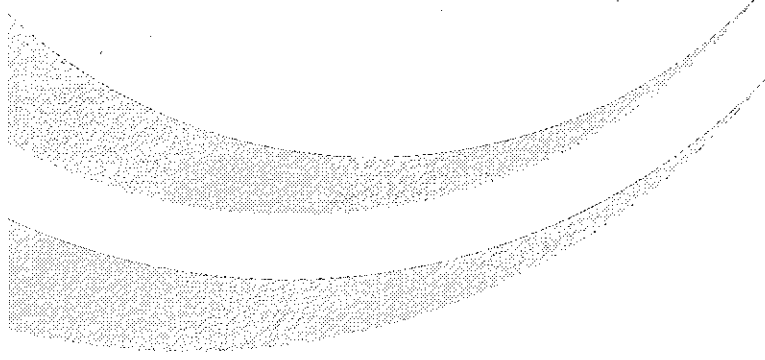


**Commission for Gender Equality**  
A society free from gender oppression and inequality

**SUBMISSION TO THE PARLIAMENTARY PORTFOLIO COMMITTEE ON  
THE HUMAN RIGHTS COMMISSION BILL [B 5-2013]**



**09 MAY 2013**

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## 1. INTRODUCTION

The Commission for Gender Equality (CGE) is a Chapter 9 Institution and in terms of Section 11 of its empowering legislation obliged to evaluate legislation and make recommendations to the relevant legislature. This responsibility is exercised with the primary aim of promoting, protecting and developing gender equality in South Africa.

## 2. COMMENTS BY THE CGE

### 2.1 CLAUSE 4 (2)

The CGE is concerned with the construction of Sub-clause 4(2) because cooperation and assistance is denied in critical matters such as investigations which compromises the independence, dignity and effectiveness of most Chapter 9 Institutions including the South African Human Rights Commission (SAHRC). In many cases such conduct is executed deliberately and with impunity because no effective remedy exists for such unlawful conduct. Against this background the CGE does not support Clause 4(2) in its current form because it will serve no purpose. Instead the CGE proposes a penalty clause to be inserted which will ensure compliance with the proposed provisions in Clause 4(2). In this regard the CGE proposes the following change.

A revision to clause 4(2) by an insertion as follows :

Clause 4(2) All organs of state must afford the Commission ... any wilful contravention is an offence and a penalty as set out in Clause 23 (Section 23) will be applicable.

### 2.2 CLAUSE 4 (4)

The construction of clause 4(4) which prohibits a Commissioner or member of staff from rendering assistance or conducting an investigation if he or she has a pecuniary or any other interest is overbroad and therefore unconstitutional. A Commissioner or member of staff may be acting in the public interest or on the moral convictions of society. This is permissible but is prohibited in terms of Clause 4(4).

Therefore, the CGE does not support Clause 4(4) in its current form and recommends a less restrictive approach. In this regard the following is recommended :

The words [any other] should be replaced with a provision that prohibits conducting an investigation or providing assistance that is in conflict with the fiduciary and official duties of any Commissioner and staff member.



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### 2.3 CLAUSE 4(6)

The CGE does not support Clause 4(6) in its current form because it is unreasonable and will result in untenable consequences. An example of a difficulty which may arise with such a provision on promulgation is as follows :

If a staff member or Commissioner of the SAHRC assists a family member who has been subjected to racial discrimination then the Commissioner or Staff member who assists such as family member would be in contravention of the proposed SAHRC Act. This is unconstitutional because such a provision is unreasonable and unjustifiable. In South African law it is permissible for another party to assist family members and the law establishes *locus standi* as seen in the Domestic Violence Act. Therefore, any person who by virtue of being a family member of a Commissioner or a staff member would be required in law to assist such a person. Accordingly, Clause 4(6) does not meet the test of legality and the CGE recommends the following revision to Clause 4(6) by the insertion of the following :

4(6) A member or a member of staff who without good reason contravenes or fails to comply with subsection (1) (b) of (4) is guilty of misconduct.

