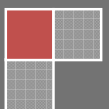


Green Paper: Towards a Gender Equality Bill (draft)

**MINISTRY FOR WOMEN, CHILDREN AND
PEOPLE WITH DISABILITIES**



Framework of the Green Paper

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Overview

1. Since 1994 South Africa has made significant progress in putting in place a legislative and policy framework for advancing gender equality and women's empowerment. Through the Constitution and a range of other statutory provisions South Africa has sought both to protect and promote the rights of women and girls. The statutory and policy architecture for gender equality in the country is comprehensive and multi-dimensional, with individual laws and policies that protect the rights of women and girls.
2. Amongst other statutory provisions, the following constitutional and legislative frameworks include key elements designed to protect the rights of women, promote gender equality and facilitate women's empowerment: Constitution of South Africa (1996), Promotion of Equality and Prevention of unfair discrimination Act (2000), Employment Equity Act (1998), Electoral Act (1998), Municipal Systems Act (2000), Basic Conditions of Employment Act (1997), Domestic Violence Act (1998), Communal land Rights Act (2004), Sexual Offences Act (2007), among others.
3. At the strategic policy level South Africa's ***National Policy Framework for Women's Empowerment and Gender Equality*** (2000) established a clear vision and framework to guide the processes of developing laws, policies, procedures and practices which ensure equal rights and opportunities for women and men in all spheres, levels and structures of government, workplace, community and the family. The National Policy Framework provided the basis for the Public Service to adopt a Gender Management System – a network of structures, mechanisms and processes – that has enabled the mainstreaming of gender across government. The ***Eight Principle Plan for Heads of Departments*** provides a mandate to see that gender equality becomes a goal in all aspects of government departments.
4. In order for the National Policy Framework to be effectively implemented it needed to be aligned and integrated with the provisions of the South African Constitution and South Africa's international obligations, as well as with key pieces of legislation that incorporated gender equality dimensions. The National Gender Machinery (NGM), as outlined in the National Policy Framework, was intended as "an integrated package" of structures located at various levels of state, civil society and within the statutory bodies, in particular the Commission for Gender Equality and the Human Rights Commission.

Problem Statement

5. While progress has been made on a number gender equality fronts there has at the same time been a consistent and growing unease with a range of matters regarding the institutionalisation of the women's agenda for societal transformation and the inalienable realisation of women's rights. These concerns have come from within

government, as well as from a range of civil society organisations. Significantly these concerns were flagged early on in the ***National Policy Framework for Gender Equality and Women's Empowerment***.

6. The policy noted that while South Africa had adopted a sophisticated rights-based legislation with explicit reference to gender equality “an important challenge remains in making these rights accessible to all women by the provision of information and the development of the knowledge and skills that women require to avail themselves of the mechanisms inherent in the legal remedies” (pg. v) South Africa’s ***CEDAW Report*** (2008) noted that progress on achieving gender equality has been hampered by “the lack of monitoring and enforcement and the need for this to happen within an organised and well-coordinated framework” (pg. 43).
7. The Government’s document ***Towards a 15 Year Review*** (2009) argued that “while these institutional arrangements for driving the issues of gender equality tend to be acknowledged internationally as best practice, closer to home one finds challenges in their operation. Chief among these is the matter of inadequate resourcing, financially and in terms of human capacity. Related to this is a problem of policy frameworks without legal status and therefore not legally binding. These challenges apply particularly to the national gender machinery. Also, local government still needs to replicate the institutional structures, strengthening the accountability of municipal managers for driving the issues of women at grassroots level.”
8. In 2010 the ***ANC Women’s League*** noted that although “a number of policy guidelines, legislative frameworks and institutions doing credible work on women matters exist in South Africa [the] lack of coordination of these efforts renders them ineffective, or only partially beneficial. “
9. In a recent survey that looked at women’s economic empowerment, “despite the BEE Act being clear on the need for women to be equal beneficiaries of black economic empowerment, the prevailing opinion among women surveyed, including some of the large women’s investment groups that have done well, is that BEE is mainly a men’s game, with women treated as minor partners, or add-ons.” (FinMark Trust, 2006)
10. A recent UN ***Gender Mapping Report for South Africa*** (2010) highlighted a number of gaps in the current gender equality legislative architectures:
 - 10.1 Criminal Legislation on Hate Crimes: The Committee on the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) has requested South Africa to enact a Hate Crime Law. There is no specific legislation dealing with these crimes in South Africa and it is very difficult to prove that the motivation for the crime is based on hatred. By May 2009 there were 20 documented cases of murder of lesbians in South Africa, of which only two had gone to trial. Both cases had

