

"Violence against women: Good practices in
combating and eliminating violence against women"

Expert Group Meeting

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**Addressing domestic violence in South Africa:
Reflections on strategy and practice**

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passed in 1998 and operationalised a year later on December 15 1999. Its passage was not without controversy, with some of its key innovations challenged by two male non-feminist committee members. According to Meint

country's police stations were located in white suburbs or business districts (Department of Safety and Security, 1998). The consequence of this is to impose what are often prohibitive travel costs upon black women. Drawing on research based in poor, black rural communities in the Southern Cape, Artz (1999:10) lists the following obstacles that women must overcome in trying to seek help with domestic violence:

- limited or no taxi or bus services, with what does exist being expensive;
- slow response times by the police and ambulance services;
- poor and expensive telecommunication services;
- large distances to public services means child care is a bigger problem if travel is necessary;
- few support services for abused women and no safe accommodation for women if they need to leave their homes;
- high rates of unemployment and underemployment, resulting in women struggling to pay for basic necessities, travel, accommodation or the costs of separation or relocation.

Staff at rural courts also noted the prohibitive costs of transporting witnesses from outlying areas, which were added to when witnesses were required to stay within courts' jurisdiction in order to testify (Artz, 2003).

Interviews with 23 women who had obtained protection orders highlighted police negligence and impotence, difficulties such as finding the money for documents to be served on the respondent and lack of information regarding due court process, as impediments to complainants' access to justice. Some women withdrew their applications because they experienced the process as being too expensive. Other women reported as being unable to cope with the administrative requirements of the Act (Artz, 2003).

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Public Prosecutions	Access to justice for women and children	Number of public awareness and education campaigns about sexual offences, domestic violence, maintenance and child justice	1 campaign per subject per province reaching 50 schools and 40 000 pupils per province
	Prosecution of cases involving women and children	Conviction rate in sexual offences cases	70% in 2004/05

Litigating around domestic violence

Litigation is an emerging area of strength for the small number of legal organisations¹⁵ concerned with making the Bill of Rights real for women. A number of Constitutional Court cases have begun exploring and outlining the duties imposed upon the police and courts in terms of the Bill of Rights. These cases have primarily centred on state duties in relation to rape and have begun establishing a delictual duty upon state agents.

In *S v Baloyi*¹⁶ the Constitutional Court held that the Constitution imposes a direct obligation on the state to protect the right of all persons to be free from domestic violence. In *Carmichele v Minister of Safety and Security* the High Court held that the common law of delict required development in order to reflect the constitutional duty on the state and, in particular the police and the prosecution, to protect ‘the public in general, and women in particular, against the invasion of their fundamental rights by the perpetrators of violent crime.’ The court accordingly held that the test for unlawfulness (the legal convictions of the community) must be redefined in the light of the Constitution, and that the police and prosecution thus owed ‘the plaintiff a legal duty to protect her against the risk of sexual violence’ in the circumstances of the case.¹⁷ In *Van Eeden v Minister of Safety and Security* the Supreme Court of Appeal held that the respondent owed a legal duty to the appellant to take reasonable steps to prevent an escaped serial rapist from causing her harm.¹⁸

Such test cases are important. Their costs however, ensure that only individual women with means will be able to rely upon this approach to holding the state accountable. Further, once the precedent has been set, public interest law organisations will typically not run such cases again. Arguably, for real impact such cases probably need to be run repeatedly to stamp both the principle and financial consequences upon criminal justice system practices. Such delictual consequences for non-compliance should, ideally be guaranteed, rather than exceptional.

¹⁵These include the Women’s Legal Centre, the Legal Resources Centre, and the Centre for Applied Legal Studies.

¹⁶ 2000 (2) SA 425 (CC).

¹⁷ Having found that the police and prosecution had failed to discharge this duty, had done so negligently, and that the element of causation was satisfied, the High Court held the defendant liable for delictual damages. The High Court’s finding was confirmed by the Supreme Court of Appeal in *Minister of Safety and Security v Carmichele* 2004 (3) SA 305 (SCA).

¹⁸ The respondent had failed to discharge this duty and was thus delictually liable. It had admitted the elements of negligence, vicarious liability and causation. [Ibid.]

It is primarily in criminal matters where arguments are being developed around state failure to uphold domestic violence law and policy. These failures are most stark in the cases of women who have killed abusive partners, and the focus of the Justice for Women Campaign, which aims to reform law and sentencing practices applied to women who kill their abusive partners and to obtain early releases for women already serving lengthy sentences for killing their abuser.

The most significant case to test arguments around the failure of the state to enforce and uphold the DVA was *S v Engelbrecht*, concluded in 2005. Evidence before the court showed that Mrs Engelbrecht had moved nine times to escape her abusive husband; made three attempts to divorce him (the sheriff

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