

COMMISSION ON GENDER EQUALITY

5TH FLOOR, ABSA BUILDING
132 ADDERLY STREET, CAPE TOWN



SUBMISSION TO THE SOUTH AFRICAN
PARLIAMETARY NATIONAL ASSEMBLY
PORTFOLIO COMMITTEE ON SOCIAL
DEVELOPEMENT

CHILDREN'S BILL [B70-2003]

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Tel: 021 - 426 40 80 Fax: 021- 424 0549

**Email: surayaw@sn.apc.org
CGE PARLIAMETARY OFFICE**

JOYCE PILISO-SEROKE (CHAIRPERSON), THABISA DUMISA, GERTRUDE FESTER,
THEMBA KGASI, BAFANA KHUMALO, TEBOHO MAITSE, RASHIDA MANJOO,
NOMBULELO SIQWANA-NDULO, MANANA TLAKE

INTRODUCTION

The Commission on Gender Equality (CGE)¹ is an independent statutory body, established in terms of Section 187, Chapter 9² of the Constitution of South Africa, Act 108 of 1996.

Our mandate is to promote respect for gender equality and the protection, development and attainment of gender equality. The powers and functions of the CGE are detailed in the Commission on Gender Equality Act 39 of 1996. In terms of Section 11(1), the CGE must inter-alia evaluate any law proposed by Parliament, affecting or likely to affect gender equality or the status of women, and make recommendations to Parliament with regards thereto.

Section 7(2) of the Constitution compels the state to fulfil the rights stipulated in the Bill of Rights. Sections 9, 10; 11, 12, 14, 27 and 28 of the Constitution³ permits the State to the enact legislation promoting, equality, human dignity, life, freedom and security of the person, privacy, and access to health care in South Africa. The law of general application limits all these rights, to the extent that they are reasonable and justifiable in an open democratic society based on human dignity⁴.

The CGE commends the Portfolio Committee on Social Development for the Children's Bill⁵, as it aims at consolidating the laws relating to the welfare and

¹ Hereinafter referred to as the CGE

² Constitution of South Africa, Act 108 of 1996.

³ Constitution of South Africa, Act 108 of 1996.

⁴ S36(1) Act 108 of 1996.

⁵ Hereafter referred to as the Bill

protection of children. This objective, acknowledges Section 25 of the Constitution, which provides for the rights of children. We acknowledge that issues relating to children, are broadly covered by the South African Human Rights Commission, and in light hereof, our submission will focus on the following issues, which are of primary concern to the Commission in respect of girl children:

1. Introduction
2. Constitutional Perspective
3. Virginitv Testing
4. Female Genital Mutilation

CONSTITUTIONAL PERSPECTIVE

SECTION 25 Children's rights are entrenched in the Bill of Rights, which clearly states that the best interests of every child should be of paramount in every matter concerning the child. This therefore includes the child's right and respect to bodily integrity, which includes issues around virginitv testing, and health care.

The State is committed to gender equality, as evident from the Constitution. Sexual, social and cultural responsibilities are disproportionately borne by women and the girl-child. Section 25 provides that children should be free from violence, coercion, discrimination, intimidation and abuse, as this is essential in achieving gender equality.

SECTION 12 of the Constitution provides for freedom and security of the person, which right to includes the bodily and physical integrity.

SECTION 14 of the Constitution states that everyone has the right to privacy.

Virginity testing as a practice, infringes these rights in the following respects:

- Virginity testing of children without their informed consent, is an invasion of bodily and physical integrity, and an invasion of privacy. The question still remains whether children can give informed consent, under the guise of culture. The reality of issues such as coercion, parental compulsion, duress, as well as social pressures needs to be acknowledged.
- Disclosing the girl child's virginity status to someone else, without their consent is an invasion of privacy.

This Bill does not protect the children in respect of the aforesaid rights, as it fails to provide for non-disclosure of the virginity testing results to someone else. Children should be protected against the disclosure of their virginity status to someone else.

SECTION 36 of the Constitution provides for the limitation of rights in the Bill of Rights.

In considering less restrictive means, Parliament is entitled to have regard not only to constitutional rights, but also considerations of cost, practical implementation, and the prioritisation of certain social demands⁶. Alongside the issue of less restrictive means, is the extent of the infringement, and the strength of the justification. The level of justification required to warrant a limitation upon a right depends on the extent of the limitation. The more invasive the infringement, the more powerful the justification must be.⁷

⁶ S v Manamela and Another at [34]

⁷ S v Manamela and Another

The following three key issues need to be considered in evaluating the validity of the limitation.

- In the context of this Bill, the practice of virginity testing without consent of the child, as a pre-requirement is an infringement of the rights of the child. Disclosing the results of the virginity testing, to someone else, is a more significant invasion. The only safeguard this Bill provides is that the child can refuse to be subjected to virginity testing.
- Secondly, we need to consider how powerful the justification for the infringement will be. The justification is to the benefit of the “culture”, or an attempt to address the HIV/AIDS pandemic. Currently, the claim of virginity testing as a culture, is still a contested issue. The accuracy of the results is unreliable, as the hymen can be severed for reasons other than sexual penetration.
- Finally, we need to consider if there are less restrictive means to combat the HIV/AIDS pandemic. The CGE is of the opinion that there are other less restrictive means to address the HIV/AIDS pandemic, such as educating, and empowering children to make informed choices with regard to their sexuality.

SECTION 39 of the Constitution provides that the Bill of Rights should be interpreted in a manner which “promotes the values which underlie an open and democratic society based on human dignity, equality and freedom”.

The preamble of the Constitution, speaks of the need to “heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights. It invites South Africans to actively engage with the values and rights enshrined in the Constitution, to build a new democratic society, and to “improve the quality of life of all citizens” and to “free the potential of all persons”.

