set out in section 7; (c) when a member dies; (d) when a member's resignation, submitted in terms of section 9(1)(b) takes effect; or (e) when a member is removed from office in terms of section 12.*

*(2) If a vacancy occurs on the Board, such vacancy must be filled within six months by the Minister, who must comply with section 6.*

*(3) A member appointed or nominated to fill a vacancy holds office for the unexpired portion of the term of the member who that member replaces."*

The CGE contends that a six-month appointment period for Board members is reasonable and appropriate, provided that the following sub-section be inserted:

*" to allow for the completion a potential appointment of a new member to the Board. Which must take place within the extension period of six months "*

Furthermore, it is imperative that a clause exists that speaks to the consequence or contingency in respect of an appointment not being made within the six-month extension period.



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### **3.2.6 Section 18 FUNDS OF COUNCIL**

*" (1) The funds of the Council consist of— (a) monies appropriated by Parliament for this purpose; (b) donations or contributions received from any source; (c) trust funds vested in the Council; (d) interest derived from investments; and (e) money received from any other source."*

The CGE recommends that appropriate resources be allocated to the Council in order to advance the objectives of the NSPGBVF. It is therefore critical that funds are made available once the Bill is passed into law.

### **3.2.7 Section 22- PROVINCIAL AND LOCAL STRUCTURES**

*"The Minister must, after consultation with the Board, Premiers and Mayors, prescribe norms and standards for co-ordination and accountability of the provincial and local gender-based violence and femicide structures consistent with this Act, the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), and the Intergovernmental Relations Framework Act, 2005 (Act No. 13 of 2005)."*

In order to achieve rapid coordination, the CGE agrees that it is essential that the Council engage Provincial, Local, and District structures. There are, however, no details in the Bill regarding the manner in which the Council intends to coordinate these three structures in order to implement the NSPGBVF.





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### **3.2.8 SECTION 12 REMOVAL FROM OFFICE**

In terms of section 12 of the Bill;

*"(1) The Minister may remove a member from office—*  
*(a) on the ground of misconduct, incapacity or incompetence;*  
*(b) for being absent from three consecutive meetings of the Board without permission of the Board;*  
*(c) for engaging in any activity that is reasonably capable of undermining the purpose of this Act and the functions of the Council; or*  
*(d) for failure on the part of a member to disclose any interests as contemplated in 5 section 8.*

*(2) Before removing a member from the Board in terms of subsection (1), the Minister must afford the member in question an opportunity to be heard. "*

In its submission, the CGE contends that the Bill fails to clarify whether the Board has the authority to suspend a member of the Council pending a decision by the Minister to remove such a Board member from office. A clause such as this is essential for the Board to be able to create an environment that is enabling for all members. Especially when Council members cannot work with a Council member who does not adhere to the values and ethos of the Council, pending a decision by the Minister.



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### **3.2.9 Section 3 - ESTABLISHMENT OF THE NATIONAL COUNCIL ON GENDER-BASED VIOLENCE AND FEMICIDE**

- (1) *" The National Council on Gender-Based Violence and Femicide is hereby established.*
- (2) *The Council is a statutory body responsible for providing strategic leadership in the prevention of, and response to, gender-based violence and femicide in South Africa, in line with the objects contemplated in section 4.*
- (3) *The Council acts through its Board.*
- (4) *The Public Finance Management Act applies to the Council"*

Part of the function of the CGE is to monitor GBVF cases before the justice cluster and the judiciary. To this end the CGE engages the Department of Social Development, the SAPS, the Department of Justice and Constitutional Development and the National Prosecuting Authority regarding the handling of GBVF cases. Furthermore, the CGE monitors GBVF cases at lower and higher courts to determine whether fair trial is adhered to and whether courts are accessible in terms of section 34 of the Constitution.

Similarly, the SAHRC is responsible for to "*monitor and assess the observance of human rights in the Republic*".<sup>1</sup> Arguably this includes the monitoring of GBVF cases as it includes a violation of the right to human dignity and the right to life of survivors in South Africa.

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<sup>1</sup> Section 2 of the SAHRC Act.



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The Bill gives effect to chapter 1 and 2 of the Constitution which includes, human dignity, equality, security of persons and the advancement of human rights. The SAHRC is already tasked with the function to uphold and protect human rights. Moreover, the State is also clothed with the responsibility to give effect to chapter 1 and 2 of the Constitution. This laments the view that the Council is duplicating functions and responsibilities. In line with the above the CGE submits that there are notable similarities between the functions of the Council and existing Chapter 9 institutions. As such, it has no difference in principle from the functions of the GBVF Council. As a result, this in itself represents a replica in principle of the functions of both the SAHRC and CGE.

