

**SUBMISSION TO THE MINISTRY OF WOMEN, CHILDREN AND
PEOPLE WITH DISABILITIES**

on

THE WOMEN EMPOWERMENT AND GENDER EQUALITY BILL

SUBMITTED BY:

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1. INTRODUCTION

We would like to commend the Department of Women, Children and People with Disabilities for their efforts towards establishing a legislative framework that attempts to reinforce and promote the Constitutional right to equality. At the heart of this Bill is the promotion of equality through measures that focus on addressing unfair discrimination against women. The Bill is an important and welcomed acknowledgment that gender inequality in South Africa is a pervasive issue and requires a dedicated legal framework to address it.

In this submission we will comment on the proposed Bill, the emphasis of which will lie with the objectives of the Bill. We will also draw the Ministry's attention to a number of challenges that it may face if the Bill is promulgated in its current form, particularly in relation to how "gender" is defined and how the Bill is governed.

The submission contains commentary on the following:

- The Preamble
- Definitions ("Defining Gender")
- Reinforcing Existing Laws, Policies and Mechanisms
- Structural Inequality of the Empowerment of Women
- Gender Mainstreaming
- Governance

While there appears to have been little consultation with civil society organisations (and other relevant stakeholders) in drafting of the Bill, we hope our submission encourages constructive dialogue with the Ministry in the development of this promising legislation. We hope that your request for comments on the Bill is indicative of your commitment to an ongoing and substantive engagement with organisations that share your objectives in ensuring that the new “gender empowerment and gender equality” law is relevant, practicable and constitutionally sound.

ABOUT THE GENDER, HEALTH AND JUSTICE RESEARCH UNIT

The Gender, Health & Justice Research Unit (the GHJRU/The Unit) is a multi-disciplinary research unit within the Faculty of Health Sciences at the University of Cape Town. The Unit undertakes progressive research, education and advocacy in the areas of criminal justice, women’s rights, and public health and has a proven history of policy-focused empirical research on gender, health and criminal justice, specialising in issues relating to violence against women. The Unit uses methods from various academic fields (including law, the social sciences and public health) to monitor and contribute to policies and laws, and to advocate for social justice. The Unit has a well-established history of providing technical assistance to a wide range of government departments, non-governmental organisations and community-based organisations. We use our empirical research to develop well-informed, evidence-based advocacy positions to support legal and policy reform in South Africa and similarly situated countries.

The University of Cape Town awarded the Unit a Social Responsiveness Award in 2009. These awards recognise academics who demonstrate that social engagement has enhanced the teaching and learning process.

2. THE PREAMBLE

The Preamble of a Bill does more than simply setting ‘the context’ of a Bill. It should set out the purpose and objectives of the Bill, in addition to reinforcing Constitutional rights and freedoms and practices that inhibit the realisation of these. The Women’s Empowerment and Gender Equality Bill (herein referred to as the WEGE) reflects on a wide range of inequalities and discriminatory practices, including those:

- on the basis of “race, class and sex” (the latter, which we presume was meant to mean, or meant to include, “gender”, which is in fact distinct from sex) (p. 2);
- as a result of certain “cultural, patriarchal, traditional and customary practices” (p. 2);
- on the basis of sexuality, sexual orientation or gender identity (p. 3);
- as a result of structural inequality (including social, institutional and systemic inequalities) (p.3);
- which manifest in violence against women (p.3); and
- that undermine the notion that women should be treated equally, protected equality and treated with dignity regardless of “age, sexual identity, expressions or orientations” (and presumably “race”) (p. 3).

It also reinforces rights contained in the Constitution and other international instruments ratified by South Africa as well as the *South African National Policy Framework for Women’s Empowerment and Gender Equality* (2000). Gender mainstreaming seems to be particularly vital in addressing the “deeply rooted norms and attitudes that undermine gender inequality” (p. 4).

(a) What the Preamble Implies

If the Preamble is meant not only to set the context for the Bill, but to instrumentally draw on this context to define the objectives of the Bill, the Bill has set itself up to be extremely wide in its purpose and ambit. It gives emphasis to the range of cultural, attitudinal and systemic inequalities as the basis for inequality and discrimination, but the Bill does little to constructively remedy and redress these structural conditions. It instead puts a heavy emphasis on sanctioning national public entities, non-profit organisations and private bodies (or institutions) for not complying with the Bill.

There are also curious inconsistencies in relation to the proposed ambit of Bill. Ambiguities surrounding the ambit begin, in fact, with the title of the WEGE Bill. For instance, it is entitled the “Women Empowerment and Gender Equality Bill”. This indicates that its focus is on the empowerment of just *women*, but the equality of *all groups* (genders) affected by pernicious gender norms.

We therefore recommend that:

The Bill takes a very clear position within the Preamble – or within the Definitions section – that distinguishes *women’s empowerment* from *gender equality*. As the title is currently formulated, the former can only apply to women and latter can apply to all genders. In absence of this, the title of the Bill should either:

- (a) replace “gender” with “women” so that the focus of the Bill is on *women’s empowerment and women’s equality*; or**
- (b) replace “women” with “gender” so that the focus of the Bill is “*gender empowerment and gender equality*”**

It is only in the Preamble that women's empowerment is considered to be just one facet of gender equality, with children, and sexual and gender minorities also considered particularly vulnerable populations affected by rigid gender norms. The remaining references to gender inequality in the Bill revert specifically to women’s empowerment. However, the Preamble also includes statements such as “*RECOGNISING that all female persons are women ...*” (p. 3) but fails to make reference to girls or to include gender minority groups, such as transgendered men. This highlights the ambiguous intentions and mandate of the Bill.

If the intention of the BILL is to address gender inequality in its broadest sense, then it must take into consideration that sexual minorities (including men) often bear the brunt of gender-based discrimination and violence. Given this uncertainty about the purpose of the Bill, our submission makes recommendations that are underpinned by this broader framing of gender inequality.

However, if the intention of the Bill is to address gender inequality in a narrower way (focusing specifically on women), this could easily be justified by evidence that supports the fact that women and girl children are disproportionately affected by gender-based violence and discrimination.