- committed and qualified prosecutors who failed to see the way that transgressing of normative gender roles contributed to the murders.
- 10.2 Legislation on Sex Work: The issue of decriminalising sex work in South Africa remains an unresolved policy area, resulting in the continuing stigmatisation and marginalisation of women.
- 10.3 Legislation on Human Trafficking: The current law regarding trafficking in persons in South Africa is fragmented. A bill exists but the national law still needs to be finalised, as recommended by South African Law Reform Commission (SALRC).
- 10.4 The Policy on Sexual Offences: This policy was supposed to have been finalised in December 2008, but the Department of Justice obtained another 18-month extension. Such extensions result in the continuation of the difficulties faced by women in the area of gender-based violence.
- 10.5 Implementation of the *Sexual Offences Act*: This Act is not being effectively implemented because it is still largely unknown and very little quality training on the law has taken place.
- 10.6 Implementation of the DVA: The Act has not been adequately budgeted for and there has been a lack of consistent training for court officials and the police, which have resulted in ongoing inequalities in service provision. The Parliamentary Portfolio Committee on Women, Children and Persons with Disabilities held public hearings on the implementation of the DVA in October 2009. The hearings noted the enormous challenges women face in exercising their rights as contained in the law and the ongoing failure to protect women from Domestic Violence. There is also a challenge in effectively implementing the Act in LGBT communities.
11. Under South African civil law, parental authority is shared by the mother and father. African women married under customary law, however, are seen as perpetual minors and have no authority in the family. Patriarchal traditions that require women to submit to men, who are the heads of families, are deeply rooted in South African society in both urban and rural areas.
12. The physical integrity of women is not adequately protected in South Africa. Despite concerted government action, violence against women persists. South African law makes provision for protection of victims of domestic violence, and tasks the police with providing this protection. The law also gives the police authority to arrest perpetrators, even without a warrant. Offenders face prison sentences of up to five years. The legislation is rarely applied in practice because of deeply rooted societal norms, a lack of resources, and the attitudes of doctors, police and judges. The government has financed shelters for women who are victims of assault, and has organised training for police working in this area.

13. Over the past decade South Africa has ratified the main international and regional women's rights protection instruments and national statutory laws has aligned with these commitments in respecting the principle of equality between women and men. The continued application of discriminatory customary laws and persistent patriarchal traditions continue, however, have led to widespread and ongoing violations of women's human rights. Particular concerns remain about gender inequality as exemplified in areas such as discrimination within the family, violence against women, trafficking of women, unequal access to property, discrimination in employment and access to health services and in particular sexual and reproductive health rights.

Issues to be Considered

14. There is a clearly articulated need for **enhanced coordination** and for ensuring that all available gender equality programmes are geared towards addressing gender-based challenges in a holistic and integrated way. As a result a key proposal that has emerged is the call for a Gender Equality Bill. The introduction of such a Bill would ensure that there was no duplication of previously undertaken processes and initiatives, and ultimately the Bill would be elevated into an Act that clearly defines the institutional mechanism for gender transformation. The Ministry is therefore working towards accelerating the introduction and implementation of Gender Equality Act. This move is being promoted on the understanding that in lieu of the strengthening of the National Gender Machinery, it is critical for the South Africa to have a gender policy with a legal binding status and enforceable at government, private sector, labour and civil society levels.
15. A critical concern is the lack of alignment and strengthening coordination between the various laws, policies and practices that are intended to promote gender equality, as well as the weak state of coordination within government itself, and between government and its key social and development partners. As a result of this fragmentation South Africa has been increasingly engaged in gender equality debates geared towards reviewing and restructuring the existing institutional mechanisms for the advancement of women. In 2009 this led to the establishment of a Ministry for Women, Children and Persons with Disabilities.
16. The Ministry was mandated to act as the central coordinating point for the advancement and protection of the rights of women, children and persons with disabilities. A focus of the Women's Ministry is to strengthen the existing uncoordinated national gender machinery at the highest level of government, with a clearly defined mandate and authority, adequate resources and the ability to influence policy, formulate and review legislation that will proactively and substantively entrench the rights and entitlements of women in women in a comprehensive and focused manner.

