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Submissions to the Department of Higher Education and Training
on the
**DRAFT POLICY FRAMEWORK TO ADDRESS GENDER-BASED VIOLENCE
IN THE POST-SCHOOL EDUCATION AND TRAINING SYSTEM**

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COMMENTS ON THE DRAFT POLICY FRAMEWORK TO ADDRESS GENDER-BASED VIOLENCE IN THE POST-SCHOOL EDUCATION AND TRAINING SYSTEM

1. On 2 May 2019 the Minister of Higher Education and Training (“the Minister”) published the Draft Policy Framework to Address Gender Based Violence in Post-School Education and Training (“The Draft Policy”) for public comment.¹ The policy is required as existing legal and social frameworks have proved incapable of eradicating gender- based violence (“GBV”) from post-school education and training institutions.

2. The LRC welcomes the decision of the Minister to publish the Draft Policy at a time when the focus, both nationally and internationally, has increasingly shifted to GBV within tertiary institution and the post-school education and training environment. While the bulk of the Draft Policy is to be welcomed, there are some areas, principally where definition and scope are concerned, which it is submitted ought to be rethought. Those areas are the subject of the LRC’s submissions, which are structured as follows:
 - 2.1. Interest of the LRC
 - 2.2. The Draft Policy’s Proposed Scope
 - 2.3. The Draft Policy’s Conceptualisation on Gender Based Violence
 - 2.4. The Context of GBV in Post-School Education and Training Institutions
 - 2.5. The Draft Policy’s Approach to International Agreements
 - 2.6. Applying the Draft Policy Outside Traditional PSET Institutions
 - 2.7. Conclusion

¹ *Government Gazette* No. 42437 (2 May 2019).

I. Interest of the LRC

3. The LRC is an independent non-profit public interest law clinic which uses the law as an instrument of justice. It works towards the development of a fully democratic South Africa based on substantive equality and provides free legal assistance to indigent people and communities who suffer discrimination by reason of race, class, gender, disability or due to social economic circumstances.
4. The LRC has been in existence since 1979 and operates throughout the country from its offices in Johannesburg, Durban, Makhanda (previously Grahamstown), and Cape Town.
5. The LRC is deeply committed to eradicating any forms of GBV and are involved in a number of projects that aim at addressing the problem of GBV in the country. This includes projects related to the training of domestic violence stakeholders, the rights of LGBTQI+ people, and sexual harassment on university campuses.
6. In particular, the LRC was closely involved in the RUPreference Protests at Rhodes University in 2016 that was a direct result of a failure by the university to adequately address GBV on and off campus. During this time the LRC acted as an alternative reporting centre for complaints of GBV after it became apparent that the university's internal reporting structures were no longer functioning. The LRC was also closely involved in assisting the university with the redrafting of its sexual harassment policy.
7. The LRC has also assisted students in laying complaints of sexual harassment and rape against students and members of staff at universities around the country. This has given the organization a unique perspective on

the challenges that GBV at post-school institutions and the regulatory framework that may be needed to address some of the challenges. It is against this background that we make the following submissions.

II. The Draft Policy's Proposed Scope

8. The Draft Policy states that it applies to 'the entire national PSET system', and goes on to specify which institutions are covered at Section 1.2.² This is clarified by a number of statements as to which institutions the Draft Policy *will* apply to, and one statement about which institution the Draft Policy *will not* apply to, being 'the schooling sector'.
9. The following list can be deduced from the paragraphs making up section 1.2:
 - 9.1. Universities
 - 9.2. Technical and Vocational Education and Training Colleges
 - 9.3. Community Education and Training Colleges
 - 9.4. 'Skills providers'
 - 9.5. 'Registered and legally operating private PSET institutions', explained in parentheses as comprising 'higher education institutions, colleges and skills providers')
 - 9.6. 'Workplaces and places where practical learning or workplace based learning is taking place'
 - 9.7. Sector and Education Training Authorities
 - 9.8. 'Quality Councils reporting to the Department [of Education and Training]'
 - 9.9. The South African Qualifications Authority
 - 9.10. The National Student Financial Aid Scheme
 - 9.11. The National Skills Authority

² Page 3 of the Draft Policy.