3. DEFINING GENDER

The WEGE Bill's attempt at a holistic approach to gender – which includes girl's rights, and the rights of sexual and gender minorities – is a vital and promising starting point. In contemplating what the true objectives of the Bill were, we examined how the term “gender” was defined throughout. With this, we found several inconsistent, sometimes partial and frequently shifting notions of gender within both the Preamble and the Definitions section.

Our comments on the definition and use of “gender” and “women” exemplifies our submission above that it is critical that the Bill is deliberate about what specific protections and rights are being advanced and promoted specifically for *women* and what is being promoted for vulnerable or marginalised groups. We present examples of these contradictions below.

(a) Vulnerable “Women”

Women, women with disabilities and girls are distinctly vulnerable groups that require specific and focused equality enhancing measures. We are concerned that such measures may be overlooked if these distinct groups are subsumed within one broader definition of “women” as currently articulated in the Bill.

For that reason, we recommend that:

Women, women with disabilities and girls are specifically mentioned within the Preamble at Paragraph 2, which sets out to recognise other factors that increase their vulnerability.

We have offered the following alternative wording for Paragraph 2 of the Preamble. We respectfully suggest that all sections that currently refer to “women” should be amended to also specifically refer to “girls” and/or sexual and gender minorities as appropriate.

We offer the following alternative definition of “women” at Section 1 of the Bill:

“Women” refers to all female bodied or female identified persons, including girls, women with disabilities, women in same sex relationships, and transgendered persons.

(b) Aligning with Global Definitions

Further, whilst the definitions included in the WEGE Bill are intended to identify the multiple and intersecting sites of gender-based discrimination, several definitions are imprecise, or contradictory, and the subsequent use of these definitions within the text are, therefore, sometimes confusing. For example, the definition of “gender” does not conform to the internationally recognised principle that a person’s gender and sex are distinct (WHO, 2012; UNESCO, 2003). Therefore, we respectfully suggest that the use of the term “gender” within the Bill does not to make reference to biological sex. As an alternative, we forward the following definition of “gender”, based on those propounded by the United Nations Educational, Scientific and Cultural Organisation (UNESCO, 2003) and the World Health Organisation (2012):

“gender” refers to the socially constructed characteristics, roles, behaviours and activities that a specific society considers appropriate for men and women

(c) “Intersectionality”

We commend the recognition shown in the Bill for the diverse factors that contribute to a person’s disadvantage on the basis of their gender. We would like to point out, however, that the intersections of these vulnerabilities, such as race, disability, sex and age are not consistently recognised throughout the sections of the Bill.

For example, we note that the definition of “women” in the Bill “includes girls, women and girls with disabilities” (p. 9), but in paragraph seven of the Preamble, race and disability are not specifically acknowledged as factors that render them more vulnerable. For this reason we would recommend the following alternative wording of paragraph 2 of the Preamble:

RECOGNISING that historically distinctions, exclusions or restrictions made on the basis of race *and/or* class *and/or* sex *and/or* age *and/or* sexual orientation *and/or* disability have had the effect to impair or nullify the recognition, enjoyment and

exercise by women of their human rights and fundamental freedoms in the political, economic, social, cultural or any other field of their lives...

(d) (Over)Emphasis on Workplace Inequality

Finally, we commend that the Bill endeavours to recognise the multiple social factors that contribute to gender inequality. However, while the Preamble (at paragraph 3) and Section 2(b) recognise that gender inequality is not confined to the workplace, the Bill subsequently only addresses inequality in the workplace. Furthermore, the duties of the Ministry outlined in the Bill do not provide a strategy for tackling the deep rooted social norms, values and behaviours (manifested in religious views, cultural practices, and language amongst others) that inform gender inequality, as identified in the Preamble and Section 2(b). Rather these duties only address organisational practices, and *gender equity* (for example through gender quotas).

4. SPECIFIC RECOMMENDATIONS TO THE PREAMBLE AND DEFINITIONS

Introductory paragraph:

In the introductory paragraph to the Bill we would suggest rewording the sentence relating to practices with adverse effects for gender equality as follows:

BILL

*To establish a legislative framework ... to provide for an offence of practices **which have adverse effects for women, girls, sexual and gender minorities;** ...*

PREAMBLE

Paragraph 1:

As suggested above, we recommend including a specific reference to girls within the text. Suggested alternative:

*RECOGNISING South Africa's constitutional and international commitments in the field of human rights to promote gender equality and prohibit unfair discrimination against women **and girls.***

Paragraph 2:

As suggested above, paragraph 2 should read:

RECOGNISING that historically, distinctions, exclusions or restrictions made on the basis of race **and/or** class **and/or** sex **and/or** age **and/or** sexual orientation **and/or** disability, have had the effect to impair or nullify the recognition, enjoyment and exercise by women **and girls** of their human rights and fundamental freedoms in the political, economic, social, cultural or any other field of their lives;

Paragraph 3:

The following suggested alternative wording for paragraph 3 includes specific reference to sexual and gender minorities and removes the reference to biological sex:

RECOGNISING that certain ***patriarchal practices, including cultural, traditional, customary, and religious practices,*** may impair the dignity of women, ***girls, sexual and gender minorities and contribute to gender inequality.***

Re-ordering of Paragraphs:

In light of the serious and urgent issues raised in the current paragraph 9 we suggest it is moved to earlier in the PREAMBLE to form paragraph 4 (before the existing paragraph 4 on lesbian, gay, bisexual, transgender and intersexual persons, and after paragraph three on ‘cultural, patriarchal, traditional, customary and religious practices’). In consideration of our concerns raised above about the confusing use of terms “gender” and “sex”, which in the current wording of the paragraph results in a circular argument, we suggest the following alternative:

CONCERNED that violence against women is a serious and widespread problem that restricts women’s ability to take advantage of opportunities and thereby reinforces cycles of gender inequality

Current Paragraph 4:

In light of the seriousness of the issues raised in this paragraph we suggest using “Concerned” rather than “Recognising” at the beginning and the following alternative wording:

***CONCERNED** that despite a universal recognition and constitutional guarantee that lesbian, gay, bisexual, transgender and **intersex** persons are endowed with the same inalienable rights and **are** entitled to the same protections as all human beings, they face abuse and violations of their human rights including **discrimination and violence** because of their sexual orientation or gender identity.*

Current Paragraph 5:

In light of our introductory comments we suggest the following additions to paragraph 5:

*RECOGNISING that gender mainstreaming offers transformation that **involves deconstructing the binary** between women and men, **and their associated cultural, social and economic responsibilities**, **and** establishing a new and positive form which becomes the mainstream and in which both men and women, including boys and girls, **and sexual and gender minorities, are equally valued and active members of society.***

Current Paragraph 7:

As suggested above, paragraph 7 should read:

*RECOGNISING that **all women**, regardless of their age, **and/or** sexual orientation, **and/or** race **and/or any disability** are entitled to equal treatment, equal protection and the dignity that comes with being recognised members of our diverse society;*

Current Paragraph 9:

As suggested above, this paragraph should be moved to before the existing paragraph four, and reworded as above.

