



GAUTENG PROVINCE

29 JULY 2020

HIGH LEVEL SESSION ON GENDER BASED VIOLENCE AND FEMICIDE

LAW AND THE ADMINISTRATION OF JUSTICE IN SOUTH AFRICA : IDENTIFYING GAPS IN CURRENT LEGISLATION THAT WEAKENS THE STATE'S ABILITY TO EFFECTIVELY RESPOND TO THE SCOURGE OF FEMICIDE

We all accept that violence against women and children in South Africa is now more than a crisis, it is an epidemic and a scourge.

Gender based violence (GBV) and in particular, domestic violence, is usually the precursor to femicide. Curbing and eradicating GBV will in turn reduce the incidents of femicide.

South Africa has a progressive and comprehensive legal framework which addresses GBV. This includes, *inter alia*:-

- Domestic Violence Act 116 of 1998
- Criminal Law (Sexual Amendment and other related Matters) Amendment Act
- 32 of 2007
- Regulations Relating to Sexual Offences Courts in terms of The Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007
- Criminal Procedure Act 51 of 1977
- Criminal Law Amendment Act 107 of 1990
- National Directives and Instructions on conducting forensic examination of survivors of sexual Offences cases in terms of the Criminal Law (Sexual Offences Amendment Act)
- Protection from Harassment Act

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- Service Charter for Victims of Crime
- National Policy Guidelines for Victim Empowerment
- Amended Code of Good Practice: Sexual Harassment Cases (the Amended Code)
- Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 (PEPUDA)

This legal framework is underscored by the Constitution and specific rights in the bill of rights such as

- Section 9 – The right to equality, which includes equality before the law, and equal protection and benefit before the law for everyone, and the prohibition of unfair discrimination by the state and individuals on a number of grounds including gender.
- Section 10 – the right to human dignity.
- Section 11 – The right to life.
- Section 12 – the right to freedom and security of the person, which includes the right of everyone to be free from all forms of violence.

The scourge of GBV and femicide has been brought into the spotlight repeatedly in the past few years. NGOs, CSOs, faith based organisation and other institutions and organisations which provide assistance and support to victims and survivors of GBVs have all provided reports, submissions and research studies to Government setting out the challenges faced by women in accessing the protections afforded by the existing legislation coupled with recommendations to address these challenges.

What has emerged is that the existing legislation places the responsibility on various state organs to ensure that victims and survivors of domestic violence and abuse are able to access all state institutions in order to seek protection in a way which :

- Is efficient and speedy;
- Compassionate and helpful; and
- Does not result in secondary victimisation.

These state institutions are, *inter alia*:

- The South African Police Services;
- Various health services providers;

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- The Courts, particularly the Family Court (Clerks and Magistrates);
- Centres like the Thuthuzela Care Centres (TCCs). 24-hour centres intended to assist victims of sexual offences by providing access to all required services, including the police, counselling, doctors, assistance with court preparation and prosecution of the perpetrator.

The failure of these state institutions to provide victims and survivors of domestic abuse with the level of service and assistance which the legal framework mandates is well documented, as are the recommendations in relation to, *inter alia*, education, training and monitoring to address these failures.

The results of victims and survivors continued difficulty to access the criminal justice system are, *inter alia*:

- Victims are discouraged to report cases to SAPS or tend to withdraw cases because of the secondary victimisation which they experience;
- Victims of GBV experience difficulty navigating the court system, coupled with under-resourced courts and staff shortages to process applications for protection orders;
- The long distance which indigent victims have to travel make accessing the courts or seeking legal assistance prohibitive; and
- Victims of GBV are subsequently killed as a result of intimate partner violence, femicide.

The SAHRC, amongst others, has already concluded that the failure to establish mechanisms and accessible services for effective information, rehabilitation and reparation for victims of violence; and provide adequate budgetary and other resources for the implementation and monitoring of actions aimed at preventing and eradicating violence against women lies at the heart of the failure of the existing legal framework to curb and /or eradicate GBV and domestic violence. The costs of implementing legislation, policies and associated plans are insufficiently accounted for, resulting in inadequate funding. The lack of adequate funding has resulted in a constrained resource environment, with a shortage of skilled staff, and inadequate data collection, monitoring and evaluation of state programmes to address GBV.

