

WOMEN'S LEGAL CENTRE

**COMMUNICATION TO THE COMMISSION ON THE
STATUS OF WOMEN ON WOMEN IN SOUTH AFRICA**



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Executive Summary

This report is a response to the call for communications from the Commission on the Status of Women in relation to the violations of human rights that affect the status of women. It will set out submissions in relation to human rights violations of women in South Africa.

This communication reports on the progress made by South Africa (the state) in relation to the protection of women's human rights.

There are no individual claimants, rather areas of concern are identified and noted. It is hoped that this will assist the Commission in identifying patterns of discriminatory practices and developing policies to address such discrimination.

While the state is remiss in its obligations to legislate in regard to certain human rights, for example in relation to human trafficking, the main violation of women's equality identified is a failure to implement the numerous policy and legislative frameworks already in place. This may be due to lack of capacity, but of greater importance is the lack of political will to allocate resources and ensure that structures and institutions provide for the specific needs of women. The systemic failures, together with the poor understanding of women's issues, undermine women's rights to equality, dignity, freedom from violence, access to health care and property. This communication deals with each of the aforementioned rights. In addition the committee's attention is drawn to specific potential harmful cultural practices such as "ukhutwala" and virginity testing, and the specific circumstances of vulnerable women such as refugees and adult sex workers.

Introduction

1. The Women's Legal Centre ("WLC") welcomes the opportunity to lodge a communication to the Commission on the Status of Women.
2. This communication reports on the status of women in South Africa in relation to the following aspects:
 - Violence against women (including sexual violence, domestic violence and sexual harassment)
 - Child abductions
 - Refugee women
 - Adult Sex work
 - Right to own and inherit property
 - Stereotypical attitudes towards women
 - Human trafficking.
3. South Africa signed and ratified the Convention on the Elimination of All forms of Discrimination against Women ("CEDAW") on 15 December 1995 and acceded to the Optional Protocol to CEDAW in March 2005.
4. The 1995 Beijing Platform for Action (BPFA) issued by the United Nations Fourth World Conference on Women and signed by South Africa contains key commitments that governments all over the world should comply with. The Platform places the empowerment of women at the centre stage and it also recognizes that women's rights and empowerment are a requirement for advancement of all humanity. South Africa has ratified the Beijing Platform for Action (BPFA).
5. South Africa has a progressive Constitution, which guarantees equality for women as well as the right to freedom from violence, and access to socio-economic rights such as housing, land, fair labour practices, and health. Unfortunately there is a vast chasm between the rights contained in the constitution and the everyday lives of the majority of South African women.
6. By providing statistical data, case studies and an analysis of the impact of laws and policies on women, this communication will illustrate that the government has failed to demonstrate the political will and invest the necessary resources and capacity to ensure the realisation of

women's equality in South Africa. There are instances where the state has failed to meet its international obligations, contained in the aforementioned and other treaties that South Africa has ratified. In addition, where the law and policy is in place the state has failed to implement and deliver thus undermining the human rights of women.

7. We briefly set out the socio-economic conditions of women in South Africa below.

General Socio economic context

8. South Africa has one of the widest income disparities in the world. The divide between the rich and poor has steadily increased since the year 2000 with approximately half of all South Africans living below the poverty line. Poverty and inequality in South Africa are characterised by race and gender, with the per capita income of black households only 13% of that of white households, and female headed households only 46.2% of that of male headed households. It is estimated that 60% of black South Africans remain poor and live in deteriorating socio-economic conditions. Female headed households are the poorest households in South Africa with rural women headed households bearing the brunt of poverty. According to the 2006 Household Survey, more women (31.8%) than men (23.8%) are unemployed and black African women have the highest unemployment rate at 41.8%. The same survey shows that 61.5% of discouraged work seekers are women. The 2006 General Household Survey shows that 37% of households are headed by women and 31.9% are headed by black African women. The recent Women's Budget reports by the Institute for Democracy in South Africa reflect that 80% of female-headed households have no wage earners. The most vulnerable members of our society are black women.
9. When women are employed they earn less than men do. Women are generally employed in highly vulnerable job sectors, such as domestic, casual or seasonal employment and in the informal sector. With more women than men living in informal settlements, women have less access to basic services such as sanitation, refuse collection and electricity in urban and semi-urban areas as compared to their male counterparts. More women than men live in rural areas, far from schools, courts, public administration and health services. Women are further economically disadvantaged by the discriminatory application of customary law, lack of access to land rights and the failure to recognise religious marriages and domestic partnerships.

10. The General Household Survey of 2006 found that 12.6% of women over the age of 20 had no formal education compared to 8.6% of men. By the age of nineteen, 23% of black African women are mothers and 27.3% have been pregnant at least once. When asked why they did not further their education, a staggering 14% of women indicated pregnancy as a factor. Women whose children live with them spend 10 times as much as men do on childcare and even women with no children of their own tend to spend more time on childcare than men who have their own children living with them. Moreover, although approximately 4.3 million children under 11 years benefited from the child support grant, in March 2004, less than 1.5% of the 3 million paid caregivers were male, demonstrating that it is women who bear the burden of caring for children, particularly in poorer households. Women headed households usually include children and 46% of African children live only with their mothers.

11. Women are further economically disadvantaged by the aspects of customary law that rely on gendered hierarchy. In light of their vulnerable circumstances, and important social function, it is of particular importance that family law rules be carefully crafted to cater for black, women headed families.¹

About the Women's Legal Centre

12. WLC is an independent non profit public interest law centre started by women to enable women to use the law as a tool to advance and achieve their right to equality, particularly women who are socio-economically disadvantaged. The WLC was established as in 1999 by the Women's Legal Centre Trust. The WLC seeks to achieve equality for women through impact based litigation, the provision of free legal advice to women, supporting gender advocacy campaigns in collaboration with other women's rights organizations and providing training that ensures that people know and understand the impact of court judgments around women's rights. The WLC is based in Cape Town but operates nationally.

Vision and Mission of the WLC

13. The Centre has a vision of women in South Africa, free from violence, empowered to ensure their own reproductive and health rights, free to own their own share of property, having a safe place to stay and empowered to work in a safe and equal environment.

Objectives of the WLC

¹ Bonthuys and Albertyn, *Gender, Law and Justice*, Juta 2007 at page 198

14. The WLC seeks to achieve the goals set out below. The goals are categorized per focus area :

- **Fair access to resources:** On dissolution of partnerships, whether by death or separation, women receive a fair share of the assets of the partnership. This involves ensuring that all partnerships are legally recognised, irrespective of religion and custom.
- **Being free of violence:** Improve the access of women and girl children to state protection from gender based violence, particularly rape and domestic violence and increase protections for girl children from abuse in schools.
- **Having a safe place to stay:** Extend tenure to women in their own right, and to prevent loss of tenure on dissolution of relationships.
- **Being able to work:** Extend employment protections to vulnerable groups of women, develop the law on sexual harassment in relation to farm and domestic workers, and ensure equal opportunities in the workplace.
- **Being well:** Improved access to health care for women, including due diligence standards set for the state in relation to screening for cervical cancer, preventing forced sterilizations and access to hospitals for child birth. We will continue to defend challenges to reproductive rights as they arise.

15. The WLC has been at the forefront of legal reform in relation to women's equality in South Africa since the Constitution came into effect, having won several precedent setting cases in the past. The WLC has represented clients in challenges to discrimination and assisted the courts as a friend of the court by making submissions in relation to women's rights in the following cases:

- challenging the primogeniture rules of the customary law of succession thus enabling girls to inherit from their fathers in terms of customary law for the first time (*Bhe* case);
- challenging the discriminatory provisions of laws relating to intestate succession, thus enabling women married in terms of monogamous Islamic marriages (*Daniels*), polygynous Islamic marriages (*Gabie-Hassam*) and Hindu marriages (*Govender*) to inherit from their spouses;

- challenging the provisions that prevented women married in community of property from claiming damages when injured by their spouses in motor vehicle accidents (*Van der Merwe*);
 - challenging the discriminatory remnants in the law that operated to preclude women in polygynous customary marriages claiming for loss of support on the death of their husbands (*Gasa*);
 - challenging the provisions of the Recognition of Customary Marriages Act that discriminated unfairly between women married before and after the promulgation of that Act, thus extending the remedies available to women married before the Act (*Gumede*);
 - challenging the provisions in the law of prescription which prevented survivors of child abuse from claiming damages (*Van Zijl*);
 - developing the concept of sexual harassment as discrimination by case law (*Ntsabo*) and related advocacy, resulting in stricter obligations on employers to ensure that the workplace is free from discrimination in the form of sexual harassment;
 - developing the State's duty of care in giving effect to women's rights to be free from violence (*K case*) and the duty of the police in particular (*Van Eerden case*);
 - holding the state as employer liable for sexual harassment by successfully suing the metro police on behalf of a woman employee who was constructively dismissed after reporting sexual harassment, obtaining maximum compensation for client;
 - defending legal challenges to the right to reproductive health care (*Christian Lawyers case*);
 - challenging the interpretation of an "employee" in the Labour Relations Act which prevented sex workers from obtaining the necessary labour protections in terms of the labour legislation and the Constitution (*Kylie case*)
16. In order to empower women through knowledge of their rights, the Centre also offers free legal advice to women. Women will be assisted or referred to the relevant body, NGO or court for assistance. The bulk of the queries we receive involve the dissolution of partnerships, gender based violence and maintenance.
17. In the long term we hope to contribute to capacitating the sector to be more effective in achieving women's equality. Our advocacy and training work focuses on providing support to

other organisations and groups of organisations advocating for the advancement of rights of women in the WLC's focus areas. We assist these organisations by providing legal opinions; drafting and making submissions to parliament; presenting workshops and drafting legislation, regulations and policies. We provide training and do capacity building nationally and on a regional level.

18. Finally, in order to work towards the transformation of the profession we also train candidate attorneys, and seek to make submissions on the gender record of acting judges before they are appointed.

19. We now proceed to make submissions in respect of several areas.

A. Violence against Women

Sexual Violence

20. In South Africa violence against women has reached epidemic proportions, one of the highest rates in the world of countries collecting such data.² It exists in millions of households³, in every community, in every institution, in both public and private spaces. Violence against women cuts across race, class, ethnicity, religion and geographic location. The history of the country is a violent one, including slavery, imperialism, colonialism and apartheid, and then the armed struggle for self determination. All these have left in their wake social and gender relations of a militarised society that have nurtured extremely violent masculinities to the detriment of women.⁴

21. Official police statistics, fraught with problems of under-reporting, corruption, codification of crimes and lack of disaggregated data only paint part of the picture. Even with these

² Some statistics: For rape statistics as reported by the South African Police Services see: <http://www.saps.gov.za/statistics/reports/crimestats/2008/march_april_2001_2008/category/rape.pdf> (accessed 20 Sept 09); Ursula Lau *Intimate Partner Violence Fact Sheet*, research undertaken by the Medical Sciences Research Council reveals that 1 in 4 women in the general South African population has experienced physical violence at some point in her life and a national study of female homicide reveals that every 6 hours a woman is killed by her intimate partner.

<<http://www.mrc.ac.za/crime/intimatepartner.pdf>> (accessed 10 Sept 09). According to People Opposing Women Abuse, 1 in 2 women have a chance of being raped during her lifetime <<http://www.powa.co.za>> (accessed 10 Sept 09)

³ Vetten, L, Kim, J., Ntlemo, E., Mokwena, L. (2009) *From Paper to Practice: Lessons in the Implementation of Health and Victim Empowerment, Policy Applicable to Rape Survivors*. Tshwaranang Legal Advocacy Centre, Policy Brief 2.

⁴ Above note 106

limitations, South African Police Services (SAPS) statistics for reported rape were 69117 in 2004/5, 68076 in 2005/6, 65201 in 2006/7, 63818 in 2007/8 and 71500 in 2008/9.⁵

22. The Medical Research Council (MRC) estimated in 2002 that 88% of rape cases go unreported⁶ due to embarrassment, self blame, fear of not being believed, trauma, and fear of secondary victimization. Findings from research conducted on prevalence support the MRC suggestion that actual levels of violence are much higher than the national SAPS statistics:

- More than 40% of women interviewed in a Cape Town study had experienced one sexual assault⁷
- 45% of women aged 14 – 24 described their first sexual experience to have been one where they had been coerced – “persuaded, tricked, forced [or raped]”⁸
- 27.6% of men interviewed in a MRC study⁹ admitted having raped a woman, while 14.3% had raped a current or ex-girlfriend or wife. Nearly half of the men who said they had raped, had raped more than one woman or girl.