The above Chapter 9 institutions have a Constitutional mandate, one that has been created with specific intent to monitor the development of South Africa's democracy. Their independence has been cemented within the Constitution to enable it to hold the State accountable in respect of obligations all human rights as entrenched in the Constitution. In contrast the Council is to be established a statutory body which on the face of it in terms of the Bill does not enjoy the same independence as that of Chapter 9 institutions.

Moreover, Section 2 of the Bill states that the Council which acts through its board is responsible for providing strategic leadership on the elimination of GBVF in South Africa. There are existing government departments, such as the South African Police services, the NPA, the Department of Social Development, the Department of Justice and Constitutional Development, the Department of Women, Youth and Persons with Disabilities and Department of Correctional service that are already tasked with the function to provide strategic leadership.



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In addition to the above the monitoring and evaluation of implementation of the NSPGBVF by relevant stakeholders on a regular basis in terms of section 5 of the Bill can also be effected by the national Department of Planning, Monitoring and Evaluation.

In this regard, the CGE further submits that it notes that it is expressly stated in the Bill that the Council may not be independent of the State.

This may hinder the Council's ability to hold the Department accountable for non-compliance with the NSPGBVF. In addition, if the Bill requires the Council to report directly to the Minister of Women, Youth, and Persons with Disabilities, how will the Council hold the Department of Women, Youth, and Persons with Disabilities responsible?

It may be prudent for the Council to be reporting either to the Presidency or Parliament.

#### **4. General Comments**

In relation to the aspect of a Bill passing the Constitutional muster, the CGE asserts that this Bill was published in 2019 and that the public was invited to make submissions during the process in November 2019. The Bill was identified as problematic in a number of submissions. Additionally, during the Presidential Summit II on GBVF held on November 2 and 3, 2022, the same issues were raised and it was resolved that the Bill should be amended. Despite this, it does not appear that any of the contributions made during the above period are taken into account by the Bill.



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As for the law-making process related to the introduction of Bills, it is common cause that there are four types of Bills. In accordance with the Constitution, Section 74 Bills constitute constitutional amendments, Section 75 Bills constitute ordinary Bills that do not affect the provinces, Section 76 Bills constitute ordinary Bills that affect the provinces, and Section 77 Bills constitute money Bills (appropriations, taxes, levies, duties, etc.). Introducing these must be the responsibility of the Minister of Finance.

It is important to note that each type of Bill has a different path to becoming a law and usually falls into only one category. A Bill's category is determined by the Joint Tagging Mechanism (JTM), which is composed of the presiding officers and their deputies. Bills that do not clearly fall into one category, or those that fall into more than one category, are usually redrafted or split into several Bills. According to the current Bill, the process is described;

*"(As introduced in the National Assembly (proposed section 75); explanatory summary of Bill and prior notice of its introduction published in Government Gazette No. 46991 of 30 September 2022)(The English text is the official text of the Bill)"*

GBVF is a problem that is prevalent in provinces, and therefore the Assembly has the power to pass a Section 75 Bill regardless of the NCOP's opinion. Therefore, the Assembly should consider the views of the NCOP when considering the content of Section 75 legislation. In respect of this Bill, such consultation is imperative to truly constitute a law which passes the constitutional muster.



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In spite of this, the CGE acknowledges that the Bill aims to strengthen the accountability architecture of South Africa through the establishment of a national coordinating structure. It is expected that this structure will lead the country's efforts to address issues of gender-based violence and femicide. There was an interesting observation made that the mandate of the Council somewhat duplicates the work of the CGE in terms of its objectives and functions, yet due to the financial constraints of the CGE, there is a need for another institution to exist. The establishment of the Council is premised on the fact that there is a gap, however the funding would need to be revised significantly in order to avoid the creation of another institution that will suffer from underfunding, and that will be unable to fulfill its obligations and objectives. Despite its general support for the Bill, the CGE believes that further consultation is necessary to fill identified gaps. By failing to address these gaps, the South African Council may be ineffective in addressing the GBVF.

## **5. Conclusion**

The CGE welcomes the initiative to combat and respond to the current wave of GBVF in the country. However, this Bill presents practical challenges that may result in the Council not being able to fully achieve its objectives and the pillars of the NSPGBVF. These challenges need to be addressed, including addressing the duplications of functions and independency of the Council.

The CGE therefore recommends that the Bill in its current form be sent back for further consultation.