- 9.12. The Human Resources Development Council of South Africa
- 9.13. The National Skills Fund

10. The manner in which the list is populated may cause confusion for the following reasons.

10.1. **Firstly**, there is a risk in naming the higher education institutions that the policy applies to as there may be a chance that some institutions are excluded from the list or that changes in legislation may result in the types of institutions or their designations changing over time.

10.2. **Secondly**, there is a lack of definitional clarity to some entities on the list. For example, 'places where practical learning... is taking place' could, without clarification, be applied to an almost unlimited set of circumstances. Similarly, the term 'skills providers' may well have been used with a specific legal definition in mind, but without clarification, it remains unclear what types of skills providers may be included.

11. Given the extent and importance of the obligations placed upon, and opportunities afforded to institutions which fall under the scope of the Draft Policy, it is desirable for the institutions to which the policy applies to be easily determinable.

12. It is noted that the list includes a number of institutions that fall under the definition of 'higher education institutions' in section 1 of the Higher Education Act 101 of 1997, as well as several institutions which would not fall under this definition, such as 'workplaces... where work based learning is taking place' and the National Skills Fund.

Recommendation

13. In light of the above, it is submitted that the following changes ought to be made to section 1.2.
14. In order to avoid any confusion as to the institutions to which the Draft Policy applies, the LRC suggests that it must simply state that it applies to any “higher education institution” as defined by Section 1 of the Higher Education Act 101 of 1997, which states that:

“higher education institution” means any institution that provides higher education on a full-time, part-time or distance basis and which is—

(a) converted, merged, established or deemed to be established as a public higher education institution under this Act; or

(b) declared as a public higher education institution under this Act; or

(c) registered or provisionally registered as a private higher education institution under this Act.”

15. “[T]o provide higher education” is also defined in Section 1 as:

“(a) the registering of students for higher education;

(b) the taking of responsibility for the provision and delivery of the curricula;

(c) the assessment of students regarding their learning programmes; and

(d) the conferring of qualifications,

in the name of the higher education institution concerned.”

16. The definition as set out in the Higher Education Act is encompassing enough to cover most institutions referred to in the Draft Policy. Those institutions that are not covered by the Higher Education Act can then be separately identified with reference to their empowering legislation such as the Skills Development Act 97 of 1998.

17. Those institutions not defined by statute should have an adequate definition provided such that officials and other parties tasked with interpreting and applying the Draft Policy can be certain as to whether given institutions are included. This would require clarification to, at least, ‘Workplaces and places where practical learning or workplace based learning is taking place’ and “skills providers”.

III. The Draft Policy’s Conceptualisation of GBV

Widening the scope of individuals and groups affected by GBV

18. We note that the policy recognises that women are more likely to be the victim of violence and as such are at risk of living lives dominated by violence. The policy also recognises that LGBTQI persons are vulnerable to violence. We appreciate this recognition given the rates of targeted attacks on this class of persons because of their sexual orientation and gender identity.

19. In our work, it is apparent that GBV and specifically sexual violence, imitates inequalities of gender, gender identity, race, ethnicity, class, age, sexuality, ability status, citizenship status, and nationality, among other identities. This imitation also replicates the power dynamics when people interact with those in the so called vulnerable and marginalised groups who are more likely to be victims of violence because of their identities and position in society.
20. Like women, these classes of persons are differently situated in societies and often ignored. They are less likely to have their needs met and/or included in policy development compared to men in general and other dominant identities such as white persons, cisgender persons, and persons without disabilities. The experience of the LRC has always been that if a person or a group of people are standing in the path of numerous forms of exclusion and marginalisation you are likely to suffer the consequences of them all.
21. For example, black women who are not South African citizens may be excluded from policy development on the basis of race, sex, and nationality. They may however be more prone to be victims of GBV because of their sex, race, and nationality and less likely to be able to access mechanisms and institutions to assist them if they are victims of GBV. While the policy does recognize that these intersectional factors do influence perpetrators' ideas as well as the response to instances of GBV,³ it is important to recognize from the beginning that GBV is based on complex perceptions of the characteristics of minorities.

³ Page 8 of the Draft Policy.