17. The Ministry has recognised the importance of consolidated legislation that addresses gender equality within a systematic, comprehensive and equitable framework, and is now committed to driving this process as a matter of urgency.
18. The overarching purpose of the Bill will be to ensure equal treatment arising from the Constitution and to promote gender equality for men and women as a fundamental human right and for the broader public good in all areas of social life. The Bill will strengthen the provisions of PEPUDA by providing clear and unequivocal prohibitions on discrimination based on sex in the private and public sectors. Furthermore the Bill will also seek to:
 - 18.1 Regulate the obligation of state and related agencies to promote gender equality. State and related agencies will be required to promote gender equality systematically and purposefully and change the conditions and circumstances which hinder achievement of gender equality;
 - 18.2 Be an overarching Act of Parliament aimed at ensuring gender equity across South African society, and ensuring that women participate fully and equally in all spheres of life. The Bill will seek to inculcate a culture of gender equality throughout South African society;
 - 18.3 Reduce gender-based discrimination in all areas of life, including the home and the workplace;
 - 18.4 Oblige authorities and employers to promote equality between men and women, thereby strengthening the legislative basis for promoting gender equality;
 - 18.5 Seek to reduce gender-based discrimination in all areas of life;
 - 18.6 Define what is meant by gender equality, explicitly prohibit direct and indirect discrimination, and lay down relevant measures that need to be taken against cases of discrimination.
 - 18.7 Deal with equal treatment at work and place obligation on all organizations – whether for-profit and not-for-profit organizations – to promote gender equality. Organizations will be obliged to promote equality between men and women and to create the appropriate conditions for that purpose;
 - 18.8 Establish a mechanism that will enable women to stand up for their rights where they are violated and therefore be active participants in the monitoring of non-compliance.
 - 18.9 Identify appropriate penalties for failing to comply with provisions, with such penalties also serving as a deterrent.

Objectives of the Gender Equality Bill

19. The Gender Equality Bill should, wherever possible and feasible, address the gender equality gaps, challenges and inconsistencies that exist in the current legislative and

policy framework. The gaps, challenges and inconsistencies will be reformulated into proactive and transformative legislative provisions that enhance and further strengthen gender equality. Critical objectives for the Gender Equality Bill will therefore be:

- 19.1 Address inconsistencies and gaps with regard to the current national gender policy framework and remove the discrepancies that play themselves out in implementation processes;
- 19.2 Develop a policy that has legal and binding status on relevant stakeholders and that effectively promotes compliance with the National Gender Policy and ensure its substantive implementation;
- 19.3 Assist in the gendered transformation of institutions, laws, policies, procedures, consultative processes, budgetary allocations by taking into account the needs and aspirations of all women, and particularly those who were most disadvantaged or marginalised by the previous dispensation;
- 19.4 Promote the exchange and sharing of information on the implementation of gender equality policies, and the evaluation of their impact and effectiveness;
- 19.5 Review the priorities, targets, timeframes and performance indicators articulated in existing laws and policies using gender analysis and ensure that gender responsive indicators are included in the Government-wide Monitoring and Evaluation Framework as a means to ensuring that gender is being mainstreamed into the Government's monitoring processes;
- 19.6 Create an enabling policy environment for translating government commitment to gender equality into reality;
- 19.7 Enforce the application of Gender Mainstreaming across all spheres of government, as well as the private sector;
- 19.8 Identify mechanisms, processes and sanctions for enforcement and accountability in relation to the goal of 50/50 gender parity.

