

REPORT TO THE CEDAW COMMITTEE

ON

**SOUTH AFRICA'S IMPLEMENTATION
OF CEDAW: 1998 – 2008**

**Compiled by the Commission for Gender Equality
July 2010**

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List of Acronyms

AIDS	Acquired Immune Deficiency Syndrome
ANC	African National Congress
AR	Annual Report
BPA	Beijing Platform for Action
BEM	Boys Education Movement
COP	Community of Property
CALS	Centre for Applied Legal Studies
CASE	Community Agency for Social Enquiry
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CGE	Commission for Gender Equality
CHE	Council for Higher Education
DA	Democratic Alliance
EEC	Employment Equity Commission
EPWP	Expanded Public Works Programme
FGM	Female Genital Mutilation
GEM	Girls Education Movement
GETF	Gender Equity Task Force
GFP	Gender Focal Point
GSI	Gender Status Index
HEMIS	Higher Education Information Management System
ID	Independent Democrats
IEC	Independent Electoral Commission
IOM	International Organisation for Migration
LRA	Labour Relations Act
MDG	Millennium Development Goals
M&E	Monitoring and Evaluation
MTEF	Medium Term Expenditure Framework
MWI	Women Mining Investment
NGM	National Gender Machinery
NIA	National Intelligence Agency
NPA	National Prosecuting Authority
NSFAS	National Student Financial Aid Scheme
NTS	National Travel Survey
NQF	National Qualification Framework
OSW	Office on the Status Women
PALAMA	Public Administration Leadership and Management Academy
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
PSA	Public Service Act
PSC	Public Service Commission
RSA	Republic of South Africa
SAHRC	South African Human Rights Commission
SALRC	South African Law Reform Commission
SAPS	South African Communist Party
SGB	School Governing Body

STATS SA	Statistic South Africa
SOCA	Sexual Offences and Community Affairs Unit
SWEAT	Sex Workers Education and Advocacy Taskforce
UNESCO	United Nations Educational, Scientific and Cultural Organisation
WINSA	Women in Nuclear South
WIPHOLD	Women's Investment Portfolio Holdings
WOESA	Women in Oil and Energy of South Africa

Explanation of some terminology

Commission for Gender Equality - is an independent body established under Chapter Nine of the Constitution of South Africa.

Constitutional Court - is the highest court of South Africa on constitutional matters.

Expanded Public Works Programme - is one of government's array of programmes aimed at providing poverty and income relief through temporary work for the unemployed, to carry out socially useful activities.

Joint Monitoring Committee on the Improvement of the Quality of Life and Status of Women – is a national parliamentary committee which is part of the South African gender machinery and must monitor and evaluate progress with regard to the improvement of the quality of life and status of women in South Africa.

Judicial Service Commission – is an institution responsible for judicial recruitment, appointments and governance matters.

National Development Agency – is a section 3A statutory organisation which was established by the National Development Agency Act (Act no 108 of 1998) to eradicate poverty by granting funds to civil society organizations that implement development projects in poor communities, and strengthen institutional capacity of other civil society organisations.

National Student Financial Aid Scheme - a statutory body which provides study loans to academically able but financially needy students wishing to study at one of South Africa's public institutions of higher education.

Thuthuzela Centre - is South Africa's unique one-stop, integrated response to the burgeoning incidence of violent sexual acts against women and children and its intersect with HIV and AIDS.

Ukuthwala - is an Nguni cultural practice whereby an intending bridegroom, together with one or two friends, would waylay a desired bride in the neighbourhood of her own home, and forcibly take her to the young man's home, thereby pre-empting marriage negotiations.

Foreword

The Commission for Gender Equality presents its report on the Implementation of CEDAW during the period 1998-2008 to the citizens of the Republic of South Africa and the International community. The CGE is mandated by the Constitution of the Republic of South Africa and the CGE Act to monitor South Africa's compliance with conventions, covenants, protocols or charters relating to the object of the Commission.

Furthermore the principles relating to the status of the National Institutions (The Paris Principles) clearly states that institutions like the CGE should prepare reports on the national situation with regard to human rights in general, and on more specific matters. In light of the aforementioned, the CGE has prepared this report.

This is the first CEDAW report compiled by Commission for Gender Equality (CGE). It is an indication that CGE is maturing in exercising its monitoring role of the South African Government and private bodies.

The report highlights various achievements and challenges. It also acknowledges the comprehensive legislative policy framework in place. The most significant challenge highlighted in this report, is the ineffective implementation of policies and legislation which echoes throughout the report. Non- implementation of policies and legislation could be viewed as indirect way of perpetuating discrimination against women. This is an anomaly which calls for the national state machinery to improve on the implementation of legislation and policies so that South African women would be free from all forms discrimination and oppression.

I hope that this report will serve as a catalyst for change and will sensitise the South African Government, civil society organisations and other stakeholders to address the challenges that have been identified. It is our hope that the report will stimulate government to function appropriately to deal with issues raised in the report.

I would like to thank all the contributors who have assisted in compiling this report.

By Mfanozelwe Shozi
Acting Chairperson

About the CGE

The Commission for Gender Equality (CGE) is an independent state institution established in terms of Chapter 9 of the Constitution of the Republic of South Africa. The CGE is charged with a broad mandate to promote respect for gender equality and the protection, development and attainment of gender equality in South Africa. Part of its mandate, in terms of section 11 of the CGE Act, is to monitor state compliance with international conventions, covenants and charters acceded to or ratified by the Republic related to the object of the Commission, that is, that impact directly or indirectly on gender equality. These instruments include amongst others the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The CGE is further required to prepare and submit reports to parliament pertaining to compliance with any such conventions, covenants, protocols or charters.

It is therefore within the CGE mandate to monitor South Africa's compliance with and implementation of the provisions of CEDAW, as well as concluding comments of the CEDAW Committee on country reports, in order to assess the attainment of substantive gender equality between men and women. Despite the fact that South Africa has a credible and progressive legislative and policy framework that seeks to implement obligations imposed by CEDAW and the Constitution, the lived experiences of the majority of women have not yet sufficiently changed.

Executive Summary

Since ratification of CEDAW in 1995, South Africa submitted its first country report in 1998, covering the period 1994-1997. In 2001 and 2005 respectively, South Africa did not submit its report to the Committee. As such, the report that South Africa submitted in 2009, covers the period 1998-2008.

The CGE Report will focus on the shortcomings of the South African Government report of 2008, and will take into consideration CEDAW concluding remarks and recommendations made on South Africa's previous reports. The CGE Report will focus on critical areas not highlighted or expanded upon in the SA Country Report by systematically covering all the articles to identify the outstanding issues in accordance with the set reporting guidelines.

The following observations were made while analysing the South African Country Report of 2008:

- South Africa's Country Report consists of 172 pages, far exceeding the prescribed page limitation of 70 pages as required for periodic reports set by the aforementioned Reporting Guidelines of 2003. This was largely occasioned by a lot of unnecessary repetition, and the inclusion of superfluous information. For example, South Africa's Periodic Report made reference to Constitutional provisions of Act 108 of 1996, and in particular, the founding provisions and Section 9, despite the fact that the initial country report also made reference to similar provisions. It was therefore not necessary to reiterate those provisions unless there were new developments or amendments after 1998 which were enacted or adopted. Long repetitive reference to the Constitutional provisions should have been avoided by the then Office on the Status of Women;
- The SA Country Report fails to address the concerns and recommendations raised by the Committee in its previous concluding comments in the very beginning of its report;
- The Report neglects to include statistical data disaggregated by sex as well as by ethnicity, age, and by urban and rural areas, to make it easier to assess over time to evaluate progress made;
- Furthermore, most of the General Recommendations (GR) of the Convention were not factored into the Report, more importantly GR 21 on equality in marriage and family relations; GR 23 on women in political and public life; GR 24 on women and health; and lastly GR 25 on temporary special measures. These General Recommendations are critical in understanding, clarifying and interpreting the articles attached to them;
- Article 18.2 of the Convention makes provision for factors and circumstances affecting the scope of meeting obligations under the Convention. The Report fails to explain the nature of and reasons for encountering such factors and what action, if any was taken to intervene in those circumstances, for example, the impact of the Recognition of Customary Marriages Act on women, which affects the enjoyment of their rights and freedoms

- The Report fails to address the 12 areas of concern expressed in the Beijing Platform of Action pertaining to its implementation and action taken;
- Information on certain articles that were previously reported on is repeated in this Report. For example, Article 16 (1) (e): Reproductive Freedom; and Article 16 (1) (f): Guardianship and Related Rights;
- The Report mentions numerous laws and policies as an area of achievement, yet no monitoring and evaluation (M&E) function is presented to enable an assessment of the effectiveness of these laws and policies in practise, and whether they have benefited women;
- In this Report no reference is made to the role played by civil society organisations during the report compilation process, as is required by the Working Ways of the Committee. The focus of the Office on the Status of Women was on government departments only.
- The Report neglects to include a list of women's NGOs and civil society organisations which have benefited from funding through the National Development Agency and National Lottery, and the percentage of women benefiting from such funding as opposed to men.
- The Report fails to identify the progress made in terms of implementing the areas of concern raised by the Committee in its concluding comments. Furthermore, the Report fails to make reference to the general recommendations made by the Committee from time to time in order to give effect to such issues which were not covered by the original version of the Convention.

The aforementioned concerns are but a few of the issues the CGE Report attempts to expose. It should further be asked why South Africa failed to timeously submit its periodic reports for 2001 and 2005 to the Committee. Through its Report, the CGE seeks to provide a better sense of what gaps exist within the SA Country Report and which articles require further probing by the Committee when South Africa presents this report in January 2011.

Part 1:

1. Background to CGE Report

South Africa signed CEDAW on 29th January 1993 and ratified it without reservations in December 1995. The Optional Protocol to CEDAW was ratified on 18th October 2005. The purpose of this report therefore is to evaluate whether the laws and policies adopted by the state translate into actions that effectively promote the rights of women, and whether there are sufficient programmes in place to advance the status of women. The report further indicates how some of the concerns raised by the CEDAW Committee were addressed, and whether recommendations made by the Committee during the last reporting session were implemented.

2. Report Objectives

The main objective of this report is to provide additional information to the CEDAW Committee to enable the Committee to have a better informed understanding of how South Africa is implementing its obligations in terms of the Convention.

The specific objectives of the CGE report are:

- To provide additional information indicating the implementation of the recommendations of the CEDAW Committee at the last reporting session (1998).
- To assess the South African government's compliance with and implementation of CEDAW.
- To highlight some of the shortcomings of the SA government Report which will be presented before the CEDAW Committee in January 2011.

The CGE report employs a critical approach of investigating the challenges faced by the country in achieving gender equality and eliminating all forms discrimination against women, to establish whether these problems are occasioned by inadequate policy or legislation, or the strategic approach and implementation thereof.

Part 2: Concluding Comments of the CEDAW Committee in 1998

This part of the report addresses the concerns that were raised by the CEDAW Committee after South Africa presented its first country report in 1998

The principal areas of concern are addressed according to the numbering that appears on the concluding comments of the CEDAW Committee when it considered the initial Report of SA in 1998 (CEDAW/C/ZAF/1) at its 387th, 388th and 393rd Meetings on 24 & 29 June 1998.

115: Conflicts between the Constitution of South Africa and Religious and Customary Laws

Although the Constitution does not clearly define an act of discrimination in accordance with the definition of the Convention, it does in fact make provision for a guarantee of the right to equality, the grounds for discrimination, and protection against unfair discrimination on the listed grounds enumerated in section 9 (3) of the Constitution, both by the state and private persons.

Again, the Constitution has been interpreted and applied creatively by our courts in such a manner that reinforces the right to equality, which to a large extent meets the definition of discrimination in terms of article 1 of the Convention. For example, Section 39 (3) states that the Bill of Rights does not deny the existence of any other rights or freedoms recognised in law or conferred by customary law, as long as they are consistent with the Bill of Rights. This is of particular significance for the rights of vulnerable people, such as women and children. In the absence of a guarantee that the rights in the Bill of Rights takes precedent over custom, traditional practices harmful to women and children would not be deemed unlawful.

The issue of these laws' conflicting with the provisions of the Constitution was highlighted in *Shilubana & Others v Nwamitwa*¹. The Valoyi traditional community argued that they intended bringing an important aspect of their customs and traditions in line with the values and rights of the Constitution. Several provisions of the Constitution require the application of the common law and customary law, as well as the practice of culture or religion, to comply with the Constitution.

116. Adoption of a Definition for Discrimination Negative Aspects

To this end, Government has not passed legislation that defines discrimination which reflects the definition contained in article 1 of the Convention on the Elimination of All forms of Discrimination against Women, which can be easily applied by the Courts as recommended by the CEDAW Committee. Instead the Constitution, the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000, the Labour Relations Act of 1995, and the Employment Equity Act of 1998 make provision for grounds of discrimination which amongst others include sex and gender, as prohibited grounds of discrimination.

