



16 June 2020

GENDER BASED VIOLENCE AND FEMICIDE (GBVF) WORK STREAM

c/o: Fight Back SA
Attention: Nicole Mirkin
Email: nicolemirkin@hotmail.com

Dear GBVF Work Stream Team,

SUBMISSION ON PARLIAMENTARY GENDER BASED VIOLENCE AND FEMICIDE WORK STREAM'S CALL FOR ENGAGEMENT

1. Parliament's Gender Based Violence and Femicide Work Stream ("GBVF Work Stream") has called for an engagement on the fight against gender based violence and femicide. Fight Back SA has been approached by the GBVF Work Stream to facilitate this engagement with stakeholders such as our organisation. Accordingly, this constitutes The Embrace Project's submission to the GBVF Work Stream.
2. The Embrace Project is an NPO which aims to "creatively combat" gender based violence. We provide an online platform for the sale of artwork donated by different South African artists and creatives who collaborate with our organisation. The proceeds of these sales are given to selected grass-roots organisations already combating gender based violence in their own communities. These organisations are the beneficiaries of The Embrace Project. We also create awareness, through our social media presence, around gender based violence (it's prevalence and causes) while simultaneously working at changing the narrative around violence and disempowerment.

Directors: Leanne Berger and Lee-Anne Germanos

3. We have been asked by the GBVF Work Stream, through Fight Back SA, to engage on the following 5 topics:
 - 3.1. Short-comings in laws (focusing on implementation), policies and interventions by Government.
 - 3.2. On-the-ground experiences.
 - 3.3. Sensitisation of laws, policies and programmes.
 - 3.4. Case studies
 - 3.5. What continues to be overlooked.
4. We will address 3 of the above topics to which we can meaningfully contribute. That will form part of our contribution to the engagement, and will constitute part of our submission to the GBVF Work Stream. It is understood that Fight Back SA will facilitate this engagement by furnishing the GBVF Work Stream with this written submission.

Understanding and Prevention

5. Prior to addressing the topics identified by the GBVF Work Stream above, it is important first to acknowledge that South Africa has a 'rape culture'; and that gender based violence and femicide are not a woman's problem (or any victim's problem). The problem lies with perpetrators, who are predominantly men. Therefore, if we are effectively to combat gender based violence and femicide, the narrative around the issue must change and men must take responsibility.
6. The Republic of South Africa has a duty to protect women, children and indeed all persons against any form of violence, committed by both state and individual actors. We point out that the punitive measures that have been implemented by Government to address gender based violence, and violence in general, have failed in both their deterrent and rehabilitation function. For this reason, we highly recommend that Government shift its focus from punitive to preventative measures. Instead of 'treating' the symptoms of violence (being the crime), Government should rather be treating the causes (what leads perpetrators to commit these crimes).

Directors: Leanne Berger and Lee-Anne Germanos

7. Gender based violence is violence perpetrated against a person on the basis of their biological sex or gender identity. Femicide is the killing of a female or perceived female on the basis of gender identity. Gender based violence, and violence against women, takes many forms and is encompassed in many legal and social definitions relating to the treatment of women, both as individuals within society and also as a collective. In order to 'treat' the causes we have to understand properly the multiple forms of abuse, why they are perpetrated and how they have become systemically ingrained into our social and legal tapestries.
8. Women's rights to dignity, equality and privacy are violated in private, domestic, public, and social spheres, through the commission of sexual assault, cyber sexual assault, sexual grooming, workplace harassment, rape, human and sexual trafficking, and domestic violence and abuse. It is, therefore, clear that not all gender based "violence" is physically violent in nature but includes emotional, psychological and economic violence. The pervasive nature of violence against women results in legal and social systems being blind to the holistic picture and realities experienced by women and girls in South Africa. This makes it impossible to achieve meaningful reform.
9. In order properly to address this problem it must be clearly understood that the commission of gender based violence, along with the commission of all types of sexual offences, is about power and control. This violence is often perpetrated by intimate partners, which means it falls under the 'acquaintance violence' category (which is a dominant feature of violent crime in South Africa).¹ Gender-based and sexual violence are perpetrated because of a feeling of disempowerment and lack of control by perpetrators who then exert control and power over weaker and more vulnerable victims (which is why victims are predominantly women and children). Traditional patriarchal norms enforced through religions, customs and traditions exacerbate these perceptions. Rape was described by the Constitutional Court as being "*not simply an act of sexual gratification, but one of physical domination. It is an extreme and flagrant form of manifesting male supremacy over females,*" and further that, "*sexual violence and the threat of sexual violence goes to the core of women's subordination in society. It is the single greatest threat to the self-determination of South African women.*"

¹ The Centre for the Study of Violence and Reconciliation, *The Violent Nature of Crime in South Africa*, 25 June 2007.

