

**SOUTH AFRICA'S LEGAL FRAMEWORK
TO ERADICATE PERIOD POVERTY**

by

605505

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ABSTRACT

A teenage girl attempting to complete high school in a low-income setting in South Africa is likely impeded by period poverty. Period poverty is the circumstance of women and girls¹ being unable to manage their periods due to their socio-economic conditions. It compromises a plethora of human rights, such as the rights to education and equality. The South African state is legally obliged to ensure, at the very least, that these rights are not compromised. This paper equips the reader with an understanding of South Africa's legal framework to address period poverty. It tells the story of the state's measures to address period poverty; identifies their pertinent shortfalls and proposes amendments to the framework. Activists campaigning for the eradication of period poverty are encouraged to advocate for these amendments.

¹ This includes all people who menstruate, including transgender, non-binary and other LGBTQIA+ individuals

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SOUTH AFRICA'S LEGAL FRAMEWORK TO ERADICATE PERIOD POVERTY

I. INTRODUCTION

A teenage girl attempting to complete high school in a low-income setting in South Africa is likely impeded by period poverty. Period poverty is the circumstance of women and girls² being unable to manage their periods effectively and sustainably due to their socio-economic conditions. This paper equips the reader with an understanding of South Africa's legal framework to address period poverty, being the legal instruments (legislation, regulation or policies) designed and in force for the sole purpose of addressing period poverty, although which draw on wider constitutional provisions and legislation. The legal framework comprises only one instrument to date: the Sanitary Dignity Policy Framework³ ("SDPF"). The bottom line is that this legal framework with only one constituent instrument, which is itself problematic, is deficient. Possible solutions to improve the legal framework and a recommended route to achieve these are canvassed below.

The paper is divided into the following sections: section II describes period poverty in South Africa. Section III considers its implications for two human rights guaranteed by the Constitution of the Republic of South Africa, 1996 ("Constitution"): the rights to education and equality. Period poverty compromises these rights, yet the state has clear obligations to ensure, at the very least, that they are not compromised. Section IV tells the story of the state's steps to address period poverty to date: (i) promulgating the SDPF and allocating National Budget towards it, and (ii) VAT zero-rating certain period products. Despite the introduction of these measures, period poverty remains widespread. To understand why, section V delineates key provisions of the SDPF, and section VI identifies its pertinent shortfalls, paving the way for a discussion about solutions. Section VII proposes a solution, the amendment of the SDPF and ultimately an improved legal framework, and recommends taking a collaborative approach to achieve this solution given the state's apparent political will to address period poverty.

² This includes all people who menstruate, including transgender, non-binary and other LGBTQIA+ individuals

³ Department of Women, Youth and Persons with Disabilities ("DWYPD") *Sanitary Dignity Framework* (June 2019) (also referred to as the 'Sanitary Dignity Policy Framework' and the 'Sanitary Dignity Implementation Framework')

II. WHAT IS PERIOD POVERTY?

Period poverty is the circumstance of being unable to manage one's period due to their socio-economic conditions. Rossouw and Ross's economics report on period poverty in eight low- and middle-income countries shows that period poverty is a multidimensional problem. It explains that period poverty comprises any one or more of the following four conditions: condition 1, being unable to afford or access period products of one's choice and of sufficient quality and quantity; condition 2, lacking adequate facilities (private, clean, safe, lockable, with soap and running water) for period management; condition 3, lacking menstrual health education, being a general education about what menstruation is, how it works and how to manage it; and condition 4, lacking medical care to identify and treat menstrual disorders.⁴ Below, I discuss the prevalence of conditions 1-3 in South Africa and then consider the rights implicated by period poverty.

While empirical and statistical evidence of period poverty in South Africa is scant,⁵ non-empirical evidence (including the lived experiences of poor women and girls,⁶ civil society campaigns,⁷ and government's position⁸) logically leads to the conclusion that period poverty is a critical socio-economic challenge in South Africa.

Condition 1 of period poverty, being unable to afford or access to period products, seems to be at centre stage in the mainstream understanding of period poverty in South Africa: South African women in low-income settings are unable or struggle to access or afford period products. Scorgie et al collected data on period management in three low-income settings in Durban. Their research confirmed that women in these settings struggled to afford period products, resorting instead to using

⁴ Laura Rossouw & Hana Ross 'Understanding Period Poverty: Socio-Economic Inequalities in Menstrual Hygiene Management in eight Low-and Middle-Income Countries' (2021) 18 *International Journal of Environmental Research and Public Health* 1-2

⁵ Tamryn L Crankshaw, Michael Strauss & Bongwiwe Gumede 'Menstrual health management and schooling experience amongst female learners in Gauteng, South Africa: a mixed method study' (2020) 15 *Reprod Health* 1

⁶ Fiona Scorgie, Jennifer Foster, Jonathan Stadler, Thokozile Phiri, Laura Hoppenjans, Helen Rees & Nancy Muller "'Bitten By Shyness": Menstrual Hygiene Management, Sanitation, and the Quest for Privacy in South Africa' (2015) 2 *Medical Anthropology*

⁷ Pontsho Pilane 'Mboweni zero rates and allocates funds for free sanitary pads' *Health-E News* 25 October 2018, available at <https://health-e.org.za/2018/10/25/mboweni-zero-rates-and-allocates-funds-for-free-sanitary-pads/>, accessed on 12 January 2022

⁸ SDPF at para 1.3

‘cloth from old clothes or towels, toilet paper, or tissue’ to manage their periods.⁹ Period products are not cheap in South Africa; they are ‘prohibitively unaffordable’.¹⁰ The reality for women in low-income groups, who are predominantly black,¹¹ is that ‘a walk down the feminine hygiene aisle of any supermarket will reveal that [period] products are not affordable’¹² and a choice will likely need to be made between purchasing food and period products.¹³ The estimated figures of girls between the ages of 12 and 19 in South Africa that are unable to access period products regularly range in the millions.¹⁴

Importantly, the government accepts the existence of condition 1 in South Africa. The SDPF plainly notes that ‘menstruation...is expensive for ordinary women’;¹⁵ period products are ‘a financial burden for all indigent females’¹⁶ and they are accordingly inaccessible.¹⁷ It acknowledges that South African girls who are unable to access period products ‘have to resort to using old clothes, rags, newspapers, leaves, bark and grass’.¹⁸ Flowing from the government’s acceptance of the prevalence of condition 1 in South Africa is its admission there is a need for the provision of period products.¹⁹

Crankshaw et al conducted a study in 2018 on (i) the degree of access to period products amongst high school girls in Sedibeng district, Gauteng and (ii) the range of challenges they experience in managing their periods at school. While their study supported the fact that high school girls do not

⁹ Scorgie et al op cit note 5 at 15

¹⁰ Bongani Majola ‘The cycle of the menstrual burden’ *South African Human Rights Commission* 5 March 2019, available at <https://www.sahrc.org.za/index.php/sahrc-media/opinion-pieces/item/1789-the-cycle-of-the-menstrual-burden>, accessed on 4 July 2022

¹¹ Amandla.mobi ‘Stop taxing my period’ May 2018, available at <https://awethu.amandla.mobi/petitions/don-t-tax-my-periods>, accessed on 12 January 2022

¹² Pontsho Pilane ‘Why treasury won’t support a fall in the tampon tax’ *Bhekisisa* 5 December 2016, available at <https://bhekisisa.org/article/2016-12-05-00-pontshogooestoparliament-four-things-i-learned/>, accessed on 12 January 2022

¹³ Pontsho Pilane ‘#FreeToBleed: Here’s why Mboweni’s announcement of free & tax-free pads matters’ *Bhekisisa* 3 March 2017, available at <https://bhekisisa.org/article/2017-03-03-00-freetobleed-the-struggle-of-being-too-poor-to-afford-pads/>, accessed on 12 January 2022; Sana Mamtaney ‘Period Poverty in South Africa’ *The Borgen Project* 30 June 2021, available at <https://borgenproject.org/period-poverty-in-south-africa/>, accessed on 4 July 2022

¹⁴ Laura Rossouw & Hana Ross ‘An Economic Assessment of Menstrual Hygiene Product Tax Cuts’ (2020) 4:137 *Gates Open Research* pg 62; Mamtaney op cit note 12; SDPF at para 6.2.1

