



## **Gender-Based Violence in South Africa**

### **A submission to the Universal Periodic Review (3rd Cycle)**

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#### **On behalf of the Shukumisa Campaign**

The Shukumisa Campaign was launched in 2008 by members of the National Working Group on Sexual Offences (NWGSO). The Shukumisa Campaign is made up of over 50 organisations and individual members and is governed by a steering committee comprising of 11 member organisations and the Shukumisa Campaign Coordinator. All nine provinces of South Africa are represented in the coalition as a whole. Please find a list of all Shukumisa members attached to this submission marked A.



This submission, which focuses on gender-based violence in South Africa, was prepared in advance of South Africa's Universal Periodic Review (UPR) by the United Nations Human Rights Council to be completed in May 2017. Through a consultative process, a coalition of civil society organizations have identified the ways in which the South African government has and has not met the accepted recommendations provided by members during the previous UPR.

This submission is structured as following, **Part one** of this submission discusses progress and provides recommendations in the following three areas: sexual offences, domestic violence, and harmful customary practices. The **second part** of this submission focuses on emerging issues not covered in the recommendations accepted by South Africa since the previous UPR cycle.

## **PART I: IMPLEMENTATION OF PREVIOUS RECOMMENDATIONS**

### **A. SEXUAL OFFENCES**

#### **1. Sexual Offences Court**

##### **Recommendation 124.53 (Ukraine); Recommendation 124.74 (Spain)**

- 1.1 In June 2012 the Ministerial Advisory Task Team on the Adjudication of Sexual Offences Matters (MATTSO) was appointed by the then Minister of Justice and Constitutional Development to investigate the viability of the re-establishment of Sexual Offences Courts (SOC's) in South Africa. On 6 August 2013 the Minister endorsed the MATTSO Report<sup>1</sup>, accepting all its recommendations. This officially permitted the commencement of the Department of Justice and Constitutional Development's National Project of the Sexual Offences Courts in August 2013<sup>2</sup>.
- 1.2 The Judicial Matters Second Amendment Act 43 of 2013, amending the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, was signed into law in January 2014 to give effect to one of the recommendations of the MATTSO Report, that of providing an enabling provision and legislative framework for the establishment of SOC's. Section 55A of the Act gives the Minister the authority to designate a court as a sexual offences court for the purpose of hearing sexual offences matters exclusively. To date this Act has not yet come into operation. The Department in its 2014/2015 report<sup>3</sup> has indicated that the reasons for this delay is firstly that the draft Regulations still need to be approved by the Minister and published for public comment, and secondly, that objections to section 55A of the Act by the Regional Courts President (RCP) needed to be considered. The regulations have still not been published for comment. As a result of the objections to section 55A, further proposed amendments to section 55A of SORMA are contained in the Judicial Matters Amendment Bill 2016. This Bill has not been enacted. This has further delayed the operation and implementation of section 55A of SORMA.

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<sup>1</sup> Report on the Re-establishment of Sexual Offences Courts August 2013

<sup>2</sup> Department of Justice and Constitutional Development: Report on the Implementation of Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007: 01 April 2014 to 31 March 2015

<sup>3</sup> Ibid page 84

- 1.3 It is submitted that the South African Government has had sufficient time to put this Act into operation, including the necessary regulations, for the formal establishment, implementation and management of SOC's. This legislation is essential for the effective provision of justice to sexual offences victims. Without it the roll out of these courts is dependent on policy and undertakings by the Department of Justice and Constitutional Development. Legislation places a positive duty on the government to establish SOC's which must comply with and provide services in terms the legal requirements of the Act. It is only when a legislative framework exists that there will be real accountability by the state and the provision of legal recourse for victims should the state not comply with its legal obligations.
- 1.4 The South African government should give effect the legislative framework for these courts by enacting the SORMA as amended.

## **2. Sexual Offences Register**

### **Recommendation 124.24 (Viet Nam); Recommendation 124.53 (Ukraine)**

- 2.1 In 2007, the Parliament of South Africa approved the establishment of the National Register for Sex Offenders (NRSO) to record the names of individuals found guilty of sexual offences against children and mentally disabled people. While the register is not available to the public, employers, such as schools, crèches and hospitals, may review an employee's name to ensure they are not on the list.
- 2.2 However concern remains over children who were automatically placed on the sexual offences register in terms of SORMA. The Constitutional Court<sup>4</sup> found this unconstitutional, and SORMA was amended<sup>5</sup> to ensure that the rights of children are protected. Section 50(2) of SORMA now requires a formal application by the state for the child's details to be entered into the register. However there is concern about children whose details were placed on the register before the amendment, which would be in violation of the Constitution.