¹ (CCT/03/07) BCLR 914, 2009, Volume (2) SA, Pg 66, (CC)

Positive Aspects

Despite the fact that the Government has not passed legislation in which discrimination is defined in line with article 1 of the Convention on All Forms of Discrimination against Women, the Constitutional Court has developed progressive jurisprudence on the definition of discrimination, in particular when it applies the law to complaints of discrimination. Amongst others, the case of *Harksen V Lane No and Others*² clearly defines the stages of interpreting an act of unfair discrimination. In this case the Constitutional Court defined discrimination as follows:

- a) *Does the provision differentiate between people or categories of people? If so, does the discrimination bear a rational connection to a legitimate governmental purpose? If it does not then there is a violation of Section 8 (1).*
- b) *Even if it does bear a rational connection, it might nevertheless amount to discrimination.*
- c) *Does the differentiation amount to unfair discrimination? This requires a two stage analysis:*

B (i) Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is a discrimination will depend upon whether, objectively, the grounds will be based on attributes and characteristics which have the potential to impair the fundamental dignity of persons as human beings or to affect them adversely in a comparably serious manner.

B (ii) If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of discrimination on the complainant and others in his or her situation. If at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).

- d) *If discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitation clause (Section 33 of the Interim Constitution).*

The shortcoming of this analysis is that although it has been developed by the Constitutional Court to interpret a violation of a right to equality generally, the analysis does not define discrimination, but only explains what constitutes unfair or fair discrimination.

117: De Facto implementation of legal measures and policies, have yet to be achieved.

Negative Aspects

In the case of the Recognition of Customary Marriages Act³ the notable concern in implementing the provisions contained therein stems from the difficulty in comprehensively

² (CCT9/97) 1997 ZACC,12,1997 (11) BCLR 1489, 1998 (1) SA 300

³ Act 120 of 1998

proving that the customary union was concluded, particularly in situations where the marriage was not registered at the Department of Home Affairs. Implementing the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act⁴ (PEPUDA) has also proven problematic as the dedicated Equality Court structures created under the Act are underutilized due to lack of promotion and awareness-raising around its purpose and functions.

118: Addressing the issue of unequal inheritance rights, land rights and polygamy

Negative Aspects

Presently, Government still continues to recognise customary and religious laws despite the fact that the adverse effects of these laws impact on the lives of women disproportionately to their male counterparts when it comes to inheritance and property rights of women and women's rights in family relations in practice. Although the laws provide for the protection of the rights of women, there are still challenges, particularly relating to the enforcement of these rights by women. Polygamy is still permissible in terms of our law despite intense lobbying by various groups who are opposed to this practise. The Government has done very little in terms of ensuring that there is an adoption of a Family Code in conformity with the Convention in terms of which unequal inheritance rights, land rights, and polygamy are addressed, with the aim of abolishing them.

Positive Aspects

Although the Government of South Africa has either not adopted legislation, or taken adequate steps to ensure its effective implementation in order to guarantee women's *de jure* and *de facto* right to equality, the Constitutional Court has developed progressive jurisprudence in terms of which numerous rights of women have been effectively enforced by the Courts. Leading cases here include Moseneke and Others vs Master of the High Court⁵, Fatima Gabie Hassam vs Hermanus Jacobs No and Others⁶, Elisabeth Gumede vs President of the Republic of South Africa and Others⁷, which highlight the issue of enforcement of these rights versus discriminatory religious and customary laws and practises. Summaries of these cases are attached to this report (**Find summarises of these cases in annexure A**).

⁴ Act 4 of 2000

⁵ (CCT /51/00) (2001) Volume (2) BCLR 103 SA Pg 18

⁶ (CCT /83/08) (2009) ZACC 19

⁷ (CCT/50/08) (2008) ZACC 23

119 & 120: Insufficient Financial and Human Resources

1. National Machinery

Negative Aspects

The National Gender Machinery (NGM) is still under-funded by government and this hinders the progression of gender mainstreaming not only in the public service, but also society in general. The Commission for Gender Equality (CGE) is an independent body established under Chapter Nine of the Constitution of the country, and is charged with the responsibility of ensuring the promotion, development and attainment of gender equality in South Africa. Critically the CGE receives minimal funding to perform its functions and this hampers progress in terms of monitoring the mainstreaming of gender equality in the country.

Since its inception, the CGE has only received annual inflationary adjustments. Furthermore, the CGE has been operating without adequate human resource capacity for extended periods of time. Coupled with a high turn-over of staff, this ultimately contributed to a lack of performance in meeting its mandate effectively. Furthermore, many of the government departments do not have designated gender focal points/persons employed to implement gender mainstreaming interventions and women's empowerment programmes within their respective departments.

a) Income & Expenditure Trends for CGE

The CGE receives funding mainly from government, and has been allocated an amount of R 48 634 000 (USD 6.448 mil) in 2008/2009, compared to the R39 745 000 (USD 5.269 mil) allocated in 2007/2008. The graph below reflects the CGE's average budget growth over five Medium Term Expenditure Framework (MTEF) periods. The growth has not been adequate for the CGE to actually implement an effective Programme of Action. **See below Table 1.**

Tabl: CGE Budgetary allocation from 2006- 2010/11⁸

Year	2006/2007	2007/2008	2008/2009	2009/2010	2010/2011
Budget allocated Rand	R37 757 mil	R39 745 mil	R44 193 mil	R48 634 mil	R51 512 mil
Budget allocated Dollar exchange	USD 5.006 mil	USD 5.269 mil	USD 5.859 mil	USD 6.448 mil	USD 6.830 mil
Growth per year	5.90%	5.90%	5.90%	5.90%	5.90%

The CGE has absorbed a number of cost pressures in the past two years that include inflationary demands on operational budgets, higher than funded multi-term wage agreement and efficiency gains reduction in baseline allocation. Over the current MTEF cycle, growth in operational budgets is contained whilst increasing employment numbers and reducing vacancy rates.

⁸ Commission for Gender Equality Annual Report (2008)

To date gender budgeting is not taken seriously. The Minister of Finance has failed to incorporate measures to ensure that government allocates sufficient resources to and departments submit gender sensitive budgets for gender mainstreaming initiatives. Likewise, insufficient funds are allocated to the NGM, in order to strengthen their monitoring functions aimed at achieving gender equality and women's empowerment in South Africa. The table below demonstrates the pattern of increased funding of the CGE since its inception as from 1999 to 31 March 2006 (CGE 2005-2006 Annual Report). See below

Table 2: CGE Budgetary allocation from 1999 - 2006

	1999	2000	2001	2002	2003	2004	2005	2006
Treasury Allocation	R8 m USD 1.060.7m	R10.7m USD 1 mil	R12.2m USD 1 mil	R13.05m USD 1 mil	R14.9m USD 1 mil	R17.3m USD 2 mil	R24m USD 3 mil	R37.7m USD 4.998.6
Donor Fund	R0.62m USD 82.2	R1.2m USD 159.108	R0.25m USD 33.147.0	R025m USD 33.14	R1.5m USD 198.886	R1.7m USD 225.404	R2m USD 265.18	R0.5m USD 66.295.0
Annual Bud	R20m USD 2 mil	R22m USD 2 mil	R25m USD 3 mil	R30m USD 3 mil	R34m USD 4.5 mil	R39m USD 5.1 mil	R44m USD 5 mil	R39.5m USD 5.237.3
Shortfall	R11.3m USD 1 mil	R10m USD 1 mil	R12m USD 1.5 mil	R16m USD 2.12 mil	R18.5m USD 2.452.93	R20.1m USD 2.665.07	R18m USD 2.386.6 mil	R1.3m USD 172.368

b) Human Resource Management (2005-2006 Annual Report)

The total staff complement from 1999 to 31 March 2006 can be illustrated as follows:

Table 3:

	1999	2000	2001	2002	2003	2004	2005	2006
Male	6	10	4	10	7	11	12	17
Female	36	44	52	49	40	47	54	48
Total	42	54	56	59	47	58	57	65

2. Machinery within government.

The Public Service Commission of South Africa's Report published in 2007 revealed that there is a lack of a clearly defined institutional framework necessary to facilitate the

attainment of the vision of gender mainstreaming. The Public Service report recommends that roles and responsibilities within the National Gender Machinery need to be clarified, then implemented and institutions held accountable for their success or lack thereof, within the Public Service. The national structures established to promote women's empowerment and gender equality (specifically the OSW and the CGE) will need to be strengthened to be able to provide the support and services required by government departments in implementing and monitoring gender mainstreaming.

The report goes on to state that most GFPs do not understand their roles or know how to implement their responsibilities. Whether the GFP is dedicated to gender mainstreaming or plays a multi-faceted role as is presently the case remains a contested issue, as most GFPs in government departments have gender as an additional responsibility to their main duties. As a result, they are not able to sufficiently focus on issues of gender equality. Secondly, most of these GFPs are appointed at a low level where they are not able to influence policy development and as such are not in a position to ensure that gender mainstreaming is implemented. The report also states that the role and competence of GFPs need to be reviewed and assessed. There is hope that the Women's Ministry established in 2009 will ensure that GFPs play a more prominent role.

Positive Aspects

Presently, a new Ministry, called the Ministry of Women, Children and Persons with Disabilities, has been established and it is hoped that this ministry will improve the coordination of the gender machinery, gender mainstreaming, and the promotion of the rights of women.

Despite the fact that the CGE budget has not been significantly increased to cover for shortfall areas, the annual inflationary adjustments by the National Treasury, as well as supplementary donor funding, have assisted the organisation implement its programmes geared towards the promotion, protection and development of gender equality in South Africa.

121, 122, 123 & 124: High Level of Violence against Women

Negative Aspects

SA is currently cited as one of the most violent countries in the world. Studies indicate that an estimated 60% of all SA women experience some form of abuse within relationships, and that one woman is raped every 35 seconds. This is an estimate according to research conducted by the Centre for Applied Legal Studies.

Although a significant legal and institutional framework has been put in place to prevent and combat acts of violence and serious crime, and address violence against women, high levels of violence against women continue to be perpetuated in our society due to inadequate implementation of these interventions. The South African Police Services (SAPS) is reported to have received 43 330 cases of domestic violence during the period July – December 2006, whilst for the period January – June 2007, they received 45 454 cases⁹.

⁹ African Gender and Development Index: South African Report Commissioned by Centre for Applied

Positive Aspects

In compliance with CEDAW and the Beijing Platform for Action, our Constitution has been crucial in terms of providing for the rights of women and girl-children. Legislation like the Sexual Offences Act makes it an offence to have sexual intercourse with a girl under 16 years of age.

South Africa has launched a Victim Empowerment Business Plan, which includes policies such as the Victim Empowerment Charter, Victim Policy Framework and a policy for Compensation for Victims of Crime.

In order to integrate gender equality and fight violence against women in the prosecution of crime, the Sexual Offences and Community Affairs (SOCA) Unit was established within the National Prosecuting Authority (NPA), mainly to focus on Sexual Offences, domestic violence, human trafficking, enforcement of child maintenance, managing of child offenders and other issues involving victimization of women and children. This unit has succeeded in establishing Thuthuzela Care Centres¹⁰ and Sexual Offences Courts. The Thuthuzela Care Centres are responsible for providing victims of sexual abuse with access to police, counselling, doctors, court preparation and prosecution. The NPA launched an initiative known as the Indabezitha Programme, which entailed the training of traditional leaders on the provisions of the Domestic Violence Act. (Kindly refer to our input on General Recommendations 12 & 19 for a complete explanation on domestic violence).

125 & 126: Trafficking In Women

Negative Aspects

The study conducted and published by Molo Songololo¹¹ on Trafficking of Children for purposes of Sexual Exploitation (2008) states that in 2000 approximately 30 000 children were trafficked for prostitution. There is no gender breakdown for this statistic, and there are no figures as to trafficking for organ harvesting.

The International Organisation for Migration (IOM) in a 2003 report on trafficking for purposes of sexual exploitation in South and Southern Africa estimated that at least 1 000 women were trafficked into South Africa. The policy paper on Human Trafficking in South Africa, developed by UNESCO in 2007, found that while trafficking in persons for sexual exploitation and forced labour constitutes the vast majority of incidents, there is an increase in the trafficking for human body parts, or organ harvesting.

Positive Aspects

In 2000 South Africa signed the Protocol to Prevent, Suppress and Punish Trafficking in Women and Children, and has also ratified the Protocol. In so doing South Africa committed itself to criminalising the act of trafficking and developing legislation to combat it.

Legal Studies (2006)

¹⁰ See explanation of Thuthuzela on page 6

¹¹ An NGO based in the Western Cape Province of South Africa who specialises in Child Rights

The South African Law Reform Commission (SALRC) has embarked on research into Trafficking in Persons and a Bill on Preventing and Combating Trafficking in Persons was drafted. According to SALRC, poverty and the lack of economic opportunities, war and political instability are some of the main causes/push factors of trafficking in persons. Persons are trafficked for sexual exploitation, forced labour or slavery, forced marriages, adoptions, or removal of organs or parts of the body.