¹⁵ SDPF at para 1.3

¹⁶ Ibid para 3.1.5

¹⁷ Ibid para 3.1.3, 3.1.4 and 4.1

¹⁸ Ibid para 6.2.1

¹⁹ Ibid para 6.1.2

have sufficient period products over a given period, it revealed that this was far from the only period-related challenge faced by high school girls.²⁰

Condition 2 of period poverty, the lack of adequate sanitation facilities, is undoubtedly also an issue in South Africa. Scorgie et al's research demonstrated that sanitation systems in low-income settings simply fail to meet the needs of women to manage their periods: they do not have adequate water supply or disposal facilities; they are not lockable and lack privacy; they are generally unhygienic and dirty; and they are not safe (particularly outdoor systems at night).²¹ The appalling state of public school sanitation is broadly evidenced by the litigation around pit toilets in Limpopo.²² Crankshaw, et al's research also confirms consistently poor conditions of bathrooms in high schools: 'school facilities had leaking toilets or basins, some had muddy water over the floor; in addition there were used sanitary pads, tissues, chip packets and sweet wrappers on the floor. The toilets themselves were reported to have a strong urine smell.'²³

The government accepts the prevalence of condition 2 in South Africa, acknowledging in the SDPF that 'poor women and girls [are] lacking... available, safe and hygienic water supply; private safe and hygienic sex-segregated sanitation; hygienic hand washing facilities and soap (hygiene) etc'.²⁴ It accepts that there is a glaring need for 'safe, hygiene and private spaces'; 'a clean and reliable supply of water...; toilets where they change their menstrual products should be clean, private and safe; they should have access to...toilet paper, and... to hygienically dispose of the used products'.²⁵

Condition 3 of period poverty, the lack of menstrual health education, is a significant part of the problem in South Africa.²⁶ Scorgie et al's research demonstrates the lack of education about periods in low income settings in South Africa.²⁷ Crankshaw et al's focused research showed that while high school girls generally have an understanding (i) of needing to attend to their personal hygiene during

²⁰ Crankshaw et al op cit note 4 at 1

²¹ Scorgie et al op cit note 5 at 19

²² Section 27 'High Court declares sanitation in schools a "national emergency"' 20 September 2021, available at <https://section27.org.za/2021/09/high-court-declares-sanitation-in-schools-a-national-emergency>, accessed on 4 July 2022

²³ Crankshaw et al op cit note 4 at 9-10

²⁴ SDPF at para 4.1

²⁵ Ibid para 6.1.2

²⁶ Scorgie et al op cit note 5 at 12-14

²⁷ Ibid at 14, 16, 17

their periods and (ii) that they could now fall pregnant, ‘very few could correctly explain or understood the menstruation process, with patchy and often incorrect knowledge being offered’.²⁸

The government, in the SDPF, acknowledges that menstrual health education is deficient in South Africa.²⁹ The SDPF is explicit that in rural areas and traditional communities in South Africa, the thinking around periods is characterised by stigma, ‘numerous myths and unsubstantiated taboos’, including the common beliefs that that menstruating women are not clean and periods should be hidden.³⁰ This thinking evidences the lack of menstrual education.³¹ The government accepts the need for ‘menstrual information and knowledge’³² and that such education ‘must be extended to include educators, men and boys, families, communities and community leaders and civil society in general.’³³

III. RIGHTS IMPLICATIONS

Given that period poverty is a multi-dimensional social problem, it potentially implicates a plethora of human rights: human dignity, equality, bodily integrity (including sexual and reproductive rights), health care (comprising reproductive health care), sufficient water, adequate housing, basic education, and children’s rights. This section considers the impact of period poverty on only two rights: the right to basic education and the right to equality.

Notably, the South African government not only accepts the prevalence of period poverty in the SDPF, it understands period poverty to be a human rights violation and boldly insists on its obligations to address period poverty as prescribed by, inter alia, the Constitution, national legislation and international human rights law.³⁴

²⁸ Crankshaw et al op cit note 4 at 10

²⁹ SDPF at para 6.4.5 and 6.3.4

³⁰ Ibid para 6.4.3

³¹ Ibid para 3.1.6

³² Ibid para 6.1.2

³³ Ibid para 6.4.3

³⁴ Ibid para 5

(a) *Right to education*

The right to education is an unqualified and immediately realisable socio-economic right guaranteed by section 29 of the Bill of Rights³⁵, which provides that, inter alia, ‘everyone has the right to a basic education, including basic adult education’.³⁶ A ‘spate of public interest litigation’ has incrementally and cumulatively expanded the list of requisite ingredients that now comprise a ‘basic education’.³⁷ The case law requires the state to provide all of the ingredients for a basic education in order to fulfil the right to basic education as a whole. The *Centre for Child Law v Minister of Basic Education*³⁸ and *Linkside v Minister of Basic Education*³⁹ judgements developed the right to basic education to comprise the appointment of teachers⁴⁰ and non-teaching staff⁴¹ and at public schools. *Madzodzo v Minister of Basic Education*⁴² added the ingredient that school furniture is required to be provided⁴³; *Minister of Basic Education v Basic Education for All*⁴⁴ and *Section 27 v Minister of Education*⁴⁵ added textbooks⁴⁶; *Tripartite Steering Committee v Minister of Basic Education*⁴⁷ added transport for school students⁴⁸; and *Equal Education v Minister of Basic Education*⁴⁹ added basic nutrition⁵⁰. Settled litigation proceedings also added adequate classrooms and school buildings as ingredients.⁵¹ As such, in order to satisfactorily fulfil the right to basic education, the state is required to appoint teachers and non-teaching staff and to provide school furniture, textbooks, transport, adequate classrooms and school buildings, and basic nutrition.

³⁵ Jason Brickhill & Yana van Leeve ‘From the classroom to the courtroom: litigating education rights in South Africa’ in Sandra Fredman, Meghan Campbell & Helen Taylor (eds) *Human rights and equality in education* (2018) 144

³⁶ Constitution Section 29(1)(a)

³⁷ Brickhill & van Leeve op cit note 34 at 157

³⁸ *Centre for Child Law v Minister of Basic Education* 2013 (3) SA 183 (ECG)

³⁹ *Linkside and Others v Minister of Basic Education and Others* [2015] ZAECGHC 36

⁴⁰ Supra note 37 at 1 and 35; supra note 38 para 24-6

⁴¹ Supra note 37 at 21 and 32-4

⁴² *Madzodzo and Others v Minister of Basic Education and Others* 2014 (3) SA 441 (ECM)

⁴³ Ibid para 20-1

⁴⁴ *Minister of Basic Education v Basic Education for All* 2016 (4) SA 63 (SCA)

⁴⁵ *Section 27 and Others v Minister of Education and Another* 2013 (2) SA 40 (GNP)

⁴⁶ Supra note 43 at 42; Ibid para 25

⁴⁷ *Tripartite Steering Committee v Minister of Basic Education* 2015 (5) SA 107 (ECG)

⁴⁸ Ibid para 66

⁴⁹ *Equal Education and Others v Minister of Basic Education and Others* 2021 (1) SA 198 (GP)

⁵⁰ Ibid para 42

⁵¹ Brickhill & van Leeve op cit note 36 at 160

To determine whether the given ingredient should be added to constitute basic education, the courts in the above cases considered the ‘impact of the absence’ of the ingredient: ‘what is the impact of the absence of these inputs on a learner and on the learning process?’.⁵² Given that the absence of any of the abovementioned ingredients, which are all inter-linked,⁵³ has a severe impact on the learner and learning process, it follows that the courts determined that they are essential ingredients for the fulfilment of the right to basic education. It is certainly conceivable that the list of ingredients could be further expanded to include additional ingredients without which learners and the learning process are severely impacted.

The relevant question in this paper is whether the list of ingredients ought to include (i) period products, (ii) sanitation facilities equipped for period management, and (iii) menstrual education. If the absence of ingredients has an adverse impact on the learner and the learning process, it can be argued that they are essential ingredients for the fulfilment of a right to basic education. Further, if they are essential ingredients of basic education, the state’s failure to provide them constitutes a violation of the right to basic education.

