ATTEMPTS AT GAGGING THE WORLD:

A MANUAL *on the* GLOBAL GAG RULE

WOMEN'S LEGAL CENTRE

LRC
Legal Resources Centre

Words of GRATITUDE

The Women's Legal Centre (WLC) and the Legal Resources Centre (LRC) are grateful for the generosity of our funders, the Open Society Foundation, and the Center for Health and Gender Equity who made the development and finalisation of this manual possible.

We also recognise the contribution of Nasreen Solomons (WLC), Amy-Leigh Payne (LRC) and Mandivavarira Mudarikwa (LRC) in the development and finalisation of the manual.

IT IS OUR SUGGESTION that this manual be used in conjunction with further assistance from experts on the GGR including those with legal expertise. In our view this will ensure that the target audience is thoroughly versed with the GGR and the available legal protections.

Our details are provided at the end of this manual should you wish to contact us.

TARGET AUDIENCE FOR THE MANUAL

This manual is intended for use by organisations and individuals in organisations currently receiving funding from the United States Government, and particularly those receiving Global Health Assistance funding. It is also aimed at organisations contemplating applying for funding from the United States Government, and serves to assist these organisations in understanding the operation and parameters of the Global Gag Rule to the funding for which they have applied or intend to apply.

Though the manual has been produced centring organisations directly affected by the provisions of the Global Gag Rule, it is also intended for use by organisations who do not receive or contemplate receiving Global Health Assistance funding from the United States Government. The aim is to ensure that the civil society sector in South Africa understand the provisions, operation and effects of the Global Gag Rule, and the limitations it imposes on those receiving the funding with a view to empowering and educating organisations to better understand the ways of working while the Global Gag Rule is in effect.

WHAT IS THE GLOBAL GAG RULE

and why is its current iteration so damaging?

The Global Gag Rule ('GGR'), also known as the Mexico City Policy, is a policy that prohibits foreign NGOs receiving certain categories of health assistance funding from the United States from performing or promoting abortion services.

To be clear, the mention of foreign NGOs in the policy refers to organisations that are operating outside the United States. We have called them non-US NGOs or foreign NGOs in this manual.

The GGR's application goes beyond what NGOs receiving US global health funds do with US funding but also applies to their own, non-US government funds.

It essentially forces such NGOs to choose between providing a comprehensive range of sexual and reproductive health care and receiving US global health assistance funding.

The GGR is issued by the sitting President of the United States through an executive order. It can therefore be withdrawn or extended by the President in a similar manner. The Policy was first introduced by President Ronald Reagan in 1984. Over the different presidential terms in the US, it has been reinstated, strengthened and/or extended by Republican presidents, and withdrawn by Democratic presidents.

IN THE PAST, THE POLICY ONLY APPLIED TO FAMILY PLANNING FUNDING, but since 2017, under the Trump administration, it has been extended to all global health assistance funding. Trump's extension of the GGR is a massive expansion of this policy compared to any other reinstatement by any previous Republican president. Previous implementation by Republican administrations applied the policy to an estimated $600 million per year for funding specifically designated for family planning and reproductive health services. The extension by Trump's administration makes the GGR applicable to an estimated $9 billion per year for all global health spending. This extension has far-reaching consequences for programmes and access thereof to maternal and child health, nutrition, HIV, tuberculosis, malaria, among other areas of health funding.

Given that the US is one of the largest funders of health initiatives globally, this version of the GGR will certainly have negative health consequences for many. As will be seen below, the policy's impact will be severely felt by womxn and girls in countries where NGOs receive US health funding. Their access to contraception will be severely hindered which will likely result in more unintended pregnancies, and more unsafe abortions.

More on this will be discussed in this manual.

HOW THE GGR WORKS GENERALLY

GGR funding applies to global health funding applied for directly from the USAID, Department of Defence, and Department of State; or global health funding received from a US NGO.

Under the following categories of funding, a contract, grant or co-operative agreement will contain the GGR provisions, also known as Protecting Life in Global Health Assistance:

- Family Planning
- Reproductive Health
- Maternal and child health
- HIV/AIDS
- Tuberculosis
- Malaria
- Emerging pandemic threats
- Neglected Tropical Diseases
- Nutrition

It does not apply to humanitarian assistance, or Water Supply and Sanitation programmes.

THE GGR APPLIES TO FOREIGN NGOS, NOT INDIVIDUALS ACTING IN THEIR PERSONAL CAPACITY.
This means that individuals employed by the organization are barred from performing any of the prohibited actions while on duty or on the premises of the organization. The organization must not endorse or finance the individual's actions.

THE ORGANIZATION RECEIVING THE FUNDS MUST AGREE TO THE POLICY IRRESPECTIVE OF WHETHER IT WORKS IN REPRODUCTIVE HEALTH.