10. When asked by UN Special Rapporteur on Violence Against Women why they commit these crimes, the majority of South African sexual abusers answered that they do it out of boredom, for fun or because they are entitled to.² From this it is clear that South African men have a toxic understanding of what masculinity is, which further informs their views on the exertion of power and control over others.
11. Violence is also learnt behaviour, so the millions of South African children who grow up in violent households (where violence is either perpetrated in front of them or against them) are likely to perpetuate the cycle into adulthood.
12. The nature and level of the violence in South Africa is evidence of severe and systemic social issues. These issues have rotted away the South African social fabric. If we are finally to address the issue of violence in South Africa, and more specifically gender based violence, we must look at the holistic picture and not target isolated parts of it. It works like the human body – all parts affecting one another.
13. For the most part, South Africa's violent roots stem from its legacy of colonialism and Apartheid. These legacies fostered ambivalence towards the law, produced an unequal socioeconomic society with a low sense of self-worth, and encouraged the abuse of substances to numb these realities. These low levels of self-esteem have been cemented by, what has become, institutionalised inequality (no longer on the basis of race but rather socioeconomic standing built on historically disadvantaged backgrounds). The psychological effects of these legacies, and continued inequality, are underrated because they are not visible and are therefore overlooked in crime prevention policy. Further, mental and psychological health are perceived as less of an urgent priority by societal norms as well as by the state that directs funds to ensure human survival at a basic Maslow level.
14. The majority of South Africans continue to live below the poverty line with little opportunity to better their circumstances based on high unemployment rates and poor marketability (unskilled labour force). This means that the low levels of self-worth are perpetuated. The added frustration of not being able to change one's circumstances exacerbates the situation and creates a dangerous sense of disempowerment, anger and sense of entitlement.

² 2011 report of Gender Links and South African Medical Research Council in 'Report of the Special Rapporteur on Violence Against Women, its causes and consequences on her mission to South Africa' UN A/HRC/3242/Add.2 14 June 2016.

Substance and physical abuse become outlets and, themselves, contribute to the high rates of violent crime.³

15. The culture of violence in correctional services facilities also fuels the perpetuation of the cycle of violence, as it results in the release of more violent individuals into society. Breaking the cycle of violence includes eliminating prison violence experienced between inmates and authorities, as well as between inmates with one another.
16. The Centre for the Study of Violence and Reconciliation produced a report on the above factors contributing to South Africa's high rate of violent crime for the Department of Safety and Security in 2007. Its recommendations have gone unimplemented. The recommendations included early intervention programmes for children, community programmes for violence-prone areas, and the provision of psychological and social service support.
17. Abuse occurs in a society that tolerates it. It is imperative that harmful behaviours, beliefs, attitudes, and social and cultural practices be unlearned and corrected. The change starts in each South African household. Government can intervene to promote these changes through school, community programmes and by using the media to educate people. Government can easily reach the youth, and future, of South Africa by developing specialised and compulsory school curricula for young children, which are designed to eradicate gender based violence. (This was implemented with success in parts of Kenya.⁴)
18. In summary, South Africa's gender based violence and femicide problem stems from psychological issues which should be treated appropriately. This is best achieved through the application of the aforementioned preventative measures. The implementation of these measures might require more effort and resources than those used for punitive measures. They will also not yield immediate results. Having said that, preventative measures are a long-term investment into South Africa's future, and a necessary one. They will require prolonged energy, consistent updating and support, and continued stakeholder engagement. However, when this investment starts to bear fruit, the resultant effect will be a lightened caseload on the criminal justice system, requiring less resources, and an overall healthier, happier and safer South Africa.

³ The Centre for the Study of Violence and Reconciliation, *The Violent Nature of Crime in South Africa*, 25 June 2007.