Period poverty has a severe, adverse impact on a female learner’s learning process and, therefore, right to education. The amalgamation of conditions 1 to 3 of period poverty results in girls either remaining absent from or participating less in school.⁵⁴

Condition 1, the inability to afford or access to period products, directly results in girls skipping or not participating in school.⁵⁵ The only options available to a girl on her period without period products are: staying at home or proceeding to attend school using makeshift items, assuming the risk of leakage.⁵⁶ Accounts of girls missing school because of their periods are common: schools pick up that girls lose around 3 days of school per month and teachers try prevent this by buying period products for their students.⁵⁷ The alternative, attending school using a makeshift product and fearing leakage the whole time, comes with the inability to concentrate and participate at school. The

⁵² Ibid

⁵³ Ibid

⁵⁴ Crankshaw et al op cit note 4 at 10, Rossouw & Ross op cit note 3 at 2; Scorgie et al op cit note 5 at 4

⁵⁵ Rossouw & Ross 2021 op cit note 3 at 2; Scorgie et al op cit note 5 at 4; Mamtaney op cit note 12

⁵⁶ Crankshaw et al op cit note 4 at 2

⁵⁷ Pilane op cit note 12

government, in the SDPF, accepts that condition 1 of period poverty results in both school absenteeism⁵⁸ or compromised concentration and participation despite attendance.⁵⁹

Condition 2, the lack of adequate sanitation facilities at schools, makes attending or participating in school very challenging for female learners on their periods. Crankshaw et al's research shows that 'poor conditions of water and sanitation facilities, lack of privacy and discreet waste disposal options, and outdoor sanitation facilities that are perceived as unsafe'⁶⁰ impede female learners' ability to manage their periods at school and, as such, result in school absenteeism. The government, in the SDPF, accepts that condition 2 results in girls missing school.⁶¹

Condition 3, deficient menstrual health education in South African schools, and the resultant myths and taboos spewing therefrom, have the consequence of female learners dealing with suffocating shame and social humiliation around their periods. Crankshaw et al's research confirms that female learners skip or participate less in school due to the shame associated with their periods.⁶²

The state's provision of the combination of free period products, adequate sanitation facilities and menstrual health education would likely ensure increased female learners' school attendance and participation and thereby fulfill their right to education.

(b) Right to equality

Section 9 of the Bill of Rights guarantees the right to equality. Section 9 provides that, inter alia, the state is prohibited from unfairly discriminating against anyone based on certain listed grounds, including gender.⁶³ It also entitles the state to 'take legislative and other measures' to address unfair discrimination and thereby 'promote the achievement of equality'.⁶⁴

⁵⁸ SDPF paras 3.1.4 and 6.2.2

⁵⁹ Ibid para 6.4.1

⁶⁰ Crankshaw et al op cit note 4 at 3

⁶¹ SDPF para 6.2.2

⁶² Crankshaw et al op cit note 4 at 2

⁶³ Constitution Section 9(3)

⁶⁴ Ibid Section 9(2)

The Promotion of Equality and Unfair Discrimination Act⁶⁵ (“PEPUDA”) is the legislation enacted to protect the right to equality by prohibiting unfair discrimination by the state or individuals. Where conduct, including a policy or decision, potentially violates the right to equality, it is PEPUDA, as opposed to section 9 of the Constitution, that governs the potential violation.⁶⁶

PEPUDA defines ‘discrimination’ as *‘any act or omission... which directly or indirectly (a) imposes burdens, obligations or disadvantages on; or (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds’*.⁶⁷ Any discrimination on the basis of a ground listed in is PEPUDA’s definition of ‘prohibited grounds’⁶⁸ is presumed to be unfair and the onus falls on the respondent to prove its fairness.⁶⁹ Gender is one such listed prohibited ground and, as such, any discrimination based on gender is presumed to be unfair. Section 8 of PEPUDA then further prohibits unfair discrimination on the ground of gender specifically and lists instances of such prohibited unfair discrimination.⁷⁰

Given the multi-dimensional nature of period poverty and the extensive scope and jurisprudence on unfair discrimination, there could be a few ways in which period poverty constitutes unfair discrimination. This section considers four ways that the state’s failure to address period poverty, being the conduct in question, unfairly discriminates against women and girls, and impacts the right to equality.

First, the unaffordability of period products places an unavoidable and disadvantageous financial burden on women that is not faced by men, as acknowledged by the state in the SDPF.⁷¹ The state’s failure to address the unaffordability of period products imposes an unfair burden on women based on their gender in breach of PEPUDA.

⁶⁵ Promotion of Equality and Unfair Discrimination Act 4 of 2000 (“PEPUDA”)

⁶⁶ Pierre De Vos & Warren Freedman (eds) *South African Constitutional Law in Context* 2 ed (2014) 452

⁶⁷ PEPUDA section 1

⁶⁸ Ibid

⁶⁹ Pierre De Vos op cit note 65 at 450 and 453; PEPUDA section 14

⁷⁰ PEPUDA Section 8

⁷¹ SDPF at para 3.1.5

Secondly, the lack of adequate sanitation facilities at schools disproportionately impacts girl learners. While boy learners are certainly adversely impacted by inadequate facilities at schools, girl learners require these facilities for a further reason that boys do not – managing their periods. As such, without adequate facilities, girls suffer far more than boys do. The state’s failure to provide adequate facilities disadvantages girls based on their gender, also in breach of PEPUDA.

Thirdly, insufficient menstrual health education, and the resultant myths and stigmas around periods, result in social exclusion of and unfavourable treatment towards females, and not males.⁷² The state admits this, explaining in the SDPF that ‘taboos and myths related to menstruation may portray women and girls as inferior to men and boys and may result in social exclusion of girls and women during menstruation’.⁷³ It goes on to detail the ‘range of restrictions being placed on girls and women during their menstrual period’⁷⁴: ‘with women and girls being excluded from cooking, washing clothes and participating in ceremonial or social activities within and outside the family’.⁷⁵ The state’s failure to provide menstrual health education results in practices which impairs the dignity of women and unfairly discriminates against women, a further breach of PEPUDA.

Fourthly, because period poverty compromises a girl’s right to education, it also compromises her right to equality, particularly her guaranteed equal enjoyment of rights.⁷⁶ There is a strong link between the rights to basic education and equality: an unmet right to education leads to an unmet right to equality. The right to education is considered an ‘empowerment right’ given that it ‘is necessary for each individual to develop their abilities and access social and economic opportunities’.⁷⁷ One of the purposes of the right to education is to create equality: to diminish the distinction between those with and without access to education and, thereby, to close the socio-economic gap perpetuated by this distinction. It follows that compromising someone’s education implicates their right to equality, particularly if such compromise is based on one of the listed grounds of unfair discrimination, such as gender. By jeopardizing girls’ education, period poverty limits their

⁷² Rossouw & Ross op cit note 3 at 2; Scorgie et al op cit note 5 at 4

⁷³ SDPF at para 3.1.6

⁷⁴ Ibid para 6.3.4

⁷⁵ Ibid para 3.1.6

⁷⁶ Constitution Section 9(2)

⁷⁷ Brickhill & van Leeve op cit note 36 at 144

‘chance to...lift themselves and their communities out of poverty’.⁷⁸ It denies girls access to opportunities and economic autonomy, thereby perpetuating gendered socio-economic inequality in South Africa. The state unequivocally shares this position in the SDPF:⁷⁹

The state’s failure to address period poverty compromises girls’ education rights, thereby, contravening PEPUDA by withholding benefits, opportunities or advantages from girls based on their gender; unfairly limiting access of girls to resources and education; and denying girls access to opportunities.