Current Paragraphs 10 and 11

Due to the use of imprecise definitions and concepts, the issues raised in paragraphs 10 and 11 are unclear in their current wording. We therefore suggest an alternative wording as follows:

ACKNOWLEDGING that the many causes of gender inequality are complex and are deeply rooted in society and may be exacerbated by various traditional values and/or ethics, and that gender equality within the workplace can only be truly realised when gender inequality in various fields in society is eradicated.

And

RECOGNISING that the many discriminatory social disadvantages facing girls, young women, sexual and gender minorities have a damaging and long-term effect of perpetuating gender inequality when such persons enter the labour force and continue careers within the workplace. And further, that those young people especially are disproportionately disadvantaged by the current volatility of the labour market, which negatively impacts their socio-economic status, resulting in further inequality.

Current Paragraph 12:

We would suggest removing the word “**intractable**” from this paragraph as it suggests the problems are beyond fixing. Rather, we suggest using the following wording:

ACKNOWLEDGING that the extensive policies and legislative framework in place for improving gender equality and empowerment of women, have so far failed to effectively tackle difficult problems of discrimination, inequalities and dire poverty.

Current Paragraph 14:

In light of our introductory comments we suggest the following alternative wording:

THEREFORE, measures to address the structural and underlying causes of subordination of, and discrimination against women, girls, sexual and gender minorities are essential in order to eliminate all forms of gender discrimination.

SCHEDULE 1
CHAPTER 1
GENERAL PROVISIONS

Definitions

- (a) As discussed above, we provide the following alternative to “gender”:

“gender” refers to the socially constructed characteristics, roles, behaviours and activities that a specific society considers appropriate for men and women.

- (b) Suggested alternative to “gender based violence”:

“gender based violence” means all acts perpetrated against women, girls, men and boys on the basis of their gender or sexual orientation which cause or could cause them physical, sexual, psychological, emotional or economic harm, and includes threats to do so

- (c) Suggested alternative to “gender equality”:

“gender equality” means the equal recognition, enjoyment and ability to exercise fundamental human rights and fundamental freedoms by a person, in the political, economic, social, cultural, civil or any other aspect of life, irrespective of their sex or gender.

- (d) We suggest employing the Council of Europe’s (1998) more comprehensive definition of “gender mainstreaming” (our own emphasis added):

“gender mainstreaming” is the (re)organisation, improvement, development and evaluation of policy processes, so that a gender equality perspective is incorporated in all policies at all levels and at all stages, by the actors normally involved in policy-making. The definition of gender mainstreaming highlights the goal of mainstreaming, the process, the objects and active subjects of mainstreaming. The objects of mainstreaming are all policies at all levels and at all stages, while the active subjects of mainstreaming are the ordinary actors. Gender mainstreaming can mean that the policy process is reorganised so that ordinary actors know how to incorporate a gender perspective. It can also mean that gender expertise is organised into the policy process by including gender expertise as a

normal requirement for policy-makers (p. 15).

(e) Suggested alternative to “special measures”:

*“special measures” includes, but is not limited to, measures, policies, programmes or steps designed to protect or advance women **and girls and sexual and gender minorities** who have been **or may be** disadvantaged by unfair discrimination and which actively seek to -:*

(a) eliminate gender discrimination;

*(b) empower women **and girls and sexual and gender minorities** ; and*

*(c) afford women **and girls and sexual and gender minorities** equal participation,*

*by ensuring and promoting equal opportunities, real choices and positive outcomes for women **and girls and sexual and gender minorities** in all sectors of life;*

(f) Suggested alternative to “women”:

“women” refers to all female bodied or female identified persons, including girls, women with disabilities, women in same sex relationships, and transgendered persons.

4. EXISTING LAWS, POLICIES AND MECHANISMS

As the Bill itself recognises, any law should operate in conjunction with other existing South African laws. However, the existing formulation of the WEGE does not engage with other relevant equality or gender rights legislation in any meaningful way, such as reinforcing the rights and remedies contained in existing laws, policies and mechanisms nor pointing to areas where the WEGE might address the limitations within them.

The Women’s Legal Centre, in a 2011 workshop report on the “Gender Equality Draft Bill”, described the original purpose of the Bill as it was articulated in the Ministry’s Green Paper:

The Green Paper identifies problems with implementation and enforceability of existing gender laws and policies, a lack of coordination among key stakeholders involved with

gender issues, and gaps in existing laws as factors contributing to the need for new legislation. According to section 18 of the Green Paper, “the overarching purpose [of the Bill] is to ensure equal treatment arising from the Constitution and to promote gender equality...” (p. 3).

The draft version of WEGE Bill deviates from the intended purpose as it was set out in the Green Paper. While the WEGE Bill vaguely attempts to create mechanisms to enforce existing legislation, it does little to address the deep (and evident) systemic issues that affect the implementation of existing ‘gender laws and policies’ and the mechanisms created to ensure their enforcement. In fact, instead of reinforcing existing laws, it creates another seemingly bureaucratic mechanism for monitoring compliance and punishing transgressors.

The WEGE Bill falls short of truly ‘enabling’ gender empowerment. Instead, the Bill reads punitively, favouring heavy-handed compliance measures over actual empowerment. The latter requires a legislative framework that defines, in precise terms, what is required to achieve empowerment and gender equality and what specific (enabling) measures will be taken to support, reinforce and monitor it.

(a) The Role of the WEGE Bill in Reinforcing Existing Laws and Policies

There are numerous domestic laws and policies promoting substantive gender equality and reinforcing women’s rights and freedoms, including laws relating to termination of pregnancy¹, equality², labour³, domestic violence⁴, sexual offences⁵, maintenance⁶ and customary marriages⁷, to name just a few. Yet, despite how progressive the substance of these laws and measures are on paper, implementation remains a serious challenge.