23. The NGO Treatment Action Campaign reported in 2008 that one in three South African women would be raped in her lifetime. The National Institute of Crime Rehabilitation estimates that in actuality there are 494,000 rapes each year.¹⁰ The same study indicated that one woman is raped every 17 seconds in South Africa and that between 28% and 30% of first sexual encounters are forced.

24. A recent study¹¹ by the Tshwaranang Legal Advocacy Centre showed 44% of reported rapes were withdrawn by the South African Police Service (SAPS) and 16% by the National Prosecuting Authority (NPA) with the conviction rate being 4.1%. It is our belief that secondary trauma and a lack of psycho-social care for rape survivors play a vital role in the attrition rate.

⁵ Above note 106

⁶ Jewkes, R & Abrahams, N. (October 2002). „The Epidemiology of Rape and Sexual Coercion in South Africa: An Overview”. In *Social Science & Medicine*, vol.55, no 7, pp 1231- 1244.

⁷ Kalichman, S., Simbayi, L., Kaufman, M., Cain, D., Cherry, C., Jooste, S& Mathiti, V. (2005). „Gender Attitudes, Sexual Violence, and HIV/AIDS Risks among Men and Women in Cape Town, South Africa”. *The Journal of Sex Research*, 42 (4), pp299 – 305.

⁸ Hallman, K (2005). „Sexual Violence and Girls Education in South Africa. Available online at: <https://paa2005.princeton.edu/download.aspx?submissionId=51448>

⁹ Jewkes, R., Sikweyiya, Y., Morrell, R., Dunkle, K. (June 2009). „Understanding Men’s Health and Use of Violence: Interface of Rape and HIV in South Africa. Medical Research Council Policy Brief. Pretoria

¹⁰ Rape Statistics-South Africa & Worldwide, 09 January 2008. Available at: www.rape.co.za/index2.php?option=com_content%do_pdf=1&id=875

¹¹ Vetten, L., Jewkes, R., Sigsworth, R., Christofides, N., Loots, L., Dunseith, O. 2008 *Tracking Justice: The attrition of rape cases through the Criminal Justice System in Gauteng*. Johannesburg: Tshwaranang Legal Advocacy Centre, the South African Medical Research Council and the Centre for the Study of Violence and Reconciliation. View at www.tlac.org.za .

25. Many women live in housing and communal environments that place them at risk of violence¹² as they are reliant on walking or public transport in environments characterised by the absence of lighting in the night. In one study, 29% of women reported having been gang raped when they were walking to or from particular destinations¹³.
26. Amnesty International (AI) found, when interviewing women in relation to the 2008 report on rural women and HIV, that the majority of the women interviewed had experienced, witnessed or were aware of incidents of violence in the home or rapes occurring in the wider community, including in schools or while en route to school, or on farms.¹⁴ This report finds that "many South African women live in a general environment of high levels of crime, including rape, which affects their lives at home, in the community and wider society, placing them at risk of HIV infection in an accompanying context of high HIV prevalence levels". Medical researchers are in agreement that rape is the main reason why HIV/AIDS is at such a high level in South Africa.¹⁵ AI concludes that the quality of policing and justice response may decline if key reforms are not sustained.¹⁶
27. South Africa has the largest number of recorded child-rapes in the world.¹⁷ Each day at least 50 children are victims of rape.¹⁸ The South African Human Rights Commission concluded after hearings on school based violence in 2006 that schools were "the most likely place where children would become victims of crime, including crimes of sexual violence". 2008 statistics reveal a young girl born in South Africa has a greater chance of being raped than learning how to read.¹⁹
28. This confirmed the earlier finding of Human Rights Watch²⁰ that:

¹² Foundation for Human Rights (2009) Violence Against Women: A Study of Women's Experiences and Views of Men Post 1994.

¹³ Vetten, L. & Haffeejee, S (2005) „Urban predators: an analysis of gang rapes reported at six inner-city Johannesburg police stations“. CSVR Gender Programme Policy Brief 1.

¹⁴ Amnesty International Document – South Africa: 'I am the lowest end of all' Rural women living with HIV face human rights abuses in South Africa chapter 2.

¹⁵ Adriana Stuljt, "Half of South Africa's Young Have AIDS From Rape," Digital Journal, 8 January 2009, available at <http://www.digitaljournal.com/print/article/264771> (last accessed 5 February 2009).

¹⁶ Amnesty International Document – South Africa: 'I am the lowest end of all' Rural women living with HIV face human rights abuses in South Africa chapter 2

¹⁷ South African Press Association, June 2005 (quoted from The Oprah Winfrey Show, "Shocking Rape Statistics," available at http://www.oprah.com/article/oprahshow/tows_past_20060420_b) last accessed February 6, 2008.

¹⁸ South African Press Association, June 2005 (quoted from The Oprah Winfrey Show, "Shocking Rape Statistics," available at http://www.oprah.com/article/oprahshow/tows_past_20060420_b) last accessed February 6, 2008.

¹⁹ BBC News, April 2002 (quoted from The Oprah Winfrey Show, "Shocking Rape Statistics," available at http://www.oprah.com/article/oprahshow/tows_past_20060420_b) last accessed February 6, 2008.

²⁰ Human Rights Watch Report 2001, p. 11]

“On a daily basis, in schools across the nation girls of every race and economic class encountered sexual violence and harassment at schools that impedes the realization of the right to Education”.

29. The Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”)²¹ recognizes that violence against women “inhibits women’s ability to enjoy rights and freedoms on the basis of equality with men”.
30. In South Africa, violence against women contravenes numerous constitutionally guaranteed rights, most significantly, the right to equality, which provides for equality before the law and the right to equal benefit and protection of the law.²² The reality and threat of infringements impinge on women’s rights to inherent dignity, the right to have that dignity respected and protected²³, the right to life²⁴, the right to freedom and security of the person²⁵ and the right to bodily and psychological integrity²⁶. While South Africa has one of the most progressive and inclusive Constitutions in the world, with a Bill of Rights proclaimed to be the cornerstone of democracy, the incidence of violence against women continues to escalate to alarming proportions. Protection against such abuse is limited at best, as perpetrators enjoy widespread impunity.
31. The Preamble to the Criminal Law (Sexual Offences & Related Matters) Amendment Act, 32 of 2007 recognises that the high rate of sexual offences is of grave concern and has a particularly disadvantageous impact on vulnerable groups. Constitutional rights to equality, inherent human dignity, freedom and security of the person which includes the right to be free from all forms of violence from either public or private sources and the rights of children to have their best interests considered to be of paramount importance are reinforced. The preamble further notes that several international legal instruments place obligations on the state to combat and ultimately eradicate abuse and violence against women and children.
32. The criminal justice system in South Africa fails to respond adequately to incidents of violence against women. The system is structured in such a way that seems to place more value and

²¹ Convention on the Elimination of All Forms of Discrimination against Women adopted 18 December 1979 available at <<http://www2.ohchr.org/English/law/cedaw.htm>>

²² Section 9(1) of the Constitution

²³ Section 10 of the Constitution

²⁴ Section 11 of the Constitution

²⁵ Section 12(1) of the Constitution

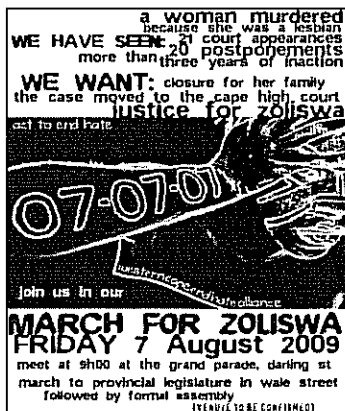
²⁶ Section 12(2) of the Constitution

consideration on the rights of the accused thus resulting in an almost non-consideration of the rights of the survivor. A woman who has been raped has to go through a tedious process just to access justice-police report, medical examination, give evidence, face stigmatization only to have the rapist acquitted/given a lenient sentence. The legal process in itself tends to be traumatic to rape survivors.

33. The Constitutional Court in *S v Baloyi*²⁷ summed up the situation as follows;

*"The ineffectiveness of the criminal justice system in addressing family violence intensifies the subordination and helplessness of the victims. This also sends an unmistakable message to the whole of society that the daily trauma of vast numbers of women counts for little. The terrorisation of individual victims is thus compounded by a sense that domestic violence is inevitable. Patterns of systemic behaviour are normalised rather than combated."*²⁸

34. Therefore, the failure of the Government to address the problems of backlog and delay in many court systems could constitute denial of access to justice²⁹



Case study. The case of Zoliswa's murder was delayed for years, and postponed more than 20 times.

35. One researcher has commented: *"The most important social force behind the problem of rape is the gender power inequalities in society, which include prevalent notions of male sexual entitlement and male rights to use rape and punishment. A culture of tolerance to sexual violence against women is reflected in and reinforced by the lack of seriousness with which the*

²⁷ *S v Baloyi* 2000 (1) BCLR 86 (CC)

²⁸ *S v Baloyi* 2000 (1) BCLR 86 (CC) at para 12)

²⁹ H Chodosh, S Mayo, F Naguib, & A Sadek "Egyptian civil justice modernisation: A functional and systematic approach" (1996) *Michigan Journal of International Law* 24.

crime is treated by some members of the community, police and parts of the criminal justice system.”³⁰

36. Despite the passing of the minimum sentencing legislation, courts continue to disregard the minimum sentencing principles and continue to give out lenient sentences. One such example is the case of *Molefe*³¹ a convicted rapist was given a sentence of only four years instead of the prescribed life sentence because he was a “well educated man” and the complainant was a “grown up woman”.³² The court failed to take into consideration that *Molefe* was also facing charges of sexually assaulting 13 other women. This alone shows that he is indeed a danger and a menace to society.
37. Despite the success of having courts that are specifically designate to handle sexual offences matters, the state has allowed them to be turned back into ordinary courts. In addition, quite strange is the government’s decision to close the Family Violence Child Abuse and Sexual offences (FCS) Units. According to Vetten (2007) the work of the FCS Units is far superior to that of ordinary detectives, they make more arrests and have fewer cases that are withdrawn at court.
38. According to The One in Nine Campaign whilst providing court support and preparation to three survivors of sexual offences and many other complainants of rape, the following has become apparent:
- Women survivors of sexual violence are frequently confronted with unsympathetic and hostile treatment from the police, prosecutors and often, judicial officers.
 - Investigations and medical examinations are not thoroughly and effectively conducted to ensure successful prosecution;
 - Unreasonable delays and withdrawal of cases are a common occurrence which have a negative impact on a complainant witness;
 - Judicial officers routinely fail to effectively implement legislative provisions relating to bail applications, rules of evidence and sentencing;
 - The extent of the harm suffered as a result of the gendered dimension of sexual violence is underestimated resulting in the absence of a gender sensitive approach to criminal prosecution of rape cases; and

³⁰ Rachel Jewkes, Overview on Sexual Violence Against Women in South Africa.

³¹ S v Molefe SS116/2009 Westonia Regional Court

³² Baldwin Ndaba, South Africa: Rape Ruling causes Outrage, African Crisis, July 2009.

- Reconciliation and other alternative methods of dispute resolution are encouraged as opposed to legal intervention resulting in successful prosecution.³³
39. The manner in which the criminal justice system processes sexual offence cases presents a multi-dimensional problem. From the initial reporting of the sexual offence to sentencing (or the dismissal/withdrawal of the case) role-players within the criminal justice system are routinely insensitive or even completely dismissive of the constitutionally protected rights of survivors.

Domestic violence

40. The Medical Research Council reported that the levels of domestic violence reported in various research studies are also cause for concern:
- 31% of pregnant women surveyed in KwaZulu Natal reported domestic violence³⁴
 - One study conducted in three South African provinces found that 27% of women in the Eastern Cape, 28% of women in Mpumalanga and 19% of women in the Northern Province had been physically abused in their lifetimes by a current or ex-partner and 51% of women in the Eastern Cape, 50% in Mpumalanga and 40% in Northern Province had experienced emotional and financial abuse in the year prior to the study³⁵
 - Interviews conducted with 1 394 men working for three Cape Town municipalities found that approximately 44% of the men were willing to admit that they abused their female partners³⁶
 - Intimate femicide research found that every six hours a woman is killed by her male partner, revealing one of the highest rates ever reported in research anywhere in the world³⁷
41. The problems experienced by women in relation to protection orders are similar to those that present in the criminal justice system. The courts lack capacity and training, are often insensitive and unco-operative. The police are reluctant to arrest violators, often hiding behind

³³ <http://www.hrw.org/reports/2001/safrica/ZA-FINAL-07.htm>

³⁴ Hoque, ME., Hoque, M., Kader, SB. (2009). „Prevalence and experience of domestic violence among rural pregnant women in KwaZulu-Natal, South Africa. Available online at: <http://www.sajel.co.za/index.php/SAJEL/article/view/106/209>

³⁵ Jewkes, Rachel, Penn-Kekana, Loveday, Levin, Jonathan, Ratsaka, Matsie and Schrieber, Margaret (1999). *He must give me money, he mustn't beat me.: Violence against women in three South African Provinces*. Pretoria: CERSA (Women's Health) Medical Research Council

³⁶ Abrahams, N., Jewkes, R. and Laubsher, R. (1999). *"I do not believe in democracy in the home" Men's relationships with and abuse of women*. Tygerberg: CERSA (Women's Health) Medical Research Council

³⁷ Mathews, Shanaaz, Abrahams, Naeemah, Martin, Lorna J., Vetten, Lisa, van der Merwe, Lize and Jewkes, Rachel. (2004). *Every six hours a woman is killed by her intimate partner.: A National Study of Female Homicide in South Africa*. MRC Policy brief no. 5, June 2004.

the lack of legal clarity around the definition of "imminent harm" contained in the legislation and the delays in obtaining a warrant of arrest from the courts.

