

**To: Special Rapporteur on violence against women, its causes and consequences**

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**From: The Centre for Applied Legal Studies**

**University of the Witwatersrand, Johannesburg, South Africa**

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**SUBMISSIONS TO THE SPECIAL RAPPOREUR ON VIOLENCE AGAINST WOMEN:  
COUNTRY VISIT TO THE REPUBLIC OF SOUTH AFRICA DECEMBER 2015**

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## INTRODUCTION

The Centre for Applied Legal Studies (CALs) is a civil society organisation based at the School of Law at the University of the Witwatersrand, Gauteng, South Africa. CALs is also a law clinic, registered with the Law Society of the Northern Provinces. As such, CALs connects the worlds of both academia and social justice. CALs' vision is a socially, economically and politically just society where repositories of power, including the state and the private sector, uphold human rights. CALs practices human rights law and social justice work with a specific focus on five intersecting programmatic areas, namely Basic Services, Business and Human Rights, Environmental Justice, Gender, and the Rule of Law. It does so in a way which makes creative use of the tools of research, advocacy and litigation, adopts an intersectional and gendered understanding of human rights violations, incorporates other disciplines (such as film and social work) and is conscious of the transformation agenda in South Africa.

In particular, CALs' work explores the intersection of socio-economic rights issues and gender rights and the Gender Programme has worked on projects facilitating dialogue and heightened awareness of gender issues among lawyers and activists working within various socio-economic rights sectors. We have also been involved in litigation on issues such as equality between men and women regarding the age thresholds for old age pension benefits and mandatory sentencing for the rape of girl children. The Programme has also undertaken activities ranging from providing written and oral submissions to the Parliamentary Committee on Private Members' Legislative Proposals and Special Petitions relating to the Choice on Termination of Pregnancy Amendment Bill, to hosting workshops on adult sex work and the role of men in transactional sex, the object of which was to engage with these issues and discuss various approaches to sex work adopted by other jurisdictions and how these might apply in South Africa.

More recently, CALs has been involved in major projects examining the intersection of gender and other issues, including the Independent Inquiry into Sexual Harassment at Wits University, an investigation of sexual violence in schools, and a project on the transformation of the legal profession. In 2015, CALs is partnering with the South African Medical Research Council on a project commissioned by the National Prosecuting Authority. The project entails a national study of the prosecution and adjudication of rape matters (including attempted rape) as reported to the police, with



the aim of generating evidence-based recommendations for strengthening their prosecution and adjudication processes.

CALS is pleased to note that the Special Rapporteur on violence against women, its causes and consequences has chosen South Africa as her first country visit as part of her mandate. In anticipation of her visit, CALS has prepared submissions on the different manifestations of violence against women in South Africa that CALS has specific experience in working on.

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## SUBMISSIONS

### 1. Sexual Violence in Schools (SVS)

- 1.1. Sexual violence perpetrated against learners by educators is a serious human rights issue that is widespread and well known in South Africa. In 2006 the South African Human Rights Commission (SAHRC) stated that sexual violence against female learners, including violence perpetrated by educators, was one of the most prevalent forms of violence identified through its hearings on violence in schools.<sup>1</sup> In 2015 ActionAid found that one in every five female learners has felt pressured by an educator to have sex with them.<sup>2</sup>
- 1.2. CALS has been focusing on gender based violence perpetrated by educators against female learners as part of its Gender Programme. In May 2014 CALS published the report: 'Sexual Violence by Educators in South African Schools: Gaps in Accountability'.<sup>3</sup> The report examines the gaps in accountability that permit the continued abuse of learners by educators in Gauteng, South Africa. The report focuses on the accountability of the Department of Basic Education (DBE), South African Council of Educators (SACE), the South African Police Service (SAPS), the National Prosecuting Authority (NPA), the judiciary and organisations dealing with victim and survivor support.
- 1.3. Our findings suggest that there are gaps in accountability throughout the system. This is in part caused by the lack of implementation of national laws and procedures for disciplining the perpetrator of sexual violence and in part created by the lack of coordination amongst the institutions which have been delegated with the duty to launch disciplinary procedures against the perpetrators. The duty to conduct disciplinary processes are held by both the DBE and SACE which creates a system that is tedious, duplicative and overlapping. For example, a complainant may have to go through up to four hearings both internally and

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<sup>1</sup> South African Human Rights Commission 'Report of the Public Hearing on School-Based Violence' v, 11–12

<sup>2</sup> ActionAid South Africa 'Key Findings: Sexual Offences and Reporting' Sexual Violence in Schools 2015 Baseline Study – Limpopo and Gauteng.

