



WOMEN'S LEGAL CENTRE

SUBMISSIONS TO THE PORTFOLIO COMMITTEE ON WOMEN, CHILDREN AND PEOPLE WITH
DISABILITIES: WOMEN EMPOWERMENT AND GENDER EQUALITY BILL
[B50-2013]

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Introduction

The Women's Legal Centre (WLC) welcomes the opportunity to make submissions on the Women Empowerment and Gender Equality Bill (WEGE).

The WLC is a non profit law centre that seeks to achieve equality for women, particularly black women, through impact based litigation, the provision of free legal advice to women, legal support to advocacy campaigns by gender and other organizations and training that ensures that people know and understand the impact of the judgments of the courts around women's rights. The WLC also provides legal advice to other women's organisations nationally and in Africa. The WLC has won several precedent setting cases that have improved women's access to justice in South Africa. The WLC is staffed by attorneys who specialise in gender law and have extensive litigation experience. The WLC is based in Cape Town and has satellite offices for free legal advice in Khayeltisha and East London.

Context

Gender inequality is deeply embedded in South African society. This is evident in:

- The alarming levels of violence against women, with high levels of both sexual and domestic violence;
- The stubbornly unresponsive criminal justice system, despite an improved legislative framework;
- The racial and gendered dimension of poverty and unemployment;
- Gender-skewed land and property ownership;
- Culturally enforced exclusions faced by rural women, and their diminished access to justice;
- The persistent violation of sex workers' human rights, violence against LGBTI people;
- Gender discrimination in the workplace;
- The gendered nature of the spread and impact of HIV and AIDS.

The WLC wishes to submit that the WEGEB accurately addresses the need for oversight and enforcement of gender equality rights. It is an indication of political will to bring about gender equality in our society that is commendable. It is crucial that this initiative be an effective one.

Process to date

In September 2012, the Women's Legal Centre (WLC) made full submissions to the Department of Women, Youth, Children and People with Disabilities ("the Committee") regarding the Women Empowerment and Gender Equality Bill (WEGE Bill).

The WLC submissions dealt with three broad areas:

1. The constitutional framework,
2. The overlap with existing legislation, and
3. Implementation.

Briefly, it was submitted that

- the proposed enforcement structure could be challenged on grounds of lack of independence and it may not be practicable;
- there needs to an alignment between the roles and responsibilities of the Ministry and the CGE
- there is some duplication between the WEGEB and existing legislation, and it may be preferable to amend and supplement existing legislation and enforcement mechanisms.
- in order to ensure that an enforcement structure works, one needs to assess the existing enforcement framework, ascertain why it has not been successful in ensuring compliance with existing legislation and that should inform the improvement of existing structures or the need to create a new and effective structure.

The Constitution envisages a society in which women and men are equal. Section 9 of the Constitution guarantees the right to substantive equality for women, prohibits discrimination on the grounds of sex and gender and instructs that national legislation must be enacted to prohibit unfair discrimination.

The Constitution further creates a positive obligation on the state by requiring it to respect, protect, promote and fulfil the rights in the Bill of Rights , including the rights to equality and dignity. The challenge that faces (and has historically faced) the state is the "how". Experience has shown that passing legislation is necessary, but not sufficient. The most well intentioned legislation does not benefit women if it is not properly implemented.

On 12 December 2013, WLC, together with a number of civil society organizations requested an extension to the deadline for submissions to be made in relation to this Bill. This was primarily due to the fact that this Bill seeks to address the circumstances of over 50% of the population, women. Women in South Africa are not a homogenous group, and are experience multiple and intersecting discrimination. We felt it essential that women throughout the country be consulted in order that the Bill speak to their lived realities.

The WLC will make submissions in relation to the legal framework and the WEGE Bill.

The submissions contained in this document are submitted by the WLC, independently of any other civil society organizations.