The Criminal Law (Sexual Offences and Related Matters) and the Children's Act contain transitional provisions relating to trafficking in persons. The Sexual Offences Act criminalises the act of trafficking for sexual exploitation only, while the Children's Act addresses more comprehensively the trafficking of children. It is expected that the Bill on Preventing and Combating Trafficking in Persons will soon go through parliament.

127 and 128: Political Field and Appointment to decision-making posts

Negative Aspects

South Africa does not have national legislation making provision for equal representation of men and women in decision-making positions. The Electoral Act only makes it peremptory for political parties to ensure equal representation of men and women in their election lists to the national and provincial legislatures. Presently, the representation of women in party lists depends largely on optional measures adopted by the political parties, and in the case of the public service, by various discretionary policy prescripts by Cabinet. In the absence of a legislative obligation on political parties and government to pursue equal representation of women into decision-making positions, the achievement of *de jure* and *de facto* equality of men and women will be difficult to attain.

The Public Service Act also does not make it mandatory for government departments to ensure equal representation of men and women at senior management levels. The Public Service report indicates that in general the empowerment and promotion of women is not addressed in any significant or meaningful way in departments. Apart from general policies and practices that affect all staff, there are no specific programmes that recognise women as a separate interest group with specific interests and needs. This includes issues related to recruitment, promotion, training and addressing the practical needs of women.

Positive Aspects

The Electoral Act states that every registered party and candidate must facilitate the full participation of women in political activities and take reasonable steps to ensure that women are free to engage in political activities. The ruling party in 2004 adopted a policy in terms of which 50% of its candidates on party electoral lists will be women. Although this target has not yet been achieved, it will continue to have a positive impact on the number of women in parliament who wish to participate in this arena. In 2007, the ruling party also took a decision to ensure gender parity in its decision-making structures and with respect to representatives in national parliament and provincial legislatures.

129 and 130: Women Representation in the Judiciary

Negative Aspects

According to the report of the Women Judges Conference¹² transformation of the higher courts judiciary has emerged as one of the most disappointing areas with regard to achieving gender-balanced representation at all levels of decision-making and power-sharing between men and women in South Africa. Women’s representation at that time stood at about 11.6% (25/214).

The Toward a 15 Year Review¹³

Table 4:

Total Number of Employees In Occupation Categories										
Occupational category	Male				Female				Total	% Women
	Africa	Col	Indian	White	African	Col	Indian	White		
Judges	62	12	10	79	16	4	8	14	205	20.4%
Legislators, Senior Officials and managers	49	8	7	46	25	7	7	11	160	31.2%

Source: Department of Justice and Constitutional Development, Annual Report 2008/2009, pg. 220

As at 2009 statistics of the Department of Justice & Constitutional Development show that out of 205 judges in South Africa, of which 112 are black and 93 white, only 42 are women. Sixteen of these are black, four are coloured, eight are Indian and 14 are white.

While racial transformation has made significant progress within the judiciary, it remains a male-dominated arena and ongoing gender transformation is required. It should be noted, however, that South Africa has seen the appointment of one of its women judges, Judge Navi Pillay, to the International Criminal Court.

To this end, South Africa has not made significant progress in ensuring that women are sufficiently represented in the judiciary. Training programmes for judges and recruitment for posts do not seriously address the need for women empowerment and equitable representation. Presently, the country has only one female Judge President throughout all its Divisions of the High Court.

Positive Aspects

In 2003 the Department of Justice & Constitutional Development held a Women Judges’ Conference as a follow-up to a 2001 Women Judges’ Workshop, with a view to bringing together women judges from all over the country. The idea was to present women judges with a forum to network amongst themselves, share experiences, provide support to each other and explore avenues for organising themselves into some entity that would enable their voices to be heard in decision-making processes within the judiciary, particularly those relating to the transformation of the judiciary.

The Minister of Justice undertook to prioritise gender representation in future appointments of judges, as a key component to the transformation of the judiciary, noting

¹²Department of Justice and Constitutional Development (2003) Women in the Judiciary Making a Difference, A Women Judges Conference Report p. 10-11

¹³ Gender Mapping Report for South Africa *Current status and gaps* (2010) UNDP, Pretoria

that this move will seek to counter the appointment of male candidates, and that of white applicants in particular.

131 and 132: High Level of Unemployment of Women and their Protection from Exploitation

South Africa has progressed in terms of introduction provisions addressing the rights of domestic workers. According to the Department of Labour¹⁴, the following achievements have been implemented:

- Sectoral determination 7: Domestic workers

Sectoral Determination 7 was made in terms of the Basic Conditions of Employment Act 75 of 1997. This determines minimum wages, working hours, number of leave days and termination rules for domestic workers.

- Acts and Amendments

The Basic Conditions of Employment Act applies to all employers and workers, and regulates leave, working hours, employment contracts, deductions, pay slips, and termination. According to the Unemployment Insurance Fund (UIF) Act 63 of 2001, all employees working for more than 24 hours a month should be registered for UIF. The application of this legislation has been extended to include domestic workers.

Positive Aspects

The Department of Labour and Department of Public Works and Social Development have collaborated in initiating programmes to create more employment opportunities to alleviate the plight of those affected by poverty within South Africa. Numerous projects have been implemented through the Extended Public Works programmes (EPWP) to accommodate, train and empower women. As far as education is concerned, statistics reveal that the majority of illiterate women reside in rural communities. The Department of Education introduced programmes such as Adult Basic Education and Training (ABET) as well as the Outcome Based Education (OBE). The report from the Department of Minerals and Energy reveals that although there are challenges facing women in the mining industry, there is a notable achievement in that a mining company owned by two women empowerment groups has recently been established.

Legislative measures are being put in place to combat the exploitation of women by virtue of their being trafficked for cheap labour and sex work. (The graph under Annexure B indicates the population of working females age 15 – 65 years by labour market status according to the official definition of unemployment, 2001-2006 (thousands). Annexure C indicates the graph of Population of working males)

133 and 134: Uneven distribution of health care services and research into female genital mutilation

Negative Aspects

¹⁴ Department of Labour website: www.labour.gov.za/legislation/sectoral-determination-7-domestic-workers Accessed 08.07.2010

According to the South African Human Rights Commission (SAHRC) *Public Inquiry Report on Access to Health Care Services (2007)*, access to health care services, especially for the poor, is severely constrained by expensive, inadequate or non-existent transport, by serious shortages with regard to emergency transport, and by long waiting times at clinics and other health care service providers. Such challenges continue to limit women's access to adequate health care service, especially "poor women in rural areas".

Staff attitudes have been widely identified as a problem for the South African health care system. Research into access to safe motherhood found that at least 37% of maternal deaths were avoidable. A variety of factors contributed to the deaths, including the poor treatment of women, and an extremely demotivated corps of midwives and doctors¹⁵.

To date South Africa has not commissioned any evidence-based study into the extent of female genital mutilation (FGM) prevalent in the country, and no clear definition for FGM has been forthcoming. It is further unclear from the report what role government is playing in the prevention of the practice of virginity testing. The report serves only to confirm that this harmful and discriminatory practice is prevalent in South Africa, but it falls short in disclosing what is being done to protect women and girls, especially since the interests of the girl-child should be of paramount importance.

An area of particular concern within the health-care profession, relates to the poor retention of qualified and experienced doctors and nurses within South Africa. For the past 5 years a trend has emerged whereby experienced medical practitioners and nursing staff have opted to emigrate from the country for reasons ranging from uncompetitive remuneration packages to inadequate infrastructure within our state hospitals, such as staffing and resources. This has led to a shortage of valuable skills within the medical profession which has a direct impact on the quality of health care services being delivered to patients, hindering the right to accessing adequate and genuine health-care services.

Positive Aspects

The South Africa Constitution, Act 108 of 1996, specifically recognises the right of access to health-care in section 27: health care, food, water and social security,

i) "Everyone has the right to have access to –

a) health care services, including reproductive health care;

b) sufficient food and water; and

c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.

ii) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

iii) No one may be refused emergency medical treatment."

Currently, approximately 92% of women in South Africa are able to access antenatal and delivery care.¹⁶ Health care is free for all pregnant women and a national guideline and

¹⁵ SAHRC (2009): Public Inquiry: Access to Health Care Services

¹⁶ Ibid

protocol have been developed in this regard. Government spending on health care has improved significantly in nominal terms. At current prices, spending increased from R17.4 billion (USD 2.307.080 billion) in 1995/96 to R48 123 billion (USD 6.380.668 billion) in 2005/06. The total government expenditure for the fiscal year 2007/08 amounted to R60 586 billion (USD 8.033.147 billion), (National Treasury Expenditure Framework, 2009).

135 and 136: Special Programmes for Rural Women including Education and Employment

Negative Aspects

According to Stats-SA, South Africa has unemployment above 25% women constitute a large percentage of this figure. Access to education is closely linked to employment and poverty alleviation. In 2006, 13,9% young girls (13-19 years) were not in school due to pregnancy and 38,6% persons aged 7-24 years were not attending educational institutions because they had no money for tuition fees.¹⁷ (General Household Survey, 2006, Stats-SA).

South Africa has a higher literacy rate among men (87%) compared to women (85%). In 2005/06, 92% of those benefiting from land reform were men, as opposed to 8% women. In 2009/10, men comprised 90% of this figure and women 10%. These statistics clearly indicate the challenges faced by woman in gaining equal access to economic resources.

Positive Aspects

There has been an increase in the number of Social Grant beneficiaries since 1995 (2.6 million beneficiaries) compared to 2007 (more than 12 million). Most of the beneficiaries are women and children in rural areas. Despite such a positive move by government, there is no clear government exit strategy from social grants to prevent the culture of dependency.

¹⁷ Statistics South Africa (2006) General Household Survey

Part 3: Comments on South African Government's CEDAW Report 2008

Article 1: Definition of Discrimination against Women

Constitutional Provisions

Although the Constitution does not clearly define an act of discrimination in accordance with the definition outlined in the Convention, it does in fact make provision for a guarantee of the right to equality, grounds for discrimination and protection against unfair discrimination on the listed grounds enumerated in section 9 (3) of the Constitution, both by the state and private persons.

The Constitution has been interpreted and applied creatively by our courts in such a manner that reinforces the right to equality, which to a large extent meets the definition of discrimination in terms of article 1 of the Convention. For example, Section 39 (3) states that the Bill of Rights does not deny the existence of any other rights or freedoms recognised in law or conferred by customary law, as long as they are consistent with the Bill of Rights. This is of particular significance for the rights of vulnerable people, such as women and children. In the absence of a guarantee that the rights in the Bill of Rights take precedent over custom, traditional practices harmful to women and children would not be deemed unlawful.

Article 2: Obligation to Eliminate Discrimination

The Gender Challenges

The Gender Mapping Report for South Africa "Current Status and Gaps"¹⁸ notes that the constitutional mandate towards attaining gender equality is clear, and legislative reform has provided the building blocks for a gender equitable society. The government does, however, face major challenges in ensuring that constitutional, legislative and policy imperatives on gender equality and women's empowerment are translated into substantive improvements in the lives of women and girls. Key implementation issues facing government include:

- Proactively addressing the unintended consequences of progressive legislation, policy and regulation to ensure that progress on gender equality remains on track¹⁹.
- Ensuring that the regulatory frameworks that have been put in place are effectively implemented, enforced, monitored and evaluated, and budgeted for, especially the following components:
 - **Sexual Offences Act**
This Act is not fully implemented because it is still largely unknown and very little quality training on the law has taken place.

¹⁸ Gender Mapping Report for South Africa *Current status and gaps* (2010) UNDP, Pretoria

¹⁹ A case in point would be where the non-discrimination clause of the constitution allows lesbian women to openly declare their sexual orientation, but this right in turn exposes them to further stigmatisation and increased likelihood of violence.

○ **Domestic Violence Act**

The Act was never adequately budgeted for, and no consistent training of court and police officials has taken place, leading to inequality in service provision. The Parliamentary Portfolio Committee on Women, Children and Persons with Disabilities held public hearings on the implementation of the DVA in October 2009. The hearings noted the enormous challenges women face in exercising their rights contained in the law, and its failure to protect women from domestic violence. There is also a challenge in implementing the Act in lesbian, gay, bisexual and transgendered (LGBT) communities.

- The state has failed to align constitutional protection of religious and cultural practices with the secular rights held by women and girls under the Constitution and related legislation.
- There is an imperative to work with a broad range of community and interest groups to address social, religious and cultural beliefs, assumptions and practices that remain as barriers to women's empowerment and gender equality.

Article 3: Development and Advancement of Women

One of the challenges that South Africa is still grappling with is the ineffective implementation of the National Policy Framework for Women's Empowerment and Gender Equality. The National Gender Policy Framework was intended to bring about gender transformation in the country by placing "gender at the very centre of the transformation process within all structures, institutions, procedures, practice and programmes of government, its agencies and parastatals, civil society and the private sector"²⁰. However, this has not been fully accomplished, and the desired implementation of gender mainstreaming in all policy and programme formulation and budget allocation processes not attained.

