

# **Submission**

to

## **The Parliamentary Portfolio Committee on Women, Children and People with Disabilities (National Assembly)**

on

## **the Commission on Gender Equality Bill [B36-2012]**

**22 March 2013**

**Submitted by:** AIDS Legal Network, Childline South Africa, Domestic Service and Allied Workers Union, Democratic Rights and Governance Unit (UCT), The Federation of Unions of South Africa, Gender, Health and Justice Research Unit (UCT), Her Rights Initiative, Intersex Society South Africa, Legal Resources Centre, MOSAIC Training Service and Healing Centre for Women, New Women's Movement, People Opposing Women Abuse, Rape Crisis Cape Town, Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN), South African Faith and Family Institute (SAFFI), Sonke Gender Justice Network, Sex Workers Education and Advocacy Taskteam (SWEAT), Tshwaranang Legal Advocacy Centre, Triangle Project, Women's Hope Education and Training Trust (WHEAT Trust) and the Women's Legal Centre.

**Contacts:**

**Cherith Sanger**  
**Sonke Gender Justice Network**  
Tel: 021 423 7088  
Fax: 021 424 5206  
Email: [cherith@genderjustice.org.za](mailto:cherith@genderjustice.org.za)

**Jennifer Williams**  
**Women's Legal Centre**  
Tel: 021 424 5660  
Fax: 021 424 5645  
E-mail: [jennifer@wlce.co.za](mailto:jennifer@wlce.co.za)

## 1 Introduction

The organisations making these submissions welcome the opportunity to provide submissions to the Portfolio Committee on Women, Children and People with Disabilities ('the Portfolio Committee') on the Commission for Gender Equality Amendment Bill: B36-2012 ('the Bill').

This submission is submitted by a collective of organisations (hereinafter referred to as 'the organisations' or 'we') working towards the advancement and enforcement of women's human rights through the provision of direct services, public education, capacity building, law and policy reform, and various forms of advocacy. A full list of the organisations is provided on the covering page of this submission<sup>1</sup>.

All of the organisations have an interest in a Commission for Gender Equality ('CGE') that is proactive, effective and successful and that has the necessary independence and authority to optimally fulfil its mandate to advance gender equality in South Africa - more particularly, women's human rights and well-being.

The organisations support those objectives of the Bill that are technical in nature and that seek to bring the Commission for Gender Equality Act of 1996 ('CGEA') in line with the Constitution Act of 1996 ('the Constitution'). We recognise that the CGEA was enacted while the interim Constitution of 1993 was in operation and prior to the coming into operation of the final Constitution, the result of which was that the CGEA necessarily makes reference to the repealed interim Constitution. In this submission, we make recommendations to further enhance the effectiveness of the CGE and strengthen its independence in accordance with the constitutional imperatives of Chapter 9 institutions.

In this submission, we raise concerns about specific proposed amendments which may undermine the independence of the CGE and motivate for further amendments to the CGEA.

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<sup>1</sup> The organisations making submission listed on the cover page above are members of the CGE Monitor working group, lead by the Women's Legal Centre and Sonke Gender Justice Network, which was constituted in March 2012. The overall object of the CGE Monitor working group is to promote the effective functioning of the CGE so that it can fulfil its mandate as set out in the Constitution Act of 1996 and the Commission for Gender Equality Act of 1996.

This submission is structured as follows:

- 1 Comments and recommendations on the preamble;
- 2 Comments and recommendations on various provisions of the Bill;
- 3 General comments on the Bill; and
- 4 Conclusion.

## **2 Comments and recommendations on the Bill**

### **2.1 Preamble**

The organisations recommend that the Bill amend the Preamble of the CGEA to explicitly provide that the CGE, in exercising its duties, upholds and promotes the founding values of the Constitution and that it practices a democratic system of institutional governance that is open, transparent, responsive and accountable to the citizens of South Africa. Such an amendment to the CGEA can further South Africa's constitutional democracy and ensure that the CGE promotes the interests of South African society, more specifically women and other marginalised groups who remain susceptible to unfair gender discrimination.

### **2.2 Specific Provisions of the Bill**

Section 2(c) of the Bill:

We raise concern to the proposed change in the definition of 'Minister' from the Minister of Justice and Constitutional Development to the Minister of Women, Children and People with Disabilities ('MWCPD').

