



GENDER SECTION NEWSLETTER



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GREETINGS FROM THE CHAIRPERSON



This edition of the CMJA Gender Section Newsletter is being published while we struggle with challenges created by the COVID 19 pandemic.

As we are all aware, everyone has been affected by the consequences of this global health crisis and states of emergency have been declared world-wide.

One of the deeply concerning consequences of these unusual and unexpected conditions has been the increase in domestic violence. Certainly, in Canada the calls to domestic violence crisis lines and domestic calls to police have spiked. We are very fortunate that government has responded with increased funding to agencies supporting victims of gender-based violence. Prevention education in

online formats and support through webchat and texting has been facilitated. Bar associations are offering enhanced pro bono services. Nonetheless, access to these services and to the courts continues to be challenging.

Magistrate Caroline Byakutaga Kabugho from Kampala, Uganda has prepared a very thoughtful paper outlining the challenges for victims of gender based violence in Uganda, the factors relevant to the increase in such violence, the consequences of the pandemic on domestic violence cases and the strategies developed by the Ugandan judiciary and sister institutions to address the challenges.

We are also pleased to include the perspectives from the Magistrate's Court in Jersey courtesy of Bridget Shaw, the Gender Representative for the Atlantic and Mediterranean Region.

In addition, we are grateful to receive a contribution from Linda Bradford-Morgan, Gender Section Representative for the Pacific Region, on the development of the law in Australia, particularly in relation to the offence of strangulation.

We are also shining a light on the work of the Global Judicial Integrity Network (GJIN) originally launched in April 2018 by the United Nations Office on Drugs and Crime (UNODC). The GJIN is a platform to provide assistance to judiciaries in

strengthening judicial integrity and preventing corruption in the justice system. I am honoured to serve on the advisory board for the GJIN representing the CMJA. Judges are encouraged to register on the GJIN. (<https://www.unodc.org/ji/en/registration.html>)

Dr. Karen Brewer has reported on the webinar hosted by the GJIN discussing the increase in gender-based violence during the pandemic. The Handbook for the Judiciary on Effective Criminal Justice Responses to Gender-Based Violence Against Women and Girls created by UNODC referenced in the webinar was highlighted in the last edition of our newsletter.

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We also commend to you the important issue paper on gender related judicial integrity issues published by the GJIN to raise awareness of these issues and to share good practices in relation to training and guidelines which Dr. Brewer has summarized.

Lastly, we highlight items of interest around the commonwealth. I am very grateful to Dr Brewer, for her assistance in creating bi-annual editions of our Gender Section newsletter and I appreciate the research efforts of CMJA interns.

THE IMPACT OF COVID 19 ON GBV CASES IN UGANDA

The following paper was prepared by Magistrate Caroline Byakutaga Kabugho from Kampala, Uganda, for the newsletter.

Introduction

Gender means culturally and socially constructed roles, responsibilities, privileges relations and expectations of women, men, girls and boys.

GBV - the intentional use of force or power, threatened or actual against another likely to cause or causing injury.

Domestic violence means family violence or any abuse in a domestic setting e.g. marriage or cohabitation

FORMS OF DOMESTIC VIOLENCE

- Physical violence includes slapping, burning, arm twisting
- Sexual violence includes rape, defilement, forced sex
- Psychological abuse includes stalking, name calling, isolation, verbal threats
- Economic violence includes refusing a person to work, withholding finances from the victim, stealing finances
- Harmful traditional practices e.g. early marriages, son preferences and Female Genital Mutilation.

(See Article 5 of the Maputo protocol), irrational gender norms that a man must provide

UGANDA'S INTERVENTION IN CURBING THE SPREAD OF COVID-19

The COVID 19 outbreak started in Wuhan China in December 2019 and by 19 March 2020, it had reached Uganda. It was declared a global pandemic by WHO on March 11,2020 (*Human Rights Watch, 2020. What is Human Rights Watch doing? Follow our reporting on the impact of COVID 19 at*

<http://www.hwr.org/tag/coronavirus>, accessed on 27th May 2020) and all countries were required to take drastic measures to flatten the curve of its spread. Globally, many countries such as China, Italy, USA and in some African countries like South Africa Egypt, Algeria, had registered many deaths.

Uganda in an attempt to save lives of its citizens and in response to the WHO guidelines, the president pronounced a lock down and a Curfew from 7pm to 6:30 am. Many businesses were closed among which were public places like schools, hotels, bars, places of worship and any other public gatherings. The president encouraged social distancing, washing hands with soap, use of sanitizers, avoiding touching on the face and use of face masks among others. When the first COVID patient was discovered in Uganda, around March 29th, 2020 a partial lockdown was ordered and subsequently public transport, international travels in and out of the country and other businesses were all suspended. A few essential service providers like banks, truck drivers, hospitals, food markets, Police, Prisons, ODPP, Courts were allowed to operate remotely as long as they maintained the MOH SOPs. Legal service providers and advocates were among those that were locked down. Despite that, criminal offences have continued to be committed especially

those that fall under the category of domestic violence. Subsequently the CJ in alignment with the MOH SOPs, on March 19,2020 issued a circular (*The Chief Justice Circular no. 1 on COVID 19*) suspending all court hearings and appearances which were always extended following the extension of the lockdown. Prisoners are not presented to court. Courts are required to operate in a skeletal manner while maintaining social distancing. Only 1 judicial officer and about 2 support staff are required be at court to register only **SERIOUS CRIMINAL CASES and URGENT CIVIL MATTERS. Unfortunately, most of the domestic violence cases do not fall in the category of serious cases.** Courts are only taking pleas, handling bail applications and remanding offenders. In real sense courts are also under lock down. No serious court business is going on due of travel restrictions of witnesses. Initially one required a travel permit from the president's representative (RDC) in the district or division to travel, which was not easy to access. This complicated court business the more.

