

**WOMEN & HUMAN RIGHTS
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**PREVENTING VIOLENCE AGAINST WOMEN
IN SOUTHERN AFRICA**

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During 5-8 March 1998, the South African Ministry of Justice hosted a conference on the prevention of violence against women in the SADC region. Participants included government delegations and representatives of non-governmental organisations from the fourteen SADC member countries.

The conference aimed to support the formulation of regional and national plans to address violence against women, and also to promote inter-sectoral and inter-regional co-operation in this area. A primary objective was to explore the possibility of a binding regional convention on violence against women, which would build on the provisions of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and which would be similar to the regional convention adopted by the OAS.

Panel discussions were held on a number of areas of mutual interest and concern, including the forms and extent of violence against women in the SADC region, the cultural, economic, religious and human rights context of violence and comparative experiences regarding legislation and the criminal justice system. The presentation of a case study on recent amendments of domestic violence legislation in

Mauritius was of particular interest to South African participants, given the imminent completion of a draft Bill amending the South African Prevention of Family Violence Act (133 of 1993).

Apart from providing an opportunity to share best practices from the region, the conference also led to the forming of alliances and informal partnerships which will hopefully prove instrumental in addressing violence against women on a coordinated basis. Most significantly, the conference culminated in the acceptance of a draft Declaration on the Prevention and Eradication of Violence Against Women and Children. This declaration, which builds on the SADC Declaration on Gender and Development (signed by SADC Heads of State in September 1997), recognizes that violence against women constitutes a seri-

ous violation of fundamental human rights and reflects the unequal relations of power and value between men and women. In order to address violence against women, several measures are recommended, including the enactment of laws such as sexual offences and domestic violence legislation, ensuring accessible and effective police, prosecutorial, health, social welfare and other services, and promoting gender sensitisation training of all service providers engaged in the administration of justice.

It was further recommended that the Declaration be considered for adoption by SADC Heads of State at their Summit in Mauritius in September 1998. If adopted, this Declaration will provide further clarity on state responsibilities to prevent violence against women.

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THE RECENT CHALLENGE TO THE CHOICE ON TERMINATION OF PREGNANCY ACT

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When the Choice on Termination of Pregnancy Act 92 of 1996 (the Act) came into effect, it realised women's reproductive autonomy by affording every woman the right to choose to have an early, safe and legal termination of pregnancy according to her own private beliefs. This Act repealed the restrictive provisions of the Abortion and Sterilisation Act which only allowed women to terminate their pregnancies under specific conditions, for example, where the woman's life was in danger or where the pregnancy resulted from rape or incest.

In spite of the prohibition imposed by the Abortion and Sterilisation Act, many women still terminated their pregnancies. The result was that up to 425 women died each year because of back street abortions and about 44 686 had to be hospitalised. Eighty four percent of these women were black. Thus black women especially were severely affected by this lack of access to safe legal methods of terminating unwanted pregnancies. The new Act on the other hand, gives all women an opportunity to take control over their reproductive health.

The Act makes provision for three terms during which pregnancy can be terminated on certain conditions:

- During the first 12 weeks a pregnancy may be terminated upon the request of the woman.
- From the 13th to the 20th week it may be terminated if the pregnancy would pose a risk of injury to the woman's physical or mental health; or if there is a risk that the fetus would suffer from a severe physical or mental abnormality; or if the continued pregnancy would significantly affect the woman's social or economic circumstances.
- After the 20th week a woman may

only terminate a pregnancy if the continued pregnancy would endanger the woman's life; or would result in a severe malformation of the fetus; or would pose a risk of injury to the fetus.

Thus the Act gave women a right of choice whether or not to continue with a pregnancy, but it also recognised that it may be in the interest of the state to limit this choice - hence the conditions prescribed

The plaintiffs contended that the Act is unconstitutional in that it infringes on the right to life of the unborn fetus.

under the Act. Since the implementation of the Act more than 20 000 women had their pregnancies terminated. According to national statistics (excluding 1998) 82.6% of these women were over 18 and 64.5% were first trimester (first 12 weeks) terminations, whilst 35.5% were second trimester (13 - 20 weeks) terminations.

