

# Agenda

**Empowering women for gender equity**

15<sup>th</sup> July 2013

**For attention: The Honourable Minister Lulama Xingwana**

Ministry of Women, Children and Persons with Disabilities  
39 Hamilton Road  
Arcadia  
PRETORIA  
0001

**Re : OPEN LETTER ON THE WOMEN EMPOWERMENT AND GENDER  
EQUALITY BILL**

Dear Minister Xingwana

Agenda is a Feminist Media Project based in Durban and is in its 26<sup>th</sup> year. Agenda publishes a quarterly journal, produces community radio documentaries and programme. We also hold feminist forums which bring women together to share information and raise awareness on issues which are of common concern.

At Agenda's 4<sup>th</sup> Feminist Dialogue held on 12<sup>th</sup> April 2013 in Durban, which focused on gender, law and policy, the Women Empowerment and Gender Equality Bill was discussed. A decision was taken by organisations and gender activists present at the Dialogue, to register concerns about the Bill in an Open Letter to the Minister.

Please find attached the Open Letter which also indicates the Organisations and individuals who supports the contents of the Open Letter.

Please note this Open Letter is submitted by the Agenda Management Board Members and the Agenda Editorial Advisory Board.

Kindly acknowledge that the Open Letter has been received.

Thank you

Yours sincerely

*A. Moodley*

**Ashlatha Moodley**

obo Agenda Management Board and Agenda Editorial Advisory Board

**Cc: Mfanobelwe Shoji**  
**Chairperson of the Commission for Gender Equality**

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**Board Members: Janine L Hicks (Chair), Prof. Devina Perumal, Dr. Tanja E Bosch, Lee Stone,**  
**Asha Moodley (EAC), Prof. Relebohile Moletsane (EAC)**

# AGenda

**Empowering women for gender equity**

## **OPEN LETTER TO THE MINISTER FOR WOMEN, CHILDREN AND PERSONS WITH DISABILITIES ON THE WOMEN EMPOWERMENT AND GENDER EQUALITY BILL**

Following a decision taken by organisations and gender activists at Agenda's 4<sup>th</sup> Feminist Dialogue held on 12<sup>th</sup> April 2013 in Durban, where Gender Law and Policy were discussed, including the Women Empowerment and Gender Equality Bill, it was agreed to register the concerns relating to the Bill that were raised during open discussion, in an Open Letter to the Minister.

We welcome the Women Empowerment and Gender Equality Bill Draft Bill (hereafter 'the Bill') of 29 August 2012. We recognise that it is intended to ensure the equal participation of women in social, political and economic structures of society, by providing for women's empowerment and gender mainstreaming in the public and private sectors and civil society, and eliminating detrimental cultural, economic, social and traditional practices against women.

While our objections to the Bill invariably involve the redrafting of the WEGE Bill, given the body of legislation that already exists, we call on the Minister to undertake a gender analysis of that existing legislation and the systemic gaps in the implementation and enforcement of same before embarking on redrafting the WEGE Bill. Our call for the reconsideration of the Bill is premised on the following concerns:

1. The Bill does not recognise the multi-levels of discrimination based on race, class, gender identity and sexual orientation that women face, and how these intersect to create embedded disadvantage for women and for persons who express and self identify as woman. The rights of Lesbian Gay Bisexual Transgender and Intersex (LGBTI) persons, widows and disabled women are ignored, even though they are mentioned in the preamble and the Green Paper that preceded the Bill.
2. The Bill's good intentions will be defeated through the vague, overbroad and punitive formulation of provisions imposing obligations on 'entities' (affected

bodies) to take measures to empower women, including integrating 'gender' in all strategies, policies, programmes and budgets, as well as to ensure their economic empowerment and representation.

3. Whilst the sentiments underlying these obligations are based on a wish to rectify the impact of patriarchy, colonialism, Apartheid, sexism and gender discrimination on women, the measures to enforce these obligations are punitive in nature, empowering the Minister to penalise offenders of gender equality objectives as set out in the Bill. Clauses 7.5-8 and 13(3)-(4) and other legislation listed in the Schedule attached to the Bill provide the Minister with a virtually unfettered and sole discretion to enforce compliance with it. For example, clause 7(5) stipulates that wilful and unlawful failure to obey a compliance notice issued in terms of clause 7(1) or (2) creates an offence. The penalisation of this non-compliance is provided in clause 7(6) which provides that an entity that contravenes subsection (5) is liable upon conviction to a fine or, in default of payment, to imprisonment for a period not exceeding ten years. In imposing a sentence, the relevant court must consider as an aggravating factor, the fact that the offender deliberately disregarded subsection 2. Potentially, CEOs of companies, directors or heads of civil society organisations and public entities (organs of state) could be criminally liable for non-compliance with a reporting requirement and could in fact serve time in prison. This provision (clause 7(8)) requires vicarious liability, which is unlikely to find support within any quarters, particularly considering that contempt of court procedures are not enforced in civil cases against state departments. Disparate consequences for non-compliance may result where one entity may be subject to criminal sanctions whilst another will simply be part of parliamentary proceedings.
4. The proliferation of laws, like this Bill and including the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) Act 4 of 2000, does little to assist the promotion of gender equality without appropriate measures for implementing its enforcement mechanisms. Commentators have questioned whether sufficient state capacity exists to monitor compliance with equality plans and progress reports in PEPUDA. Similarly, it is not clear how the Minister will have capacity to monitor compliance in the WEGE Bill, considering her current constraints with human and financial resources.
5. We reiterate the concerns raised by the Gender, Health & Justice Research Unit, University of Cape Town (GHJRU) in a submission on the Bill to the Ministry that the vagueness of the scope, ambit and powers of the Ministry inhibit meaningful implementation of the provisions. The list of entities the Minister will have to monitor is too large which may result in uneven enforcement of the Bill's provisions. There is no complaints mechanism for non-compliance, nor does it provide guidance on how the Minister will

measure compliance, or how the Minister can evaluate whether an entity is compliant with the provisions of the Bill.