Such an NGO will be required to sign an agreement to certify and/or declare that they will not perform or promote abortion in their work. The NGOs are then held accountable through the application of the terms of the signed funding agreement.

If you are sub-granting to another organisation, then the terms of the agreement signed would apply to your sub-grantees as if they themselves signed the contract. The prohibition applies to an organisation's entire pool of funding, which includes funds from other funders. This means organisations cannot use these other funds to promote or perform abortions. If an organisation sub-grants funding that does not come with the GGR terms attached, e.g. from the Open Society Foundation, then this is argued by US officials to be subject to the GGR terms as well because the organisation providing the sub-grant is a recipient of US Government funding to which the policy applies. As long as an organisation receives GGR funding, it is argued that ALL of its funding is then subject to the provisions of the GGR.

WHAT DOES THE GGR PROHIBITION APPLY TO (ACTIVITIES)

The Table below indicates what activities are prohibited by the GGR and what activities are excluded from the prohibition.

APPLIES TO THE FOLLOWING ACTIVITIES	EXCLUSIONS
Abortions sought for fetal abnormalities and the mental or physical wellbeing of the womxn	Abortions where a womxn's life is in danger, or circumstances of rape or incest
Referrals for abortions on the basis of fetal abnormality, or the mental or physical wellbeing of the womxn	Referral for abortions based on life endangerment, or circumstances of rape or incest
Performing abortions, which includes operating a facility where abortions are provided	Post-abortion care Contraception, including emergency contraception
Actively promoting abortion by committing resources, financial or otherwise, to increase the availability or use of abortion. This includes: ● Counselling services about the benefits or availability of abortion ● Actively providing advice about abortion as an option, or encouraging womxn to consider it ● Conducting an information campaign ● Lobbying a foreign government to legalise abortion, or lobbying for continued legalisation	Passive referral: where a womxn asks about an abortion then the organisation may refer her to a service provider. Requires four conditions to be met: ● The womxn is pregnant ● She has clearly stated her decision to have an abortion ● She asks where to obtain a safe and legal abortion; and ● The healthcare provider has a reason to believe the country's medical ethics require referral.
Foreign NGOs (non-US NGOs)	Individuals acting in their private capacity/not on behalf of the funded organisation

WHAT CAN LIMIT THE APPLICATION OF THE GGR: AFFIRMATIVE DUTY DEFENCE

Beyond the applications and exclusions above, there exists the affirmative duty defence. This defence applies where there is a local law mandating the healthcare provider to provide counselling and referral for abortions. In these circumstances, providers are obliged to follow their local law without triggering a violation of the GGR. The defence only enables the provider to counsel and refer for abortion while performance of the abortion itself is still excluded in this respect.

We will expand further on how this defence applies in South Africa.

RECIPIENTS NOT REQUIRED TO COMPLY WITH THE GGR

As we have already stated, any non-US entity or organization that receives US funding must comply with the GGR. **However, the following entities are not required to comply with the GGR:**

- Foreign governments including Departments of Health; and parastatal organisations or entities
- US Based NGOs
- Multi-lateral organisations, e.g. The World Health Organisation
- Public international organisations

PENALTIES FOR NON-COMPLIANCE

The penalty for non-compliance with the agreement of the GGR is that the grant agreement is terminated, and the remaining money must be returned to the funder. The recipient is required to reimburse the US Government for the money spent on offending activities.

THE GGR *in* SOUTH AFRICA

ABORTION LAW IN SOUTH AFRICA

Freedom of choice and the ability to make decisions based on one's own circumstances is the golden thread running through the constitutional guarantees in section 12 of the Constitution.

Section 12 provides for the right to freedom and security of the person, and section 12(2) specifically provides for the right to bodily and psychological integrity which includes the right to make decisions concerning reproduction; and the right to security in and control over one's body.

These rights contained in section 12(2)(a) and (b) expressly recognise and protect the right for one to make decisions in relation to reproduction, including the right to termination of pregnancy.

These rights are also bolstered by the protections to the rights to reproductive health care (section 27(1)(a)), right to equality (section 9); right to dignity (section 10); and right to privacy (section 14).

In keeping with these entrenchments, abortion is legal in South Africa with specific regulations as provided by the Choice of Termination of Pregnancy Act (CTOPA) 92 of 1996. The CTOPA makes abortion available on request and without any conditions up to 12 weeks of pregnancy, and can be performed by a doctor, nurse, or registered midwife.

Where the pregnancy is between 13 and 20 weeks, then it can be provided, in consultation with a doctor, for the following reasons:

- Rape or incest
- Danger to mental and physical health
- The fetus is not viable
- The pregnancy would significantly affect the economic or social circumstances of the womxn

In these circumstances, the abortion is performed by a doctor.