Challenging the Act

In July 1997 three groups, the Christian Lawyers Association of Southern Africa, the Christians for Truth in South Africa and the United Christian Action (the plaintiffs) issued a summons against the Minister of Health, the premier of Gauteng and the MEC for Health in Gauteng (the defendants). They claimed that the Act is unconstitutional in that it infringes on the right to life of the unborn fetus. Their basic argument was that the life of a human being starts at conception and that abortion thus terminates human life. They furthermore maintained that section 11 of the Constitution, which

guarantees everyone the right to life, applies to the fetus from the moment of conception and that the Act is thus in conflict with section 11 in that it allows for the termination of pregnancy at any stage after conception and prior to birth.

The Exception

The Reproductive Rights Alliance and the Gender Commission joined as co-defendants in the action. Together with the defendants mentioned above, they raised an exception to the summons of the plaintiffs, arguing that this summons did not disclose a cause of action since the fetus is not a bearer of rights. In addition, they contended that section 11 of the Constitution does not preclude the termination of pregnancy and that the right of the woman to choose to have her pregnancy terminated is protected by the guarantee of reproductive rights in the Constitution.

Argument Presented by Defendants

In May of this year, these arguments were presented during the exception hearing in the Pretoria High Court. The main argument of the defendants was that the fetus is not a bearer of rights, neither in common law, nor in terms of the Constitution. In terms of common law, the fetus is not a legal subject before birth, but only forms part of the woman. Thus, it only becomes a bearer of rights once it is born and completely separated from the body of the woman. The common law however protects the interests of the fetus as a potential legal subject by the application of the so-called *nasciturus* fiction. This fiction entails that whenever it is to the advantage of the fetus, it is deemed to have been in existence since the time of its conception (if and when it is born alive). The operation of this fiction

is therefore dependent and conditional upon the fetus being born alive. Thus the *nasciturus* fiction does not serve as protection against termination of pregnancy.

The defendants further argued that it is clear that the term 'person' in section 11 of the Constitution does not include unborn life. Any other interpreta-

"A woman's right to control her body should be respected and she should not be socially, economically or culturally penalised because of her reproductive role in society."

tion would produce anomalous consequences that could never have been intended. It would, for example, mean that the life of the fetus enjoys the same protection as that of every other human being, including its mother.

The defendants argued that a woman's right to make decisions regarding reproduction is essential to equality.

Abortion would thus be constitutionally prohibited even when the pregnancy constitutes a threat to the life of the mother, or where the pregnancy resulted from rape or incest.

The Reproductive Rights Alliance and the Gender Commission supported this argument, and argued further that in interpreting the Constitution, the court should take cognisance of the values that the Constitution seeks to promote and protect. The values of equality, freedom,

dignity, non-racism and non-sexism show a commitment to transformation, which includes the eradication of systemic domination and disadvantage, including systemic inequalities directed against women. Central to the transformation of our society is respect for and recognition of women's rights to reproductive autonomy. A woman's right to control her body should thus be respected and she should not be socially, economically or culturally penalised because of her reproductive role in society.

Women's reproductive rights are furthermore secured in the Constitution, through the rights to dignity, equality, privacy, freedom and security of the person, freedom of religion, belief and opinion and health. Collectively these rights protect and promote a woman's reproductive autonomy and are fundamental to her full participation in society. The rights of women to make decisions regarding reproduction are essential to equality, and the absence of such rights could result in pro-

found social and economical consequences for women. In *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC) the Constitutional Court recognised the fact that women carry a disproportionate burden in child bearing and child rearing, and are thus subordinated by virtue of this uneven burden. Where a woman is forced into child bearing, because the termination of an unwanted pregnancy is prohibited, she is doubly preju-

diced. For a woman to have equal status in society she should have a choice as to whether or not to bear children.

Response from Plaintiffs

The plaintiffs responded to these arguments by stating that the common law as it stands is incorrect and that even before the advent of the Constitution, the *nasciturus* fiction had been the subject of intense debate. It was argued that this fiction should be expanded to recognise the rights and interests of the fetus before birth. The plaintiffs believe that even if the common law did not recognise these rights expressly before 1994, such formal recognition was imminent and was in any event latently present at the stage of development which the common law reached when the Interim Constitution was adopted. They further argued that the Constitution itself did not abrogate the common law and that the point of departure in the interpretation of the Bill of Rights should be the common law as it existed at the time of implementation of the Constitution. Thus, they argued that since the unborn fetus had a right to life in terms of the common law, it should also have that right under the Constitution.

