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What is the Commission on Gender Equality?

Established in term of the Constitution

The Commission on Gender Equality is an independent body established in terms of the Constitution of the Republic of South Africa to promote respect for gender equality, and the protection, development and attainment of gender equality.

Independent Body

The Commission is an independent body that must report to Parliament every year.

The Commissioners

There are twelve Commissioners, including a chairperson. The Commissioners are nominated by the public, and selected by a parliamentary committee. They are appointed by the President. A secretariat assists the Commissioners in carrying out their work.

The Functions of the Commission:

A Watchdog for Gender Equality

The Commission monitors national and provincial Parliament to ensure that laws promote gender equality. If the Commission identifies any problems in a law, it may recommend to parliament that the law be changed. The CGE may even recommend the adoption of new laws to promote gender equality and the status of women. The Commission also monitors the policies and practices of government and the private sector.

The Legal Department

The Commission's Legal Department is responsible for identifying areas of systemic discrimination on the grounds of gender or sex in the law, and works in close collaboration with organisations and activists in this area, to ensure that these are adequately addressed by law makers.

Public Education and Information

The Commission has embarked on public campaigns to inform and educate the public on gender equality.

Investigating Equality

The Commission will investigate any instance of inequality on the basis of gender. It may try to resolve these cases by mediation or litigation. It also has extensive powers to carry out its investigations in that it may subpoena people to appear before it or order that documents be brought before it.

Research

The Commission carries out research.

Prioritising the Most Disadvantaged Women

In carrying out its functions, the Commission will try and ensure that it impacts on the lives of the most marginalised and disadvantaged groups of women.

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PREFACE

The publication of this report by the Commission on Gender Equality and the Centre for Applied Legal Studies represents the first comprehensive attempt to identify inequality and discrimination in the law on the basis of sex and gender. It finds that legislative discrimination is both direct and indirect or systemic.

Direct discrimination in the law is relatively easy to establish. Direct discrimination occurs when a distinction is made on the basis of sex or gender which serves to prejudice or disadvantage women or men. It is largely identified through assessing the extent to which these distinctions remain in the language of the legislation. It is clear from the Audit that South Africa has made progress in the elimination of direct discrimination in the law. However certain key areas of law require immediate attention. These include:

- Customary law: the inequalities of the customary law of succession and inheritance.
- Domestic and farm workers: these categories of workers remain excluded from the benefits of the Unemployment Insurance Fund Act and the Compensation for Occupational Injuries and Diseases Act.
- Sexual orientation: Gay and lesbian couples and families remain the subjects of overt discrimination in the Marriages Act and other laws which confer benefits on the basis of heterosexual marital status or a narrow meaning of spouse.
- Sexual rights: Differences still exist in the Sexual Offences Act.

The Audit reveals that most of the inequality and discrimination experienced by women lies not in the letter of the law, but in its impact. Hence a seemingly neutral law may adversely affect women, or a good law may be poorly implemented or administered in a discriminatory manner. Such hidden and often systemic discrimination is much more difficult to identify. Examples highlighted in this Audit include:

- In the area of housing, the Audit concludes that the application of certain legal provisions do not go far enough in ensuring gender equality in the housing sphere.
- In the area of Family Law, the continuing use by Blacks of the former Black Divorce Courts (now theoretically open to all), means that black couples seeking a divorce do so before a magistrate rather than a judge and without the services of the Family Advocate.
- The regulations surrounding the implementation of the Births and Deaths Registration Act mean that women lose their name upon marriage and can only regain it if they provide Home Affairs with a "good and sufficient reason".
- In respect of access to water, the Audit finds that "rights to water are intrinsically linked to land rights. Therefore control, access and quality of water inequitably resides with those enjoying riparian rights and land ownership. This means that rural women, who historically do not own land and whose traditional duty is to ensure that the household is supplied with water, bear the burden of having to travel long distances carrying heavy loads of water"
- The unequal value attached to women's work means that they receive unequal pay. The law has been unable to deal with this inequality emerging from deeply entrenched views of women and men.
- The treatment of women in the Courts is often based on myths and stereotypes that result in discrimination and inequality. An example of this is the apparent disparity in sentences handed down to women who kill the partners that batter them, and men who kill their partners.

The Audit also suggests that "the problem of inequality is often not a legislative one. It lies in the absence of policies or programmes or in the existence of gender biased or insensitive policies and programmes". The Audit has not sought to evaluate policies and recommends that further research is commissioned in areas such as education, the environment, water, media, communications and the arts. It suggests further that a real understanding of the inequality of women must start from an understanding of the needs and interests of women. The Commission on Gender Equality has already embarked on a range of research projects that seek to do this, for example: the Maputo Development Corridor, Gender, the Media and Advertising and the Private Sector.

Readers of the Audit should be alert to the fact that this Audit was completed in the middle of 1998 at a time when several laws for and about women remained bills. The new laws are the Recognition of Customary Marriages Act, the Employment Equity Act, the Adoption Matters Amendment Act, the Domestic Violence Act and the National Water Act. Every effort has been made to ensure that these changes have been incorporated into the Audit.

The findings of this Audit challenge all of us to continue to engage in research and advocate for legislative change. In particular, we should urge the swift passage and implementation of the anti-discrimination legislation or the equality law currently being drafted by the Human Rights Commission and the Department of Justice. Moreover, although women have won significant legislative gains, especially in 1998. These will remain paper rights until such time as the laws are efficiently and effectively implemented. Good implementation requires resources in a country where these are limited. It is critical that civil society organisations join in partnership with the Commission on Gender Equality to monitor the activities of government and ensure that they benefit all women, including those who live on the periphery of our society and who have yet to taste the fruits of our democracy.

INTRODUCTION

This legislative audit was prepared by the Gender Research Project at the Centre for Applied Legal Studies for the Commission on Gender Equality.

The aim of the Audit was to identify laws which discriminate on the basis of sex/gender and, where possible, to highlight areas for research, advocacy and reform. We have sought to identify laws which discriminate both directly and indirectly. Direct discrimination in the form of prejudicial differential treatment of women in the law is relatively easy to establish. Indirect and systemic forms of discrimination are more difficult to ascertain, as they often involve an apparently innocent legal differentiation, or failure to differentiate, which has an adverse effect on women or a particular group of women. This, together with the limited resources and time available to the project, means that there are limitations to what we have been able to achieve. While we have produced a fairly comprehensive review in some areas, in others we have been less successful. In particular, we have not always been able to identify the more invisible and systemic consequences of legislation or the circumstances in which an absence of legislation results in inequality. Moreover, the problem of inequality is often not a legislative one. It lies in the absence of policies or programmes or in the existence of gender biased or insensitive policies and programmes. It has not been our task to evaluate policies and we have mostly refrained from doing so. However, the chapters on education, environment, water, media, communications and the arts tend to raise policy rather than legislative problems. It is in these areas, especially, that more work needs to be done to isolate and address the problems of inequality.

A further critical issue beyond the scope of this study lies in the implementation of legislation. With a plethora of new bills relating to women currently being debated and passed by parliament, the task of monitoring the effectiveness of these laws constitutes a new challenge for the Commission on Gender Equality and civil society generally.

Methodology

This research relied on documentary material, including legislation, bills, Green and White Papers, academic articles and legal texts. We also prepared a questionnaire which was sent to a range of organisations and government departments to establish what was being planned in respect of the removal of discriminatory laws. A list of the organisations contacted appears in Annexure A.

A study such as this one inevitably takes the law and legal texts as its starting point and proceeds to analyse their impact on women. While this is informed by an understanding of the needs of women, it does not start from the needs and interests of women and analyse whether and how the law addresses these. Such a study would require more diverse methodological tools that were allowed by this research. It is recommended that such research would be important in selected sectors, especially when seeking to develop truly gendered policies and laws. This research would also be able to understand the complex and differential interplay of, for example, race and class and gender in creating and reproducing inequality.

Structure of the Report

The document is divided into chapters. At the end of each section within a chapter, we have

attempted to identify current or proposed policy and legislative reforms, and have focussed occasionally suggested reforms areas or strategies. However, we have largely concentrated on government initiatives. Clearly, civil society has often played a critical role in policy and legislative reforms through research and advocacy. We have summarised the information that we have received from civil society organisation in Annexure B, although this should not be seen as a reflection of all of the work being done in these areas.

Acknowledgements

Several persons and organisations assisted in the research by providing information and, in some cases, writing chapters. We wish to acknowledge and thank Coriaan de Villiers (economic issues), researcher for the Parliamentary Committee on Improving the Quality of Life and the Status of Women (PCIQLSW), Nicole Fritz of Wits University School of Law (Employment), Karrisha Pillay (Housing) and Sandy Liebenberg (Social Security) of the Community Law Centre, University of the Western Cape. We also wish to thank the PCIQLSW for making available their documentation from government departments. Finally, we thank all those NGO's and research organisations, as well as government departments, which sent in information for this Audit.

We are grateful to the Royal Netherlands Embassy for funding this research.

The study was written and edited by Lana Zylich and Cathi Albertyn of the Gender Research Project, Centre for Applied Legal Studies. We have tried to ensure that the information is correct to the end of August 1998.

Cathi Albertyn

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LEGAL STATUS AND CAPACITY

2.1 Introduction

Despite Constitutional guarantees of equality for all persons, glaring incongruities exist within the law whereby certain women continue to be denied full legal status and the capacity to enter into contracts, litigate and to own property or acquire credit. Not only is this contrary to section 9 of the Constitution¹ but it also challenges many of the provisions set out in CEDAW² and serves to perpetuate women's legal and social inequality in South Africa.

2.2 Legal Status

Historically women were subjugated under Roman-Dutch law having an inferior status especially when married in community of property and falling subject to the marital power. The Fourth General Law Amendment Act 132 of 1993 repealed the last vestiges of marital power for women in civil marriage³. The Constitution expressly guarantees freedom from any form of discrimination based upon, *inter alia*, gender, sex, pregnancy or marital status⁴. Further protection is found in both CEDAW⁵, which compels signatories to ensure legal equality between men and women.

Majority status is conferred upon individuals either at common law upon marriage or by statute for those reaching the age of 21⁶.

2.2.1 Customary Law

The enactment of the Recognition of Customary Marriages Act 120 of 1998 and the repealing of section 11A of the Black Administration Act has significantly improved the position of women married in terms of customary law. Previously women married in terms of customary law were treated as minors and were subject to the guardianship of their husbands.

¹The Constitution of the Republic of South Africa Act, 200 of 1996.

²The Convention on the Elimination of All Forms of Discrimination Against Women, which came into effect on 15 January 1996. See *inter alia* articles 2 and 15.

³S 29.

⁴*Supra* n.1 s 9(3).

⁵*Supra* n. 1 see articles 15 and 16.

⁶The Age of Majority Act, 57 of 1972.

2.2.2 *Discrimination by way of attitudes/stereotypes of women's "minority status"*

Sometimes women are discriminated against not because of the law, but because of outdated stereotypes which continue to affect policies and practices. For example, more often than not one must own property in order to receive bank credit. Anecdotal evidence of financial institutions and banking practice indicates that for women married out of community of property, the consent of her husband may be required in order to secure credit.

Proposals for Reform

The Human Rights Commission is currently drafting equality (anti-discrimination) legislation. It is hoped that once this mechanism is in place that discriminatory practices based on such attitudes will finally fall away, or else be challenged.

2.3 **Legal Status of Sexual Realignment**

The Births and Deaths and Registration Act 51 of 1992 repealed section 7B of the 1963 Act which had allowed for transsexuals (those who have undergone transformative surgery) to make an application to the Secretary of Home Affairs in order to have the population register reflect their change in sex. Those who had started the process of undergoing a sex change prior to the commencement of the 1992 Act are still able to do so, however this does not apply to those undergoing such operations after the Act's commencement⁷. Importantly, unlike those who have had their sex change legally recognised prior to the change in legislation, they are not entitled to full legal recognition under such areas as criminal, employment, marital or evidential law⁸.

This discriminates on the basis of sex and gender.

Proposals for Reform

It has been recommended by SALC that provisions be made for the recognition of a change in sex in the register of births by application to the Director-General of Home Affairs or, upon refusal in the first instance, to a Magistrate for an *in camera* hearing⁹. However, there is no information on any legislative changes in response to this recommendation.

⁷The Birth's and Death's Registration Act, 51 of 1992, s 7(3).

⁸See *W v W* 1976 2 SA 308 (W) and SALC Working Paper 24 on the Examination of the Legal Consequences of Sexual Realignment and Related Matter, 1994 pp. 21-35.

⁹SALC Working Paper 24, Project 52 on an Examination Of the Legal Consequences of Sexual Realignment and Related Matters, 1994, pp. iv-vii.

2.4 Surnames

The common law maintains that a wife assumes her husband's "rank and dignities"¹⁰. This is reflected in the practical application of the Births and Deaths Registration Act¹¹ whereby she is unable to retain her own name and pass it to her child¹². If the parents wish the child to assume either the mother's name or both names, discretionary approval, given on the basis of "good and sufficient reasons" being provided, must be sought from the Director-General¹³. In the case of illegitimate children, the notice will fall under the mother's name unless both parents come forward and request otherwise¹⁴.

Once married, the wife's name is automatically changed by the Department of Home Affairs to that of her husband's. Thus, she is legally prevented from using her maiden name under section 26(1) unless an application is made to change her name, again demonstrating "good and sufficient reason" to do so¹⁵.

These provisions not only discriminate on the basis of gender, sex and marital status and hence violate s 9 of the Constitution, but also contravene article 16(1)(d) and (g) of CEDAW which states that women and men have the same rights and responsibilities as parents. This includes the right to choose a family name.

Proposals for Reform.

Section 3 of the Births and Deaths Registration Amendment Bill¹⁶ proposes the insertion of section 26(1)(c), which would allow a woman to add her previous surname to her married name without having to seek permission of the Director-General.

There is no information on when this bill will be passed by Parliament or whether any further changes to the Act are planned.

¹⁰Voet 1.9.5.8, 5.1.9.5 and 23.2.40 cited in Sinclair *The Law Of Marriage* 417.

¹¹The Births and Deaths Registration Act, 51 of 1992.

¹²*Ibid* s 9 and 10 state that the birth notice must be under the father's surname.

¹³*Ibid* s 25(2).

¹⁴*Ibid* s 10(1)(a) and (b).

¹⁵*Ibid* s 26.

¹⁶Births and Deaths Registration Amendment Bill 53 - 97.

2.5 Citizenship, Unauthorised Immigrants and Refugees

Due to the way in which the Aliens Control Act¹⁷ is worded, most of the policy and practice surrounding immigration is governed by departmental circulars and regulations. These are inaccessible to the public and offer nothing but procedural uncertainty which effectively impedes any available appeal.

2.5.1 Citizenship

No citizen may be deprived of citizenship¹⁸ and in the case of marriage, section 14 of the South African Citizenship Act¹⁹, states that South African citizenship may not be lost or gained simply due to marriage²⁰. On an historical note, this is a change from much earlier legislation which once forced a woman to assume automatically her husband's nationality upon marriage²¹.

2.5.2 Unauthorised Immigrants

Unauthorised immigrants are estimated to range in number from 2.5 to 4.5 million²² individuals. They may not seek constitutional protection by reason of their illegal status and are therefore at risk of abuse and unable to seek police protection. Anecdotal evidence indicates that women and children are even further at risk when detained, as they are often not separated from male detainees. In fact throughout the process of arrest, detention and repatriation women are especially vulnerable to sexual harassment and abuse with no recourse to justice.

Women as authorised immigrants can also be at risk and exploited in situations of arranged marriages/marriages of convenience. Husbands can threaten to expose such an arrangement if they complain of abuse and thus subject the woman to quick deportation with minimal administrative process and little chance for recourse under the Aliens Control Act²³.

¹⁷Aliens Control Act (of 1992 as amended in 1995).

¹⁸The Constitution of the Republic of South Africa, 200 of 1996, s 20.

¹⁹South African Citizenship Act, 88 of 1995.

²⁰Thus conforming with article 9(1) of CEDAW and article 1 of the Convention on the Nationality of Married Women, signed on 29 January 1993.

²¹British Nationality in the Union and Naturalisation of Aliens Act, 18 of 1926 ss 12, 13; Union Nationality and Flags Act, 40 of 1927 s 2.

²²As per Home Affairs estimates given in *The Star*, 4 December 1996. However, statistics vary widely, suggesting that an accurate picture of this problem has yet to be formed.

²³The Aliens Control Act, 96 of 1991.

Proposals for Reform.

The Department of Home Affairs is to appoint a White Paper Task Group to draft immigration legislation. The tabling of an Aliens Control Bill is dependent upon a White Paper on Immigration being passed by Parliament²⁴.

2.5.3 *Refugees*

At present there is no legislation specifically addressing the issue of refugees and as such, asylum claims based on gender persecution are unlikely to succeed²⁵.

Proposals for Reform

The Green Paper on International Migration²⁶ has recommended an extension of persecuted social groups to encompass, *inter alia*, gender, sexual orientation or caste. A Draft Refugee White Paper (20 June 1998) and Draft Refugee Bill, 1998 have been published. The Bill is expected to go before Parliament in 1999.

