



Submission to
Portfolio Committee on Women, Youth and People with
Disabilities

On
National Council on Gender-Based Violence and
Femicide Bill
(B31-2022)

Date: 19 May 2023

TO: Ms CN Ndaba,

Chairperson PC on Women, Youth and People with Disabilities

Submitted Via Email To: Ms. Neliswa Nobatana, the Committee Secretary

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1. Introduction

The Call to Action Collective emerged from the activism of the #TotalShutdown movement, which mobilised thousands of women, the LGBTQIA+ community and gender non-conforming people across the country to protest the increasing violence perpetrated against their bodies and demand that government take concrete action in the fight against ending the scourge of gender-based violence and femicide in South Africa. The collective was therefore established in 2018 and is a coalition of over 90 civil society organisations, trade unions and individual activists working on issues ranging from direct service provision, research, advocacy, litigation, and varying GBVF prevention initiatives.

The main objective of the collective has always been premised on the idea that formulating joint strategies and interventions between government and civil society would offer a vehicle to effectively and successfully deal with the increasing violence subjected to womxn, children, LGBTQIA+ and gender non-conforming people. In so doing we have sought to strengthen the building of an autonomous feminist movement across the country, and as a result, have continued our national mandate of providing information on various multi-sectoral developments as per the expectations set out in the 24 demands – the bedrock of our mission statement.

This submission on the National Council on Gender-Based Violence and Femicide Bill was prepared in collaboration with Sonke Gender Justice, and Ipas South Africa. Representatives of the organisations are willing and available to make oral submissions in Parliament should the opportunity arise to do so.

About Sonke Gender Justice

Sonke Gender Justice (hereafter 'Sonke') is a non-partisan and non-profit organisation established in 2006. The organisation works to create the change necessary for men, women, young people, and children to enjoy equitable, healthy and happy relationships that contribute to the development of just and democratic societies.

About Ipas

Founded in 1973, Ipas works globally to advance reproductive justice by expanding access to abortion and contraception. Ipas has programs and offices in Africa, Asia, Latin America, and North America. In 2021, we launched the Ipas Africa Southern Region program. This new initiative consolidates our dynamic programs in Malawi, Zambia, and South Africa. As we continue to implement innovative, woman-centred projects at the country level, we are creating new opportunities for cross-regional learning, collaboration, and movement building for sexual and reproductive health and rights (SRHR) while also addressing humanitarian response, climate change, and gender justice, all which impact SRHR outcomes. Over the decades, Ipas has forged strong relationships with ministries of health and gender; civil society advocates; medical and professional organizations; global health and development non-governmental organizations; community-based organizations; and research organizations.

2. Our Submission

The National Strategic Plan on Gender-Based Violence and Femicide (hereafter NSPGBVF) in South Africa sets the parameters and architecture for the development of the National Council on Gender-Based Violence and Femicide (hereafter NCGBVF). The founding document states the institutional arrangement and implementation modalities¹ that must characterise the constitution of the NCGBVF Bill. This institutional arrangement is premised on a multi-sectoral approach and therefore requires that the Bill “reflect a commitment to a flexible and light structure at the centre, with key operational mechanisms in place to respond effectively and urgently to arising needs”.²

¹ See, Chapter 5 of the National Strategic Plan on Gender-Based Violence and Femicide in South Africa. See, webinar presentation by Sibongile Ndashe at <https://drive.google.com/file/d/1RvYtASTB98YvdwcbDNk7NB-n6zgt322v/view>

² Ibid at p57.

Furthermore, the Presidential Summit on Gender Based-Violence and Femicide 2, held on 2-3 November 2022 resolved to fast-track the legislation of the NCGBVF, placing emphasis on:

- The composition of the Council
- Ensuring that government departments are resourced to respond to GBVF, and the funding is ring-fenced.
- Creation of the GBVF Fund as prescribed in the NSP on GBVF.
- Multi-sector implementers such as government, business, volunteering and activist organisations that are listed as implementers of the NSP on GBVF.
- Outlining the roles and responsibilities of the champions which are the Presidency, the IMC and the Council.
- Integrating Chapter 3 of the NSP on GBVF into the legislation.
- An intergovernmental framework.
- The multi-sectoral nature of the response.
- Establishing transitional arrangements for the NSP on GBVF beyond the current time-frames.
- Provision for tracking who is implementing.