Judgement Reserved

The High Court has reserved judgement in this case. Should the defendants succeed with their exception, the plaintiffs may appeal against the decision and the case will proceed to the Supreme Court of Appeal. If the defendants are unsuccessful, the case will proceed to trial. Whatever the outcome, there may still be a long road ahead in the attempt to protect women's rights to reproductive autonomy.

The Women and Human Rights Project is a member of the
Reproductive Rights Alliance

DEVELOPING GENDER INFORMATION IN AFRICA

Gill Kerchhoff (consultant to the Women and Human Rights Documentation Centre) reports on a workshop recently held in Cape Town.

In April 1998, the Women and Human Rights Documentation Centre hosted a three day workshop for the Information and Communication Technology (ICT) technical group of the *Gender in Africa Information Network (GAIN)*.

The primary aim of this workshop was to follow up on a meeting held in March 1997 where GAIN and the ICT group were established, and to assess the progress of the technical group. To complement this discussion, other initiatives in the field of women, gender and information and communication technology were also examined.

Participants at the workshop included documentalists and information workers from South Africa, Kenya, Uganda and Ethiopia.

History of the GAIN Network

In order to provide some background to the workshop, Jenny Radloff (African Gender Institute, South Africa) and Ruth Ochieng (Isis-WICCE, Uganda) briefly set out the history of GAIN.

The strong emphasis placed on pan-african networking by the African Gender Institute led to its hosting a workshop in March 1997, where it was agreed that an African network on gender information (GAIN) should be established. Four technical subcommittees were created, which included the ICT committee. The goal of this subcommit-

tee was to establish effective channels of communication among GAIN members.

Workshop Discussion

While there was substantial evaluation of the work of the ICT group, with the identification of weaknesses and suggestions for improvements, the most exciting outcome of the

The second initiative will be a pilot project to digitise information on women and gender in Africa and make it more widely available online. Based on the collections of six to ten organisations, the information will be full text, and will provide contentious and marketable material that is strategically related to the contemporary needs of

The GAIN Network is a moderated list. Jenny Radloff, the moderator and facilitator, can be contacted at jradloff@agi.uct.ac.za.

The website for Women'sNet can be found at <http://womensnet.org.za>

workshop was the planning of practical projects which, depending on funding, will be developed in the next three years.

The first project is a website building and training workshop which is planned to take place in Addis Ababa, Ethiopia, towards the end of 1998. The aim is to build a website for the GAIN network and at the same time, to train women in website construction and other aspects of information and communication technology. Women'sNet, a South African network which recently successfully set up a comprehensive website dealing with information relevant to women and gender, will provide the training.

women. The vision is to make available a large full text, online database with indigenous information on women and gender within three years.

In addition, an e-mail workshop is planned for the Zimbabwe Book Fair in August this year. This workshop will train women in using e-mail as a tool for information dissemination and in facilitating and moderating listserves. The aim is also to shift the facilitation and moderation of the GAIN listserv from South Africa to another African site.

The workshop provided an exciting and productive opportunity for women from around Africa to meet and work together.

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THE NEXT FRONTIER: STRIKING DOWN THE PROHIBITIONS ON SAME-SEX SEXUAL CONDUCT

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It has been almost four and a half years since South Africa became the first country in the world to include a specific prohibition on discrimination based on sexual orientation in its constitution. It is thus surprising that so few challenges to legal provisions discriminating against gay men and lesbians have reached our courts.

The recently decided case of *The National Coalition for Gay and Lesbian Equality and Another v The Minister of Justice and Another* (Case no 97/023677, not yet reported) is therefore of particular interest. In this case, the Witwatersrand Local Division (WLD) of the High Court had the opportunity to decide on the constitutional validity of several legal provisions criminalizing sexual activities between men.