Independence and impartiality are key characteristics of an effective and successful oversight body established in terms of the Constitution. The CGE's independence, vested in it in terms of Section 181(2) of the Constitution<sup>2</sup> and Section 10 of the CGEA<sup>3</sup>, will be compromised if it is required to both monitor government departments whilst also having to account to the same department, even if it is only in relation to its budget and expenditure. Our concern has particular applicability to the Ministry of Women, Children and People with Disabilities ('the Ministry') on the basis that it is the government department tasked with advancing gender equality and women's rights, a mandate that the CGE has

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<sup>2</sup> Section 181(2) of the Constitution states that the CGE as a state institution supporting constitutional democracy is '...independent, and subject only to the Constitution and the law, and ... must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.'

<sup>3</sup> Section 10(1)(a) of the CGEA states that 'the Commission shall be independent'. Section 10(1)(b) further states that 'A member of the Commission as well as a member of staff of the Commission shall perform his or her functions in good faith and without fear, favour, bias or prejudice.'

a particular vested interest in. The proposed amendment would effectively subjugate the CGE to the Ministry and compromise its role to independently oversee and monitor the work of the Ministry. Further, it is vitally important that any appearance of conflict be avoided in the eyes of the public, and that the CGE be seen to be independent.

Ultimately, in the furtherance of the independence and impartiality of the CGE, the CGE should not in be under the direction of any Minister but Parliament exclusively.

We have interpreted Section 2(c) of the Bill to not seek to amend or impact on Section 12 of the CGEA which entails that the CGE will continue to be required to report to the President and Parliament. Should our interpretation be incorrect, we would recommend that the CGE continue to report to Parliament directly. This ensures the CGE's independence from the government departments that it tasked to monitor.

### Section 3 of the Bill

We raise issue with the proposed amendments in subsections 3(b)(a) and (d) of the Bill which would not allow for the public to nominate appropriate candidates to take up positions as members of the CGE and would vest the committee of the National Assembly and Minister with sole power to appoint CGE members. Such an amendment would undermine public participation, which is essential to a functioning constitutional democracy. The public has a direct interest in contributing to the nomination process and in having the democratic opportunity to influence the appointments made by the Minister by motivating for the appointment of strong and appropriate candidates who possess the requisite experience and historical track record, amongst other criteria, to perform the crucial role of CGE member.

## **2.3 General Comments on the Bill**

### **2.3.1 Discretionary powers and obligations**

Section 11 of the CGEA provides that the CGE 'shall investigate any gender-related issues of its own accord or on receipt of a complaint, and shall endeavour to

- I. Resolve any dispute; or
- II. Rectify any act or omission, by mediation, conciliation or negotiation:...' (emphasis added)

We recommend that the Bill amend Section 11 of the CGEA to enhance the powers of the CGE and to place a greater obligation on the institution to take up matters that are relevant to the fulfilment

of its mandate, by replacing the word 'shall' with 'must' and by replacing 'of its own accord' with 'at its discretion and that is necessary to fulfil its objectives'. These proposed amendments would enhance the CGE's powers and obligations, and, as such, would serve to better equip the institution to tackle current and pressing gender related matters that may arise.

### 2.3.2 The CGE's functionality and fulfilment of its mandate

In this section of the submission, we recommend that the CGE's functioning and performance against its mandate be reviewed on an annual basis in order to address concerns highlighted through a 2006 review and current concerns raised by the organisations making this submission.

In 2007, a report was issued by a parliamentary *ad hoc* committee ("the committee"), lead by the late Professor Kader Asmal. The report was the result of a review and assessment of the extent to which Chapter 9 and associated institutions were adequately fulfilling their mandates (between 1996 and 2006). The report sought to assist the institutions in improving their efficacy<sup>4</sup>. In its report, the committee asserted that: "it strongly believes that the [CGE] represents a lost opportunity as until now [as at 2007] it has failed to engage, in a sustained and effective manner, with the policies, approaches and mechanisms to eliminate all forms of gender discrimination and to promote gender issues in South Africa"<sup>5</sup>. The committee goes on to explain several ways in which the CGE has failed to fulfil its mandate from pages 150 to 162 of the report and sets out accompanying recommendations from pages 162 to 164 of the report.