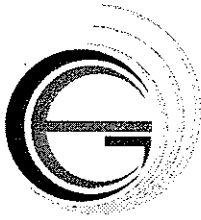
### 2.4 CLAUSE 5(2)

The Commission on Gender Equality Act allows for Commissioners to be appointed for a fixed term of five years. It is unconstitutional where another human rights institution established in terms of Chapter 9 of the Constitution is treated differently in that Commissioners are allowed longer terms of office. A longer term provides greater organisational stability. The CGE recommends a period of office where the duration is five years for all Commissioners of the SAHRC.

### 2.5 CLAUSE 6

#### 2.5.1 Clause 6(1)

The CGE supports the proposal where both the Chairperson and Deputy Chairperson are appointed by the President but recommends that both the Chair and Deputy Chair receive such remuneration commensurate with their additional duties.



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2.5.2 Clause 6(3) (a)

The CGE supports abovementioned Clause but recommends an insertion to amend as follows :

6(3) (a) Whenever both the Chairperson and Deputy Chairperson are absent or for any reason unable to exercise or perform the powers and functions vested in the office of the Chairperson, or whenever both offices are vacant, the remaining members must from their numbers elect an acting Chairperson who will receive such additional remuneration and benefits commensurate with the acting position.

2.6 CLAUSE 7

The CGE supports Clause 7 in its current form.

2.7 CLAUSE 9

The manner in which remuneration of Commissioners may be determined is ambiguous and therefore, untenable. The remuneration should be determined by the Commission for Remuneration of Office Bearers. Accordingly, the CGE does not support Clause 9(1) in its current form and recommends an amendment to Clause 9(1) by way of a revision as follows :

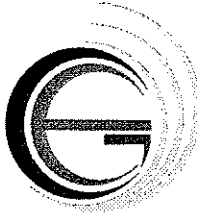
9(1) The remuneration, allowances, and other terms and conditions of office inclusive of service benefits of the full-time and part-time members are determined on recommendations made by the Commission for Remuneration on Office Bearers.

9(3) This Clause would be superfluous if Clause 9(1) is amended as per recommendation in above paragraph.

2.8 CLAUSE 10 (3)

The number of Commissioners may not always equal the number provided for in terms of the Act. Therefore, the Bill [5 – 2013 ] must take cognisance of this probability. Accordingly, the CGE recommends the following amendment to Clause 10(3) :

10(3) The quorum for any meeting of the Commission is a majority of the total number of members that have been appointed by the President.



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2.9 CLAUSE 17(5) (e)(iii)

The period of validity of a warrant issued in terms of Clause 17(5) is far too short. There are numerous factors which may delay the execution of a warrant. These include delays in service flowing out of the fact that the Commission deals with complaints over the entire country and it might take time to locate respondents. Furthermore, respondents may enter into negotiations and the Commission is obligated to negotiate. During the course of negotiations the warrant may be held in abeyance. This may prejudice the investigation as one month is far too short a time and the CGE recommends a period of validity of three months.

2.10 CLAUSE 20(5) (b)

The provisions of this Clause is unlawful for the following reasons :

- (i) The National Assembly is not empowered to determine the remuneration of staff in the Commission.
- (ii) The provisions of Clause 20(5) (b) are in conflict with Section 23 of the Constitution because it is not permissible to unilaterally terminate a valid contract at the behest of a third party. Such conduct will allow for numerous claims of damages arising out of a breach of contract on the part of the SAHRC in addition to action in terms of labour legislation.

Accordingly, the CGE recommends the deletion of this Clause.

2.11 CLASUE 21

The division of labour and competencies between Commissioners and Secretariat is not clearly defined. Therefore the CGE recommends an insertion to cure this shortcoming.

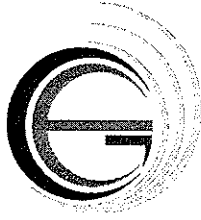
An amendment to Clause 21 by way of an insertion of the following :

21(4) The chief executive officer must be supported and assisted by Commissioners in the execution of his or her duties and must not be unduly influenced in any way.

3. CONCLUSION

The CGE supports repeal of the South African Human Rights Commission Act 54 of 1994 and takes this opportunity to wish the Portfolio Committee on Justice and Constitutional Development every success in its endeavours.

Issued by The Parliamentary Office  
Commission for Gender Equality  
Cape Town



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