The judicial system and the circumstances right now are particularly challenging for victims of GBV. Women are experiencing violence both from a personal safety standpoint regarding COVID-19 and from their perpetrators whom they live with. Many couples are maiming and killing each other. It is reported that at least a murder is registered everyday as a result of GBV in this COVID 19 period. The measures intended to flatten the curve of COVID-19 are not cognizant of GBV cases as being serious crimes and many people are dying as a result of GBV as opposed to COVID 19 where government has put its concentration.

EVIDENCE OF DOMESTIC VIOLENCE DURING COVID-19 IN UGANDA

Very many NGOs such as the UN Women, Government agencies such

as police have sighted the upsurge of GBV cases in this period of the pandemic country wide (*UN Women, 2020. COVID 19 and Ending Violence Against Women and Girls*).

The media is awash with various incidents of GBV caused by the continued lockdown because the victims are locked down with their perpetrators and they have no means of escape. Even if they are to escape, there are no alternative shelters that can temporarily house them since most of them are now closed.

Just like in normal times, GDV cases are hard to track. This period is worse because few victims manage to report while others have accepted the social economic challenges COVID-19 has come with. In the urban setting for example, victims have decided to keep quiet especially the men, for fear of shame therefore they are psychologically suffering.

The minister of Gender, Labour and Social Development Hon Frank Tumwebaze confirmed to reporters that domestic violence cases has increased in the COVID period due to the lockdown. He noted that between March 30th, 2020 and April 28th 2020, about 3280 cases of GBV were reported to police in addition to other 283 abuses against children (*Domestic Violence against Women Increases in Uganda amid COVID-19* www.xinhuanet.com accessed on May 27, 2020). FIDA Uganda, in their report (*FIDA UG; Domestic Violence Statistical Report, May 2020*) also highlighted that there is an upsurge of GBV cases in Uganda during the COVID 19 period. FIDA particularly referred to the data collected in the Karamoja region which includes Napak, Kotido, Moroto, and Kaabong districts. It is reported that between 22 March 2020 and 17 April 2020, the FIDA's legal clinic alone recorded an abrupt spike in Domestic Violence cases of 133.3% in Karamoja. These cases include but not limited to child neglect, child desertion, child abuse,

grievous harm, assaults, torture, defilement, incest, rape, forced sex, threatening violence. Other instances are: eviction of children and their mother from matrimonial homes, defecating in the food given by government.

On a sad note, all these cases are not translated into court cases. Police, LCs and Probation try to mediate some of these cases since many victims cannot access courts that are a bit distant owing to the travel restrictions. Uganda however is not alone in this. The global media reports show that worldwide all countries that enforced the lockdown directive, have experienced a rise in these cases. Similarly, the New York Times noted an increase in data of domestic abuse created by the pandemic (*Kabonesa C, Kindi F: Assessing the Relationship between Gender Based Violence and COVID 19 Pandemic in Uganda; Konrad Adenauer Stiftung, April 2020*). The UN Women reported an intensity in violence against women and girls in the COVID 19 period. France and Cyprus registered 30% increase, Singapore 33%, Argentina 25%, Brazil, Spain, China, US were all reporting a threefold rise in domestic Violence after the lockdown (*UN Women note 3*).

CAUSES OF THE RISE IN GDV CASES IN THIS PANDEMIC PERIOD

- Unemployment: Many people have lost jobs and businesses therefore they have no income. This has caused financial stress and uncertainty of how to live which have led to aggression at home.
- Social network breakdown; Some men use social networking for economic survival and to run away from violence at home.
- Boredom /idleness; Domestic violence increases whenever families spend more time together. Confinement is a breeding ground for domestic abuse.

- Abuse of power e.g. the Elegu women in Amuru district were brutally assaulted by the Local Defense Unit officers under the pretext of enforcing presidential directives of the curfew.
- Irrational gender norms: In Africa for example men must be men in whatever situation, so they must provide for their families. Instead of declaring their inability to provide they blame their wives and children for being extravagant.
- Too much sex urge leading to forced sex, child molestation, defilement, rape.
- Extra-marital affairs e.g. a lady who had a secret relationship with a married man forcefully went to the man's official home because he had stopped providing for her and the children.
- Inability of victims to temporarily escape from their abusers due to travel restrictions and some relatives are not willing to accommodate the victims due to the social- economic and health challenges posed by the pandemic
- Poor anger management.
- Lack of specialized courts for GDV cases to expedite them.
- Men are selling food given to families by government, in order to buy alcohol.
- A certain man in the eastern part of Uganda defecated in the food that government that had given them to punish the wife and children.
- Demand for money with menaces e.g. a man killed the wife and children when she was unable to give him the charcoal business proceeds which he demanded from her.

THE EFFECT OF THE PANDEMIC ON GDV CASES IN UGANDA

- The social and economic costs of violence against women and girls are substantial. Overall crime has decreased because there are fewer people on streets but GBV

cases have increased. A lot of violence happens in the night (curfew time). Neighbours cannot rescue the victims because of fear to be arrested by Local Defense Unit officers who misinterpret presidential directives.

- Few people are intentionally being arrested to prevent the spread of COVID in prisons.
- Judicial officers as goal keepers of justice who must ensure access to justice for victims of GBV throughout the trial, have been constrained by the lockdown because there are no GBV cases that are being heard in courts.
- Limited or no movement at all for the victims and witnesses exacerbates the whole situation.
- All court sessions for GDV cases were adjourned hence rendering the Domestic Violence Act unenforceable yet the Act requires that DV cases be handled within 24 hrs.
- The pandemic has increased GBV workload in a judicial system that is already struggling with case backlog.
- Abusers are now taking control of the largest part of their victim's life because they all locked down together.
- No court hearings are going on, so the perpetrators are taking advantage of the whole situation, yet Uganda's Domestic violence Act requires that DV cases be handled within 24 hrs.
- Limited reporting mechanisms due to restrictions in movement and limited access to technology. Some victims have no phones.
- A number of shelter houses for victims have been closed. Its only ACTION AID UG that has remained with a few, which are not spread all over the country. Even the open ones operate in their area of operations, they are out of reach for many.
- Enforcement of court orders such as Protection orders, provision orders, exclusion orders is a

challenge due to lack of alternative accommodation for the abusers and no income to maintain the victims.