<sup>3</sup> CALS 'Sexual Violence by Educators in South African Schools: Gaps in Accountability' (May 2014) See [http://www.wits.ac.za/files/t5ccr\\_910848001399909772.pdf](http://www.wits.ac.za/files/t5ccr_910848001399909772.pdf). Hereinafter referred to as 'the report'.



externally for purposes of disciplinary action. Although the Gauteng Department of Education (GDE) is dedicated to the eradication of sexual violence perpetrated by educators against learners there has been little change in the state of affairs since the launch of the report.<sup>4</sup>

- 1.4. Ineffective sanctions are a further issue relating to disciplinary procedures. There is concern that educators that have been found guilty in a disciplinary hearing do not always have their names removed from the educators' register when they are dismissed from employment. This is because, according to SACE, the DBE does not report complaints to them at the same time they are lodged at the DBE and thus this results in a delay by SACE in removing the educator's name from the register. A further problem is that the DBE and SACE have separate disciplinary hearings for the perpetrators. So the DBE might find an educator guilty of misconduct and dismiss them whereas SACE may find him innocent and his name will remain on the educators' register. What often occurs then is that the educator simply reemerges in a different province and begins working there.<sup>5</sup>
- 1.5. The second publication from CALS around sexual violence perpetrated by educators is called 'Managing Sexual Violence in Schools: A Guide for Children, Families and Community Members'<sup>6</sup> which is a child-friendly publication that explains what sexual abuse is and then advises the learner on steps to be taken such as going to the hospital, reporting the abuse to the police, reporting the matter to the DBE, going for counselling, applying for a protection order, transferring to a new school and finally important contact details of organisations that can help the learner at each step. The publication has been translated into two official languages with plans for more and has been edited to be used in situations where the sexual perpetrator is not an educator.

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<sup>4</sup> See n3 at p34 – 35 on a discussion on the lack of coordination between DBE and SACE.

<sup>5</sup> See n3 at p37 – 40 on a discussion on ineffective sanctions.

<sup>6</sup> CALS '*Managing Sexual Violence in Schools: A Guide for Children, Families and Community Members*'. See [http://www.wits.ac.za/files/soht7\\_284151001397574503.pdf](http://www.wits.ac.za/files/soht7_284151001397574503.pdf). Hereinafter referred to as 'the handbook'.



## 2. Gender Based Violence Underground (Women in Mining)

- 2.1. In 2002 the South African Mining Charter introduced quotas into the mining industry which urged mining companies to ensure that they have a workforce consisting of at least 10% women miners. The presence of women in underground mining is relatively recent since the South African Minerals Act<sup>7</sup>, that banned women from being employed underground, has been repealed and replaced by the Mineral and Petroleum Resources Development Act in 2002.<sup>8</sup> The MPRDA together with the Mine Health and Safety Act<sup>9</sup> lifted the ban on women underground. Although this was intended to enhance gender equality, women miners are a minority group underground and due to lack of gender transformation they are continuously the victims of gender discrimination, harassment and sexual violence.<sup>10</sup>
- 2.2. CALS' work on Women in Mining is currently focused on the matter of Binkie Mosiane, a 27-year-old female miner from the North West province in South Africa. On 6 February 2013, Binkie Mosiane was gang raped while working underground for Anglo Platinum's Khomanani mine in Rustenberg. When she was found, she was still alive but by the time the safety officials arrived, she had died. There were 13 men working underground at the shaft at the time of her death. Only one suspect was arrested and prosecuted. In December 2014 he was found guilty of the rape and murder of Binkie Mosiane. Three months later, on Sunday 8 March 2015 another female miner was raped at Anglo Platinum's Thembelani mine in Rustenburg.
- 2.3. The rape of Binkie Mosiane and the unnamed female miner suggests that rape underground is not a once-off phenomenon. Increasingly in South Africa, we have become aware of the normalisation of rape by male mine workers against female mine workers. The entrapment

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<sup>7</sup> South African Minerals Act of 1991. See [http://soer.deat.gov.za/dm\\_documents/Minerals-Act-50-of-1991\\_zJ7qk.pdf](http://soer.deat.gov.za/dm_documents/Minerals-Act-50-of-1991_zJ7qk.pdf).

<sup>8</sup> Mineral and Petroleum Resources Development Act of 2002. Hereinafter referred to as 'MPRD'.

<sup>9</sup> Mine Health and Safety Act of 1996. See [http://www.saflii.org/za/legis/consol\\_act/maprda2002452/http://www.gov.za/sites/www.gov.za/files/37027\\_gen1103.pdf](http://www.saflii.org/za/legis/consol_act/maprda2002452/http://www.gov.za/sites/www.gov.za/files/37027_gen1103.pdf).