While the draft Bill attempts to provide a cohesive structure to the radical approach taken in the implementation of the NSPGBVF, it does not sufficiently provide for a body that will be independent and non-partisan in its nature as prescribed. It is essential that the Bill reflects the objectives of the NSP.

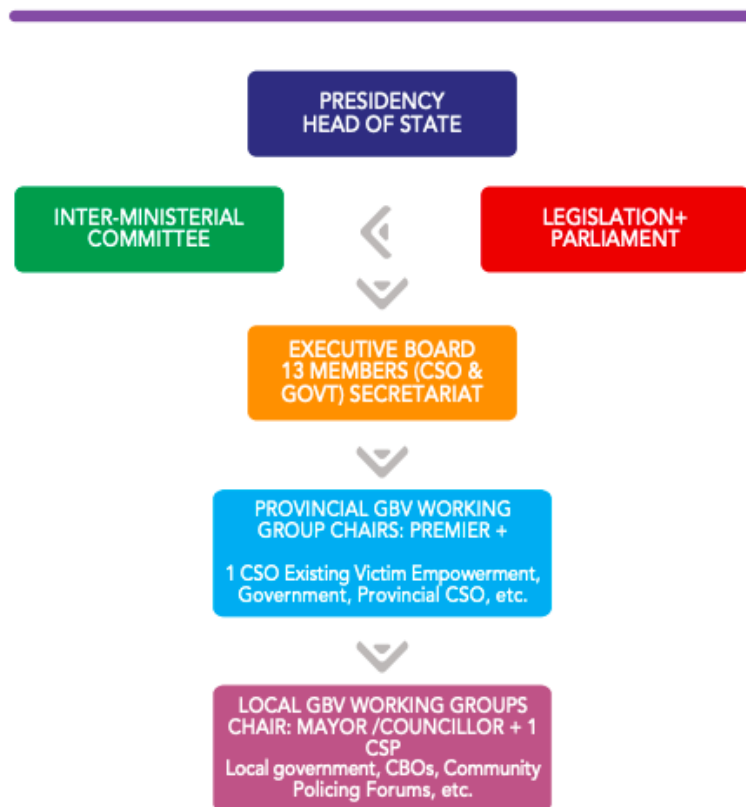
Although the Bill attempts to present the multi-sectoral nature of the Council, this is not explicitly reflected and thus needs to be augmented. The comments submitted herein seek to highlight such gaps and resolve any inconsistencies that exist within the Bill, in order to ensure the proper functioning of the NCGBVF in dispensing its mandate as prescribed by the NSPGBVF. Furthermore, to ensure that there is alignment to the resolutions taken in the Second Presidential Summit on GBVF that was held on 2-3 November 2022. Our submission, therefore, intends to address the following:

1. Tagging of the Bill
2. Decision-Making and Governance Structure
3. Accountability, Reporting and Transparency
4. Intergovernmental Coordination
5. Establishing a multi-sectoral response
6. Establishment of the Fund and its Architecture

2.1 Tagging of the Bill

The first issue noted pertains to the tagging of the Bill as a section 75 of the Constitution Bill not affecting Provinces. In the title description of the bill, it refers to the bill being introduced to the National Assembly as a section 75 bill. We submit that this is incorrect. While the Bill provides the precedent prescribing the legal test for tagging a Bill, it has failed to consider the shared competencies and suggested hierarchy of the objects of the Bill itself. Below is the proposed organogram for the constitution of the NCGBVF.