- Lack of enough logistics to move the victims to shelter homes since the available ones are donor funded and business is locked down worldwide.

EFFORT MADE BY JUDICIARY AND SISTER INSTITUTIONS IN ADDRESSING THE EFFECTS OF COVID 19 ON GBV CASES.

Many measures intended to reduce the spread of COVID -19 have also limited the ability of GBV victims to distance themselves from the abusers and to access support. In trying to address the effects, the judiciary and its sister institutions have come up with the following strategies:

- Virtual handling of court cases plea taking via zoom and teleconferencing.
- Courts have continued registering cases which include GBV cases.
- A lot of information dissemination is going on via social media, TVs and radios.
- DPP office encourages communities to be a brother's keeper and report any act of violence e.g. the boy who assaulted the grandmother in the Northern part of Uganda was immediately arrested upon a tip off by the neighbour.
- Judiciary PRO offices are open and are always updating the public on the available services in court.
- DPP and Judiciary social media handles are open 24/7
- CSO are trying to establish more shelter homes to act as temporary alternative shelter to the victims. UGANET is opening up one in Ntinda, Kampala
- Toll-free numbers of Judiciary, ODPP, Police, CSOs, Legal aid service providers such as FIDA UG, CEDOVIP, UGANET, LASPNET, LEGAL AID CLINIC, are open. They are counselling victims on phone to give them psychological support.

- Police is responding to DV cases in an unprecedented manner.
- UN WOMEN is funding legal aid service providers like FIDA UG in establishing justice desks that are handling GBV victims and advising them on the process of receiving justice.

CONCLUSION

Generally, this pandemic poses unprecedented challenges to our judicial system. A lot of time has been wasted because courts are not handling trials. Time lost shall not be recovered, even if all courts embraced technology which of course comes with its challenges. Case disposal rate shall never be the same. No hope yet of wiping COVID away completely. COVID has caused a lot of stress, the work environment shall not be as free as it has been, therefore case disposal rate shall decline yet the country is already suffering with case backlog.

Much as the judiciary is building digital infrastructure for handling court cases, the gender divide where women are less likely to access internet and some have no telephones and other gadgets, puts them at a disadvantage. The judiciary has to balance between flattening the COVID curve and ensuring that justice is served. Any decision taken must be cognizant with the right of access to justice. People will die if they don't receive justice. It might not be easy to avoid death completely but it's important to minimize the deaths.

As judiciaries are embracing technology, they need to set up a wider digital platform that is user friendly to the public especially women and girls. The internet has evolved from being a luxury to a public good yet many people especially in developing countries are ever offline. Digital disparities reflect the inequality and discrimination that exist in wider society with access

lowest for the least privileged (*UN Women; How to handle Uganda's gender gaps in the use of technology; www.unwomen.org accessed on 28 May 2020*). Digitalization should not be high tech, otherwise it marginalizes those that lack the resources. A two-pronged approach is needed to ensure full connectivity for everyone one and cater for those offline.

Government should also rethink of opening up to allow judiciary and other JLOS stakeholders operate fully as long as they maintain the MOH SOPs and observe social distancing. All courts should be fully operational across the country at least to handle GBV cases because GBV is spiking country wide. GBV court sessions cases should be reorganized to fast track the sessions that were cancelled because of the lockdown. A signal needs to be sent to the abusers that with or without COVID, no tolerance to Gender violence.

DOMESTIC ABUSE AND GBV- A view from the Magistrate's Court of Jersey

The following article was produced by the Gender Representative for the Atlantic and Mediterranean Region, Mrs Bridget Shaw.

The majority of assaults dealt with by the Magistrate's Court of Jersey [‘the Court’] are domestic related and/or gender based [‘DA’]. Such cases pose particular challenges for criminal justice systems in all jurisdictions. However, in recent years significant changes in Jersey have assisted the Court in dealing with DA cases justly and fairly.

Training

In 2013 a training programme was held across the island to ensure that all who worked in criminal justice had a common understanding of what DA

is and why it matters including the potential for coercive and controlling behaviour; the detrimental effect on children; the effect on the community and damage to the economy.

Magistrates, judges and advocates learnt to be aware of the potential risks in DA cases. The Court now specifically takes account of recognised risk factors including separation, pregnancy, social isolation, the use of drugs or alcohol, a sexual element and strangulation. In each case the Magistrate must assess whether, and if so to what extent, the presence of such factors might heighten the risk of serious harm to a complainant.

Court Policy

The policy of the Court is to order a background report before sentencing in every DA case, no matter how minor the harm caused by the actual offence. The report is prepared by the Jersey Probation and Aftercare Service who will examine a defendant's behaviour and attitudes. They will also make collateral checks, including an interview with the victim if possible, before making a sentencing recommendation.

Advocates now rarely urge the Court to sentence on the day of conviction citing the offence as an isolated incident. A report enables any underlying issues to be identified and addressed appropriately, possibly by an offender's course which challenges attitudes with a view to changing behaviour.

Legislation

The overriding objective of the criminal justice system in Jersey is to ensure that cases are dealt with justly: that includes convicting the guilty and acquitting the innocent within a fair trial system. (Criminal Procedure (Jersey) Law 2018 <https://www.jerseylaw.je/laws/enacted/Pages/L-25-2018.aspx>)

To this end the admissibility of hearsay and bad character evidence has been expanded by legislation (Police Procedures and Criminal Evidence (Jersey) Law 2003). For example, if a witness has given a statement to the police but later in court gives an account inconsistent with that statement, the Court may admit the first statement as evidence of the truth of its contents and give it the weight the Court considers appropriate. The first statement is no longer admissible merely to show that the witness is inconsistent, irrespective of how compelling the account might have been. The changes enable the Court to admit a wider range of relevant evidence and so to deal with cases justly in accordance with the overriding objective.

The Future

The Government of Jersey is considering the introduction of DA specific legislation, similar to that introduced in Scotland and that proposed for England and Wales. The Court awaits developments with interest.