The Draft White Paper includes in its categories of a persons genuinely at risk of serious human rights violations, persons at risk on account of gender, sexual orientation, disability, class or caste²⁷. The manner in which this is translated into the draft bill²⁸, and whether this provides sufficient protection on the grounds of gender, should be scrutinised.

²⁴<http://www.polity.org.za/govdocs/bills/tracking.98.html>

²⁵Some countries accept female refugees on the basis that their country of origin, *inter alia*, has a policy condoning violence against women.

²⁶Draft Green Paper on International Migration 1997. G.N. 849 of 1997. *Government Gazette* No. 18033, 30 May 1997.

²⁷Para. 2.2.

²⁸See s 2(1)(a) of the draft Bill.

THE FAMILY

3.1 Introduction

Women's gender roles in the family have been the source of much of their legal and non-legal inequality. The right to equality on the basis of sex and gender in the Constitution, as well as article 16 of CEDAW, guarantee women and men equal rights and responsibilities within marriage. Although the legislative framework for family law has moved in this direction over the past fifteen years, areas of inequality remain within the law and in the practice and implementation of the law. Furthermore, those women, men and children that are part of families that fall outside of the traditional nuclear family or recognised civil marriages continue to experience substantive inequalities in the recognition of their relationships, as well as their rights within these 'non-traditional' family forms.

3.2 Definition of Family and Marriage

There is growing international recognition that family law needs to be modernised to endorse the multiplicity of family forms that exist such as cohabitees, extended family arrangements, same sex partnerships and customary and religious unions. To cling fervently to archaic ideals that the family unit consists solely of husband, wife and legitimate children is contrary to the reality of a culturally diverse society, yet continues to remain the stalwart definition.

Common law defines marriage as "...the legally recognized voluntary union for life of one man and one woman, to the exclusion of all others while it lasts."¹ This excludes same sex marriages, single parent families, cohabitees, extended family relationships and polygamous marriages and is contrary to many current practices and precepts. Hence, a non-traditional family group in terms of this definition may not enjoy the legal and societal status and benefits associated with marriage and family under traditional definitions.

Proposals for Reform

Reforms in this area are taking place at several levels:

- a) The SALC (Project 109) is reviewing the Marriage Act of 1961. This review may include an assessment of the place of cohabitees and same-sex partnerships.
- b) Various policies and statutes define 'family' or 'family responsibility' to decide who receives benefits/rights etc. in terms of the particular statute. Attempts are being made for such definitions to be widened. Examples of this include:
 - The Department of Welfare's White Paper² defines family as: "...individuals who either by contract or agreement choose to live together intimately and function as a unit in a social and economic system."

¹Sinclair, J.D. (1996) *The Law of Marriage*, South Africa: Juta & Co. p. 305.

²Department of Welfare, White Paper, Government Gazette 16943, 2 Feb 1996.

- The Employment Equity Act defines 'family responsibility' as 'the responsibility of employees in relation to their spouse or partner, their dependent children or other members of their immediate family who need their care and support'³.
- The 1st Issue Paper of the SALC's Project 110 on the Review of the Childcare Act calls for the explicit recognition of different family forms in parenting and care-giving of children⁴.

3.3 Recognition of Marriages

Only marriages that are properly solemnised and not considered contrary to public policy are valid under civil law⁵. This has led to non recognition of Muslim and certain Hindu marriages⁶. The denial of validity to these unions consequentially led to, inter alia, the illegitimate status of children and the absence of a legally recognised duty of support between spouses.

The Constitution, however, recognises the validity of customary law, culture and religion alongside common law and legislation⁷. Nevertheless, customary law remains subject to the Constitution and the Bill of Rights whereby rights to culture and religion are subordinated by the right to equality in the event of any constitutional conflict⁸.

The Recognition of Customary Marriages Act has given legal recognition to customary unions, finally removing a longstanding source of discrimination against women married in terms of customary law. The act also recognises polygamy.

Reform proposals

- a) The SALC, in conjunction with the Department of Justice, is currently undertaking Project 59 entitled Islamic Marriages and Related Matters that will result in a Discussion Paper addressing the obvious inequities suffered by women in non civil unions. A draft bill is anticipated in the near future.
- b) Civil unions and marriages in general under the Marriage Act of 1961 are also under review by the SALC⁹. It is hoped that major recommendations for change will result especially in view of the fact that South Africa is now bound by, inter alia, the Convention on the Nationality of Married Women¹⁰, the Convention on Consent to Marriage, Minimum Age for Marriage and Registration for Marriages¹¹ and the Constitution which enshrines equality and children's rights.

³S 1 of B 60B - 98

⁴Para 2.1. of the First Issue Paper.

⁵The Marriage Act, 25 of 1961.

⁶See, for example, the Pensions Fund Act, 24 of 1956, which recognises spouses in customary and Muslim rites as "dependant" and the Workman's Compensation Act, 30 of 1941, which includes in its definition of "widow" spouses in a customary marriage.

⁷*Ismail v Ismail* 1983 1 SA1006 (W). However, if a Hindu ceremony is carried out by a recognised marriage officer in accordance with the Marriage Act, then the union shall be recognised.

⁸Ss 39(3), 211, 30 and 31.

⁹Albertyn, C.H., Fedler, J. and Goldblatt, B.A. (1997) Gender. In Joubert, WA (ed.) *The Law of South Africa*, Durban: Butterworths, pp. 139-189 at 156.

¹⁰B 110-98.

¹¹Review of the Marriage Act, Project 109.

3.4 Divorce

Given that South Africa is not a welfare state providing an adequate social security net for those in need of assistance, it then becomes vitally important that substantive divorce laws provide appropriate protection for women who traditionally bear the burden of maintaining the family unit and suffer greatest hardship upon its dissolution.

Current legislation states that for those who enter into antenuptial contracts, the accrual system (arguably the best next to marriages in community of property) will apply by means of default, where it is not specifically excluded in the antenuptial contract, which entitles each spouse to half the profits of the marriage¹². If no antenuptial contract is entered into then the common law regards the marriage as a partnership in community of property and profit and loss, which entitles each spouse to half the estate¹³. Further, when an antenuptial contract excludes sharing of matrimonial assets judicial discretion may intervene to equitably redistribute the estate¹⁴.

These provisions were to counter the severe results out of community of property marriages imposed upon women who, most often, did not understand nor have explained to them the implications of antenuptial contracts. Women are often left with no financial support or settlement from their husbands upon divorce yet are left to bear the burden of child support. With no state assistance available and, often, an inability to enter the workforce due to years of domestic servitude, they become further impoverished.

Proposals for reform.

- a) Project 112 of the SALC on Sharing Pension Benefits (Discussion Paper 77) recommends that legislation be drafted to regulate the sharing of retirement fund benefits between spouses upon divorce.
- b) No information is available on further reforms. However, research on the feminisation of poverty upon divorce is important to underpin reform proposals.

3.4.1 Customary and Religious Divorce

The protection and benefits of the accrual and judicial discretion provisions do not apply to either customary or Muslim divorces. Women are further prejudiced under Muslim laws upon divorce as the former have no entitlement to the matrimonial property whilst the latter have marriages which are automatically out of community of property. Orthodox Jewish divorces are legally recognised

¹²The Convention on the Consent to Marriage, Minimum Age for Marriage and Registration for Marriages, 1962, signed by South Africa on 29 January 1993.

¹³However, the accrual system can be excluded from the antenuptial contract under S 2 of the Matrimonial Property Act, 88 of 1984. This frequently occurs when the husband anticipates an increase in future wealth and, ultimately, wishes to exclude it from his wife.

¹⁴However, as many women do not enjoy the benefit of legal representation they are often granted divorces without an agreement of settlement. This, in turn, creates lengthy solitary battles after the divorce decree over the redistribution of assets, often to the detriment of the interests of the woman.

yet can only be initiated by the husband. However, the recent Divorce Amendment Act addresses this as civil court can now refuse to grant the divorce if the husband has unfairly used this power¹⁵.

The Recognition of Customary Marriages Act provides for divorce to take place in a court. It also provides that customary marriages should be in community of property, which will allow the matrimonial estate to be divided into two upon divorce.

Reform Proposals

- a) The extent of possible proposals in respect of Muslim personal law are unknown.

3.4.2 Application

Controversy surrounds the judicial discretion system as it only applies to white marriages concluded prior to 1 November 1984 and to black marriages prior to 2 December 1988¹⁶. The following women remain unassisted by either the accrual or judicial discretion systems: white women married prior to 1984 with an antenuptial contract or after 1984 with an antenuptial contract excluding the accrual system; black marriages prior to 1988; black marriage with an antenuptial contract excluding the accrual system and Muslim marriages. It has been suggested that this system is unconstitutional due to its arbitrary discrimination based upon the date in which one was married which denies fair access to judicial assistance for those married after these dates¹⁷.

Reform proposals

No information is available on this. However it is an important issue for considering a test case.

3.5 Black Divorce Courts

Despite the High Court having concurrent jurisdiction for all divorce cases, blacks continue to utilise the Black Divorce Courts¹⁸ whilst others attend the High Court. Practically this has meant that a magistrate rather than a judge presides over the divorce and that matters relating to child welfare and maintenance cannot be dealt with at the time of the divorce proceedings. This in turn leads to an unnecessarily protracted divorce procedure as women are left having to approach the Maintenance Court to settle outstanding matters. The Family Advocate's services are not available in the Black Divorce Courts.

¹⁵Divorce Amendment Act 95 of 1996

¹⁶*supra*

¹⁷The SALC in its report Review of the Law of Divorce Project 12 of 1990, rejected a proposal to extend judicial discretion to marriages solemnised after the commencement dates as it would introduce legal uncertainty regarding future divorces.

¹⁸The Black Divorce Courts are now open to all races as per s 1(a) of the Divorce Courts Amendment Act 65 of 1997 which came into effect on 1 April 1998.

Reform proposals

No information is available, but see under "Family Courts". It is also an important area for considering a test case.

3.5.1 Family Courts

This aforementioned difficulty has been addressed, at great length, by both the Department of Justice and the Hoexter Commission¹⁹. The Hoexter Commission has recommended the abolition of the Black Divorce Court²⁰ and the creation of a universal Family Court sitting at High Court level. The proposed court would offer conciliation services and attend to issues such as maintenance and adoption.

Reform proposals

The Department of Justice has proposed and is now implementing pilot Family Courts at the Magistrate's Court level uniting divorce, maintenance, children's and domestic violence courts whilst leaving the Family Advocate outside of the system. In overall terms it is feared that this latter proposal may offer nothing more than a reshuffling of current, arguably unsatisfactory, services under one roof.

3.6 Parental Responsibilities/Rights

Parents in a legally recognised union enjoy equal parental power and administrative responsibilities as both guardians and custodians of their children²¹. However, the much diluted common law rule remains, albeit unclearly, that the husband is head of family and as such would have final say in family matters²². In the case of illegitimate children, the mother, at common law, has sole parental power which is to be exercised in the best interests of the child²³. However, the Natural Fathers of Children Born Out of Wedlock Act²⁴ has recently come into force and would allow the biological father access, custody or guardianship upon application to the court and only if the court is satisfied that it would be in the child's best interests.

¹⁹The Hoexter Commission of Enquiry into the Rationalisation of the Provincial and Local Divisions of the Supreme Court, Fifth and Final Report Number RP78\1983. The final report was released in December 1997.

²⁰Although the High Court has jurisdiction to hear all divorce cases, Blacks continue to utilise the exclusive Black Divorce Courts whilst others use the High Courts.

²¹The right to equal administrative power over the affairs of the children is a relatively recent legislative change. See the Guardianship Act 192 of 1993.

²²*Supra* n.1 at 438 - 442

²³s 28(2) of the Constitution

²⁴Act 86 of 1997

3.6.1 Guardianship and Custody.

Guardianship and custody dually constitute parental power and are shared equally between partners to a marriage. The illegitimate child²⁵ falls under the sole guardianship and custody of the mother²⁶. This has been widely regarded as unfair especially as the father is legally required to maintain an illegitimate child without enjoying further legal rights. However, this is now tempered by the Natural Fathers of Children Born out of Wedlock Act which allows these rights to a father on application to a court.

3.6.2 Access.

The right of access, which stems from parental power, does not apply to fathers of illegitimate children.²⁷ However, the Natural Fathers of Children Born out of Wedlock Act allows the father to apply to the courts for access rights, provided the court is satisfied that it is in the best interests of the child²⁸. This places them in the same position as fathers of legitimate children to whom access is refused by the mother.

3.6.3 Adoption.

Issues surrounding adoption most affect, again, fathers of illegitimate children. Previous legislation stated that the consent of both parents of a legitimate child is needed for its adoption but only the mother's consent is necessary as regards illegitimate children²⁹. The Constitutional Court recently examined whether this was inconsistent with section 8 of the Constitution in so far as it is unfair to discriminate against fathers on the basis of marital status or gender. It was held that the legislation did violate equality rights but that it was up to Parliament to remedy the situation within two years from the date of judgement.³⁰

In accordance with the judgement, section 18(4)(d) of the Child Care Act was recently amended by the Adoption Matters Amendment Act³¹ and it provides that both parents' consent is required, although the natural father is required to acknowledge his paternity in writing. This requirement is only applicable in cases where the whereabouts of the natural father are known. . The consent of a father who is not married to the mother is not required where the father fails to acknowledge the child or to fulfil his parental duties without good cause, where the child was conceived out of an incestuous relationship or where the father has raped or assaulted the mother.³²

²⁵The illegitimate child being one born out of wedlock or one of a customary union considered illegitimate at common law. At customary law guardianship is with the father or the father's elder male relative if the father is deceased and not with the mother. There is also no shared interest.

²⁶Unless the mother is a minor, in which case guardianship vests in her guardian while she would retain custody. This is contrary to article 16(1)(d) of CEDAW.

²⁷*B v S* 1995 SA 571 A. Importantly, one must bear in mind that illegitimacy arises from not only, *inter alia*, cohabitation but from some customary and religious marriages.

²⁸See s 28(2) of the Constitution

²⁹s 184(4)(d) of the Child Care Act 74 of 1983

³⁰*Fraser v The Children's Court, Pretoria North and Others* 1997 2 BCLR 153 CC

³¹Act 56 of 1998

³²see ss 4 & 5 of Act 56 of 1998

3.7 Gay and Lesbian Rights

Currently, same sex unions are in no way accorded family status under the law as the definition of marriage exclusively caters to heterosexual unions. Same sex couples also have no right to enter into a legally recognised marriage. Further, any benefits that heterosexual cohabitants may enjoy are, largely, unavailable for same sex unions resulting from, in part, the presumed heterosexual basis upon which statutes are drafted. Thus, same sex unions do not enjoy, inter alia, intestate succession, immigration rights, taxation benefits, the rights and responsibilities as regards the joint rearing of children or the ability to adopt³³.

The pre-constitutional case of *Van Rooyen v Van Rooyen*³⁴ demonstrates traditional judicial attitudes towards homosexuality which, in this case, resulted in a lesbian mother's sexuality being used to distort legal rights of access and custody in favour of the heterosexual father. This type of discrimination is now open for challenge under section 9(3) of the Constitution which specifically excludes sexual orientation as a ground for discrimination. This unleashes the potential for extensive and innovative legal reform that would improve status and open benefits to same-sex couples as has been demonstrated in the recent case of *Laangemat v Minister for Safety and Security (Polmed)*³⁵

Reform proposals

The review of the Marriage Act by the SALC might address some of these issues relating to the recognition of partnerships and rights and benefits flowing from those partnerships. Other issues are being dealt with through litigation by the National Coalition for Gay and Lesbian Equality.

3.8 Cohabitees

Although cohabitation commonly exists and functions in the same way as a traditional family unit it remains, by and large, legally unrecognised.³⁶ Cohabitants are obviously free to invoke general legal remedies such as are found under contractual or proprietary regimes, but have no recourse to existing family law provisions that provide, inter alia, maintenance awards or intestate benefits. Children of such unions are also affected as they are deemed illegitimate.

Reform proposals

It is expected that some of these issues can be dealt with under the review of the Marriage Act by the SALC, however the scope of this review is not yet clear. It is an important area for legislative reform.

³³s 17 of the Child Care Act 74 of 1983 states that only married couples may adopt jointly. A homosexual individual can adopt under s 17(b)

³⁴1994 2 SA325 W

³⁵case no 19077/97 - the High Court extended full medical benefits to same sex partners.

³⁶However limited statutory recognition exists in the Prevention of Family Violence Act 133 of 1993 and the Compensation for Occupational Injuries and Diseases Act 130 of 1993 which do recognise the existence and validity of such arrangements.

SUCCESSION

4.1 Introduction

As will be shown, some of the laws relating to succession breach the equality clause within section 9 of the Constitution. Further, article 2 of CEDAW states that appropriate measures must be taken to amend existing discriminatory laws, regulations, practices and custom. The interaction of common and customary laws are, by their own nature, convoluted and make current succession laws unworkable and require rectification.

4.2 Civil Law

Inheritance under civil law is governed by the Maintenance of Surviving Spouse Act¹ the deceased's will or the Intestate Succession Act² and is determined in accordance with the matrimonial property regime under which the marriage occurred. There is no right to intestate succession for cohabitees.