Research monitoring the implementation of many of these laws complain of systematic barriers, poor or partial implementation, lack of resources to adequately implement particular provisions, the flagrant disregard or lack of knowledge of the law by those required to implement it, inaccessible complaints mechanisms as well as unremitting complaints relating to lack of coordination, lack of

¹ The Choice on Termination of Pregnancy Act 92 of 1996.

² Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

³ Employment Equity Act 55 of 1998 (as well as sections of the Basic Conditions of Employment Act 75 of 1997 and the Labour Relations Act 66 of 1995).

⁴ Domestic Violence Act 116 of 1998.

⁵ Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

⁶ Maintenance Act 99 of 1998.

⁷ Recognition of Customary Marriages Act 120 of 1998.

information, lack of training and lack of resources. It is these “gaps” that the Ministry should consider focusing on through not only monitoring but through active measures to support departments and institutions in addressing them. Against the background of these structural and systemic barriers that affect *all* ‘gender’ laws and policies, it seems counter-intuitive to establish a Bill that does not directly deal with these challenges and that instead creates a framework that is likely to be hampered by these same failures. While the WEGE Bill to some extent ‘recognises’ these challenges in the Preamble, it does little to create mechanisms and processes to strengthen the implementation of existing laws and policies.

Section 8 of the WEGE refers:

8. (1) (a) *mainstreaming gender in all strategies, policies, programs, budgets, so as to empower and benefit women.*
(b) *enforcing gender equality legislation, policies and strategies within their mandate through*
- (i) *setting targets to improve compliance with such legislation, policies and strategies;*
 - (ii) *auditing factors that cause and contribute to non-compliance with such legislation, policies and strategies;*
 - (iii) *encouraging and rewarding compliance with such legislation, policies and strategies;*
 - (iv) *sanctioning non-compliance with such legislation, policies and strategies; and*
 - (v) *implementing appropriate corrective measures that may be needed to improve and achieve compliance with such legislation, policies and strategies,*

The potential of the Bill (and of course the Ministry) is in the recognition, knowledge and understanding of gender disparities and the obstacles to effective implementation of ‘gender laws and policies’. The Ministry also has the mandate, resources and the authority to intervene where systemic problems affect the rights of women and vulnerable groups.

It is therefore our recommendation that the WEGE Bill refers to its role in addressing the *specific* problems experienced in the implementation of *existing* legislation, policies and mechanisms. Below we provide a list of laws, policies and measures that support gender equality and call on the Ministry to include a provision within the WEGE Bill that will outline its role in *supporting, reinforcing and monitoring* the following:

(1) Our commitments to international treaties, *including* the South African government's duty to report to international bodies in relation to these treaties:

- a. *The Convention for the Elimination of All Forms of Discrimination against Women (CEDAW)*⁸
- b. *The Beijing Declaration and Platform of Action and the Africa Platform for Action* (adopted prior to the Beijing Conference)
- c. *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (The African Women's Protocol)*⁹
- d. *The Southern African Development Community Declaration on Gender and Development*; and
- e. *The Women's Charter for Effective Equality.*

⁸ It is important here to point out that South Africa's second, third and fourth Periodic Reports were due in 2001, 2005 and 2009, although were not submitted on time. These three outstanding reports were consolidated into the 2009 report. In a shadow report to the CEDAW Committee, it was noted that as well as being late, the report did not "fully address the challenges to women's enjoyment of fundamental rights and freedoms over a ten-year period, but rather provides a generalised overview of law, policy and jurisprudential developments" (CSV, et al., 2011, p. 9). The report also provides insufficient detail on the challenges faced by vulnerable groups (particularly lesbians, transgendered individuals, refugees, women seeking asylum, women with disabilities, indigenous women, and HIV positive women), and the statistics it employs – both describing the demographics of South African women, and illustrating the impact of the State's actions – are insufficiently disaggregated. Finally, the report fails to address and engage with the CEDAW Committee's Concluding Observations on South Africa's 1998 report.

⁹ It is also important to note that South Africa reports on all its duties under the African Charter, including the African Women's Protocol, in one report. The initial report – which did not include the African Women's Protocol, as it had not yet been signed – was submitted on time in October 1998, but all subsequent reports have been submitted late, and the three most recent reports are still outstanding. South Africa's second, third and fourth reports were due in October 2000, October 2002 and October 2004 respectively, and were submitted late as a consolidated report in May 2005. The African Commission voiced its concern with the late submission. South Africa's fifth and sixth periodic reports were due in October 2006 and October 2008. These are being consolidated with the seventh periodic report, which was due in October 2010 but has still not been submitted.

(2) It goes without saying, the promotion and reinforcement of Constitutional Rights:

particularly the right to equality (including on the basis of gender, sex and sexual orientation)¹⁰; the right to human dignity¹¹; the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources¹²; the right to adequate housing¹³; the right to access to health care, food, water and social security¹⁴; and the right to access to court¹⁵.

(3) The rights of women and vulnerable groups in domestic legislation and policy, including (amongst others):

- a. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
- b. The Employment Equity Act 55 of 1998 (as well as sections of the Basic Conditions of Employment Amendment Act 11 of 2002 and the Labour Relations Act 66 of 1995)
- c. The Domestic Violence Act 116 of 1998
- d. The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007
- e. The Maintenance Act 99 of 1998
- f. The Recognition of Customary Marriages Act 120 of 1998
- g. The Housing Act 107 of 1997
- h. The White Paper on the Transformation of the Public Service, 1995.