This Bill allows for virginity testing, which fails to heal the gender inequalities of the past, and now makes the vulnerable girl child, even more vulnerable.

EQUALITY PERSPECTIVE

The Promotion of Equality and the Prevention of Unfair Discrimination Act No.4 of 2000, gives effect to Section 9 of the Constitution, which aims at preventing and prohibiting unfair discrimination, as well as to promote equality, and eliminate unfair discrimination. Section 8 of this Act, prohibits unfair discrimination on the grounds of gender. Section 8(d) prohibits any practice, including traditional, customary or religious practice, which impairs the dignity of women, and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child.

Virginity testing, clearly discriminates on the grounds of gender (See arguments below), and impairs on the dignity and well-being of the girl child. The provision of virginity testing clearly disregards the dignity and well being of the girl child, as the harm that it causes the girl child, clearly outweighs the intended benefits. Virginity testing subjects, and exposes vulnerable girl children, to an invasion of their privacy, degrading treatment, impairs their dignity, stigmatisation, sexual abuse, and even diseases such as HIV/AIDS. Due to the fact that virginity testing is mostly practiced on girl children, clearly discriminates, and undermines girl children.

CLAUSE 12: VIRGINITY TESTING

Clause 12 of the Bill, deals with harmful social and cultural practices.

Clause 12(5)(a) of the Bill provides for virginity testing. No consent is required to be subjected to virginity testing. This clause however gives children the right to refuse to be subjected to virginity testing.

Clause 12(5)(b) states that every child has the right not to be subjected to virginity testing.

The following provisions with regarding virginity testing are of great concern to the Commission:

- Clause 12 provides for virginity testing by default;
- No penalties are stipulated for non compliance with hygienic virginity testing;
- No procedure is stipulated in respect of virginity testing;
- Virginity Testing is an invasion of the Constitutional right to Privacy & Bodily integrity;
- The Bill does not provide for confidentiality in respect of the results of the virginity testing;
- Virginity testing is disproportionate in respect of gender.

CULTURE: It is difficult to say whether virginity testing could still be regarded as part of culture. Upon close examination, the revival of this practice was a reaction to social ills, of which HIV/AIDS was paramount. If a practice was revived, the claims were usually made that it was for cultural purposes. The idea that virginity testing was cultural, had to be challenged for a number of reasons. This practice contravenes the Bill of Rights, as it was biased against girl children. More girls than

boys are subjected to virginity testing, even though the results are inconclusive, and unreliable, as other events besides penetration could tear a girl's hymen.⁸ The revival of discriminatory practices in the name of Culture, undermines the Constitutional Bill of Rights.

GENDER INEQUALITIES: Virginity testing disproportionately affects women and the girl children. The marking of these women, make this vulnerable group, even more vulnerable, as they are now exposed to a greater risk of rape, and other forms of abuse. Virgins have also become a commodity in the trade of child trafficking.

'The revival of old-style local practices to address a modern global pandemic such as HIV/AIDS, will do more harm than good, as long as marked gender inequalities, sexual violence and hegemonic, masculine sexualities are left unchallenged.'⁹

Sexual offences are highly gendered, and they are a cause of disempowerment and inequality. Dealing effectively with them, and their consequences, is important for achieving gender equality. The primary victims of sexual offences are women. Virginity testing exposes victims of sexual crimes, and on the other hand, the marking of virgins does not afford protection to girl children against sexual crimes. Victims of sexual offences are known to suffer abandonment, rejection and violence, on disclosing their identity. The practice of virginity testing will in all likelihood further victimise the girl child victims of sexual offences, who are themselves already suffering from the consequences and trauma of offence. It is against this backdrop that the practice of virginity testing should be analysed, especially in respect of its implications for the girl child.

⁸ Professor Charles Dlamini "The Constitution and the Practice of Cultures" in the CGE Report on the Consultative Conference on Virginity Testing, 2000, page 37

⁹ Suzanne Leclerc-Madlala quoted in article by Amita Parashar "Where Angels Fear to Tread" Mail & Guardian, 6-12 August, page 37

HYGIENE: There has been shocking reports of virginity testing, which include women being examined unhygienically, and women who stuff meat and lace into their virgins, to fool the testers¹⁰. Virginity testing is generally conducted in public areas, such as community Halls, schools, and sports fields.

HIV/AIDS: The CGE however does not support virginity testing as an answer the HIV/AIDS pandemic, as there are other non-intrusive ways of addressing the issues of HIV/AIDS. The gender power imbalances needs to be addressed, and this could be through a comprehensive education campaign around issues of sexuality.

FEMALE GENITAL MUTILATION

The CGE supports Clause 12(3), which outlaws female genital mutilation, and female circumcision as a cultural practice. We feel that this is important, and support the inclusion of this Clause in the Bill, especially since there has not been any medical support for this practice to date.

The CGE feels that this clause may to some extent seek to give effect to the standards stipulated in Clause 11.

¹⁰ Mail & Guardian; 6-12 August 2004; page 37

CONCLUSION

We believe that this Bill will assist in defining the rights and responsibilities of children, as well as to consolidate the laws relating to the welfare and protection of children. It is not possible to lay down an absolute standard or test for justification of an infringement of rights. One has to apply these principles, and weigh all these factors together. In doing so, leads to the conclusion that the proposed provisions in Clause 12, with regard to virginity testing, will fail to meet the requirements of Section 36 of the Constitution.

In conclusion, the CGE does not support the practice of virginity testing. At the same time, we do recognise the importance of the rights of individuals to practise their culture, but emphasise that this should be in accordance with the Constitution.