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# PRO BONO & HUMAN RIGHTS ALERT

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### Undocumented foreign nationals/persons in South Africa to also benefit from the COVID-19 vaccine rollout: Nuances to be alive to

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### The fight against GBV – three new bills

The scourge of gender-based violence (GBV) continues to worsen each year, and the effect of the COVID-19 pandemic and the national lockdown only exasperated the horrors of the widespread nature of the GBV crisis in our country. In the first three weeks of the national lockdown, the government's GBV and femicide command centre recorded over 120,000 victims.

## Undocumented foreign nationals/persons in South Africa to also benefit from the COVID-19 vaccine rollout: Nuances to be alive to

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On Monday 11 January 2021, while addressing the nation on the country's progress in combatting the COVID-19 pandemic, President Cyril Ramaphosa (the President) announced that government would deploy a comprehensive vaccination strategy that aimed to reach all parts of the country. The President described the task as the "largest and most complex logistical undertaking in our country's history" and explained, "It will be far more extensive than our HIV treatment programme or even our national, provincial and local elections in terms of the number of people who have to be reached within a short space of time".

Subsequent to this announcement there have been mixed messages from the government about who will qualify for a vaccine under this roll out. In an announcement that drew some criticism, the Minister of Health, Dr Zweli Mkhize, initially indicated that only South African citizens with identity documents would be entitled to receive the vaccine.

However, government appears to have reconsidered this decision. In his address to the nation on 1 February, in what appears to be an about turn, the President said the government aimed to make the vaccine available to all adults living in South Africa, regardless of their citizenship or residence status. He went on to state that, "We will be putting in place measures to deal with the challenge of undocumented migrants so that, as with all other people, we can properly record and track their vaccination history".

This is in line with a statement made by the National Treasury Director-General Mr Dondo Mogajane on 24 January 2021, during a virtual meeting between his Department and the SA National Editors Forum in which Mr Mogajane said that foreign nationals including undocumented foreign nationals/persons would also benefit from the rollout of the COVID-19 vaccine: "We are in SA and we have many millions of undocumented people and [we can't say they shouldn't receive the vaccine as they are undocumented]. The demand for the vaccine is going to be exceeded, and we are not going to turn away undocumented people..."

These indications that the government will include undocumented persons in its vaccine roll out has been welcomed by Refugee and Migrant advocacy groups, some of whom were it seems already considering challenging the constitutionality of limiting the roll out to South African citizens.

Perhaps in making this announcement, the President was mindful of the Pretoria High Court's decision just last year declaring the exclusion of asylum seekers and Zimbabwean and Lesotho special permit holders from the government's COVID-19 social relief of distress grant to be unconstitutional; or that countless numbers of South African citizens are themselves for systemic reasons undocumented – and have neither a birth certificate nor an identity document.



## Undocumented foreign nationals/persons in South Africa to also benefit from the COVID-19 vaccine rollout: Nuances to be alive to...*continued*

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On a more pragmatic level, given the purpose and intent behind the mass vaccine rollout, it seems that it would simply not be sensible to exclude a large portion of the population from the Programme.

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Whatever the reason for the change in policy the decision is to be welcomed. Importantly, it signals a welcome departure from an increasingly exclusionary approach by our government to the treatment of undocumented persons (and foreign nationals) and accords with the spirit of our Constitution. On a more pragmatic level, given the purpose and intent behind the mass vaccine rollout, it seems that it would simply not be sensible to exclude a large portion of the population from the Programme.

It is clear from the President's address that the purpose of the mass vaccination programme is to enable us to achieve population immunity (herd immunity). In his address, the President explained the government's ambitious targets: *"we will [by phase 3 of the programme] ... have reached around 40 million South Africans, which is considered to approximate herd immunity."* The President further intimated: *"We have always said that an effective vaccine will be a game-changer. Vaccines offer to the peoples of the world a means to control the Coronavirus pandemic. A person who is vaccinated has a much-reduced chance of becoming ill and dying from COVID-19."*

Population immunity will be achieved when enough of the population is immune to the virus to provide indirect protection to those who are not immune, bringing the spread of the virus under control and importantly reducing pressure on our healthcare system. While the actual level needed for such immunity is, at this stage, unknown, scientists have estimated that South Africa will likely reach herd immunity once around 67% (approximately 40 million) of the population is immune.

Statistics on the number of foreign nationals (documented and undocumented) living in South Africa vary. According to Stats SA, the number of foreign-born people living in South Africa in 2020 is around 3,9 million. This includes both the documented and undocumented. The United Nations population division put the number at 4,2 million in 2019 – this it said represents about 7,2% of the population. According to Stats SA's 2011 census, 6,2 million foreign nationals lived in South Africa, and the organisation's 2015 estimate placed the number of undocumented migrants between 1,2 and 1,5 million.

## Undocumented foreign nationals/persons in South Africa to also benefit from the COVID-19 vaccine rollout: Nuances to be alive to...*continued*

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To exclude all undocumented persons would mean the exclusion of many innocent South African citizens, victim to the systemic obstacles preventing them from being documented.

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Although there is no certainty as to the number of undocumented foreign nationals/persons living in South Africa today, it is a substantial number of people. Certainly, any decision to exclude undocumented persons would exclude a significant number of people. Furthermore, and important to emphasise, to exclude all undocumented persons would mean the exclusion of many innocent South African citizens, victim to the systemic obstacles preventing them from being documented.