The judgement comes soon after the decision in the Cape High Court in *S v K* 1997 (9) BCLR 1283, in which the common law crime of sodomy was declared unconstitutional. However, it differs from the above judgment, not only because it is wider in scope, but also because the *National Coalition* case follows in the wake of the cluster of constitutional court judgements which significantly clarified equality jurisprudence under the new Constitution.

The court took as its point of departure that it was constitutionally bound to accept that "the expression of homosexuality is as normal as that of its heterosexual equivalent and is therefore entitled to equal tolerance and respect". Although the judgement contains some remarks which might suggest that the judge does not wholly share the tolerant view of homosexuality espoused by the Constitution, the court nevertheless found that all

the targeted common law and statutory provisions infringe upon the right to equality as guaranteed in the Constitution. In addition, the court did not find any justification for these infringements that would satisfy the requirements of the limitation clause in section 36 of the Constitution.

It was held that the common law offence of sodomy violated the right to equality in the Constitution.

In doing so, Heher J rejected arguments that public opinion and prejudice should play a role in deciding on either the contours of the right to equality or the possible justifications for its limitation.

It was thus held that it was self-evident that the common law offence of sodomy violated the right to equality in the constitution. The real issue here, the court contended, was whether such an infringement was not perhaps justifiable in terms of the limitation clause. Since there was no such justification, the common law prohibition on sodomy between consenting males was ruled inconsistent with the Constitution.

The court considered the same argument in relation to the common law offence of an 'unnatural sexual act'. Here the court made a distinction between 'unnatural sexual acts' between humans, and those between humans and animals. Given the state's responsibility to its citizens to prevent any individual or group from 'descending to the level of the

beast', the criminalization of bestiality as an unnatural sexual offence could be justified. The common law prohibition against 'unnatural sexual acts' was thus held to be unconstitutional only to the extent that it criminalizes acts by a man or between men which, if it had been committed by a woman or between women or between a man and a woman, would not constitute an offence.

The infamous section 20A of the Sexual Offences Act, which prohibits a male person from committing with another male person at a party any act 'which is calculated to stimulate sexual passion or to give sexual gratification', was also examined. The court held that the prohibition differentiated impermissibly between individuals on both the ground of sex (because it only applied to men) and on the ground of sexual orientation (as the targets of the provision 'are clearly men with homosexual tendencies'). Once again, no justification could be found.

Finally, the court held that the listing of sodomy as a scheduled offence in the Criminal Procedure Act (51 of 1977) and certain provisions of the Security Officers Act were indefensible since they hinged on the recognition of sodomy as a criminal offence.

The fact that two provisions of an act of Parliament were declared invalid by the High Court means that the case will now have to go to the Constitutional Court for confirmation of the invalidity of these provisions. This will present the Constitutional court with its first opportunity to express itself on the entrenched protection of sexual orientation.

S v K 1997 (9) BCLR 1283 (C) is discussed by Pierre de Vos in the March 1998 edition of this newsletter.

WOMEN'S HEALTH: REALITY OR A HOPELESS DREAM?

Karrisha Pillay (researcher at the Economic and Social Rights Project, Community Law Centre) examines the White Paper on Health.

Section 27(1)(a) of the Constitution provides for a right of access to health care services, including reproductive health. Section 27(2) obliges the state to take reasonable legislative and other measures (within its available resources) to achieve the progressive realization of this right.

The White Paper on Health, which represents the primary policy framework within which the right to health

Furthermore, the physiology of women results in certain diseases or conditions affecting women and men differently and in different risk factors for men and women. These biological differences between men and women demand particular consideration of women's needs in the formulation of health legislation and policy.

In addition, the male bias that has historically prevailed in access to health care services, both in South

lives and strategies of the White Paper failed to adequately address women's health. The primary criticism in this regard related to the White Paper's attempt to address women's health needs primarily through a single chapter that deals with maternal, child and women's health. In order to meaningfully reflect and address women's health needs, the submission argued that the issue be mainstreamed and consistently reflected throughout the White Paper.

Many of the chapters in the White Paper, such as those dealing with financial and physical resources, the development of human resources for health, national health research, health information, nutrition, HIV/AIDS and sexually transmitted diseases have implications for women's health which should accordingly be addressed within those chapters. In spite of certain random attempts to do this, the White Paper by no means reflects a comprehensive and meaningful recognition of women's health needs.