In the cases of in community of property unions, half of the estate automatically goes to the survivor whilst the remaining half is divided according to the will or law of intestate succession. In cases of intestate succession the spouse inherits the estate when there are no children. If there are children, then the spouse receives R125,000 or a child's share, whichever is greater.³

These rules also apply to black civil marriages which are in community of property.⁴ However, black marriages which are out of community of property⁵ attract certain customary law consequences.

Proposals for Reform

The situation of co-habitees (including same sex unions) requires attention under civil law, however there are no known reform processes under way. The reform relating to marriages of blacks which are out of community of property and have customary consequences are dealt with in the next section.

¹The Maintenance of Surviving Spouse Act, 27 of 1990. The Act enables the surviving spouse to petition the estate for reasonable maintenance allowance until death or remarriage in cases where the deceased excluded the spouse from testate benefits.

²The Intestate Succession Act, 81 of 1987.

³*Ibid* s(1)(a) and s (1)(c)(I) and regulations therein.

⁴Prior to 1988 marriages automatically fell under the out of community of property regime.

⁵Either by specifically stating so in the marriage contract or under the automatic regime for most black marriages prior to 1988. *Supra* n1 s 22(6), except if a declaration was made to the contrary.

4.3 Customary Law

Customary law of succession is governed by primogeniture in the male line and drastically prejudices the inheritance rights of women. Whilst most widows in civil law unions would inherit in cases of intestate succession (ie without a will) this is not the case for women married under customary law or African women married out of community of property under civil law.

A widow automatically falls under the guardianship of her husband's heir along with the moveable and immovable matrimonial property.⁶ In some cases⁷ the woman remains a wife in her husband's family home with a right to be maintained⁸ by her new guardian as long as she remains at the family home. Customary law excluding women from intestate succession was recently challenged in *Mthembu v Letsela and Another*.⁹ The constitutionality of customary law was challenged in relation to section 23 of the Black Administration Act and Regulation 200.¹⁰

Le Roux J held that even if *prima facie* discrimination existed on the basis of sex or gender that the presumption in section 8(4)¹¹ of the interim Constitution was refuted by the duty of support owed to the widow by the heirs and that the succession rule is not in conflict with section 8 or contrary to public policy. However, this does not accurately reflect current social practice as often the widow is left abandoned by her husband's family or heirs.

There are instances whereby statutory law affecting succession is applied to customary unions. The Black Administration Act¹² states that any moveable property accrued to the customary wife cannot be transferred to her by will¹³ nor can land held in individual tenure upon quitrent conditions.¹⁴ Thus, only the categories of family and personal property may enjoy testamentary succession and benefit either spouse.¹⁵

⁶The heir could be either her own eldest son or a male relative of her husband's family.

⁷However, in KwaZulu Natal the marriage is dissolved upon death of the spouse.

⁸*Zepe v Zepe* 1963 BAC 90.

⁹*Mthembu v Letsela and Another* 1997 (2) SA 936 (T).

¹⁰Regulations for the Administration and Distribution of the Estates of Deceased Blacks (6 February 1987) Regulation 200 No. 10601.

¹¹S 8(4) of the interim Constitution read as follows:

Prima facie proof of discrimination on any of the grounds specified in ss (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established.

¹²The Black Administration Act, 38 of 1927 and the regulations framed thereunder.

¹³*Ibid* s 23(1) which is repeated in s 79(2) of the Natal and KwaZulu Codes.

¹⁴*Ibid* s 23(2) and (10).

¹⁵*Ibid* s 23(3).

The Intestate Succession Act, in addition to the Black Administration Act, applies to Africans in the following three circumstances. Firstly, whereby the deceased is exempted from the operation of the Code of Zulu law by possessing a letter of exemption.¹⁶ Secondly, if the deceased had a customary or out of community of property union, or if cohabiting, the Minister would then have a discretion to declare that the Act applies if it appears that customary law would be inequitable.¹⁷ Lastly, when the deceased was either married in community of property or under antenuptial contract, or was a divorcee or widow(er) of a marriage where no subsequent customary marriage took place.¹⁸

Widows are also prejudiced during the liquidation and distribution process in that they experience difficulties in providing proof of the existence of the customary marriage as required by the presiding magistrate. Nevertheless, all people have testamentary capacity, albeit limited to the aforementioned areas, which would enable them to avoid some of the pitfalls of intestate succession under customary law. Conversely, the testator could choose to ignore totally their spouses and families. In reality, testate succession at customary law is limited¹⁹ and, ultimately, is beyond reach of the disadvantaged who have no access to professional assistance.

Proposals for Reform

- a) The SALC has recently released an Issue Paper on Succession²⁰ as well as a Discussion Paper on Conflicts of Laws²¹ which, if followed through to legislative change, would do much to remedy the situation of women under customary law.
- b) The Amendment of Customary Law of Succession Bill²² seeks to extend the civil law of intestate succession to customary marriages

¹⁶*Supra* n 9 s 31. See also regulation 2(b) Government Notice No R200 of 6 February 1987 in *Government Gazette* 10601.

¹⁷*Ibid* regulation 2(d).

¹⁸*Ibid* regulation 2(c).

¹⁹However, even in cases of testate succession men often provide for men within their wills to the detriment of women.

²⁰Harmonisation of the Common Law and Indigenous Law (Draft Issue Paper on Succession) Issue Paper No 12 (Project 108) of 1998.

²¹The Harmonisation of the Common Law and the Indigenous Law. Conflicts of Laws. Discussion Paper 76 (Project 90) of 1998.

²²B109-98.

4.3 Wives and Girl Children under Muslim Personal Law

Women married under Muslim personal law have an entrenched non-derogable right to inherit from their husbands as governed by The Holy Quran.²³ They would obtain one quarter of the estate if there are no children to the marriage and one eighth if there were. However, women under Muslim law are disadvantaged as, generally, they receive half as much as male heirs of the same standing.²⁴

Proposals for Reform

The SALC has not made known its terms of reference for its Project on Muslim Marriages and Related Matters so it is unclear whether inheritance will be dealt with in this Project.

²³In fact Islamic law does not allow freedom of testation as only one third of the estate's net wealth may be bequeathed to persons or causes other than Quranic heirs.

²⁴Cachalia, F. (1993) Citizenship, Muslim Family Law and a Future South African Constitution. *THRHR*: 392-413.

EMPLOYMENT

5.1 Introduction

The drawing of the public/private divide has for generations effectively rendered the woman worker an invisible entity with her voice, needs and wants unheard and unattended in the labour market. Race and class have compounded the inequalities suffered by black and working-class women. Attempts to remedy unequal treatment must recognise that the stereotypical depiction of the worker as male, unhindered by family responsibilities, has long expired and that there needs to be a reformulation of labour legislation in accordance with this appreciation and in recognition of equality under section 9 of the Constitution, article 11 of CEDAW and the ILO Conventions, including Convention 111 of 1958 on Discrimination (Employment and Occupation).

5.2 Gender Inequality.

The Constitution guarantees the right to equality and freedom from discrimination on the basis of, *inter alia*, sex, gender, pregnancy and marital status.¹ This right can be invoked against the state and private persons².

The Labour Relations Act (LRA)³, like the Constitution, prohibits both direct and indirect unfair discrimination, adding the ground of family responsibility as a ground of discrimination. Neither affirmative action nor a determination based on the inherent requirements of the job will constitute unfair⁴ discrimination. Both the Basic Conditions of Employment Act (BCEA)⁵ and the Employment Equity Act⁶ echo this understanding of discrimination.

Proposals for reform.

- a) Although the Employment Equity Act takes over the unfair discrimination provisions of the LRA and will compel designated employers to undertake organisational audits and to institute affirmative action policies or positive measures in respect of persons from designated groups (black people, women and people with disabilities). However, Chapter II on the Prohibition of Unfair Discrimination can be developed to give greater certainty to employers and employees.
- b) The Equality Legislation currently being researched and drafted by the Human Rights Commission in conjunction with the Department of Justice will possibly further refine the discrimination provisions in the Employment Equity Act.

¹S 9 of the Constitution, Act 200 of 1996

²see ss 9(3) and (4) of the Constitution

³Act 66 of 1995

⁴s 2(2)(b) of Schedule 7 of the LRA

⁵Act 75 of 1997

⁶Act 55 of 1998

c) Codes of Good Practice in terms of the Employment Equity legislation will regulate conduct in many areas relating to equality⁷.

5.3 Parental Rights

Parental rights refer to rights relating to paternity and maternity leave and pay, job security while on leave and family leave. Legislation⁸ pertaining to parental rights is fragmented and consequently is not user-friendly.

5.3.1 *Maternity and paternity leave*

The BCEA⁹ provides maternity rights whereby an employee is entitled to at least four consecutive months maternity leave commencing at any time from four weeks¹⁰ before the expected date of birth or at such time as a medical practitioner or midwife certifies is necessary¹¹. The employee may not return to work for six weeks after the birth unless she receives medical clearance.

In cases of paternity rights an employee who has worked for more than four months for the same employer and works at least four days of the week for that employer is entitled to three days paid leave in the event of the birth of the employee's child¹².

5.3.2 *Job security and protection against discrimination.*

The LRA provides that a dismissal of an employee will be automatically unfair if the justification is her pregnancy, intended pregnancy or any related reason¹³. It also provides for protection against unfair discrimination on the basis of pregnancy.

Proposals for Reform.

This issue will also fall under the new Employment Equity Act and the Equality legislation being drafted by the Human Rights Commission and the Department of Justice.

5.3.3 *Maternity pay*

Maternity pay is regulated by the Unemployment Insurance Fund Act (UIF)¹⁴. The UIF Act

⁷s 54 of Act 55 of 1998

⁸ILO Convention 156 dealing with workers with primary responsibility has also not yet been ratified

⁹s 25

¹⁰written notice of commencement of maternity leave of at least four weeks, unless impossible, must be given to the employer. Notice must also be given of the date of resumption of duties.

¹¹S 25 of the BCEA. S 25(4) also grants maternity leave for miscarriages.

¹²S 27 of the BCEA

¹³s 187(10)(e) of the BCEA

¹⁴ss 34 and 27 of Act 30 of 1996

stipulates the conditions under which women qualify for maternity pay and provides for maternity benefits at a rate of 45% of her pay in respect of her pregnancy and confinement for a period not exceeding 26 weeks from the date on which she is deemed to have become unemployed.¹⁵ The employee must have been in employment as a contributor to the Unemployment Insurance Fund or otherwise have been in employment for at least 13 weeks during the 52 weeks immediately preceding confinement. Adoption benefits are available to women who choose to adopt children¹⁶.

At present domestic workers are unable to claim such benefits as are the husbands or wives of employers when working for such an employer¹⁷.

It has been acknowledged by the Department of Labour that legislative amendments are necessary to improve the benefits and to ensure that maternity benefits do not adversely affect unemployment benefits¹⁸.

Proposals for Reform.

There appears to be no legislation anticipated at the time of writing. Given its centrality to working women, urgent attention is needed on this issue.

5.3.4 Family Responsibility

Increasingly, labour legislation is paying heed to family responsibility, not only as a criterion on which discrimination is prohibited but as a factor to be taken into consideration by employers when regulating the working time of each employee¹⁹. The BCEA provides for three days paid family responsibility leave per annum, where the employee has worked for longer than four months and works at least four days per week. Family responsibility leave can be taken to care for a sick child and on the death of a spouse or life partner, parent, grandparent, child, grandchild or sibling²⁰.

Proposals for Reform

- a) A Code of Good Practice on the Regulation of Working Time is to be issued by the Minister of Labour²¹. No details are available on when this will be complete.
- b) The Employment Equity Act requires that affirmative action measures must include making reasonable accommodation for people from designated groups²². Given the presence of women as a

¹⁵s 37(1)

¹⁶s 37A

¹⁷s 2(2)

¹⁸Fn 7 to Act 75 of 1997

¹⁹s 7(d) of the BCEA

²⁰s 27 of the BCEA

²¹s 7(1)(a) of the BCEA. See also s 54 of the Employment Equity Act which provides for a Code of Good Practice on "Special Measures to be taken in relation to Persons with Family Responsibility"

²²s 15(2)(c)

designated group, the area of family responsibilities should be a growing area of policy and legislation in employment law.

5.4 Sexual Harassment

Sexual harassment has been recognised as an unfair labour practice falling foul of the LRA.²³ However the nature and scope of sexual harassment has largely been left to judicial determination in the few cases that have reached the courts²⁴. This has meant that there has been a great deal of uncertainty in this critical area of law. To assist employers in the prevention and punishment of sexual harassment, a Code of Good Practice on Sexual Harassment has been agreed at NEDLAC for issuing in terms of the LRA²⁵. This provides a more substantial enumeration of what is to be understood as sexual harassment in the workplace.

Proposals for reform

- a) The Employment Equity Act includes harassment as a form of unfair discrimination, but provides no further details as to definition, evidence, proof etc²⁶. These can be highly contested issues and it may be useful to spell them out in legislation.
- b) The Equality Legislation drafting process is considering the development of more detailed legislative provisions on sexual harassment.

5.5 Pay Equity

Wage discrimination is one of the most overt forms of discrimination that women encounter in the workplace whereby a woman with equivalent qualifications receives less remuneration than does a man for performing the same role. Wage discrimination continues despite prohibition under the residual unfair labour practice section of the LRA²⁷ and the Wage Act²⁸.

The more persistent inequality, which is more difficult to address, is the manner in which different types of jobs are valued and rewarded. These classifications are based upon gendered assumptions about his and her jobs. Thus, professions and occupations traditionally filled by women are undervalued and badly paid. Problems differ from sector to sector. Whether the notion of comparable worth will be invoked applying the LRA is as yet unclear²⁹.

²³Schedule 7, s 2(2)

²⁴See for example *J v M Ltd* (1989) ILJ 755 (IC)

²⁵the Employment Equity Act also makes provision for a Code of Good Practice on racial and sexual harassment (s54 and fn 8)

²⁶s 6(3)

²⁷Schedule 7. See also CEDAW article 11 (1)(d)

²⁸Act 5 of 1957. However both acts have little impact as they are related only to minimum wages

²⁹para 245

Proposals for Reform

The Employment Equity Act³⁰ contains no specific reference to equal pay but it is conceivably covered in both the prohibition against unfair discrimination and affirmative action measures. The Act states that designated employers must take measures to 'identify and eliminate employment barriers including unfair discrimination which adversely affect people from designated groups.'³¹

Detailed research and legislation are required in this difficult area.

5.6 Health

5.6.1 General

The protection by law of the health and safety of employees is to be found in the Occupational Health and Safety Act³² which prescribes the obligations of employers in providing and maintaining, to the extent practicable, a working environment that is safe and without risk to the health of employees³³. Employers must also ensure as far as is reasonably practicable that every employee is made conversant with the health and safety hazards attached to any work performed³⁴. The Compensation for Occupational Injuries and Diseases Act³⁵ provides compensation to an employee or their dependants, should the employee meet with an accident resulting in death or disability.

Proposals for Reform

Whilst the Act recognises as a 'dependant' a person who was living with the deceased at the time of death as if they were husband and wife³⁶, neither those in same sex relationships nor domestic workers are entitled to claim compensation. Further, the Act fails to provide explicit compensation for damages to reproductive organs.

No information is available on potential legislative amendments.

5.6.2 Reproductive Health

The BCEA prescribes particular safeguards in cases of pregnant employees³⁷. Employers are prohibited from requiring or permitting a pregnant or nursing employee from performing work that

³⁰The Affirmative Action Policy development Forum released in 1996, a Green Paper on Employment and Occupational Equity which proposed an employment equity law.

³¹S 15(2)(a)

³²Act 85 of 1993. See also CEDAW articles 11(1)(f) and 11(2)(d)

³³s 8. Notably it does not distinguish between male and female employees.

³⁴S 13

³⁵Act 130 of 1993

³⁶s 1

³⁷See also CEDAW article 11(2)(d)

is hazardous to her health or that of her child. Moreover, in cases of night work and if at all practicable, an employer must offer suitable, alternative employment with equal terms and conditions throughout pregnancy and for six months after delivering if the work is hazardous to her health or the child's.³⁸ The BCEA requires the Minister of Labour to issue a Code of Good Practice on the Protection of Employees during Pregnancy and after the Birth of a Child.³⁹

Proposals for reform

No information is available on the abovementioned Code of Good Practice.

5.7 Skills and Training

Historically, the employer bore very little obligation to train and develop employees whilst government provided only scant training opportunities geared towards male dominated employment. The LRA requires an employer, when appropriate, to give, *inter alia*, whatever evaluation, instruction, training or guidance the employee requires to render satisfactory service.⁴⁰ Further, the Employment Equity Act reinforces the need for training by requiring designated employers take measures to, *inter alia*, train people from designated groups.⁴¹ The extent to which individual employers may invoke commercial considerations as a justification for not implementing such measures is uncertain. Too great an appreciation of commercial considerations might allow for systemic inequalities to persist.

Proposals for Reform

The Department of Labour has released a Green Paper (March 1997) on A Skills Development Strategy for Economic Growth in South Africa. The Skills Development Bill is currently before Parliament. It is critical to ensure that this Bill effectively targets women.

