

MEMORANDUM

1. TO : COMMISSIONER Mr M. SHOZI
 2. FROM : KAMRAJ ANIRUDHRA
 3. ISSUE : LEGAL MANDATES OF CGE AND MINISTRY WOMEN, CHILDREN AND PERSONS WITH DISABILITIES.
 4. DATE : 27 MAY 2010
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5. INTRODUCTION

Gender means the following: the roles, duties and responsibilities which are culturally or socially ascribed to women, girls, boys and men. It is therefore a term which embraces both men and women. However, *equality* relates to the equal enjoyment of rights and the access to opportunities and outcomes inclusive of resources by women, boys, girls and men.

Contextualised against the above definitions a simplistic presumption of the role of the Commission on Gender Equality (CGE) is presumed to relate to the support of public and private initiatives aimed at achieving equality for any person in the political, social, economic and cultural spheres of life. This implies that the CGE has a specific focus area which ranges across the entire spectrum of South African society.

The CGE is a not a creature of statute but derives its powers directly from the Constitution. It has equal standing to a government Department but because of its size and for reasons best known to The Department of Finance the CGE along with other C9's still receive funding via other Departments. This untenable situation has not only created confusion but also conflated the role and status of C9's.

In respect of the Ministry for Women, Children and Persons with Disabilities it is envisaged to be a fully fledged state Department. *With reference to its competencies relating to women it has concurrent jurisdiction with the CGE in most areas. This creates an opportunity for overlap of operational areas between the Ministry and the CGE.* However, the programmes and products which the Ministry may conceptualize will obviously have a completely different if not divergent focus but with similar outcomes in some instances. For example the Ministry may introduce legislation aimed at ensuring that women and men occupy decision making positions in the workplace. This is aimed at empowering women in the corporate sector. The CGE on the other hand may evaluate policies in the workplace in order to ascertain whether men and women have equal access to positions in management and also litigate where its finds non-compliance in terms of PEPUDA. The outcome of the CGE is the same to that of the Ministry to the extent that it also wishes to empower women in the workplace.

Therefore, one has to be mindful that the role and function of the CGE is far different from that of the Ministry because in essence the Ministry has to develop and promote the rights of women specifically by taking substantive measures. This is in stark contrast with the role and function of the CGE which has an obligation to promote and develop gender equality which includes the rights and interests of **both males and females to the level where both sexes enjoy equal access**. Accordingly, if a father approaches the Ministry to complain that as a father he is being discriminated against in relation to his ex-spouse by the Maintenance Act because it requires him to pay a greater proportion of his income as maintenance, then the Ministry may be entitled to refer the matter to the CGE on the basis that it relates to a gender issue and is not an issue which prejudices women. In this regard the nature of the role and functions which may be assigned to the Ministry and the CGE will be different because one is a “watchdog” while the other has to deliver services which enhance substantive rights limited to one sex only, namely women.

Secondly, the Ministry does not have any oversight role over the CGE. The Ministry may not require that the CGE seeks its approval prior to implementation of a CGE Plan of Action (POA). This would be unconstitutional as the CGE reports to Parliament and not the executive. Therefore, the Ministry cannot decide that it will withhold funds due and payable to the CGE. It has no authority in law to make such a decision. Surprisingly, it is the CGE which may require the Ministry to submit its employment equity plans to the Commission for the purpose of evaluation for compliance with the Employment Equity Act. In cases of such requests the Ministry is obliged to accede to the request of the CGE.

I will now turn to legislative and other substantive aspects in support of what I have raised herein.

6. STATUTORY PROVISIONS THAT REGULATE THE CGE

A. ADMINISTRATION AND ORGANISATIONAL STRUCTURE

6.1 The Constitution

181 (2) The CGE is independent and subject only to the Constitution and the law, they must be impartial and must exercise their powers without fear, favour or prejudice.

181 (3) 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.**

181(4) **No organ of state may interfere with the functioning of these institutions.**

181(5) **These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year.**

6.2 The Commission on Gender Equality Act of 1996

Section 2

2(1) The President shall determine the seat of the Commission

2(2) The Commission may establish such offices as may be necessary to enable it to exercise its powers and to perform its duties and functions conferred on or assigned to it by this Act or any other law.

Section 5

5(a) The Commission shall determine its own procedure : Provided that due regard shall be given to the principles of transparency, openness and public participation.

Section 7

7(1) The Commission shall at its first meeting ...

(a) in consultation with the PSC and the Minister of Finance appoint a suitably qualified and experienced person ...in terms of subsection (4) as Chief Executive Officer of the Commission.

7.2 The persons appointed by the Commission in terms of subsection (1) shall receive such remuneration, allowances ... as the Commission may in consultation with the PSC and the Minister of Finance, determine.