42. Equally frustrating is the lack of policing capacity in rural areas to deal with domestic violence cases, the lack of legal aid offices. Where legal aid is available, the perpetrator qualifies for representation and not the complainant.
43. According to the preliminary research findings on the implementation of the Domestic Violence Act (DVA);
 - most women in rural areas remain uninformed about the DVA
 - lack of persons to assist women in filling out required forms for protection orders
 - police are unhelpful and insensitive to women who report domestic violence and they often place more value on privacy and family considerations than on a survivor's right to access justice. There have been increasing allegations of women being ridiculed and discouraged by police to lay charges
 - there have also been increasing cases of rape, sexual assault and physical abuse in which members of SAPS are actually the perpetrators.
44. Women further experience difficulties with the Internal Complaints Directorate of the police, who are often reluctant to investigate matters in which the police are perpetrators.
45. The systemic failures in the justice system illustrate the lack of political will to implement laws that have been designed to protect women from violence and discrimination. There has been a constant call by civil society to reform law and improve implementation, yet these seem to fall on deaf ears.

Cross cutting:

46. According to research done by Centre for the Study of Violence and Reconciliation (CSV), the government is failing the women of South Africa, by not providing support to non-profit organisations providing services to women experiencing gender violence. Without the NPOs and community-based organisations, women experiencing gender-based violence would have very few options.³⁸ Gillit (2002) states "*there would be no rape crisis assistance, no help for*

³⁸ Velten, L. & Khan, Z. (2002). "*We are doing their work for them*". An Investigation into Government Support to Non-Profit Organisations Providing Services to Women Experiencing Violence. Research report written for the Centre for the Study for Violence and Reconciliation

women trying to navigate their way through the justice system or health system, which so shamefully often lets them down. There are some wonderful policies and fantastic legislation, but it all falls flat in the practical implementation,³⁹ Funding by government is very difficult to access despite it being available. Many organisations need funding as they provide services such as shelters or court programmes which are essentially government functions.

47. In the civil society shadow report on Beijing, the organizations reported that there are inadequacies in South Africa's legislative and policy framework, which include the following:

- There is currently no comprehensive law to deal with trafficking and stalking;
- In the application of existing law there is lack of capacity to adequately deal with and prosecute "hate crimes";
- The Sexual Offences Act allows for compulsory HIV testing of persons accused of rape, which, in some opinion, violates Constitutional provisions of privacy, dignity, autonomy and non-discrimination. The "discovery" of an HIV-positive diagnosis also places women at further risk of violence;
- The Sexual Offences Act (2007) provides for survivors to give their statements to female police officers but in practice this often results in delays while survivors wait for female officers to be called to take the statements;
- There is inadequate costing and budget allocation for the implementation of legislation. A study conducted in 2005 found that there was no specific budget dedicated to implementation, and that allocations were only for ad-hoc once-off projects for training and publicity around DVA and that these funds were provided by international donors rather than the State⁴⁰. Further, despite the State's reliance on civil society organizations to provide services to survivors of violence, it fails to adequately resource these organizations. Funding by government is very difficult to access despite it being available. Many organisations need funding as they provide services such as shelters or court programmes which are essentially government functions;
- Delays in reviewing and enacting legislation: This is evidenced by the government's delay in passing of critical legislation for example the Criminal law (Sexual Offences Act and related

³⁹ <http://www.globalpolicy.org/component/content/article/176-general/31994.html>

⁴⁰ Vetten, L. (2005) „Show Me the Money”: A review of budgets allocated towards the implementation of the Domestic Violence Act (no. 116 of 1998); In *Politikon*, Vol. 32, No. 2, pp. 277-295, November 2005

Matters Act) Act 32 of 2007 which took over a decade to be enacted, Domestic Partnerships legislation, as well as law reform relating to Decriminalization of Sex Work.

Sexual Harassment of Women in the Workplace

48. Sexual harassment remains a problem in the workplace. Sexual harassment undercuts women's potential for social equality in the same manner that apartheid policies undercut the potential for social equality for black women and men in South Africa. Sexual harassment does not therefore apply or affect all women equally. Research indicates that South African women are divided by race, class, culture, urban and rural situation, education and language with black women being the most likely victims of sexual harassment since historically they have occupied the lowest rung of the working ladder and have experienced subordination as black women and as members of an exploited working class.⁴¹
49. Studies⁴² indicate that up to 76% of career women in South Africa have been harassed in some or other form in the workplace. These studies also show that women are commonly the victims of male perpetrators. It can be assumed that an even higher percentage of women are harassed or abused in the more vulnerable jobs, the informal sector, and illegal work such as sex work, all of which are made up by predominantly women. Due to poverty, high unemployment levels and their disproportionate burden of household maintenance, women are less likely to challenge unfair labour practices and gender based violence in the workplace. Thus in sexual harassment, the element of gender subordination will often co-exist with racial and class dimension. Bonthuys⁴³ points out that in addition to being the most likely targets of sexual harassment, the most disadvantaged women will be the least able to resist it because they lack the resources to litigate, because work is scarce and because their families tend to depend on their income.
50. A recent research study by REACH, *Sexual Harassment: is it really a problem on farms?* revealed that 32 % of both women and men experienced some form of sexual harassment ranging from unwelcome comments or remarks of a sexual nature to its worst form, rape. The

⁴¹ Zalesne D, The Effectiveness of the Employment Equity Act and the Code of Good Practice in reducing sexual harassment (2001) 17 SAJHR 503 at 507-508.

⁴² Zalesne 2001 SAJHR 505; Doncaster 1991 ILJ 449

⁴³ Bonthuys and Albertyn Gender, Law and Justice, 2007, Juta at page 277

study further revealed that the majority of the farms do not have a policy or code of good practice on sexual harassment.

51. Approximately 40% of the labour related queries received by the Women's Legal Centre (WLC) relate to sexual harassment. In many of these cases the employers have no policy relating to sexual harassment in place. Research into these cases has shown that even where there is a policy in place the workplace culture and response of the employer can deter women from reporting harassment. Women generally work in highly vulnerable jobs, such as domestic, casual or seasonal work.
52. The State has enacted the Employment Equity Act and promulgated the Code of Good Practice in relation to Sexual Harassment as a response to the problem of sexual harassment in the workplace. While the law in place does provide a remedy, this is not accessible to many women due to the problems related to access to justice generally such as affordability, geographical remoteness, lack of access to legal representation and lack of knowledge of existing rights. Further, the Code is only a guideline. As the research referred to above indicates, many employers do not follow the guidelines, and the guidelines do not go far enough in imposing obligations on employers to eradicate the environment conducive to sexual harassment.
53. When viewed in the context of the high levels of violence against women and the disproportionate levels of poverty suffered by women in our society, the cases of sexual harassment that remain unreported are a cause for alarm. In order to give effect to equality in the workplace, an environment that is conducive to reporting sexual harassment without repercussions is essential.
54. In the case of Ntasbo the WLC obtained a Labour Court order that sexual harassment amounts to unfair discrimination and that the employer bears a duty to take all reasonable steps to ensure that the workplace is free from such discrimination. As a result of this judgment, the Code of Good Practice was developed. However, the Code itself has not been properly implemented. The State has failed to utilize the opportunity provided by the courts to enforce obligations on employers. The State itself, as an employer, has been found negligent in relation to taking steps to prevent sexual harassment.

Case : Ruling slams accused cop's boss: Radebe v JMPD

A Johannesburg metro police officer who reported a rape case against her boss was unfairly treated, verbally harassed and intimidated, the Council for Conciliation, Mediation and Arbitration (CCMA) found on Friday.

Commissioner Nicole Johnston found that the woman was forced to resign in April due to "intolerable and bad" working conditions she was subjected to.

She also found that the JMPD had failed to follow proper procedures to investigate the alleged rape reported in May 2007, or to take proper disciplinary steps against the top official accused of the rape.

It was for these reasons that they ordered the JMPD to pay the woman 12 months' worth of salary.

However, spokesperson Superintendent Wayne Minnaar said the metro police would challenge the ruling.

"We view sexual harassment very seriously. But in regard to this case, we found no grounds for allegations against the senior officer following our internal investigations. We are going to challenge the ruling," he said.

The case was argued before the CCMA by the Women's Legal Centre, a Cape Town-based NGO focusing on women's rights litigation. It did so on instruction from People Opposing Women Abuse (Powa).

"It is appalling how state departments such as the JMPD, who are responsible for enforcing the law, fail to apply the law when dealing with their employees," said Cherith Sanger of the Women's Legal Centre.

She said the alleged rape victim, who had been working for the JMPD for six years at the time of the incident, was subjected to "unfair degrading treatment which violated her human dignity".

"She was discriminated against on the basis of her sex and gender in a male-dominated department operating on principles of patriarchy as illustrated by the treatment she was afforded subsequent to making an allegation of rape," Sanger said. - Sapa⁴⁴

55. In order to meet its obligations as an employer and to promote, protect, fulfil and respect the rights contained in the Bill of Rights, the State ought to :
- adhere to its own policies and obligations as employer,
 - strengthen the legislative and enforcement mechanisms,
 - make the guidelines in the Code of Good Practice on Sexual Harassment compulsory,
 - penalise employers that do not comply,
 - improve access to justice,
 - educate women on their rights in the workplace
 - rate employers on their compliance with the guidelines when assessing general compliance under the affirmative action provisions of the Employment Equity Act and the laws relating to black economic empowerment.

⁴⁴ Published on the Web by IOL on 2008-11-28 17:46:47

B. Child abductions

56. According to SAPS, there were 1,497 reported cases of child abduction in 2006. Reported cases of child abduction reduced by 21% between 2002 and 2006. Government has recently launched an advocacy programme together with traditional leadership, faith based organisations on reported prevalence of child abductions and early forced marriages of children in some parts of the Eastern Cape. Government is leading a multi-stakeholder effort to discourage this harmful practice which goes against constitutional, legal and policy provisions for the country. This practice is also believed to be fuelled by extreme poverty in some communities.
57. The practice of ukuthwala (where girls are taken without their consent and forced to marry) violates a number of human rights. The prevalence of the practice is not well known. However, it is indicative of the gender inequality already evidenced in our society by the high levels of gender based violence and violence against children generally. Inequality in South Africa presents on many intersecting levels, and ukuthwala negates the consent and freedom of one of the most vulnerable groups in our society, the African, rural, girl child. Failure to deal with this practice will perpetuate the inequality of women and children and disempower these groups further.
58. The practice of ukuthwala (as defined above) is unconstitutional. It is discriminatory against the girl child on grounds of sex and gender. Girls are deprived of their right to choose whether to marry and if so, to whom and when. It impacts every aspect of a girls' life including her right to human dignity, her right to education, and her right to live free of violence and her right to freedom and security of the person. Ukuthwala targets the girl-child and perpetuates the cycle of gender inequality that has severely burdened women and girls with social, economic, and political disparities.
59. Further, if the abduction and marriage involve the removal of a girl child from school then it violates her right to education.
60. The Recognition of Customary Marriages Act and the Marriage Act deal with the age at which a girl may legally consent to marriage. Ukuthwala is the abduction and forced marriage of young girls, often as young as 12 years of age, therefore, both the Marriage Act and the Recognition

of Customary Marriages Act come in to play. Section (3) (1) (a) of the Recognition of Customary Marriages Act requires that both parties be above the age of 18 years and both consent to be married in terms of customary law. The Act also specifies under which circumstances minors are allowed to marry and provides strict guidelines for such marriages.