5.8 Domestic and Farm Workers

Until recently, domestic and farm workers had little labour protection and have suffered great abuse. Employment for female farm workers is, more often than not, tied directly to their husband's employment with the farmer. However, they now enjoy a degree of extended protection offered by the LRA and the BCEA⁴². The BCEA now requires employers to provide at least four weeks notice of termination of employment to those employed for a period exceeding four weeks whilst for those employed for less than four weeks, a notice period of two weeks is required⁴³.

³⁸s 26

³⁹s 87

⁴⁰Schedule 8, s 8(1)

⁴¹s 12(2)(e)

⁴²The BCEA extended protection to agricultural workers in May 1993 and to domestic workers in January 1994.

⁴³*Supra* n.3, s 37

As employees' accommodation is frequently linked to their employment, the Act provides that once notice of termination of employment is served, there is a right to remain in such premises for a period of one month or for a longer period depending upon the time at which the contract could lawfully be terminated.⁴⁴

Proposals for Reform

Unfortunately, social security and employment benefits under the Unemployment Insurance Act⁴⁵ and the Compensation for Occupational Injuries and Diseases Act⁴⁶ remain unavailable to persons employed as farm or domestic workers. Pay equity is emerging as a further area of reform.

Urgent attention is required on these issues.

5.9 Part-time workers.

Internationally, most part-time workers tend to be women. In South Africa, women tend to do full-time rather than part-time work, although women are more likely to be part-time workers than men.⁴⁷ Part-time workers often do not qualify for rights and benefits because of their status. This may result in employers structuring their workforce in such a way as to avoid their obligations under various labour laws.

Proposals for reform.

- a) The Employment Equity legislation may provide a mechanism for dealing with discrimination and inequality to part-time workers.
- b) Research on the manner in which part-time workers may suffer discrimination would be useful, as well as research on unfair discrimination against casual or seasonal workers (see also farm and domestic workers). There is also evidence that discrimination occurs between, for example, weekly and monthly paid employees.⁴⁸

5.10 Public sector workers

Gender and sex discrimination amongst public sector workers, particularly in the vast array of regulations governing this sector, is currently being addressed, as are policies and programmes for

⁴⁴*ibid* s 39

⁴⁵Act 30 of 1996

⁴⁶Act 130 of 1996

⁴⁷Women and Men in South Africa, CSS. 1998 at 17

⁴⁸See the case of *Leonard Dingler Employees Representative Council Leonard Dingler (Pty) Ltd* (1998) 18 ILJ 285 (LC) which demonstrates that the distinction between weekly and monthly paid employees amounts to indirect race discrimination.

affirmative action and the transformation of the public sector.

5.11 Sex Workers

Criminalisation of prostitution condemns sex workers to a continued threats of violence as they are forced to work underground or in isolation⁴⁹. Moreover, they cannot report assaults for fear of prosecution and often police are implicated in such attacks. Criminalisation of their profession not only reduces the credibility of sex workers within the legal system but in society at large as, *inter alia*, financial institutions respond prejudicially to their employment status and they are refused both workers compensation and health insurance.

Proposals for Reform

In 1997 the Gauteng Legislature, having considered a report submitted by the Safety and Security MEC, recommended the decriminalisation of prostitution. Despite provincial political support⁵⁰ for reform, decriminalisation can only occur at national level and to date very little has been done to undertake this reform. Responsibility lies with the Department of Justice which has not set this as a priority area.

⁴⁹The Sexual offences Act 23 of 1957 makes it an offence to live off the earnings of prostitution, to keep a brothel or permit premises to be used as a brothel and to procure and solicit for the purposes of prostitution.

⁵⁰Both the ANC and the DP have called for the decriminalisation of prostitution.

FREEDOM, SECURITY AND PHYSICAL INTEGRITY

6.1 Introduction

Physical integrity encompasses a broad range of issues which include the obvious criminal harms of rape and assault, as well as subtler forms such as psychological abuse. The right to physical integrity is protected under section 10 of the Constitution and articles 1, 2, 5, 11, 12 and 16 of CEDAW. South Africa is currently cited as one of the most violent countries in the world. Studies indicate that an estimated 60% of all South African women experience some form of abuse within relationships¹ and that one woman is raped every 35 seconds². Therefore, compliance with the Convention on the Elimination of Violence Against Women,³ the Beijing Platform for Action⁴, CEDAW and the Constitution become crucial for the mental and physical protection of its female citizens.

6.2 Rape and Sexual Violence

The current legal definition of rape refers only to the intentional and unlawful⁵ penetration of the penis into the vagina⁶. This definition excludes sodomy, penetration by foreign objects and coerced oral sex which are classified as indecent assaults. Forced sexual intercourse with an animal would attract the charge of being an accomplice to bestiality for the third party.

Prior to the recent Prevention of Family Violence Act⁷ husbands were exempt from prosecution on the grounds of marital rape as marriage was believed to provide blanket consent to intercourse. This is no longer the case under section 5 of the Act which appears to apply to both customary and civil unions.

Gang rapes⁸, which are not specifically recognised in law, against poor, homeless or younger women are increasing. In order to secure a rape conviction at least one individual must be identified as the perpetrator then the remainder may be convicted as accessories. The issue of consent does not usually arise⁹.

In the case of sexual offences against minors, the Sexual Offences Act¹⁰ states that it is an offence for any man to have or attempt to have sexual intercourse with a girl under the age of sixteen

¹Albertyn, C H *et al* (1997) "Gender" in Joubert, W A *The Law of South Africa*, Durban, Butterworths 139 - 188 at 164

²As estimated by the South African Police Services, see Webster, N (1997) *Researching Rape Sentences*, *Gender Research Project Bulletin*, Centre for Applied Legal Studies, Vol 2 at 5

³The Convention was adopted by the United Nations in February 1994, resolution 48\104

⁴Beijing Declaration and Platform for Action UN Doc A/Conf. 177/20. Adopted by the Fourth World Conference on Women and recommended to the UN General Assembly by the Committee on the Status of Women on 7 October 1996

⁵Rape is defined as having penetrative intercourse with a woman without her consent. Male rape is not addressed.

⁶Incest is also limited to heterosexual intercourse. The issue of consent does not apply to incest.

⁷Act 133 of 1993

⁸Known as "jackrolling"

⁹It has been suggested that the definition of rape be broadened similarly to that of Namibia where a move away from using consent as a sole indicator towards accepting coercive circumstances, has occurred.

¹⁰Act 23 of 1957, see s 14(1)

years, or to commit/attempt to commit an immoral/indecent act with boy/girl under the age of 19 years. Consent is not a defence¹¹. The SALC is currently undertaking further work on a project on Sexual Violence Against Children.

The biggest obstacle for women is to be found in rules of evidence whereby the complainant's statement must survive three stages of judicial inquiry. There must have been hue and cry raised and, as regards the issue of consent, evidence may be introduced as to the sexual history of the complainant. These issues are highly discriminatory¹² and do not take into account the realities of rape¹³, the victim's post-rape reactions¹⁴ nor the often improperly documented evidence supplied by the district surgeon. This rule of evidence which was based upon the myth that women behave in an irrational manner and are probably liars when claiming rape has finally been ousted by the recent Appeal Court decision whereby the judge stated that the court may need a "cautionary approach" but not a cautionary rule in rape cases.¹⁵

A further problem is found in the fact that an alleged rapist may plead an honest but mistaken belief that the victim had consented to sexual intercourse.

Reform proposals.

Comprehensive reforms in the area of sexual violence are required. However, there are no known processes to address these either by the SALC or by the Department of Justice under whose jurisdiction this would fall.

6.3 Sexual Harassment

At present legislation does not exist which specifically addresses or defines sexual harassment outside of labour legislation.¹⁶ Women exposed to this indignity must either lay a criminal charge of rape or assault (which attracts a high burden of proof on the complainant), *crimen injuria* (damage to reputation or dignity) or use civil delict remedies (ie wrongful and intentional impairment to, *inter alia*, physical integrity).

Reform proposals

The equality legislation drafting process of the Human Rights Commission for the Department of

¹¹*ibid* s 1492)(a)9(c)

¹²The Namibian High Court declared the cautionary rule sexually discriminatory and unconstitutional. *S v D* 1992 1 SA 513 N

¹³However expert witness on rape trauma syndrome has been accepted and used when deciding sentence in *S v Daniels and 3 Others*. Unfortunately this only binds the Cape Provincial Division of the High Court and is not yet a universally recognised condition.

¹⁴For instance, rape trauma syndrome which has only once been recognised. See *S v Daniels* unreported CPD case no 162/92.

¹⁵*S v Jackson* unreported case no 35\97 decided 20 march 1998 in Bloenfontein

¹⁶The Labour Relations Act recognises it as an unfair labour practice. See also chapter 5 above

Justice is considering the inclusion of sexual harassment in equality legislation.

6.4 Domestic Violence

6.4.1 Introduction

Section 12 of the Constitution enshrines freedom and security of the person at both public and private levels. This provision is of vital importance as it specifically extends protection to the area where most violent crimes against women occur, namely in the private, domestic sphere¹⁷.

However, in the past law enforcement agencies have not actively interfered in what was generally considered purely a private matter. Despite a recent shift in investigatory behaviour, the South African Police Services policy recently stated that it will delay the investigation of complaints of domestic violence for seven days due to current budgetary restraints¹⁸. This is most worrying especially as domestic violence often leads to the most serious of gender motivated crimes, femicide, the killing of a woman by her intimate partner.¹⁹

6.4.2 Civil Remedies

Domestic violence was first addressed specifically as family violence by the much debated Prevention of Family Violence Act²⁰. The Act applied only to men and women who enjoyed customary or civil marriages or lived together as though they were married²¹. This effectively denied protection under the Act to former wives, gay relationships, domestic workers, teenage girls, prostitutes and relatives.²²

Several other problems were also identified. Those women who did fit into the scope of the Act and are abused may apply for the interdict. However, the interdict did not provide the best form of protection for all women as, *inter alia*, the poor cannot afford the costs of issuing an interdict²³, rural dwellers have difficulty accessing a magistrate and ultimately it is difficult to ensure that

¹⁷Whereby violence acts as a destabilising force within the family unit as children themselves may learn to see violence as the appropriate means of behaviour and act this out within the wider community. Women become in need of welfare and economic support which most countries strain to meet.

¹⁸Maharaj, Z (10 February 1998) finding reasons why Domestic Violence is Growing in *The Star*, p 2 of the Business Report

¹⁹Although femicide is not yet fully recognised is not yet fully recognised as a crime motivated by gender, the common law in *S v Di Blasi* 1996 1 SACR 1 A appears to understand the dynamics which can motivate femicide

²⁰supra n 7. Fedler suggests that it was completed by the Nationalist government at a time when it would most attract women voters and thus was not entirely thought through as complimentary governmental support structures were never provided. See Fedler, J (1995) Lawyering Domestic Violence Through the Prevention of Family Violence Act 1993 - An evaluation after a year in operation, *South African Law Journal* 231 - 251 at 234.

²¹*ibid* s 2

²²*ibid* Fedler at 239 - 240

²³Although the court can cover the costs of the Sheriff's fees, this does not happen frequently, not is it widely known.

warrants of arrest are promptly, if at all, executed due to lack of police co-operation and understanding.

The Act also failed women as it did not define the type of behaviour that the interdict covered. This caused problems most easily demonstrated in cases of potential threat, for example in stalking or verbal abuse, whereby magistrates had wide discretion and were reluctant to issue an interdict if physical violence had not taken place. Further concerns surrounded the constitutionality of the interdict as it applied in perpetuity and the respondent could be arrested before having the chance to state his case.²⁴

In addition to the interdict the abused individual may seek, *inter alia*, a trespass²⁵ or eviction order, peace order²⁶ or forfeiture of benefits of community of property upon divorce²⁷. It is important to note that these are all civil remedies and do not adequately address the seriousness of domestic violence. In fact, use of the civil interdict highlights the fact that domestic violence is considered to be less serious than violence found outside of the domestic sphere where use of criminal remedies are paramount.

The new Domestic Violence Act²⁸ has attempted to address some of these concerns. In particular it has extended the categories of persons who can apply for protection under the Act and it has also extended to the definition of domestic violence to include non-physical conduct.

6.4.3 *Criminal remedies.*

Criminal charges of assault, assault with intent to do grievous bodily harm, sexual assault, rape and marital rape are all available to the abused individual. The problem, however, is the strict onus of proof which must be met in order for a successful conviction which is most problematic in domestic cases as women do tend to hide physical proof out of fear and wish for privacy within their communities.

Reform Proposals

Currently an NCPS Victim Empowerment Business Plan is being drafted to include as policies, *inter alia*, a South African Victim Charter, Victim Policy Framework, a Model for Victim Empowerment and a policy on Compensation for Victims of Crime. However, a comprehensive review of the criminal law in relation to sexual violence is required.

6.4.4 *Battered Women as Murderers*

In other jurisdictions, self defence (including evidence of the battered women syndrome) has been recognised as a defence to killing their abusive partners and is granted a special category. South

²⁴This concern was addressed in the SALC's Discussion Paper 70, Project 100.

²⁵Trespass Act 6 of 1959. This remedy is often not appropriate as the abuser is the lessee or the owner.

²⁶Criminal Procedure Act 56 of 1955 as amended.

²⁷Divorce Act 70 of 1979

²⁸Act 116 of 1998

Africa has yet to either recognise this phenomenon or accord the crime a separate category. At best battered women turned perpetrators may attract diminished criminal capacity by having acted out of desperation or must rely on the complete defence of "non-pathological criminal incapacity" which is highly criticised as not being a recognised psychological condition anywhere in the world²⁹.

Reform Proposals

No information is available on initiatives by government, although research is being conducted by the Justice for Women Alliance based in Johannesburg.

6.5 Women's Shelters

Current legislation offers no provision for victim support. Thus the few women's shelters that do exist are not state-funded. Shelters are an essential provision for women and children escaping domestic abuse and violence and provide ongoing support and information on their rights.

Reform proposals

The SALC has recognised that violence against women is a social problem and that gaps do exist in the provision of support services. Thus, they have stated that changes to legislation "...should be fortified by the provision of shelters and referral services..."³⁰ This responsibility would typically rest with the Department of Welfare, however the majority of the social welfare budget is allocated to pension payouts with little else to be offered to other areas.

6.6 Pornography

Many women view pornography as an incidence of violence against women.

The new Film and Publications Act³¹ has been criticised for it does not set out a definition of pornography but rather deals with the more regulatory side of distribution of publications and films. Infinitely debatable, pornography could be defended under the freedom of expression clause in section 16 of the Constitution whilst plausibly condemned as breaching the equality and dignity provisions of sections 9 and 10. The legal boundaries of this particularly difficult area have yet to be thoroughly tested, in particular the meaning of section 16(2)(c) which excludes from the ambit of freedom of expression "advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm".

²⁹Nevertheless there have been cases where women who have killed their abusive husbands have been acquitted under this defence. See *Wiid* 1990 1 SACR 561 A and *Campher* 1987 1 SA 940 A.

³⁰*ibid* p 193 at para 6.5

³¹The Film and Publication Act of 1996 (not yet in force), which will allow the Film and Publication Board and the review Board to classify and regulate material.

ACCESS TO JUSTICE

7.1 Introduction

Access to justice must be extended universally to all citizens to recognise that women's rights form an inalienable part of universal human rights. Access to justice includes the right to legal services, including information, advice and representation, as well as access to independent and impartial courts. Access to courts entails both the provision of facilities to women in courts to ensure that they can exercise their rights, as well as fair procedures and adjudication. These rights are captured in the Bill of Rights via the right to equality and access to independent and impartial courts¹ with further provisions being found in CEDAW², and the African Charter on Human and People's Rights.³

7.2 Legal Services

7.2.1 *Legal information*

Access to legal services presupposes that women are aware of the extent of and means by which to exercise, their legal rights. However, appropriate information about legal services is not readily available to the majority of women. The accessibility of user friendly legal information would empower women by enabling them to seek redress for violations of their rights.

Proposals for Reform

The draft Gender Policy Considerations of the Department of Justice address these issues.⁴

7.2.2 *Legal Representation*

The majority of women in South Africa cannot afford the cost of legal representation which, therefore, makes state provided legal aid vital. Unfortunately, women do not have equal access to state assistance as the Legal Aid Board's budget favours criminal cases where men form the majority of the accused. Although the Legal Aid Board does provide funds for some family law issues which concern women most, the amount is considerably smaller than for criminal matters and for issues such as maintenance and domestic violence interdicts, legal aid is not at all available. Hence, women are unduly affected as they are unable to obtain freely the legal assistance needed to protect themselves or to obtain custody or guardianship of children and do lose out on the division and distribution of marital property upon divorce.

¹See, *inter alia*, s 9(1), 34, 35.

²See, *inter alia*, articles 2, 4(1), 5(a) and 15.

³The African Charter on Human and People's Rights 1981 (ratified 1996) articles 3(1), 19 and 28.

⁴S 5.