7.3 (a) A document setting out the remuneration , allowances and other conditions of service ...shall be tabled in Parliament

(b) If Parliament disapproves of any determination such determination shall cease to be of force to the extent that it disapproves.

Section 8

8(1) The remuneration, allowances and other terms of conditions of office and service benefits of the full - time and part-time members of the Commission shall be determined by the determined by the President.

Section 10

10.1 (a) The Commission shall be independent.

10.2 No organ of state and no member or employee of an organ of state nor any person shall interfere with, hinder or obstruct the Commission, or any member thereof ...in the performance of its or his or her functions.

10.3 All organs of state, including any statutory body or functionary shall afford the Commission such assistance as may be reasonably required for -

- a. the protection of its independence and dignity
- b. the effective exercise of its powers and functions

Section 11 (i)

Shall prepare and submit reports to Parliament pertaining to any convention, covenant ...relating to the object of the Commission.

SECTION 15

15(2) THE COMMISSION REPORTS TO THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND ITS ANNUAL REPORTS MUST REFLECT THIS.

B MANDATE

6.3 Introduction

The CGE derives its mandate from Section 181 of the Constitution and Section 11 of the CGE Act expands on this Constitutional mandate which is the legal mandate of the Commission. In this regard the following is relevant.

6.4 Powers and Function of the Commission

Section 11.1

(a) The Commission is empowered to monitor and evaluate policies and practices across three spheres of government, statutory bodies, public authorities and any private institution. This is a full blown power to monitor any organisation or institution irrespective of where it resides. This means that that then CGE must monitor the Presidency and all Ministries, the JSE and even ABSA Bank.

(b) The Commission must also develop and manage educational programmes to the extent that it fosters public understanding of **gender equality** and the role and activities of the Commission. This means that the Commission is obligated to educate any person on gender equality and the mandate of the Commission.

(c) The Commission must evaluate any Act of Parliament, system of personal law, custom, indigenous law any other law that has a potential to affect gender equality. This means that the Commission must evaluate domestic, international and indigenous laws as well as customs and practices that impact on gender equality.

(d) The Commission must also investigate complaints reported to it and attempt to resolve same by way of mediation, conciliation or negotiation. This means that it has a dispute resolution power as well.

(e) The Commission must also monitor compliance with international obligations that flow out of the ratification of agreements and treaties signed by the Republic.

(f) The Commission must conduct research that impact on gender equality

(g) This Commission may make recommendations to Parliament or any legislature on the adoption of legislation which impacts on gender equality.

(h) In terms of the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 the Commission must litigate in the Equality Court with Reference to gender /equality matters.

7. COOPERATION, COLLABORATION AND CO-EXISTENCE BETWEEN THE COMMISSION (CGE) AND MINISTRYFOR WOMEN, CHILDREN AND PERSONS WITH DISABILITIES

INTRODUCTION

I will now seek to contextualise my discussion within the framework of the above legal guidelines.

7.1 The Commission concedes that there are no legal or other constraints which exist which prohibit the establishment of a Ministry that will seek to advance women and gender equality. The challenge is for such a Ministry to co-exist with a Commission for Gender Equality in a manner which is Constitutionally sound.

7.2 With reference to management and oversight it is clear in empowering provisions that the Commission must not only appear to be independent but must also function independently. In this regard one will find that the Commission is expected to regulate its own procedure (see section 5 of the CGE Act). Furthermore, one will find that the Commission reports to Parliament in terms of operations (see section 7.3 , 10.1, 10.2, 11 (i) as well as 181(5) of the Constitution).

7.3 It is therefore trite, that the Commission is not envisaged to report to any member of the Cabinet. This aspect will not be laboured on the basis that an examination of the legislative provisions will illustrate the level of independence ascribed and expected of C9's.

- 7.4 The potential for challenges will most probably arise in the operational paradigm between a Ministry and C9. This relates to the possibility of overlaps in the mandate of the two organs of state. This creates opportunities and risks. In this regard the mandate of the Commission has been set out and the Ministry could then use this as a guideline to develop its mandate in respect of the empowerment of women and subsequent realisation of gender equality.
- 7.5 A Ministry would most probably take cognisance of its status and the gender needs in the RSA when conceptualising its mandate. **Firstly** this would involve crafting a policy which would be aimed at promoting substantive rights of women by service delivery initiatives aimed at poverty reduction, land redistribution, legislative initiatives, monitoring of policy implementation such as compliance with the Domestic Violence Act by all stakeholders and also compliance by Departments with Legislative obligations such as the reporting and provision of facilities by the Department of Health in the realisation of safe terminations of pregnancies. In the last initiative the Ministry would most probably be focused towards monitoring of the affirmation of the Constitutional Right to health care and reproductive rights of women. (**The Commission on Gender Equality in terms of its mandate is expected to monitor whether the MWCPD has a practice in place which monitors compliance with legislative instruments that promote and protect gender equality or women's rights**) In such an instance the initiative of the MWCPD is designed to promote the rights of women. Taken into the paradigm of gender equality the right of men and women to access health care services equally would comprise a gender based competency and fall into the mandate of the CGE). These are the nuances that impact on the mandates of the MWCPD and CGE.