61. Similarly, Section 26 of the Marriage Act prohibits marriages involving minors except in special circumstances. Marriage in South Africa, regardless of religion or culture requires the full consent of both parties; ukuthwala does not meet this requirement or the age requirement and is not a valid marriage arrangement in terms of the Marriage Act or the Recognition of Customary Marriages Act.
62. Young girls are forced into marriage with men significantly older and are required to fulfil their duties as a wife, a role that is not appropriate for their age. They are forced into having unprotected sex and are vulnerable to an unwanted pregnancy, the transmission of HIV/AIDS and other STDs.
63. The element of sexual violence in ukuthwala makes it a criminal offence. The section (3) of the Sexual Offences Act states that any person ("A") who unlawfully and intentionally commits an act of sexual penetration with a complainant ("B"), without consent of B, is guilty of the offence of rape. The Act also states in section (5) that a person ("A") who unlawfully and intentionally sexually violates a complainant ("B"), without the consent of B, is guilty of the offence of sexual assault. The sexual violence that is present in the practice of ukuthwala makes it a criminal offence. The minimum penalty for rape is 10 years and the maximum is a life sentence depending upon the nature of the crime. If the complainant is under 16 years of age, the penalty is a life sentence.
64. Kidnapping is also a common law offence. A person found guilty of kidnapping will be sentenced to 5 to 10 years.
65. In many situations, the parents play a role in their daughter's abduction and forced marriage. They can be either active or inactive parties to the arrangement. Some parents are party to the arrangement for financial benefit, while others are reluctant to protect their daughters from the practice for fear of community disapproval. The Child Care Act provides special protection to the child and establishes strict responsibilities for the parent. Section 50 declares

that any parent or guardian of a child or any person having the custody of a child who ill-treats that child or allows that child to be ill-treated or abandons that child or any other person, who ill-treats a child, is guilty of an offence. This adds another criminal element to the ukuthwala. It can be argued that parents subjecting their daughters to the practice or failing to protect their daughters from the practice are guilty of an offence. The penalty for any person convicted of any offence under section 50 shall be liable to pay a fine not exceeding R20 000 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

66. The Children's Act reinforces the rights of the child set out in the section 28 of the Bill of Rights. Section 2 asserts the belief that the best interests of the child are of paramount importance in every matter concerning the child and to promote the protection, development and well-being of the child. It also states that the child must be protected from maltreatment, neglect, abuse, and degradation. Allowing the girl-child to be subjected to the practice of ukuthwala is inconsistent with the ideas set out in the Bill of Rights, the Children's Act, and the Child Care Act. Section (6) stresses the importance of respecting a child's inherent dignity, treating the child fairly and equitably, protecting the child from unfair discrimination, and recognising the child's need for development and play appropriate for the child's age.
67. Ukuthwala does not treat the girl-child fairly and equitably, it does not respect her inherent dignity and it forces her to take on responsibilities that are inappropriate for her age. Section 12 of the Children's Act focuses on social, cultural, and religious practices. According to this section, every child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being. It also states that a child below the minimum age set by law for a valid marriage may not be given out in marriage or engagement and above the minimum age may not be given out in marriage or engagement without his or her consent, reinforcing the Marriage Act and the Recognition of Customary Marriages Act.
68. Since the practice involves school age girls it prevents them from attending school. The South African Schools Act thus becomes relevant to the practice of ukuthwala. Section 3 on compulsory attendance defines the scope of compulsory education for the child in South Africa. It also places a duty on the parents to ensure that their children attend school. Furthermore, section (5) states that the Head of Department must investigate the circumstances of the learner's absence from school and take measures to remedy the

situation. Any parent or any other person who, without just cause, fails to comply with subsection (1) is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months. Any parent or bridegroom that prevents a girl-child from completing her compulsory education is guilty of an offence.

69. South Africa has signed and ratified a number of international treaties applicable to handling the practice of Ukuthwala. Ratification of these treaties means that South Africa is legally bound by these documents and certain obligations have been created. The treaties relevant to the practice are the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, the African Charter on the Rights and Welfare of the Child, and UN Covenant on the Rights of the Child.
70. While the Bill of Rights contained in the Constitution and the domestic legislation dealing with children prohibit harmful cultural practices, marriage without consent, underage marriage and any form of abduction, the framework in place does not deal with the practice holistically or coherently. It would be far more effective to have legislation on ukuthwala that is designed to deal with the practice than the current application of other criminal offences and statutory penalties (which were not necessarily drafted with this practice in mind). Even improved enforcement will only reveal the flaws in the application of various legal remedies to various aspects of the practice. There remain aspects that are not covered, and the existing framework fails to deal with the harmful practice as a whole, meaning that the practice **itself** is not prohibited but aspects of it.
71. Since the current framework consists of fragments of different legislation, it will require the collective effort of all relevant bodies and departments to make an impact on ukuthwala. Furthermore, these groups are responsible for dealing with other matters and are unable to give ukuthwala the attention that it requires. Legislation specifically designed to address ukuthwala is the most effective way of combating the practice. Both advocacy and education regarding the practice is much easier when dealing with one piece of legislation as opposed to fragments of 8 or 9 Acts.
72. The State is obliged, in terms of the Bill of Rights, its international obligations and domestic legislation, to take positive steps to protect girl children from the practice as discussed above.

The WLC submits that the legislation dealing with the practice comprehensively should be enacted.

C: Virginitv Testing

73. Typically, virginitv tests involve a gynecological examination to establish whether or not the hymen in unmarried young women is intact. Girl children and young women are usually regarded as being eligible for testing anywhere between the ages of seven and twenty-six, although there have been reports of women as old as fifty being subjected to virginitv tests.
74. In South African communities the examination is usually conducted in a traditional public setting by either one or a group of female community elders. Girls who pass the test are praised by their community while those who do not are ostracized and isolated. In one community when a girl passes, the women clap and ululate but when someone fails, an accusing silence follows the girl, who is asked to sit in a private corner and wait for an older woman to "counsel" her⁴⁵. In other communities the practice, may include the public declaration of virginitv, being awarded a "virginitv certificate" and the marking of girls' faces in distinctive ways to identify those who are virgins.
75. Historically, virginitv testing was used to determine a women's suitability for marriage, but it also reflected prevailing social norms which stressed abstinence from sexual activity on the part of unmarried women⁴⁶. According to Dr Queeneth Mkhabela-Castiano, a former lecturer in indigenous knowledge systems, traditionally, although young girls were often tested privately in their own homes, the focus was not on the inspection, there was a high spiritual value placed on virginitv, instilled through instruction by older women⁴⁷. *"After falling into disuse, the practice made a comeback around 10 years ago when the HIV/AIDS pandemic began to take hold. Individuals rather than families were now at the forefront of the practice, and the testers had succumbed to the hype by introducing gimmicks such as certificates"*⁴⁸.

⁴⁵ IRIN News South Africa: "Virginitv testing - absence of a small tissue becomes big issue", <http://www.irinnews.org/report.aspx?reportid=56222>, last accessed 26 February 2010

⁴⁶ Catholic Parliamentary Liaison Office Briefing Paper 145, "Virginitv Testing: In the best interest of the child?" November 2005, p2.

⁴⁷ IRIN News South Africa, op.cit.

⁴⁸ *ibid*

Purpose and Efficacy of Virginity Testing

76. Those in favour of virginity testing in South Africa claim that the practice is an effective method of preventing the spread of HIV and other sexually transmitted diseases as well as teenage pregnancies. Often the protection of young girls is cited as an important element of testing with testers claiming that they are able to detect the sexual abuse of children, enabling them to intervene on behalf of the child⁴⁹. Proponents of virginity testing see it as an initiative to encourage morality among young people and as part of a revival of indigenous knowledge systems that were marginalized during the apartheid era⁵⁰.
77. Virginity testing has come under fire from many women's rights groups which describe the testing as "*discriminatory, invasive of privacy, unfair, impinging on the dignity of young girls and unconstitutional*"⁵¹. Furthermore, these tests often take place in unsanitary conditions, are invasive, sometimes coerced and not necessarily accurate. Doctors confirm that checking for an intact hymen is not a reliable indicator of sexual activity⁵². Women can break their hymens in ways unrelated to sex such as riding a bicycle, falling down, or inserting a tampon⁵³. Other girls have their hymens ruptured when they are sexually assaulted. In fact, the threat of these tests motivates some young women and girls to participate in "virginity-saving" sexual practices that put them at risk for sexually transmitted diseases including HIV⁵⁴. In areas where there is rising social pressure to undergo virginity testing, some doctors report an increased incidence of anal sex among young women, and hypothesize that this is related to the concurrent rise in HIV-infection rates in young women in these same areas⁵⁵.
78. Virginity testing may expose girls to increased risks of sexual violence by publicly marking them as targets for men who seek out virgin girls as sex partners⁵⁶. In some parts of Southern and Eastern Africa a myth has arisen that HIV can be cured by having sex with a virgin⁵⁷. This has led to large numbers of girls, from infants to young women, being raped and leading to their infection with the virus⁵⁸. Virginity testing is a dangerous companion to this myth, serving to

⁴⁹ Interview with a virginity tester in the Mail and Guardian, September 23-29 2005

⁵⁰ Catholic Parliamentary Office Briefing Paper, op.cit. p2

⁵¹ Commission for Gender Equality Report June 2004

⁵² T. Bravender, MD, S. Emans, MD, M. Laufer, MD, *Use Caution When Determining 'Virginial' vs 'Nonvirginal' Status*, Arch Pediatr Adolesc Med/vol 153, July 1999 p.773. (American Medical Association, 1999). See also Francis Markus. Chinese brides may keep virginity secrets. (Shanghai: BBC, Jul. 31, 2002).

⁵³ SIECUS, op.cit.

⁵⁴ Ibid

⁵⁵ W. Hlongwa, *Teens turn to anal sex to keep virginity*, (South Africa: News 24, Jun. 26, 2004).

⁵⁶ *Deadly Delay: South Africa's Efforts to Prevent HIV in Survivors of Sexual Violence*, Human Rights Watch March 2004, Vol. 16, No. 3 (A), p12

⁵⁷ Kathambi Kinoti, *Virginity Testing and the War Against AIDS*, AWID August 2005

⁵⁸ Ibid

confirm which girls are virgins and exposing them to the sexual violence and the concomitant risk of contracting HIV⁵⁹.

79. Virginitly testing is also linked to the traditional practice of *ukuthwala* or forced marriage which is practiced in certain rural areas of South Africa. In effect the practice encourages older men to abduct young women who are virgins for the purpose of marriage. This is often done with the knowledge and consent of the girl's parents or guardians but does not require that the girl herself consent to the marriage. Most commonly the girls who are abducted are under the legal age for marriage and find themselves the victims of domestic and sexual servitude at the hands of their husbands. Virginitly testing also has unintended consequences for survivors of sexual violence, discouraging them from seeking help.
80. Counsellors and advocates report that parents and guardians are afraid to disclose a child's rape because they do not want it known that their child had lost her virginitly through rape and because of the shame that child rape brings to the family⁶⁰. Girls who have been raped are likely to suffer secondary trauma on several levels as a result of forced or coerced virginitly testing⁶¹. The implications for a country like South Africa with notoriously high levels of sexual and gender based violence are self evident.
81. Virginitly testing moralizes the issue of HIV and this is not effective in tackling the disease, as it merely leads to discrimination against people living with HIV/AIDS which in turn discourages them from disclosing that they are HIV positive and isolating them from the benefits of living positively and accessing support systems, which have been shown to delay the onset of full blown AIDS and to improve the quality of life of those with AIDS⁶². By placing the responsibility for abstinence on girls and young women, virginitly testing ignores the gendered nature South Africa's HIV/AIDS pandemic and does not address the issue of male sexuality and the lack of responsibility for risky sexual behaviour among men⁶³. Virginitly tests rely on shame and the fear of stigmatization, rather than free choice, to encourage girls to abstain from sex before marriage⁶⁴. Virginitly testing focuses almost exclusively on girls who are then expected to remain 'pure' before marriage⁶⁵. Most cultures venerate the girls' virginitly while

⁵⁹ *ibid*

⁶⁰ Rachel Jewkes, "Child Sexual Abuse in the Eastern Cape," presentation at the Second South African Conference on Gender Based Violence and Health, May 7, 2003.

⁶¹ Kinoti, *op.cit*

⁶² *ibid*

⁶³ Catholic Parliamentary Office Briefing Paper, *op.cit* p2

⁶⁴ Kinoti, *op.cit*

⁶⁵ *ibid*

encouraging the exact opposite behaviour in boys. Virginity testing also ignores the fact that HIV/AIDS is spread within marriage and a girl or young woman who has avoided contracting the virus before marriage may contract it afterwards from her husband⁶⁶. The tests may at best temporarily suspend the risk of getting the disease⁶⁷.