IV. ADDRESSING PERIOD POVERTY IN SOUTH AFRICA

The state accepts the prevalence of period poverty and its human rights obligations to address this. This section provides the background story of the state’s apparent political will to eradicate period poverty in South Africa. Providing this background sets the stage for a meaningful discussion on the possible ways to enhance the legal framework to address period poverty. The state has taken the following measures: (i) the development and implementation of the SDPF, which receives a National Budget allocation and (ii) the removal VAT on certain period products.⁸⁰

(c) The 2010 Sanitary Dignity campaign and patchy distribution programmes

In 2010, the DWYPD launched the ‘Sanitary Dignity campaign’ through which it sought to ‘mobilise resources’ for the distribution of period products to indigent female learners.⁸¹ In the 2011 State of the Nation Address, President Zuma alluded to the Sanitary Dignity campaign and did so within the context of reproductive health rights: committing to ‘broaden the scope of reproductive health rights

⁷⁸ Mamtaney op cit note 12

⁷⁹ SDPF at para 6.4.1

⁸⁰ UNFPA ‘Moving the needle forward for menstrual health requires multi-sectoral partnerships’ *The Mail & Guardian* 28 May 2021, available at <https://mg.co.za/special-reports/2021-05-28-unfpa/>, accessed on 12 January 2022; Livemag ‘#FreeToBleed: Are we any closer to free sanitary pads for all?’ 13 July 2017, available at <https://livemag.co.za/freetobleed-are-we-any-closer-to-free-sanitary-pads-for-all/>, accessed on 12 January 2022

⁸¹ Department of Women, Children and People with Disabilities ‘Minister’s Budget Speech’ *PMG* 6 June 2011, available at <https://pmg.org.za/briefing/18919/> accessed on 12 January 2022

and provide services related to ... sanitary towels for the indigent'.⁸² There was, however, no formal national policy and no financial mandate from National Treasury for the purpose of distributing period products.⁸³

The Sanitary Dignity campaign added an elective task to the 'to do' lists of provincial governments. Each province could elect to distribute period products and, if they did so, decide which of their departments would take on the task, how it would be executed and how much of the provincial department's budget would be allocated to it. As described later in the Draft Sanitary Dignity Policy Framework⁸⁴ ("Draft SDPF"), the distribution of period products was non-uniform across provinces, with the provinces choosing different departments, different beneficiaries, and different strategies to do so, and at varying scales and with varying consistency.⁸⁵

Distribution programmes were managed by the provincial Departments of Education in KwaZulu-Natal,⁸⁶ Mpumalanga and the Free State,⁸⁷ the provincial Department of Social Development in Gauteng,⁸⁸ and the Offices of the Premiers in the Eastern Cape and Limpopo⁸⁹. The Northern Cape and North West provinces incorporated their distribution programmes into other existing programmes for indigent learners.⁹⁰ Some provinces allocated budgets to their distribution programmes, and other provinces partnered with NGOs, corporates, banks and international period product companies to fund or donate to distribution programmes.⁹¹ KwaZulu-Natal had the largest distribution programme of all the provinces⁹² and the Western Cape had no distribution programme.⁹³

⁸² President Zuma 'State of the Nation Address' *South African History Online* (10 February 2011), available at <https://www.sahistory.org.za/archive/2011-president-zuma-state-nation-address-10-february-2011>, accessed on 12 January 2022

⁸³ UNFPA op cit note 79

⁸⁴ Department of Women *Draft Sanitary Dignity Policy Framework* (June 2017)

⁸⁵ Pilane op cit note 12; Pontsho Pilane '#FreeToBleed: Zero-rating and free pads to start in South Africa' *Health-E News* 1 April 2019, available at <https://health-e.org.za/2019/04/01/freetobleed-zero-rating-and-free-pads-to-start-in-south-africa/>, accessed 12 January 2022

⁸⁶ Pilane op cit note 12

⁸⁷ Draft SDPF at para 8.4.1 (b) and (f)

⁸⁸ Ibid para 8.4.1(c)

⁸⁹ Ibid para 8.4.1(a) and (e)

⁹⁰ Ibid para 8.4.1(g) and (h)

⁹¹ Ibid para 8.4.1; Minister in the Presidency for Women, Youth and Persons with Disabilities 'Questions & Replies: Women, Youth, Children and People with Disabilities' *PMG* 31 December 2011, available at https://pmg.org.za/question_reply/292/ accessed on 12 January 2022

⁹² 3 March 2017 Pontsho Pilane; 1 April 2019 Pontsho Pilane

⁹³ Draft SDPF para 8.4.1(i)

The DWYPD later described the provision of period products during this time, in the absence of a ‘national law, policy or framework’, as ‘inconsistent, uncoordinated and would seem to depend on provincial priorities’⁹⁴ and ‘not properly regulated and managed’⁹⁵. The DWYPD noted five issues with the way period products were being distributed. First, there were ‘no national norms and standards for the sanitary products or for the implementation of sanitary dignity programmes’.⁹⁶ Second, while some of the provinces managed to execute the distribution of free period products, ‘this is not necessarily done in terms of approved policies’ and ‘these initiatives are not properly funded and coordinated’.⁹⁷ Third, the approach was too narrow in that it focused only on the provision of period products (addressing condition 1 of period poverty), ‘rather than a comprehensive package of education and water supply, sanitation and hygiene (“WASH”)’ (addressing the other conditions of period poverty).⁹⁸ Fourth, ‘the target beneficiaries differ from province to province’ and ‘there is no clarity on who the beneficiaries should be and thus no consistency in this regard’.⁹⁹ Fifth, there was ‘insufficient monitoring and evaluation of the impact and effectiveness of the project in provinces’.¹⁰⁰

(d) *#FreeToBleed and the 2017 Draft SDPF*

The haphazard and largely unsuccessful implementation of distribution programmes, a resounding non-fulfilment of the government’s promises to deliver free period products, motivated the ‘#FreeToBleed’ campaign. #FreeToBleed started in 2015 with Pontsho Pilane’s submission of a policy proposal for the Department of Health’s provision of free period products to Livity Africa’s youth competition¹⁰¹ calling for parliamentary submissions, which she then won. #FreeToBleed’s focus was advocating for the distribution of free period products at public education and health

⁹⁴ SDPF at para 4.3

⁹⁵ Ibid para 4.4

⁹⁶ Ibid para 4.4.a

⁹⁷ Ibid para 4.4.b

⁹⁸ Ibid para 4.4.c

⁹⁹ Ibid para 4.4.d

¹⁰⁰ Ibid para 4.4.e

¹⁰¹ Livity’s Africa Project Demo was a competition held in 2015 to encourage youth participation in governance. It called on young people to make Parliamentary submissions on issues they wanted addressed. The winner of the competition would be afforded an opportunity to present their submissions to Parliament.

institutions through a coordinating national policy. It also advocated for the removal of the 14% VAT on period products.¹⁰²

On 23 November 2016, Pilane presented her proposal to Parliament. The Department of Health indicated that the distribution of free period products was not within its mandate. Fortunately, the day before Pilane's presentation, and perhaps in light thereof, the DWYPD announced that (i) it was drafting a policy for the distribution of free period products, (ii) it planned to undertake a consultative drafting process by engaging with other government departments, NGOs and the private sector regarding the implementation of the policy, and (iii) the policy was set to be finalised in 2017.¹⁰³

The DWYPD followed through and, in 2017, released the Draft SDPF, a first draft of the current SDPF, which (i) sets out norms and standards to guide the varying provincial efforts to address period poverty (primarily the distribution of free period products)¹⁰⁴ and (ii) contemplates funding of the steps in the SDPF by government through the allocation of national budget.¹⁰⁵ During mid July 2017, the DWYPD held a stakeholder meeting with civil society (Pilane attended¹⁰⁶) and other government departments to present and deliberate the draft SDPF. In October 2017, the draft SDPF was presented to Cabinet and then opened for public comment.¹⁰⁷ Cabinet then selected three provinces, Mpumalanga, Eastern Cape and KwaZulu Natal, to pilot implementation in 2018 ultimately to assess budgeting for national implementation.¹⁰⁸

¹⁰² Pontsho Pilane 'Free pads versus free condoms: Why we can't afford this debate' *Bhekisisa* 18 October 2016, available at <https://bhekisisa.org/article/2016-10-18-00-we-shouldnt-have-to-choose-between-free-condoms-and-free-sanitary-pads/>, accessed on 12 January 2022; Pilane op cit note 11; Livemag op cit note 79

¹⁰³ Pilane op cit note 11

¹⁰⁴ Crankshaw et al op cit note 4 at 3

¹⁰⁵ Draft SDPF para 12

¹⁰⁶ Livemag op cit note 79

¹⁰⁷ Sheilan Clarke '#FreeToBleed: The sanitary policy is on its way' *Livemag* 18 July 2017, available at <https://livemag.co.za/freetobleed-the-sanitary-policy-is-on-its-way/>, accessed on 12 January 2022