Proposals for Reform

Currently, the Legal Aid Transformation Team, under the Ministry of Justice, is examining ways in which the provision of legal aid can be improved giving special consideration to, *inter alia*, vulnerable persons and groups, particularly women and children.⁵ See also the draft Gender Policy Considerations of the Department of Justice.

7.3 Access to Courts

7.3.1 Facilities

Courts must take account of women's specific needs. For example, women often have to bring children to courts which lack proper waiting facilities, change areas or canteens. Secondly, women witnesses in sexual assault cases have to wait in the same corridor/waiting room as other witnesses. Separate waiting rooms should be provided.

Proposals for Reform

The Gender Policy Considerations of the Department of Justice make a number of proposals in this regard.⁶

7.3.2 Procedure and decision-making.

Court procedures can be biased along gender lines. The situation of women complainants in sexual violence cases has been mentioned in section six above. This section deals with the broader issue of women's credibility as witnesses and judicial decision-making.

7.3.2.1 Credibility as Witnesses

It has been argued that endemic within the judicial system, are the stereotypical beliefs that women lack credibility, are untrustworthy and lie more often than other witnesses. These sorts of gender biased allegations have been paralleled to stereotypical racist claims commonly experienced by, *inter alia*, Jewish and Black individuals. Examples of women's lack of credibility range from the rape complainant being on trial rather than the accused, to asking victims of domestic violence what they did to provoke the attack.

Women's lack of credibility as witnesses is fundamentally unsubstantiated and incorrect but nevertheless continues to exist especially within areas and experiences that are more common to women than men. Rather than learn from women's experience, the judiciary tends to dismiss their testimony as unreliable, yet would rely on the testimony of a (male) expert witness to the same

⁵See the Initial Report by Legal Aid Transformation Team to The Minister of Justice, 18 May 1998.

⁶S 7.3.1.

facts, as they fail to understand the background and experiences from which different women come.⁷

Proposals for Reform

Further research on this area is recommended, as well as education programmes targeted at addressing the gendered stereotypes underlying findings of credibility.

7.3.2.2 Gender Bias in Judges and Magistrates.

There are potentially many examples of gender bias by judges, some of which are tied up with stereotypes which prevail within the law as a whole. One illustration of this is the calculation of damages in civil suits by a predominately white, male judiciary who carry with them traditional views of gender roles which, in fact, do not reflect women's actual economic or social reality. These assumptions influence quantum whereby homemakers receive less than wage earners as housework is undervalued or not valued, women wage earners receive less than male wage earners as women's wages are lower and undervalued and quantum for disability, pain and suffering are lower if the complaint is the type typically attributed to women, for example headaches, and dismissed as hysterical.⁸ Judicial decisions have also been framed by prejudicial rules of evidence as discussed in chapter six.

Proposals for Reform

The South African Bill of Rights may be a cornerstone of democracy enshrining the rights of the people, but unless fundamental changes occur within the provision of justice, women will continue to suffer unfairly. In the words of Justice P Langa the "...failure of the system is really the failure of the functionaries who make up the structure..."⁹ Training and education is essential. At present only a few organisations, on an *ad hoc* basis, directly tackle human rights and gender education within the judicial system.¹⁰ Judicial education can include gender bias issues in rape and evidence,¹¹ delict and damages, prostitution, domestic violence, sentencing, race, ethnicity, economic status and age all of which compound the effects of sexism. All functionaries, including magistrates and lay assessors¹² would be targeted for this training.

⁷Czapanskiy, K (1993) Domestic Violence, the Family and the Lawyering Process: Lessons from Studies on Gender Bias in the Courts. *Family Law Quarterly* 27: 235.

⁸Conversely, a women receives more compensation than a man if she is disfigured as it is believed that physical appearance is a women's greatest attribute and vital to securing economic security through marriage.

⁹Address delivered by Constitutional Court Judge Pius Langa at the Law, Race and Gender Research Unit's Free State Conference, August 1997.

¹⁰The Law, Race and Gender Research Unit at the University of Cape Town undertakes gender sensitivity training of the judiciary. The Justice College has recently embarked on a Canada-SA Justice Linkage Project which will also offer training for Judges, Magistrates and Prosecutors in human rights sensitivity and social context training.

¹¹For example, rape trauma syndrome, battered wife syndrome, psychiatric consequences of sexual harassment and the use of expert testimony.

¹²It must be noted that there is a real need for gender training targeted towards lay assessors who are often the least gender sensitive yet are often the first and only contact for dispute settlement.

7.4 Community Courts

The Department of Justice¹³ and the SALC¹⁴ have raised questions about the role of community courts in the legal system.

Community Courts arose in the country during the eighties. According to the Department of Justice's Position Paper, a small proportion of community courts in the townships have accepted limited numbers of women as members.¹⁵ However, the gender power relations within the community tend to be reproduced in these courts.

Proposals for Reform

It is anticipated that the SALC will now produce a Discussion Paper on Community Courts.

7.5 Traditional Courts

Traditional Courts, unlike community courts, have a formal status in terms of the Black Administration Act 38 of 1927. They have both civil and criminal jurisdiction, having concurrent jurisdiction with the Magistrates Courts. However their continued operation raises a number of issues relating to democracy and gender, including the exclusion of women from positions of authority in the court structures, the subordinate status of women in the court procedures and attitudes towards women evinced in the courts.

The nature and operation of these courts requires scrutiny, in order to determine how to transform these courts in line with the Constitutional guarantees of equality and access to justice.

Proposals for Reform

- a) An Issue Paper is expected from the SALC on Traditional Courts.
- b) The Department of Constitutional Development is embarking on a White Paper process on traditional leadership and institutions.

¹³See the Position Paper on Specialist Courts and Community Courts, Commissioned by the Planning Unit, Ministry of Justice 1997.

¹⁴The SALC raised this in an Issue Paper (no. 8) on Alternative Dispute Alternative Resolution. SALC, Project 94.

¹⁵*Ibid* at 10.

ECONOMIC ISSUES¹

8.1 Introduction

CEDAW states that the State must make sure that there is social and economic equality between women and men. Women and men must have equal rights to family benefits, bank loans, mortgages and other forms of credit.²

8.2 Finance: Economic Policy, the Budget and Reform

Economic policies and budgets have tended to be gender blind. Various initiatives have begun to challenge the apparent neutrality of economic policy and budgets from a gender perspective.³

The Women's Budget Initiative, as a collaborative venture between the Parliamentary Joint Standing Committee on Finance and now the Committee on the Improvement of the Quality of Life and Status of Women and the Non Governmental Organisations (NGO's), IDASA and CASE, has analysed all the different budget votes from a gender perspective.³

South Africa also forms part of a commonwealth pilot project to engender macro-economic policies within member countries. The areas focused on to date are the Medium Term Expenditure Framework (MTEF) and the Budget Review, the discursive document which is released together with the budget itself. The 1997/1998 Budget Review is more gender sensitive than in other years and contains case studies of programmes and policies targeting women.

Proposals for Reform

These initiatives have shown that there is a need for gender-disaggregated statistics, targets and indicators of gender equality. The Department of Finance has committed itself to the development of methods of including women's unpaid labour in the Gross Domestic Product. There is also a clear need for an impact study on the effects of the government's macro-economic strategy on women.

8.3 Taxation

In South Africa there has been a shift from company to personal tax, but the proportion of women personal income tax payers is relatively small. Nevertheless, in the 1995/1996 year discriminatory aspects of the tax structure for married women were removed. All full time employees pay

¹This chapter was prepared by Coriaan de Villiers, researcher to the Parliamentary Committee on Improving the Quality of Life and the Status of Women.

²CEDAW article 13. See also the Beijing Platform of Action.

³*The Women's Budget. The Second Women's Budget. The Third Women's Budget.* All edited by D Budlender and published by IDASA.

Standard Income Tax on Employees (SITE) tax and those in a higher bracket Pay as You Earn (PAYE). Although there are provisions for employees who pay SITE to regain overpayment of direct taxes through filling returns, women who constitute the majority of low earners do not benefit from the system either through lack of knowledge or access to resources.

The effect on women of indirect taxation is however still disproportionate and impacts on their substantive equality. Value Added Tax (VAT) was introduced as part of the shift from direct to indirect taxation and contributes very substantially to government revenue.

Proposals for Reform

Although certain foodstuffs are exempt from VAT, unions and women's organisations argue that more items should be exempt from VAT, for example, paraffin. A further possibility is to introduce differential ratings to alleviate the burden on the poor, especially women. Women's unpaid labour within the family can be seen as a further indirect tax on women and rebates in this regard can be explored.

8.4 Trade and Industry

Within Trade and Industry there has been a recent shift in policy towards supporting South African industry to improve the capacity of South African manufacturers to compete in international markets. One aspect of this strategy is Small Business Promotion which partly reflects a concern with gender equity as women tend to be more represented in smaller enterprises.⁴

The Department of Trade and Industry has created Ntsika Enterprise Promotion agency (Ntsika), Khula Enterprise Finance Limited (Khula) and the Centre for Small Business Promotion to promote small, medium and micro enterprises (SMMEs). Ntsika offers non-financial support to providers of services to small enterprises and Khula provides credit guarantee schemes to banks for loans to SMME's. Applications for funding from Khula are evaluated on the basis of the extent to which their target market involves manufacturing enterprises and the gender profile of the target market.⁵

Proposals for Reform

- a) One cannot assume that the support of SMMEs will necessarily advantage women as women are disadvantaged within the sector. The practices and programmes of Khula and Ntsika need to be evaluated to assess whether women are gaining access to finance and whether there are training and skills development programmes targeted at women.
- b) It is anticipated that a National Empowerment Fund will be set up during 1998 with the object of increasing the participation of previously disadvantaged people in mainstream

⁴Budget Review 1998, 6.52

⁵*Ibid*

economic activities.⁶ Again one would have to ensure that the position of women is addressed.

- c) The white paper on a National Strategy for the Development and Promotion of Small Business in South Africa (1995) makes reference to further possible legislation. It suggests a Transaction and Procurement Act to lay down conditions and principles in relation to set-asides for small enterprises, non-discriminatory public sector procurement rules and incentives for big business subcontracting to smaller enterprises.
- d) The White Paper further suggests the possibility of a Small Business Finance Act to address issues in relation to access to finance, such as the recognition of certain non-conventional collateral types, the widening of scope for more specialised lending and investment institutions focusing primarily on SMME needs and the facilitation of deposit taking by lender-NGO's. Currently NGO's in this area such as Women's Development Banking are hampered by provisions of the Banks Act⁷ which only allow deposit taking by registered banks. In other countries, legislation has been specifically developed to accommodate this difficulty in order to facilitate access to credit.

8.5 Insolvency

The aspect of insolvency which directly and explicitly impacts on women was recently placed before the Constitutional Court.⁸ The Court upheld a provision which allows for all the property of a solvent spouse, upon the sequestration of the insolvent spouse, to vest in the master and then in the trustee.⁹ The provision further allows for the solvent spouse's property to be dealt with by the trustee or the master as if it was the property of the sequestrated estate. The solvent spouse can reclaim the property if he or she can prove ownership of it.

Important to note however is the strong dissenting judgement which held that the provision was unconstitutional on the basis that it violated the right not to be unfairly discriminated against. It was held that the section discriminated on the basis of marital status and that the discrimination was unfair because of the severity of the impact on the proprietary interest of solvent spouses.

The purpose of the provision is to ensure that there is no collusion between spouses and to protect creditors. The dissenting judgement reviews comparative case law, most of which uses the concept of voidable transactions, i.e. transactions which can be set aside, to achieve the same purpose.

Some protection is offered to spouses on insolvency, to the extent that on the sequestration of a spouse's estate during the subsistence of a marriage, the spouse's right to share in the accrual of the estate of the other spouse is excluded from the former's insolvent estate.¹⁰

⁶Budget Review, 1998 6.51

⁷Banks Act No. 94 of 1990

⁸*Harksen v Lane NO and others* 1997 (11) BCLR 1489 (CC)

⁹S 21(1) of the Insolvency Act 24 of 1936

¹⁰S 3(2) of the Matrimonial Property Act, 88 of 1984.

Proposals for Reform

In view of the judgement consideration could be given to introducing a legislative amendment to the Insolvency Act with reference to foreign case law.

8.6 Insurance

8.6.1 General

The provisions of the Insurance Act 27 of 1943 which affect women directly are in relation to the protection of policies. The Act contains a number of provisions which were introduced to ensure that life policies in favour of women were protected from the marital power of husbands, which now no longer exist in our law.¹¹

One of the sections was originally intended to protect women when donations between spouses were not allowed, but the law in this regard has subsequently changed. The section was declared unconstitutional on the basis that it discriminated on the grounds of sex and marital status and in fact disadvantaged women.¹²

Proposals for reform

Two Bills which have been introduced aim to repeal the current Insurance Act in its entirety. None of the above-mentioned provisions appear in the Long Term Insurance Bill, which deals with life insurance.¹³ The memorandum to the Bill states that policy protection will be scaled down and gender differentiation will be eliminated as undue protection gives the industry a competitive advantage and women are legally emancipated, removing the need for special provisions.

The proposed provisions do not alter the position of women. As mentioned the current provisions are dated in view of the abolition of marital power. The Bill provides protection for beneficiaries in respect of insurance policies upon insolvency, i.e. a portion of the policy falls outside of the insolvent estate in certain circumstances.¹⁴ One could argue that these policies should fall outside of the insolvent estate in their entirety.

8.6.2 Risk Classification

The aspect of insurance law which is the most discriminatory, however, is not covered by either the current legislation or the proposed bills. In order to be economically profitable, insurance contracts use risk classification, i.e. classes are developed which accommodate the various degrees

¹¹Ss 40-44

¹²*Brink v Kitshoff* 1996 (6) BCLR 752 (CC)

¹³Long Term Insurance Bill, B 78-97

¹⁴S 63 provides that certain policies which have been in force for at least three years are not liable to be attached if the benefits devolve upon a spouse, child, stepchild or parent. The excluded amount is up to a maximum of R50 000.

of risk of loss which applicants for insurance represent to the insurer. Many of the categories of risk relate, for example, to sex, race, pregnancy and marital status and are often used in calculating the premium payable.

Proposals for reform

This classification infringes the right to equality in the Constitution and has been the subject of court challenges in other countries and may well be in South Africa. Perhaps one could explore including legislative provisions in the proposed Long Term Insurance Bill in respect of risk categorisation and the calculation of premiums.

SOCIAL SECURITY¹

9.1 Introduction

Poverty in South Africa has strong racial (nearly 95% of South Africa's poor are African), gender, rural, regional and age dimensions.² One of the socio-economic rights included in the Bill of Rights is the right to social security under section 27(1)(c), along with the state's obligation under section 27(2) to take reasonable steps to realise this right. Articles 11(1)(e), 11(2)(b) and 14(2)(c) of CEDAW further support the right to social security.

As the White Paper for Social Welfare indicates, social security should cover a wide range of public and private measures that provide cash or in-kind benefits "...in the event of an individual's earning power permanently ceasing, being interrupted, never developing...only at unacceptable social cost and such person being unable to avoid poverty...[also] in order to maintain children."³

The government's Growth, Employment and Redistribution programme (GEAR) has emphasised the role of the market in social security provision, and the role of the state as providing only a "social security net". However, as things currently stand, few women will be adequately protected by the market as barely 50% of the total labour force has formal employment.⁴

9.2 Social Assistance

Two of the three main categories of non-contributory grants that impact on women most are, the elderly and child and family support.⁵ As such social assistance represents some of the most significant mechanisms of poverty alleviation and income redistribution and can protect those whose income has been stopped by reasons such as old age or pregnancy or help others to live above the poverty line.

9.2.1 Old Age Pensions

Parity of old age pensions between blacks and whites has only been in place since 1994 with this and other social security benefits constituting approximately 85% of the total welfare budget amounting to 53% of all welfare, with two thirds of these pensions going to rural areas.⁶

¹This chapter derives entirely from a paper written by Sandy Liebenberg of the Community Law Centre, University of the Western Cape.

²World Bank/SALDRU (October 1995) *Key Indicators of Poverty in South Africa*. pp 3-4, 6-7.

³The White Paper for Social Welfare, Chapter 7 para 1.

⁴van der Berg, S. (1997) South African Social Security Under Apartheid and Beyond. *Development Southern Africa* vol. 14 no. 4: 485.

⁵Eligibility criteria are set out in welfare regulations R 373 of 1996 under the Social Assistance Act 59 of 1992.

⁶Approximately 2% of the GDP see the Financial and Fiscal Commission, *Public Expenditure on Basic Social Services in South Africa*, An FFC Report for UNICEF and UNDP, p 88.