Legal Context in terms of Constitutional Rights

82. Section 7(2) of the Constitution of the Republic of South Africa⁶⁸ ("the Constitution") compels the state to respect, protect, promote and fulfill the rights contained in the Bill of Rights. Sections 9, 10; 12 and 14 of the Constitution establish the rights of every person in South Africa to equality, dignity, freedom and security of the person, and privacy. Section 28 of the Constitution provides special protections for the rights of children. These rights can only be limited by a law of general application, to the extent that the limitation is reasonable and justifiable in an open, democratic society based on human dignity, equality and freedom⁶⁹ ("the limitations clause"). In addition, the Constitution sets out that certain rights are regarded as being non-derogable, i.e. rights which are not capable of being limited under the limitations clause. The following non-derogable rights are of relevance to the current discussion on virginity testing: the right to equality with respect to unfair discrimination solely on the grounds of sex⁷⁰; the right to human dignity⁷¹; the right not to be tortured or treated in a cruel, inhuman or degrading manner⁷² and the rights of children to be protected from maltreatment, neglect, abuse or degradation⁷³.

83. Virginity testing clearly discriminates on the grounds of gender and impairs on the dignity and well-being of women and girl children who are subjected to the practice. Virginity testing is almost exclusively practiced on women while their male counterparts are rarely subjected to similar tests. Furthermore the dignity of those who refuse to be tested or those who do not pass the test for various reasons including being raped is clearly violated by the practice and the social consequences which go along with such refusal.

⁶⁶ *ibid*

⁶⁷ *ibid*

⁶⁸ Act 108 of 1996

⁶⁹ *op.cit.* §36(1)

⁷⁰ *op.cit.* §9

⁷¹ *op.cit.* §10

⁷² *op.cit.* §12(1)(d) and (e)

⁷³ *op.cit.* §28(1)(d)

84. The practice of virginity testing violates the rights set out in Sections 12(1) and 12(2) of the Constitution which guarantee that everyone has the right to freedom and security of person which includes the right not to be tortured; treated in a cruel degrading manner and the right to security in and control over their bodies. The test is highly invasive. The girls who are tested are made to lie on a straw mat, undress and part their legs for a vaginal examination by a female inspector who then inserts her fingers into the girls' vaginas to find the hymen and attempt to determine if the membrane is intact⁷⁴. Furthermore, the myth that having sexual intercourse with a virgin cures HIV/AIDS places girls who have passed the virginity test and whose results have been publicly announced at great risk of being targeted for rape and other forms of sexual violence at the hands of men who are HIV positive who wish to cure themselves⁷⁵.
85. Virginity testing violates the right to privacy of those subjected to the practice. Supporters of the practice argue that the tests are voluntary and conducted with the consent of the women and girl children being tested. The refusal to go through the test in many communities is regarded as an admission of not being a virgin placing pressure on women to consent to testing. There are serious concerns as to whether minor children can in fact provide informed consent. Furthermore the issues of parental coercion and social pressures which result in both direct and indirect coercion by families and communities must be acknowledged as having a serious impact on whether there is real consent on the part of those being tested. In the absence of clear guidelines as to what constitutes informed and voluntary consent and how such consent may be obtained, especially in relation to girl children, it seems clear that the practice of virginity testing violates the right to privacy.
86. Both the Children's Act⁷⁶ and Section 28 of the Constitution protect children from maltreatment of any sort. Furthermore, it is a clear principle in our law that the best interests of the child are of paramount importance in any matter concerning the child⁷⁷. Section 12 of the Children's Act which deals with social, cultural and religious practices states that every child has the right not to be subjected to social, cultural and religious practices which are detrimental to the child's well-being. In addition the Children's Act prohibits virginity testing of children under the age of 16⁷⁸. Virginity testing of children older than 16 may only be

⁷⁴ Dean E Murphy 'A time for testing for Virginity' The Los Angeles Times <http://ww2.aegis.com/news/Lt/199/LT990702.html>

⁷⁵ South African Human Rights Commission, Submission to the Select Committee on Social Services (NCOP) on Harmful Social and Cultural Practices, p9.

⁷⁶ Act 38 of 2005

⁷⁷ §7 and §9 of Act 38 of 2005

⁷⁸ op.cit. §12(4)

performed if the child has given consent to the testing after receiving proper counselling⁷⁹. The results of a virginity test may not be disclosed without the consent of the child⁸⁰ and the body of a child who has undergone virginity testing may not be marked⁸¹. The physical invasiveness of checking a young girl's hymen may be an extremely traumatic experience and many women's rights and public health advocates claim that the testing is traumatic to the girls regardless of the results⁸². Betty Makoni, the director of the Girl Child Network in Zimbabwe, characterizes this practice as sexual abuse⁸³. It is clear that in the context of human dignity, the freedom and security of the person and privacy, the practice of virginity testing may constitute maltreatment or even abuse of children. At the very least the practice is degrading and humiliating and cannot therefore be in the best interests of the girl child⁸⁴.

87. Furthermore the Constitution states that customary international law is law in South Africa unless it is inconsistent with the Constitution or an Act of Parliament. When interpreting any legislation a court must prefer any reasonable interpretation of the legislation that is consistent with international law over an interpretation that is inconsistent with international law⁸⁵. South Africa is therefore legally bound to ensure that domestic laws and practices do not violate its international legal obligations as set out in the various human rights treaties to which it is a party.

88. South Africa is a party to numerous international human rights treaties which have a direct bearing on the practice of virginity testing within South African borders.

89. The Convention on the Elimination of all forms of Violence against Women ("CEDAW")⁸⁶ states explicitly that it is unacceptable to use culture, tradition or religion as a pretext to justify discrimination against women and, by extension, violence against women is not acceptable⁸⁷. Article 2(f) of CEDAW states that: "*States parties condemn discrimination against women in all its forms, agree to pursue, by all appropriate means and without delay, a policy of eliminating discrimination against women, and to this end, undertake: (f) to take all appropriate measures,*

⁷⁹ op.cit. §12(5)

⁸⁰ op.cit. §12(6)

⁸¹ op.cit. §12(7)

⁸² SIECUS, op.cit.

⁸³ ibid

⁸⁴ Human Rights Commission Submission op.cit.

⁸⁵ op.cit. §232 and §233

⁸⁶ GA res. 34/180, 34 UN GAOR Supp. (No. 46) at 193, UN Doc. A/34/46; 1249 UNTS 13; 19 ILM 33 (1980)

⁸⁷ op.cit. Article 2(f)

including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”

90. The Committee on the Elimination of All Forms of Discrimination against Women said in its General Recommendation 19: *“Traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision. Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them of the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms.”*⁸⁸
91. The Declaration on the Elimination of Violence against Women states in Article 4: *“States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination.”*⁸⁹
92. The United Nations Human Rights Committee has said that: *“State parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women's right to equality before the law and to equal enjoyment of all Covenant [on Civil and Political Rights] rights.”*⁹⁰
93. Under UN General Assembly resolution 56/128 of 30 January 2002, *“Traditional or customary practices affecting the health of women and girls”,* States which have ratified the Women’s Convention and the Convention on the Rights of the Child are called upon *“to develop, adopt and implement national legislation, policies, plans and programmes that prohibit traditional or customary practices affecting the health of women and girls...and to prosecute the perpetrators of such practices”.*⁹¹
94. The Beijing Platform for Action states in paragraph 124 a) that governments should: *“Condemn violence against women and refrain from invoking any custom, tradition or religious*

⁸⁸ General Recommendation 19, Violence against women, (Eleventh session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRIGEN/11/Rev.1 at 84 (1994).

⁸⁹ UN Declaration on the Elimination of Violence against Women, UN Doc. A/RES/48/104, adopted by the UN General Assembly on 20 December 1993

⁹⁰ Human Rights Committee, General comment no. 28: Equality of rights between men and women (Article 3), UN Doc. CCPR/C/21/Rev.1/Add.10, 29 March 2000.

⁹¹ Clause 3(d), General, A/RES/56/128, 30 January 2002

consideration to avoid their obligations with respect to its elimination as set out in the Declaration on the Elimination of Violence against Women.”⁹²

95. General Recommendation 19 of the Committee on the Elimination of All Forms of Discrimination against Women says in paragraph 24 e): *“States parties in their report should identify the nature and extent of attitudes, customs and practices that perpetuate violence against women, and the kinds of violence that result. They should report the measures that they have undertaken to overcome violence and the effect of those measures;”⁹³*

96. The First UN Special Rapporteur on violence against women, Radhika Coomaraswamy, has explicitly condemned forcible virginity testing. She commented, in relation to Turkey, that *“forcibly subjecting detainees to so-called virginity tests is an egregious form of gender-based violence constituting torture or cruel, inhuman or degrading treatment”*, she urged the government to take all measures to abolish the practice⁹⁴. The Special Rapporteur, however, also expressed concern that the practice where it occurs outside a custody situation may also violate women’s human rights, specifically dignity and equality, and called on state agencies not to collaborate in the practice⁹⁵.

97. In her 2003 report to the UN Commission on Human Rights, the first Special Rapporteur on violence against women Radhika Coomaraswamy wrote:

“States must promote and protect the human rights of women and exercise due diligence:

(a) To prevent, investigate and punish acts of all forms of VAW whether in the home, the workplace, the community or society, in custody or in situations of armed conflict;

(b)...

(c) To condemn VAW and not invoke custom, tradition or practices in the name of religion or culture to avoid their obligations to eliminate such violence;

(d)...

(e)...

⁹² 15 September 1995, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995).

⁹³ *op.cit*

⁹⁴ E/CN.4/1999/68 Violence against women in the family, paragraph 178; E/CN.4/2003/75/Add.1, paragraph 1833

⁹⁵ Preliminary report submitted by the Special Rapporteur on violence against women, its causes and consequences, Ms Radhika Coomaraswamy, in accordance with Commission on Human Rights resolution 1994/45, E/CN.4/1995/42, 22 November 1994; Report of the Special Rapporteur on violence against women, its causes and consequences, Ms Radhika Coomaraswamy, in accordance with the Commission on Human Rights resolution 2001/49. Cultural practices in the family that are violent towards women. E/CN.4/2002/83, 31 January 2002; E /CN.4/2003/75/Add.1. International, regional and national developments in the area of violence against women 1994-2003, E /CN.4/2003/75/Add.1

(f) To support initiatives undertaken by women's organizations and non-governmental organizations on VAW and establish and/or strengthen, at the national level, collaborative relationships with relevant NGOs and with public and private sector institutions."⁹⁶

98. In 2000 the UN Committee on the Rights of the Child, in response to South Africa's compliance report, noted its concern that *"the traditional practice of virginity testing...threatens the health, affects the self-esteem and violates the privacy of girls"* and recommended that the State party introduce sensitization and awareness-raising programmes for practitioners and the general public to change traditional attitudes and discourage the practice of virginity testing in light of articles 16 and 24(3) of the Convention"⁹⁷.

99. The WLC therefore recommends that:

- 99.1 The minimum age requirement for virginity testing to be conducted should be increased from 16 years to 18 years;
- 99.2 A regulatory framework must be put in place which requires that testers be registered and trained in accordance with procedures set by the Departments of Justice and Social Development in consultation with civil society organisations;
- 99.3 The training should address general reproductive health issues including HIV/AIDS; adequate infection control procedures, privacy and protection of confidential medical information; what constitutes proper informed consent and how to obtain such consent, the human rights aspects of virginity testing and HIV/AIDS, as well as compliance with the legal regime;
- 99.4 Due diligence standards must be set to ensure compliance with the regulatory framework and adequate structures must be put in place to monitor and enforce compliance;
- 99.5 The regulatory regime should include sanctions which will act as an effective deterrent to non-compliance;
- 99.6 Education programmes should be developed and implemented which promote a broad understanding within communities of the importance of adopting HIV/AIDS

⁹⁶ Radhika Coomaraswamy, Special Rapporteur on violence against women, Report to the Commission on Human Rights, UN Doc. E/CN.4/2003/75, 6 January 2003, para. 85.

⁹⁷ Concluding Observations of the Committee on the Rights of the Child: South Africa, CRC/C/15/Add.122, 23 February 2000, paragraph 33 [http://www.unhcr.ch/lbs/doc.nsf/\(Symbol\)/6e861f881eca1ble8025687f005a805b?O](http://www.unhcr.ch/lbs/doc.nsf/(Symbol)/6e861f881eca1ble8025687f005a805b?O)

prevention practices which do not violate the human rights of women and girl children.