¹⁰⁸ Pilane op cit note 6; Crankshaw et al op cit note 4 at 3

(e) 2018 VAT increase

A separate event in 2018 sparked movement in addressing period poverty in South Africa: the VAT increase from 14% to 15% on 1 April 2018.¹⁰⁹ The increase was met with ‘widespread opposition from civil society, trade unions, researchers and the public’ raising concerns about the disproportionate impact on the poor and thereby perpetuating socio-economic inequality in South Africa.¹¹⁰ In response, in May 2018, the Minister of Finance commissioned an independent panel of experts (“the Panel”) to review the list of items to be VAT zero-rated, i.e. have no VAT applicable to their prices.¹¹¹ In undertaking its review, the Panel ran a consultative process, requesting both written and oral submissions and holding engagements with various groups to obtain suggestions and feedback on items to be VAT zero-rated.¹¹²

Amandla.mobi, the civil society organization which lead the campaign against the VAT increase on period products,¹¹³ delivered 1,397 submissions to the Panel; and the Panel reported that period products were ‘undoubtedly the most suggested’ of the items to be VAT zero-rated. To further consider the VAT zero-rating of period products, the Panel held an in-person engagement with the Budget Justice Coalition (comprising Amandla.mobi, Section27, the Alternative Information and Development Centre, the Studies in Poverty and Inequality Institute, Pietermaritzburg Agency for Community Social Action, the Institute for Economic Justice and the Teddy Bear Clinic).¹¹⁴ Amandla.mobi’s demand to VAT-zero rate period products stressed ‘the lived experience of low-income Black women’.¹¹⁵

¹⁰⁹ Liezl Laughton ‘South African Value-Added Tax now at 15%’ *RSM* 2 March 2018, available at <https://www.rsm.global/southafrica/news/south-african-value-added-tax-now-15>, accessed on 12 January 2022

¹¹⁰ Lindokuhle Njozela ‘Mitigating the impact of the VAT increase: can zero-rating help?’ 2018 *Institute for Economic Justice*

¹¹¹ Ministry of Finance ‘Terms of Reference for the Independent Panel of Experts for the Review of Current List of VAT Zero Rated Food Items’ 28 May 2018 at 2

¹¹² Independent Panel of Experts for the Review of Zero Rating in South Africa ‘Recommendations on Zero Ratings in the Value-Added Tax System’ 6 August 2018 at 11 and 75

¹¹³ Amandla.mobi ‘How we helped axe the tax on sanitary pads’ available at <https://amandla.mobi/our-work/how-we-helped-axe-the-tax-on-sanitary-pads/>, accessed on 12 January 2022

¹¹⁴ Independent Panel of Experts op cit note 111 at 11

¹¹⁵ Amandla.mobi op cit note 112

In its report dated 6 August 2018, the Panel recognized VAT on period products as an ‘unfair gender tax’¹¹⁶ in that it ‘makes women pay additional taxes compared to men based on their biology’.¹¹⁷ This gender equity concern alone motivated the Panel’s recommendation that period products be VAT zero-rated. Notably, the recommendation was not based on a finding that removing VAT on period products would make period products more affordable and accessible. In contrast, the Panel determined that VAT zero-rating period products would have an insignificant impact on the price and affordability of period products¹¹⁸ and would therefore ‘have only a limited impact on improving women’s access to sanitary products in low-income households’.¹¹⁹ The Panel therefore ultimately concluded that VAT zero-rating period products would amount to nothing more than a ‘gesture’, which ‘on its own will not be sufficient to ensure that the needs of the poor are adequately catered for in this instance.’¹²⁰ Rossouw and Ross reached the same conclusion in an economic report on the relationship between VAT zero-rating and period product affordability and accessibility. Their report explains why VAT zero-rating alone would have a ‘relatively small’ impact on the price of period products and would therefore unlikely ‘influence affordability, access and use’ thereof.¹²¹

While the toil, and victory, of getting period products VAT zero-rated seems unavailing in the sense that it would have little empirical impact on access to period products, it placed period poverty before the Panel for consideration and was therefore an important catalyst in shifting the spotlight back to the development of the SDPF. The Panel was fortunately also tasked with considering whether increasing access to the considered items ‘could be better achieved through additional/or other mitigatory government expenditure programmes’.¹²² The Panel strongly recommended that the VAT zero-rating be combined with the distribution of free period products to women in low-income groups through a government expenditure programme.¹²³ It was critical of the government’s failure to deliver on President Zuma’s 2011 commitment to distribute free period products and asserted that ‘the inability of government to design, fund and implement a programme that would procure and distribute readily available, non-perishable items through an existing network of distribution points

¹¹⁶ Independent Panel of Experts op cit note 111 at 63

¹¹⁷ Ibid 158

¹¹⁸ Rossouw & Ross op cit note 13 at 31; Njozela op cit note 109 at 13

¹¹⁹ Independent Panel of Experts at 60

¹²⁰ Ibid 69

¹²¹ Rossouw & Ross op cit note 13 at 1 and 21

¹²² Ministry of Finance op cit note 110 at 3

¹²³ Independent Panel of Experts at 60, 63, 69

demonstrates the need for a significant upscaling of the capacity of government to implement pro-poor policies'.¹²⁴ The Panel 'urge[d] the government in the strongest terms to expedite the delivery of free sanitary pads to the poor'.¹²⁵

(f) 2019 government action

Crucially, in the medium-term budget policy statement on 24 October 2018, the Minister of Finance announced two of the state's measures to address period poverty in 2019. First, sanitary pads would be VAT zero-rated as of 1 April 2019.¹²⁶ Notably, only pads were zero-rated; tampons and other period products, which are perceived to be consumed by higher income groups, were not. Further, all other taxes and duties, including a 20% import tax, remained applicable to pads.¹²⁷ Secondly, and more importantly, the 2019 National Budget would provide for the allocation of funds to the SDPF,¹²⁸ as contemplated in the SDPF itself.¹²⁹

The SDPF was formally 'launched' nationally on 28 February 2019 and the final draft of the SDPF, dated June 2019, was approved by Cabinet on 18 September 2019.¹³⁰ The 2019/20 National Budget allocated R157 million to the provincial equitable share for the roll-out of the SDPF¹³¹, enabling the implementation of the SDPF from 1 April 2019.¹³² The SDPF was subsequently allocated R209 million in the 2020/21 National Budget, R217 million in the 2021/22 National Budget,¹³³ and R236 million in the 2022/23 National Budget.¹³⁴ These amounts are distributed between the nine provinces

¹²⁴ Ibid 69

¹²⁵ Ibid 63

¹²⁶ Tito Mboweni 'Medium Term Budget Policy Statement 2018' 24 October 2018, available at <https://www.gov.za/speeches/minister-tito-mboweni-2018-medium-term-budget-policy-statement-speech-24-oct-2018-0000>, accessed on 12 January 2022

¹²⁷ Rossouw & Ross 2020 pg 1,7, 56, 58

¹²⁸ Tito Mboweni op cit note 125

¹²⁹ SDPF at para 13.2 and 13.3

¹³⁰ Minister in the Presidency for Women, Youth and Persons with Disabilities 'Question NW877 to the Minister in the Presidency for Women, Youth and Persons with Disabilities' *PMG* 10 October 2019, available at <https://pmg.org.za/committee-question/12485/>, accessed on 12 January 2022

¹³¹ Western Cape Committee 'Division of Revenue Bill: Treasury briefing; Committee Report on Division of Revenue Bill Negotiating Mandate' *PMG* 15 March 2019, available at <https://pmg.org.za/committee-meeting/28151/>, accessed on 12 January 2022

¹³² Multi-Party Women's Caucus 'Minister on implementation of the Sanitary Dignity Programme' *PMG* 20 May 2021, available at <https://pmg.org.za/committee-meeting/32997/>, accessed on 12 January 2022; Pilane op cit note 83

¹³³ Minister of Finance *Division of Revenue Bill* (2021)

¹³⁴ Minister of Finance *Division of Revenue Bill* (2022)

proportionately based on the number of female learners per province in quintile 1 – 3 schools, being the poorest three categories of public schools in South Africa.¹³⁵

(g) *2022 call for legislation*

Despite receiving national budget allocations, the SDPF has not been effectively implemented to date¹³⁶ and period poverty remains widespread. In August 2022, a student advocacy group, #TeamFreeSanitaryPads, led a march to deliver a petition, signed by 36 706 people, to the DYWPD.¹³⁷ The petition’s core appeal is for government to ‘legislate the provision of menstrual health and hygiene management’, for which legislation it seems to propose broad key provisions.¹³⁸ The petition made no mention of the SDPF, yet called government to take certain steps envisioned by the SDPF. While the petition’s silence in respect of the SDPF may point to the advocacy group lacking knowledge of the SDPF, it also evidences the SDPF’s ineffectiveness to date: had the SDPF been effectively implemented since 2019, the petition would likely not have been necessary.