(4) We also recommend that the WEGE specify its role in *supporting, reinforcing and monitoring existing* structures and bodies designed to address gender equality and complaints against the state of non-compliance to national legislation, including (amongst others):

¹⁰ Section 9 of the South African Constitution (Act 108 of 1996)
¹¹ Section 10
¹² Section 12
¹³ Section 26
¹⁴ Section 27
¹⁵ Section 34

- a. *The Commission for Gender Equality*¹⁶
- b. *Equality Courts*¹⁷
- c. *Equality Review Committee*
- d. *The Commission for Employment Equity (CEE) & Employment Conditions Commission (ECC), Department of Labour*
- e. *The Independent Complaints Directorate (ICD) [and the Independent Police Investigative Directorate (IPID)]*¹⁸
- f. *The Inter-Sectoral Committee for the Management of Sexual Offence Matters*¹⁹

¹⁶ While in 2010-2011, the Commission for Gender Equality (CGE) handled 468 complaints and opened 255 new files, monitored 19 cases countrywide, litigated a case in Mpumalanga, and provided input on a range of legislation, policies and practices, amongst other activities (CGE, 2011), a national review of Chapter 9 institutions, conducted in 2007, found the CGE to be largely dysfunctional and under-resourced. The Commission was found to have a poor understanding of its mandate; to have a poor relationship with civil society; to have a poor relationship with Parliament, impacting on its ability to oversee and hold Parliament accountable; to have a low public profile; to have neglected to utilise its investigative powers; to be insufficiently independent due to Commissioners being appointed by the President; and to have no strategic plan for monitoring and evaluating the status of women in South African society (CSVR, et al., 2011, p. 17).

¹⁷ The same 2007 review of Chapter 9 institutions criticised the inefficiency of the Equality Courts (cited in CSVR, et al., 2011, p. 17), and in 2006, the Department of Justice reported that although 330 magisterial districts were intended to contain Equality Courts, only 220 did, and fewer than 700 cases had been referred to the courts, due in part to the lack of public awareness of the Courts (cited in CSVR, et al., 2011, p. 17). The South African Human Rights Commission (SAHRC) and CGE have further reported that the Courts are under-resourced and that Court officials are insufficiently trained, resulting in poor performance, and that of the cases heard, very few concerned gender (cited in CSVR, et al., 2011, p. 17-18). One notable case concerning gender resulted in such a weak sentence – an apology from the community, (where a woman was assaulted for wearing trousers), that it is unlikely to encourage other women to bring their cases before the Court (CSVR, et al., 2011, p. 18).

¹⁸ The ICD reports on SAPS members' non-compliance with the Domestic Violence Act 116 of 1998 (DVA) in two reports: its general Annual Reports, and its DVA-specific bi-annual reports. The ICD has reported annually since 1998 (except for 2003), and bi-annually on SAPS members' DVA compliance since 2003 (except for the period of July-December 2008). In 2010-2011 it audited 279 police stations for compliance with the DVA, received 102 complaints of domestic violence, and 21 applications for exemption in terms of the DVA, and dealt with 155 cases of non-compliance with the DVA, 133 of which were completed (ICD, 2011, p. 26-30). In 2010-2011, the ICD made 49 recommendations to SAPS regarding cases of DVA non-compliance (ICD, 2011, p. 34), but none of these resulted in a sentence or sanction. By its own admission in its 2010-2011 annual report, "[t]he ICD has often been criticised for being a 'toothless watchdog' because the SAPS has no obligation to give effect to a recommendation made by the ICD in cases of police misconduct..." (ICD, 2011, p. 14).

¹⁹ In terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, an Inter-sectoral Committee for the Management of Sexual Offence Matters is to be established to develop a national policy framework on sexual offences, and to monitor the implementation of the framework by the relevant organs of state. Although the National Policy Framework has been tabled

- g. *The National Policy Framework for Women’s Empowerment and Gender Equality*
- h. *The Office of the The Public Protector*
- i. *The South African Human Rights Commission (SAHRC)*
- j. *Parliamentary Portfolio Committees.*

5. STRUCTURAL INEQUALITY AND THE EMPOWERMENT OF WOMEN

The Empowerment section of the proposed Draft Bill (chapter 3, section 8) states that ‘all entities must empower women politically, socially and economically’, without specifying the sectors, policies, strategies and means of achieving empowerment. Again, the terms “women” and “gender” are used interchangeably. The Bill needs to be much more conscious about which rights, obligations and protections apply to women and which apply to all genders.

This section is onerous without adequate qualification of or specificity in relation to some of the requirements in section 8. For example the Bill does not address

- What it means to change the conditions and circumstances which hinder achievement of sustainable, substantive gender equality’ (s. 8(1)(a)).
- What it means to ‘mainstream gender’ (s. 8(1)(b)) – also *see our comments on gender mainstreaming below.*
- What ‘reasonable accommodation of needs’ refers to (s. 8(1)(c)).
- What it means to support not only the so-called ‘reproductive role’ of women (which is already set out in existing labour legislation), but their ‘productive, family and community roles’. We must re-emphasise that this section refers to women and not both genders, despite the fact that both may require protection and/or promotion of ‘family roles’. The single father is an example of this.
- Why section 8(1)(e) refers to the enforcement of “gender equality legislation” but concludes with “unless good cause can be shown why *women* are not so empowered in a particular instance”.

on 23 August 2012, there have been no communications from the State regarding the Committee’s composition or mandate and civil society organisations have not seen the NPF document to date.

We recommend that the Bill provide concrete examples, procedures and measures that articulate the precise nature of these obligations, or, at minimum, set minimum standards for their implementation.

What constitutes the promotion of access to economic opportunities and special measures to promote women's empowerment needs to be at least minimally articulated. Empowerment refers to "the process by which those who have been denied the ability to make strategic life choices acquire such ability" (Kabeer, 1999:435). However it is unclear who the groups in need of empowerment are. Section 8 assumes that all "females" are homogeneous and have similar needs and development challenges without specifying the specific needs of distinct target groups like girls, youths, the elderly, women living in rural areas, women with disabilities and the like. It is only in identifying these groups, specifying and implementing mechanisms that address their needs, that *substantive equality* is achieved.

We therefore recommend that:

For the progressive realisation of substantive equality to be achieved, the Bill needs to include examples of what form these enabling structures and measures for empowerment might take. These norms must be articulated in the substance of the legislation and only further articulated and operationalised in the "code of good practice ... on gender mainstreaming and women empowerment" referred to in section 14(1) of the Bill.

On this front, the Capability Approach (Sen, 1999) – the most renowned development policy evaluative paradigm in current international public policy and development discourses – requires not only building institutional capacities, but the *creation* of enabling structures in order to enhance the capabilities of women to be empowered in the economic, political and socio-cultural spheres of their lives (Kabeer, 1999; Nussbaum, 2000; Sen, 1999). Despite the fact that the proposed Bill states the need for these forms of empowerment, it lacks specification on the strategies and specific areas that need to be addressed.