In summary, the additional submissions are related to the following aspects of WEGE:

1. the delegation of oversight and enforcement powers,
2. the definition of gender equality;
3. the overlap with other legislation,
4. the lack of consultation carried out prior to the introduction of the Bill;

Oversight/enforcement

1. One of the challenges we currently face is a lack of enforcement of the existing laws in place to advance women's equality. These laws are discussed in more detail below. The existing legal framework is administered by different departments, each of whom are obliged to deliver on their mandates, and to take steps to advance women's equality. The private sector is also required (by the Constitution and other pieces of legislation) to end discriminatory practices and to advance women's equality. There is a clear need for oversight and accountability to ensure that there are consequences when departments fail to deliver, and that the private sector is also held accountable for not meeting its obligations. Without an effective way of holding society accountable, women's right to equality will remain a paper right. This raises the question of what the appropriate oversight and enforcement system (or machinery) is.
2. The Constitution creates independent oversight bodies in the form of Chapter Nine institutions, including the Commission on Gender Equality (CGE).

The Constitution in section 181, after establishing the Commission on Gender Equality (CGE), states,

'These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice. Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions. No person or organ of state may interfere with the functioning of these institutions.'

In terms of Section 187 of the Constitution, the CGE has the mandate to

'promote respect for gender equality and the protection, development and attainment of gender equality.'

3. Further, the CGE,

'has the power, as regulated by national legislation, necessary to perform its functions, including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality. The Commission for Gender Equality has the additional powers and functions prescribed by national legislation.'

The Commission on Gender Equality Act sets out the powers of the CGE, which include the powers to monitor; investigate (with power of search and seizure); evaluate and make recommendations to parliament and the president; or refer the matter to the Human Rights Commission, Public Protector or relevant authority. It can also receive complaints, which it may resolve through mediation and negotiation. The CGE reports to parliament, which is the body responsible for oversight of the executive.

In terms of the Promotion of Equality and Prevention of Unfair Discrimination Act (Equality Act), the CGE is accorded the status to institute proceedings. The Equality Courts can make a wide variety of orders (against the state and private sector) including that special measures must be taken and regular reports on implementation of court orders must be made to the court or the CGE. The Equality Act further empowers the Human Rights Commission and CGE to:

'request any other component falling within the definition of the State or any person to supply information on any measures relating to the achievement of equality including, where appropriate, on legislative and executive action and compliance with legislation, codes of practice and programmes',

and to request regular reports from Departments.

Further,

'(4) All Ministers must implement measures within the available resources which are aimed at the achievement of equality in their areas of responsibility by—

(a) eliminating any form of unfair discrimination or the perpetuation of inequality in any law, policy or practice for which those Ministers are responsible; and

(b) preparing and implementing equality plans in the prescribed manner, the contents of which must include a time frame for implementation of such plans, formulated in consultation with the Minister of Finance.

(5) (a) The equality plans must, within two years after the commencement of this Act, be submitted to the South African Human Rights Commission to be dealt with in the prescribed manner.

(b) The South African Human Rights Commission must consult with the Commission on Gender Equality when dealing with the plans contemplated in paragraph (a).'

4. The overlap between the role of the CGE and the proposed role of the MWCPD is self-evident. Whilst the monitoring and oversight (reporting) mechanisms appear similar, the main differences lie in the independence of the CGE, jealously guarded by the Constitution and CGE Act, and the ability to compel and reward compliance or sanction non compliance given to the MWCPD by the WEGEB.
5. Arguably, a monitoring and oversight body needs to be independent from government and seen to be so, in order to be able to hold all departments accountable individually and collectively. This is what was envisaged in Section 181(2) of the Constitution:

'These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.'