D: Refugee women

100. While the state has reviewed the regulatory frame work for refugees to ensure that all refugees including women are treated with dignity and have unhampered access to life's necessities, including health, social grants, housing, education and work, not enough has been done to educate the local community and public service providers on the equal treatment of refugees and women migrants.⁹⁸ The State acknowledges that its departments which address the needs of refugees are not aware and have not received training on the constitutional provisions for access to basic public services such as education, health and other social assistance or how to manage this without bias.⁹⁹

101. Refugees and migrant women living in South Africa find themselves victims of physical violence, verbal and psychological abuse, structural and institutional violence, and cultural and ethnic discrimination on a daily basis.¹⁰⁰ In 2008, at least 50 people were killed, thousands more injured, scores of women gang raped and nearly 35 000 displaced due to xenophobic attacks around South Africa.¹⁰¹ The Center for Study of Violence and Reconciliation (CSV), in a study on 'The Gendered Nature of Xenophobia in South Africa' found that:

"During the attacks, 'the displacement of people has very specific gender dimensions. The protection concerns of refugee and migrant women and girls differ in many respects from those of men. For instance, in addition to begin disproportionately affected by sexual and gender-based violence, women often do not get equal access to humanitarian assistance and asylum opportunities. Immigrant women from other African countries have complained of xenophobic treatment in South Africa. They have recounted derogatory name-calling, harassment and abuse by citizens, police, and government officials. In addition, they complained of regularly being restricted access to

⁹⁸ South African CEDAW Periodic Report 1998-2008

⁹⁹ South African CEDAW Periodic Report 1998-2008

¹⁰⁰ Nicolle Beeby 'Double Jeopardy: Female and Foreign in South Africa' available at www.ngopulse.org accessed 4th June 2009.

¹⁰¹ Biz- Community 'Xenophobia in SA- Media Should Take the Blame' available at www.lexisnexis.com accessed 5th June 2009

*basic services such as health, care, and education. Some mainstream media outfits have also been accused of fueling xenophobic sentiments and attitudes.*¹⁰²

102. Migrant women are said to be the most vulnerable victims of xenophobic attacks because they are seen as easy targets since they have less recourse to the criminal justice system and protection than South African women.¹⁰³

103. One migrant woman was reported to have said that:

‘When she was raped during the xenophobic attacks, she reported to the police and they refused to assist her, saying they could not provide a service to a *kwerekwere* (a derogatory term for an African immigrant) and that she should rather report the case to the police in her home country, the DRC.’¹⁰⁴

104. As a result there had been no medical or legal examination, no post exposure prophylaxis and no morning-after pill.¹⁰⁵ This renders migrant women easy targets of rape and other forms of violent crime.

105. The common thread in all refugee matters that have come before South African courts is that while government can be commended for the legislative and policy framework adopted to ensure compliance with international and constitutional commitments, implementation continues to be a major challenge. Contributory factors to some of these challenges include the fact that the Department of Home Affairs is grossly under-staffed, exceptionally high levels of corruption and staff at the various refugee reception offices are not adequately trained to provide an efficient service to asylum seekers.

106. Many refugee women are unable to access social security. South Africa’s Constitution and Refugee Act of 1998 provide refugees with the right to social security. Asylum seekers and undocumented migrants should be able to access UIF and COIDA as long as they can prove an employer-employee relationship. Many refugees find at the time of attempting to access

¹⁰² Center for the Study of Violence and Reconciliation : ‘The Gendered Nature of Xenophobia in South Africa’ available at www.csvr.org.za accessed 5th June 2009

¹⁰³ Center for the Study of Violence and Reconciliation : ‘The Gendered Nature of Xenophobia in South Africa’ available at www.csvr.org.za accessed 5th June 2009. See also Peter Luhanga Cape Argus 8, 13 June 2008

¹⁰⁴ Dee Smythe director at the University of Cape Town, Race and Gender Research Unit for The Center for the Study of Violence and Reconciliation : ‘The Gendered Nature of Xenophobia in South Africa’ available at www.csvr.org.za accessed 5th June 2009

¹⁰⁵ Ibid.

benefits associated with the UIF or COIDA, that their employer had not registered them with the Department of Labour and that they are thus not entitled to any benefits flowing from the UIF or COIDA. Refugees are only entitled to the disability, foster care and care dependency in respect of social grants. In times of hardship they are also eligible to receive social relief of distress. It appears that despite these entitlements, refugees are not accessing these benefits as they are unaware of their entitlements.

107. The South African Social Security Agency (SASSA), the agency responsible for the distribution of social grants is also responsible for a certain amount of hardship experienced by refugees. There seems to be a lack of communication between the different levels of the agency resulting in refugees being refused access to grants as staff members should be trained on the interpretation and implementation of the Act and refugees should be educated on their entitlements. According to CoRMSA¹⁰⁶ not much progress has been made in this regard.

108. In addition, refugees experience hardship with the Department of Home Affairs. The State has on numerous occasions stated that they are experiencing large amounts of backlog at their offices. Refugees and asylum seekers end up waiting months at a time to receive new or updated documents, they end up waiting in queues for the most part of a day often never reaching the reception area and thus leaving the department without assistance. The department's failure to assist refugees leads to refugees not being in possession of required legal documents for extended periods of times and facing threats of arrest or deportation by the South African Police Service (SAPS) members and are unable to access grants. Procedures are in place for situations where refugees are not in possession of valid identity documents, but it appears that neither refugees nor department officials are aware of these procedures.

109. Another survey conducted by the Centre for the Study of Violence and Reconciliation in 2004 showed that only 35% of the SAPS had received some training on diversity and discrimination, also none out of the said 35% were actually active members of the SAPS but members who do not go out into the community or who were not in direct contact with people in the community. It also pointed out the perceptions of the SAPS regarding immigrants and crime. According to the survey, some immigrants are arrested simply to meet arrest targets. Police officials privately admit that they round up refugees, asylum seekers, and other immigrants

¹⁰⁶ CoRMSA, (2008, June 18). Protecting Refugees, Asylum Seekers and Immigrants in South Africa Retrieved May 2, 2009, at www.cormsa.org.za

without proper identification papers because they are believed to be the cause of a lot of serious crimes in the country.¹⁰⁷

110. We recommend the following:

110.1 *Diversity training*: There have to be policies and training programs put in place in order to educate public service providers on the equal treatment of every individual in the community without bias. This will encourage equal treatment of migrant and refugee women.

110.2 *General public awareness*: Chan¹⁰⁸ points out that forums and programs where the police and migrants are exposed to one another will change the current police culture. Also, Umbrella Campaigns will help change the perception of the local community about the immigrants living amongst them. These campaigns will only work with the co-operation and aid of the local government.

E: Adult Commercial Sex Work

111. Sex work is criminalized in South Africa, both the sex worker and the client commit offences. The *Sexual Offences Act of 1957* currently prohibits the act of having sex for reward [section 20(1)(aA)]. This section only targets the sex worker and not the client. The new *Criminal Law (Sexual Offences) Amendment Act of 2007* now also criminalises the act of buying sex (section 11).

112. Sex workers' criminal status in society increases vulnerability to violence in a number of ways. Sex workers around the world continue to be murdered at rates higher than the general population, in fact in some places standardised mortality rates for sex workers are six times those seen in the general population.¹⁰⁹

113. The fact that they are by and large female, sex workers remain particularly vulnerable to all crimes of violence against women. The incidence of physical violence, including rape, is higher among sex workers than among the general population. Violence links with social stigma and

¹⁰⁷ Themba Masuku ' Targeting Foreigners : Xenophobia among Johannesburg's police' available at www.iss.co.za accessed 5th June 2009

¹⁰⁸ Chan Targeting Foreigners : Xenophobia among Johannesburg's police' available at www.iss.co.za accessed 5th June 2009

¹⁰⁹ SWEAT submission to the South African Law Reform Commission page 27

discrimination producing disempowerment and in some situations learned helplessness giving the sex worker the message that their life does not matter.¹¹⁰

114. The human rights abuse of sex workers in South Africa is alarming and demands immediate attention. Sex workers suffer systematic and regular violence and rape. In Cape Town, 37% of street-based and 20% of brothel-based sex workers often undergo violence and, alarmingly, can't report it to the police. Most sex workers are very reluctant to report crime committed against them or others to police. Unreported crimes include verbal abuse, refusal to pay and being robbed, threats of physical assault, physical assault and rape. Currently there is great skepticism about the police as an avenue of redress, especially in light of the fact that some police officers are themselves perpetrators of the above crimes. Many sex workers report abuse by the police.¹¹¹

115. Sex workers are heavily stigmatized: being named, shamed and labelled as immoral, abhorrent and a threat to society. Sex workers are a popularly "accepted" target of hate crime - people feel justified in harassing and abusing them. Sex workers often function as a target onto which people express their hatred but at the same time they often feel justified in their violence and have no sense of accountability.¹¹²

116. Pervasive stigma and discrimination against female sex workers at clinics, where they are viewed as "vectors of disease", significantly inhibits health seeking behaviours and access to available prevention and treatment services.

117. Many sex workers work under extremely exploitative working conditions that would not be tolerated in any other industry.

Case study: On the 28 May 2010, in a case which the Women's Legal Centre litigated, the Labour Appeal Court found that the CCMA has jurisdiction to hear complained of unfair dismissal made by sex workers who are employed by brothel owners. The judgment confirmed that the constitutional right relating to fair labour practices applies to 'everyone' including sex workers. It further clarified that sex workers should not be stripped of their right to be treated with dignity by clients, and concluded that this should apply to employers as well. As a result of this judgment, sex workers can now approach the relevant CCMA or Bargaining Council or the Labour Court. The arbitrator or judge would then have to consider if the sex worker has been treated unfairly and what an appropriate remedy would be. It may not mean re – instatement, but there are other available remedies, such as compensation.

¹¹⁰ Ibid

¹¹¹ Ibid

¹¹² Ibid

118. All legal businesses in South Africa are regulated by industry standards which apply, across the board to the industry in question. No such regulations apply to the sex industry currently. The absence of such a set of standards allows criminals, individual managers and corrupt police officers to determine all of the conditions under which sex workers work. Regulation of the sex industry (like all industries) obviously needs to occur. Under decriminalisation existing laws like the Basic Conditions of Employment Act which are used to regulate other industries will be used to regulate the sex industry.¹¹³
119. Sex workers have limited access to health and welfare services because they are afraid that if they seek these services and disclose their occupation they will be arrested or discriminated against. This forces the industry underground making it very difficult for health service providers to access sex workers. Sex workers have reported situations where health care officials refuse treatment, provide inadequate treatment and make very abusive remarks when discovering or even suspecting the person is a sex worker. Therefore enacting a legal model will assist sex workers of accessing appropriate health services without being afraid of disclosing their occupation.
120. Sex workers do not have proper working conditions and therefore many are vulnerable to HIV/AIDS. Most sex workers work in unhealthy and unregulated conditions, where there is little or no promotion of safer sex, where the manager encourages a high turnover of clients and provides little or no control over clients' behaviour.¹¹⁴ UNAIDS suggest that non – criminalisation constitutes a necessary, but preliminary, step to addressing HIV vulnerability amongst prostitutes.¹¹⁵
- 121.** We submit that many sex workers have poor access to: adequate health services and HIV prevention measures; post – exposure prophylaxis after rape, emergency contraception, management of sexually transmitted infections; and, drug treatment and other hard reduction services. We submit further that sex workers face many barriers in accessing their health needs such as discrimination and constant harassment from law enforcement officials.