## **3. Case Management of Sexual Offences**

### **Recommendation 124.64 and 124.68 (Norway); Recommendation 124.70 (Portugal); Recommendation 124.71 (Slovakia)**

- 3.1 Despite attempts by the South African government to make the criminal justice process more responsive to the needs and experiences of survivors of sexual violence and improve case management processes through the establishment of designated sexual offences courts, multi-service Thuthuzela Care Centres and inter-departmental/inter-agency service level agreements that aim to guide the management and disposition of cases, the management of sexual offences cases continue to face serious challenges. Key studies and other analytical works that have examined the

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<sup>4</sup> *J v The National Director of Public Prosecutions and Another* 2014 (2) SACR 1 (CC)

<sup>5</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act 5 of 2015

processing, investigation and prosecution of sexual offences cases<sup>6</sup> – conducted both prior to and subsequent to the establishment of these interventions – have regrettably regenerated an invariable list of concerns about the management of sexual offences matters over the past two decades. They reiterate persistent problems with the police management of cases, which not only include high levels of case attrition at the reporting and investigation stages of cases, but also cite the deleterious impacts of police responses to rape complainants, the persistent refusal to accept rape complaints if deemed unfounded, perfunctory statement-taking skills, delayed or sub-standard investigations, and pressures placed on complainants to withdraw charges or to seek alternative resolutions. Feeding into these policing practices has been an unyielding police culture that views rape cases as “too complex” or “iffy” as well as implacable perceptions about victim credibility and false reporting.

- 3.2 The law, in this case, is not necessarily the hindrance to good police practice. According to section 4(6) of the National Instructions for SAPS members on the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (hereafter ‘the Sexual Offences Act’), *any person who reports the alleged commission of a sexual offence to a member must be treated in a professional manner and must be reassured that the report is viewed in a serious light and will be thoroughly investigated*. Further, section 5(5) states that *a [police] member may never be judgmental while interacting with the victim irrespective of the circumstances surrounding the offence*. Research evidence indicates that these guidelines are not adhered to. Notably, it has been found<sup>7</sup> that it remains unclear as to whether in cases deemed “false reports”, particularly where a complainant is under the age of 16 are followed up for investigation by relevant policing and social development authorities or whether these complainants are taken to health care facilities for forensic examinations, to which child complainants are entitled under sections 54 and 28 of the Sexual Offences Act.
- 3.3 Conventional rape myths about ‘good’ and ‘bad’ complainants not only significantly influence police approaches to rape case management, but have also been found to influence health care responses,

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<sup>6</sup> Artz L, Burton P, Ward C, & Leoschut L. (2016). *The Optimus Study on Child Abuse, Violence and Neglect in South Africa* (p. 1-138). Switzerland/South Africa: UBS Optimus Foundation; Artz, L. (2009). “Theorising Attrition’: The Facts, the Faults and the Findings”. *Gateway to Justice? Policing Rape in South Africa*. Centre for the Study of Violence and Reconciliation and University of Cape Town. 11 December, Cape Town SA; Artz, L. et al. (2003). *An Investigation into the Causes of the Low Investigation and Arrest Rates of Sexual Offences Cases Channelled through the Thuthuzela Care Centre*, p. 1-66. Commissioned by the National Directorate of Public Prosecutions and UNICEF; Martin, L.J., Combrinck, H., & Artz, L. (2003). *Rape Survivors Access to Appropriate Medico-legal Services: Constitutional Perspectives*. Submission to the Portfolio Committee for Justice and Constitutional Development in response to the Criminal Law (Sexual Offences) Amendment Bill; Pithey, B., Artz, L., Combrinck, H., & Naylor, N. (1998). *The Legal Aspects of Rape: A Proposed Draft Bill for Sexual Offences*: 1-234; Shukumisa (2012). *Monitoring the Implementation of Sexual Offences Legislation and Policies*. South Africa: Shukumisa Campaign; Vetten, L., Jewkes, R., Sigsworth, R., Christofides, N., Loots, L. and Dunseith, O. (2008). *Tracking Justice: Attrition of Rape Cases through the Criminal Justice System in Gauteng*. Johannesburg: Tshwaranang Legal Advocacy Centre, the South African Medical Research Council and the Centre for the Study of Violence and Reconciliation; Watson, J. (2015). *The role of the state in addressing sexual violence: Assessing policing service delivery challenges faced by victims of sexual offences*. South Africa: APCOF