Research has shown that the pension system is well targeted for rural areas (where the majority of poor are women and often bear child care duties), performs well in gender terms and acts as a source of ‘pooled’ income to support other family members (ie children).⁷

While the government concedes that old age pensions constitute one of its most powerful tools in poverty alleviation, pensions have only been increased by 4.3% in the current fiscal year, which is less than the prevailing inflation rate. Further, pension back-pay will now only be allowed to accumulate for 3 months despite the fact that pensioners can wait up to one year from date of application to receiving first benefit thus drastically reducing the amount first time pensioners receive.⁸

9.2.2 *Child and Family Support Grants*

As at 1 April 1998 a new Child Support Maintenance Grant (CSG) has replaced the old racially biased State Maintenance Grant (SMG). The CSG has been criticised⁹ for restricting the eligible child’s age to 7¹⁰ from 18 (or 21 for those in school) as well as drastically reducing the overall level of the grant. Further, the new system has a number of negative gender implications such as the means test and other conditions applicable to the CSG. Many women will find it difficult to provide the requisite proof of household income and proof that they have ‘made efforts’ to secure maintenance from the parent(s) concerned¹¹ as well as trying to meet the excessive conditionality of the grant. Obviously, the current grant system excludes those poor households who do not have elderly members or children qualifying for the CSG and also completely exclude non-citizens, including those with permanent residence status. However, positively the grant is payable to the ‘primary care-giver’ which breaks with the nuclear models of the family that are inappropriate in the South African context.

For those currently receiving Child Support Grants (CSG) they will receive about one third less than their previous payments initially as the three year process of phasing out these grants with the replacement of the CSG begins. Nevertheless, state support for child care does have positive gender implications as it inevitably relieves some of the pressures surrounding child care and, as such does play a positive role in advancing substantive equality.

⁷See, Ardington, E. Lund, F. *How the Social Security System can Compliment Programmes of Reconstruction and Development*. Development Bank of South Africa. 1995.

Report of the Lund Committee on Child and Family Support (August 1996).

Financial and Fiscal Commission, *Public Expenditure on Basic Social Services in South Africa*, A FFC Report for UNICEF and UNDP.

⁸This change was introduced with effect from 1 April 1998. See Regulations No. R 418, R11(1).

Also, Cape Argus, *Pension back-pay crackdown - “Efficiency” move likely to reduce payments*. 16 April 1998.

⁹See SANGOCO representations on the draft regulations for the CSG, dated 17 November 1997 and 5 March 1998.

¹¹The Constitution defines a ‘child’ for the purposes of the rights protected in s 28 as a person under the age of 18 years.

¹²There may also be violent implications for those trying to seek maintenance from their partners.

Proposals for reform

The allocation of more state resources to the above grants will further address the poverty of families in general and women in particular.

9.3 Social Insurance

The Ministry for Welfare and Population Development's White Paper for Social Welfare sets out a national development social welfare strategy that will require the restructuring of social insurance including unemployment insurance and health insurance for universal access, meeting a minimum income to meet basic subsistence needs.¹² The Social Welfare Action Plan supports this and sets a period of five years to implement the White Paper policies.

Those who do not have access to work related benefits must rely on the flawed social assistance scheme outline above. Access to social insurance schemes has enormous gender implications as access to contributory social insurance is usually tied to a stable, uninterrupted job in the formal sector. Many women are indirectly excluded because of their higher unemployment rates, their prevalence in less secure, 'a-typical' informal sector jobs (ie home work, seasonal work), and because of the fact that their employment record is much more likely to be interrupted due to child care and other domestic responsibilities.¹³

As women are found, more often than not, within the 'a-typical' working sector, they are also discriminated against by private occupational retirement fund schemes. It is hoped that proposed anti-discrimination legislation will provide recourse and correct discriminatory insurance policies.¹⁴

9.3.1 Unemployment Insurance

The Unemployment Insurance Act¹⁵ provides benefits for, inter alia, unemployment, maternity leave (albeit to a current minimal standard of 40% of total wage for three months with the Basic Conditions of Employment Act providing 4 months leave only) and illness to the exclusion of casual workers, piece workers, seasonal workers and domestic workers. The overwhelming majority of domestic workers are women (there are approximately 860,000 domestic workers),¹⁶ and as UIF covers maternity benefits, their exclusion from the Act is a major disadvantage.

¹²The Ministry for Welfare and Population Development's White Paper for Social Welfare (February 1997) paragraph 27.

¹³The 1995 October Household Survey estimates that 75% of African workers in the informal sector are women. See Budlender, D. (1997) *Introduction*. In Budlender, D. (ed.) *The Second Women's Budget*. Cape Town: IDASA. p 26. See also chapter 3 on Labour.

¹⁴See also arguments in *Leonard Dingler Employees Representative Council v Leonard Dingler (Pty) Ltd* (1998) 19 ILJ 285 (LC) which, although addressing indirect racial discrimination, would be applicable to gender.

¹⁵The Unemployment Insurance Act, 30 of 1996.

¹⁶Meth, C (et al) *Unemployment Insurance and Related Coverage Issues*, Interim Report of the Task Team (October 1996).

9.3.2 Occupational Injuries and Diseases

The Compensation for Occupational Injuries and Diseases Act¹⁷ (COIDA) is an employer contributory fund which entitles *workmen* to compensation upon workplace injury. Again domestic workers in private households are completely excluded from any of COIDA's benefits and if injured, may only seek recourse through delictual remedies which is a protracted and expensive proposition. This is not in harmony with the human rights commitments expressed in the Labour Ministry's Programme of Action nor does it grant them access to critical social security rights.

Proposals for Reform.

- a) There are no known proposals for legislative amendments to the above acts.
- b) It is hoped that anti-discrimination legislation currently under preparation by the Human Rights Commission will include more effective remedies against unfair discrimination in social welfare schemes.

Although the social security system in South Africa is fragmented, discriminatory and fraught with delivery problems¹⁸ it remains an important measure for the alleviation of poverty and to enable women to escape destitution.

¹⁷The Compensation for Occupational Injuries and Diseases Act, 130 of 1993.

¹⁸The Committee for the Restructuring of Social Security (the Chikane Commission) recognises these difficulties and recommended a tighter, more simplified means of social security distribution that would close loopholes for corruption and inefficiencies.

See also the Public Service Commission's main proposals resulting from the Chikane document in its *Presentation on an Investigation into Social Security Services* (February 1998).

HEALTH

10.1 Introduction

The Constitution entrenches the right to accessible health care and indicates that the state must take steps towards realising health care rights.¹ Further, CEDAW asserts that women, especially rural women, must have equal access to adequate health care, appropriate services for pregnancy and health information.² This is of vital importance given that the majority of South African citizens are women who live longer and have more complex health care needs. Estimates show that when grouped together with children, they compose 73% of the entire population. Importantly, statistics indicate that 35-55% of the population live in poverty and, as has been proven, poverty is a major determinant of an individual's health status. Thus, women are acknowledged as extremely vulnerable and most affected by our currently fragmented and underfunded health care system.

10.2 Reproductive Rights

Reproductive rights incorporate a collection of rights and issues which include, inter alia, the right to security, dignity and physical autonomy as well as issues surrounding reproductive technology, HIV/AIDS, sex education and access to health care. The right to bodily and psychological integrity, reproductive self determination and access to reproductive health care, are all entrenched rights within the Constitution.³ South Africa is also bound by the Cairo Declaration which states that women have the right to make decisions concerning reproduction free from coercion and discrimination.⁴

10.2.1 IVF

Historically only married women were allowed access to in vitro fertilisation treatment and this had to be with the consent of her husband. In 1996 a complaint was brought to the Human Rights Commission which resulted in the Minister for Health changing the regulations.⁵ Now access to treatment for single women and lesbian couples is possible and married women no longer need the consent of their husbands.

10.2.2 Surrogacy

Surrogacy is currently unregulated in South Africa.

¹S 27. The Constitution under s 12 also guarantees the right to make decisions concerning reproduction.

²CEDAW articles 12(1), 12(2), 14(2)(b) and also articles 6, 10(f), 11(1)(f), 11(2)(d), which all involve health issues

³ss 12(2) and 27(1)(b)

⁴see the signed *Cairo Declaration of the International Conference on Population and Development* 1994, clause 7.3 (CD)

⁵Government Gazette 18362, regulation 1354, 17 October 1997

Proposals for reform

The Draft Bill on Surrogate Motherhood⁶ was tabled in 1995 by the SALC and sets out to regulate the artificial insemination of surrogate mothers. At present there are no legal provisions protecting the interests of surrogate children, the surrogate or needy parents. The Draft Bill has been tabled in Parliament and is currently being considered by a Parliamentary Committee. It is anticipated that their report, which may include a final Bill, will be presented within the current parliamentary year.

10.2.3 Sterilization

Sterilization is provided free of charge at state institutions and women do not need the consent of their spouses or partners to undergo this procedure.⁷ However, anecdotal evidence suggests that in practice often doctors do require that the partner knows about the proposed surgery and agrees to it. Further, access to such a procedure is often difficult, especially in rural areas.

In cases where the woman is either incapable or legally incompetent to give her consent to sterilization, three requirements must be met. Firstly, two medical practitioners must certify that the woman suffers a hereditary condition which would cause the child to suffer serious disability, or that the woman cannot comprehend or manage parental responsibilities.⁸ Secondly, the woman's guardian or a magistrate must consent.⁹ Lastly, written authority from the Minister of Health or authorized medical officer of the Department of Health must provide written authority.¹⁰

10.2.4 Termination of Pregnancy

The Choice on Termination of Pregnancy Act¹¹ now ensures that a woman is able to access,¹² at designated institutions¹³, a termination without the consent of her partner¹⁴ or, in the case of a minor, her parents¹⁵. This is in contrast to earlier, repealed, legislation¹⁶ which virtually denied access to legal abortions and, arguably, contributed to the between 42,000-300,000 illegal and dangerous abortions black women were forced to seek.

⁶Draft Bill on Surrogate Motherhood, Government Gazette 16479. 14 June 1995

⁷The Child Care Act 74 of 1983 which states that anyone over the age of 18 years who is competent to consent may, without the assistance of a guardian, consent to any operation upon themselves. See also s 12(2) of the Constitution.

⁸The Abortion and Sterilization Act 2 of 1975, s 4 (1)(a)

⁹*ibid* s 4 (1)(b)

¹⁰*ibid* s 4(1)(c)

¹¹Act 92 of 1996

¹²Further that medical practitioners are obliged under s 6 to inform women of their rights within the act and that any obstruction to facilities or prevention of a lawful termination is *ultra vires* according to s 10

¹³*supra* n 1 s 3

¹⁴*ibid* s 5(2). See *Planned Parenthood v Casey* 112 Sct 2719, 120 Led 2d 674 (1992)

¹⁵*ibid* s 5(3). Although the medical practitioner must advise the child to consult with her parents or guardian prior to having the termination

¹⁶s 3 of Act 2 of 1975, now repealed.

Terminations occur under one of three categories. Firstly, on demand during the initial twelve weeks of pregnancy¹⁷. Secondly, between the thirteenth and twentieth weeks if her medical practitioner believes that, inter alia, her physical or mental wellbeing is at risk, that rape or incest was involved or that the foetus would be at risk of serious physical or mental defects if the pregnancy were to continue.¹⁸ Lastly, after twenty weeks only if the medical practitioner, in consultation with either a midwife or a second practitioner, believes that the pregnancy would endanger the life of the woman or result in severe injury or deformation to the foetus¹⁹.

For those women mentally incompetent and unable to make such a decision, the same grounds apply for pregnancies up to twenty weeks with the additional consent needed from either her guardian, spouse or curator personae when the guardian or spouse cannot be found.²⁰ However, there are medical grounds whereby two medical practitioners, or one plus a midwife, may proceed without consent or if consent is refused by the guardian, spouse or *curator personae*.²¹

The legislation was unsuccessfully challenged in the Transvaal High Court²² recently. The Court found that the foetus does not have a constitutional right to life.

10.3 HIV/AIDS

For women in developing countries, who are economically, sexually and socially the most disadvantaged and vulnerable citizens, exposure to and infection by the HIV/AIDS virus is most prevalent and occurs primarily through heterosexual intercourse. Statistics for 1996 have shown that 14% of pregnant women were HIV positive which figure may, in some urban areas, rise to 30%. Despite proven indications that AZT treatment for HIV during pregnancy reduces transmissions to the newborn by 67.5%, hospitals do not offer treatment arguably contributing to the overall increase of children being born HIV positive.²³

For those individuals afflicted with the HIV/AIDS virus, the most protective aspect of South African law is found within section 9 of the Constitution which makes any form of unfair discrimination based on, inter alia, disability unconstitutional.²⁴ This provision is of vital importance in view of the fact that current legal provisions regarding HIV and AIDS derive from an assortment of common and statutory laws, regulations, and also from ethical guidelines and practice rules of the South African Medical and Dental Council.

¹⁷*ibid* s 2(1)(a) and may be carried out by a registered midwife, s 2(2)

¹⁸*ibid* s 2(1)(I)-(iii)

¹⁹*ibid* s 2(1)(c)(I)-(iii)

²⁰*ibid* s 5 (4)

²¹*ibid* s 5(5)

²²*Christian Lawyers Association of SA and others v The Minister of Health and others*, case 16291\97 Transvaal High Court

²³See Lucy Blamey's forthcoming article in the SAJHR - *The Need for a Definition : The Meaning of Reproductive Rights and the Case of HIV/AIDS*.

²⁴Other areas of potential protection can be found in the Constitution under ss 10, 12, 14, 21-23, 27, 29, 32 and 33

Proposals for Reform

The government has recently produced a White Paper²⁵ on the transformation of the health system, but despite recognising women's particular vulnerability to HIV, it does not go further to provide a specific gender policy on women and AIDS. The SALC has also recommended that an HIV and AIDS Act be passed, but the government has yet to act.²⁶ In view of women's greater biological vulnerability, their position as child bearers and victims of rape, plus the fact that AIDS is currently on the register of communicable diseases,²⁷ makes it most crucial that appropriate steps are taken to ensure that unfair discrimination and testing without consent no longer occur.

Discrimination on the basis of HIV is outlawed in the workplace in the Employment Equity Act and is being considered in the drafting of Equality legislation by the Human Rights Commission and the Department of Justice.

10.4 Women and the Primary Health Care System

Primary health care is administered by the District Health Authorities and embodies services such as family planning, HIV/AIDS education and counselling, maternal and child health services such as deliveries, antenatal, postnatal, and neonatal care.

As of 1 June 1994 pregnant women, women 42 days post pregnancy, women with complications arising from delivery and children under the age of six have been entitled to free health care at all state clinics and hospitals. From 1 April 1996 access to free primary health care was extended to all. The Department of Health, as indicated in its White Paper, plans to establish a Directorate of Maternal, Child and Women's Health (MCWH) to focus on the urban poor, rural and farm workers.

²⁵White Paper : Towards the Transformation of the South African Health System, Government Gazette No 17910 of 16 April 1997

²⁶See also SALC Working Paper no 58, Project 85 1995 on Aspects of law Related to AIDS; Centre for Applied Legal Studies draft bill of pre-employment HIV testing.

²⁷Regulations Relating to Communicable Diseases and Notification of Notifiable Medical Conditions, No R2438, Government Gazette No 11014 of 30 October 1987. This allows, for example, principals to banish HIV positive children from the classroom.

HOUSING¹

11.1 Introduction

Section 26 of the Constitution provides for a right of access to adequate housing, prohibits arbitrary evictions and together with section 9 unequivocally requires equality in access to adequate housing.² The former section further obliges the state to take reasonable legislative and other measures, within its available resources, to ensure the progressive realisation of the right to adequate housing. It further requires special measures to promote the achievement of equality in housing for groups who have been disadvantaged by unfair discrimination, such as women. Article 14(2)(h) of CEDAW also recognises the right to enjoy adequate housing as do a number of international documents.³

The Department of Housing has identified female headed households, the elderly, rural households, the poor, the disabled and farm worker households as more vulnerable than others and accordingly in need of special measures.⁴ However, in order to ensure substantive gender equality, special measures are required not only for female headed households but also for the broader group of women, who, in the past have been subjected to discrimination on the basis of gender.

11.2 Access to Housing

11.2.1 Subsidies

In order to fulfill the right of access to adequate housing, the National Housing Subsidy Scheme (NHSS) has been implemented.⁵ Arguably its application may have certain disproportionately negative consequences for women as it operates on a one-off basis, often prejudicing women who

¹This chapter was prepared by Karrisha Pillay of the Community Law Centre, University of the Western Cape.

²For an analysis of the terminology used in s 26 see Liebenberg, S. (1997) *Fundamental Rights: Commentary on Chapter 3 of the 1993 Interim Constitution and Chapter 2 of the 1996 Constitution (Housing)* in Davis, Cheadle and Haysom (eds.) *Fundamental Rights in the Constitution* Juta & Co at 342.

³See the International Covenant on Economic, Social and Cultural Rights, the Istanbul Declaration on Human Settlements, the Beijing Platform for Action and the UN Resolution on “Women and the Right to Adequate Housing and to Land and Property” which all illustrate the importance of ensuring substantive gender equality in the realisation of the right of access to adequate housing.

⁴Most legislation that has been referred to in the course of this paper points to the fact that these groups are considered to be more vulnerable than others and accordingly in need of special measures.