(a) Empowerment through Education and Economic Empowerment

A major shortcoming of the Bill is the lack of specific attention to the education and economic development of women and girls. According to a report by UNESCO and UNICEF (2010), investing in

education contributes to poverty reduction, income growth, economic productivity, improvements in child health and nutrition, increases in school enrolment, protection against HIV infection, higher maternal and child life expectancy, reduced fertility rate and delayed marriage (UNESCO & UNICEF, 2010: 129). Poor education quality contributes to girls dropping out of school and leads to high levels of illiteracy among young and adult women (Omwami, 2011; Roby et al, 2009; UNESCO & UNICEF, 2010).

In the educational area, women's freedom to participate in education can be enhanced by: removing direct and indirect costs attached to education, providing of appropriate safety nets, eradicating gender stereotypes in curricular and teaching practices and all areas of education, ensuring that women's and girls' education is responsive to individual needs that will enable them to exercise their social, economic, cultural, civil and political rights increasing national and international funding for education amongst other things (Davids et al, 2005; Omwami, 2011; UNESCO & UNICEF, 2010).

Economic empowerment is also instrumental in improving the lives of poor women. Women living in poverty grapple with numerous barriers to economic empowerment which include *inter alia* patriarchal exclusion of women in the labour market, (over)burdens created by reproductive roles, socio-cultural barriers, limited educational levels, lack of access to skills development opportunities (Sengendo, 2006; Strier & Abdeen, 2009).

We therefore recommend that the Bill specify the mechanisms, policies and strategies that would address the barriers highlighted above.

(b) The Impact of Culture, Patriarchy and Tradition on Economic Empowerment

The Preamble of the Bill (p. 2) recognises the role of “cultural, patriarchal, traditional, customary and religious practices” that undermine equality of women. This too is a critical in the analysis of gender inequality, but is not taken further than the Preamble in the Bill. Discriminatory housing and land rights, exclusion from decision-making bodies, lack of vocational opportunities, patriarchal attitudes towards family and child care are just a few of the practices that serve to inhibit the achievement of women's economic empowerment (Kabeer, 1999; Liebenberg & Pillay, 2000; Sengendo, 2006). It is therefore imperative to address socio-cultural factors that perpetuate the disempowerment of women.

While the rhetoric about access to resources is common in development discourses it is important for statutory bodies to acknowledge that for most women accessing resources such as land for example, does not automatically translate into economic benefits for them and empowerment *per se* because of deep seated cultural and traditional attitudes that manifest in hidden power dynamics in the private lives of poor women.

It is therefore important for the Bill to: **incorporate specific strategies that accommodate the hidden power dynamics inherent in socio-cultural realities of disempowered women. In addition the proposed Bill needs to specify the sectors, policies, strategies and means of achieving the empowerment. The specific role players who are responsible for ensuring the mandates gender equality legislation policies and procedures as well as monitoring and evaluation needs to be spelt out.**

For economic empowerment to effectively benefit women and free them from poverty it is necessary for the proposed Bill to: **demonstrate its commitment to the development agenda by articulating the specific strategies which will increase access, control and management of resources. Micro-financing, access to land rights, entrepreneurship skills and educating women on their rights are examples of strategies that the government can commit itself to pursue if women empowerment is to be achieved.**

6. GENDER MAINSTREAMING

The Bill proposes “to establish a legislative framework for the empowerment of women: to give effect to section 9, read with section 2 of the Constitution of the Republic of South Africa’s international commitments; to provide for an obligation to adopt and implement gender mainstreaming; to provide for an offence of practices with adverse effects; to provide for matters to be regulated by the Minister; and to provide for matters related thereto” (p.2)

The Bill also recognizes that:

Gender mainstreaming offers transformation that involves neither the assimilation of women into men’s ways, not the maintenance of dualism between women and men, but establishing a new and positive form which becomes the mainstream and in which

both men and women, including boys and girls, have an important role to play. Thus a change in the traditional role of men, as well as the role of women in society and in the family, is needed to achieve complete equality between men and women, and that this should be an integral part of the moral fibre of our society (p.3)

Gender mainstreaming is specifically mentioned in sections 6(2)(c) (progress on gender mainstreaming), 8(1)(b) (mainstreaming gender in all strategies, policies, programs, budgets,) and section 9 (which dedicates a section to how gender mainstreaming should be achieved). While the Bill makes a commitment to promote gender equality in strategies, policies, programs and budgets, it neither reflects the complexity of mainstreaming, nor does it adequately provide standards for the implementation of gender mainstreaming obligations.

According to Thege, Welpé and Wyckoff-Wheeler (2002), gender mainstreaming requires a dual approach: “it is both a general principal” (which is captured in the WEGE Bill) “and it comprises *specific actions and methods* of applying gender-equity principles” (p.8).

The Council of Europe (1998) provides the following definition of “gender mainstreaming” (our own emphasis added):

... the (re)organisation, improvement, development and evaluation of policy processes, so that a gender equality perspective is *incorporated* in all policies at all levels and at all stages, by the actors normally involved in policy-making. The definition of gender mainstreaming highlights the goal of mainstreaming, *the process, the objects and active subjects* of mainstreaming. The objects of mainstreaming are all policies at all levels and at all stages, while the active subjects of mainstreaming are the ordinary actors. Gender mainstreaming can mean that the policy process is reorganised so that ordinary actors know how to incorporate a gender perspective. It can also mean that gender expertise is organised into the policy process by including gender expertise as a normal requirement for policy-makers (p. 15).

Gender Mainstreaming is a process that *starts* by analysing the situation of women and men, making visible their differing needs and difficulties in their everyday lives and examining what these means for specific policy areas (European Commission, 2004). It should look at “social structures, institutions, values and beliefs which create and perpetuate the imbalance between women and

men” (European Commission, 2004), and creates strategies for “making women's as well as men's needs, experiences and priorities an integral dimension in the design, implementation, monitoring and evaluation of policies and programs in all political, economic and social spheres, with the ultimate goal being equality” (United Nations Economic and Social Council, 1997/2), ensuring that differences between women and men are equally valued and favoured in society. Gender mainstreaming covers the full policy cycle, from policy design, decision-making, access to resources, procedures and practices, methodology, implementation and monitoring and evaluation (European Commission, 2004). It is a pro-active process and “needs determined political action and support with clear indicators and targets” (European Commission, 2004, p.41).