The biological differences between men and women demand particular consideration of women's needs in the formulation of health legislation and policy.

can be realized, was released in June 1997. In March of this year the Portfolio Committee on Health received submissions on this White Paper. The Economic and Social Rights Project at the Community Law Centre, together with the ANC Women's Caucus, presented a joint submission focusing primarily on the need for the White Paper to adequately reflect a women's health perspective. This article focuses on certain key areas of the submission.

Why the Need for Specific Attention to Women's Health?

Women are more vulnerable to health risks, for the following reasons:

- Lower levels of education leading to higher levels of illiteracy among women;
- The working environment that many women find themselves in;
- The low socio economic standing of women in society; and
- The exceedingly high levels of violence against women.

Africa and abroad, reiterate the need for specific attention to women's health. Comparative experiences have indicated that where specific strategies to address women's health needs and requirements are absent, actual access to such health care is often skewed along the lines of gender (even though a gender neutral definition of health care may exist). Two examples illustrating this point are the non recognition of violence against women (a significant cause of female morbidity and mortality in South Africa) as a public health issue and the limited availability of cervical screening programmes - even though cervical cancer is one of the leading causes of death amongst women of colour in South Africa.

The Approach Followed in the White Paper

The realities of women's health needs are implicitly recognized by the White Paper's emphasis on health care services reaching women. Whilst this recognition is supported in principle, the submission argued that the goals, objec-

How should Women's Health be Addressed in the White Paper

In reflecting a women's health perspective, the submission suggested that the Constitution as well as international human rights instruments inform the content of the White Paper. For example, even though South Africa has ratified the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW), which accords specific attention to women's health, the White Paper on Health fails to make any reference to the Convention.

Furthermore, in spite of the exceedingly high levels of violence against women in South Africa, the White Paper on Health gives very limited recognition to violence against

women as a public health issue. Domestic violence and rape are public health problems and a significant cause of female morbidity and mortality. The White

rights and focuses solely on their reproductive functions and roles. Whilst the Constitution provides for a right of access to reproductive health care ser-

vice, ability, ethnicity and sexual orientation;

- Being aware of how gender roles affect women's health needs and the variations encountered across different social strata;

- Addressing problems faced by women as providers of health within the formal health sector as well as informally in the home;

- Changing the tendency in health education to "blame the victim";

- Planning in consultation with women and respecting women's knowledge of the community's health needs;

- Primary health care including comprehensive reproductive health care throughout a woman's life span and not only during child bearing years;

- Addressing the impact and increased susceptibility of women to HIV/AIDS, sexually transmitted diseases, reproductive tract infections, cervical and breast cancer.

The White Paper on Health gives very limited recognition to violence against women as a public health issue.

Paper should accordingly acknowledge that violence against women leads to psychological trauma, depression, substance abuse, injuries, sexually transmitted diseases and HIV infection, suicide and murder. In addition, whilst access to medico legal services form part of the primary health care package, no attention is accorded to exactly what such services should entail. The absence of such defi-

initions, it also provides for access to health care services on the basis of equality between men and women. In defining reproductive health services, it is strongly recommended that the Department of Health adopt a comprehensive definition that adequately reflects the fact that reproductive health actually refers to the reproductive systems of women in their entirety as opposed to limiting the term to 'maternal health care'. It was suggested that the definition of reproductive health as provided for in international human rights instruments may be useful here.

Women's health is in many respects equated with reproductive health, an approach which fails to recognise the totality of women as human beings.

inition is likely to prove highly problematic and possibly render access to such services nugatory in many respects. For example, practice has indicated that whilst district surgeons are responsible for examining women who have been assaulted or raped, they are not obliged to provide any treatment as part of the medico legal service package.

Whilst Chapter 8 of the White Paper seeks to address maternal, child and women's health, women's health is in many respects equated with reproductive health. In so doing, the White Paper fails to recognize the totality of women as human beings and subjects of human

Proposals

In order to adequately address women's health, it was proposed that the White Paper on Health include specific strategies to reflect women's needs. In this regard, the fundamental importance of a gendered primary health care approach in the White Paper was stressed.