Recommendation:

22. **We therefore recommend that the policy recognises that they are other minorities in addition to women and LGBTI persons who are also likely to be victims of violence of their minority status in South Africa.**

23. **Furthermore, it is imperative to look for tangible solutions to violence that take into account all aspects of experiences of oppression and marginalisation of various minority groups. It is our belief that recognising and addressing this intersectional approach of violence together with the context of identity marginalisation is an effective way to address the systems that perpetuate oppression as a way to comprehend the intersectional nature of violence.**

Definition of "sex"

24. The Draft Policy provides a definition of "sex" in paragraph 2.1 that is based on the definition provided by the World Health Organisation. The definitions relied upon in this section of the policy refers only to men and women and completely excludes persons with diverse gender identities and expressions, as well as persons with diverse sex characteristics. These classes of persons generally remain marginalised, rendered invisible and oppressed in South Africa due to the continued, overt and covert dominance of essentialist cisnormative and heteronormative conceptions of sex and gender, and binary conceptions of biological sex.

25. In order to ensure that these classes of persons are not invisible in the gender based violence policy frame we suggest that the definition of "sex" is reflective of the diversity that exists in South Africa when talking about gender identity and sex characteristics.

Recommendation

26. We therefore recommend that the policy define “Sex characteristics” as follows:

“Biological characteristics that are used to classify people as female, male, intersex or bodily diverse. These include chromosomes, genitals, gonads, hormone levels, breasts, facial hair, musculature, fat distribution, body contours and voice pitch.”

Definition of “Gender”

27. Paragraph 1.2 also defines “gender” with reference to the World Health Organisation’s definition. The limited binary understanding of gender is repeated. We have accordingly offered a revised definition that we submit is more inclusive and recognises diversity in describing gender, as opposed to only recognising the binary understanding of gender.

Recommendation:

28. We therefore recommend that the policy define gender as *“social roles, behaviours, activities and qualities that a society or community ascribes to individuals on the basis of their sex characteristics.”*

Use of the term “gender non-confirming”

29. “Gender nonconforming” defines people in a negative way in relation to dominant gender norms, stereotypes and cisnormativity, thereby reinforcing the latter. We suggest that the drafters consider removing “gender non-confirming” in favour of an approach that emphasises the value of a diversity of gender identities and gender expressions.

Recommendation

30. **The term “gender diverse” is increasingly used internationally in advocacy and research, and it has a more positive and affirming ring than “gender non-conforming”.**

Dominant Conceptions of Gender and Power Dynamics

31. The Draft Policy mentions the association of specific roles, abilities and behaviours with specific bodies and societies, mapping sexual practices and expression on particular bodies. Further, that they are only two dominant bodies, namely male and female, rather than a spectrum.
32. We submit that it imperative for the policy framework to clearly emphasise that as a country we reject any such notions and we will develop our policies in a manner that clear indicates that we recognise and affirm the diversity in gender identities and expressions, and sex characteristics.
33. In a similar way, the policy takes note of the stereotypical views of society, namely heterosexuality being the norm, and women being perceived as signaling their sexual availability through dress and/or conduct which is perceived as excusing men when they are violent. These perceptions of the prevailing stereotypes in society can be dangerous as it may negate the experiences of those individuals or groups who are victims or perpetrators of GBV, but who do not meet the stereotypical perceptions of victims or perpetrators of GBV.
34. For example, the stereotype that men will perpetuate GBV towards women who dress provocatively, may undermine the myriad of other reasons why men commit GBV and negate attempts to address the other factors. It may

also negate the experiences of women who are victims of GBV, but who were not dressed in a stereotypically provocative manner.

Recommendation

35. We recommend that the policy makes it clear that our Constitution, specifically sections 9,⁴ 10,⁵ and 12,⁶ requires a society that recognises and encourages diversity in this context. While the policy may recognise the typical views of sex and gender, the policy needs to strongly reject stereotypical views in order to avoid marginalising and ignoring these classes of persons. Accordingly, the policy should also reject any notions about heterosexuality being the norm and the views that women could be held liable for violence because of their dress and/or conduct.