Figure 8: Proposed Organogram of the NCGBVF



Herein the role of each stakeholder is defined. From this organogram, it is noted that the provincial legislature has a significant role in the implementation of the NSPGBVF. Section 42 of the Constitution prescribes the composition of Parliament which consists of the National Assembly and the National Council of Provinces. Section 42 subsection 2 further stipulates that both constituencies participate in the legislative process in the manner set out in the Constitution. Schedule 4 of the Constitution as highlighted, provides for the parameters that give effect to this undertaking. These are headed as concurrent competencies. Concurrent competencies mean that both legislative bodies have the power to institute legislation on issues pertaining to those in schedule 4. These are concurrent because the Constitution allows provinces to institute their own laws and regulations to implement set policies as per the needs of that particular province. In this regard, provinces must be involved in the making of legislation that substantially impacts them as stated by the test for tagging a Bill. This was not only stated in the case law referenced by the Bill but in subsequent case law where such issues of tagging have risen.

In ***Democratic Alliance v President of South Africa and others***³ the court stipulates that the tagging of Bills is indeed subject to the competencies that it substantially affects. Where the areas affected have, to a substantial extent, concurrent competencies with provinces then a Bill must be tagged as a Section 76 Bill. The reason for this is that while national legislation will always take precedence as stated in Section 146 of the Constitution, provinces must be involved in the making of laws that will extensively impact them. Therefore, the tagging of the Bill as a Section 76 does not invalidate the operation of national directives as the law clearly sets out. Provinces must still prescribe to the guidelines of national directives as they take precedence.

However, as the organogram presents it is necessary to include local government in the architecture of the Bill not as passive role players either. It is indeed for this reason that Provinces need to be actively involved in the making of legislation that impacts all tiers of governance. To rely on the trickle-down effect is insufficient, especially given the track record of the implementation of policies in this country. What happens is that local governance is

³ 2014 (7) BCLR 800 (WCC).

often left out of the fold, leaving it in disarray and without any guidance or accountability. If the structure is to take a bottom-up approach as intended by the NSPGBVF, the tagging of the Bill as a Section 75 becomes insufficient.

Section 44 subsection 2 of the Constitution stipulates that Parliament may intervene by passing legislation in accordance with Section 76 subsection 1, concerning a matter falling within a functional area listed in Schedule 5 – which is the area for local governance. Certainly, those areas that affect local governance also sit within the ambit of Schedule 4 areas thus furthering the case for the tagging of the Bill as a section 76 Bill. The issue of tagging need not be a contentious one, precisely because a Bill can be tagged as both, if required. It must be taken into consideration that the Bill being drafted is a radical deviation from the Bills that precede it. It requires a multi-stakeholder engagement architecture of a legislative framework that ensures each tier has a fiduciary duty to implement the NSPGBVF as per their mandate. We, therefore, submit that the Bill should be tagged as a section 76 due to its role as the middle pathway between the two spheres of governance.

2.2 Composition, Decision-Making and Governance

Preamble

An Act of Parliament that is well-constituted needs to be accompanied by a Preamble that sets out the guiding principles of the legislative framework and the philosophy that undergirds its constitution. The theory of change, as per the NSPGBVF, is an essential element in the construction and development of this legislative framework.

Clause 1

The first provision of the Bill provides the definitions within the context of the Bill as stated. Reference is made to the Inter-Ministerial Committee (IMC), yet this is not defined under this provision. Accordingly, the IMC is a key custodian of the NCGBVF which needs to be reflected accordingly by the Bill.

In addition, the IMC, although constituted through the NSPGBVF, has no publicly available legal framework for its mandate. Its inclusion in the Bill without any such reference invalidates

its role as part of the matrix of the NCGBVF. The terms of reference of the IMC need to be legally consolidated so that their role is explicit within the Council as a structure. The IMC plays a key role in the effective functioning of the NCGBVF and what it seeks to achieve in terms of governance.⁴

The issue of accountability herein shadows the lack of accountability mechanisms undergirding the current Bill. Within its provisions, the Bill is silent on an accountability framework that would enable the Council to operate as intended by the NSPGBVF. The lack of an accountability framework renders the Bill ineffective as the issue of transparency arises - as is the case with the IMC.