⁵In terms of s 7(2) of the Constitution, the state is obliged to, *inter alia*, promote the right of access to adequate housing. The Housing Subsidy Scheme forms part of the state’s duty to fulfill this right, details can be found in the Housing Subsidy Implementation Manual. See Liebenberg, S. (1997) *Identifying Violations of Socio Economic Rights in Law, Democracy and Development* Durban. Butterworths: vol. 1 at 161; Leckie, S. (1995) *The Right to Housing* in Eide, A. et al (eds.) *Economic Social and Cultural Rights: A Textbook* London: M Nijhoff Publishers at 107; K. Pillay, *The Role of Local Government in Implementing the Right of Access to Adequate Housing* (1998) (Unpublished The Community Law Centre, University of the Western Cape).

may be forced to stay in abusive relationships in order to maintain housing.⁶ The problem is further exacerbated by the fact that the couple usually, due to the unequal power dimensions within many relationships, register the home in the male partner's name. Whilst the system assumes that these women will be protected by the legal system, many lack knowledge of their legal rights and have little access to legal assistance.

Proposals for reform

- a) The implications of customary and social practices,⁷ which mediate women's ability to realise their right of access to adequate housing, must accordingly be addressed in the formulation of housing legislation, (for example, discriminatory provisions relating to ownership and inheritance).⁸
- b) The current subsidy scheme excludes single men and women and only makes provision for those in a relationship or those with dependants. It also excludes parents under the age of 21 thus putting large numbers of young mothers at risk of homelessness as they are highly unlikely to have alternative access to credit.⁹
- c) Furthermore, a National Housing Code must be published¹⁰ which will lay down national norms and minimum standards for housing. It is important that this code includes gender equality as a national norm and minimum standard applicable to housing development.

11.2.2 The Development Facilitation Act

The Development Facilitation Act¹¹ introduces measures to facilitate and speed the implementation of programmes in relation to land for, inter alia, residential use. It operates on the basis of gender neutrality with no specific reference to either female headed households or women.

The Act makes provision for a Development and Planning Commission which, despite referring to urban and rural interests, makes no such reference of gender.¹² The absence of gender

⁶A case study done in a number of hostels in fishing towns on the West Coast revealed that some women forge and stay in relationships as a means of securing their housing needs. See, the Surplus Peoples Project (1997) *Land Reform Pilot Programme: A Social Economic Study of the West Coast*. West Coast District Plan (unpublished).

⁷Furthermore, incidents of male hostel dwellers accessing the subsidy with a women partner in the urban area and then bringing a wife from the rural area to live with him and forcing the "urban partner" out have been reported. See the Development Action Group (1997) *Marconi Beam* (unpublished case study).

⁸Housing and Gender Working Group (1997) *Joint Submission to the Portfolio Committee on the Housing Bill*. (includes The Community Law Centre-UWC, Centre for Rural Legal Studies, Legal Resources Centre-CT, Surplus Peoples Project, Development Action Group, AGI-UCT)

⁹*Ibid.*

¹⁰As indicated in s 4 of the Housing Act.

¹¹The Development Facilitation Act, 67 of 1995.

¹²*Ibid* s 7(1). There is also no gender representation on Development Tribunals.

representivity is problematic in view of the powers of the Commission to advise the government on numerous issues including ensuring appropriate emphasis on development for the benefit of low income and historically disadvantaged communities (ie. female headed households).¹³

11.2.3 The Rent Control Act

The Rent Control Act¹⁴ fails to accord any attention to discriminatory rental policies or patterns. This is particularly problematic in view of the reality that many women are discriminated against by being subjected to higher rentals than men with no simply legal remedy apart from the constitutional right to equality.

11.2.4 The Mortgage Indemnity Fund

Despite efforts by the Department of Housing's Mortgage Indemnity Fund to underwrite risks incurred in loans to low income communities, discrimination against women and female headed households still occurs widely in the private sector

11.3 Security of Housing

11.3.1 The Housing Act

National, provincial and local spheres of government are obliged to promote measures to prohibit unfair discrimination on the grounds of gender by those in the housing development process.¹⁵ Government is further obliged to promote the housing needs of marginalised women and other groups disadvantaged by unfair discrimination.¹⁶ Provision is also made for the establishment of Housing Boards, their composition to reflect, inter alia, the gender composition of South Africa.¹⁷

11.3.2 Illegal Evictions and Occupation of Land

As per section 26(3) of the Constitution, no one may be subjected to arbitrary evictions or be evicted or have their home demolished without an order of court made after all the relevant circumstances have been considered. The Prevention of Illegal Evictions and the Unlawful Occupation of Land Act¹⁸ accordingly aims to prohibit unlawful evictions¹⁹ and provide for the

¹³*Ibid* s 14.

¹⁴The Rent Control Act, 80 of 1976.

¹⁵S 2(1)(d)(iv) of the Housing Act, 107 of 1997.

¹⁶*Ibid* s 2(1)(d)(x).

¹⁷*Ibid* ss 5(3)(c) and 8(3)(d). Provision is also made under s 5 for a National Housing Data Bank and Information System which will compile and analysis of housing development data according to *inter alia* gender, ultimately monitoring gender equality in the housing delivery process

¹⁸The Prevention of Illegal Evictions from and the Unlawful Occupation of Land Act 19 of 1998.

¹⁹Ss 4 (6) and 4 (7) of the Bill provide that a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of households headed by women.

procedures for the eviction of unlawful occupiers.

The Preamble of the Act expressly notes that special consideration should be given to the rights of certain vulnerable groups of people (ie female heads of household). Ironically, when a state body decides whether it is just and equitable to grant an order for eviction under section 6(3), no specific regard is made for households headed by women, despite the fact that female headed households have a 50% higher poverty rate than male headed households.²⁰

11.3.3 The Extension of Security of Tenure Act

The Extension of Security of Tenure Act²¹ seeks to provide measures with state assistance to facilitate the long term security of land tenure²² as well as seeking to regulate the conditions of residence on certain land, the conditions and circumstances under which the right of residence may be terminated as well as the conditions for eviction from land.

The recognition in the Preamble of the Act that many do not have secure tenure of their homes and the land which they use and are therefore vulnerable to unfair evictions is commendable yet incorrectly assumes that vulnerable groups form an homogenous body. Thus, failing to recognise that certain groups (such as female headed households) are more vulnerable and are thus accordingly in need of special measures to ensure security of tenure.

Termination may take place on any lawful ground, provided that termination is just and equitable²³, having regard to all relevant circumstances (ie. the interests of female headed households).

The Act fails to make reference to the nature of tied housing on farms and the practice of not regarding a woman farm dweller as an occupier in her own right. This practice clearly results in many women farm dwellers being denied the right of access to farm housing. Further, certain provisions fail to go far enough so as to ensure substantive gender equality within it as it fails to take adequate account of the social and cultural inequality that mediate women's access to security of tenure.²⁴

²⁰*Key Indicators of Poverty in South Africa*, An analysis prepared for the Office of Reconstruction and Development (RDP) by the World Bank, based on the South Africa living Standards and Development Survey, co-ordinated by the Southern Africa Labour and Development Research Unit at the University of Cape Town (October 1995) pp 4 and 13.

²¹The Extension of Security of Tenure Act 62 of 1997.

²²The UN Committee on Economic, Social and Cultural Rights has stated in a General Comment (No 4, para 8) that legal security of tenure is one of the criteria that should be used to determine the adequacy of housing.

²³Despite the exception to the just and equitable criteria under s 8(4), which allows for the continued right of residence under particular circumstances, no reference is made to the continued right of occupation of the spouse or dependants of the occupier. As men predominantly acquire the right of occupation through labour, this provision is particularly detrimental to the interests of women.

²⁴See further chapter 13.

11.3.4 *The Prevention of Family Violence Act*

As incidents of domestic violence soar, the implications can be felt on women's rights of access to housing as limited council housing or shelters are available for abused women. Currently a woman may apply for an interdict under section 2(1)(b) of The Extension of Security of Tenure Act²⁵ enjoining the respondent not to, *inter alia*, enter the matrimonial home, or other place where the applicant is resident. Due to the well-documented shortcomings of issuing an interdict (see chapter 6) the SALC²⁶ is considering alternatives such as issuing an exclusion order from the matrimonial home as the way to ensure the effective protection of the applicant. Whatever reforms are put in place, it is critical that survivors of domestic violence (women forming the majority) are not deprived of their housing rights or that their housing rights are not compromised when an application for an interdict is being made.

11.4 Customary Law

11.4.1 *General Proprietary Rights*

As discussed in chapter two women are considered to be perpetual minors and are said to lack proprietary capacity. Whilst the actual definition of proprietary incapacity is uncertain, it could refer to the absence of the power to acquire property, the freedom to use and dispose of it or the right to vindicate it. Many women still lack proprietary capacity under customary law.

11.4.2 *Property Rights on Divorce*

The fact that women generally lack proprietary capacity can result in serious consequences for such women when a marriage is dissolved. For instance, they could lose the property when a marriage ends since their acquisitions have already become part of the husband's estate.

11.4.3 *Succession*

As discussed in chapter 4, the oldest son inherits the deceased's property. The widow is in a desperate situation when her husband dies as she stands to lose everything she has contributed to the family estate, including her house. Even though she may be maintained by the deceased's estate or sustained via a levirate union with her husband's family, she is obliged to remain on good terms with the heir and his family in order to maintain her security as maintenance does not result in ownership of her house or property.

Reform Proposals

The Reform of the Customary Law of Succession Bill²⁷ address some of these issues.

²⁵The Extension of Security of Tenure Act, 62 of 1997.

²⁶See the South African Law Commission Discussion Paper 70, Project 100 Domestic Violence (1997).

²⁷B 109-98.

11.5 Conclusion

Whilst there is no evidence of direct discrimination in national legislation pertaining to housing, it is clear however that the application of certain provisions does not go far enough so as to ensure substantive gender equality in the housing sphere. It is also clear that social and cultural practices further inhibit the attainment of substantive gender equality in the housing sphere. Some of this may be challenged once the equality legislation currently being drafted by the Human Rights Commission for the Department of Justice is in place.

EDUCATION

12.1 Introduction

Both the Constitution under section 29 and CEDAW¹ article 10 assert the right to receive basic education and equity of access respectively. Education has suffered most significantly from the racial and economic divisions under the apartheid era. Deep divisions exist in respect of the provisions, quality and equity of education between urban and rural schools². Importantly the greatest division and suffering occurs for female students³ who, especially those living rurally, not only have exceptional difficulties accessing education given the distances to travel, but carry the added burden of domestic and child care duties that their male counterparts do not share. This compounded with endemic gender discrimination,⁴ sexual harassment, violence and the way in which a female student is educated and brought up will ensure the perpetuation of an inequitable educational system whereby proportionally more girls fail than boys.⁵

12.2 Violence in Schools

Although statistics are unavailable, it is generally acknowledged that incidents of rape, sexual harassment and violence in schools are widespread. Although rape is often reported, sexual harassment and violence are generally ignored and regarded as a part of everyday life. Perpetrators are free to continue to attend or work in schools, thus creating an environment that is highly disruptive to learning and often forces female pupils to drop out altogether rather than face continued abuse.

The perpetrators are not exclusively fellow students but are often teachers or even outsiders who, for instance, may stalk and harass rural schoolgirls during their long walk to school, demanding sex in exchange for money or food.⁶ Unfortunately, teachers and the community provide passive, implicit support for such behaviour as they generally refuse to respond to complaints, falsely believing that the female student had brought it upon herself. Not surprisingly, female teachers are also subjected to similar abuse at the hands of colleagues or even their older students.

¹See also article 14(d).

²It is hoped that the Human Rights Commission's process of drafting anti-discrimination will markedly contribute towards the redress of past inequalities.

³Statistics for 1995 indicate that 50.9% of all students were female.

⁴Gender discrimination is widespread in educational materials. The National Curriculum Development Committee of the Ministry for Education aims to eradicate gender stereotypes from educational materials in the 1998 curriculum for complete implementation by 2005.

⁵*Gender Equity in Education*, Report of the Gender Equity Task Team, Department of Education 1997, Cape and Transvaal Printers (Pty) Ltd, Cape Town at p 80.

⁶*The Star*, 5 December 1995.

Proposals for Reform

Neither legal provisions nor the Curriculum 2005 deal directly with violence in schools. Hence, calls have been made by, *inter alia*, the Gender Equity Task Team (GETT) for the Department of Education to address violence against female students and educators by drafting a legislative framework which would appropriately penalise the perpetrators of violence. Nevertheless, legislation alone cannot eliminate such abhorrent behaviour but would need the additional support of appropriate educational policy provisions to challenge the attitudes and causes of violence.

12.3 Student Pregnancy

Pregnancy rates amongst school girls is unacceptably high and accounts for 28% of the drop-out rate.⁷ Pregnant students are routinely dismissed from attending school, often never to return. Anecdotal reports have even suggested that in some cases the permission of the young mother's husband must be obtained before she could re-enter education.⁸

It is not uncommon for the men responsible to be either the headmasters or teachers of these young women, who assume no responsibility and receive no penalty for their actions. It has been suggested that vicarious liability could be introduced as a way of addressing this problem and that of violence which plagues the school system.

Proposals for Reform

While policies are often in place to allow girls to continue their schooling, these are not necessarily followed. Disciplinary and other procedures within the Department of Education can address the problem, as well as the proposed Equality Legislation currently being drafted by the Human Rights Commission and the Department of Justice. However, the solution is not merely a legal one.

12.4 Science and Technology

Cultural and school practices⁹ have meant that female pupils are under represented and do not perform as well as boys in subjects like maths, technical drawing, engineering and science. A female student's self image has been moulded such that she is made to believe that these subjects are options for her male counterparts only and reinforced by discouragement in taking these subjects.¹⁰ This has contributed to women's under representation as graduates of higher education

⁷According to the C A S E survey of 1993. Compounding this troubling statistic is the fact that peak prevalence of HIV infection occurs in young women aged 15-19 years.

⁸*Supra* n. 5 p 80.

⁹For instance, teacher-pupil interaction is more than twice as frequent with boys than girls as girls are expected to be submissive and quiet.

¹⁰In fact only 21% of African girls were enrolled in higher maths. See Smith, G. (1998) Arts, Culture, Science & Technology and Sport and Recreation. In: Budlender, D. *The Third Women's Budget* (currently unpublished).

science programmes and influences the number of women doctors, engineers and those involved in commerce.

Proposals for Reform

Small steps have been taken by government with the Science Committee in Education piloting a micro-scale teaching approach. However, this only impacts upon 300 schools and has yet to prove itself. As well, the parliamentary committee on Arts, Culture, Language, Science and Technology, together with others, is working on a pilot project that will document indigenous technological knowledge (women are the acknowledged holders of this information) with a view to incorporating this into the current science framework.

12.5 Adult Literacy and ABET

The majority of illiterate individuals are women¹¹ living in poor rural communities. Functional illiteracy vastly contributes to the suppression of women in situations of chronic unemployment as they find themselves unable to enter into the labour market. A Presidential Lead Project of the RDP on general national literacy was launched in 1996. However, impact has been minimal as gender targets were not included and only 1% of the needy population participated.¹²

Men receive proportionally more Adult Basic Education and Training (ABET) as a result of employee in-house training. Women, on the other hand, tend only to have access to the services of small NGOs who, by their nature, reach fewer individuals.¹³ ABET accounts for approximately 1% of the total education budget and generally focuses on self-help programmes in non-innovative areas such as sewing which does not contribute substantially to the advancement of women's basic educational needs.

12.6 Gender inequality and the White Paper

South Africa lacks legislation directly tackling the discrimination and harassment which female students experience.¹⁴ The Ministry of Education's White Paper on Education and Training¹⁵ acknowledges that the right to education includes gender equity and that educators must provide leadership for change, given the influence that the educational system has on children's

¹¹Estimated at 4 million in 1994.

¹²*Supra* n. 5 p 167.

¹³Consideration must also be given to the fact that women are often unable to leave domestic and child care duties to participate. Even when possible often lack of transport or finance entirely precludes their participation.

¹⁴In fact, gender equity issues are also not addressed in, *inter alia*, the South African Schools Act 1996 which deals with the governance of public schools and could have introduced quotas to ensure women's equal participation in decision making bodies.

¹⁵White Paper on Education and Training, Cape Town, WPJ/1995, *Government Gazette* Vol 357, No 16312, 15 March 1995.

socialisation skills¹⁶ which in turn impacts on gender relations.¹⁷ As of yet tangible solutions have yet to be unearthed. However, in response to the serious sexual and gender discrimination which exists in education, the White Paper provided for the establishment of bodies such as the Gender Equity Task Team. The recommendations of this task team have recently been published and have yet to be translated into legislation.¹⁸

¹⁶In fact, if during early childhood development the child is exposed to pre-school learning the chances of repeating years later on or dropping-out decreases. This is important given the higher drop-out rate for female students owing to, *inter alia*, pregnancy, socialisation of women to become only family carers and unequal job prospects for women. *Supra* n. 5 pp 55-75.

¹⁷Further, Strategy 18 of the Draft Population Policy aims to improve, *inter alia*, the quality and access to education from early childhood onwards emphasising gender and promoting women's opportunities.

¹⁸GETT was established in 1996 with a mandate to, *inter alia*, "...identify means of correcting gender imbalance in enrolment, dropout, subject choice, career paths, and performance." As per paragraph 67 of the White Paper. GETT has recently released its report on Gender Equity in Education, *supra* n 5.