6. Worryingly, the role of the Ministry as set out in the Bill, duplicates that of other existing mechanisms such as the Commission for Gender Equality (CGE). This is problematic as it blurs the lines of accountability and oversight responsibility and also amounts to an egregious waste of financial resources that could be used elsewhere to improve substantive equality for women and girls in communities across South Africa.
7. Clause 12 provides that the Minister can avail any dispute resolution mechanisms, parliamentary procedures or court to address gender discrimination and non-compliance with the Bill when acting in the interests of women. It is not clear which court would be utilised by the Minister for the state to sue the individual *in nomino officio capacity qua company*, NPO or organ of state. Moreover, the procedures and jurisdiction of the relevant courts, being the maintenance court, divorce court, CCMA, Consumer Protection Commission, National Credit Regulator, Labour Court, Domestic Violence Courts (family courts), High Courts and so on, differ substantially, thus causing confusion and further inhibiting compliance. The role of traditional courts is not clear and its absence from the Bill is glaring considering recent debates regarding the impact of the Traditional Courts Bill on women's equality. Further, with regard to the remedies proposed, in terms of PEPUDA, the remedies that the Equality Court can impose do not extend to criminalisation and jail time and these are the main mechanisms to advance equality that is anticipated in the Bill. Criminal offences and sanctions cannot be created without a valid, explicit basis for unlawfulness. Criminal sanctions are not suited to all instances and it is not clear how it will assist in engendering gender mainstreaming in the long run. Ultimately, these sanctions are not likely to pass constitutional muster.
8. The list of "applicable legislation" in the Schedule is overbroad and provides an extensive mandate to the Minister. Instead, the Minister should look at reforms to those existing laws, without flagging all the legislation in the Schedule as applicable to gender mainstreaming, gender equality and women empowerment issues. This creates legal uncertainty as to the mandate of the relevant Chapter 9 institutions, such as the CGE, SAHRC and other bodies, including COGTA, Commission for the Promotion and Protection of Cultural, Religious and Linguistic Communities and the various oversight and enforcement bodies, tribunals and courts that deal with issues as diverse as divorce, consumer protection and unemployment insurance.
9. We reiterate the Gender Unit's submission to the Minister that the systemic gaps in existing laws, in particular on termination of pregnancy, equality, labour, domestic violence, sexual offences, maintenance and customary

marriages are mostly due to problems with implementation, not a lack of a progressive framework of legislation. Instead, we agree with the Unit that the Minister should focus on providing active support measures to support these departments and institutions in addressing the gaps (i.e. resource constraints, inaccessible complaints mechanisms and lack of training) instead of needlessly duplicating efforts.

10. The provisions regarding adverse practices are vague and overbroad. It is an offence, where a person willfully and unlawfully participates in or perpetuates a practice of male or female dominance over women which infringes or is likely to infringe the fundamental rights of women, or have a substantial adverse effect on their well-being. This offence can result in an individual or entity being liable to a fine or imprisonment of 5 years. The possibility to effect change in harmful (or adverse) practices should be embraced with precision, clearly worded provisions that tackle specific practices or a narrow definition of adverse practices that is more likely to find application, implementation and enforcement than the current draft's provisions. It is presumed that the kind of practices that are envisaged to fall under this provision may include *ukuthwala intombi* or other harmful practices such as widow cleansing. There has been much debate as to the lack of enforcement of criminal sanctions, mostly in terms of the Sexual Offences Act, against perpetrators of child bride kidnapping and rape and those concerns are not addressed. The Children's Act also provides for harmful practices as does PEPUDA. It is therefore not clear how these overbroad provisions will lead to effective implementation.
11. The Bill's measures to empower women through equal representation and participation are surprisingly toothless considering the sledgehammer approach of the Bill to enforcement on adverse practices and disobeying a compliance notice. The provision dealing with quotas, although mandatory, does not provide for an offence for non-compliance with the quotas. The equal participation and representation clause is based on a 'progressive realisation' standard, with no end-date specified. The standard of 'progressive realisation' as in socio-economic rights is nebulous.
12. What underlies most of the challenges with the Bill is the lack of a gendered analysis being undertaken by the Minister on existing legislation and gaps within those statutes and enforcing agencies or departments. Had the Minister undertaken such an analysis before drafting the Bill, the monitoring role would be clearer, may lead to consistency in application, and of course result in effective measures being implemented that can be monitored and evaluated to ensure compliance on a larger scale.

In the face of the walls of indifference expressed in the structural and systemic barriers that affect the implementation of all gender laws and gender justice for women, the WEGE Bill appears to be another brick in the wall which, far from

addressing structural gaps in existing legislation, enacts broad, vague and highly discretionary penalising provisions that render the Minister susceptible to having unmitigated power, which is open to abuse.

Participants at the Feminist Dialogue noting the significant shortcomings in the WEGE Bill, and in the context of scarce resources and gaps in the implementation of existing gender equality legislation, believe that the proposed WEGE Bill would do little to advance gender equality and would contribute toward the proliferation of ineffective laws. We call on the Minister to withdraw the Bill in its present form and undertake the gender gap analysis proposed, whereafter the Minister should re-draft the Bill to address the shortcomings highlighted in our letter and in other submissions put to her.

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