⁴ No Means No Worldwide: <https://www.nomeansnoworldwide.org/>.

Identified topics

19. We will now address each of the 3 topics to which we can meaningfully contribute. As we do not work with victims directly, we cannot provide input on case studies and on-the-ground experiences.

20. Short-comings in laws (focusing on implementation), policies and interventions by Government

20.1. Policing

20.1.1. According to a 2016/17 crime survey, only 35.5% of sexual offences are reported to the South African Police Services (“SAPS”).⁵ Of the 35.5% of sexual offences reported, between 40%-60% of them are withdrawn by either SAPS or the National Prosecuting Authority, predominantly on the basis that the charges are ‘false’⁶. A 2017 report revealed that only 8.6% of these reported cases see a successful conviction.⁷ This failure properly to implement the progressive laws that South Africa has enacted reinforces a culture of impunity that already exists in the country. It creates the impression that even if victims were to engage the criminal justice system they will not attain justice.

20.1.2. Furthermore, when it comes to reporting gender based violence, there is a widely held view by police personnel that women lie about rape to, for example, blackmail their ex-lovers into paying maintenance.⁸ Another major deterrent is that SAPS have a reputation for perpetrating the same crime against the victim when reporting it.⁹ This is secondary trauma caused and abuse committed by our own criminal justice system.

20.1.3. Over and above the capacity, skills and resource constraints facing the policing system in South Africa, there is a lack of understanding by police officers of the nature of the crimes committed (in respect of gender based violence) and the

⁵ 2016/2017 Victims of Crime Survey in Fourth Respondent’s Submission at para 35.2.3 in *Levenstein and Others v Estate of the Late Sidney Lewis Frankel and Others* (CCT170/17) [2018] ZACC 16.

⁶ 2000 report by the Information Analysis Centre in L Artz and D Smythe, ‘Should we consent: Rape Law Reform in South Africa’ Juta 2008 at pg 200.

⁷ South African Medical Research Council, ‘Rape Justice in South Africa’ 2017 report.

⁸ L Artz and D Smythe, ‘Should we consent: Rape Law Reform in South Africa’ Juta 2008.

⁹ *Supra*.

effect that it has on the victim, as well as the sensitivity required to handle cases. As a result the state assists in the further traumatising of South African society. Victims are not believed and stigmatised.

20.1.4. In addition to the crackdown required on the abuse of power committed by police, we suggest that a part of the police training budget be spent on sensitisation training. The training should be held by victim support services or trauma centres. This will also provide victim-centric institutions with an additional revenue stream to enable them to continue to support victims.

20.1.5. Family Violence, Child Protection and Sexual Offence units that are specialised to deal with the reporting of a sexual offence, as well as in offering assistance and providing information to the victim, must be placed at every police station. Police stations must be adequately resourced to provide victims with proper care when collecting evidence. Alarming reports reveal the lack of rape and DNA kits and other resources at many police stations across the country. Evidence collected must be with care and sensitivity.

20.1.6. Protocols for reporting offences must be made publicly available and easily understandable so that victims know their rights and can demand them from officials. This would include publishing and posting the rights, and procedures to be followed, at police stations, and requiring that they be explained to victims. This empowers both victims and police personnel to act in accordance with protocol.

20.1.7. It is essential that the various criminal justice system institutions collaborate and communicate with one another to ensure that meaningful action is taken against perpetrators. A more effective criminal justice system (with all the constraints that it currently faces) would serve as a warning to potential perpetrators that the law and society will not tolerate such violence.

20.1.8. The criminal justice system should have a centralised database of information. It should also consider sharing its information with non-state actors working to combat gender based violence, with a view to collaborating and bridging the capacity and skills constraints gaps in the system. This centralised database and collaboration with civil society will also assist in ensuring that accurate, reliable

Directors: Leanne Berger and Lee-Anne Germanos

and meaningful data on violence against women, girls and children is collected. This data must be collected timeously and promptly. There is an urgent need for civil society organisations to enhance their own data collection, analysis, dissemination and utilisation of synthesised data to inform decision making. A coordinated approach to information gathering will allow a proper consideration of facts when deciding on policy formulation.