Article 4: Acceleration of Equality between Men and Women

Recruitment practices in all departments are regulated by Public Services Regulations, and must be in line with employment equity legislation and affirmative action measures²¹. Recruitment of women is often merely equated with meeting employment equity targets. There is a perception that meeting employment equity targets can sometimes result in inexperienced women being appointed to posts, resulting in competent and experienced males losing out on these appointments.

The challenge facing the acceleration of equality is that for the most part gender mainstreaming is not included in departmental planning, monitoring and budgeting processes, apart from ensuring that employment equity targets are met. The Public Service report states that, for government to achieve gender equality, it must embark on a rigorous gender mainstreaming strategy. Individual departments will need to develop gender equality strategies in accordance with the particular needs and requirements of their

²⁰ Report of the Joint Monitoring Committee on Improvement of Quality of Life and Status of Women, (17 September 2003) <http://www.pmg.org.za/docs/2003/comreports/030923jcwomenreport.htm>
Accessed 08.07.2010

²¹ Public Service Commission Report on Gender Mainstreaming (2007)

departments. In addition, the government needs to develop strategic guidelines to inform gender mainstreaming in planning and implementation processes.

With respect to the planning and implementation of programmes for women's empowerment and gender equality at the departmental level, the costs involved will need to be incorporated into existing departmental budgets.

Article 5: Stereotypes & Sex Roles

Presently, women are still being discriminated against on grounds of religious and cultural beliefs and practises. The widowhood study conducted by the CGE during 2007 revealed that society has not moved from a fundamentally patriarchal system and women have not been emancipated from oppression with regard to their rights, such as inheritance. This is contrary to the right to equality which is enshrined in the Constitution of South Africa, and has impacted negatively on the lives of women as far as their rights to inheritance and dignity are concerned.

Although most women still experience discrimination in society, the Equality Act seeks to prohibit gender discrimination, and several landmark legal cases have served to outlaw the traditional practice of primogeniture, as reflected in the *Bhe*²² and *Shilubane*²³ cases.

Article 6: Exploitation of Women

While South Africa is a signatory to international instruments related to human trafficking, such as the UN Convention against Trans-national Organised Crime, and the Palermo Protocol, we have yet to promulgate legislation that effectively deals with trafficking in persons. Notwithstanding current efforts to combat and suppress trafficking, the South African Law Reform Commission has been slow in developing a draft Bill that would criminalize this form of exploitation and modern day slavery.

The South African report lacks statistics on human trafficking cases that have been successfully prosecuted to date. This can be attributed to the difficulty of obtaining statistics on trafficking due to the nature of this crime, and the use of common law to prosecute trafficking cases. As a result, suspects in such cases can only be charged on certain acts of trafficking such as kidnapping, abduction, child labour and child pornography or rape. Under the reporting period South Africa has not managed to successfully prosecute a single human trafficking case.

According to the annual US Department of State's 2007 Trafficking in Person Report, South Africa was placed on the Tier 2 Watch List for the fourth consecutive year for its failure to show an increased effort to address trafficking. The report argues that the South African government provided inadequate data on trafficking crimes investigated or prosecuted, and on resulting convictions or sentences. In addition, it did not provide information on its

²² *Bhe and Others v Magistrate, Khayelitsha; Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of SA and another* 2005(1)SA580(CC)

²³ *Tinyiko Lwandhlamuni Philia Nwamitwa Shulubana and Others v Sidney Nwamitwa* 2008 ZACC 9

efforts to protect victims of trafficking, and continued to deport and/or prosecute suspected foreign victims without providing appropriate protective services²⁴.

Exploitation and Prostitution of Women and Girl-Children

Some institutions in their submission to the South African Law Reform Commission proposed that sex work be decriminalised as "it fuels crime against sex workers, encourages police corruption, subverts the human rights values within the police force and violates the basic human rights of sex workers"²⁵.

The reality on the ground is that sex workers generally believe that people take advantage of them because they know the law is not in their favour. This is confirmed by one sex worker who says "for now, our rights and dignity are violated and sometimes by law enforcers themselves"²⁶. The fact that sex workers are abused by the same people who are supposed to protect them leaves them perpetually subjected to abuse with nowhere to go for protection.

Article 7: Political and Public Life

a) Public Service Representation

According to a study done by the *Public Service Commission of South Africa in 2007*, the proportion of women in senior management positions (director level and above) in the Public Service has increased significantly since 1994 and has exceeded the target of 30% that was set for the management echelon by April 2005. The average percentage of women in senior positions in national departments is 31.2%.

The concern raised in this report is that while 30% is used as the benchmark for departments to use as an indicator of successful gender transformation, when departments reach the 30% target they could assume that no further interventions are required to push for further transformation or equity. Target setting could therefore, create a barrier to the continued advancement of women, especially as gender mainstreaming in the South African Public Service is still seen as merely meeting numerical targets.

Some departments reflect higher numbers of women in senior positions in what was traditionally viewed as more male-dominated departments; examples include Departments of Public Works, Transport and Safety & Liaison. Similarly, departments that traditionally employed more women, such as Health and Education have fewer women in senior positions than would have been anticipated.

A lot still needs to be done to advance women in the public sector, especially at managerial level, with senior management positions²⁷ still dominated by males. Information provided

²⁴ The National Prosecuting Authority, Tsireledzani: Understanding the Dimensions of Human Trafficking in South Africa, P. ii, (March 2010).

²⁵ Peta Krost Maunder (July, 18 2009): Decriminalise prostitution to prevent abuse by police-ICD, The Weekender, P.1

²⁶ Times of Ladysmith, *Abused 'hookers' want protection from the law*, (10 July 2009) P.5

²⁷ Senior Managers include all personnel at salary levels 13 (Director) through to 16 (Director-General).

by the Department of Public Service and Administration reveals that in all racial groups men outnumber women in senior management in both national and provincial government spheres.

b) Political Representation

Since the adoption of South Africa's Constitution Act 108 of 1996, Parliament has not promulgated national legislation that would ensure equal representation of women and men in political party lists.

In this way, determining criteria for the selection of candidates for party list rests solely with political parties. In the case of appointments to national and provincial executive councils, the President and the provincial premier have the final say in selection of candidates. In the exercising of this power, the President, the premier and the political parties concerned, are not in any way obliged to consider equitable representation of women, but follow purely political considerations. Such discretion held by the premier, President or political party is not subject to judicial review in terms of the provisions of the Promotion of Administrative Justice Act 3 of 2000.

South Africa has come a long way in ensuring full participation of women in politics and public life. The majority of voters in South Africa are women and they account for almost 55% of registered voters.

For the 2004 elections women outnumbered men in all age categories in the voter registration figures, where they comprised 11.3 million, while men made 9.3 million of the total²⁸. South Africa also witnessed an increase in the number of female electoral candidates in Municipal Elections, which has increased from 28.5% in 2000 to 34.8% in 2006.

South Africa currently has two major opposition political parties that are led by women. These political parties are the Democratic Alliance and the Independent Democrats. As correctly captured in the country report, the number of women in cabinet positions has also increased during the reporting period. In 1999 South Africa's cabinet consists of 16 male and 12 female ministers. This took the total cabinet representation of women to 43%. **(The table in Annexure B illustrates the Female Ministers between 1999 – 2004, while the table in Annexure C illustrates the Female Ministers between 2004 – 2008)**

The elevation of women into decision-making positions is more evident at the level of parliament. According to an Independent Panel that assessed parliament, "in 1999 women made up 30% of Parliament and following the 2004 elections the figure increased to 32,8%"²⁹.

Parliament also established a Joint Monitoring Committee on the Improvement of the Quality of Life and Status of Women whose task, among others, is to monitor the government's implementation of the United Nations Convention on the Elimination of

²⁸ Independent Electoral Commission, Report on the 2004 National and Provincial Elections, P.10

²⁹ Preggs Govender et al (2008) Report of the Independent Panel Assessment of Parliament

all Forms of Discrimination against Women (CEDAW) and the Beijing Platform of Action (BPA)³⁰. Furthermore, Parliament also instituted a Multiparty Women’s Caucus.

While South Africa may claim some achievements in the advancement of women’s political and public lives, these achievements are, however, not without challenges.

Acknowledging the platform that the Women’s Parliaments convened by legislatures annually in August afford to many women in the country to participate in parliamentary processes, the reality is that most ordinary and rural women are not well informed about nor enjoy access to these processes. This is confirmed by the then Speaker of Parliament³¹, who said that it is “sad and depressing to see that people are still not aware that they can come to Parliament to participate in public hearings or to add their voices to the pieces of Legislation it passes”³².

(See Tables in Annexure C which indicate the gender disaggregated data on senior management positions in the public sector and judiciary and the Text box under Annexure D represents the Gender Status Index pertaining to political power).

Article 10: Education

Mainstreaming gender equality within the education system is a task located with the Department of Education. Research reveals that women remain in the minority in so far as their education level is concerned. Male students still dominate in the fields of science, maths and technology. Currently a low percentage of women are involved in the area of engineering, mining and construction. According to the Department of Science & Technology Report: “Facing the Facts, Women’s Participation in Science, Engineering & Technology” (SET), published 12 August 2009, it was revealed that while encouraging women to enrol in these studies, little progress had been made with demographic representation. The report further acknowledges that much still needs to be done to increase the participation of women in SET. In 2001 women represented more than half of all higher-education enrolments (53%) and graduates (58%). At universities, women were in the majority at the undergraduate and lower postgraduate levels, although they were not as well represented at upper postgraduate level (42% of enrolments and 43% of graduates). In terms of race, white women still constitute by far the greatest proportion of university doctoral full-time equivalent enrolments (66%) and graduates (75%).

The reasons contributing to the under-representation of women (particularly black women) in the SET sector include financial difficulties before and during tertiary studies, gender stereotyping, legacies of disadvantage in black communities, negative dynamics at workplaces, and the lack of attention to women’s specific needs.

³⁰ Ibid.

³² Parliament of the Republic of South Africa, (2007) Women’s Parliament Report, p.7

Between 1995 and 1999 there was a slight decline in the number of male student enrolments in the higher education sector. After 1999, male student enrolments increased steadily but started flattening off in 2004. Female student enrolments increased between 1995 and 1998 and dropped somewhat in 1999. Female enrolments have seen an increase between 2000 and 2004, but present a similar flattening in 2005. The table below provides a visual indication of the aforementioned trend.

Table 5:

	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
Female	252339	27019	28184	28401	27545	30809	342550	36341	385857	403462	40104
Male	295481	29489	28688	27652	26215	27547	294916	31173	331935	341022	33403

- **Gender disparities in adult literacy:** The General Household Survey (2006) revealed that 8.6% of men and 12.6% of women have no formal education;
- **To translate the increased educational levels of women into decent formal or self-employment:** According to the CEDAW Report 2008 the educational profiles of women had improved by 2007, indicating that the increase in the level of education among women however did not necessarily translate into increased job accessibility³³. Unemployment for women still remains high at 30% while for men it is 21.1%. The table below shows the educational levels between men and women as at March 2007.
- **Sexual Violence in South African Schools:** Sexual Violence in South African Schools has always been a serious concern. Human Rights Watch³⁴ found that sexual abuse and harassment of girls by both teachers and other students is widespread in South Africa. Girls who encountered sexual violence at school were raped in school toilets, in empty classrooms and hallways, and in hostels and dormitories. Some girls were also fondled, subjected to aggressive sexual advances, and verbally degraded at school. It was found that girls from all levels of society and among all ethnic groups are affected by sexual violence at school. According to Human Rights Watch, sexual violence and harassment in South African schools erect a discriminatory barrier for young women and girls seeking an education. As a result, the government's failure to protect girl children and respond effectively to violence violates not only their bodily integrity but also their right to education.

Human Rights Watch found that sexual violence has a profoundly destabilizing effect on the education of girl children. The rape survivors reported that their school performance suffered. Social workers and therapists working with girls who were raped by teachers or classmates reported, among other problems, that the girls were failing their higher education matriculation exams and losing interest in other outside activities, such as sports. Parents told Human Rights Watch that their children had become depressed, disruptive, and anxious. Teachers expressed

³³ Statistics South Africa, (2007) Labour Force Survey.

³⁴ Scared at School- Sexual Violence against Girls in South Africa; A report by Human Rights Watch (2001)

concern that girls they knew to have experienced sexual violence at school or at the hands of their teachers or classmates were not performing up to full potential.

Table 6:

Education Levels according to sex as at March 2007		
Highest educational level	Male	Female
Grade 12/Std 10	18.1%	33.7%
Diploma	10.7%	17.2%
Degree	4.2%	8.4%

Article 11: Employment (See detailed Graphs on Employment under Annexure E)

Despite significant employment equity gains in South Africa as a result of the introduction of labour legislation and other policies that have responded to historical race and gender inequalities, the patterns of gender inequality continue to be reflected in labour force data. The most recent *Quarterly Labour Force Survey* (October 2009) indicates the continuing disparities in employment³⁵, and highlights broad trends that reflect the gendered nature of employment in South Africa:

- A high percentage of women undertake low-skilled, low wage employment;
- Women are the primary providers of domestic labour and home-based care;
- Women remain consistently under-represented in high-skills, high wage employment;
- Women remain significantly under-represented in senior management and leadership positions.