<sup>10</sup> A thorough discussion of gender based violence in mining can be found in the master's research report of Asanda Benya called 'Women in Mining: A Challenge to Occupational Culture in Mines'. See <http://wiredspace.wits.ac.za/bitstream/handle/10539/7191/MA%20Research%20Report.pdf?sequence=1>.



and violation that characterises rape is emphasised in the context of the confined location of an underground mining shaft.

- 2.4. The phenomenon is occurring in part due to the regulation mentioned above, that requires 10% of all mineworkers be female. This small percentage, however, means that women are a minority of underground workers and, as such, are extremely vulnerable to sexual violence. But it is not only the regulations that are the cause of this harm; contributing factors include gender norms in mining, lack of security and a lack of policies around gender-based violence in mining or the implementation thereof. In some instances, mines will pair women together as a form of security; however, the homogenous makeup of the male-dominated mining industry makes a mockery of this pairing. In the case of the Binkie Mosiane, she had been forcibly separated from her female co-worker.
- 2.5. The position of the mines is that gender-based violence underground is a criminal justice matter and is not an issue for which mining companies take responsibility. This is incorrect and inconsistent with South Africa's constitutional regime, which applies to both the state and juristic entities such as mining companies. Specifically, there are two legal mechanisms that could trigger the liability of mining companies for these violations. The first is the principle of vicarious liability under the law of delict (also referred to as 'tort law' in jurisdictions outside South Africa). The second is in respect of Health and Safety Standards under labour law. Both these standards need to be tested, with the hope that successful litigation and advocacy will lead to legislative provisions which are binding on multinational corporations to prevent sexual violence underground.

### **3. State-Sanctioned Violence**

#### **3.1. Rape Adjudication and Prosecution Study in South Africa**

- 3.1.1. According to the Medical Research Council (MRC), 1 out of 9 women who experience rape in South Africa are willing to report the crime to the police. In a study published by the same organisation, in July 2008, called 'Tracking Justice:



The Attrition of Rape Cases through the Criminal Justice System in Gauteng'<sup>11</sup> it was found that of the 2064 cases of rape that were examined during the study, only half of the cases (50.5%) resulted in an arrest of the perpetrator. Only 42.8% of perpetrators were charged in court and trials commenced in less than one in five of the cases. The conviction rate, this includes lesser crimes than rape, was at 6.2% which is equivalent to 1 in 20 cases.

3.1.2. The MRC and CALS have partnered in 2015 to release an updated version of 'Tracking Justice' that extends beyond Gauteng to all nine provinces in South Africa. The project is called 'Rape Adjudication and Prosecution Study in South Africa' (RAPSSA). RAPSSA is a study into the prosecution and adjudication of rape matters (including attempted rape) as reported by police. The cases that are the basis for the project were those reported to the police in 2012. The report focuses on the efficiencies and challenges of the criminal justice system in responding to rape.

3.1.3. The initial findings of the report have shown that insofar as the commission of rape and attempted rape in South Africa there has been little to no change whatsoever. In 2015 the crime statistics released by the South African Police Services only listed 'sexual offences' and was not disaggregated in terms of types of sexual offences such as rape or sexual assault. The statistics showed a decrease in sexual offences from 56 680 in 2014 to 53 615 in 2015. The decrease is misleading as the term 'sexual offences' groups together all sexual offences as defined in the Criminal Law (Sexual Offences And Related Matters) Amendment Act.<sup>12</sup> It is not necessarily true that rape has decreased at all in South Africa as 'sexual offences' includes other crimes such as exposure of one's sexual organs ('flashing') and sex work.

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<sup>11</sup> MRC 'Tracking Justice: The Attrition of Rape Cases through the Criminal Justice System in Gauteng' (July 2008). See [http://www.csvr.org.za/docs/tracking\\_justice.pdf](http://www.csvr.org.za/docs/tracking_justice.pdf).

<sup>12</sup> Criminal Law (Sexual Offences And Related Matters) Amendment Act 32 of 2007. Hereinafter referred to as the 'Sexual Offences Act'. See <http://www.justice.gov.za/legislation/acts/2007-032.pdf>.