<sup>7</sup> Artz et al. (2016)

restricting rape survivors' access to vital emergency health care services, especially post-exposure prophylaxis (PEP) for HIV as well as decisions proceed with prosecution. Four key beliefs about rape complainants are repeatedly mentioned in the literature: (i) young girls have consensual sex, but when their parents find out they claim that it was rape and lay false charges; (ii) sex workers lay false charges as a form of extorting money from clients who refuse to pay, or to receive PEP for HIV (as there is a misconception that rape survivors must lay a charge with the police before being given PEP); (iii) women lay false charges of rape as a form of revenge or as an attempt to get a better divorce settlement and to receive custody of children; (iv) when rape complainants were perceived to be under the influence of drugs or alcohol at the time of the alleged incidence, his/her credibility is questioned.

3.4 Misconceptions about rape complainants, is not the only factor affecting the effective disposition of rape cases. The research cited at footnote 6 has also found the following factors to adversely influence the effective management of sexual offences cases: poor documentation and administration of case files at all (state) service provision levels; insufficient or delayed evidence collection; delays and postponements of cases due the absence of (or poorly composed) witness statements or key witnesses, expert reports, continually changing legal representation and protracted delays of forensic laboratory results; and the lack of pre- and post-court support. As a result of these systemic failures, of those cases that are referred for prosecution, many cases are withdrawn or prosecutors decline to proceed without ever going to trial. Criminal justice experts have also been critical of the (over)emphasis on conviction rates as a key indicator of successful sexual offences case management. There is no indication that beyond the standard detection and conviction "count", there are any genuinely qualitative, service-focused indicators that are being used to measure the impact of victim-centered services. In 2007<sup>8</sup>, Artz and Smythe argued that key performance indicators for the justice cluster are in some instances contradictory. For instance, for police, low reporting of cases are considered a good indicator of policing (demonstrating effective crime prevention) and high rates of referrals to prosecution are a good indicator of effective case disposition. The prosecution service on the other hand perceives high levels of referrals of sexual offences cases as a signal of poor crime prevention (increased levels of crime). They question whether the use of conviction rates reflects anything about *effective justice*.

3.5 While the integrated service provision model and protocols associated with the TCC's have been successful in terms of concentrating service providers into one system and centralised facilities, the separate elements of these systems continue to be beleaguered by a lack internal coherence, specialised knowledge and capacity, adequate resources to maintain effective services, and in some instances, basic professionalism.

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<sup>8</sup> Artz, L., & Smythe, D. (2007). 'Case attrition in rape cases: A comparative analysis'. *South African Journal of Criminal Justice*, 20(2), p. 158-181.

#### 4. Redress/Support to Those Affected by Sexual Violence

**Recommendation 124.67 (Sweden); Recommendation 124.71 (Slovakia); Recommendation 124.72 (Slovenia); Recommendation 124.62 (Austria)**

- 4.1 The South African Police Service's (SAPS) National Instruction 22/1998 provides clear instructions to the SAPS on how to support victims.<sup>9</sup> A key deliverable in this regard is victim-friendly rooms in which to interview victims of both domestic and sexual violence. SAPS have claimed that all police stations in South Africa offer "victim-friendly services".<sup>10</sup> However, the lived experience of victims and Shukumisa research findings<sup>11</sup> clearly indicate that these rooms and services are not consistently available or utilized for their intended purposes.
- 4.2 The National Prosecuting Authority's Thuthuzela Care Centres (TCCs) are one-stop service centres where victims can simultaneously access appropriate health care, counselling and psycho-social support (typically provided by non-governmental organisations), and specially trained SAPS investigators and prosecutors (case managers). Cases reported through TCCs have been linked with higher conviction rates, but only 44 of 55 TCCs nation-wide were fully operational in 2014/15.<sup>12</sup> TCCs are also overwhelmingly donor funded, as opposed to state funded, and a recent decision by a major donor in this regard has led to a withdrawal of funds from 27 TCCs. Members of the Campaign believe that this will directly impact on the psycho-social support and counseling services offered to victims. The South African government has not moved to close this funding gap, despite the success of the model.
- 4.3 The Department of Social Development has drafted a Victim Empowerment Support Services Bill. This Bill will mandate the state to fund and regulate the availability of support services to all victims, and will set norms and standards for such services. The Minister of Social Development has indicated that the Bill will be tabled in parliament.<sup>13</sup> We are concerned that the Minister neglected to provide a time line for the introduction of the Bill or the period that will be given to seek and ensure public consultation. There is also no clarity as to how the Bill and existing intersectoral mechanisms<sup>14</sup> already in existence will complement each other.
- 4.4 Despite the establishment in 2011 of the National Task Team on LGBTI and Gender based Violence (NTT), coordinated state responses to attacks against LGBTI people remain poor. For LGBTI women who are targeted victims of sexual assault because of their sexual orientation or gender identity,