Taken as a whole across all sectors there are positive trends in the socio-economic empowerment of women in South Africa, although it should be noted that the base is historically low. Transformation processes tend, however, to be uneven. The *2009 Development Indicators* produced by the Presidency indicate that **the rate of growth in the percentage of women in top and senior management of companies and organisations is increasing**, but this still lags behind the rate of increase overall in the percentage of top and senior managers who are black.

Table 7:

	2000	2001	2002	2003	2004	2005	2006	2007	2008
	12.7	25.1	18.4	23.8	21.1	27.2	22.2	28.8	24.2
	18.5	19.1	22.2	27.3	25.7	27.5	26.9	32.4	32.5
	2000	2001	2002	2003	2004	2005	2006	2007	2008
	12.4	11.9	13.8	14.1	15.1	16.5	21.6	17.8	17.8
	21.0	17.7	21.6	22.3	23.7	23.6	27.4	24.9	27.8

Source: Development Indicators 2009, The Presidency, pg. 19

³⁵ Statistics South Africa, (2009) Quarterly Labour Force Survey

The Commission on Employment Equity Report (2008/09) provides statistics relating to transformation in the labour market. The report reveals that black female employees are still in the lowest percentages at all levels in the workplace compared to their white female counterparts. In the top management and senior positions, black females constitute 5.5% as compared to 15.2% of their white female counterparts. *The Labour Force Survey conducted in 2007 (statistics)* provides an overview on progress made with regard to women in the labour force. Although the survey indicates an improvement in their level of education, this does not immediately translate into increased job accessibility and opportunities. Unemployment rate for women still remains at 30% as compared to 21.1% of males.

With regard to disability, blacks represented 33.3 % of employees recruited in the Top Management level and whites represented 66.7%. Of this percentage, 33% represent female employees who are black and 0% for white females **(See detailed table on Annexure F which highlights the relevant data)**.

Wage discrimination has been one of the consistent forms of discrimination that women experience in the workplace. There is still inequality with regard to wages between black females as compared to white females, and the manner in which this is determined is difficult to address.

Article 12: Health

- Although “reproductive laws and policies in South Africa are among the most progressive in the world” in terms of the recognition that they give to human rights, including sexual and reproductive health rights³⁶, the maternal death rate is increasing is not sufficient.

It was reported that the number of “backstreet abortions” are on the increase. Between 2005 to 2007, South Africa saw an increase from 4.7 to 4.9% in maternal deaths related to unsafe abortion.³⁷ The perpetrators are often not prosecuted. The Medical Research Council (MRC) is currently conducting research on the implementation of the termination of pregnancy policy.

As a whole, some of the civil society respondents felt that there was no empowerment framework on sexual and reproductive health rights and that “human rights stop at the door of sexual and reproductive health”. The following challenges were mentioned with the regards to the accessibility of termination of pregnancy services:

- The termination of pregnancy service is not sufficiently advertised.
- Some health centres that should conduct termination of pregnancies do not.
- There are not enough campaigns promoting early pregnancy confirmation and pregnancy tests are not sufficiently advertised.

³⁶ Cooper et al, (2004), P. 70 ‘ Ten Years of Democracy in South Africa: Documenting Transformation in Reproductive Health Policy and Status’ *Reproductive Health Matters* 2004;12(24):70–85, quoted in SANAC, 2010

³⁷ Trueman, K. Director, Ipas South Africa, as quoted in SANAC, 2010

Between 2007 and 2009 an estimated 5.5 to 5.7 million people were living with HIV and Aids in South Africa³⁸. Almost one-in-three women aged 25-29, and over a quarter of men aged 30-34, are living with HIV³⁹. There were an estimated 280 000 children under the age of 15 years living with HIV in 2007, a figure that almost doubled since 2001⁴⁰.

Approximately 70 000 babies are born with HIV every year, reflecting poor prevention of mother-to-child transmission. HIV and AIDS is one of the major contributors to South Africa's infant mortality rate, which barely declined between 1990 (49 deaths per 1000 infants) and 2007 (46 per 1000), when all regions of the world saw far greater decreases.⁴¹

Article 13: Social and Economic Benefits

South Africa's overall Gender Status Index (GSI) for Economic Power is 0.866, illustrating that there are still many gender gaps to overcome before South Africa can achieve gender equality in the area of women's economic power, (*African Gender and Development Index, South Africa, November 2006*). The report places more emphasis on social grants. Data provided on social grants does not show the number of women, men and children beneficiaries.

The 2001 Statistics South Africa report on self-employed people showed that on average fewer women than men borrowed from commercial banks, business partners and associates. (**See table below**).

Table 8:

	Women	Men	Total
Total Operators	1382401	900998	2283399
Borrowed from stokvel	50918	14138	65057
Borrowed from somewhere else	148133	68133	216733
Commercial bank	4228	6713	10942
Friends or relative	125685	54822	180507
Credit society	1897	0	1897
Moneylenders	7574	2350	9924
Business partners	305	424	729
Business associates	1159	1329	2488
NGO or CBO	814	0	814
Other	8312	3343	11655

Article 14: Special help for Rural Women

Women's right to land are not firmly entrenched in legislation⁴²:

³⁸ UNGASS (2010, 31ST March) South Africa UNGASS Country Progress Report

³⁹ Human Science Research Council (2009) South African National HIV Prevalence, Incidence, Behaviour and Community Survey, (2008) A Turning Tide Among Teenagers?

⁴⁰ UNAIDS (2008) Report on the Global AIDS epidemic.

⁴¹ UNICEF (2009) State of the World's Children.

⁴² Africa Gender & Development Index Report, South Africa(November 2006)

- The Restitution of Land Rights Act⁴³ does not recognise women’s rights in so far as it does not recognise women who held land prior to 1993.
- The Communal Land Rights Act⁴⁴ attempts to recognise gender equality, but it has been criticised for giving too much discretionary powers to the Minister and too much actual power to Traditional Leaders. It has been argued that this Act will not secure women’s land rights.

Article 15(A): Equality before the Law in Civil Matters

Generally, women married under religious/Islamic laws, experience great injustice and abuse. Just like in customary marriages, women married under Muslim/Islamic Law endure inequality with respect to their right to inherit from the deceased estate of their spouses or parents because the form of matrimonial regime is not recognised under South African Law.

In Muslim marriages adjudication of disputes and divorces is determined by senior religious leaders or Imams which is problematic as many Muslim women who approach their respective Muslim Judicial Councils feel intimidated and have no alternative but to abide by the decisions made by this patriarchal structure, which often sides with the men/husbands.

It is therefore necessary for the government to pass national legislation similar to the Recognition of Customary Marriages Act, which will provide a framework for the recognition, conclusion, solemnisation, registration, dissolution and matrimonial property system of Muslim marriages in the country, in order to reduce the plight of women married under this system.

Article .16: Equality in Marriage and Family

The Recognition of Customary Marriages Act⁴⁵ allows for polygamous marriages, which is in direct contravention of General Recommendation 21 paragraph 14.

The following commentary was published by Prof. Pierre De Vos on 4th January 2010 titled “Is Polygamy Unconstitutional?”⁴⁶. This commentary clearly highlights the current status of polygamy and its position within our democratic South Africa.

“The equality clause trumps the right to culture in the South African Bill of Rights and polygamy discriminates against women – so the argument goes – because it allows a man to marry many wives but not a woman to marry many husbands and because the emotional and financial position of the existing wives is said to be weakened when their husband takes another wife.

In practice this is probably true for many polygamous marriages as many men have both financial and physical power over their wives and act like tyrants and expect their wives to serve and obey them. But the law does mitigate against the harsh consequences of some marriages.

⁴³ Act 22 of 1994

⁴⁴ Act 11 of 2004

⁴⁵ Act 120 of 1998

⁴⁶ Prof. Pierre De Vos “ Is Polygamy Unconstitutional?” <http://constitutionallyspeaking.co.za/is-polygamy-unconstitutional/> Accessed 08.07.2010

The Recognition of Customary Marriages Act no. 120 of 1998 extends the state's recognition and regulation of marriage to both monogamous and polygamous customary marriages. Where someone enters into a customary marriage they have a legal duty in terms of the Act within three months of entering into the marriage to have that marriage registered.

The financial position of the wife in a customary marriage is also safeguarded to some degree as section 6 of the Act states that:

"A wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law."

While some traditional patriarchs (and some other men who are not necessarily considered traditional patriarchs) will be rather surprised to hear that their wife or wives enjoy equal status with them after marriage in terms of the law and might not always adhere to this provision of the law, the Act clearly aims to limit the harsh discriminatory effect of traditional patriarchal practices on married women.

Section 7 of the Act also attempts to mitigate the negative effects of a polygamous marriage on existing wives and states that a husband in a customary marriage who wishes to enter into a further customary marriage with another woman must make an application to the court to approve a written contract which will regulate the future financial arrangements of the marriages.

When this happens the husband's existing spouse or spouses and his prospective spouse must be joined in the proceedings and must in effect give permission for the further marriage. The court can amend any agreement to ensure that the existing wives are not prejudiced financially – even where such wives purport to consent to the terms of the new marriage.

Where the husband and his wives respect one another and get along and where the husband does not act like a tyrannical patriarch, this would mean that the wives would enjoy considerable protection from discrimination. The Act therefore goes a long way – on paper at least- in mitigating the discriminatory effect of polygamy.

It seems to me the real discrimination will be felt by one or more of the wives where the husband is not a kind man and where he does not respect the provisions of section 6 set out above or where the judicial officer shares the patriarchal views of the husband and fails to protect the financial and other interests of the existing wives. This happens – both in customary and civil marriages – and has just as much to do with culture as with the provisions of the law.

It seems to me that while one could make an argument that many women - of all races and whether they are in a polygamous marriage or not – are discriminated against when they enter into a marriage, the marriage *per se* could not be said to constitute unfair discrimination.

It is the cultural practices and assumptions and the view that many men (of all races and whether they are polygamous or not) have of women and their role in a marriage that is the true cause of much of the hardship of married woman.

Although South Africa's Constitutional Court has not yet been asked to pronounce on the constitutionality of polygamous marriages, I suspect the court will take a nuanced approach to this issue and will try to accommodate the cultural practice while also requiring protection of women.

If the letter and the spirit of the Recognition of Customary Marriages Act are adhered to by all parties concerned – something that is not always happening at the moment and will only change as our culture changes – I am not sure a court will declare polygamy unconstitutional".

It is therefore a serious challenge to have legislation protecting women's right to equality and yet recognise a practice of polygamy which puts women at greater risk of abuse, unequal treatment and discrimination. Until legislation is promulgated to provide adequate protection and recognition to women married under religious law, the status quo will remain unchanged.

Despite the Civil Union Act being passed in November 2006, lesbian women are still discriminated against on the basis of their sexual orientation and thus find it increasingly difficult to access services, such as medical aid schemes and registration of marriages at the Department of Home Affairs.

Women engaged in same-sex marriages or unions are still the subject of discriminatory treatment and are faced with violence and abuse daily. The issue of adoption of children by same-sex couples is also an area of concern as government departments fail to process or finalize enquiries or applications speedily due to the lack of sensitivity by public servants, officials and government departments in executing their duties.

Ignorance of the law is one of the contributory factors that lead to women unknowingly entering into civil marriages without educating themselves about the risks and benefits of the respective regimes at their disposal. The majority of women are often disadvantaged by not being informed of the various options and marital regimes available prior to their entering into a lifelong relationship or marriage. More needs to be done to raise awareness around the options and legal consequences of the respective matrimonial regimes, such as marrying in or out of community-of-property, and with or without the accrual system, and ante-nuptial contracts. In many instances men are more privy to the pros and cons of the different regimes and it is that knowledge that often leads to women being disadvantaged.

Article 16(a) (4) of the South African Country Report of 2008 speaks to Parental Rights and Responsibilities and looks at the overhauling of the Maintenance Act in 1998. The reality of the situation is that women still have tremendous difficulty in accessing maintenance payments and the maintenance courts are not effective in assisting them.

Maintenance Officers and investigators are ineffective in dealing efficiently and adequately with enquiries and investigations resulting in women often having to spend considerable time away from work to attend numerous court appearances. Yet this does not guarantee that the court will grant the maintenance sought. Therefore, to simply state that the Maintenance Act was overhauled in 1998 fails to disclose the real underlying difficulties women face in accessing maintenance payments.

It would have been desirable to include some form of statistics in this regard as it would have revealed how many women are in fact dependent on maintenance payments to sustain their families.