GENDER BASED VIOLENCE AND COVID 19

On 15 June, the UNODC's Global Judicial Integrity Network (GJIN) organised a webinar about the increased in GBV during the COVID 19 pandemic. This has been described as a "shadow pandemic". The following is a short summary of the webinar.

There were four panellists speaking during the Webinar.

Ms Claudia Baroni at UNODC who gave a brief outline of the issue and introduced the speakers. COVID 19 has exacerbated gender-based violence in many countries. In the first quarter of 2020, we have seen the immediate impact of COVID 19 on GBV: there has been a 30% increase in France, 25% in Argentina, 33% in

Singapore and there has also been an increase in the UK and US of domestic violence cases.

For many women, the home is no longer a safe space. There has also been evidence that the resources have been diverted from the criminal justice system to the health sector. Courts have closed in some countries or reduced their workload and there has been an increase in backlogs. Hotlines, women's shelters, access to lawyers and legal aid has been scaled back or closed.

Despite this several countries have introduced innovative solutions for access to essential services. E.g.: In Argentina, the Violence against Women Division have introduced measures so that the police can be sent to deal with the issues; In Australia, in Queensland they have introduced tele conferencing and video hearings; In Lebanon they have introduced virtual sessions for protection orders; In Peru, there is now a dedicated email address for reports on violence against women.

UNODC has also produced a briefing paper on the issues and provided emergency equipment to services providing support on GBV cases; advising on women in prisons and victims of GBV.

She also referred to the Handbook on GBV produced in 2019 which is valid during COVID 19 and beyond.

Justice Jakkie Wessels, President of the Regional Court, Limpopo Province, South Africa spoke of the issues in South Africa. Recent headlines have pointed to the recent increase in GBV. Whilst at the beginning of the hard lockdown the cases were 70% lower than previously (probably because public transport was closed; people were more fearful of going out to report incidents; and liquor was banned until the end of May). However,

since South Africa reduced the level to level three of the lockdown, there has been an increase in femicides and in GBV especially after alcohol ban was lifted.

Courts were not totally closed, and protection orders and bail applications were prioritised. GBV and Femicide trials have been prioritised since level three was introduced. SMS notifications have been introduced for victims so that they are made aware when defendants have been granted bail. Trauma assistance centres have been opened and there has been an increase in the number of social workers to deal with the increase in GBV cases.

The definition of what is considered to be a court room has been expanded to include audio video link. Email addresses of clerks have been publicised so that application could be made to the courts. Legislation has been fast-tracked to increase audio-visual testimonies and a platform is being developed to deal with protection orders. Whilst some of these changes were introduced in September 2019, they have been fast tracked. Prosecutors have been given directions that GBV issues must be prioritised. South Africa had already launched an initiative on 5 March 100 Days Rapid Result Action Plan Pilot. This was put on hold once the lockdown happened, but SMS messaging was working. Email applications were paused and whilst teleconferencing and audio-visual links for remote hearings were put on hold, they have now been introduced since level 4 was introduced. Court Staff and Practitioners have been given audio-visual links and these can be used if they have to self-isolate. Youth Day on 16 June saw female bikers supporting awareness of GBV and there has been a recent campaign "Turn Down Your Radio" to stop people drowning out sounds of GBV.

In the question and answer session, she pointed to the importance of having administrative support for virtual court sessions, including the use of court interpreters and the need for coordination so that these courts could operate normally.

Judge Aditi Chaudhury from India spoke about the situation more particularly in Delhi. She pointed out that COVID 19 had had a disproportionate impact on the vulnerable and with the reverse migration that had happened there had been an increase in GBV cases. The Judiciary has responded quickly and has worked with a mixture of physical and virtual hearings. They have also extended time limitations at the Supreme Court level and time limitations for protection orders. They have been an increase in virtual hearings and the courts have been leading the way in efforts to digitalise with e-filing, e-mediations, e-arbitrations so there has been an increase in the digital infrastructure. However, there continue to be problems because of the lack of access by people to the internet. Courts have introduced e-tutorials and facilities have been put in place in court rooms to ensure that people can access systems. There has also been a proactive approach to GBV cases. She mentioned two particular cases:

Courts on its Motion v Union Territory of Jammu, Kashmir and Laddak of 16/04/2020- in which the courts tasked the stakeholders to work together and nudged the Executive to provide more resources and be more proactive to ensure better services response to abuse cases and other support mechanisms such as legal assistance, counselling for women and girls. Trial Courts have been asked to deal with GBV cases as a priority.

All India Council of Human Rights and Social Justice v Union of India-Delhi High Court 24/04/2020- as a

result of this case the different ministries have had to introduce measures to assist GBV cases (e.g.: issuing advisories to shelters that they are exempt from lockdown; introduction of a WhatsApp number for those needing to call helplines; helplines being introduced for access to shelters, psychologists, doctors; counsellors being on hand to accompany victims to police stations; access to legal aid lawyers, police protection officers as well as access to courts).

There are however still some major challenges especially with virtual courts:

- There continued to be problems with internet access as not everyone had phones or computers to access court hearings;
- There were problems in maintenance orders where people had lost their jobs and couldn't provide;
- There weren't enough apps for those who victims to notify authorities
- Going forward there would be a need to clear the backlogs and this would require additional judges
- E-filing should be introduced as a matter of course to ease the load of the courts.

She felt that virtual courts should remain in place after the pandemic was over as this was useful to deal with cases.

Eileen Skinner- from the Centre for Criminal Law Reform in Vancouver, Canada spoke about the UNODC Handbook on Domestic Violence which was relevant at this time as well as after the pandemic. She pointed out that GBV was a pandemic in itself and had now become the "shadow pandemic" to the global COVID 19 pandemic.

COVID 19 had not changed the need for the Judiciary to be aware of GBV cases and there was still a need worldwide to prioritise these cases.

There were a lot of innovative practices that had been introduced as a result of the pandemic but there was a concern that there still existed a gender digital divide and especially at this time when community centres and other services were limited or closed and there was limited access to justice.