To enable discussions about the inefficacy of the SDPF and proposed solutions to addressing period poverty, the section below gives an overview of the SDPF.

V. THE SANITARY DIGNITY POLICY FRAMEWORK

Notably, the SDPF is not a policy; it is a policy framework. According to the National Policy Development Framework 2020, which sets out South Africa’s process for policy development, a ‘policy’ is a ‘stated position on internal or external issues’ or a vision statement: ‘it provides the written basis for an organisation’s operations and informs legislation, regulations and the

¹³⁵ Donald Grant, Minister of Education, Western Cape ‘Background to the national quintile system’ *Western Cape Government* 14 October 2013, available at https://wcedonline.westerncape.gov.za/comms/press/2013/74_14oct.html#:~:text=All%20South%20African%20public%20ordinary,is%20the%20'least%20poor, accessed on 3 July 2022; *ibid*

¹³⁶ DWYDP ‘Sanitary Dignity Programme implementation’ *PMG* 13 October 2020, available at <https://pmg.org.za/committee-meeting/31175/>, accessed on 12 January 2022

¹³⁷ Kimberly Mutandiro ‘Learners march to demand free sanitary pads’ *GroundUp* 29 August 2022, available at <https://www.groundup.org.za/article/learners-and-activists-march-in-pretoria-to-demand-free-sanitary-pads-for-all/>, accessed on 9 October 2022

<https://www.groundup.org.za/article/learners-and-activists-march-in-pretoria-to-demand-free-sanitary-pads-for-all/>

¹³⁸ #TeamFreeSanitaryPads ‘Urgent call for RSA Government to Legislate Menstrual Health & Hygiene Management in SA!’ *Change.org* August 2022, available at <https://chnng.it/f6Bcy5dcSr>, accessed on 9 October 2022

organisation’s governing document.’ On the other hand, a ‘policy framework’ is defined as ‘an overarching structure tabulating a set of steps, procedures, principles, values and standards that officials ought to comply with to ensure the realisation of an organisation’s adopted policy. It provides broad and detailed guidelines that are crucial to proper implementation of a policy’.¹³⁹ It is effectively a general guideline of the process and the norms and standards for implementation of a policy or programme; ‘it’s a guideline for how a policy [or programme] should play out’.¹⁴⁰

The SDPF can accordingly be understood as a guideline, setting out the processes and the norms and standards, for how provinces are to address period poverty. While the SDPF is merely a policy framework, it acknowledges that successfully addressing period poverty is dependent on, inter alia, ‘supporting and enabling policy [and] legislation’.¹⁴¹

The SDPF seems to have two overarching aims: the first is to address period poverty proper¹⁴² and the second is to advance economic empowerment of women through the value chains that feed period product distribution programmes.¹⁴³

(a) Aim 1: Addressing period poverty

During the consultative process of drafting the SDPF, it was acknowledged that period poverty ‘is not just solely an issue of lack of pads, tampons or menstrual cups, but also involves education, as many people, especially girls don’t know what’s happening to their bodies. It’s also a broader sanitation issue, as many schools still don’t have adequate sanitation or running water’.¹⁴⁴ The SDPF accordingly adopts a holistic approach in addressing period poverty and deals with three of the four conditions of period poverty, being (i) access to period products¹⁴⁵, (ii) the provision of adequate WASH facilities¹⁴⁶ and (iii) menstrual health education¹⁴⁷.

¹³⁹ The Presidency Republic of South Africa *National Policy Development Framework* (2 December 2020) at 9

¹⁴⁰ Clarke op cit note 106

¹⁴¹ SDPF at para 9.1.2

¹⁴² Ibid para 8.1.(a), (b), (e), (f), (h), (j)

¹⁴³ Ibid para 8.1.(d), 9.1.2(c), 9.4, 9.5

¹⁴⁴ Clarke op cit note 106

¹⁴⁵ SDPF at para 8.1(b); 9.2; 10

¹⁴⁶ Ibid para 9.1.2(b); 9.3

¹⁴⁷ Ibid para 8.1.h; 6.4.5

(i) *Access to period products*

The thrust of the SDPF seems to be to standardise the distribution of free period products across the country; ‘to provide for an integrated and coordinated, responsive government programme aimed at the provision of sanitary products free of charge to indigent girls and women’.¹⁴⁸ It does this, foremost, by delineating the beneficiaries of, inter alia, state distributed period products, namely, ‘indigent persons’.¹⁴⁹ Paragraph 2.1 of the SDPF defines ‘indigent persons’ as ‘the indigent girls and women as identified in paragraph 9.1.5...who, due to poverty, lack necessities of life such as sanitary products’.¹⁵⁰ Paragraph 9.1.5 then identifies six categories of ‘indigent women and girls who have reached puberty [and] commenced menstruation’ to benefit from the SDPF: those who (a) attend quintile 1 – 3 schools, special schools and farm hostels; (b) attend ‘post-school education and training institutions’; (c) ‘live in indigent and child headed households’; (d) are in ‘state-owned mental institutions, hospitals, orphanages, special needs schools, places of care, prisons and places of safety’; (e) are ‘vulnerable indigent women & girls not in state institutions’; and (f) have been identified as such by the relevant committees established by the SDPF.¹⁵¹ The SDPF proposes that the free period products be distributed to and accessible at either the relevant institution as listed in paragraph 9.1.5 or ‘places to be identified by the proposed institutional structures...within reasonable distance from where such indigent persons go to school, live or work’.¹⁵²

The SDPF then establishes an institutional structure to manage the distribution of period products.¹⁵³ The structure established by the SDPF comprises committees at a national, provincial and ground, ‘target group’ level.¹⁵⁴ The DWYDP is the national custodian of the SDPF and provincial governments implement the SDPF.

¹⁴⁸ Ibid para 8.1(b)

¹⁴⁹ Ibid 2.1 and 9.1.5

¹⁵⁰ Ibid 2.1

¹⁵¹ Ibid 9.1.5

¹⁵² Ibid para 9.2.2

¹⁵³ Ibid para 10

¹⁵⁴ Ibid para 9.1.2

At a national level, the SDPF suggests that an Inter-Ministerial Committee be formed ‘to improve the coordination among ministries and harmonization of the various policies and implementation strategies’.¹⁵⁵ It also directs that the Director-General of the DWYPD establish a National Sanitary Dignity Oversight Committee (“SDOC”), to essentially oversee, monitor and report on the implementation of the SDPF.¹⁵⁶

At a provincial level, each provincial government is entitled to choose which provincial department is to implement the SDPF in their province. Some of the provinces have chosen their Department of Education, and others their Department of Social Development.¹⁵⁷ The SDPF directs that a Provincial Sanitary Dignity Oversight Committee (“PSDC”) be established for each provincial government to, inter alia, consider applications for the provision of period products, keep a database of the number of indigent persons requiring and receiving period products, and monitor implementation of the SDPF.¹⁵⁸

At the ground level, the SDPF directs that the institutions attended by indigent persons (as defined above) must establish an Indigent Sanitary Management Committee (“ISMC”).¹⁵⁹ The ISMCs are the principal role players in the effective implementation of the SDPF. They are ‘responsible for the overall management of sanitary dignity within such ... institution’ and their functions are to, inter alia, keep and update a list of the indigent persons at their institutions; apply to the relevant PSDC for the provision of period products at their institutions by submitting the list of indigent persons; distribute the period products to the indigent persons; and keep an inventory and register of the period products delivered to and distributed at their institutions.¹⁶⁰ The SDPF envisions an ISMC, preferably one of its female members, engaging closely with the indigent persons at their institution ‘in order to establish when such persons will need the products’.¹⁶¹ Further, the SDPF notes that ‘it is important

¹⁵⁵ Ibid para 10.1

¹⁵⁶ Ibid para 10.2

¹⁵⁷ DWYPD ‘Sanitary Dignity Programme implementation’ *PMG* 2 February 2021, available at <https://pmg.org.za/committee-meeting/31883/>, accessed on 12 January 2022