Where the pregnancy is after 20 weeks, then an abortion is only available under the following circumstances:

- Life endangerment
- Danger to the health of the fetus

In these circumstances, the abortion is performed by a doctor.

THE AFFIRMATIVE DUTY DEFENCE IN SOUTH AFRICA

In addition to the CTOPA provisions on abortion, South African law and courts generally recognise a positive duty to counsel and refer womxn for safe and legal abortion services.

Our courts have affirmed that healthcare providers can be held accountable if they fail to provide adequate information that is relevant to enable a womxn to make an informed decision about having an abortion and having access to abortion services.

As we have already explained, where an NGO receives global health funding from the US Government, and such funding comes with the policy attached, then they may not perform abortion services. But, under the affirmative duty defence, they may counsel or refer a womxn for abortion services, and in the circumstances listed above. This is because the CTOPA mandates the provision of abortion services including information on abortion therefore actively providing counselling or a referral in terms of its provisions will not trigger a violation of the GGR. A provider who is working for an organization that receives GGR funding still has an obligation to provide counselling and abortion referrals in terms of the CTOPA.

This means that if you are in South Africa you do not need to wait for a womxn to request a referral for an abortion first, and you do not need to refer only in circumstances of rape or incest, and life endangerment as it is in line with the CTOPA to refer in circumstances over and above rape or incest or life endangerment. Referring womxn to abortion services, or counselling womxn on abortion service provision and its availability are the only two instances in which one can go against what the terms state as provided for by the affirmative duty defense, and it is only available to healthcare providers tasked with counselling and referral.

THE IMPACT *of the* GGR

THE US IS A CRUCIAL DONOR TO GLOBAL HEALTH PROJECTS WORLDWIDE INCLUDING IN SOUTH AFRICA

As such, organisations receiving funding subject to the GGR tend to over-interpret its provisions out of fear of not complying and losing their funding, especially considering the limited pool of funding generally available to NGOs currently. This is referred to as the 'chilling effect' which has led to clinics closing, staff being laid off and services being cut. Without a doubt, Trump's expansion of the GGR has only exacerbated this effect.

Critically, the GGR policy decreases the quality and availability of HIV prevention and treatment programs, disproportionately affecting girls and womxn. The policy also impacts marginalized groups – like sex workers, members of the lesbian, gay, bisexual, and transgender (LGBT) community including persons with diverse gender identities, people living with disabilities, and people living in rural areas – who see programmes focused on their health and rights cut due to the withdrawal of funding.

Most times, there are no other services available to fill this gap. Where there is a decrease in funding as a result of an organisation refusing to confirm or certify the GGR, or an organisation certifies the provisions of the GGR but has to cut abortion-related programmes, the effect is that comprehensive sexual and reproductive services can no longer be offered in certain communities.

It fragments a basket of services that would previously be available at one clinic or in one area, forcing organisations not only to limit the ways in which and with whom they work, but users to search for other organisations, facilities or methods of attaining access to services. The shrinking of services in terms of the GGR also affects the availability of information available to communities and groups.

The GGR policy also smothers the broader sexual and reproductive health and rights movement and undoes years of progress by limiting advocacy efforts, scaring and confusing health providers, and making it too complicated for groups to work together.

It severs relationships fostered in support of providing womxn and girls access to necessary sexual and reproductive health services, and ensuring rights enjoyment directly related to these services.

Where an organisation has refused to certify the provisions of the GGR, and therefore rejected the funding, this has also affected the internal operations of the organisations.

The loss of funding leads to retrenchments as programmes are scaled down or done away with completely; or clinics have to close down completely.

THE GGR IS REGRESSIVE IN NATURE, seeking to undo dedicated and concerted efforts made by organisations towards the provision of comprehensive health services to marginalised and under-served communities and groups of persons. Simultaneously, it emboldens or provides space for regressive actors to push back against gains made towards protecting the right and access to safe and legal abortions.

This has been the experience of the GGR in South Africa where there are many NGOs offering abortion services and/or working towards providing access to comprehensive health services which include sexual and reproductive health services. There is no doubt that the GGR has undermined the efforts assumed by NGOs in terms of the CTOPA, and therefore undermining the object and provisions of this law. The GGR has also violated and/or impeded the realisation of constitutional rights through its wide reach and consequences.

THE RIGHTS VIOLATED AND/OR IMPEDED INCLUDING:

- right to bodily and psychological integrity (sections 12(2));
- right to freedom of expression (section 16);
- right to freedom of association (section 18);
- right to have access to healthcare including reproductive care (section 27(1)) and
- generally, the rights to equality (section 9), dignity (section 10), and privacy (section 14) which are intimately connected to the rights above.

STRATEGIES *to* COMBAT GGR

Here are some of the activities that are being supported in either limiting or completely removing the GGR policy in order to improve the health circumstances we discussed this manual.