Questions and Answers

There was limited time for questions and answers but one of the UNDP representatives for Bangladesh pointed out that there had been an increase of 65% in reports of women experiencing violence in Bangladesh and so they were developing an app for rapid response to issues. They had also introduced digitalisation for access to justice for human rights cases and for cases that involved women and children. They were working with the Ministry of Law and Justice to provide hotline centres and legal aid services for women and girls.

GENDER RELATED INTEGRITY ISSUES

In January 2020, the UNODC published a paper on Gender Related Integrity Issues ("The Paper") following wide consultations on the issue across the globe. This was part of the work that has been undertaken under the auspices of the Gender Judicial Integrity Network (GJIN) and an expert group came together to undertake the first draft. The Advisory Committee of the GJIN which includes the CMJA's Regional Vice President for East, Central and Southern Africa, Justice Lynne Leitch also provided guidance as to the content of the paper. The CMJA, as a partner organisation of the UNODC in the GJIN, was also consulted on the Paper.

The objective of the Paper was to look at the gender-related issues that

could affect the integrity of the judiciary and analyse the existing safeguards to promote appropriate conduct or in taking corrective action where inappropriate conduct is found.

Judicial officers have a responsibility that all those that use or are part of the justice system are treated with respect; to not allow their prejudices or unconscious biases to influence their decisions in court; to ensure that their interactions with court personnel and court users conforms to judicial standards; that when fulfilling their administrative duties, they respect gender related issues and promote public confidence in the judiciary; that their personal interactions do not undermine their integrity both professionally and personally.

The Paper is divided into four different parts:

1: Gender Based Integrity Issues-An Overview

The first part examines the different forms of misconduct that can occur and provides a number of examples. The "MeToo" campaign has brought to light the problems faced by women who have been the victims of sexual misconduct from men who hold the power over them in different walks of life. The Judiciary and the courts has not been immune to these acts of degradation of women, men or vulnerable sectors of society such as the LGBTI communities although reliable data is not always available.

Allegations of misconduct, investigations and disciplinary proceedings are often confidential and the information that is made public may not be easily accessible. The victims of such misconduct may also not feel confident in reporting the issues they have faced for various reasons including concerns about repercussions such as how it might affect their workload or future careers. However, as in other sectors such as the legal profession,

sexual misconduct within the judiciary can take different forms from sextortion, sexual harassment, sex discrimination, gender bias, unequal gender representation, gender stereotyping and other forms of inappropriate sexual conduct. Such sexual misconduct can and has affected the integrity of the justice system. Such misconduct can affect the adjudication process itself and the right of every citizen to equality under the law. Whilst judicial officers are expected to have the highest ethical standards in both their professional and private lives, their behaviour could be seen as harmful, even if it may be legal and judicial officers need to be aware that, for example, unconscious bias can be unfair and inappropriate. Gender related integrity issues can also affect all levels within the justice system from judicial officers to court personnel, to court users such as lawyers, witnesses, police officers, bailiffs etc...

Whilst women seem to suffer the most from such issues, men and those from the LGBTI community may also be affected by inappropriate behaviour.

The Paper outlines the various sexual misdeeds that may occur within the justice system and which are of differing seriousness. Some are extremely serious such as sextortion and sexual harassment (see below) and can be readily described as ethical misconduct. However, other forms of gender discrimination, gender stereotyping, unequal treatment in court, bias etc are less obvious but can still affect the integrity and impartiality of the justice system. The Paper also draws on case studies from around the globe to illustrate some of the worst examples of sexual misconduct that have come to light in the judicial field.

Sextortion is the abuse of power in exchange for sex or sexual favours

and is a form of corruption as defined by the UN Convention Against Corruption (UNAC) not only because it is an abuse of functions as defined by the Convention but it also falls



within the definition of trading on influence.

Sexual Harassment can take different forms from the most severe forms of coercion such as sextortion to unwanted attention whether this is offensive or sexual in nature. Judicial Officers are expected to respect the highest of standard of propriety and unwanted, overfriendly attention towards fellow judicial officers or employees, whether it is against the law or not is unprofessional. Using sexual harassment to control power over individuals can affect the integrity of individual judicial officers or the judiciary as a whole. It is much worse when the sexual harassment includes physical harassment, sexual comments, pornography in the workplace and the Paper outlines some examples of these unacceptable occurrences.

Sexual discrimination in the judiciary is an issue that needs to be resolved not only in areas where recruitment has favoured men over women entering or progressing through their careers but can also affect the workplace itself when issues such as

inadequate bathroom facilities or child care facilities are may be affected. Like any other profession there has also been a tendency in some jurisdictions, to equate maternity leave with inability to be able to fulfil your functions effectively and efficiently to the highest of standards.

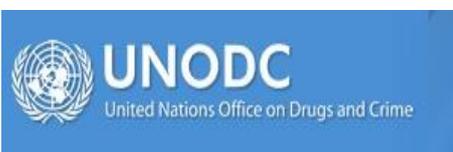
Gender Bias is an issue that has been much discussed within the context of the good administration of justice and can create a hostile environment for users of the courts and in particular the more vulnerable members of society that may appear in court. It is important that the impartiality of judicial officers is not affected by their unconscious bias or by gender stereotyping and the Paper illustrates some of the examples around the globe of such conduct.

The Paper also covers what it calls "Inappropriate Sexual Conduct" which, although consensual in nature, may raise integrity issues in particular if there is a question mark over whether or not the behaviour was actually consensual and definitely when it is seen as bringing the judiciary into disrepute.

2. Clear and Comprehensive Guidance on Gender Based Integrity Issues

We have seen an increase in the numbers of codes/guidelines of ethical conduct for judicial officers and even judicial personnel, these codes rarely deal with gender specific issues. There has been some debate that if such misconduct is included in legislation, there may not be a need to include it in the codes of conduct of judicial officers. However, not all jurisdictions condemn sexual harassment, for example. Measures may not be put in place to cover issues which are not considered unlawful but are still unethical or unprofessional. Codes may also not provide practical advice on how to deal with integrity issues where judicial officers are faced with

conflicts of interest or pressures. The codes or guidelines may not take into account the personal interactions of judicial officers but only their professional conduct. Even the Bangalore Principles on Judicial Conduct produced in 2002 and the Commentary on the Principles do not address any gender specific issues, except perhaps under the principle of equal treatment - though this is limited to the use of that principle within the confines of the courtroom itself and doesn't touch on any interaction within the justice system with personnel, lawyers and other court users. The Paper calls for a review of the



Bangalore Principles in the light of the Paper.