6. Provisions within the Bill relating to oversight and enforcement have undergone modification since WEGE's conception. The original Bill sought to create a type of 'super-ministry' to carry out oversight and enforcement. The WLC submits that such a body would be unconstitutional, concentrating as it would, such significant power in the hands of one ministry. Further, such a ministry would be highly at risk of interfering with the mandate and responsibilities of the Commission of Gender Equality, a 'Chapter Nine' institution, created by the Constitution.
7. Following consultation with the civil society sector, enforcement mechanisms were removed from the original Bill. The revised Bill lacks provisions for enforcement, which is a source of concern to the WLC. Without some kind of procedure for enforcing the regime which the Bill seeks to introduce, it is unlikely that public and private bodies will comply, or at least comply fully, with the new system contemplated by WEGE, as there is no penalty for non-compliance, nor incentive to comply.
8. Therefore, while the WLC agrees that for the reasons set out in paragraph 5 above, WEGE should not delegate all powers relating to oversight and enforcement to a single Ministry, it is nevertheless submitted that some such powers must remain in the Bill in order to ensure that WEGE becomes effective legislation, able to make a meaningful difference to women's lives in South Africa.
9. The WLC proposes that enforcement and oversight powers should in fact be located in the President's office. The main reason for this is that locating power in the President's office would serve to mainstream WEGE, increasing the capacity to call Ministers to account for their actions relating to the enforcement of the Bill.

Recommendation:

10. The WLC therefore kindly request that the Committee give serious consideration to their suggestion that enforcement and oversight powers relating to WEGE should be centred in the President's Office.

Definition of Gender Equality

11. The WLC has serious concerns about the definition of gender equality in WEGE. Clearly the concept of gender equality is of central importance within the Bill, and the term is used frequently. WEGE Chapter 1 provides a set of definitions relevant to the Bill. Gender equality is defined as

'the full and equal enjoyment of rights and freedoms and equal access to resources, opportunities and outcomes, by women, men, girls and boys'.

Substantive equality is defined as 'gender equality in fact and law'.

12. The fundamental right to equality is protected by section 9 of the Constitution:

'9. Equality

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'

13. In *Harksen v Lane* the Constitutional Court set out the stages of enquiry in a case involving the fundamental right to equality:

'(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

(b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:

(i) Firstly, does the differentiation amount to discrimination? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of s 8(2).

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause.'

14. The Constitutional Court has confirmed this approach to the stages of equality analysis on several occasions.

15. The Constitutional Court has also made it clear that substantive equality, instead of mere formal equality, is what is to be achieved under the provisions of Section 9 of the Constitution. It is

submitted that the Constitution and the interpretation of the equality clause contained in the Bill of Rights by the Constitutional Court is sufficient. There are a number of cases dealing with equality where the courts have interpreted the equality clause, and any definition that “narrows” this broad test would not pass constitutional muster.

16. To over codify when one cannot predict every manifestation of inequality is ill advised, as it could result in the exclusion of discriminatory behavior. In addition, one should bear in mind the concern of marginalizing gender issues by separating them from the existing jurisprudence on discrimination as this disregards the current South African context where women suffer multiple and intersecting forms of discrimination.
17. A further problem with the definition provided of gender equality is its binary and exclusive definition of gender. A government Bill dealing with gender ought to be more sensitive, and responsive to fluid gender identities. Instead, the Bill deals simply with ‘women’, ‘men’, ‘girls’ and ‘boys’, effectively ignoring the existence of the transgender community.

Duplication of legislation

18. There are a number of pieces of legislation that overlap with the WEGE. We discuss these below.

Employment Equity Act (EEA)

19. The EEA already prohibits discrimination based on gender in the workplace, obliges employers to take steps to eliminate discrimination and provides for affirmative action measures to redress inequalities based on gender. It also requires annual or biannual reporting from employers as to the implementation of their affirmative action plans for “designated groups” which includes black people, women, and persons with disabilities. The WEGE overlaps with this existing requirement by mandating the submission of a duplicative report by employers on the status of women, annual goals, and eliminating discrimination within the entity. These reports include the current representation of designated groups at every level/category and the goals for future

representation. However, the legislature could amend the EEA to include additional, specific requirements relating to women in decision-making roles.

20. The WEGE does not address the issue of women lacking the appropriate labor skills, with the exception of its statement regarding: “building women’s capacity to participate; and developing support mechanisms for women.” In addition, any attempt at equalizing the labor force would have to address the fact that women are predominantly employed in the informal sector, with little job security and no benefits. One of the greatest obstacles to women’s participation in the workforce is the lack of affordable childcare. This is not addressed in either the EEA or the WEGE, but has been shown in countries such as Germany as a very effective way of ensuring that women become employed, and can make the move from the informal to the formal sector.
21. Another issue that the WEGEB does not appear to address, but one which arguably could be made more explicit in the EEA is the concept of equal pay for work of equal value.