LAND AND AGRICULTURE

13.1 Introduction

Apartheid's legacy of dispossession and exclusion has left 87% of the people on 13% of the land. Cutting across this legacy is the fact that historically, South African women have had little access to personal ownership and tenure of land as patriarchal attitudes maintained them as a different kind of "landless majority". However, the Constitution now provides a legal framework from which access, ownership and control of land is to be equal for all individuals irrespective of sex, gender, race or marital status¹. CEDAW also provides protection for rural women under article 14 which has implications in land redistribution policies, access and agrarian economics.

13.2 Land Use and Access

Despite the fact that civil law systems of tenure are open to everyone, within customary law the practice whereby women can only access land through their relationships with men remains. Land is controlled either by her father or, if married, by her husband. Most often women are allocated the poorest and most inaccessible land from which to subsist and feed their families. Unmarried women remain with their father or brothers and can quite easily lose access to land and end up as tenants or squatters on another's land. There is no right for a widow to remain on the land which she enjoyed during her marriage and it is not unheard of for heirs to demand the widows pension as rent to remain on the property she most likely husbanded. As regards women labour tenants, access to land and employment is dependant directly upon her husband's contract with the farmer.² Divorced women have no tenure or inheritance rights to land.

Freehold tenure can be applied to traditional communities. However this does not guarantee access to land or assist in determining land use. This is due, in part, to the traditional exclusion of women from decision making bodies and the fact that most traditional communities use a communal system of tenure. Communal land is held by male heads of household as distributed by the Chief and his Council. However, even when freehold tenure is applied to traditional communities, women can be prevented from owning land independently as a result of customary norms.

13.3 Current forms of Tenure

The apartheid legacy has meant that 13% of South African land was set aside for 87% of its population. Although reformative steps are being taken and women enjoy legislative freedom to tenure, patriarchic values and societal practice continue to prevent women from holding tenure to the land in which they occupy³. Further, in both communal and customary systems of tenure

¹See ss 9(1) and (3) and s 25

²The recent land Reform (Labour Tenants) Act 3 of 1996 has offered no assistance to women as evictions upon the death of or separation from their husbands, who traditionally hold the employment contract with the farmer, continue.

³See Mbatha, L and Albertyn, C, *Submission to the DLA on Land Allocation Practises* in Taung and Braaklagte (1997) Centre for Applied legal Studies, University of the Witwatersrand (unpublished)

women remain unable to own land but only gain access to land via their father, husband or son.

13.3.1 Urban

Currently, in both rural and urban areas, ownership for white women is based upon private property, registration of ownership and title-deeds. This has never been an option for women under the minority legal status imposed within customary marriages. In fact even for those women who do own land, often enjoyment of tenure is diluted as their husbands may have control as administrators of the joint estate.

Tenure in urban areas has traditionally been unavailable to the majority of the population under apartheid. Although this no longer applies, ownership of urban land on a practical level still remains out of the means of women who cannot afford the high costs of urban land or its associated purchase fees, which is exacerbated by the fact that women earn less than men. Any affordable urban land is to be found in the most inaccessible informal urban residential settlements with insecure tenure resulting from incomplete registers.

13.3.2 Rural

As previously stated rural women, who make up the majority of permanent rural dwellers, do not generally hold tenure to land due to traditional custom and practice. Taking this in combination with the continued urban bias in policy formulation and the fact that white commercial farmers own 80% of productive rural land, a bleak picture emerges for rural women's land tenure.

One way of women potentially securing tenure to rural land is via successory law which does not preclude women from inheriting privately owned land. However, customary beliefs⁴ and attitudes generally prevent land going to women and instead devolve to a male heir.⁵

13.4 Land Reform

Traditional and communal tenure systems have, in part, been responsible for discrimination against women. By and large, security of tenure is gained either through ownership or land use, to the traditional exclusion of women. Government's response to land reform is occurring quickly and in three main areas - tenure reform, redistribution and restitution. Sadly, none of these areas of land reform have involved active participation by women to whom the greatest inequities fall nor have government policy papers that refer to women's access to land, resulted in any practical proposals as to how this will be done.⁶

⁴It is believed that if property moves to the woman that her family's control of the land will be lost to her husband.

⁵See Chapter 11

⁶*Inter alia*, the DLA's Land Reform Gender Policy document-A Framework

13.4.1 Tenure Reform

Security of tenure is gained by use, land regularisation and ownership⁷ to which, despite addressing women's needs at most junctures, they have been excluded. At present there is a tendency within the Department of Land Affairs (DLA) to treat all women as a homogeneous group as regards tenure reform.⁸ Arguably, this does not go far enough, given the multiplicity of women's needs and in combination with customary law⁹ and practices, can impact severely on equal participation in tenure reform and have grave implications for women as it will not change the *status quo*.

Proposals for Reform

The Upgrading of Tenure Rights Amendment Act¹⁰, the Extension of Security of Tenure Act¹¹ and Communal Property Associations Act¹² all attempt to provide for non-discrimination in property ownership and tenure reform. However, the fact remains that customary law and practices do continue to prevent women from securing land tenure. Recognising this, the DLA's Tenure Directorate is currently in the process of drafting new tenure legislation.

13.4.2 Redistribution

One of the major stumbling blocks to equitable land redistribution is found within the Green Paper's¹³ definition of "household". It is argued that the definition appears to exclude women, such as widows and single women, who may have beneficial interest in property. The White Paper on South African Land Policy¹⁴ simply acknowledges the arguments surrounding this definition but offers no solution or breakdown of this concept. Further problems with redistribution can be found under land held for groups under trust as men dominate decisions making positions and do not adequately reflect the needs or views of women.

13.4.3 Restitution

Although women have always participated in communal land activities in order to sustain their

⁷Importantly a relationship between land ownership and lower fertility rates for women has been shown whereby women owning land do not have to rely on having a large family to provide income as land itself can be income generating - Du Guerny, J (1997) Gender, Land and Fertility, Land Update 61, 14 - 17

⁸In fact the DLA's White Paper (1997) on South African Land Policy does not address the specific needs of women and has been criticised for only briefly mentioning women in order "... to pay lip service to gender commitments..." Meer, S (1997) Land Affairs and Agriculture; in Budlender, D (ed) *the Second Women's Budget*, Cape town, IDASA 167 - 199 at 189

⁹see Chapter 11

¹⁰Act 112 of 1991

¹¹Act 62 of 1997

¹²Act 28 of 1996

¹³The DLA's (1996) Green Paper on South African Land Policy. The redistribution programme as set out in the Green paper is to provide access to land for residential and productive use for impoverished citizens.

¹⁴DLA (1997) White Paper on South African Land Policy

families, men have held title to the land. Hence, restitution provisions such as the Restitution of Land Rights Act¹⁵ and the Communal Property Association Act¹⁶ do not, in fact, address the inequality women experience, but offer restitution to those who have been the mistreated title owner, namely men. Anecdotal reports also indicate that for some communities now entitled to restitution, women who have married outside of the community are being denied their rights to inherit land or remain members of their original communities where the contested land lies¹⁷.

13.5 Finance and Loans

Article 14(g) of CEDAW states that women should have equal access to agricultural credit and loans. However, due to women's status¹⁸ and banking practices¹⁹, access to finance is far from equal or accessible and, as such, is the biggest obstacle to women gaining access to land.

The Strauss Commission²⁰ has made recommendation in its document regarding rural finance that, if implemented²¹, could make access to loans from private lending institutions easier for rural women. However, unless radical change in lending practices are undertaken, access to credit will remain practically impossible as women generally do not hold secure land tenure or the other property rights needed to access credit.

Women are also often largely unaware, due in part to male dominated information sharing networks, of programmes such as the Settlement/Land Acquisition Grant and do not therefore benefit to the same extent as men.

¹⁵Act 22 of 1994

¹⁶Act 28 of 1996

¹⁷Gilfillan, D (1996) Putfontein - A Restitution Case Study, *Land Updates* 53 : 10 - 13 at 11

¹⁸See Chapter 1

¹⁹*ibid*

²⁰The Strauss Commission released its report in September 1996

²¹However the DLA in section 2(4) of its Land Reform Gender Policy Document makes only tentative moves, indicating that it *should* take steps to ensure that these recommendations are implemented rather than asserting that it will.

ENVIRONMENT AND WATER

14.1 Introduction

The human population and the environment are intrinsically linked by a close, interactive relationship and, as has been advanced, should be treated as a single structure. The Constitution, under section 24, recognises the right to a healthy environment whilst article 14 of CEDAW recognises the right to enjoy adequate living conditions including access to adequate sanitation and water.¹

14.2 Environment

Within this framework, women have been acknowledged as most affected by ecological change and development as their livelihood and subsistence depends directly upon a healthy and sustainable ecostructure and as such gain to benefit the most. Women are the most stable members of the community, as men tend to move about in search of work, and fulfil a multifarious role as consumers, food producers, family and environmental caretakers.² Thus, women must be included in environmental decision making and gender concerns must be included in decisions surrounding sustainable development.³ Mechanisms at all decisions making levels should also be established to assess the impact of environment and developmental policies on women instead of continuing to develop environmental legislation on an *ad hoc* basis.

Proposals for reform

A gender unit within the Department of the Environment and Conservation is addressing gender issues in these areas.

14.3 Water

The right to access sufficient water is guaranteed under section 27(1)(b) of the Constitution, article 14(2)(h) of CEDAW and section 2 of the Water Services Act.⁴ Rights to water are intrinsically linked to land rights. Therefore, control, access and quality of water inequitably resides with those enjoying riparian rights and land ownership. This means that rural women, who historically do not own land and whose traditional duty it is to ensure that the household is supplied with water, bear the burden of having to travel long distances carrying heavy loads of water. Not only does this

¹The African Charter in article 24 also asserts a right to a satisfactory environment favourable to development.

²The 1995 UN 4th World Conference on Women gave particular attention to indigenous women because of their recognised knowledge of the local ecological system and the fragile management therein. See platform for Action and the Beijing Declaration 1995 cpr 4 s K.

³*Ibid* para 253, Agenda 21, Chapter 24 of the Global Action for Women Towards Sustainable and Equitable Development of the United Nations Conference on Environment and Development. The Earth Summit 1992 echoes many of the Beijing Declaration's environmental clauses.

⁴Act 108 of 1997

have implications for women's health but also decreases the time available that women could use in more beneficial ways.⁵

Proposals for Reform

If plans to regulate water use through a licensing system come to fruition under the National Water Act,⁶ it will hopefully provide better access, encourage sustainability, entrench the socio-economic rights to water and importantly give effect to Constitutional rights.

⁵It is estimated that rural women may spend over four hours per day gathering fuel and water. See Libenberg, S (1998) The National Water Bill - Breathing New Life into the Right to Water, *ESR Review* Vol 1 No 1 at 3 - 6

⁶Act 36 of 1998

MEDIA, COMMUNICATIONS AND THE ARTS

15.1 Introduction

The power of the media is such that it quite easily reinforces gender stereotypes and contributes to marginalising women by portraying them in disempowering roles of victims. Research has shown that the media places women within the domestic sphere as mothers, daughters or housewives, whilst men are rooted in the public sphere as politicians and decision-makers¹. The Beijing Platform for Action has recognised that media stereotyping reinforces the idea that decision making belongs to men.²

Many of the problems in the media cannot be dealt with in legislation, but rather through education, policies and programmes, as well as measures to overcome exclusion and under-representation.³ However the enabling legislation in areas such as broadcasting should include a distinct gender theme to enhance the participation and portrayal of women.

15.2 Broadcasting

Community radio stations have been licensed since 1994, but have not effectively increased women's participation on the airwaves. Recently the Broadcasting and Monitoring Complaints Committee of the Independent Broadcasting Authority (IBA)⁴ refused to grant a further broadcasting licence to Radio Islam as, despite a shift in position from not allowing women on air to allocating women a small amount of air time, the degree of participation the station proposed would not amount to substantial equality and as such contravened section 9(4) of the Constitution. This case highlighted the need for the act to be interpreted in line with the guarantee of gender equality in the Constitution.

Proposals for reform

The Minister of Posts and Telecommunications, Jay Naidoo, has recently announced that he will be reviewing the notion of a 'community' licence under the Independent Broadcasting Authority Act.⁵ It would be important to use this opportunity to inject some clear gender content into the Act.

¹Segel, K. Everatt, D. Jennings, R. (1995) "Where are the women?" *Analysing the representation of women in the media*. Community Agency for Social Enquiry CASE: Johannesburg.

²(1996) *Platform for Action and the Beijing Declaration*. Fourth World Conference on Women, New York: United Nations. p. 110.

³See the Report of the Media Workshop of the CGE, 1997.

⁴The Independent Broadcasting Authority Act No. 153 of 1993 provided for creating of the IBA independent body in control of broadcasting and frequency spectrum and who is responsible for, *inter alia*, granting community radio licences. It has yet to set in place a Gender Equity policy.

⁵No. 153 of 1993.

15.3 Arts and Culture

Although there is no obvious legal discrimination in place to impede women's full benefit and participation in arts and culture, socio/economic issues or residual discriminatory policies are often the root of the actual discrimination.

Proposals for reform

The Equality Legislation currently being drafted by the Human Rights Commission and the Department of Justice could be used to address indirect and systematic discrimination in this area.

POLITICAL PARTICIPATION

16.1 Introduction

Those seeking equality of representation in the political process by means of, *inter alia*, quotas, can now look towards the Constitution. Section 9(2) states that in order to achieve equality legislative measures designed to assist those who are disadvantaged may occur. Although the need for affirmative action is now acknowledged in the Constitution, the Convention on the Political Rights of Women¹ still remains to be ratified by government.

16.2 Electoral System

One of the most significant ways of ensuring the representation of women is in the type of electoral system chosen. Comparative research demonstrates that proportional representation coupled with a quota of women on party lists, obtains the best representation of women.

16.2.1 National/Provincial

At present, women constitute 25% of the National Assembly. This ranks South Africa as a country with one of the highest proportion of female representatives in the world. Unfortunately, many women have already indicated that they do not intend to stand in forthcoming elections and it is feared that this percentage will fall.

The Parliamentary Women's Group has been working towards making Parliament a more gender sensitive workplace which would encourage current parliamentarians to continue with their work and also attract new candidates to run for office. Future parliamentarians (both nationally and provincially) should benefit from the support of the Women's Empowerment Unit (WEU) which plans to offer comprehensive training for new MPs and MPLs.

Also at the national level the *Ad Hoc* Joint Committee on Improvement of the Quality of Life and Status of Women operates to monitor government commitments to CEDAW and to identify gaps within existing legislation. The Office on the Status of Women (OSW) with its provincial offices also operates at a national level to ensure the implementation of constitutional provisions.

Proposals for reform

The national electoral system will be changed after the 1999 elections. Intervention into that policy and legislative process is crucial to ensure the best possible legislative vehicle for women's representation.

¹Convention on the Political Rights of Women (1953) signed in 1993.

16.2.2 Local Government

Local government plays a central role in the enhancement of democracy, the provision of community services and the promotion of economic and social development. Importantly, local government affects the lives of individuals as it operates on a level closest to them. Impact is both at an internal level, as regards inequitable employment and election practices, and at an external level in its relationship with the community and the marginalisation of women in the consultative process.

Both CEDAW² and the Constitution³ state that women must have the opportunity to participate equally within the democratic process. This would not only include local or national levels but representative positions in both civic and ratepayers associations to ensure that the diversity of needs is equitably met and delivered. At present approximately 20% of local councillors are women. This falls short of the 25% representation at the national level and far below the 30% critical mass needed to ensure that gender related policies are translated into practice at the local government level⁴. Proportional representation, a quota or mixed system⁵ have all been examined as ways of ensuring maximum female representation at the local level. However, it is widely accepted that the quota system is the best way of ensuring gender balanced representation⁶.

The Ministry for Provincial Affairs and Constitutional Development has released its White Paper on Local Government. Unfortunately, it falls short of the submissions of NGOs and the CGE⁷ by not introducing a legislated quota but rather stating that political parties simply make provisions for a quota system based upon goodwill.⁸

Proposals for reform

The Municipal Structures Bill which is currently before Parliament requires urgent intervention.

²Article 7 states that discrimination in political and public life must be eliminated and that women's participation be ensured in the process of formulating government policy and in holding public office.

³S 152 outlines the objects of local government and has clear gender implications.

⁴Even if local government's role is to be a service provider and not a policy maker, women councillors remain vital to ensuring that services are appropriately delivered as they are more affected by the absence of basic services and form the majority of impoverished individuals, than men.

⁵See, *inter alia*, the Gender Advocacy Programme (GAP) Submission for the White Paper on Local Government on Gender, November 1997; CGE Submission to the Ministry for Provincial Affairs and Constitutional Development on the Green Paper on Local Government, December 1997; SALGA Submission on Engendering the Local Government White Paper and Gender Issues at the Local Government Level as researched by CASE for CGE and SALGA.

⁶In an open letter the Minister of Provincial Affairs and Constitutional Development on 12 January 1998, GAP, as endorsed by 14 organisations, has urged that a quota system be put in place.

⁷*Supra* n 5.

⁸Even if political parties follow the suggested quota of at least 50 percent female candidature on the party list, women's representation could not possibly be more than 26 percent.

