



**PARLIAMENT**  
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**LEGAL OPINION**  
[Confidential]

**TO:** Adv SP Holomisa, MP  
Mr BA Mnguni, MP  
Co-Chairperson of the Joint Constitutional Review  
Committee

**COPY:** Mr MB Coetzee  
Acting Secretary to Parliament

**FROM:** Constitutional and Legal Services Office  
[Adv G Rhoda – Parliamentary Legal Adviser]

**DATE:** 30 August 2012

**SUBJECT:** Legal Opinion on the submission by the Commission for  
Gender Equality

**REFERENCE:** 195/2012

**CRC Ref:** CR12-13

13



## MEMORANDUM

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### INTRODUCTION

1. Our Office was requested to advise on the submission by the Commission for Gender Equality for constitutional review by the Joint Constitutional Review Committee.
2. The Commission for Gender Equality (CGE) argues for various amendments to the Constitution of the Republic of South Africa, 1996. These will be discussed individually.

### ANALYSIS

#### ***Section 9(3) of the Constitution, 1996***

3. The CGE argues for the amendment of section 9(3) of the Constitution, 1996 by suggesting that 'disability' be included as one of the listed grounds on which the state may not discriminate.
4. The CGE asserts that it "observes that Section(3) does not include the disabled who are a vulnerable group and face considerable discrimination as well as marginalisation especially in the workplace."
5. Section 9(3) of the Constitution, 1996 reads:

"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."

6. As can be read in section 9(3), disability is already expressly listed as one of the grounds on which the state may not discriminate.

## LEGAL ADVICE

7. This submission therefore proposes an amendment to the Constitution that already exists. It is recommended that the Joint Constitutional Review Committee does not consider the submission for the purpose of an amendment to the Constitution.

### **Section 132 of the Constitution, 1996**

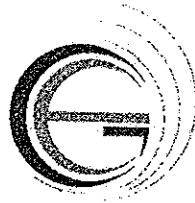
8. The CGE proposes that section 132 of the Constitution, 1996 be reviewed in order to ensure compliance with gender equity targets when appointments are made by the Premier.
9. The CGE further submits that "such an approach is envisaged in terms of section 9 of the Constitution since no checks and balances are created in section 132".
10. From the submission provided, it is not clear which gender equity targets the CGE refers to and whether these targets are legally binding on Premiers.
11. Section 125 of the Constitution, 1996 provides that the executive authority of a province is vested in the Premier of that province. The Premier of a province exercises his/her executive authority when he/she appoints her cabinet.
12. Any executive action <sup>reiterated in my court judgement</sup> must be in line with the spirit and purport of the Constitution, 1996. In exercising his/her executive action, the Premier of a province is bound only by the Constitution, 1996.
13. Section 1 of the Constitution, 1996 furthermore provides that as a democratic state, South Africa is founded on principles of the supremacy of the Constitution and the rule of law. This is confirmed in section 2 of the Constitution. Therefore, any conduct, including the conduct of a Premier, has to be measured against these constitutional standards. <sup>openness fairness</sup>
14. A Premier's action in appointing members of the executive council is therefore only fettered by the constitutional principles described above.
15. If any person, institution or body is of the opinion that these constitutional standards are not adhered to, it is open to said person, institution or body to follow the available legal avenues for challenge.

**LEGAL ADVICE**

16. It is recommended that the Joint Constitutional Review Committee does not consider the submission for the purpose of an amendment to the Constitution.

A handwritten signature in black ink, appearing to read 'Adv G Rhoda', written in a cursive style.

**Adv G Rhoda  
Parliamentary Legal Adviser**



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

**COMMENTS BY THE COMMISSION FOR GENDER EQUALITY TO THE  
CONSTITUTIONAL REVIEW COMMITTEE ON THE ANNUAL REVIEW  
OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA**

**1 JUNE 2012**

**ADV K ANIRUDHRA**  
**Kamraj@cge.org.za**



## 1. INTRODUCTION

### Commission for Gender Equality

The Commission for Gender Equality (CGE) is a Chapter 9 Institution and in terms of Section 11 of its empowering legislation obliged to evaluate proposed legislation that has a likelihood to affect gender equality and the rights of women and make appropriate recommendations to the relevant legislature. This responsibility is exercised with the primary aim of promoting, protecting and developing gender equality in South Africa in terms of its Constitutional mandate. Accordingly, the Commission requests the review of the sections set out hereunder.

## 2. COMMENTS

### 2.1 Section 9: The equality Clause

The Commission has observed that Section 9(3) does not include the disabled who are a vulnerable group and face considerable discrimination as well as marginalisation especially in the workplace.

Accordingly, the CGE recommends the inclusion of the disabled as a listed category in Section 9(3). This will ensure that the disabled will not escape consideration when accessing their rights and resources.

### 2.2 Section 132: Executive Councils

The CGE is concerned with the unrestrained powers of a Premier to appoint MEC's. This allows for an abuse of authority which will be difficult to address even in instances where rights provided for in the Constitution are infringed. A typical example would be a situation where a Premier appoints only men to his or her Executive Council. Such a step may entail behind the door negotiations which could involve unduly influencing certain categories of individuals to be discriminated against. However, due to the unequal power dynamics in such circumstances individuals who are discriminated against may be reluctant to expose the unfair treatment because no remedy is available to challenge the unfair conduct.

Accordingly, the CGE recommends that Section 132 be reviewed in order to ensure compliance with gender equity targets when appointments are made by the Premier. This approach is envisaged in terms of Section 9 of the Constitution but no checks and balances are created in Section 132.

## 3. CONCLUSION

The Commission thanks the Constitutional Review Committee for the opportunity to comment on the Review of the Constitution in 2012.

Adv K Anirudhra, Parliamentary Officer, Cape Town, 1 June 2012