There have been some judicial Benchbooks as well as gender sensitive policies that courts have developed in some jurisdictions but there is still a great deal of work to be done to raise awareness and provide practical advice on how to ensure gender related integrity issues do not arise in the courts. In addition, confidential reporting processes should be put in place to ensure that victims of such conduct are protected and provided support both physically and mentally as well as a transparent, swift, impartial investigative process for any complaints received and any remedial action required. Some jurisdictions have adopted Gender Equality Protocols to assist judicial officers when they are judging cases to ensure gender sensitivity and to make it easier for judicial officers to make fairer, more transparent and unbiased decisions.

The Paper also recommends that Sexual Harassment policies be put in place to address issues that might arise outside the court room. It is also considered important that reference is made in any policies to

the international instruments that regulate civil, political, cultural and social rights as well as the anti-corruption conventions and norms.

3. Judicial Accountability for Gender Related Misconduct.

It also is important that transparent and effective accountability systems are set up. It is paramount that there are proper mechanisms put in place to report such misconduct and those who are making the complaint are fully aware of the procedures involved, have complete confidence in the confidentiality of the processes, including confidence that there won't be any repercussions and the complaint will be fully investigated. Some experts have suggested a zero-tolerance attitude towards sexual misconduct but others have not gone as far as that, as they feel it could deter any reporting of such issues, especially for those incidents that are considered "minor". The victims must be provided with the necessary support systems and they must have confidence to report any complaints to an independent disciplinary body which can undertake an independent, effective and impartial investigation and more importantly have the ability to make a decision on remedial action which is proportionate to the misbehaviour as promptly as possible to avoid impunity or even the perception of impunity. The sanctions available to the disciplinary body can be wide ranging but the disciplinary body needs to have the resources to be able to address any issues of gender related integrity issues.

The judiciary as a whole needs to have systems in place that mainstream gender sensitivity within the justice system. Some Judicial bodies have created Gender Equality Policies or Committees to ensure that gender related integrity issues are addressed across the judiciary at a national level. The Judiciary also needs to be aware of its role in

ensuring that SDG 5 and SDG 16 are respected and provide policies and strategies in line with these international requirements.

The Paper also recommends that gender related integrity issues should be taken into account when appointments are made in the justice system or when performance reviews take place.

Judiciaries need to make sure measures are put in place to assess and address any risks of gender integrity issues.

4. Effective Judicial Education and Training

The Paper also stresses the importance of putting in place training and education programmes that address gender sensitivity in the Judiciary. Whilst it advocates for mandatory training on gender related issues, this is because it is believed that some judicial officers may see this as only relevant to women and would not take any training seriously enough. It is therefore important to ensure that both men and women were able to gain understanding and knowledge from any training undertaken. The Paper, however, goes further in terms of education and training and wants gender sensitivity awareness raising to begin at law school and should be integrated into courses on ethics.

Lawyers, court personnel should also be trained in this area. There have been numerous examples of sexual misconduct or harassment in the legal profession which have come to light in recent years and bar associations and law societies have a responsibility to promote awareness within the profession of gender related integrity issues. Court personnel, just like judicial officers, need to have training in this field and judicial officers need to be sensitive to particular issues which may arise when training court employees.

As always it is important for the public to understand the role of judicial officers as well as their ethical standards and that this information is made available to the public and the media.

The full Paper on Gender Related Integrity Issues published by the UNODC, with all the recommendations, is available from <https://www.unodc.org/ji/en/knowledge-products/gender-related-integrity-issues.html>

GENDER BASED VIOLENCE: A purposive test

The following report was produced by the Gender Section Representative for the Pacific Region, Mrs. Linda Bradford-Morgan of Australia

Strangulation (domestic violence offences)

Judicial consideration of strangulation (domestic violence) offences in Australia has recently led to a number of directions that a defendant charged with a choking, suffocation or strangulation offence be acquitted where the complainant's evidence did not establish that the victim had stopped breathing (R v AJB [2019] QDC 169 applying R v Green (No 3) [2019] ACTSC 96).

The Queensland Court of Appeal in **R v HBZ [2020]** [R v HBZ](#) applied the "purposive test" in interpreting legislative provisions and dismissed an appeal against conviction on a charge under section 315 A of the Criminal Code (Qld). The judgment of Mullins JA canvassed the principles for interpretation of legislation and the Explanatory Notes for the Bill that introduced the specific strangulation (in a domestic violence setting) offence in 2016.

Mullins JA applied the reasoning of Kiefel CJ and Keane J in the High Court decision in **R v A2** (R v A2 [2019] HCA 35) R v A2 High Court and considered **the purpose** of the introduction of the new strangulation offence; the recognition of this behaviour as inherently dangerous and a predictive indicator of an escalation in domestic violence offending, including homicide; and the significant penalty (up to seven years imprisonment) (R v HBZ [2020] QCA 73 at paragraph 36-38). The judgment refers to section 14A of the *Acts Interpretation Act 1954 (Qld)* which provides that:

"In the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation..." (Ibid at paragraph 33)

In dismissing the appeal Mullins JA (McMurdo JA and Boddice J concurred) held that there had been no misdirection of the jury by the trial judge on the meaning of "choked" being "to hinder or stop the breathing of a person" (R v HBZ [2020] QCA 73 at paragraph 21)

Female genital mutilation

The High Court in **R v A2** allowed an appeal against a decision to quash convictions on charges introduced following publication of the Family Law Council report on the practice of female genital mutilation on children. In the joint judgment the principles to be applied in determining the interpretation of section 45 (1) of the Crimes Act 1900 (NSW) were considered:

"A statutory offence provision is to be construed by reference to the ordinary rules of construction. The old rule, that statutes creating offences should be strictly construed, has lost much of its importance. It is nevertheless accepted that offence provisions may have serious consequences.