But as laudable as this announcement is, the devil always lies in the detail and at the moment there is scant detail as to how the programme will be rolled out.

Given widely reported negative experiences that undocumented foreigners have in attempting to access health care in South Africa (many face routine unlawful discrimination in attempting to access healthcare), coupled with provisions in our immigration laws which allow immigration officials wide powers to arrest and deport "illegal" foreigners, much will need to be done not only to build the trust of foreign nationals if they are to participate in the roll out, but also train healthcare workers.

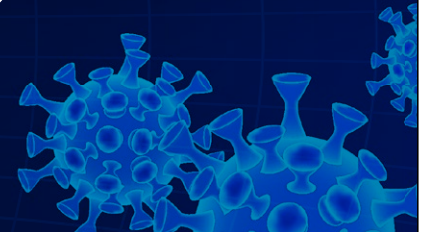
If the programme is to work as intended, the government needs to expeditiously provide more information about the roll out of the programme and consult with civil society in order to gain people's trust.

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*Jacquie Cassette and Gift Xaba*

## CDH'S COVID-19 RESOURCE HUB

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## The fight against GBV – three new bills

In an effort to strengthen the existing legislative response to GBV, President Cyril Ramaphosa announced three bills that aim to better regulate the way government departments, law enforcement and the courts respond to cases of violence against women.

The scourge of gender-based violence (GBV) continues to worsen each year, and the effect of the COVID-19 pandemic and the national lockdown only exasperated the horrors of the widespread nature of the GBV crisis in our country. In the first three weeks of the national lockdown, the government's GBV and femicide command centre recorded over 120,000 victims.

In an effort to strengthen the existing legislative response to GBV, President Cyril Ramaphosa announced three bills that aim to better regulate the way government departments, law enforcement and the courts respond to cases of violence against women.

These three bills were introduced by the Minister of Justice and Correctional Services in the National Assembly in August 2020. All three bills are currently before the National Assembly. Below are summaries of the most notable changes brought about by each bill.

### **Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill**

The bill aims to amend the Criminal Law (Sexual Offences and Related Matters) Amendment Act (SORMA). It was introduced to Parliament on 19 August 2020, and aims to make several changes - the most notable of which are to recognise sexual intimidation as an offence; to

expand the National Register for Sex Offenders to include sex offenders beyond those convicted of sexual offences against children and persons who are mentally disabled; requiring that the full name, surname, identity number and sexual offence also be included in the Register, and providing for further regulation surrounding the reporting duty of persons who are aware of sexual offences being committed against children. This includes a person who has knowledge, reasonable belief or a suspicion, and the failure to report this to a police official will result in the person being guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding five years.

### **Criminal and Related Matters Amendment Bill**

This bill was introduced into Parliament on 28 August 2020. It aims to amend the Magistrates' Courts Act and the Superior Courts Act to provide for the appointment of intermediaries and the giving of evidence through intermediaries and audio-visual links in proceedings on application by any party to proceedings other than criminal proceedings. Provisions will also be added to ensure that perpetrators of GBV are not released on bail before their first appearance in the lower courts.

The bill also aims to introduce changes to the CPA to further regulate the giving of evidence via closed-circuit television or similar electronic media and the right



## The fight against GBV – three new bills...continued

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Our government's response to GBV has resulted in significant developments in our criminal law, in addition to the notable 2018 amendment of the Criminal Procedure Act to do away with prescription in the context of criminal charges for sexual offences. While these are all welcomed developments, our civil law lags behind.

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of a complainant in a domestic related offence to participate in bail and parole proceedings. This provides survivors or the relatives of a deceased victim the opportunity to be heard before the court or the parole board before any decision is made. In addition to allowing for an opportunity to be heard, being able to give evidence via closed-circuit television also provides the victim with the added protection of not having to be in the same room as the perpetrator.

### **Domestic Violence Amendment Act**

This bill was introduced to Parliament on 7 September 2020, and seeks to make five overarching changes which includes the broadening of the domestic violence definition to include elder abuse, coercive behaviour, controlling behaviour and exposing or subjecting children to listed behaviour. This in turn recognises these forms of domestic violence and therefore widens the scope of the application of the Domestic Violence Act.

The bill also provides for the online submission of protection orders and the addition of the protection order to a central depository that stores other orders and cases against the same person to prevent perpetrators from hiding their past histories of domestic violence.

Our government's response to GBV has resulted in significant developments in our criminal law, in addition to the notable 2018 amendment of the Criminal Procedure Act to do away with prescription in the context of criminal charges for sexual offences. While these are all welcomed developments, our civil law lags behind. In line with our core focus on women's rights, our practice is currently pursuing what we believe to be the meaningful and significant development of our civil law in relation to sexual offences, and we will continue to meaningfully engage in further areas in need of development in our civil law. Our practice will also keep a close eye on the progression of these three bills as well as further significant developments in both the criminal law and the civil law space as they pertain to GBV and sexual offences.

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*Brigitta Mangale, Kirsten Felix and Akhona Mgwaba*

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### **BBBEE STATUS: LEVEL TWO CONTRIBUTOR**

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

### **PLEASE NOTE**

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