## 3.2. Domestic Violence

- 3.2.1. South Africa's Domestic Violence Act (DVA)<sup>13</sup> aims to “afford victims of domestic violence the maximum protection from domestic abuse that the law can provide”. In order to fulfil this objective, the Act prescribes duties on the South Africa Police Service (SAPS) and other state departments.
- 3.2.2. The duties on SAPS are further enhanced in the South African Police Services National Instructions. Compliance with these obligations was initially monitored by the Independent Complaints Directorate (ICD), but had become the responsibility of the Civilian Secretariat of Police (CSP) in 2012.
- 3.2.3. Despite the adoption of this well-intentioned act, in reality the state departments fail to fulfil their legal duties or inefficiently execute these duties, which has resulted in serious consequences such as the death of victims of domestic violence and/or victim's loved ones.
- 3.2.4. CALS in collaboration with other women's organisations is currently engaged in an advocacy campaign around one of these fatal cases that will be explained hereunder, in order to create awareness around the failure of the police and the court system to implement the DVA and to prevent the repetition of such cases in the future.
- 3.2.5. On the 10<sup>th</sup> of November 2013, Peter<sup>14</sup> entered the home of his mother-in-law Maria carrying a full five-litre plastic petrol container and a box of matches. He proceeded to her bedroom, where the 74-year-old was confined to her bed with severe rheumatoid arthritis. Peter doused the floor, the bed and Maria with petrol before setting them on fire. Maria succumbed to her injuries the next day. Peter had been abusing his wife Kathy, her sister Patricia, and their mother since 2004. He

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<sup>13</sup> South Africa Domestic Violence Act 116 of 1998. Hereinafter referred to as ‘DVA’. See <http://www.justice.gov.za/legislation/acts/1998-116.pdf>.

<sup>14</sup> The names of the individuals have been changed.



had threatened his family with knives and firearms; strangled, bullied and beaten them with everything from his fists to broomsticks and steel pipes. The fatal incident was the result of many calls for help that went largely unanswered by the system that was created to protect them.

- 3.2.6. Kathy had applied for a protection order as early as July 2013. In her domestic violence application form affidavit, she noted that along with the physical abuse, Peter had already threatened to rape her and to ‘burn and kill’ her. Peter violated the interim order within just a few days of it being made a final order by the court. Yet, when Maria went to report the violation to the Sophiatown Police Station, the officer on duty did not open a criminal case or even acknowledge the protection order currently in place.
- 3.2.7. On the 18<sup>th</sup> of September 2013, Peter attacked Kathy with a butcher’s knife. When police officers arrived at the house, they refused to leave their car to investigate or to take a statement. Kathy went to the Sophiatown Police Station several times in the days that followed to report the incident but the officers on duty simply would not assist her. Finally, on her third or fourth attempt, police finally agreed to open a case – not of attempted murder but of a much lesser crime of malicious damage to property. When Peter later came back to the family home, Kathy again called the police for help. The police once again failed to come and arrest him because there were apparently no vehicles available at the police station to be dispatched.
- 3.2.8. In the months leading up to their mother’s death, the sisters approached the police for assistance at least nine times. The police failed to act according to the law in almost every instance, which led to the fatal, yet preventable death of Maria.
- 3.2.9. CALS has experience in representing women that have applied to court for protection in terms of the DVA. When applicants go to the family court to apply for the protection order, based on the facts, the court decides whether to grant the applicant an interim protection order or whether to merely to issue a notice



informing the respondent to appear in court to give reasons why the protection order should not be granted. This then means that if there is no *prima facie* abuse, the applicant upon applying, leaves the court with no protection and only with a notice for the respondent to appear in court on a later date for the hearing regarding the final protection order.

3.2.10. When the interim protection order and the notice to the respondent are served on the respondent, police officers require the applicant to be present. This is always the case at the Diepsloot and Sandringham Police Stations. Police officers at these stations insist on this because they allege that the applicant needs to identify the respondent and/or the address of the respondent in instances where the areas are informal settlements (with no clearly identifiable street names). This is problematic for the applicant, who is often scared and does not want to see her abuser and can potentially be subject to retraumatisation.

3.2.11. Although the DVA encourages that protection orders be granted with as little delay as possible, CALS has often seen that these cases are postponed unreasonably, specifically in the Johannesburg Family Court, in comparison to a quicker process in the Randburg Magistrate's Court. In one of CALS' matters, an applicant applied for two protection orders (one against her brother and the other against her father) and presently six months later, there have been no orders made due to a number of postponements.

3.2.12. The personal views and beliefs of some magistrates can be extremely problematic, especially as they are the ones that determine whether a final protection order should be granted. Some magistrates, particularly from the Johannesburg Family Court, have the view which they express in open court that protection orders should only be granted where the family will not be torn apart by such order. Furthermore, magistrates often intimidate and question the motives of applicants.



#### 4. Conclusion

CALS values the opportunity to submit to the Special Rapporteur on violence against women, its causes and consequences our research and experiences on the manifestations of violence against women in South Africa For queries or further information please contact Sheena Swemmer, researcher in the Gender Programme at [Sheena.Swemmer@wits.ac.za](mailto:Sheena.Swemmer@wits.ac.za) or Marianna Belalba, researcher in the Rule of Law Programme at [Mariana.BelalbaBarreto@wits.ac.za](mailto:Mariana.BelalbaBarreto@wits.ac.za).