GENERAL RECOMMENDATIONS 12 & 19: Violence against Women and the Girl Child

Gender based violence

South Africa experiences relatively high levels of violence against women and girl children, and the government has identified the combating of violent crimes against women and children as a priority. According to a 2007 POWA Report entitled *Women's Experiences of the Criminal Justice System and Access to Psycho-Social Support*:

:

- 25% of women have experienced physical violence from an intimate partner;
- 1 in 2 health service users have previously experienced violence (2007: vii). Most violence committed against women and children is perpetrated in the “private” home domain, by persons known to the victims.

It is positive to note that the introduction of Thuthuzela Centres has contributed to the reduction in secondary trauma for victims of these crimes and has also assisted in improving conviction rates and speedy justice⁴⁷.

A study undertaken by the Medical Research Council⁴⁸ reported that:

- Rape of a woman or girl had been perpetrated by 27.6% of the men interviewed.
- Rape of a current or ex-girlfriend was disclosed by 14.3% of men.
- In total, 8.9% of the men interviewed said that they had committed acts of rape with one or more other perpetrators when a woman did not consent to sex, was forced, or when she was too drunk to stop them⁴⁹.

The *Development Indicators 2009* (The Presidency) data for contact crimes provides the following breakdown per province.

Eight of the provinces (with the exception of the Western Cape) reported increases in the rate of sexual offences in 2008/2009. Although the data is not disaggregated by sex the majority of victims of sexual offence crimes are likely to be women.

Table 9:

RATE OF SEXUAL OFFENCES PER 100 000 OF POPULATION		
	Sexual Offences	
	2007/2008	2008/2009
Eastern Cape	131.6	143.8
Free State	148.6	157
Gauteng	155.6	182.9

⁴⁷ A Thuthuzela centre operates as a “one-stop shop” for rape-care management, streamlining a network of existing investigative, prosecutorial, medical and psychological services in the health facility where they are located.

⁴⁸ *Understanding men's health and use of violence: interface of rape and HIV in South Africa*, Rachel Jewkes, Yandisa Sikweyiya, Robert Morrell, Kristin Dunkle

⁴⁹ Ibid

KwaZulu-Natal	113.4	131
Limpopo	83.8	88.8
Mpumalanga	117.9	130.3
North-West	142.5	152.5
Northern Cape	158.7	169.4
Western Cape	178.2	165
Total	133.4	146.9

Source: *Development Indicators 2009*, pg. 60.

The rise in the rate of sexual offences will also need further investigation as the newly amended Sexual Offences Act has broadened the definition of sexual offences to include matters relating to prostitution.

Domestic violence

Ms. Lisa Vetten of the Centre for the Study of Violence and Reconciliation in South Africa highlighted the problems in implementing the provisions of the Domestic Violence Act (DVA) in her paper to the Expert Group Meeting organised by the UN Division for Advancement of Women on 20 May 2005.

The paper was the result of two studies conducted by Parenzee, Artz and Moulton in 2001 and Matthews and Abrahams in 2001. The key findings are summarised as follows:

- **Women's circumstances and their access to justice**

The legacy of apartheid legislation such as the Group Areas Act⁵⁰, as well as the under-resourcing of rural areas has obstructed women's access to justice. In 1994 for instance, 74% of the country's police stations were located in white suburbs or business districts (Department of Safety & Security, 1998) and this placed prohibitive travel costs upon black women. This resulted in slow response times by police and ambulance services to incidents of domestic violence. Due to the poor and expensive telecommunication services at that time, women had little to no access to support services and safe accommodation. Due to the high rate of unemployment women struggled to pay for basic necessities, travel, accommodation, or the costs of separation or relocation.

Staff at rural courts also noted the prohibitive costs of transporting witnesses to and from outlying areas. This was exacerbated in the event of witnesses being required to stay within the courts' jurisdiction to testify⁵¹

Due to staff capacity issues within the Department of Justice and Constitutional Development, NGOs have been obliged to step in to provide essential services on a voluntary basis through funds secured from foreign donors⁵². This means that NGOs are

⁵⁰ Act 41 of 1950

⁵¹ Artz L. (2003) in in Vetten L. (2005) *Violence against women; Good practices in combating and eliminating violence against women*. A paper delivered at an expert group meeting organized by the UN Division for the Advancement of Women

⁵² Vetten & Khan, (2002) in Vetten L. (2005) *Violence against women; Good practices in combating and eliminating violence against women*. A paper delivered at an expert group meeting organized

effectively subsidising the state. For example, Mosaic Training Service and Healing Centre for Women is a community-based organisation providing a range of services to abused women in the Western Cape. During the period April 2000 to February 2001, Mosaic assisted 15 142 applicants in obtaining protection orders. From January 2001 to November 2001, Mosaic spent a total of R373 364.15 providing this service to women.⁵³

- **State Accountability Mechanisms**

Oversight of the DVA is not being accomplished. Since the Act came into operation the Independent Complaints Directorate (ICD) has only submitted one Domestic Violence Report to parliament, in March 2001. According to both the ICD and SAPS, these reports have been compiled but never tabled before parliament as they have not been requested. Furthermore, the Department of Justice and Constitutional Development has not developed an adequate approach to assessing courts and their performance in relation to the DVA.

- **Indicator targets**

The report revealed that eight police stations visited in KwaZulu-Natal failed to submit a record of complaints it had received from the public against the police station. In addition, over the second six month period in 2000, there were 115 reports to the ICD of police not fulfilling their obligations in terms of the Act. The same report to parliament states that protection orders were left to pile up in the Community Services Centres of Police stations visited in Gauteng, KwaZulu-Natal and Eastern Cape due to a shortage of police vehicles and the refusal of the Sheriffs to assist the police in serving protection orders.

- **Litigation against domestic violence**

A number of Constitutional Court cases have begun exploring and outlining the duties imposed upon the police and courts in terms of the Bill of Rights. These cases have primarily centred on state duties in relation to rape and have begun establishing delictual duty upon the state. In *S v Baloyi*, the Constitutional Court held that the Constitution imposes a direct obligation on the state to protect the right of all persons to be free from domestic violence

In *S v Engelbrecht*, concluded in 2005, evidence before the Court showed that Mrs Engelbrecht had moved nine times to escape her abusive husband, and made three attempts to divorce him, but the sheriff failed on six occasions to serve the divorce summons, while the Family Advocate never compiled some of the documentation required to decide custody of a child. She attempted on three occasions to obtain a protection order (on two occasions she was not informed of the court date and on the third magistrate suggested that the couple go for coffee and resolve their differences), and made numerous calls to the 10111 police emergency service (these were played in court and clearly captured police dispatchers arguing with her about why they were not going to assist her).

Police personnel also irregularly withdrew her charges, or refused to accept them, failed to comply with numerous aspects of the DVA and on one occasion advised her husband to obtain a protection order against her. In June 2002, after yet another assault (including one

by the UN Division for the Advancement of Women

⁵³ Vetten and Khan 2002a:23. in Vetten L. (2005) Violence against women; Good practices in combating and eliminating violence against women . A paper delivered at an expert group meeting organized by the UN Division for the Advancement of Women

on her daughter), Mrs Engelbrecht handcuffed her husband while he was sleeping and smothered him.

Ultimately while the judge in this matter decided that Mrs Engelbrecht had made all reasonable attempts to end abuse, she was overruled by her two assessors, and Mrs Engelbrecht was convicted.

Most of the challenges raised in the above paper by Lisa Vetten with regard to the implementation of the DVA in South Africa, are still prevalent with some few improvements, although the studies referred to were conducted in 2004 and 2005 respectively.

According to the Report on Gender Mapping⁵⁴ the police response to GBV is not sufficient and this evidenced in the following areas:

- **Issues related to the enforcement of laws protecting abused women:** in many instances, cases are not recorded properly, complaints not followed up, rape cases not logged and bail granted when it should not have been. Women are generally treated insensitively, with victims blamed and in a few instances, raped in police stations. Finally, enquiries conducted by investigating officers do not follow the right procedures.
- **There is not enough effort to ensure that protection orders are enforced** and that the abuser is arrested if he violates the order. Partly because of a lack of trust in SAPS, some women do not report violations of protection orders, which can lead to further violence, and possibly the death of the victim.
- **Fire arms are not systematically confiscated.**
- **Police officers are often not gender sensitive:** SAPS is a male-dominated environment and it was reported that there is a lack of gender consciousness and a lack of knowledge and understanding of the DVA. Although training courses exist, they are not long enough to address the perceptions of officers to have a meaningful impact. The gender training needs to be systematically provided, and funded by government.
- **The statistics provided by SAPS on domestic violence are not entirely reliable,** as not all police stations in South Africa keep an updated register of cases, and there are “various concerns around how the police collect and report on statistics”.

The Report further indicates that the justice sector response to GBV is not sufficient as is evident from the following areas:

- Problems have been identified with the **criminal justice system** leading to a high attrition rate. A recent study conducted by TLAC, CSVR and the MRC in Gauteng revealed that there is a high attrition of rape cases through the criminal justice

⁵⁴ Gender Mapping Report for South Africa *Current status and gaps* (2010) UNDP, Pretoria

system.⁵⁵ Of the 2,064 cases in the study, half of cases resulted in arrests (50.5%) but only 42.8% were charged in court.

- The **procedures are not conducive for women** as they are forced to come face-to-face with their perpetrators.
- The **training on “social context diversity”** for magistrates and prosecutors is not compulsory, there is no automatic follow up training and it is funded by donors⁵⁶.

Other challenges experienced in the implementation of legislation include the following:

- Many women who had obtained protection orders experienced police negligence and impotence, and found it difficult to access money for documents to be served on respondents. This resulted in many women withdrawing their applications as the process was seen to be too overwhelming.
- Although South Africa has 11 official languages, the application forms which need to be completed in order to secure a protection order, are only available in two of the official languages. Furthermore, the forms are not readily available in Braille, and sign language interpreters for deaf women are not available at Courts.

Some Harmful Cultural Practices

The report correctly states that the Equality Act, 2000 was promulgated to ensure the protection against practices that infringe on the rights of women and girls, such as the right to life, health, dignity education and physical integrity. In reality the situation is far more severe and the provisions of the Equality Act fail to render protection to women and girls when faced with forced marriages to much older men, abduction and rape as is the case in the cultural practice of *ukuthwala*.

The procedure for *ukuthwala* is as follows: The intending bridegroom, with one or two friends, will waylay the intended bride in the neighbourhood of her own home, quite often late in the day, towards sunset or at early dusk, and they will “forcibly” take her to the young man’s home. Sometimes the girl is caught unawares, but in many instances she is “caught” according to plan and agreement.⁵⁷

The common law crime of abduction has been described as the unlawful removal of a minor out of the control of her guardian with the intention of violating the guardian’s *potestas* and of enabling somebody to marry her or have sexual intercourse with her (*S v Killian 1977 2 SA 31 (C)* See also *S v L 1981 1 SA 499 (BSC) 502*) where the abduction of a 15 year old girl was followed by intercourse. In this case the court noted that “convictions” for abduction are becoming increasingly rare . . . due to more permissive standards in society”).

⁵⁵ Vetten et al (2008) *Tracking justice: the Attrition of rape cases through the criminal justice system in Gauteng*, research report, Tshwaranang Legal Advocacy Centre, Medical Research Council and Centre for the Study of Violence and Reconciliation, available on www.tlac.org.za, as quoted in SANAC, 2010

⁵⁷ D.S. Koyana & J.C. Bekker (2007) *The Indomitable Ukuthwala Custom in De Jure*, P. 139

It immediately becomes clear that the customary law practice of *ukuthwala* is totally different from the common law abduction because:⁵⁸

- (a) *ukuthwala* is perceived as lawful in the society that designed it;
- (b) There is no *ukuthwala* of males yet abduction relates to males and females; and
- (c) Whilst one of the purposes of abduction is to have intercourse, the contrary is the position with *ukuthwala* – here the aim is to negotiate a marriage.

Olivier et al (Indigenous Law (1995) 123 par 119) also state categorically that *ukuthwala* does not constitute abduction. All this notwithstanding, the courts have sometimes gone ahead and ruled that *ukuthwala* is no defence to a charge of abduction (see *R v Sita 1954 4 SA 20 (E)*).⁵⁹ The CGE reiterates the stance that the abduction and rape of women and girls forced into *ukuthwala* practises should be dealt with by the South African Police Service and criminal procedure and courts. This unlawful practise disguised as a custom should be stamped out and perpetrators must be prosecuted accordingly. The CGE does not support the abuse and exploitation of women and girls and is therefore against such “customary” practises.

Female Genital Mutilation

The report merely touches on the fact that female genital mutilation in South Africa is being practiced, if only in certain cultures and geographical areas. Regardless of the uncertainty around its prevalence there is still no clarification on what exactly government, more especially the Department of Social Development and the Department of Health is doing to address this harmful practice. No attempt at defining exactly what this practice entails has been undertaken by government. The report also fails to indicate whether such a study has been commissioned. The issue of FGM will continue to be an outstanding item in future CEDAW Reports.