¹⁵⁸ SDPF at para 10.3

¹⁵⁹ Ibid para 10.4.1

¹⁶⁰ Ibid para 10.4.3(a), (b), (c), (f), (g)

¹⁶¹ Ibid para 9.2.4

that’ period products are ‘accessible at all times’ during the month, given that ‘the menstruation cycle of girls and women differs and can take place at any time of the month’.¹⁶²

(ii) *Adequate WASH facilities*

The SDPF notes, in paragraph 9.3.1, that its implementation will be ‘successful and sustainable’ if the institutions attended by indigent persons are equipped with adequate WASH facilities, or ‘infrastructure enablers’.¹⁶³ These include: (a) a reliable supply of clean water; (b) ‘a safe, hygienic and private sanitation facilities, which is sex-segregated, has a door with a lock and is functional’; (c) soap and water for hand washing; (d) toilet paper; (e) a disposal system for period products; and (f) facilities for people with disabilities.¹⁶⁴ The SDPF envisions ISMC being responsible for inspecting the toilets at their institutions to ensure they are clean and hygienic.¹⁶⁵

(iii) *Menstrual health education*

The SDPF, in paragraph 6.4.5, stresses the need for menstrual health education. Menstrual health education is necessary for girls to ‘manage and cope with challenges of menstruation effectively and in a dignified manner’. It outlines the scope of what ought to be covered in menstrual health education, including the biology of menstruation, puberty, hygienic practices, using period products, pain management and challenging the stigma around periods.¹⁶⁶ The ISMCs are responsible for arranging menstrual health education for the indigent persons at their institutions.¹⁶⁷

¹⁶² Ibid para 9.2.3

¹⁶³ Ibid para 9.3.1

¹⁶⁴ Ibid para 9.3.1

¹⁶⁵ Ibid para 10.4.1(i)

¹⁶⁶ Ibid para 6.4.5

¹⁶⁷ Ibid para 10.4.1(h)

(b) Aim 2: Economic empowerment through value chain

At the July 2017 public consultation in respect of the SDPF, ‘the general consensus from those in the room including Treasury was that these products be locally produced to reduce costs and create sustainable jobs’¹⁶⁸ As such, while the principal aim of the SDPF is to address period poverty, it also has a second aim: to advance women’s economic positions by giving preference to ‘local businesses owned by black females, youth and persons with disabilities’¹⁶⁹ in the supply chains that feed period product distribution programmes.¹⁷⁰ The SDPF insists on ‘a gender-responsive menstrual health management implementation value chain’.¹⁷¹ Specifically, it requires that the period products provided for in terms of the SDPF be procured from black female owned local businesses,¹⁷² which manufacture such products locally too.¹⁷³ The SDPF sets out the legal and regulatory requirements for such local procurement¹⁷⁴ and manufacturing.¹⁷⁵ It also cites the applicable regulations in relation to the state’s role in enabling local production and procurement.

Accordingly, the SDPF envisions black female owned local businesses (i) manufacturing period products that are compliant with the relevant SABS standards; (ii) providing other services required for the implementation of the SDPF, such as transport services and waste disposal services (iii) being awarded the tenders for the procurement of the period products and other required services, such tender processes being run by the state in accordance with applicable procurement legislation and regulations.

VI. SHORTFALLS OF THE SDPF

Despite the promulgation of the SDPF and national government allocating budget for its implementation, period poverty remains prevalent in South Africa. This section considers why this

¹⁶⁸ Clarke op cit note 106

¹⁶⁹ SDPF at para 9.4.2

¹⁷⁰ Ibid para 8.1(d); Para 9.4 and 9.5

¹⁷¹ Ibid para 9.1.2(c)

¹⁷² Ibid para 9.4

¹⁷³ Ibid para 9.5

¹⁷⁴ Ibid para 9.4

¹⁷⁵ Ibid para 9.5.2

may be the case by analysing some notable shortfalls of the SDPF, thereby enabling a discussion on possible solutions to addressing period poverty.

Plainly, the situation is that since the SDPF's promulgation in 2019, it has not been effectively implemented and/or monitored and evaluated in respect of implementation.¹⁷⁶ A review of progress updates from the DWYPD and the implementing provincial departments reveals dismal implementation of the SDPF on the state's own admission: period products are either being delivered to schools in a haphazard manner or not at all,¹⁷⁷ schools do not have adequate water supply, sanitation and hygiene, if at all,¹⁷⁸ and feedback on menstrual education is scant at best.¹⁷⁹ The progress updates reveal a deluge of implementation challenges across the board, including, inter alia: (i) provincial departments not spending their allocated budgets for the SDPF, either at all or in part;¹⁸⁰ (ii) delays in implementation due to procurement challenges, including irregularities in procurement processes and/or the inability to procure period products on account of supply chain incapacity and inefficiencies;¹⁸¹ (iii) poor stakeholder coordination;¹⁸² and (iv) public finance irregularities, corruption and looting.¹⁸³ The SDPF's implementation issues match those seen in the delivery of other state services in South Africa.

Given the limits of this paper, this section discusses only three problems with the SDPF, to which implementation issues can be attributed. First is a foundational problem: the current legal framework is deficient and does not adequately set up enforceable government obligations to address period poverty. Second is the problem that the SDPF is arguably too ambitious in that it has two main aims, as opposed to just one. Third is that the SDPF is practically unworkable, particularly in that it places the burden of its implementation on its beneficiaries.

¹⁷⁶ DWYPD op cit note 135

¹⁷⁷ DWYPD op cit note 135; Crankshaw et al op cit note 4 at 8

¹⁷⁸ PMG 11, Multi-Party Women's Caucus op cit note 129

¹⁷⁹ Minister of Women, Youth and Persons with Disabilities op cit note 129; DWYPD op cit note 159

¹⁸⁰ DWYPD op cit note 135

¹⁸¹ Ibid, DWYPD op cit note 159

¹⁸² DWYPD op cit note 159

¹⁸³ DWYPD op cit note 135, DWYPD op cit note 159

(a) *Legal framework*

The SDPF acknowledges that, prior to its promulgation, there existed no legal framework to address period poverty in South Africa.¹⁸⁴ The foundational problem with the SDPF is that it is deficient as a legal framework to address period poverty, for arguably two main reasons.

First, the SDPF does not adequately achieve the purpose of a policy framework as an instrument in a legal framework, being to provide for the implementation of a policy. It proposes an institutional structure and proffers broad vision statements of what one day needs to happen: the government's provision of free period products, adequate facilities and menstrual health education. However, it does not fulfil the essential functions of a policy framework. It does not sufficiently provide implementation guidelines, strategies or methodologies: in other words, *how* period products are to be made accessible to beneficiaries, *how* water supply, sanitation and hygiene infrastructure is to be provided and *how* menstrual education is to be administered. Further, it does not seem to envision the development or implementation of any official policy or other instrument which may provide further implementation guidance. The problem with this is that government actors are equipped with only a broad vision, a list of what must happen or what is needed, yet with no direction on how to get there.

Second, and related to the first, the SDPF, a policy framework, is the only instrument comprising the current legal framework address period poverty in South Africa. A glaring concern is whether a policy framework is legally enforceable. The SDPF envisions obligations for the various institutions, for example, SDOCs conducting awareness campaigns¹⁸⁵; PSDCs developing educational material¹⁸⁶; public schools establishing ISMCs. However, it is not a given that these obligations created by a policy framework are legally enforceable. There is uncertainty in South African law on the 'status and possible basis for the enforcement of "executive" policies that give effect to socio-economic rights'.¹⁸⁷ If policy frameworks are not legally enforceable, there is in effect no real consequence of SDOCs, PSDCs and public schools failing to execute their obligations assigned by the SDPF. The

¹⁸⁴ SDPF at para 4.3

¹⁸⁵ Ibid para 10.2.7

¹⁸⁶ Ibid para 10.3.4

¹⁸⁷ Oliver Fuo 'Constitutional Basis for the Enforcement of "Executive Policies" that give effect to Socio-Economic Rights in South Africa' (2013) 16 PER

unenforceability of such obligations means that the existing legal framework is not really a legal framework at all: it is merely a vision board.