Discrimination Against Women

20. Critical areas of discussion during the consultation process needs to include the **definition of discrimination against women**

- 20.1 The Gender Bill should give a legal definition of discrimination which is sufficiently broad enough to be compatible with that in the CEDAW. It should encompass practices which are discriminatory in effect, even though not intended to discriminate eg perceived sexual harassment.
- 20.2 It should also encompass discrimination against women by private institutions and individuals. This will help to cater for situations of women abuse in the private homes/private employment (domestic workers and farm workers).

- 20.3 The definition of discrimination should also include a guarantee of equality of women with men in the protection and enjoyment of human rights as encompassed in section 9 of the Constitution. It should also prohibit discrimination against women based on sex and marital status.
- 20.4 The definition of discrimination should include gender-based violence/violence against women as a form of discrimination.
- 20.5 The Bill should address the African Customary practices that are discriminatory especially in the field of Customary marriages, eg Ukuthwala/ho shobedisa (abduction of women to force them into marriage) and Ukungena (imposition of a man as a successor to the house and position of a deceased husband), seantlo (the substitution of a deceased wife by her sister. These customary practices are denying women the right to consent to a marriage partner in contravention of the Recognition of Customary Marriages Act and therefore, deny her the equal treatment envisaged in terms of section 9 of the Constitution.
- 20.6 The Bill should prohibit and eradicate the Patriarchal effect that is prevalent in the Customary principle of Primogeniture (succession and inheritance along male line), the ownership of land along male line, the custody and guardianship of children along male line in Customary marriages and the proprietary consequences of marriages in terms of the Recognition of Customary marriages Act. All these are forms of discrimination that are impacting negatively on women as a result of their marriages by African Customary rites.
- 20.7 It should render invalid all the laws in operation or practice that still have discriminatory effect on women, and seek to repeal all national penal provisions which constitute discrimination against women.

Further Considerations for a Gender Equality Bill

21. **Obligation to eliminate discrimination:** The Bill should contain an aspect on enforcement and sanctions. There should be legislative measures meant to enforce the law on people/individuals failing to comply with the prohibitions of discrimination, and public and private institutions that do not want to refrain from discriminatory practices against women.
22. **Women Empowerment:** The Act should also endeavour to come up with measures to accelerate women empowerment in the workplace and introduce enforcement mechanisms and sanctions on employers that are not compliant with the women empowerment mechanisms. It should therefore make Affirmative Action mandatory for

all public and private employers as a strategy for achieving gender equality and empowerment of women and impose sanctions on employers that are not compliant.

23. The Bill should make it mandatory for employers and institutions in the public and private sector to utilize measures for attainment of gender equality eg by conducting Gender Audit, gender analysis and to make reporting compulsory on progress attained. Reporting should be made to Parliament on a specific time cycle in conjunction with the Reporting on Employment Equity plans. For employers who are not compliant with the mandate, there should be sanctions imposed.
24. The Bill should open a door for the creation and establishment of women specific Trade Unions in the workplace for the purpose of dealing specifically with women's issues of discrimination, marginalization, abuse and all other women specific problems in the workplace that cannot be discussed in the presence of men, eg sexual harassment, sexual abuse, victimization and discrimination based on sex, gender, marital status, pregnancy.
25. The Bill should make it mandatory for women to be involved in the development, formulation, planning and implementation of policies in the workplace in order to ensure women's representation in all the spheres and facets of the workplace policy.
26. It should also make it mandatory for all the employers to have a Gender Policy which is addressing the issues listed and mentioned in the National Gender Policy Framework and to report on the implementation thereof to Parliament. It should make the implementation of the National gender Policy Framework and the workplace/organisational Gender Policy mandatory with monitoring, reporting and evaluation by a specific gender machinery structure. Sanctions should be imposed for failure to comply.
27. **Women in decision-making:** The Bill should come up with measures for accelerating the involvement and participation of women in decision-making. This should involve the strategy to be involved in fast-tracking the appointment of women in Parliament with the aim to reach the target of 50:50 between men and women within a specific time frame. The Bill should highlight and criminalise every behaviour, conduct, practice that is meant to decelerate the involvement and appointment of women in political positions. The strategy should also include the development/skills development of women towards political position as a mandatory programme.