This suggests the need for caution...An ambiguity which calls for such resolution is, however, one which persists after the application of the ordinary rules of construction. The meaning to be given to "otherwise mutilates", as referable to practices falling within the umbrella term "female genital mutilation", does not involve any artificial or unexplained extension"... A broad construction of an offence provision may be warranted in a particular case. This may be when its purpose is protective.

In R v Sharpe [(2001) 1 SCR 45 at 77,79] McLachlin CJ of the Supreme Court of Canada construed offence provisions relating to child pornography broadly ...Her Honour interpreted the provisions in accordance with Parliament's main purpose in creating those offences: to prevent harm to children through sexual abuse. A similar purposive approach was taken by the Court of Appeal of the Supreme Court of Victoria in Clarkson v The Queen [(2011) 32 VR 361] in rejecting an argument that "apparent or ostensible consent" could be a mitigating factor in sexual offences relating to underage sex"[R v A2 [2019] HCA 35 at paragraphs 52;55].

The majority of the High Court held that the trial judge did not misdirect the jury by directing that a cut or nick to the complainant's genitalia could fall within the definition of "otherwise mutilates" and rejected the Court of Appeal's decision that those words "import a requirement that permanent disfigurement or obvious damage result from what is done" [Ibid at paragraph 45].

Legislative reform Strangulation – a weapon of control in domestic and family relationships

Australia: Strangulation is a gendered crime and an exertion of power and control. It is not culturally specific. Injuries include traumatic brain

injury; post-anoxic encephalopathy; thrombosis resulting in a disabling or fatal stroke; carotid artery dissection or hyoid bone fracture. Death may occur within days, weeks or months after a strangulation event. Most victims do not seek medical treatment or assessment and do not make criminal complaints. Legislation has been introduced in most States and Territories from 2016 to criminalise this high risk behaviour however most Acts do not include a definition of strangulation.

Allegations of strangulation are prevalent in domestic violence applications where civil orders for protection are sought (either by police or complainants). Family violence courts in assessing the conditions on Orders (including ousters of perpetrators from the residence) have regard to high risk factors (precursors to lethality) which include strangulation; an aggrieved's pregnancy; a perpetrator's history of domestic violence orders and employment status. Referrals are made to High Risk teams that co-ordinate available support services for high risk victims or Vulnerable Persons Unit within the Police Service.

During COVID the Queensland Police Commissioner introduced email and messaging notification of domestic violence incidents as victims confined at home with perpetrators are unable to telephone for police assistance. Specialist training for judicial officers nationally has been an important resource in developing best practice and uniform legislative frameworks. Protection Orders are enforceable throughout Australia and New Zealand. Following the murder of Hannah Clarke and her 3 children in Brisbane Queensland in February 2020 domestic violence vigils were held in all State capitals calling for further reforms to domestic violence laws.

New Zealand: On 3 December 2018 New Zealand introduced a

strangulation specific domestic violence offence which includes a comprehensive definition based on the Minnesota Penal Code (Family Violence (Amendments) Act 2018 introduced to the Crimes Act 1961 section 189A strangulation or suffocation):

"Everyone is liable to imprisonment for a term not exceeding 7 years who intentionally or recklessly impedes another person's normal breathing, blood circulation, or both, by doing (manually, or using any aid) all or any of the following: (a) blocking that other person's nose, mouth, or both:(b) applying pressure on, or to, that other person's throat, neck, or both."

The Crimes Act was also amended to introduce Section 194A assault on person in family relationship and an offence of coerced marriage or civil union (section 207A).

Papua New Guinea: In 2016 PNG introduced a National Strategy to Prevent and Respond to gender based violence. There have been vigils held in Port Moresby following the death of a 19 year old woman Jenelyn Kennedy (and mother of two children) in June 2020 after an horrific domestic violence attack.

**Gender Section News
Publication by
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(Chair)
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(Editor in Chief)**

NEWS FROM AROUND THE COMMONWEALTH

The following are summaries of various reports that the CMJA has gathered from around the Commonwealth that outline some of the developments in the field of gender and human rights.

COMMONWEALTH

In March 2020, Sisters for Change, a UK based charity launched its publication: "A comparative review of Harassment and Sexual Exploitation Laws across the Commonwealth". Although the initial objective was to provide information to inform Namibia's anti-discrimination, harassment, violence and sexual exploitation legislation, the information gathered from around the Commonwealth is of interest to all concerned with the issues. It includes a comparative analysis of the laws in the UK, Canada and South Africa but also contains, in its appendices, information on laws around the Commonwealth. The full report is available at: <https://www.sistersforchange.org.uk/2020/03/16/comparative-legal-review-of-harassment-and-sexual-exploitation-laws/>

AUSTRALIA

In June 2020, the Chief Justice of Australia issued a press statement following an investigation into sexual harassment by a Justice of the High Court of six former Judges' Associates. As a result of this the Chief Justice, Justice Susan Kiefel, has instituted a number of changes to the policies of the High Court which were included in the recommendations of the investigation report on the case:

- The Court should develop a supplementary HR policy relevant to the particular employment circumstances of the personal

staff of Justices including associates.

- The Court should review the induction it provides to associates to make sure it covers material directly relevant to their specialised role.
- The Court should identify an appropriate person to form a closer working relationship with associates. This person would check in regularly with associates, fulfil some of the administrative advisory function of a supervisor, provide support if required, and act as a conduit to the Chief Executive and Principal Registrar where appropriate.
- The Court should clarify that the confidentiality requirements for associates relate only to the work of the Court.
- The Court should make clear to associates that their duties do not extend to an obligation to attend social functions.
- The Court should consider canvassing current associates to find out more about their experiences while working at the Court.

She further stated that there was no place for sexual harassment in the workplace.