36. It is not enough to simply record these prejudicial views of society, they must each be followed individually to ensure the Department of Higher Education and Training as a representative of government, makes it clear that they affirm and recognise diversity in sex characteristics and expressions, that heterosexual is not the norm and that women can never be perceived as asking to be violated because of their dress and/or conduct.

The Exclusion of Sexual Assault from the Draft Policy's Explained Categories of GBV

37. The Draft Policy sets out the most frequent manifestations of GBV, namely intimate partner violence, sexual harassment, sexual assault and rape.⁷ The

⁴ Right to Equality

⁵ Right to human dignity

⁶ Right to freedom and security of the person

⁷ Page 8 of the Draft Policy.

next four subsections of the report⁸ then proceed to give detailed explanations of three of these, but omit sexual harassment and include flashing.

38. This omission must be rectified. Sexual harassment is one of the most common forms of GBV and it is critical that the policy provide an all-encompassing definition of this form of GBV. While “flashing” is an offence in and of itself it may also constitute a form of sexual harassment.
39. Furthermore, sexual harassment is discussed in various other parts of the Draft Policy which makes it all the more important to have a coherent definition at the start of the policy.

Recommendation

40. **Sexual harassment is a form of unfair discrimination based on sex and/or gender and/or sexual orientation and/or gender identity which infringes the rights of the complainants and constitutes a barrier to equity in higher education and in the workplace for those employed in higher education institutions.**
41. **It is submitted that, given the importance of sexual harassment as a form of GBV the Draft Policy ought to include a subsection 2.1.5 defining sexual harassment. This can be achieved with reference to the definitions provided for “sexual harassment” in applicable legislation.**
42. **The Protection From Harassment Act No 17 of 2011 defines “sexual harassment” as follows:**

⁸ Section 2.1.1 – 2.1.4.

“(a) unwelcome sexual attention from a person who knows or ought reasonably to know that such attention is unwelcome;

(b) unwelcome explicit or implicit behavior, suggestions, messages or remarks of a sexual nature that have the effect of offending, intimidating or humiliating the complainant or a related person in circumstances, which a reasonable person having regard to all the circumstances would have anticipated that the complainant or related person would be offended, humiliated or intimidated;

(c) implied or expressed promise of reward for complying with a sexually oriented request; or

(d) implied or expressed threat of reprisal or actual reprisal for refusal to comply with a sexually oriented request.”

43. Together with criminal law, the Protection from Harassment Act one of the laws that provide legal resource to survivors of sexual harassment. The Protection from Harassment Act enables a sexual harassment survivor to apply to court for a protection order against the harasser. This order is a court order that prohibits the harasser from performing any further acts of harassment.

44. The drafters can also refer to the definition of “harassment” in the Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000 to assist with the definition of “sexual harassment”.⁹

⁹ *“harassment” means unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to - (a) sex, gender or sexual orientation; or (b) a person’s membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group.”*

45. Furthermore, the Domestic Violence Act No 116 of 1998 also provides a definition for “harassment” that may assist the drafters.¹⁰ Both of these Acts discuss harassment generally, but may assist to identify the type of conduct that could constitute harassment of a sexual nature.

IV. Context of GBV in Post-Education Institutions and Training

Manner in which GBV manifests

46. Section 2.2 of the Draft Policy sets out the manner in which GBV manifests on campuses and in places of learning. While this is a relatively comprehensive list of examples, the list does not include “sexual harassment” as a common form of GBV, which should be included.

47. In the experience of the LRC, GBV is also perpetuated by the common phenomenon of students and/or staff sending or requesting nude or sexually inappropriate photographs or images from fellow students and/or staff. Students and/or staff also send sexually unwanted and inappropriate images or photos, either of themselves or someone else to fellow students/and staff.

48. The development of technology has made the sharing of photos much easier and these photos are shared amongst students and/or staff on and off campus. Students and/or staff often feel violated by being requested to send a photo or by receiving a photo of this nature as they perceive it to amount to a form of sexual harassment.

¹⁰ **“harassment”** means engaging in a pattern of conduct that induces the fear of harm to a complainant including – (a) repeatedly watching, or loitering outside of or near the building or place where the complainant resides, works, carries on business, studies or happens to be; (b) repeatedly making telephone calls or inducing another person to make telephone calls to the complainant, whether or not conversation ensues; (c) repeatedly sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant.”