In the Second Presidential Summit, it was taken as a resolution that an accountability framework would be established in collaboration with civil society. It is this framework that was thereafter intended to be entrenched in the provisions of the Bill in order to ensure the effective implementation of the work of the NSPGBVF. An accountability framework, therefore, needs to be drafted before the Bill can be consolidated. These gaps need to be rendered before the Bill can be passed as legislation.

Clause 3

The first provision of clause 3 states that the NCGBVF has hereby been established, yet there are no preceding clauses that stipulate explicitly in what manner it is to be constituted. There needs to be a clear articulation of the various role players and lamentation of their different positions including their duties and responsibilities. By merely noting that the NCGBVF is hereby established, the Bill leaves out a large portion of the key stakeholders and the exact hierarchy or order of representation. Therefore, the Bill needs to expand on how the Council is going to be constituted by noting all the stakeholders it seeks to constitute, and the exact structure this will take as reflected in the NSPGBVF. The Collective in collaboration with other organisations in 2020 held a series of webinars that will be useful to the drafters of the Bill as reference to how the NSPGBVF envisions the council to be.⁵

⁴ Supra note 1 at p59.

⁵ See, webinar presentation at <https://drive.google.com/file/d/1Vh1CN2lUp9Q1KyVVlrkRtKCWoVYKfI0w/view> by Prof Rashida Manjoo from the University of Cape Town, Public Law.

Clause 5

As previously noted, the functions of the Council cannot be clearly defined if the structure of the Council itself is not explicitly included in the Bill. It is in fact for this reason that it is crucial that the Bill be tagged as a Section 76 Bill instead of Section 75. The NSPGBVF has specifically allocated functions to Provinces and Local municipalities which are administrative in nature. In this regard, the outcomes set out in the NSPGBVF substantially affect functional areas listed in Schedule 4 and are not incidental. For example, in Schedule 4 the concurrent competencies that substantially affect provinces – and even local governance which falls under Schedule 5 of the Constitution – there are at least over ten areas that require administrative action from the lower tiers of governance. Policing is impacted at both levels and so is health and education, which swings back to the issue of intergovernmental coordination. As stated earlier, the Constitution stipulates that where a Bill impacts Schedule 5 competencies then the tagging of the Bill needs to be a Section 76.

Clause 6

Section 6 Subsection 1 identifies the composition of the Board of the Council as being 80% women in its representation, however, this is in conflict with the values of the Constitution. The Equality Clause in Section 9 of the Constitution stipulates that no individual shall be discriminated against because of their sex or gender. Therefore, the articulation of this diversity clause is interpreted incorrectly as women are intended to be interpreted as a placeholder for the marginalised. What this means is that 80% of the Board's constitution must be inclusive of all articulations and iterations of gender - that is, 80% of the Board must be representative of the LGBTQIA+ community including gender non-conforming persons, and women. Therefore, we request an amendment to reflect that the total constitution will consist of at least 80% of individuals from marginalised communities; including women; LGBTQIA+ community members, and gender non-conforming people. In this regard, it will be important for the Bill, to be cognisant of how they interpret diversity and inclusion. This must consequently be made explicit in the Bill itself.

Section 6 subsection 2 of the Bill on the appointment of civil society representation on the Board should be in line with the NSPGBVF which states that the “seven (7) representatives

from civil society will be appointed through a process of public nomination. The public nomination process will be overseen by the Presidency through the Ministry of Women, Youth and Persons with Disabilities, supported by a technical team of no more than five (5) persons”.⁶

Section 6 subsection 6 of the Bill on the appointment of the Chairperson and Deputy Chairperson on the Board. The Bill states that the Minister must appoint members for these positions. We Submit that this should be amended. **Our submission is that the board should be Co-chaired by one representative from civil society and a representative from Government** - mirroring the structure of the Presidential Summit Planning Committee (PSPC).