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<sup>4</sup> Professor Kader Asmal, *Remarks by Professor Kader Asmal, M.P. Chairperson of the ad hoc Committee at the Launch of the Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions*, Page 1, 3 (2007) <http://www.pmg.org.za/node/14143> ; Parliament of the Republic of South Africa, *Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions*, A report to the National Assembly of the Parliament of South Africa, Cape Town, South Africa, Chapter 11, Page 150 (2007), <http://www.sahrc.org.za/home/21/files/Reports/Report%20of%20the%20Ad%20Hoc%20Committee%20of%20Chapter%209.%202007.pdf> .

<sup>5</sup> Parliament of the Republic of South Africa, *Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions*, A report to the National Assembly of the Parliament of South Africa, Cape Town, South Africa, Chapter 11, Page 150 (2007), <http://www.sahrc.org.za/home/21/files/Reports/Report%20of%20the%20Ad%20Hoc%20Committee%20of%20Chapter%209.%202007.pdf>

Despite that the report was handed down as far back as 2007, the organisations making this submission have since and continue to be concerned about the lack of the CGE's delivery on its crucial and pressing mandate, which, if fulfilled, can contribute significantly towards the attainment of gender equality and the advancement of women's human rights and well-being.

In the circumstances, it is recommended that the Bill put in place measures for the annual review of the efficacy of the CGE by a committee similar to the committee on Chapter 9 and associated institutions and that such a committee follow-up on the findings and recommendations of the 2007 report to assess whether any progress has been made to address its findings. It must be noted that the organisation making this submission are in full support of the existence of the CGE as a separate human rights institution and that it accordingly does not support the long-term recommendation in the report for the CGE to become part of one larger human rights institution along with other institutions such as the South African Human Rights Commission.

In addition, it is recommended that the committee be vested with the powers to make recommendations on how the CGE should address issues related to its functioning and performance against its mandate, amongst other relevant issues, based on the findings of the committee and that the committee is entitled to follow-up on progress made bi-annually. The costs of the set up and operation of the committee should be integrated in the CGE's annual budget. It is important to note that we see the proposed committee as serving a separate purpose and addressing different issues to the *ad hoc* Committee on the Commission for Gender Equality Forensic Investigation.

### 2.3.3 Financing and independence

The organisations making this submission acknowledge that government departments are required to facilitate the transfer of budgets to Chapter 9 institutions and that the respective government departments do not have the power to determine how a Chapter 9 institution makes budget allocations or spends its budget. Nonetheless, in an effort to strengthen its independence and to mitigate the perceived lack of authority of the CGE, it is recommended that the Portfolio Committee consider an amendment to the CGEA that provides an alternative financial mechanism such that this

Chapter 9 institution receives finances directly from Treasury. Such an amendment seems more appropriate and fitting for an oversight body such as the CGE, established in terms of the supreme law of South Africa and currently required to monitor the very government department that facilitates the transfer of its budgets from Treasury.

### 3 Conclusion

In conclusion, the organisations support the amendment of the CGEA to bring in line with the Constitution but raise concern with the Bill insofar as it may compromise the independence of the CGE as a constitutional and oversight body in relation to the Bill seeking to require the CGE to be directed by the MWCPD or any Minister. In this regard, we recommend that the Office of the Presidency direct the CGE. Furthermore, in an effort to strengthen the CGE's independence we recommend that steps be taken to allow the CGE to receive its budget directly from Treasury opposed to receiving in through a government department.

We also raise concern with the amendment proposed by the Bill which will disallow public nominations for candidate members of the CGE on the basis that it will compromise South Africa's democratic system of governance. Moreover, in the interest of an optimally functioning CGE that fulfils its mandate and advances gender equality, we recommend that a committee similar to the ad hoc committee on Chapter 9 and associated institutions be set up to address performance and functionality issues of the CGE.

Finally, we recommend that the CGE's discretionary powers to take on matters relevant to their mandate is clarified and that the Bill amends the CGEA to create an obligation for the CGE to exercise its discretion.

These recommendations are based solely on the need for the CGE to exercise optimal independence so that it can effectively deliver on its oversight role as mandated by the Constitution and for the CGE to fulfil its mandate in the interest of advancing gender equality and women's rights and well-being.

**Finally, we requests that it be given the opportunity to make oral submissions at the public hearings scheduled for 17 April 2012.**