¹¹³ SWEAT submission to the South African Law Reform Commission 2009 page 18

¹¹⁴ UNAIDS Guidance Note HIV and Sex Work 2007 at 2

¹¹⁵ UNAIDS Global Reference Group on HIV/AIDS and Human Rights 2003

122. The current legal position does not comply with the international treaties that South Africa has signed and ratified, and the reform of the law in relation to sex work is an imperative for this reason.
123. Further, the existing legal framework is also unacceptably liable to police discretion and encourages police corruption due to the spin offs, for example bribes and demands of sex. In reality a system of *de facto* decriminalisation exists in South Africa in that the sex work industry is left largely undisturbed by the police and law enforcement. The majority of interventions are based on responses to public and community complaints. In these instances the targets are the most visible elements, namely street based or outdoor sex workers, and in the majority of arrests, it is the municipal by-laws that are used¹¹⁶.
124. The Sexual Offences Act as it stands is a very difficult law to prosecute under and requires intensive and intrusive police methods such as entrapment to secure a conviction. The indoor industry is rarely targeted except when the brothel tends to become too high profile or there are community complaints. In these instances entrapment procedures are used.¹¹⁷
125. The reality is that sex workers are seldom prosecuted, and are more likely to be arrested, harassed and then released. In a recent Cape High Court judgment¹¹⁸ the court interdicted the police from arresting sex workers in order to harass them. To our knowledge, no client has been prosecuted under the amended law.
126. Often, municipal by-laws are used to arrest sex workers instead of the Sexual Offences Act because of the difficulties involved in proving the elements of the offence, particularly in relation to the client.
127. Once arrested, they are required to pay a "fine" to the arresting officer or they are taken to the police cells where they are required to pay a R300 fine or kept overnight and then released the next morning. They do not appear in court nor do they receive any receipts for the fines paid.
128. The continued arrest of sex workers when they have not committed the acts for which they have received fines for conveys a practice of abusing the law to deliberately persecute a

¹¹⁶ SWEAT Submission to the South African Law Reform Commission 2009 page 26

¹¹⁷ Ibid page 27

¹¹⁸ SWEAT v The Minister of Safety & Security & 7 Others
Judgement delivered in the Cape High Court on 20 April 2009

specific group of people. This practice violates the right to be equal before the law and to amounts to unfair discrimination.

129. Sex workers further complain of the violation of their Constitutional rights to be informed promptly of the reason for being detained, to choose and consult with a legal practitioner, to challenge the lawfulness of the detention, to communicate with or be visited by next of kin or a doctor, and to conditions of detention that are consistent with human dignity.

130. It is important that these practices of lawlessness by the police are addressed. It should be noted that even where individual police officers perpetrates acts of crime against sex workers such a rape, assault and robbery, the state should be held accountable and vicariously liable for these actions.

F: Trafficking in women and girls

131. There is some anecdotal evidence that South African girls are trafficked for the purposes of domestic servitude and commercial sexual exploitation. Many of our women and children are lured away from their homes with promises of good jobs and a better future, but instead they are forced into dangerous, illegal and abusive work.

132. Trafficking deprives victims of exercising a wide range of rights, including the right of a person to preserve his or her identity, the right to education, to health care, to rest and leisure as well as the right not to be subjected to torture, or cruel, inhuman or degrading treatment and not to be deprived of liberty unlawfully or arbitrarily.

133. The particular vulnerability of women and girls is attributed to many factors including discriminatory social and cultural beliefs, lack of access to education, lack of security and property rights and HIV Aids.

134. Women and girls are most likely to be trafficked for commercial sexual exploitation, to be sold as brides, or to work in the domestic sector . The HIV/Aids pandemic is a contributory factor. Many older men want young girls as brides, believing that they are less likely to be infected with HIV/Aids than older women.

135. In South Africa, an additional problem, although largely undocumented is that although there is a high incidence of women and girls being trafficked into and out of the country, there is an

equally high incidence of women and girls being trafficked inside the country¹¹⁹. Identifying these domestic trafficking victims is more difficult than identifying internationally trafficked women, because there are no border crossings.

136. In addition, anecdotal evidence suggests that in some areas in South Africa the practice of foster families is followed, with wealthier families taking poorer families' daughters to live with them, providing them with food, education, clothing and shelter in exchange for domestic work. However, as some foster families are not trustworthy, in certain cases foster practices result in a daughter being sent into slavery.
137. Although there is limited research on the scale of trafficking in persons, the research that does exist indicates that women and girls are the primary victims¹²⁰. In its Discussion Paper 111, the South African Law Reform Commission says, "*it is general fact that those trafficked into the sex industry are predominantly female*" and that "*gender inequality is one of the underlying reasons for the commercial sexual exploitation of women*"¹²¹. The Discussion Paper explains why women are more vulnerable to becoming victims of trafficking in general because of underlying socio – economic and cultural beliefs¹²².
138. When South Africa ratified the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children it is obligated to enact legislation in compliance with the Protocol. Section 231 of the Constitution provides that an international treaty or agreement binds South Africa at an international law level "*after it has been approved by resolution in both the National Assembly and the National Council of Provinces*". Section 231 (4) provides that an international agreement only becomes law in the Republic when it is enacted into law by national legislation.

Case Study: Annexe

In 2006 the WLC reported two cases of under-aged girls brought to Cape Town from Beaufort West for domestic work to the Department of Labour. The Department intervened and arranged for these girls to be returned home. No charges were laid and in the absence of human trafficking legislation the matter was treated as a contravention of the labour law and the remedy was to return the girls to their families of origin without further investigation.

¹¹⁹ *Ibid* at 63

¹²⁰ SALRC, Issue Paper 25 (Project 131): Trafficking in Persons 61 of (2006)

¹²¹ SALRC, Discussion Paper 111 (Project 131): Trafficking in Persons 61 (2006)

¹²² *Ibid.*: see also, Human Rights Watch, Women's Rights: Trafficking, <http://www.hrw.org/women/trafficking.html>; Truong, *supra* note 13 at 63

139. South Africa's obligations in respect of trafficking in persons are contained in several conventions, protocols, international instruments and regional instruments :-

- the United Nations Convention Against Trans-National Organised Crime,
- the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children;
- the Convention on the Rights of the Child of 1989,
- the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography of 2000;
- the Convention on the Elimination of all Forms of Discrimination against Women of 1979;
- the Rome Statute of the International Criminal Court; the Convention Concerning Forced Labour 29 of 1930,
- the Convention Concerning the Prohibition and Immediate Action on Human and Peoples Rights of 1981,
- the African Charter on the Rights and Welfare of the Child of 1990 and Protocol to the African Charter on the Rights of Women in Africa.

140. The most significant and relevant of these is the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children ("the protocol"), which obliges South Africa to adopt legislative and other measures as may be necessary to establish trafficking as a criminal offence. The Protocol entered into force on 25 December 2003 in accordance with Article 17 thereof. South Africa signed the protocol on 14 December 2000 and ratified it on 20 February 2004.

141. In respect of trafficking, the effect of South Africa's failure to domesticate the Protocol is that South African courts cannot enforce criminal prosecutions for trafficking.

142. Draft legislation was introduced to parliament earlier this year but the finalization thereof was indefinitely postponed.

143. We submit that the State should do the following:

143.1 Fast track the draft legislation

143.2 Train police officials on how to deal with survivors of trafficking and on the law around trafficking crimes.

- 143.3 Train border control on how to identify a victim of trafficking;
- 143.4 Issue a directive that corrupt border officials, police officials and home affairs officials will not be tolerated; and
- 143.5 The immediate implementation of creating more safe houses for survivors of trafficking.

G: Violation of the right of women to own and inherit property

144. The state has failed to address the inequality of women contained in existing legislation and it has failed to pass new legislation in order to meet its obligations. The implementation problems around customary marriages and the primacy of civil marriages over polygynous customary marriages have resulted in many women being deprived of the potential protection offered by the legislation. In addition, many women are currently deprived of access to resources (including their homes) by the failure of the state to legislate the recognition of religious marriages and domestic partnerships. Women and children bear the brunt of the systemic failures of the maintenance system.
145. Many of the cases that have been brought to the courts to compel that state to give effect to the rights of women in this context were brought by non-governmental organizations and in one case by a private individual. Litigation is very costly in South Africa and those who do not have the financial means are left with no recourse. Also in most cases the state opposes the litigation, which also proves more costly for the party involved.
146. Chapter 9 Institutions¹²³ like the Human Rights Commission and the Commission for Gender Equality (CGE), despite being given certain significant investigative, monitoring, and reporting powers, are not always central role players in the institution of litigation.

Case: Gable Hassam

In the Hassam¹²⁴ matter the applicant approached the Constitutional Court for confirmation of the constitutional invalidity of section 1(4)(f) of the Intestate Succession Act¹²⁵ which excluded widows of polygynous marriages celebrated according to the tenets of the Muslim religious faith in a discriminatory manner from the protection of the Act. In the matter, the Constitutional Court admitted the CGE as amicus curiae (friend of the court) in the matter, but

¹²³ Institutions set up in terms of Chapter 9 of the Constitution

¹²⁴ Hassam v Jacobs No and Others (CCT483/08)[2009] ZACC 19; 2009 (11) BCLR 1148 (CC)

¹²⁵ 81 of 1987

midway through the proceedings the CGE withdrew from the case citing structural reorganization as the reason for not intervening, illustrating the failure of the Chapter 9 Institutions to uphold their mandate as protectors and watchdogs of the human rights enshrined in the Constitution.

Customary marriages

147. The most vulnerable women in South Africa are black African women. Black African women constitute 40% of the population of South Africa, about 19 million. They have the lowest per capita income, the least access to land and services, the lowest educational levels and the highest rates of unemployment. These are also the women to whom customary law applies.
148. Whilst customary marriages are recognized in terms of the Recognition of Customary Marriages Act 120 of 1998 (RCMA), in practice many women are unable to register customary marriages.
149. The reasons for this include:
- 149.1 Women may not have the power in the relationships to get the husband to attend to register the marriage with them,
 - 149.2 They may not be aware that the marriage must be registered or how to go about doing so,
 - 149.3 They may not be able to afford transport or to be able to be away from the home long enough in order to attend the nearest department of Home Affairs office to register the marriage. This may involve travelling great distances.
 - 149.4 Inept and/or untrained officials who turn women away because they are not accompanied by their spouse (although the legislation provides that one of the spouses can register the marriage in the absence of the other spouse).
150. Whilst the law is clear that a failure to register a customary marriage does not affect the validity of the marriage it does, however, affect the ability of the surviving spouse to inherit from their deceased spouse's estate. This often results in her losing her home as well as any claim for maintenance against the estate or loss of support in the case of an unlawful death. Further, the effect of the non-registration is that women are denied the right to administer the estates of their late husbands. Officials at the courts are often not legally trained and the institutions unfriendly and impersonal.

151. Failure to register the marriage also impacts negatively on women who seek to enforce their remedies on dissolution of the marriage by divorce and struggle to prove the existence of a marriage without a certificate.
152. Many women report that there are instances when certificates are issued to them by officials at the Department of Home Affairs and then subsequently cancelled without proper authority, and where men refuse to register their customary marriages the officials refuse to register the marriages at all.

Case: L Nkosi

The Recognition of Customary Marriages Act makes provision for a marriage to be registered by one party but in practice Home Affairs refuse to register the marriage where the husband does not attend. In this case Home Affairs actually registered the marriage and then exceeded their statutory powers by de-registering the marriage when the husband complained. Like many women, Ms Nkosi only registered the marriage when the relationship had broken down, and her husband then denied that the marriage had taken place. She was thus unable to claim her half share of the joint estate. Ms Nkosi approached the WLC with all the necessary evidence that the marriage had taken place according to customary law. An application was instituted and opposed by the Department of Home Affairs.

153. In 2009, the state sought to amend the RCMA to require both spouses to be present to register a marriage. This has been strenuously opposed, as it fails to take into account the very real power imbalances and difficulties faced by women in relation to the registration of marriages.
154. Many women are married in customary law to a man who is also married in terms of civil law to another woman (with or without their knowledge). While polygyny is recognised if both marriages are customary, the monogamous nature of civil law marriage dictates that where a civil marriage exists the customary marriage is invalid. This provision places these women in a similar legal position to women married in accordance with religious rights and women in domestic partnerships.
155. A further complication is that the courts have now held that where a husband does not apply for a contract dealing with the property before taking a second or later wife, the later marriages are invalid. This means that those women who often do not have the power to negotiate a contract, do not know that it is required or do not even know there is another wife lose the rights and protections contained in the RCMA because the marriage is not valid.

156. There have been several cases litigated by individuals and civil society which have won women the right to inherit. Many of these cases were necessary as a result of the state's failure to legislate to bring the law of succession in line with the right to equality.

Case study: Bhe

Two daughters, aged 2 and 9 could not inherit their father's property because they were female. The property was the girl's home in Khayelitsha where they had been living with their father who died 2 years ago. Since their parents were never married, the mother also had no legal claim to the house. Thus the house was given to the girl's grandfather who decided to sell it to defray funeral expenses.

S 23 of the Black Administrations Act of 1927 provides that daughters could not inherit their father's estate if he died intestate. The African customary law of primogeniture dictates that only a male who is related to the deceased through a male can qualify as intestate heir and looks to eldest male descendent of the deceased first. The WLC acted on behalf of the mother and 2 girls to challenge the constitutionality of the primogeniture rule and s23 of the Black Administration Act.