Legislation Dealing with Political Representation

22. The WEGEB states that it will be applicable to organs of the state as outlined in the Constitution to include executive, national, government, business, not-for-profits, public, semi-public, and private entities. It requires each entity to which the bill applies to achieve 50% female representation. These two sections seem to indicate the bill applies to political parties and areas that are more appropriately addressed through amendment of the Municipal Electoral Act. It also appears the WEGEB will overlap with the CGE proposed 50/50 representation bill since the WEGE requires 50% female representation for both government and private entities.

Broad Based Black Economic Empowerment Act (BBBEE)

23. The BBBEE already applies to black women. The BBBEE Act states that empowerment “means the economic empowerment of all black people including women... skills development... achieving equitable representation in all occupational categories and levels in the workforce.” Its objectives also includes “increasing the extent to which black women own and manage existing and new enterprises, and increasing their access to economic activities, infrastructure

and skills training.” Similar to the EEA, the BBBEE Act also applies to state, public, private, and local entities as well as requires the preparation of plans for implementing and reporting on progress toward the acts goals. The proposed empowerment of women can be addressed through the amendment of this legislation, by adding women as a category. Both the BBBEE Act and the EEA should be assessed to take into account the fact that women are not a homogenous group in society and that they suffer multiple and intersecting forms of discrimination. This may require a double weighting for a black woman as opposed to a black man or white woman.

Promotion of Equality and Prevention of Unfair Discrimination Act (Equality Act)

24. This Act already addresses prevention and general prohibition of unfair discrimination on the grounds of gender. In Chapter 1 of PEPUDA defines ‘equality’ as including the full and equal enjoyment of rights and freedoms as contemplated in the Constitution and includes *de jure* and *de facto* equality and also equality in terms of outcomes’. A list of ‘prohibited grounds’ is also provided in Chapter 1, which includes gender and sex.
25. These goals in PEPUDA are duplicative of WEGE’s objective to eliminate unfair discrimination based on gender. Additionally, the WEGE prohibits practices with adverse effects but does not mention them specifically. However, the Equality Act already addresses harmful practices and goes further to list them specifically. Any additions to this list or definition are most appropriately instituted through an amendment to the Equality Act.
26. There are very significant overlaps with WEGE and Chapter 5 of PEPUDA. Chapter 5 has not been brought into force yet, and has in fact been delayed for over a decade. This requires investigation. If WEGE and PEPUDA were both enacted as legislation, there would be a lack of harmonization and overlap between the two Acts.

Recommendations:

27. The WLC recommends this investigation regarding Chapter 5 of PEPUDA in order to assess whether all of the provisions of WEGE are actually necessary. It is our submission that it would avoid duplication, contribute to legal certainty and be more practical and cost effective to

amend existing legislation in order to achieve the goals stated in the WEGE. Further, a process to assess the reasons for the lack of implementation of existing provisions should be undertaken as part of an assessment of legislation.

Procedure/consultation

28. As stated above, WEGE seeks to usher in a large-scale cultural transition by remedying systemic prejudice and inequalities perpetrated against women in South Africa. Despite these wide-ranging ambitions, it appears that the Committee has not endeavored to consult with women living in the provinces, or in more rural areas of the country. This is a serious procedural failure. The Bill cannot hope to make meaningful changes for the better to women's lives in such parts of South Africa, if it has not engaged with them throughout the process of enacting legislation. The Bill has ramifications on women in all seven provinces, both in rural and metropolitan areas, and therefore, such women deserve to be included in the consultation process. The WLC further submits that the Bill will face greater obstacles in its implementation if more far-reaching consultation is not carried out.

29. The WLC therefore recommends that state resources are used without delay, to consult with women living all over South Africa. Their experience, stories, and opinions would enrich WEGE and aid implementation, as well as conforming with the proper nature of a democratic legislature.

Conclusion

We look forward to engaging with the committee further on request.