2.3 Accountability, Reporting and Transparency

Persons Consulted

In the memorandum, reference is made to consultations and opportunities for South Africans and stakeholders to make inputs to the Bill. However, it is our submission to the portfolio committee that inputs, and consultation resolutions referred to in this clause have not been considered and/or appropriately considered in the Bill. There has been no feedback process or communication on how these inputs from the public consultations have been incorporated substantially into the provisions of the Bill. In this regard, we submit to the Portfolio Committee that evidence be provided to substantiate the claim that such consultations occurred, and if they did, whether they were taken into consideration. It is pivotal that the government accounts for processes undertaken and that they are transparent with the public about their resolution. There needs to be reporting mechanisms to enhance transparency between the State and its citizens in the governing processes undertaken as per the requirements of the Constitution.

⁶ See, Section 5.4.1 of the NSPGBVF.

2.4 Intergovernmental Coordination

Clause 22

The Bill does not clearly stipulate mechanisms put in place for intergovernmental coordination to ensure that clear synergy exists within the NCGBVF, as well as in the implementation of the NSPGBVF. As alluded to earlier, the NCGBVF is a multi-sectoral entity whose success is dependent on the collaboration of various stakeholders, including government departments in the execution of its functions. While there is reference to an IMC as previously mentioned, a clear framework that stipulates how relevant government departments will interact, engage and account to each other in the execution of their responsibilities is essential. This is to ensure that state entities do not operate in silos in their efforts to address GBVF as has been the norm in the past. It will also ensure efficiency in the implementation of initiatives and the use of resources aimed at addressing GBVF.

2.5 Establishing a multi-sectoral Response

The NSPGBVF sets clear guiding principles for its implementation. Crucially, it envisions a multi-sectoral approach that will harness the roles, responsibilities, resources and commitment across government departments, different tiers of government, civil society, movements, youth structures, faith-based structures, traditional structures, the media, development agencies, the private sector, academic institutions and all other stakeholders.

The Bill make mention of a multi-sectoral approach; however, the Bill is not explicit on how it serves as a regulatory backbone to ensure and facilitate accountability at all levels of government and involved stakeholders. The Bill must be clear on coordination and inter-institutional working rules and tools to support the inter-sectoral approach. Failure to properly consult with different sectors, different stakeholders and other spheres of government undermines the same principle set out in the NSP, which is herein confirmed by the Bill. We submit to the Committee that the Bill must be sent back for appropriate stakeholder engagement.

2.6 Establishment of the Fund and its Architecture

Clauses 18-20

The Bill is silent on the establishment of the National GBVF Fund, therefore, we submit that reference be made to the NSPGBVF for its effective establishment.⁷ We submit that it be specifically stated that a National GBVF fund will be established with clarity on the architecture of the Fund and how it is to be constituted.

We further recommend that a minimum of 65% of funds be channelled into project implementation and activities designed in accordance with the implementation of the NSPGBVF. In lieu of this, there should be an introduction of a mandated project implementation budget into the funding structure to ensure funds are sourced for implementation activities. External fundraising initiatives should be disclosed to the Council to ensure that there is no duplication of requests from the NSPGBVF secretariat and the stakeholders for the implementation activities. This will ensure that the Fund remains an accountable vehicle of transparency as per the accountability framework established.

2.7 Regulations to the Bill

The Bill vaguely refers to regulations but fails to expressly provide for these in the Bill itself. Consequently, there is no clause that expressly provides for the drafting of regulations within a specified time frame. It is our submission that the failure to indicate when regulations should be drafted for the implementation of the Bill within X amount of time (for example 6 months) is likely to have an impact on the rollout of the Bill. Ensuring the regulations are expressly provided prevents undue delay in the implementation process.

⁷ See, Section 5.4.3 of the NSPGBVF.

3. Conclusion

The above recommendations outline the content of our submission. As invested stakeholders committed to the realisation of the NSPGBVF, the above would further entrench the values of human dignity, equality and equitable access for women and other marginalised groups, including children, LGBTQIA+ persons and gender non-conforming persons to mechanisms designed to protect these groups from GBV. It must be clearly stated that the organisations stated herein are in support of the Bill. However, it is our submission that it requires further consultation with relevant stakeholders to ensure that these gaps mentioned are addressed accordingly.

Please contact Simonia Mashangoane for further clarification on the above.

We are prepared to make an oral submission on the above and would appreciate an opportunity to do so.

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