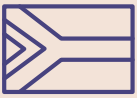
ACTIONS THAT CAN BE TAKEN IN THE US

- **Passage of the Global Health Empowerment and Rights Act:**

  The Act (also known as the Global HER Act) was introduced into the US legislative process in 2019. If passed, the Act will effectively do away with the power to reinstate the GGR by a US President and permanently end the Global Gag Rule. It would allow organisations receiving US foreign assistance to provide for safe abortion care with their own funds.

- **Repeal of executive order:**

  This requires the sitting President of the US to withdraw the executive order that reinstated the GGR and its operation. When withdrawn, it means that the provisions will no longer be applicable to funding agreements to foreign, non-US NGOs.



ACTIONS THAT CAN BE TAKEN IN SOUTH AFRICA

- Challenging the South African government to intervene and ensure that NGOs affected are funded, as a way to fulfil its duties in terms of the Constitution and CTOPA;
- Hold the provincial and national government accountable for the poor implementation of the CTOPA which has forced many NGOs to offer this service;
- Training of NGOs about the provisions and operation of the GGR so that they are aware and educated on its provisions and know how they work.
- Healthcare providers are capacitated to assert the affirmative defence and understand how it works within the frameworks of South Africa.

CONCLUSION

The current expanded version of the GGR has seen a large proportion of the pool of foreign assistance made available to foreign, non-US NGOs negatively affected by the limitations set by its provisions.

As the provisions remain in force, it is our hope that this manual will place organisations and individuals working within and alongside sexual and reproductive health services, and particularly abortion services, in a better position to understand the operation and effects of the Global Gag Rule more generally and in South Africa particularly.

To understand its operation and applicability is, in equal measure, to understand the scenarios and circumstances to which it does not apply and which it does not affect. This will enable those in civil society armed with this information to formulate and implement strategies that are adaptable to the parameters set by the GGR provisions, and which plan around its effects.

The hope is that this manual will provide assistance in the continued and sustained efforts of civil society in achieving equitable access to comprehensive sexual and reproductive services inclusive of access to safe and legal abortion services for womxn and girls in South Africa.

About the ORGANISATIONS

WOMEN'S LEGAL CENTRE

The Women's Legal Centre (WLC) is an African feminist legal centre that advances womxn's rights and equality through strategic litigation, advocacy, education, training and partnerships. The WLC aims to defend and protect the rights of vulnerable and marginalized womxn – in particular, black womxn – and to promote their access to justice and equitable resources. The WLC seeks to advance womxn's freedom from violence, improve substantive equality, and advocate for agency in all aspects of their lives - at home, at work, in the community, and within society at large.

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LEGAL RESOURCES CENTRE

The Legal Resources Centre was established in 1979 with the primary aim of using the law as an instrument of justice for South Africa's marginalised and under-resourced populations. The LRC aspires towards a fully democratic, equal society. The LRC seeks to promote justice using the Constitution, build respect for the rule of law, and contribute to socio-economic transformation within South Africa and beyond.

info@lrc.org.za

As we noted earlier, should you need any legal advice or assistance, as an organisation or individual, regarding the provisions of the Global Gag Rule, please feel free to contact either WLC or LRC for assistance.

LIST OF SOURCES

Should you wish to read up further on the Global Gag Rule, its operation and effects, the list of resources below will assist in providing you with more information on this topic.

01 AmfAR, The Foundation for AIDS Research, '*The expanded Mexico City Policy: Implications for the Global Fund*' Issue Brief (November 2019)

02 Center for Health and Gender Equity '*Prescribing chaos in global health: The Global Gag Rule from 1984-2018*' (June, 2018)

03 KFF 'The Mexico City Policy: An explainer' (29 June 2020), available at: *https://www.kff.org/global-health-policy/fact-sheet/mexico-city-policy-explainer/*

04 Schaaf M, Maistrellis E, Thomas H, et al. "*Protecting Life in Global Health Assistance'? Towards a framework for assessing the health systems impact of the expanded Global Gag Rule*" BMJ Global Health 2019

05 USAID '*Standard provisions for non-US Nongovernmental Organizations*', USAID editor, May 2017, available at: https*://www.usaid.gov/sites/default/files/documents/1868/303mab.pdf*

06 International Women's Health Coalition, '*Reality Check: Year one impact of Trump's Global Gag Rule*' (2018)

07 International Women's Health Coalition, '*Crisis in care: Year two impact of Trump's Global Gag Rule*' (2019)

08 Critical Studies in Sexualities and Reproduction, Rhodes University '*Assessing the impact of the expanded Global Gag Rule in South Africa*' (2019)

09 Planned Parenthood '*Assessing the Global Gag Rule: Harms to health, communities and advocacy*' (2019)