Addressing gender in primary health care means:

- Acknowledging and acting on the premise that the community is not an homogenous group but divided along the lines of gender, sex, class, race,

Conclusion

Whilst the White Paper's recognition of the need for health care services to reach women is laudable, it is critical that such recognition is concretized throughout the White Paper.

Although one is mindful of the resource constraints facing the health sector, it is vital that these limited resources are allocated in a manner that allows for the objectives, goals and strategies of the White Paper on Health to become a reality for women in South Africa.

Full copies of the submission on the White Paper on Health can be obtained from the Women and Human Rights Documentation Centre at a reasonable cost to cover photocopying and postage charges.

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This regular feature briefly describes some of the newest publications recently received in the documentation centre. We also suggest that for further information on new acquisitions, you look at the acquisitions list which is produced by the Centre on a quarterly basis.

Stolen Lives : Trading Women into Sex and Slavery

Sietske Altink

London : Scarlet Press; New York : Harrington Park, 1995
ISBN 1857270975

The author of this book interviews a number of women and girls who became caught in the trap of trafficking; forced to become prostitutes or domestic servants against their will and marooned in a strange place unable to escape. Many different countries are covered in this study and a closer look at both small-scale trade and large international crime networks are included. She concludes by looking at ways of preventing trafficking and includes contact details for organisations concerned with abolishing trafficking in women.

The Hidden Gender of Law

Regina Graycar and Jenny Morgan

Annandale, NSW, Australia : Federation Press, 1990
ISBN 1862870411

This extensive work comes from a strong background of legal feminist theory and is useful to those practising law as well as those studying law and contemporary feminist philosophy. Deliberately removing the traditional categories of law, the Australian authors examine in considerable detail the law's inadequate response to women; looking at women and money, women and relationships and injuries to women. The purpose of the book is to apply feminist theory to the specific cases where women encounter the legal system. In so doing they uncover the law's assumptions about women's lives and expose its entrenched partiality: its "hidden gender".

Equality in Law Between Men and Women in the

European Community : United Kingdom

Christopher McCrudden

Dordrecht : Martinus Nijhoff, 1994
ISBN 0792318420

The European Community regards equality in law between men and women as an integral part of its social policy. This publication is part of a series which analyses the legal framework for equal opportunities which exists in the Community, and the work of the European Court of Justice in this field. Directives for equal pay, equal treatment and social security have been adopted by the countries within the European Community. The Commission of the European Communities has appointed experts to draw up a series of reports on

member states and their developments with regard to the equality directives. This report on the United Kingdom is an excellent reference to legislation and jurisprudence pertaining to equality between men and women.

Women of the World : Laws and Policies Affecting Their

Reproductive Lives. Anglophone Africa

Viviana Waisman

New York : Centre for Reproductive Law and Policy, 1997
ISBN 18900671010

This report on Anglophone Africa is the first in a series of collaborative reports describing and analysing the content of laws and policies affecting women's reproductive lives around the world. Government agencies and non-governmental organisations have cooperated in producing a valuable study. The series aims to improve awareness of the vast range of formal laws and policies that affect women's reproductive lives and to identify trends, both within regions and globally.

Summary Report on the Seminar on the

Empowerment of Women : Violence Against Women.

Banjul, The Gambia, 5-9 May 1997

Kairaba Avenue, The Gambia : African Centre for Democracy and Human Rights Studies, [1997]

This report of a seminar in the Gambia attended by 23 participants from a number of African countries on the empowerment of women looks specifically at violence against women. Presentations included studies of domestic violence, including forced marriage and wife battery; social and economic violence; sexual violence, including rape and female genital mutilation; and lastly looks at tools and measures which promote women's rights and legal strategies to deal with violence against women.

Promoting Women's Human and Legal Rights in

Zimbabwe : WAG's contribution and experiences :

1990-1996

Harare : Women's Action Group

This document summarises the activities of the Women's Action Group (WAG) in Zimbabwe from 1990-1996. It outlines the organisation and its programmes including legal literacy workshops, radio programmes, legal advice and counselling and networking and also looks at its future vision in the light of the challenges and problems faced. The report aims firstly to show how WAG contributes to women's human rights in Zimbabwe and, secondly, to provide a tool for further networking with other organisations.