On Friday 15 October 2004, the Constitutional Court confirmed that the South African customary law rules relating to intestate succession are unconstitutional and discriminatory. The Constitutional Court ruling strikes down the racist apartheid statutory scheme for deceased estates of black person, as well as the African customary law rule of primogeniture, to the extent that it excludes or hinders women or extra-marital children from inheriting property.

The Court ruled that a modified form of the Intestate Succession Act would apply to all such deceased estates in the future. The Court also made provision for cases where more than 1 spouse survives a deceased in a polygamous customary union. The court order is retrospective in that it applies to all deceased estates where the deceased died after 27 April 1994, with the exception that it does not invalidate the transfer of ownership prior to the date of the Court's order unless it is established that when such transfer was taken, the transfer was on notice that the property in question was subject to a legal challenge on the grounds upon which the applicants brought challenges in this case.

157. The state only passed the Reform of Customary law of Succession Act in 2009. The Act was the opportunity for the state to make provision for women in dual system marriages, but failed to do so.

158. Thus women whose marriages are not registered or who are in invalid polygynous marriages or dual system marriages cannot inherit from their spouses.

The impact of failure to recognize a relationship on women

159. Women are predominantly adversely affected when it comes to the financial and social consequences of the dissolution of marriage. Heaton attributes this to the public/private

dichotomy with the public sphere traditionally reserved for men, and the private world of the family and the home for women¹²⁶.

“One of the biggest drawbacks of this division is that a spouse who stays at home has little or no income and few assets. Moreover, research suggests that there is a direct link between financial power and decision-making power within the home. The link is that the greater the disparity between the spouses financial position, the greater the wealthier spouse’s dominance in decision-making and the more unfair the distribution of domestic burdens. The more domestic and family care burdens a wife bears, the less are her chances of acquiring or furthering the skills with which she can get a job, set up and run a business, or gain promotion. This cycle of disempowerment operates during the subsistence of the marriage and also results in the wife being left with few or no assets and little or no marketable skills when the marriage breaks down. Upon divorce she is not assured of being awarded maintenance. Even if she gets a maintenance order in her favour, she is not assured of actually receiving maintenance, because enforcement of maintenance is notoriously ineffective. This has led to what is called ‘the feminization of poverty’.”¹²⁷

160. The greater the disparity between the financial position of the domestic partners, the greater the wealthier partner’s dominance in decision-making and the more unfair the distribution of domestic burdens. This also results in the poorer partner being left with few or no assets and little or no marketable skills upon dissolution of the relationship.¹²⁸
161. The dynamics of negotiating marriages are complicated in many cases by cultural and traditional norms, meaning that black African women often do not have the agency to even begin a conversation about marriage in intimate relationships.
162. Notwithstanding the constitutional development of the law, many women continue to experience acute discrimination resulting in vulnerability; lack the financial resources and time off work to attend court proceedings and generally lack the legal and financial support required for the full enjoyment of the benefits of democracy and the rule of law. For those women who are able to access the judicial system, the courts have not yet been able to

¹²⁶ *Striving for Substantive Gender Equality in Family Law : Selected Issues* (2005) 21 SAJHR at page 549

¹²⁷ *ibid*

¹²⁸ *ibid*

understand the plight of those women who 'fall between the cracks' of the current legal matrix.

Religious marriages

163. The Muslim population is between 1.5 and 2% of the South African population, coming in at just under a million people. The Hindu population is also a significant section of South African society. The failure of the State to recognise religious marriages means that all women married by religious rites do not enjoy the protections offered by civil marriages, such as a claim to assets acquired during the relationship, spousal maintenance and protection from eviction.

164. The WLC has litigated on behalf of women in religious marriages in the following cases:

164.1 Daniels : the court awarded women in monogamous Muslim marriages the right to inherit in terms of the Intestate Act 81 of 1987 and the Maintenance of Surviving Spouses Act 27 of 1990.

164.2 Gabie- Hassam : the court awarded women in polygynous Muslim marriages the right to inherit in terms of the Intestate Act 81 of 1987 and the Maintenance of Surviving Spouses Act 27 of 1990.

164.3 Govender: the court awarded women in Hindu Muslim marriages the right to inherit in terms of the Intestate Act 81 of 1987 and the Maintenance of Surviving Spouses Act 27 of 1990.

165. The state has failed to pass legislation recognizing these marriages despite the courts' repeated statements that failure to do so amounts to discrimination on several grounds, including gender and marital status.

166. The current position violates Article 16 of CEDAW in relation to the failure to equalize customary and religious unions to civil unions, the failure to recognize all forms of *de facto* marriage and the failure to provide for the registration of all forms of marriage. Further, children suffer prejudice and discrimination under the law as a result of being born into unrecognized relationships.

Domestic partnerships

167. The 2001 Census found there to be more than 2.3 million cohabitants¹²⁹ in South Africa. According to commentators, the reported incidence of cohabitation is probably lower than its real prevalence since many people are married and cohabiting with someone other than their spouses.¹³⁰ The South African situation is exacerbated by the phenomenon of economic migrancy of men,¹³¹ which leaves women cohabiting with men in a second marriage or partnership in a vulnerable position.
168. The trend of non-registered cohabitation without entering into a registered marriage is increasing rapidly around the world and in South Africa. In the 1996 South African census, 1.2 million people self-identified as unmarried but living together. In the 2001 census, the number of persons reporting themselves as living together but unmarried doubled to a total of 2.4 million.
169. There are geographic, economic and social reasons for the growth of non-registered domestic partnerships in South Africa today.
170. Men who are forced to migrate from rural areas to urban centres often leave behind wives and families. The duration of separation between members of such marriages can be lengthy, resulting in the natural development of city-based relationships between married migrant men and women in urban areas. When these un-registered relationships break down, the domestic partner has little legal protection or social acknowledgement of her property interests¹³².
171. The high cost of living, coupled with low income and the shortage of paid work, forces people to share accommodation. Couples who ordinarily may not wish to marry, may live together to save costs and avoid the financial burden of maintaining separate households. Such arrangements also provide some measure of protection against destitution in times of illness, unemployment or pregnancy¹³³.

¹²⁹ Statistics South Africa Census 2001 (2003) Community profiles, Tables on Sex and Population group by marital status.

¹³⁰ Bonthuys and Albertyn, *Gender, Law and Justice*, Juta 2007 at page 208

¹³¹ Bonthuys and Albertyn, *Gender, Law and Justice*, Juta, at page 209. this phenomenon is confirmed in the South African Law Reform Commission Report on Domestic partnerships at page 4.

¹³² *cp.cit* p 25

¹³³ *ibid*

172. The Law Reform Commission's research indicates that prevailing social attitudes which developed in the context of the temporary nature of migrant labour, require that the urban woman partner accept the temporary nature of the relationship and respect the fact that the other partner's main obligation is to support his family in his rural village or town¹³⁴.
173. While the failure to protect persons in domestic partnerships appears to be gender neutral in that both parties in the relationship are not afforded legal protections, our submission is that it is women that are disproportionately impacted upon and adversely affected by the failure to provide statutory protection on dissolution of such partnerships. The omission by the legislature to enact adequate legislative protections thus indirectly discriminates against women.
174. Women in domestic partnerships have no rights on divorce or death of their partners. As set out above, many women do not have the power in relationships to insist on marriage. In addition women whose marriages cannot be proved (without a marriage certificate) and women in invalid polygynous and dual system marriages also loose out on the remedies that legislation dealing with domestic partnerships would provide.

H: Stereotypical attitudes towards the role and responsibilities of women

175. There have been several incidents in the last years that point to a rise in the culture of "machismo" in South Africa, with its concomitant oppression of women. There have been two high profile cases in which women have been subjected to assault and violation of their rights based on their failure to wear "appropriate" or culturally acceptable dress:
- Nwabisa Ngcukana was stripped, beaten, sexually assaulted and had alcohol poured on her by taxi drivers at the Noord Street taxi rank, Gauteng for wearing a mini skirt. Women's groups came out in public protest, while singing songs on fighting for their dignity. Meanwhile taxi drivers retaliated by saying they will continue to strip women who wore mini-skirts because it offended their culture (Mail & Guardian, March 7-13, 2008).
 - Ms. Mpanza sought a declaratory order from the Equality Court, based on the infringement of her right to human dignity, and unfair discrimination on the basis of

¹³⁴ ibid

her non-compliance with a ban stipulating that women are not allowed to wear trousers in the Tsection of the Hostel.

176. Concerning statements from politicians include :

176.1 The comments by Julius Malema (the current ANC Youth League president)

General: Malema to appeal against hate-speech ruling¹³⁵

ANC youth leader Julius Malema is to appeal against his hate-speech conviction in the Johannesburg Equality Court spokesperson Tumi Mokwena said yesterday, according to a *Mail & Guardian Online* report. Magistrate Colleen Collis found Malema guilty of hate speech and harassment for saying that President Jacob Zuma's rape accuser had a 'nice time'. Malema made the comment while addressing 150 Cape Peninsula University of Technology students last January. **Collis ordered Malema to make an unconditional public apology within two weeks and pay R50 000 to a centre for abused women within one month.** The Sonke Gender Justice group – who took Malema to court over his comments – extended a hand of friendship to the Youth League leader outside court after the judgment. A report on the *News24* site notes that opposition parties have welcomed the ruling, saying his conviction should be a 'wake-up call' to the ruling party. 'It is time the ANC took action and brought Malema to book. Malema, for his part, should unconditionally apologise for the damage he is causing,' the DA Youth said.

Collis found Malema's statement was irresponsible, superfluous and demeaning to women. 'Mr Malema, being a man of vast political influence, should be wary of turning into a man that often speaks but never talks,' said Collis, quoting from the 19th century writer Oliver Wendell Holmes. **'This court is satisfied that the utterances by the respondent amounted to hate speech,'** she said, according to a report on the *IoL* site. 'It clearly demeans and humiliates women... The respondent has infringed on the rights of women,' said Collis. Malema earlier testified that he had said: 'When a woman didn't enjoy it, she leaves early in the morning. Those who had a nice time will wait until the sun comes out, request breakfast and ask for taxi money.'

177. In addition there has been an increase in "hate crimes" against lesbians. In 2007, Human Rights Watch took notice of the rising violence against lesbians in South Africa.¹³⁶ These involve murder or "corrective" rape. This has occurred as rape to "correct" the lesbian and make her prefer men and rape of lesbians because of the perception that sex with a virgin may cure HIV.

1. On 7 July 2007- Sizakele Sigasa of Positive Women's Network and LGBT rights activist and her friend Salome Masooa, were tortured, raped, and brutally murdered in Soweto. Sizakele was found with her hands tied together with her underwear and her ankles tied with her shoelaces. She had 3 bullet holes in her head and 3 in her collarbone.
2. On 28 April 2008- Eudy Simelane (31), former Banyana Banyana soccer player, black lesbian. Raped, robbed, and brutally murdered. Her body was found stabbed and mutilated in an open field in an open field in Tornado, Kwa-Thema.
3. On 22 July 2007- Thokozane Qwabe (23) a black lesbian, was found in a field in Ladysmith, Kwa Zulu Natal. Her clothes were lying about 70m from where her body was found. She had a number of wounds to her head suggesting that she had been stoned to death.

¹³⁵ Legalbrief 16 March 2010

¹³⁶ Amnesty International Document – South Africa: 'I am the lowest end of all' Rural women living with HIV face human rights abuses in South Africa chapter 2.

4. *In June 2007-Simangele Nhlapo, a member of a support group for women living with run by Positive Women's Network, was found dead with her two year old daughter. Simangele and her daughter were raped and killed, the daughter was found with both legs broken.*
5. *On 4 February 2006- Zoliswa Nkonyana, a 19 year old black lesbian was clubbed, beaten and stabbed to death by a group of 20 men between the ages of 17-20..*

178. Despite much lobbying from civil society, the state has failed to pass legislation dealing with hate crimes as such. The failure to pass such legislation shows a lack of will to deal with hate crimes. Hate crimes affect women, lesbians, refugees (and foreign nationals), people who are HIV positive.

Conclusion

Women in South Africa bear the brunt of the high levels of poverty and inequality. The prevalence of gender based violence and accompanying state failure to implement law and policy efficiently violate the right to equality of women. Women struggle to exercise their rights due to systemic failures, particularly in the criminal justice system and in relation to domestic violence. Practices such as virginity testing and ukhutwala potentially violate the right to equality, freedom and bodily integrity and require regulation. Vulnerable groups of women such as refugees and sex workers are particularly susceptible to violence and human rights violations. The state has dragged its feet in legislating around human trafficking, hate crimes, and protections for people in unrecognized partnerships and religious marriages.

We thank the Commission for the opportunity to make this communication.