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<sup>9</sup> Sigsworth, Vetten, Jewkes & Christofides *Tracking Rape Case Attrition in Gauteng: The Police Investigation Stage* (2009)

<sup>10</sup> South African Police Service presentation to the parliamentary Portfolio Committee on Police, on 18 August 2015, available at <https://pmg.org.za/committee-meeting/21337/>

<sup>11</sup> Shukumisa monitoring reports 2009–2014, available at <http://www.shukumisa.org.za/resource-archive-list/>

<sup>12</sup> Pg 73 of the National Prosecuting Authority Annual Report 2014/15, available at <https://www.npa.gov.za/sites/default/files/annual-reports/Annual%20Report%202014%20-%202015.pdf>

<sup>13</sup> Social Development Dept Budget Vote Speech 2016/17 on 4 May 2016, available at <http://www.gov.za/speeches/minister-bathabile-dlamini-social-development-dept-budget-vote-speech-201617-4-may-2016>

<sup>14</sup> Campaign members experience of the National policy Guidelines for Victim Empowerment which emphasises partnerships for service delivery to victims are not enforced, implemented or visible where most needed.

many of the service breakdowns are exacerbated by homophobic attitudes and notions about legitimacy of victims. The experiences of the Shukumisa Campaign members have been that cases involving LGBTI women are poorly investigated and little to no attention is given to the hate crime element at the prosecution level.

## 5. Sex Worker Criminalization

**Recommendation 124.68 (Norway); Recommendation 124.73 (Italy); Recommendation 124.94 (Costa Rica); Recommendation 124.123 (Switzerland)**

- 5.1 Currently, South Africa criminalises sex work, which is based on the false belief that it will deter the practice. The current legislation prohibits brothel-keeping, living off of the earnings of sex workers and receiving money in exchange for sexual services. However rather than achieving its stated goal, the criminalisation of sex work serves to marginalize and dehumanize sex workers and leaves them particularly vulnerable to abuse, including from members of the police. Rather than reducing the number of sex workers, criminalising sex work has resulted in increased exposure to numerous indignities, experienced primarily by women, from the police and other state agents.<sup>15</sup> Moreover, research shows that a third to half of all sex workers experienced violence in their workplace in the past year.<sup>16</sup>
- 5.2 The decriminalisation of sex work would lead to the greater realisation of human rights by providing sufficient labour protections, increasing access to necessary public health services, and improving the relationship between sex workers and police. Decriminalisation also recognizes that women have the autonomy to decide what they do with their bodies, which work they choose to undertake and the conditions in which they are prepared to apply their trade.
- 5.3 As the Southern African HIV Clinicians Society noted in March of 2016, modeling suggests that between 33-46% of HIV infections could be averted among female sex workers within a decade if sex work was decriminalised.<sup>17</sup> Therefore, we recommend that South Africa accelerate the legal framework to decriminalise sex work.

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<sup>15</sup> "An Easy Guide to Sex Law Reform: The difference between criminalization, decriminalization, legalization, and regulation of sex work." <http://www.sexrightsafrika.net/wp-content/uploads/2016/04/Sex-work-reform-120919guide.pdf> accessed on 16 September 2016

<sup>16</sup> "Decriminalisation of Sex Work," <http://www.genderjustice.org.za/policy-development-advocacy/decriminalisation-sex-work> accessed on 16 September 2016

<sup>17</sup> "The Southern African HIV Clinicians Society states its support for the decriminalisation of sex work" <http://www.sahivsoc.org/Files/Draft%20statement%20decrim%20of%20sex%20work.pdf> accessed 16 September 2016