The European Commission (2011) suggests that the following are necessary for mainstreaming to be effective:

- a. A broad long-term political commitment to gender equality;
- b. Strong legal frameworks and obligations;
- c. Gender awareness among the citizens in general
- d. A common and shared knowledge of concepts and definitions;
- e. Education and training in gender equality issues;
- f. Specific and technical expertise in dealing with gender instruments and tools, follow-up activities, monitoring and evaluation;
- g. Independent bodies to monitor and assess changes; and
- h. The recognition of the importance of bringing gender mainstreaming into local processes.

However, the implementation of gender mainstreaming programmes has not been unproblematic. Mitchell (2004) highlights several universal problems with the gender mainstreaming approach: (a) the expectations covered by the concept of gender mainstreaming; (b) the lack of clarity around the term; (c) a lack of identified measurable outcomes of gender mainstreaming; and (d) the consistent lack of financial resourcing; and (e) the lack of commitment to the concept.

The South African Public Service Commission (2006) has itself cautioned against taking an inexplicit (vague) approach to gender mainstreaming and recommends that policies relating to gender mainstreaming specify the mechanisms that will be used to achieve and monitor mainstreaming and specify resource allocation to these activities. In their 2006 report on *Gender Mainstreaming Initiative in the Public Service* they state the following:

Although there are policies in place within some departments as well as a National Policy Framework and Draft National Programme of Action on Women’s Empowerment and Gender Equality 2005 – 2015, successful implementation is often limited or non-existent. A number of problems have been experienced in the implementation and monitoring of such policies. The aim is to create an enabling environment and make it possible for government to develop mechanisms that will assist in the achievement of the national goal of gender equality, which do not yet exist. Policy on gender equality should outline commitment to gender equality at all levels, identify mechanisms to achieve gender equality, specify the resources allocated to efforts, and include effective accountability, monitoring and evaluation frameworks (p.xii).

We therefore recommend that the Bill include a much more detailed section on gender mainstreaming which incorporates:

- 1. How “gender mainstreaming” is to be understood (and defined) and what the objectives of gender mainstreaming are in both private and public and settings.**
- 2. How, in specific terms, state and public entities must by law include ‘gender mainstreaming’ in operational activities and budgets.**
- 3. What mechanisms will be made available to assist, inform or support private and public institutions in mainstreaming gender.**
- 4. What specific mechanisms will be put in place to monitor gender mainstreaming and what criteria will be used to monitor it.**
- 5. How will gender mainstreaming be evaluated (including measurable criteria)**
- 6. What will constitute full (or partial) compliance to these criterion.**
- 7. What specific “targets” will be set to improve policies and legislation (making specific reference to *each* individual statute or provision that will be monitored for improvement and/or compliance).**
- 8. Defining what constitutes “capacitation” and “participation” of women (and other vulnerable groups).**
- 9. What criteria will be developed to ensure gender mainstreaming in *future* polices and legislation.**
- 10. What resources are expected to be or will be made available to ensure compliance to gender mainstreaming obligations.**

Thus, a provision on gender mainstreaming should refer to *the full policy or programme cycle*. This includes (a) policy design; (b) decision-making; (c) access to resources; (d) procedures and practices; (e) methodology and implementation; and (f) monitoring and evaluation.

7. GOVERNANCE

Chapter 2 of the Bill sets out the governance framework of the Bill, including the mandate of the Minister for Women, Children and People with Disabilities in terms of the Act (section 5) and the mechanisms through which the Minister will enforce compliance with the substance of the Act. In terms of this framework, the Minister's mandate includes:

- i. Monitoring, reviewing and progress oversight of organs of state; executives of local, provincial and national government; government components, national and provincial business enterprises; companies; non-profit organisations; public entities and institutions; semi-public entities and institutions; and other private bodies (sections 5 (1)(a) and 4(a)-(i)) .
- ii. Establishing mechanisms to promote substantive gender equality (section 5 (1)(b)).
- iii. Issuing and enforcing an integrated, coordinated and uniform framework to achieve women's empowerment and gender equality (section 5 (1)(c)).

In order to fulfil the Minister's mandate under the Act, section 6 empowers the Minister to issue Directives to entities who she doesn't believe are "substantially complying" with the Act or applicable legislation, which "may require an entity to submit a written report" containing specific information (set out in section 6 (1)(a)-(h)) within a specified period. If an entity fails to report as directed, the Minister may issue, in writing, a Compliance Notice directing the entity to report within a timeframe specified, failing which the entity (or its company director or executive head) will be guilty of an offence and can, on conviction, be liable to a fine (or on default of payment, to imprisonment) (sections 7 (1) and (5)).

The main problems with the governance framework of the Bill as it is currently formulated are four-fold:

- i. *The ambit, scope and powers ascribed to the Ministry are too vague to ensure meaningful implementation.*
- ii. *The role of Ministry as set out in the Bill is duplicative of other existing mechanisms.*
- iii. *The mechanisms prescribed by the Bill allow for too much discretion (on the part of the Minister), which will undermine equitable and meaningful implementation.*
- iv. *The process described by the Bill for demanding compliance from entities in terms of gender equality not sufficiently rigid and will not have the effect of accomplishing compliance in the long run.*

Each of these is discussed below in greater detail below.

(a) Ambit, Scope & Powers

The Bill sets out that the Minister is to “promote and coordinate the achievement of substantive gender equality for women,” yet there is little discussion of what this means in practice, how it should be achieved, and against what standards its implementation should be measured. While the Bill specifies three activities that fall within the ambit of the Minister – namely monitoring the progress of entities defined as falling within the scope of the Act, establishing mechanisms for promoting gender equity, and issuing and enforcing a coordinated, uniform framework for achieving gender equality – these provisions in and of themselves also lack substance or clear imperatives for implementation. For example:

- i. The list of entities over which the Minister has oversight in terms of gender equity and women’s empowerment is so wide as to include all organisations and entities in society – both public and private. While this ambitious reach is indicative of the fact that the Bill’s authors require all of South Africa to move towards gender equity, such a large scope and application are not practically viable, and will inevitably mean uneven application.
- ii. The Bill does not specify through what mechanism allegations of non-compliance can or should be lodged with the Minister, and by whom. If the Bill did not intend to provide scope for outside parties to register complaints, it is not clear on what basis (or through which processes) the Minister will identify entities that are deemed to fall short of achieving women’s empowerment and gender equality.