49. Both the request to send a sexually inappropriate image/photo, as well as the sharing of that image/photo amounts to GBV.

Recommendation

50. It is recommended that sexual harassment and the requesting and/or sharing of nude or sexually inappropriate images or photos, when it is unwanted or uncalled for, should be included in the list.

Moving away from a “jurisdictional approach” to GBV at post-school institutions

51. Paragraph 2.2 recognises that there are a number of spaces within which GBV can occur that are related or unrelated to the physical institution. There are also a number of people who may be related or unrelated to the institution who are victims of GBV or perpetrators.

52. In the experience of the LRC, post-school institutions are often unwilling to interfere in a case where they feel that it does not fall within their “jurisdiction”. What forms part of the jurisdiction of a post-school institution is unclear and needs to be made clear in the policy.

53. For example, students often interact with each other in their private residences off campus or meet in public spaces as part of social events that are unrelated to educational activities. Similarly, staff and students interact socially, or staff interact socially with each other in spheres that are unrelated to the institution. Particularly in small towns, it often becomes inevitable that members of the institution will interact with each other willingly or unwillingly, simply by virtue of the nature of the place where the institution is situated.

54. When GBV happens within these contexts, institutions are quick to wash their hands of it and say that they are not responsible for what happens “off campus”, even if it is between members of their student body or their staff. This is the wrong approach as the institution maintains a duty to ensure the safety and security of its students and staff. Where one of its members is accused of GBV or becomes the victim of GBV, it is the institution’s obligation to investigate and take steps when it is reported to them.

Recommendation

55. The “jurisdictional approach” is overly legalistic and not the right stance to take in cases of GBV. It is therefore important that the policy clarify exactly when the institutions have an obligation to interfere, and that such an obligation is not confined to territorial boundaries, but rather by relations to the institution and relations between the victim and the perpetrator.

Recognising the role that the post-school institutions play in complaints of GBV

56. Paragraph 2.2 further identifies the factors that lead to under-reporting of GBV. One of the factors that have not been mentioned is the perception by some post-school institutions that GBV is not something that they are equipped, or even expected, to address.

57. The LRC have worked with institutions before that have viewed GBV as a matter to be addressed by the Police and the National Prosecuting Authority. Officials at post-school institutions often take the stance that if a person was really a victim of GBV they must pursue their case by way of the criminal law and if they fail to do so, they are being untruthful about their experiences. In some instances post-school institutions will only investigate a matter if it has been reported to the police as well, while others refuse to

investigate once it has been reported as they claim they don't want to "interfere" in a police investigation.

58. Both of these approaches are wrong and have an impact on the low reporting of GBV in post-school institutions. It is important that post-school institutions are made aware of the particular role they have to play when a student or a staff member is the victim or the perpetrator of GBV.
59. The post-school institutions have an obligation to create a safe and healthy environment for its students and staff. When there is an allegation of GBV it is important that they investigate the matter as one of urgency, so as to ensure that the safety and security of not only the alleged victim be secured, but also the safety and security of the alleged perpetrator who has a right to due process. This duty does not emanate from criminal law, but rather from the duty on the institution to create a safe and secure learning environment. There is no basis to argue that the alleged victim has a duty to approach the police or that an investigation will negatively impact on any ongoing criminal case.
60. The institution must take immediate contingency measures. This may include the convening of a preliminary investigation to determine whether the alleged perpetrator should be suspended awaiting the outcome of the full investigation, or putting in place measures to ensure that the victim and the perpetrator are not expected to continue to be in each other's presence because they for example share a class.
61. During the 2016 RUPreference protests at Rhodes University alleged perpetrators of GBV were forcefully removed from campus by fellow students as the university had not taken any steps to address their continued presence on campus, despite pending cases against them. Their victims were expected to continue meeting them on campus or sharing

classes with them while the investigations were ongoing. This resulted in emotionally and physically traumatic interactions that ultimately led to criminal charges against students who wanted the alleged perpetrators removed from campus. Had the university acted more diligently and quickly when allegations of GBV were brought to their attention, this situation could have been avoided.