## B. DOMESTIC VIOLENCE

### 1. Failure to Implement the Domestic Violence Act

**Recommendation 124.65 (Nicaragua); Recommendation 124.67 (Sweden); Recommendation 124.68 (Norway); Recommendation 124.74 (Spain)**

- 1.1 The Domestic Violence Act 116 of 1998 states in its preamble that *“[i]t is the purpose of this Act to afford the victims of domestic violence the maximum protection from domestic abuse that the law can provide; and to introduce measures which seek to ensure that the relevant organs of State give full effect to the provisions of this Act, and thereby to convey that the State is committed to the elimination of domestic violence.”*
- 1.2 Poverty, particularly inequality and distribution of assets, and the subsequent stress have been identified as key contributors to domestic violence<sup>18</sup>. South Africa of course is a highly unequal society with high levels of poverty and violence. A 2002 study on domestic violence identified that almost a quarter of women have been victims of abuse by an intimate partner and that 10% of the women interviewed in the study had been assaulted the previous year<sup>19</sup>.
- 1.3 The implementation of the Act has been problematic from its inception, which can be seen from the continued high levels of domestic violence cases before our Courts, but the implementation of the responsible government departments have in effect contributed to the failure of the legislation in effecting change in the lives of the very persons it seeks to protect.
- 1.4 Consistent Implementation Failures:

The South African Police Service (SAPS) have clear and stated obligations in terms of sections 2, 3, 8(4)(b), 8(6), 9(2) and 18 of the Domestic Violence Act. Specifically there is the obligation on the National Police Commissioner to submit six monthly reports to parliament in respect of:

- The number and particulars of complaints received against its members in respect of any failure to implement the Act;
  - The disciplinary proceedings instituted as a result thereof; and
  - Steps taken as a result of recommendations made by the Independent Complaints Directorate (now the Civilian Secretariat for Police)
- 1.5 The National Police Commissioner has failed to comply with statutory obligations as noted by the Portfolio Committee on Police in that there has been failure to submit reports as far back as 2013<sup>20</sup>. This has influenced the Committee’s ability to hold the Department accountable in terms of accuracy, oversight and monitoring. It is worth noting that in November 2015 the SAPS tabled four reports in compliance with their Domestic Violence Act obligations for the periods April 2013 – September 2013, October 2013 – March 2014, April 2014 – September 2014, October 2014 – March 2015. The content of reports are however questionable in terms of content and accuracy. This too was pointed out during the 12 August 2015 Committee Meeting where the Legal Resources Centre and Women’s Legal Centre were allowed the opportunity to present to the Committee on the

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<sup>18</sup> R Jewkes (2002) ‘Intimate Partner Violence: Causes and Prevention’ Lancet 359 1423

<sup>19</sup> R Jewkes, J Levin & L Penn-Kekana (2002) ‘Risk Factors for Domestic Violence: Findings from a South African Cross – Sectional Study’ Social Science and Medicine 1603

<sup>20</sup> Minute of Portfolio Committee of Police briefing 12 August 2015



implementation of the legislation. WLC in their submissions pointed out that in the shift from the ICD to the Civilian Secretariat (CSP) there appears to be a lacuna in that the National Instructions have not been updated to reflect the new SAPS structure. The National Instructions having come into effect in 1999 has not been reviewed for its relevance, implementation and possible amendment. With the introduction of the CSP of course the ICD's role in the implementation and reporting in terms of the Act fell away and was not initially picked up by the CSP, and the National Police Commissioner simply failed to comply with the reporting obligations during the time period. The change from the ICD to the CSP meant a 77% decline in the number of reported complaints against SAPS members in the implementation of the legislation.