- iii. The Bill does not specify what the Minister’s powers are in terms of investigating such complaints. While the Bill does provide that the Minister may issue a Directive to an entity requiring a report on a variety of issues (set out in sections 6(2)(a)-(h)), there is no guidance (here or elsewhere) as to how the Minister can or should evaluate whether the entity is in compliance with achieving gender equity and women’s empowerment.
- iv. There is no guidance in the Bill as to what the appropriate mechanisms for “promoting substantive gender equality” are (section 5(1)(b)), and how these are or should be different from mechanisms specified under the various other pieces of legislation referenced in the Act.

(b) Duplication of Role(s) and Mechanisms

There are a number of critical areas of duplication of the Minister’s role in terms of this Bill with other pre-existing mechanisms and policies:

- i. There is little to distinguish the Minister’s role as set out under this Bill from that of the Commission on Gender Equality (CGE), who have a Constitutional mandate to protect, promote, develop and assist with the attainment of gender equality. In terms of the Commission of Gender Equality Act (No 39 of 1996), the CGE has the power to “monitor,” “investigate,” “monitor compliance” and “report” on issues of gender equality. The CGE’s stated strategic objectives (submitted to Parliament during 2012) include “the creation and implementation of an enabling legislative framework that promotes the attainment of gender equality.” These roles and responsibilities are virtually indistinguishable from those prescribed to the Ministry under the WEGE Bill, which is problematic both because it blurs lines of accountability and oversight responsibility, but also because it amounts to an egregious waste of precious financial resources that could be used elsewhere to improve substantive equality for women and girls in communities across South Africa.
- ii. There are a plethora of policy statements aimed at fostering gender equality and/or women’s empowerment in South Africa – among them the Department’s own Strategic Plan on Gender Equality and the National Policy Statement on Gender Equality.

(c) Discretion by the Minister

Achieving the right amount of discretion in policy formulation and implementation has long been a conundrum: too little discretion creates policy that is rigid and that cannot properly respond to changeable implementation realities, while too much discretion creates a policy implementation environment that varies so widely as to be problematic. The current Bill errs on side of the latter – the Bill is so vague, undefined and relies on such unfettered discretion on the part of the Minister that it is difficult to see how it can be evenly implemented and enforced. Some examples of areas that are problematic in terms of governance include:

- i. The Bill sets out that the Minister “may” issue a directive to an entity she “on reasonable grounds believes is not substantially complying with the Act or applicable legislation” (section 6 (1)(a)). However, the Bill provides no guidance as to what circumstances warrant the issuance of a directive (over, for example, some other remedy available to the Minister), what constitutes “reasonable grounds” for suspecting non-compliance, or what conforms to “substantial compliance” under the Act. Chapter 3 of the Bill, which speaks to measures that entities should take to ensure empowerment of women (section 8), gender mainstreaming (section 9), economic empowerment (section 10), and equal representation and participation (section 10), are similarly vague, and leave much scope for interpretation. These shortcomings leave the Bill entirely too open to discretion, and could create scope for unequal application of the law.
- ii. There is little definition of what would constitute “progress” of an entity towards women’s empowerment and gender equality (section 5 (1)(a)) and gender mainstreaming (section 5(1)(b)). This lack of definition would make the oversight task practically very difficult, since it would be unduly open to discretion and interpretation, and may variably impose standards on entities.
- iii. While Chapter 4 (Enforcement, Offences and Penalties) of the Bill sets out that the Minister, “acting in the interests of women as a group or class of persons, may use any and all dispute resolution mechanisms, including parliamentary procedures and court processes to address – (a) gender discrimination; and (b) non-compliance with, contravention or breach of any of the provisions of this Act,” the section as it currently stands leaves too much discretion to the Minister as to which process(es) to follow, which could lead to uneven implementation

of the Act and disparate consequences for non-compliance (for example, in invoking court sanctions vs. parliamentary procedures).

- iv. While the Bill sets out in Chapter 4 (Enforcement, Offences and Penalties) that it is an offence to “wilfully and unlawfully participate in, or perpetuate, a practice of male or female dominance over women which infringes, or is likely to infringe on the fundamental rights of women, or have substantial adverse effects on their well-being,” this provision is overly broad and so open to interpretation as to suggest no standard for implementation.

(d) Insufficiently Specified Process

As mentioned above, the process for instituting inquiries into entities that are suspected of not complying with requirements for gender equality and women’s empowerment is not sufficiently well-specified. Issues under this heading include:

- i. *It is unclear how the Minister will receive complaints against entities contemplated in the Act, and what metric will be used to differentiate between those entities against which Directives are issued, and those that are not.*
- ii. *The Bill does not specify what reasonable timeframes are for compliance with a Directive issued by the Minister, and what will be done to ensure that these timeframes are not unjustifiably dragged out by entities under investigation to avoid reporting.*
- iii. *The Bill does not specify what the range of “enforcement measures” are that the Minister may intend in cases of non-compliance with a directive, since section 12 (Enforcement) is similarly vague. This once again leaves the implementation of these clauses open to wide discretion and at risk of unequal enforcement, and creates the impression that the Bill will be toothless to respond.*

Stemming from the above, we recommend that the WEGE Bill:

- 1. Reconsiders the wide range of organisations that are objects in terms of the Bill or at least consider designating priority groups among these;**
- 2. Specifies the mechanisms through which non-compliant entities are identified;**

- 3. Sets out more clearly what the Minister's powers are in terms of investigating complaints, including how the Minister can or should evaluate compliance in terms of gender equality and women's empowerment;**
- 4. Identifies the appropriate mechanisms for promoting substantive gender equality, and how these are different from other existing mechanisms;**
- 5. Clearly resolves the issue of conflicting or duplicative roles and responsibilities with other laws and bodies; an**
- 6. Improves the definitions, measures/standards and process specification under the Act to ensure that discretion doesn't hamper proper, equitable implementation of the Act.**

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