Criminal Legislation on Hate Crimes

The Committee on the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) has requested South Africa to enact a Hate Crime Law. There is no specific legislation law dealing with these crimes in South Africa and it is very difficult to prove that the motivation of crime is hatred. By May 2009 there were 20 documented cases of murder of lesbians in South Africa of which only two had gone to trial. Both cases had committed and qualified prosecutors who fundamentally failed to see the way that perceived transgressing of normative gender roles contributed to the murders.⁶⁰

Conclusion

South Africa has ratified CEDAW without any reservations and has to a great extent incorporated most of its obligations (to the Convention) into laws, policies and practices. However, the implementation of most of the provisions of the Convention and the recommendations of the CEDAW Committee continues to pose a number of

⁵⁸ Ibid P. 142

⁵⁹ Ibid P. 143

⁶⁰ Mtetwa,P.(2009). *Sexual orientation, violence and AIDS. Equality Project.* – A Collective Force To Stop The Violence, 6-7 May 2009, quoted in SANAC, 2010, A paper delivered at Population Council on Multi-Sectoral Approaches for addressing and preventing Sexual Assault And Domestic Violence

challenges. The majority of women still do not fully enjoy their rights and this further precludes the desired attainment of gender equality in South Africa.

It is acknowledged that progressive policies, programmes and laws have been passed and adopted in line with the Convention. However, an analysis of their effectiveness in addressing inequalities between men and women is not fully explained in the country report. This could have been done by showing the impact of such policies and programmes, supplying some supporting documentation or sex disaggregated statistics. It is therefore difficult to establish whether these policies, programmes and laws have indeed improved the status of women by empowering and benefitting them or even improving their lived experiences as envisaged by the Convention.

Finally, South Africa's failure to report regularly to the CEDAW Committee is a concern. The fact that the current country report does not comply with most of the 2003 Reporting Guidelines of the Committee which relate to, time-frame for reporting, the length of the report, resolving concerns of the initial report's concluding comments of the Committee, considering the General Recommendations of the Convention, is a serious concern for the Commission for Gender Equality. It is therefore recommended that future government reports be critically examined to assess compliance with the reporting format of CEDAW, and further assess the extent to which the gaps and challenges are addressed and reported on.

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Annexure A

Most Muslim marriages are customary and were not recognised and in most cases are polygamous. The case of **Fatima Gabie Hassam v Johan Hermanus Jacobs N O and Others 2004**, the decision of the Cape High Court which has been confirmed in the Constitutional Court, dealt with the issue of gender discrimination in the right to inherit as well as addressing the common law position and the Reform of Customary Law of Succession and Related Matters Act in recognising spouses in polygamous marriages for succession purposes. The case of Hassam further afforded polygamous spouses to be recognised in terms of the Maintenance of Surviving Spouses Act as well as the Intestate Succession Act.

This was substantiated by the Constitutional Court ruling in the case of **Bhe and others v Magistrate, Khayelitsha and others CCT49/03**, in which the principle of male primogeniture was abolished. The court found that this African Customary law rule unfairly discriminated against women and children in relation to inheritance of property and declared it to be unconstitutional. The CGE also conducted a widowhood research in 2007/08 which revealed that many women are still being discriminated against when they are in a mourning period. Many are ill-treated in the name of culture, and some are still excluded from inheriting or executing the estates of their husbands.

Kambule v. Master of the High Court, Case no. 1833/2006

Facts: The late Burton Baduza (Burton) married Norah Khupela Baduza (not party to this case) by civil rights in October 1956. This marriage subsisted until Burton's death in June 2002. In May 1985, Burton married applicant Lungiswa Snowy Kambule (Kambule) via customary rites. Burton failed to register this customary marriage in accordance with Part 2 of the Transkei Marriage Act no 21 of 1978. After Burton's death, Hugh Anthony Wormald N.O. (Wormald) was appointed executor of Burton's estate. The existence and validity of Kambule's marriage to Burton was challenged by Norah Khupela Baduza as well as Burton's estate and heirs. Burton's heirs also challenge Kambule's qualification for maintenance under s 2 of the Maintenance of Surviving Spouses Act no 27 of 1990.

Issues

1. Could the customary marriage in this case be valid even though it was not registered?
2. Does the surviving partner of a valid customary marriage qualify as a "survivor" in terms of the Maintenance of Surviving Spouses Act?

Outcome & Reasoning

1. Yes, the customary marriage could be valid. There are conflicting decisions in the Transkei Division as to whether the Transkei Marriage Act no 21 of 1978 requires registration but courts have followed the outcome reached in Shwalakhe Sokhewu and another v. Minister of Police (unreported- Transkei Division case no 293/94) in which registration was found not essential. The

Recognition of Customary Marriages Act no 120 of 1998 is also applicable in this case and while it does not make registration essential to a customary marriage's validity, it does prohibit a spouse from entering into a subsequent marriage while the first marriage is still subsisting. However, this provision is prospective and not retrospective and the Transkei Marriage Act, which was the applicable law at the time of Burton and Kambule's customary marriage, explicitly allows for a customary marriage during the subsistence of any civil marriage. Further, the Recognition Act requires that any customary marriage entered into before the Act's commencement must have been concluded in accordance with traditional customary rights. Therefore, if it is determined that the customary marriage between Burton and Kambule was entered into according to the traditional practices of their culture then the marriage could be found valid even though it was never registered.

2. Yes, the surviving partner of a valid customary marriage is a "survivor" and is due maintenance. The courts in South Africa, including the Constitutional Court, have given the word "spouse" a broad and inclusive definition in order to promote equality and a respect for diversity. One purpose of the Maintenance Act was to provide protection and relief to a vulnerable section of the population. To exclude the spouses of polygamous unions would only prolong inequality and hardship. Therefore, the surviving partner to a valid customary marriage is a "spouse" within the meaning of s 2(1) of the Maintenance of Surviving Spouses Act.

Shilubana & Others v Nwamitwa⁶¹ case related to a dispute regarding the right to succeed as Hosi (Chief) of the Valoyi traditional community in Limpopo. The dispute is between Ms Shilubana, the first Applicant, the daughter of Hosi (Chief) Fofeza Nwamitwa, and Mr Nwamitwa, the Respondent, son of Hosi (Chief) Malathini Richard Nwamitwa. On 24 February 1968, Hosi Fofeza Nwamitwa died without male heir. At that time, succession to Hosi was governed by the principle of male primogeniture. Hosi Fofeza succeeded his father only because his elder sister was ineligible to be Hosi. Therefore, Ms Shilubana, Hosi Fofeza's elder daughter was not considered, for the position, despite being of age in 1968. Instead, Hosi Fofeza's younger brother, Richard, succeeded him as Hosi of the Valoyi. The dispute between the parties arose following the death of Hosi Richard Nwamitwa on 1 October 2001 when the Royal Council recommended the name of Ms Shilubana for appointment as Chief of the Valoyi and Mr Nwamitwa on the other hand challenged this appointment successfully in the High Court and on appeal at the Supreme Court as well.

Sections 1(c) and establish the supremacy of the Constitution over all law. Section 30 recognises the right to participate in the cultural life of one's choice, but only in a manner consistent with the Bill of Rights. Similarly, Section 31 recognises the right of cultural and religious communities to enjoy their culture and practice their religion in a manner consistent with the Bill of Rights. Section 39 (2) has been mentioned above. Last, but certainly not least, in this context the abovementioned section 211

⁶¹ (CCT/03/07) BCLR 914, 2009, Volume (2) SA, Page 66, (CC)

(3) demands that Courts apply customary law where it is applicable, subject to the Constitution. It must also be emphasised that Hosi Richard Nwamitwa agreed and approved of this decision.

The Valoyi authorities intended to bring an important aspect of their customs and traditions into line with the values and rights of the Constitution. Several provisions of the constitution require the application of the common law and customary law, as well as the practice of culture or religion, to comply with the Constitution. Sections 1(c) and establish the supremacy of the Constitution over all law. Section 30 recognises the right to participate in the cultural life of one's choice, but only in a manner consistent with the Bill of Rights. Similarly, Section 31 recognises the right of cultural and religious communities to enjoy their culture and practice their religion in a manner consistent with the Bill of Rights. Section 39 (2) has been mentioned above. Last, but certainly not least, in this context the abovementioned section 211 (3) demands that Courts apply customary law where it is applicable, subject to the Constitution. The importance of equality in our society has been repeatedly emphasised by this Court. The remarks of Ngcobo J in his concurring judgement in *Bato Star* sum up the position:

“South Africa is a country in transition from a society based on inequality to one of equality. This transition was introduced by the Interim Constitution, which was designed to ‘create a new order . . . in which there is equality between men and women and people of all races so that all citizens should be able to enjoy and exercise their fundamental rights and freedoms’. This commitment to the transformation of our society was affirmed and reinforced in 1997, when the Constitution came into force. The Preamble to the Constitution ‘recognises the injustices of our past’ and makes a commitment to establishing ‘a society based on democratic values, social justice and fundamental human rights’. This society is to be built on the foundation of the values entrenched in the very first provision of the Constitution. These values include human dignity, the achievement of equality and the advancement of human rights and freedoms. The achievement of equality is one of the fundamental goals that we have fashioned for ourselves in the Constitution. Our constitutional order is committed to the transformation of our society from a grossly unequal society to one ‘in which there is equality between men and women and people of all races’.”

In *Carmichele v Minister of Safety & Security the High Court* the court held that the common law of delict required development in order to reflect the constitutional duty on the state and, in particular police and prosecution to protect the public in general and women in particular against invasion of their fundamental rights by the perpetrators of violent crimes. Having found that the police and prosecution had failed to discharge this duty, had done so negligently, and that the element of causation was satisfied, the High Court held the Defendant liable for delictual damages and this finding was confirmed by the Supreme Court of Appeal on appeal by the state.

Mahala v. Nkombombini, Case no. 10861/2005

Facts: Titi Gladys Mahala (Applicant) filed an application in court for the right to dispose of the body of her alleged late husband. The deceased's mother, Nolili Nkombombini (Respondent) had already made arrangements for the funeral and disputes the customary marriage between the deceased and the Applicant. The deceased left no indication as to whom he wished to make the arrangements.

Issue: Who should have the right to make funeral arrangements for the deceased?

Outcome & Reasoning: The Applicant was given the right to make these arrangements. Case law supports the notion that the heir of the deceased estate should be the one to decide on the funeral arrangements. The general rule of succession is that the court should give effect to the will of the deceased. When there is no explicit indication as to whom the deceased would wish to make the funeral arrangements, it could be deemed the implicit intention that arrangements are made by those who receive his earthly goods. When this case law was decided, however, there was normally only one heir of a deceased's estate due to the principle of primogeniture. The Constitutional Court has since ruled that the principle of primogeniture violated the rights of women to human dignity, which is guaranteed by the Constitution. Because primogeniture is no longer allowable and there can now be multiple heirs each case must be decided based on its own particular circumstances. Factors to consider include family relationships, common sense, and other relevant circumstances. Recognizing the status of women in South African society today, the wishes of the widow must carry great weight. Because Respondent cannot directly and persuasively refute the validity of Applicant's customary marriage to the deceased, the marriage is deemed valid for the purpose of this application. Because of this, the application is successful and Applicant is granted the right to dispose of the deceased's body.

Mayelane v. Ngwenyama, Case no 29241/09

Facts: Mdjadji Florah Mayelane (Applicant) married the late Hlengani Dyson Moyana (the deceased) in accordance with customary law in 1984. The marriage was not registered. The deceased is then alleged to have married Mphphu Maria Mayelane (Respondent) according to customary law in 2008. The headman of the village confirmed the second marriage but the Applicant was not aware of the second marriage and an application for an order approving a contract to regulate the future matrimonial property system of the two marriages, as provided for in section 7 of the Recognition of Customary marriages Act 120 of 1998, was not made. The deceased died in 2009.

Issue: Is the marriage of the deceased to Respondent invalid due to non-compliance with the Recognition of Customary Marriages Act?

Outcome & Reasoning: Yes, the marriage is invalid. The purpose of the Recognition of Customary Marriages Act (the Act) was to put customary marriages on an equal

footing with civil marriages and to protect the rights of individuals, including women and children, in both monogamous and polygamous marriages. Section 7 of the Act states that customary marriages entered into before the commencement of the Act should continue to be governed by customary law but a husband who is party to such a marriage and who wishes to enter into a subsequent customary marriage with another woman after the commencement of the Act must have a contract, which will regulate the future matrimonial property systems of his marriage, approved by the court. Spouses in customary marriages share equal status and capacity and the purpose of court approval is to protect the existing spouse(s), the new intended spouse, and any children resulting from these marriages. While the Act does not explicitly state that the failure to comply with the provisions will result in the invalidity of a subsequent customary marriage, the court determines that the legislature intended the Act to have this effect. The inevitable infringement on the first or earlier spouses' fundamental rights and on the rights of any children born from the earlier marriage is of vital concern. The risk for the intending spouse of a future marriage is also great but this spouse would have claims against the husband or his estate if a marriage was found invalid due to noncompliance by the husband. Finally, the court emphasizes the importance of women's empowerment and education in the communities where customary marriages are prevalent so that they know their rights and ways in which they can protect those rights.