- 1.6 During the Portfolio Committee Meeting of 18 August 2015 the CSP indicated that it had identified a number of challenges to the monitoring of the implementation of the Act. SAPS at a provincial level did not report to the provincial secretariats as anticipated and expected by the Act and the National Instructions since there were no internal instructions for them to do so. In 2015 the CSP therefore relied only on station audits in order to compile its report on non-compliance. The implication is therefore that the number of complaints of non-compliance of SAPS members with the Act could not be determined accurately. From the presentation made by the SAPS at the same meeting it became clear that there was not merely non-compliance with the implementation of the Act itself but also non-compliance with the monitoring and reporting obligations in terms of the Act. An example is the statistics provided for the period October 2013 – March 2014 where there was a national figure of 318 cases of non-compliance which was made up of 312 complaints for the Western Cape and 6 reported for the Northern Cape. The rest of the country either had complete compliance or simply failed to keep record, accept complaints or report on the complaints received. It is doubtful that the zeros reflected in the other provinces were indicative of a 100% compliance with the implementation of the Act. All of the Provincial Police Commissioners present at the meeting conceded that they had failed in the implementation of the Act.
- 1.7 Despite the Act being worded to include domestic violence between same sex couples, LGBTI persons continue to face challenges when dealing with the SAPS relating to domestic violence. Violence occurs at roughly the same levels as same sex and different sex relationships<sup>21</sup> but LBT women are less likely to seek the assistance due to fear of homophobic attitudes and secondary victimisation.
- 1.8 The reports that are available and based upon the experience of the two organisations, non-compliance by police officers include, but is not limited to:
  - Failure to arrest the abuser if an offence of violence has been committed;
  - Failure to arrest in instances where a warrant of arrest has been issued;
  - Failure to inform victims of their rights;
  - Failure to dispatch a vehicle to the scene of domestic violence failure to seize firearms or dangerous weapons;
  - Failure to advise the victim of counseling or shelters available to her/him;
  - Failure to keep required records of domestic violence cases and reports
  - Failure to serve protection orders

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<sup>21</sup> Messinger, AM (2011) *Invisible Victims: Same sex IPV n the National Violence Against Women Survey*, *Journal of Interpersonal Violence*, 26 (11) 2228- 2243

1.9 The Police are often the first responders to domestic violence and represent the state's commitment to eradicating and addressing violence against women. They bear the obligation to realise the Constitutional rights of women to safety and security and to have their bodily integrity respected and protected.

## **2. Failures to implement associated with South African Police (SAPs)**

### **Recommendation 124.68 (Norway), Recommendation 124.94 (Costa Rica)**

2.1 The South African Police Service (SAPs) are charged with protecting the South African public, yet they are sometimes the perpetrators of abuse, especially of vulnerable or marginalised individuals, such as sex workers. Similarly, the SAPs often experience various form of secondary trauma from the stress of their work, particularly in the context of domestic and sexual violence, which is often not acknowledged.

2.2 To address this issue, we recommend that the South African government provide additional resources for both sensitivity training and psychosocial support for police.

## **C. HARMFUL CUSTOMARY PRACTICES**

### **1. Child Marriages and the Practice of *Ukuthwala***

#### **Recommendation 124.26 (Chile); Recommendation 124.53 (Ukraine); Recommendation 124.73 (Italy); Recommendation 124.47 (Uruguay)**

1.1 *Ukuthwala*<sup>22</sup> is an irregular method for commencing negotiations between the families of the intended bride and bridegroom directed at the conclusion of a customary marriage. It is not a marriage in itself. There are two contrasting ways in which *ukuthwala* has been found to be practiced. On the one hand, there is a traditional conception of *ukuthwala* that requires consent of both parties wishing to enter into a marriage, and it is used primarily to encourage or compel marriage negotiations between the potential spouses' families; on the other hand, there is what is considered to be an aberration of the traditional concept, which includes the rape and abduction of girls as young as 12 without their consent to enter into a marriage. The latter version of *ukuthwala* is the lived experience of large numbers of women and children, and is a blatant violation of fundamental constitutional rights of women and girls. Section 9(3) of the South African Constitution<sup>23</sup> specifically prohibits discrimination on the grounds of gender. Any customary practice that allows women and children to be married without their consent is an unjustifiable violation of their right to equality, dignity, freedom and security of the person and privacy. The practice of *ukuthwala* is a clear manifestation of gender discrimination in South African society.

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<sup>22</sup> A customary practice, which translated roughly, means "to be carried away".