The Way Forward

28. In taking the Gender Equality Bill forward there needs to be a concerted focus on two critical and inter-related processes:

- 28.1 The Ministry will to coordinate a comprehensive process for reviewing and assessing current legislation and policy. Each law and each policy will need to undergo a stringent gender analysis that will determine the extent to which these laws and policies are responsive to the determinants of gender equality and women's empowerment. A key element of this process will be a gap analysis that identifies where laws and policies are silent, or unresponsive to gender-based challenges at the political, economic and social levels. These gaps should then translate into or inform the drafting of the provisions of the Gender Equality Act;
- 28.2 The Ministry will need to oversee a wide-ranging, inclusive and participatory consultative process. This process will ensure that the widest range of stakeholders, interest groupings and external role-players are consulted at national, provincial and local level, and that their perspectives are taken into account in the drafting of the Gender Equality Act. Attention should be given to voices from within the public sector, the political sphere, the private sector, the labour movement, the faith-based sphere, broader civil society and international development partners. The consultative process will be informed by the urgency of the task at hand, but at the same time will ensure that no voice is overlooked.
29. In order to ensure that these two processes move ahead in a timely and structured manner the Ministry will first develop a detailed action plan that identifies the key activities required, the critical outcomes anticipated, the risks and assumptions underpinning the process, as well as a monitoring framework to ensure that the process is measureable and time-bound. The development of this action plan should be underpinned by the outcomes approach developed by the Presidency, and informed by the need to link the key elements of the Gender Equality Bill with gender-related aspects of the current set of government service delivery agreements.

Road Map for the Way Forward

30. Actions, Time Frames and Responsibility

Action(s)	Time Frame	Responsibility
Research and compilation of documentation on the following: <ul style="list-style-type: none">• The legislative process associated with the drafting of a GE Bill• Review - assessing gaps in current legislation and policies• Develop a compendium of papers associated with the GE Bill	17 Jan to 15 Feb 2011	DWCPD WEGE Branch and CAPDEVNET

Request technical support from SALRC for: <ul style="list-style-type: none"> Guidelines and advisory support regarding the process of drafting a GE Bill Access to research and a stakeholder consultative process that will affect the drafting GE Bill 	1 Feb 2011	DWCPD WEGE Branch
Inter-ministerial Group advised on drafting of the GE Bill	Feb 2011	DWCPD WEGE Branch
NGM consultation: <ul style="list-style-type: none"> Share status of draft Green Paper – Towards a GE Bill Set up advisory group / task team to continually review process and drafting content of GE Bill Schedule meetings dates in support of broader consultation 	4 Feb 2011	DWCPD WEGE Branch and CAPDEVNET
Broad stakeholder consultation on Green paper – Towards a GE Bill (government, civil society, private sector, portfolio committee, trade unions, tertiary institutions, development agencies, etc) with: <ul style="list-style-type: none"> 9x provincial meetings in association with provincial gender machineries 1x national meeting in association with national gender machinery Adhoc consultations with relevant stakeholder groups (that might arise as a result of provincial and national consultations) 	14 Feb to 18 March 2011	DWCPD WEGE Branch and CAPDEVNET
Research and compilation of documentation: <ul style="list-style-type: none"> Finalise Green Paper – Towards a GE Bill 	21 to 31 March 2011	DWCPD WEGE Branch and CAPDEVNET
Final consultation with NGM on Green Paper – Towards a GE Bill	April 2011	DWCPD WEGE Branch and CAPDEVNET
Present Green Paper – Towards a GE Bill to	April 2011	DWCPD WEGE Branch

parliament		
National Women's Conference	May 2011	DWCPD WEGE Branch

31. GE Bill Advisory Group / Task Team

- Develop Terms of Reference
- Schedule meetings

32.