The SDPF does not include, as one of its objectives, the improvement of the legal framework such that it will, one day, comprise legally enforceable state obligations in legislation or regulations. In fact, the SDPF explicitly states that ‘it is not the intention at this stage to convert this Framework, once approved, into legislation’.¹⁸⁸

Three interlinked solutions can be proposed at this juncture.¹⁸⁹ The first proposed solution is that the SDPF be amended to include legal reform as a core objective. It needs to envision the improvement of the legal framework to deal with period poverty. The second proposed solution is that legislation be developed, to be the backbone of the improved legal framework. Legislation would establish legally enforceable state obligations, which are accompanied by legal consequences for non-compliance. The third proposed solution is that implementation guidelines be developed, either as part of an amended SDPF itself or another implementation policy in the improved legal framework.

(b) Two main aims

As discussed above, the SDPF has two main aims: first, to address period poverty proper and, secondly, to advance economic empowerment of women through the value chains that feed period product distribution programmes. In order to fulfill the second aim, the SDPF prescribes stringent public procurement requirements: period products may only be procured from black female owned local businesses, which manufacture such products locally too.¹⁹⁰ This paper argues, that while the second aim is critical for the advancement of South African society, it is perhaps misplaced in the SDPF and in fact impedes the successful implementation of the SDPF. Implementation is impeded by the inability to effectively procure period products for distribution because of supply chain incapacity and inefficiencies.¹⁹¹ The companies that meet the SDPF’s stringent procurement

¹⁸⁸ SDPF at para 4.3 (footnote 16)

¹⁸⁹ All three solutions assume continued budget allocation from National Treasury

¹⁹⁰ SDPF at para 9.4 and 9.5

¹⁹¹ DWYPD op cit note 135 and 156; Department of Women, Youth and Persons with Disabilities ‘Roll-out & implementation of Sanitary Dignity Programme: FS, NW & KZN briefing’ *PMG* 5 March 2021, available at <https://pmg.org.za/committee-meeting/32474/>, accessed on 12 January 2022

requirements are insufficiently capacitated to deliver the products or services sought from them in the period product value chain. This leaves the state between a rock and a hard place: they want to deliver period products and they want to support black female owned businesses, but the two aims do not in fact support one another at this stage. The SDPF postulates that its successful implementation depends on a ‘gender responsive value chain’,¹⁹² yet the contrary seems to be the case. The SDPF’s overambitious attempt to fulfill two aims, as opposed to just one, is in fact one of its downfalls and has resulted in its thwarted implementation.

The primary objective of the SDPF is to address period poverty, and this paper argues that it should first fulfil this objective before tackling wider development problems in the country too. The SDPF’s priority needs to be obtaining period products for distribution. If it is unable to do so because it is trying to achieve a secondary, albeit important, objective, then it is in effect a futile measure to address period poverty.

The proposed solution at this juncture is for the second aim of the SDPF either be dropped or relegated in priority in an amended SDPF and/or improved legal framework. A suggested approach would be for procurement requirements to require that black female owned local businesses be considered preferentially, but that, where there are none capacitated to deliver, other companies be engaged to procure the requisite goods, including foreign companies.

(c) *Practically unworkable provisions*

The third problem that arguably impairs the SDPF’s implementation is its numerous provisions that are practically unworkable. This section discusses just one of these: the SDPF places the burden of its implementation on its beneficiaries.

While the SDPF does assign functions to the ISMCs, such as keeping a list of girls and distributing period products to them,¹⁹³ in the first instance, it requires that a girl disclose to members of the ISMCs at her school that she is in need of period products and is classified as indigent.¹⁹⁴ The SDPF

¹⁹² SDPF at para 9.1.7

¹⁹³ Ibid para 10.4.3(a), (b), (c), (f), (g)

¹⁹⁴ Ibid para 10.4.3

therefore places the burden on a 12 year old girl to fulfil her own rights to education and equality, as opposed to placing this burden on the state. Aside from the fact that it simply is not the girl child's role to do this, where it is the state's, placing the burden of implementing the SDPF on the girl child obstructs the implementation of the SDPF. Given the shame and humiliation connected to both poverty and periods, it is conceivable that a girl in need would refrain from alerting her teacher to this fact: 'imagine having to display your poverty by asking for products every month, in front of your teacher, lecturer, or healthcare provider each month to access these basic products.'¹⁹⁵ Crankshaw et al's research showed that requesting period products from teachers 'was widely viewed as embarrassing for the learner concerned, who either sent a friend on their behalf or avoided the school supply and borrowed a pad from a friend'. A further issue with this functional assignment in the SDPF is that it grants teachers the discretion to decide which girls qualify as indigent and therefore beneficiaries of the SDPF and this means that girls are required to prove that they are 'poor enough' to receive the period products that they need.¹⁹⁶

The proposed solution in this section is that an amended SDPF places the onus on the state, and not the girl child, to fulfil the rights to education and equality. A suggested alternative method of distributing period products at schools would 'having a dispenser available in bathrooms, similar to the condom dispensers widely seen in health facilities.'¹⁹⁷

VII. ROUTE TO IMPROVED LEGAL FRAMEWORK

This section first ties together the solutions proposed in the section above and then makes a recommendation for the route to achieve an improved legal framework to address period poverty.

¹⁹⁵ Rene Sparks 'OPINION: Reproductive Health – It's time for a lasting solution to period poverty' *Spotlight* 16 August 2021, available at <https://www.spotlightnsp.co.za/2021/08/16/opinion-reproductive-health-its-time-for-a-lasting-solution-to-period-poverty/>, accessed on 4 July 2022

¹⁹⁶ Crankshaw et al op cit note 4 at 8

¹⁹⁷ Sparks op cit note 194

(h) Solution

This paper proposes a revamp of the existing legal framework dealing with period poverty. Foremost, it proposes that the SDPF be amended. The SDPF can remain a guiding policy document and will be a useful instrument if it can be updated to: (i) direct the improvement of the overarching legal framework – to ultimately comprise legislation as its backbone and implementation guidelines; (ii) have one main aim as opposed to two, such that addressing period poverty, by delivering period products, is prioritised over empowering marginalised groups; and (iii) include practically workable provisions, such as the state bearing the onus of fulfilling its obligations, as opposed to the beneficiaries doing so. Amending the SDPF, a policy framework, would be a relatively easy fix, in that it would involve fewer procedural and bureaucratic steps than amending legislation or regulations. Such an amended SDPF would enable the development of legislation to entrench in the law the state’s obligations to address period poverty.

(i) Recommended route

There are two routes to choose from to achieve the proposed solution: the adversarial or the collaborative. The adversarial route, being to either litigate or threaten litigation against the state, is simply not necessary in this case and would do more harm than good. Had the state denied its obligations or refused to address period poverty, the adversarial route would be an attractive option. However, the contrary being the case obviates the need to convince the state of its obligations and compel their compliance. The shortfalls of the SDPF, and the legal framework in general, are likely a case of lack of knowledge or capacity to aptly address the problem. The state’s apparent political will to address period poverty indicates a likelihood that it would collaborate with civil society and experts to better do so. Collaborating with the state to amend the SDPF and develop an improved legal framework is therefore not an inconceivable route. The collaborative route is more favourable in that it would (i) be far more time and cost effective, alleviating the state from having to defend proceedings, (ii) preserve the positive relationship with the state to achieve the desired legal reform, and (iii) given the state’s increasing disregard for court orders in socio-economic rights cases, possibly have higher chances of achieving the legal reform and service delivery.

VIII. CONCLUSION

This paper makes the case for legal reform in respect of period poverty. The current legal framework comprises only the SDPF, a policy framework which is deficient in a number of respects. It fails to provide for the implementation of its broad vision statements and is not set up legally enforceable state obligations. It is also over ambitious in taking on a second aim, the empowerment of black female owned businesses through its envisioned supply chain, which has the result of stunting delivery. Further, it has practically unworkable provisions, including placing the onus to fulfil its objective on its beneficiaries, rather than the state. This paper proposes amendments to the SDPF could cure these shortfalls, namely that its core objective be to develop legislation and improve the legal framework, relegate the second aim of empowerment through procurement for the supply chain, and placing the onus on the state, not the girl child, to implement the policy. The state seems to heed civil society demands, has admitted its obligations to fulfil the rights implicated by period poverty and has taken steps to address the issue. Given the state's apparent political will, a collaborate approach towards the state to drive legal reform is more likely to succeed than an adversarial approach.

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