<sup>23</sup> Constitution of the Republic of South Africa Act 108 of 1996

- 1.2 Currently, *ukuthwala* is being regulated in a fragmented manner that addresses the acts associated with the practice without condemning the practice itself. This is done through separate statutes and common law rules that include, inter alia, the Children’s Act of 2005, the Sexual Offences Act of 1957, and common law abduction or kidnapping and other criminal penalties applicable. This may be why there is some confusion about the legality of the practice among important role players such as the police and social workers who, based on our experience, do not always know what their roles are in terms of the criminal aspects and social welfare obligations of this practice.
- 1.3 Criticism of discrimination in customary law should not be viewed as opposition to custom. The South African Constitution guarantees the right to practice and exercise one’s cultural beliefs and therefore government needs to take the lead in educating and seeking the development of discriminatory and harmful customary practices. There is a need to develop custom to include the constitutional rights of both parties before a person can be ‘twala’d’. The government must therefore put criminal sanctions in place to regulate and deter conduct that is associated with the practice where consent is not obtained prior to the abduction and where such consent is not informed and freely given, including where the consent is obtained by a minor who lacks the legal capacity to enter into a marriage.
- 1.4 The fragmented approach to regulating *ukuthwala* fails to appropriately capture the relationship between this practice and forced and child marriages. Issues of forced marriage and *ukuthwala* are not restricted to children, but also affect adult women. As such, the government of South Africa must set 18 as the minimum age of marriage for all children without exception and any gender discrimination. They must also prohibit forced and child marriages through legislation and must fast-track the Law Reform Commission’s draft Bill on The Prohibition of Child and Forced Marriages and ensure that it repeals any current laws that allow for minors to be married. Lastly, we urge South Africa to develop and implement psycho social support programmes for girls, especially in the rural areas, who have been forced into “marriage” and are unable to leave their “husbands” because of poverty, lack of family support and having been ostracized from their community.

## 2. Virginty Testing

### **Recommendation 124.47 (Uruguay); Recommendation 124.53 (Ukraine)**

- 2.1 In 2005, the South African Parliament passed the Children’s Act criminalising virginty testing of children under the age of 16.<sup>24</sup> The new law incited outrage and protest, particularly in traditional Zulu communities wherein the virginty testing of girls and young women is a widespread practice. The practice of virginty testing of adolescent women is widely documented in South Africa, particularly in rural KwaZulu-Natal and in the Eastern Cape.<sup>25</sup> Virginty testing is a manifestation of customary social norms that clearly enforce discrimination against women in violation of Section 9(3) of the Constitution, which categorically prohibits discrimination on the basis of gender.

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<sup>24</sup> Children’s Act 38 of 2005 Section 12(4)

<sup>25</sup> Commission on Gender Equality “Submission to the Select Committee on Social Services: Children’s Bill” [B70B-2003], 1 October 2005.

- 2.2 The regular testing process involves an examination of a girl's vagina for the hymen, the presence of which is purported to indicate whether she has ever been sexually active. In reality, this test is unscientific; neither can a woman's sexual history be accurately discerned from any test, nor is penetrative intercourse the only form of sexual activity that merits recognition.<sup>26</sup> Moreover, the concept of "virginity" in these communities is limited to notions of a woman's purity, making women and girls the sole bearers of any social repercussions of unsanctioned sexual activity.<sup>27</sup>
- 2.3 The Children's Act of 2005 criminalises virginity testing of girls under the age of 16 on the grounds that it endangers the welfare of girl children and violates their constitutional rights.<sup>28</sup> The inherent limitation on the age at which virginity testing is criminalised means that there are no regulatory checks on the testing of older girls. As the practice violates the right to equality and dignity for both women and children, the Children's Act only partially addresses the issue. Furthermore, enforcement of the policy is scarce as the practice occurs predominantly in rural areas. The tests, however, usually occur in public spaces such as schools, sports fields, and community halls;<sup>29</sup> with adequate enforcement mechanisms, the practice could be prevented or at least made less legitimate.
- 2.4 We recommend that the South African government bring the practice of virginity testing under full legal purview by passing legislation to expressly ban the practice for all women, guided by the Constitution's provision in section 12 for bodily and psychological integrity. This legislation must accompany assertive efforts to combat and prosecute violence and discrimination against women in all of its forms, especially when sanctioned and entrenched in specific cultural traditions.