Ellen Maanela v. Mmampitla Maanela, Application No. 6614/07

Court History: An application was made by Ellen Nthadbiseng Maanela (Applicant) for the right to bury the deceased Peter Maanela. A temporary interdict was granted by the court, which prohibited Mmampitla Maanela (Respondent) from burying the deceased and prohibited Ntuka's Funeral Parlour (2nd Respondent) from releasing the body of the deceased to any person before the finalization of the application. Second Respondent was given notice of this interdict but Applicant was not. Second Respondent acted against this interdict and released the body to Applicant who subsequently buried the deceased. Respondent discovered this and brought an urgent application before the court.

Facts: Applicant claims to be the wife of the deceased, married in South Africa by customary rights in 1987 by Sesotho custom and by civil rights in 1992. The marriage yielded one child. Respondent also claims to be the wife of the deceased, married in Lesotho by customary rights in 1972 according to the Basuto custom. This marriage yielded six children and is confirmed by the Consulate of the Kingdom of Lesotho and supported by a letter from the Chief of Tlokoeng.

Issue: Does Applicant or Respondent have burial rights of the deceased?

Outcome & Reasoning: Respondent has burial rights of the deceased. Each marriage is deemed valid or invalid based upon the law of the jurisdiction in which it was performed. A valid foreign customary marriage is recognized as so under South Africa's Recognition of Customary Marriages Act. Respondent and the deceased have a valid customary marriage under the Basuto custom. This customary marriage is

therefore recognized under South African law. Section 1 of the Marriage and Matrimonial Property Law Amendment Act allows a man and a woman who have a customary marriage to contract to civil marriage “so long as the man is not also a partner in a subsisting customary union with another woman.” This law governed at the time of Applicant’s civil marriage to the deceased. Because the deceased was also married to Respondent by customary rights at the time of the civil marriage between the deceased and the Applicant, this civil marriage is null and void. According to Sesotho customary law (the tradition which governs Applicant’s customary marriage to the deceased), a wife’s rank is determined by the time of her marriage. The first wife taken is the great wife and each subsequent wife is subordinate to her predecessor. Burial rights are determined by rank. Applicant’s customary marriage to the deceased took place after Respondent’s customary marriage to the deceased. Respondent is therefore the great wife and has burial rights over the deceased.

Annexure B

Table: Percentage breakdown of national and provincial managers by race and sex, 2003

Year	Women	Men	Total
Total	23,9	76,1	100
Black African	14,0	35,4	49,4
Coloured	1,6	5,4	7,0
Indian	1,5	5,8	7,3
White	6,7	29,5	36,3

The Tables under Annexure indicates the gender disaggregated data on senior management positions in the public sector and judiciary:

Public Sector Index, 2003

Indicators		Data			GSI
		Women	Men	Indicator	
Members of parliament	National Assembly	125	271	396	0.358
	National Council of Provinces	20	34	54	
	Provincial Legislatures	125	309	434	
Cabinet ministers	Ministers	9	20	29	0.607
	Deputy ministers	8	8	16	
Higher courts judges (Constitutional/Supreme/High)		22	177	199	0.134
Members of local councils (1995 data)		1220	5188	6408	0.235
Higher positions in civil service (including government institutions, regional governors and ambassadors)		833	3174	4007	0.235

Judicial positions, 2003

	Women	Men	Total
Constitutional Court	2	9	11
Supreme Court of Appeal	0	19	19
High Court	20	149	169
Magistrates	467	1312	1779

Annexure C

Text Box: Overview of GSI for political power⁶²

The GSI for political power (0.769) is lowest of the three power blocks, reflecting that the public space remains that part of South African society that is most dominated by men. Although some of the scores will improve when they reflect the results of the 2004 elections (better representation in Parliament and local government), this is unlikely to change the overall picture of a substantial gender gap in political power. Gender parity (predominantly in favour of women) is only found in the NGO sector on the basis of a single study. This is a fact to be applauded, although we also know that the most senior positions in that sector, as well as the trade unions, and the political and advocacy NGOs are often dominated by men. The fact that the study does not distinguish between professional NGOs and community based organizations is a worry as it suggests that women might be clustered in the organizations that are poorly funded and resourced. In the public sector, the gender gap is highest amongst judges (0.134) and lowest amongst cabinet ministers (0.607). The latter signifies a President committed to the inclusion of women in decision-making. The latter reflects women's position in the legal profession as a whole. The score of 0.235 for senior positions in the civil service is disappointing, suggesting that the advancement of women in this sector has really taken place at lower management levels. Women's senior positions in political parties, (0.338) the professions (0.436) and trade unions (0.353) is disappointing, suggesting that much work needs to be done to promote women to leadership levels., suggesting that much work needs to be done to promote women to leadership levels and lower management levels. Women's senior positions in political parties, (0.338) the professions (0.436) and trade unions (0.353) is disappointing and suggests that much work needs to be done to promote women to leadership levels. service is disappointing, suggesting that the advancement of women in this sector has really taken place at lower management levels .Women's senior positions in political parties, (0.338) the professions (0.436) and trade unions (0.353) is disappointing, suggesting that much work needs to be done to promote women to leadership levels.

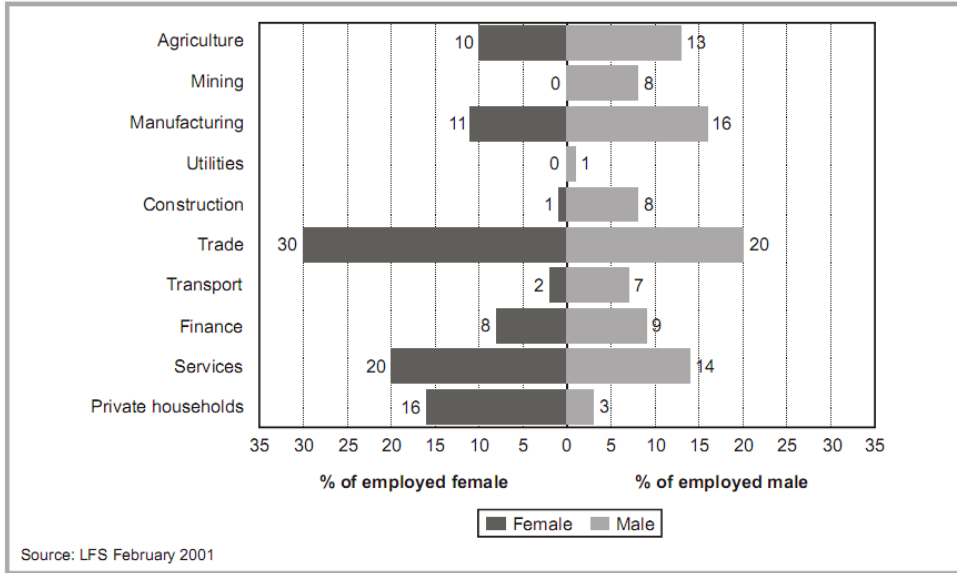
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⁶² The Gender Status index is a measure of relative gender equality that captures those issues related to women's empowerment that can be measured quantitatively. The Status Index is based on three blocks: social power, economic power and political power. It is one part of the African Gender and Development Index which measures gender equality and the changes in gender relations and the effects of gender policies in African countries.

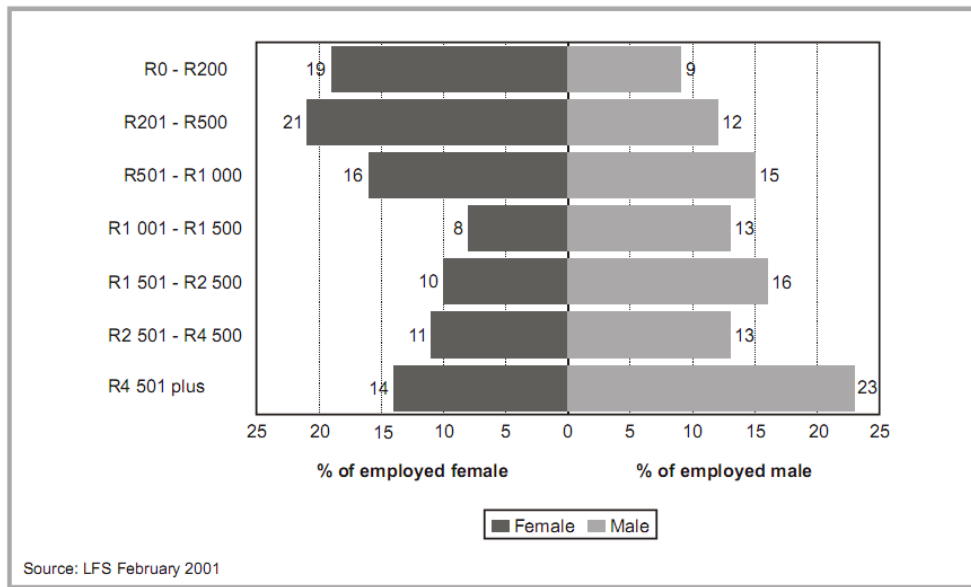
Annexure E

Annexure F represents the Sex disaggregated information pertaining to the various sectors women and men are engaged in as at 2001.

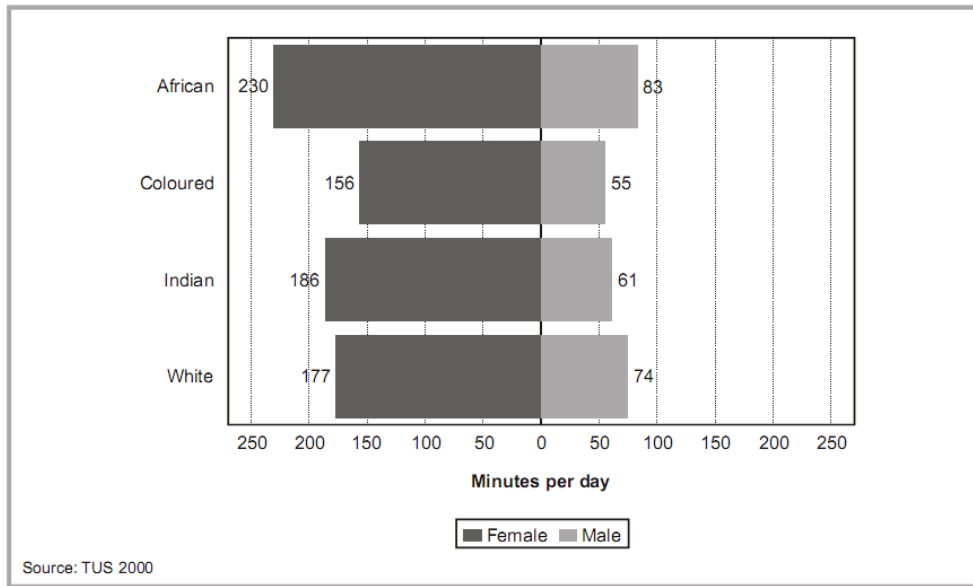
Percentage distribution of employed women and men aged 15-65 years by industry, 2001



Percentage distribution of employed women and men aged 15-65 years by Earnings, 2001



Average minutes spent per day on unpaid housework, care of others and collecting of fuel and water among employed women and men in each population group, 2000



Annexure F

Employees with Disabilities recruited by occupational level, race and gender

Table A: Male employees with disabilities recruited by occupational level and race

Occupational level	African	Coloured	Indian	White
Top management	0 0,0%	0 0,0%	0 0,0%	2 66,7%
Senior management	2 16,7%	1 8,3%	0 0,0%	7 58,3%
Professionally qualified and experienced	11 15,3%	3 4,2%	4 5,6%	16 22,2%
Skilled technically and academically qualified	59 22,4%	29 11,0%	6 2,3%	92 35,0%
Semi-skilled and discretionary decision making	186 41,9%	36 8,1%	9 2,0%	54 12,2%
Unskilled and defined decision making	128 39,5%	21 6,5%	9 2,8%	15 4,6%
Total permanent	582 41,0%	104 7,3%	35 2,5%	209 14,7%
Non-permanent	196 64,9%	14 4,6%	7 2,3%	23 7,6%
Total	582	104	35	209

Table B: Female employees with disability recruited by occupational level and race

Occupational level	African	Coloured	Indian	white
Top management	1 33,3%	0 0,0%	0 0,0%	0 0,0%
Senior management	0 0,0%	0 0,0%	0 0,0%	2 16,7%
Professionally qualified and experienced	10 13,9%	6 8,3%	6 8,3%	15 20,8%
Skilled technically and academically qualified	23 8,7%	9 3,4%	9 3,4%	34 12,9%
Semi-skilled and discretionary	80 18,0%	31 7,0%	13 2,9%	32 7,2%
Unskilled and defined decision making	112 34,6%	20 6,2%	3 0,9%	7 2,2%
Total permanent	265 18,7%	80 5,6%	32 2,3%	97 6,8%
Non-employed	39	14	1	7

	12,9%	4,6%	0,3%	2,3%
Total	265	80	32	97