We do not intend to repeat recommendations which have already been acknowledged by Government and which appear in various plans and strategies intended to address the challenges and difficulties which have already been identified. We propose to only

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highlight those recommendation which are not reflected in these plans and strategies and to propose new recommendations.

As a prelude, it is apposite to quote Retired Justice Edwin Cameron whose view is that we should “*recognise that the sole inhibiting institutional response to criminal conduct is the certainty of detection, the certainty of follow up, the certainty of arraignment, the certainty of prosecution and the certainty of punishment.*”

Domestic violence

Recommendation 1

- Section 17 of the DVA sets out various offences in relation to the contravention of the Act. Sub-section 17(a) provides that “*any person who contravenes any prohibition, condition, obligation or order in terms of section 7*” shall be guilty of any offence and liable on conviction to a fine or imprisonment for a period not exceeding five years or both such fine and such imprisonment.
- Section 7 relates to the courts powers in respect of a protection order and provides for, *inter alia*,
- Peace officers to accompany complainants to specified places to assist with arrangements regarding the collection of personal property (sub-section 7(2)(b);
- The court may not refuse to issue a protection order or impose any condition or make any order which it is competent to impose or make under this section, merely on the grounds that other legal remedies are available to the complainant (sub-section 7(7)).
- This provision needs to be utilised and enforced regularly. Police officers and Magistrates who fail to comply with their obligations should be held to account in terms of the provisions of Section 17 where applicable.

Recommendation 2

- Section 18 of the DVA is the specific section which obliges prosecutors to prosecute complaints and offences in terms of section 17(a) of the DVA.
- In terms of Section 18 (4), it is an offence of misconduct, which must be subject to disciplinary proceedings, for a member of the SAPS to fail to comply with any obligation imposed by the DVA or national instructions issued pursuant to it.

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- This section must be enforced strictly and consistently in relation to all complaints by victims and survivors of GBV in relation to service and assistance received from members of SAPS which falls short of the requirements and obligations imposed by the DVA.
- The investigation and enforcement of these complaints must be conducted by or overseen by an independent body to ensure accuracy of data, transparency, consistency and accountability.

Recommendation 3

- Consideration should be given to the amendment of Section 18 to make it an offence of misconduct for clerks of the court, magistrates, prosecutors, court interpreters, social workers and any other state employee, who fail to comply with any obligation imposed in terms of the DVA.
- Consideration needs to be given for there to be a separate independent complaints and investigation body which is tasked with investigating complaints against state service providers with the appropriate enforcement mechanisms and authority.
- An additional benefit of an independent body will be the acquisition of accurate data, transparency, consistency and accountability.

Femicide

Recommendation 4

- Femicide should be criminalised as a separate offence.
- This will assist with statistics and data collection in relation to the commission of this crime, which in turn will improve assessments of targeted interventions to reduce this crime.

Recommendation 5

- Currently, the majority of these cases are heard in the regional courts. There is no automatic review process for judgments or sentences from the regional courts.
- Section 302 of the CPA only provides for an automatic review of sentences where, *inter alia*, the accused is unrepresented.
- Section 304 (4) of the CPA provides for the review of sentences imposed by the magistrates court where either of the parties applies for the review of such

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sentence or the regional chief president requests a review of the sentence to ensure that it is in accordance with justice.

- In order to ensure consistency in the administration of justice in relation to the adjudication of femicide, recommendations have already been made that members of the judiciary including magistrates, receive specialised training and education.
- As a further recommendation to ensure consistency with sentencing, it is recommended that all sentences for convictions of femicide, when such matters are heard in the regional court, are subject to automatic review by two judges of the High Court local division having jurisdiction.
- Section 302 of the CPA can be amended to accommodate this additional automatic review with time frames imposed for the submission of the review by the regional court and finalisation by the judges of the High Court.
- Regional court trial judgements are usually *ex tempore*. A centralised database of regional court cases and judgments does not currently exist. The automatic review process for sentences for convictions of femicide will also assist with data collection and statistical databases.

Kind Regards

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