Recommendation

- 62. It is recommended that the Draft Policy specify the exact role that post-school institutions play in the handling of GBV, irrespective of any other criminal investigations.**

- 63. It is also important that post-school institutions have immediate contingency plans in place to address the incidence of GBV, pending the full investigation of the matter.**

V. The Draft Policy's Approach to International Conventions

64. At Section 2.4.1, several international conventions are mentioned as relevant to the Draft Policy. These are:
 - a. Beijing Declaration and Platform for Action (1995);
 - b. African Union Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (2003);
 - c. The 2030 Agenda for Sustainable Development (2016)

65. It is noted that the above list is not exhaustive of legally binding international agreements relevant to the prevention of and response to GBV to which South Africa is party.

Recommendation

66. It is submitted that, in order to avoid confusion, one of the following approaches should be taken in Section 2.4.1: either all relevant international agreements should be listed, or the section should state clearly that the list of international agreements discussed is non-exhaustive.

VI. Applying the Draft Policy Outside Traditional PSET Institutions

The Range of Institutions Considered by the Draft Policy's Strategies and Implementation Methods

67. As discussed in Section I of the Submissions, the Draft Policy is intended to apply outside traditional PSET institutions. This includes, but may not be limited to, workplaces, places where 'practical learning' takes place, and several professional bodies related to the administration of post-secondary education (see paragraph 5 of the Submissions, above). In the third paragraph of Section 1.2 of the Draft Policy, the term 'institution' (to which the Draft Policy applies) is defined as referring to a wide range of non-University and -College institutions.

68. At various points throughout the Draft Policy, it appears to have been drafted with traditional PSET institutions (universities and colleges) *only* in mind, and as such may be inapt for application by some institutions which the Draft Policy is intended to apply to.

69. Some illustrative examples of this problem are:

- d. At Section 3.2.5 of the Draft Policy ('Policy Actions Emanating from Strategic Objective 2: Prevention and Awareness') it is stated to be a requirement of the policy that 'institutions must implement awareness programmes'. This is elaborated on, but there elaboration is limited to 'PSET institutions'. The steps these institutions will be required to take include being required to 'undertake safety audits of campuses and residences' and to 'exercise control over... visitors to the university or college'. The requirements also switch to referring to 'universities and colleges' instead of 'institutions' or 'PSET institutions (at 'k') in the list in that paragraph).
- e. At Section 4.1 of the Draft Policy ('Creation of a system of accountability') under the subheading 'Governance of PSET Institutions', governance issues are discussed only in relation to universities and colleges. Under the subheading 'Management of PSET institutions', management is discussed only in relation to universities and colleges. This subheading specifies a concrete implementation step for the Draft Policy: that 'assessment of the overall implementation of the Policy Framework must form part of "university Vice-Chancellors' and college Principals' performance contract[s] and their annual performance appraisal[s]". This section of the Draft Policy is silent as to whose responsibility assessment of implementation will be outside these two kinds of institution, leaving a lacuna in the Draft Policy's implementation strategy.
- f. At Section 4.3 of the Draft Policy ('Funding Strategy') it is suggested that funding for implementation of the Draft Policy can usually be funded through 'existing allocations' which already exist through the 'specific mandates of each institution'. This may well be the case for universities and colleges, but will not necessarily be the case in, for example, some workplaces.

Recommendation

70. It is submitted that, in light of the above illustrative problems, all strategies and implementation methods should be checked to determine whether or not they can be sensibly applied to all institutions to which the Draft Policy is intended to apply.
71. This is especially important where, as in Section 4.1, of the Draft Policy, it is envisaged that specific legal obligations will be undertaken or imposed in order to aid implementation. Without a clear understanding of how this will operate outside colleges and universities, implementation will be hindered and the effectiveness of the Draft Policy will be undermined.

VII. CONCLUSION

72. The Draft Policy envisions a number of steps to be taken by both the DHET and the institutions themselves. We trust that the submissions of the LRC will be useful in finalizing the Policy and will be incorporated into the final document. While it is encouraging that the DHET is addressing the problem of GBV at post-schooling level, the success of the policy will depend on its implementation and monitoring as well as the availability of funding. This is an ongoing process that will only be successful if all parties work together to achieve the desired outcomes.

ENDS