JERSEY

In February 2020, it was reported that lawmakers in Jersey, Channel Islands had changed the law to allow married women to deal with their own taxes. Until 2020, the 1926 law in Jersey prohibited married women from talking to the tax office or filing taxes on their own behalf without the written permission of their husbands.

INDIA

In January 2020, the Supreme Court of India judged in favour of an illiterate widow who had seen her land confiscated in 1967 by the State of Himachal Pradesh so that they could build a road. The widow had

not received any compensation at the time or since. The State claimed that as it had been in possession of the land for decades, it had “adverse possession” of the land and therefore should not compensate the widow who was only made aware that she had the right to claim compensation when others took the state to court in 2004. The Supreme Court Judges pointed out that the widow had been ‘forcibly expropriated of her property’. The right to property, at that time was a fundamental right under the Indian constitution and the Supreme Court stated that this could not be deprived of property “without due process of law and upon just and fair compensation”. For the full judgment see: [Vidaya Devi V. The State Of Himachal Pradesh \[2020\] Insc 19 \(8 January 2020\)](#)

NIGERIA

In July 2020, the Nigerian Senate passed ‘A Bill for an Act to prevent, prohibit and redress Sexual Harassment of students in tertiary educational institutions and for matters concerned therewith 2019’. The Bill, which still needs the consent of the lower chamber, seeks to protect students from sexual harassment in tertiary education and proposes up to 5 years in jail for offenders and up to 14 years in jail for anyone found having sex with students.

However, the Bill has been criticised for not going far enough and only targeting education institutions and fails to cover sexual harassment in the workplace or in any other sectors. There is anecdotal evidence that over 70% of women in Nigeria have experienced sexual harassment although very few cases are reported as victims are afraid of being stigmatised or shamed.

There are no other national legislative provisions that protect victims from sexual harassment in

Nigeria, except in Lagos State. In addition, enforcement is problematic due to the fact that police put pressure on the victims usually to withdraw any complaints made or to settle out of court.

NORTHERN IRELAND

In June 2020, it was reported that Northern Irish MPs approved the guidelines for abortions in Northern Ireland. Until 2019, there was a ban on terminations within the jurisdiction, even in cases of incest or rape and women used to have to travel to England and Wales to get a termination. In March 2020, the UK Parliament agreed a set of regulations setting out the legal framework on the provision of abortion services in the region and these were approved by the Northern Irish MPs in June 2020. However, there are still few, if any, facilities providing support to women in Northern Ireland and they are being discriminated against because of this.

SIERRA LEONE

In June 2020, it was reported that Save the Children had launched a sex education app in Sierra Leone to avoid a repeat of what happened when schools were closed during the Ebola virus outbreak in 2014-2016 when there was a spike in teenage pregnancies. The app aims, in the form of an interactive game, to educate teenagers about how to deal with sexual health and COVID 19 and how to avoid the risks.

SOUTH AFRICA

In a statement on 18 June 2020 about COVID 19, the President of South Africa deplored the increase in Gender Based Violence (GBV) in South Africa. He stated: ‘It is with the heaviest of hearts that I stand before the women and girls of South Africa this evening to talk about another pandemic that is raging in

our country – the killing of women and children by the men of our country “. An emergency response plan had been formulated to combat GBV and femicide and R1.6 billion in government funding would be made available to support the implementation of this plan.

The CMJA has continued to monitor the progress of the Muslim Marriage Bill in South Africa as outlined in the previous Gender Newsletter. To date this has still not been passed into law despite the fact that the Cape High Court in August 2018 ordered the state had not complied with its obligations under the constitution and ordered it to enact legislation by 31 August 2020 to give the same rights to Muslim women married under traditional religious ceremonies as those married under civil law, customary law or same sex marriages. The High Court found that the fact that legislation had not yet been passed was contrary to the Bill of Rights. The state is appealing the decision of the high court which has been suspended pending the outcome of the case at the constitutional court.

UGANDA

In a recent decision in the Ugandan High Court Family Division, Justice Godfrey Namundi ruled that it was unlawful for a husband to leave the marital home to sons/heirs without the consent of his spouse. This was a case brought by the grandson against his grandmother. Speaking after the judgement, human rights activist, Diana Kagere said: "This judgment is a victory for all women in Uganda regarding property rights. It is also timely for the Succession Amendment Bill. What a remarkable precedent."

ZIMBABWE

Although Zimbabwe left the Commonwealth in 2003, the CMJA continues to monitor developments there. The following report is summarised from Legalbrief Africa

To avoid paying an increase in maintenance ordered by the Magistrates Court in Harare for his six year old daughter, a South African, with property in Zimbabwe, decided to “divest” himself of his assets (including the house where the daughter lived with his estranged partner- who were summarily evicted. These assets were then transferred into a trust fund, at the recommendation of the father’s lawyer which the father took control of. He further decided at the first AGM that no dividends should be paid out for the child’s maintenance as all assets should be divided equally between the beneficiaries. The Magistrates Court found that the father should pay the increase in maintenance which the mother indicated would be put towards rent, increased cost of living costs and schooling fees. The father appealed to the High Court, but the High Court rejected his appeal stating that the courts had a duty to protect children.

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*Mrs. Linda Bradford-
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West Africa

*Justice Sedina Agbemava,
Ghana*

Objectives of the Gender Section

Aims

- ◆ To promote the interests of judicial officers throughout the Commonwealth
- To ensure wherever possible, equal access to the law

Objectives

- ◆ To provide a forum for judicial officers to be able to consider ways of redressing any gender imbalance:
 - a) Gender Bias and other colleagues;
 - b) Gender Bias and the Public both specifically and generally;
 - c) Institutionalized Gender Bias and the Justice System.

- ◆ To exchange information among judicial officers;
- ◆ To encourage the advancement of women;
- ◆ To promote and encourage women to be aware of their legal rights;
- ◆ To address women's groups on issues relating to the law and their legal rights.

CONTRIBUTIONS AND COMMENTS

We would like to hear from you. If you have comments, suggestions, ideas, or concerns please send us an



e-mail at
info@cmja.org

If you have an interesting story to tell, please send these too!!