## **PART II: EMERGING ISSUES AND OTHER HUMAN RIGHTS VIOLATIONS**

### **Care Work and Services to Victims of Gender Based Violence**

#### **Recommendation 124.62 (Austria), Recommendation 124.67 (Sweden); Recommendation 124.73 (Italy); Recommendation 124.123 (Switzerland)**

- 1.1 The South African state's approach to the care work done on its behalf, by civil society, is threatening the continued availability of quality services to victims of gender-based violence.
- 1.2 The overwhelming majority of state social services, including victim support services and shelters, are delivered by NGOs. Community and social care work is deeply feminized in South Africa. According to Statistics South Africa the community and social service sector was made up of 61% of women.<sup>30</sup>
- 1.3 While some NGOs are subsidised by state departments, they are never paid the full cost of rendering a service,<sup>31</sup> even when services are legislated as government obligations. Due to regular

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<sup>26</sup> CGE Submission to the Select Committee on Social Services

<sup>27</sup> "Health care for women subjected to intimate partner violence or sexual violence: a clinical handbook." WHO/RHR/14.26

<sup>28</sup> Children's Act 38 of 2005, section 12(4)

<sup>29</sup> CGE Submission to the Select Committee on Social Services

<sup>30</sup> Pg 34 of the Quarterly Labour Force Survey, Quarter 2, 2016, available at [www.statssa.gov.za](http://www.statssa.gov.za)

<sup>31</sup> Department of Social Development Policy on Financial Awards to Service Providers, 2011

and intractable misinterpretation of the funding framework legislation<sup>32</sup> at provincial level, NGOs are routinely subjected to restrictive, costly, and unreasonable organisational and financial processes designed for commercial service providers - and wholly unsuited to, and not legally required for, social services at grassroots level.

- 1.4 In addition to the restrictive environment in which services must be delivered, NGOs are facing severe funding challenges, due to a loss of donor funding after the 2008 financial collapse.<sup>33</sup> The Department of Social Development in particular is failing to make up the shortfall, and is in fact proceeding to reduce funding to social service NGOs even further, while increasing spending on its own staff (who do not provide direct services) and costly commercial service providers.<sup>34</sup>
- 1.5 The current relationship between the South African state and NGOs providing care services is characterised by an exploitative reliance on the commitment of NGOs, and their ability to raise dwindling donor funds, at the expense of victims and the workers who care for them.

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<sup>32</sup> The Public Finance Management Act NO. 1 of 1999, amongst others

<sup>33</sup> Shukumisa Factsheet on Undervaluing Care Work (2015), available at <http://shukumisa.org.za/wp-content/uploads/2015/11/Care-work-scorecard.pdf>

<sup>34</sup> Shukumisa press statement on state-funded Gender-Based Violence Command Centre by commercial service provider: <http://wlce.co.za/index.php/2013-04-30-11-57-18/2013-04-30-12-22-01/295-organisations-call-for-rands-and-sense-in-the-funding-of-services-addressing-rape-and-domestic-violence>

## Annexure A: Shukumisa Members

**Members of the Shukumisa Campaign Include:** African Empowerment Agency, Agisanang Domestic Abuse Presentation and Training (ADAPT), Aids Legal Network (ALN), Childline SA, CINDI Network, Coping Centre, Department of Social Responsibility - Anglican Diocese Grahamstown, Dullah Omar Institute Law Centre (UWC), Ekupholeni Mental Health and Trauma, Epilepsy SA, Famsa Pietermaritzburg, Gender Health and Justice Research Unit (UCT), Girl's Net, GRIP, Ikhwezi Women's Support Centre, Justice and Women (JAW), KwaZulu Natal Regional Christian Council (KRCC), Kwanele-Enuf Foundation, Lawyers for Human Rights (LHR), Legal Resources Centre (LRC), Lethabong, Lifeline Durban, Lifeline Free State, Lifeline National, Lifeline Pietermaritzburg, Limpopo Legal Advice Centre, Masimanyane Women's Support Centre, MOSAIC, Nacosa, NICRO, NISAA, Peddie Women's Support Centre, Philisa Abafazi Bethu, POWA, Project Empower, RAPCAN, Rape Crisis Cape Town Trust (RCCTT), Rape Crisis PE, REMMOHO Women's Organisation, Western Cape Network on Violence Against Women, Sexual Assault Clinic (SAC), Sonke Gender Justice, Soul City Institute, SWEAT, Teddybear Clinic, Thohoyandou Victim Empowerment Project (TVEP), Tholulwazi Uzivikele, Thusanang Advice Centre (TAC), Tipfuxeni Comm. C. Centre, Triangle Project, Tshwaranang Legal Advocacy Centre (TLAC), Umbono Service Centre for the Aged, Voice Movement Therapy Eastern Cape (VMTEC), Wiser (Wits), Women and Men Against Child Abuse (WMACA), Women's Legal Centre (WLC), Women on Farms and Women's Net.