20.2. Prosecution

20.2.1. While conviction rates are low, the rate of bail for offenders is high. Perpetrators are often released on bail and are allowed back into society without any redress or intervention. The purpose of bail is not to punish the alleged offender, but rather to act as a financial guarantee that they will appear before court on the day on which their matter is to be heard. That said, in practice, alleged offenders are released on bail more than once and often, for new commissions of the same or similar crimes. Thus, those against whom the offence was committed are subject to the risk that their attacker may strike again. The law does not take into account the protection required for these victims. Bail for gender based violence related charges therefore must almost always be opposed by the state.

20.2.2. Further, crimes against women should be categorised as a schedule 6 offence, making it harder for perpetrators to succeed in their bail applications.

20.2.3. In respect of parole, victims of gender based violence should be notified when their convicted perpetrator applies for it so as to allow them the opportunity to oppose parole.

20.2.4. Maximum sentences for rape and/or murder appear to be 25 years even when referring to “life imprisonment”. Other than minimum sentence requirements, prison terms are within the court’s discretion. There should be policy developed or legislation enacted requiring minimum sentencing of life imprisonment for rape and murder committed with aggravating circumstances, and for it to mean life in prison, without opportunity for parole. This minimum sentence should also apply to offenders who cannot be rehabilitated.

20.3. Legislation and policy

Directors: Leanne Berger and Lee-Anne Germanos

20.3.1. Sexual offences cases, and therefore sexual offences legislation, need to consider the existence of ‘coercive circumstances’. This is a consideration, and acknowledgement, of the power differentials that exist between the victim and the perpetrator, which cancels out even express consent given by the victim. ‘Coercive circumstances’ are a violation of an individual’s sexual autonomy i.e. their ability to freely agree (consent) or voluntarily participate in a sexual act (without threat, force or coercion).¹⁰ The South African Law Reform Commission (“SALRC”) understood coercion to constitute more than just physical force or a threat thereof. It included “various other forms of exercise of power over another person: emotional, psychological, economical, social or organisational power,” which would cancel out consent.¹¹ This progressive reform was included in the SALRC’s discussion paper¹² on sexual offences but was unfortunately, overturned by the South African legislature and left out of the Criminal Law (Sexual Offence and Related Matters) Amendment Act. This suggestion should be revisited.

20.3.2. It would be worthwhile studying the SALRC’s Report on Sexual Offences¹³, and the recommendations made therein for policy reforms that can be implemented now, but were overlooked then.

20.3.3. The National Sexual Offenders Register should be made public. The Register contains information on people who have been convicted of sexual offences against children and mentally disabled people. Currently, the Register is not available to the publ. Only employers can access it. Publication will have the dual benefit of enabling people to protect themselves against offenders as well as creating a social stigma against the commission of such offences.

20.3.4. We suggest that all state and private educational institutions implement an age-appropriate teaching unit addressing consent, bodily autonomy and appropriate inter-sex conduct as part of the national education curriculum. It has been shown that such education is brought home and educates beyond the individual learner, to other members in the family unit.

¹⁰ *Kunarac*, ICTY. T. Chr., 22 February 2001 at para 457.

¹¹ SALRC Project 107(1999) Discussion Paper 85.

¹² *Supra*.

¹³ (2002). Project 107: Sexual Offences Report.

20.3.5. Sex work should be decriminalised. We assert that people who choose to sell sex are able to enjoy the freedoms, rights and the human dignity afforded to all in South Africa. Decriminalising the adult sex work industry would result in sex work being acknowledged as work; with sex workers having strong voices that inform and influence wider social debates. Sex workers should be respected and seen as valued members of society. As it stands, sex workers are invisible to the law and fear enforcing their rights – particularly when a crime is committed against them – due to the repercussions they are likely to face at the hands of law enforcement agents upon discovering that they are sex workers. Sex workers are also prone to abuse by the police.

20.4. **Sensitisation of laws, policies and programmes**

20.4.1. Although the cautionary rule in respect of victims of sexual offences was abolished in South Africa in 1998, the ‘cautionary approach’ still appears to be applied by the judicial system. The abolished cautionary rule was developed on the discriminatory premise that the complainants, and often single witnesses to sexual offences (who are predominantly women), were inherently unreliable witnesses as they were inclined to habitually lie about rape. Sensitisation training is required in order to eradicate this approach. That includes training for defence counsel, prosecutors, magistrates and judges.

20.4.2. It has already been mentioned that police officers require sensitisation training in order to deal correctly with victims and not to cause secondary trauma. The same applies to the remainder of the criminal justice system. Sexual offences courts cannot be the only courts which are designed to be victim-centric and which require that court officials undergo sensitisation training. This should be mandatory for all courts with criminal circuits as they all deal with victims.

20.4.3. Judges and magistrates require their own sensitisation training, particularly in respect of sentencing. It was reported in November 2019 that Kwa-Zulu Natal magistrate, Kholeka Bodlani, sentenced a father who was convicted of having raped his 11 year old daughter to a wholly suspended 5 year sentence. In September 2018 the Western Cape High Court’s Judge Binns-Ward found, in mitigation in the sentencing of an accused, that the accused had a history of prior

Directors: [Leanne Berger](#) and [Lee-Anne Germanos](#)

consensual intercourse with the victim who was 13 years old; there was no actual violence used other than forced sexual intercourse; and that the accused stopped his assault when the victim started bleeding. These kinds of findings and sentences should not exist in our judicial system in this day and age and should be regarded as legally, morally and constitutionally wrong.

20.4.4. Toxic masculinity and positive masculinity must be explored and addressed through education initiatives both formally as well as informally. Colleen Clemens¹⁴ has characterised “toxic masculinity” as a narrow and repressive description of manhood. Toxic masculinity designates manhood as defined by violence, sex, status and aggression. It is the cultural ideal of manliness, where strength is everything while emotions are a weakness. In South Africa, men, as a group, enjoy a relative privilege over women, as a group, due to perceived superior physical strength or entrenched patriarchal social and religious practices. It is these perceptions that need to be overhauled and re-evaluated. Men need to be allied with women in the fight against gender based violence and be sensitised to this reality.

20.4.5. Intersectionality must be highlighted. Foreign¹⁵ black women are extremely vulnerable in South Africa. They have little state and social protection. The complex nature of identities means that the oppression faced, whether based on race, gender, class, sexuality, disability, nationality, or other social categories, build on each other and become even more inhibiting in allowing one to exercise one's rights. Accordingly, special sensitivity must be paid to how certain individuals experience life in South Africa.

20.5. **What continues to be overlooked**

20.5.1. The traditional way in which the legal system tries crimes involving gender based violence must be reconsidered. For example, in sexual offences cases, if an accused pleads not guilty, with the existence of consent being his defence, the victim must first give evidence in order to establish a case. The accused's version is then put to the victim in cross-examination. This means that the victim's state

¹⁴ Colleen Clemens “What We Mean When We Say, ‘Toxic Masculinity’” <<https://goodmenproject.com/featured-content/the-difference-between-toxic-masculinity-and-being-a-man-dg/>>.

¹⁵ Migrants and refugees.

of mind and behaviour at the time of the commission of the offence comes under scrutiny before the burden of proof can shift to the accused. The victim is effectively put on trial while the accused may choose never to give evidence or explain why he believed such consent to have existed. This kind of institutionalised secondary trauma deters victims from giving evidence.

20.5.2. One way in which the traditional court system can be reformed is by looking to bodies such as the International Criminal Court (“ICC”) when developing special rules for victims of gender based violence and sexual offences. When being tried before the ICC for sexual violence, any evidence put forward by the accused (in his defence) may not be adduced during the trial without warning. In terms of the ICC Rules, notice must first be given to the Court. The notice must describe the substance of the evidence and its relevance. To determine whether or not this evidence will be admissible, the Court must hear the views of the prosecution, the defence, the witness/es and the victim in a closed hearing (public access is prohibited). From there the Court is required to weigh up the degree of the probative value of the evidence against the prejudice it may cause. If the evidence is found to be admissible, the Court states on record its reasons for deciding so. Only then may such evidence be adduced by the accused at trial.

21. To conclude, Government must take a policy stance against gender based violence, but must go further than paying lip service by creating and funding national solidarity campaigns.

22. We thank you for the opportunity to submit our suggestions and proposals on eradicating gender based violence in South Africa. Understanding, preventing and redressing these harms are for the good of all in South Africa and not just for the benefit of victims and/or potential victims.

Yours faithfully



Lee-Anne Germanos

leeanne.germanos@gmail.com



Jade Weiner

jadeweiner@gmail.com

Directors: Leanne Berger and Lee-Anne Germanos