Secondly, the MWPD would in all probability, in keeping with its status co-ordinate strategies at Cabinet level by initiating and introducing legislation on gender equality, provide policy and technical support to relevant stakeholders such as organs of state, universities, NGO's and even the CGE on how to mainstream gender.

In this regard it could collaborate with the CGE in developing gender mainstreaming policies and products such as a working women's manual and a National Equality Act which seek to promote equal access across all socio – economic rights. For example a policy or an equality act which would outlaw labour broking if it impacts on women negatively would rank as a priority because it denies women from holding permanent jobs and receiving benefits such as medical aid. Such an initiative would be perceived as a competency of the Ministry while the monitoring of the practice of labour broking falls within the mandate of Section 11(1)(a)(iv) of the CGE Act.

Against the above background one could use the rationale that I have just outlined to develop a mandate for the Ministry which would delineate the mandatory fields of the DWCPD and CGE with accuracy. This would be a valuable exercise as it would clearly define the powers vested in a Chapter 9 and an Executive authority where they are players in the same arena – namely women’s empowerment and gender equality.

8. POSSIBLE OVERLAPS AND PARALLELS BETWEEN THE MANDATE OF THE COMMISSION AND THE MWPD

INTRODUCTION

In this regard I will use the mandate of the CGE as a benchmark to show what the possibilities are for potential overlaps and parallels between the CGE and DWCPD.

- 8.1 The CGE is mandated to monitor and evaluate policies and practices across the three spheres of government, organs of state and private entities. A possible overlap would be highly likely in the monitoring and evaluation competencies. In this regard the DWCPD is limited in that it may not have jurisdiction over certain entities such as Parliament. **Therefore a possibility is that the scope of monitoring and evaluations could be clearly defined between the CGE and DWCPD.**
- 8.2 The provision of capacity building and policy guidelines for gender focal points could be an exclusive competency of the DWCPD.
- 8.3 The evaluation of legislation, customs, personal law and indigenous law is a wide ranging competency. These competencies comprise a basket of responsibilities and is onerous on the CGE. Therefore, the basket could be redistributed between the CGE and DWCPD with the CGE being allocated the evaluation of customs, indigenous laws etc and also the evaluation of bills and Acts but limited to the National Sphere of government. The DWCPD could be limited to Acts, Ordinances and By – Laws but with greater jurisdiction in that it will engage across all three spheres of legislative development (National / Provincial and Local Government).
- 8.4 The CGE must monitor compliance with international instruments such as CEDAW, Solemn Declaration and the SADC Gender Protocol. The DWCPD would also be keen to include in its mandate the competency to monitor same. The probable differences that could be built into the mandates is that the CGE could be limited to monitoring compliance with CEDAW and the SADC Gender Protocol and be expected to draft a shadow report.

The DWCPD could be mandated to monitor all other instruments and then generate reports which would outline steps that may be taken that will ensure compliance by relevant state departments.
- 8.5 Litigation competencies conferred by PEPUDA should be an exclusive competency of the CGE.

- 8.6 The DWCPD would have the exclusive powers to initiate and coordinate inter-ministerial initiatives that would be aimed at gender mainstreaming and the implementation of strategies aimed at advancing women's rights.
- 8.7 The DWCPD would have the exclusive mandate to be represented in fora which review and make budgetary allocations so as to advise on a gender sensitive approach.
- 8.8 The DWCPD could be responsible for residual competencies which affect women but are unassigned to any organ of state.
- 8.9 The DWCPD and CGE could carry out research in areas that they consider meritorious.
- 8.10 Receipt and handling of complaints related to gender discrimination should still reside with the CGE as the DWCPD may not be perceived as independent.
- 8.11 Initiation and introduction of legislation should be the exclusive competency of the DWCPD.
- 8.12 Execution of investigations in terms of Section 12 should be an exclusive competency of the CGE and should allow for collaboration between the CGE and DWCPD where necessary.

The above could be a possible approach towards delimiting the scope of operations and working towards a clear definition of the mandates of the CGE and DWCPD.

9. CONCLUSION

The formulation of a specific mandate for the DWCPD and CGE is not an overnight event but a process that will require careful though, good faith negotiation and an open mind that will be receptive to feasible possibilities. In this regard it would be valuable to draft a new bill that speaks to the comprehensive competencies namely women, children and persons with disabilities. This would be the grundnorm designed to advance the rights, interest and legitimate expectations of all categories of persons which reside with the DWCPD. In this proposed bill the mandate of the DWCPD could be defined with clarity. This is necessary as it will not only provide clarity but also certainty will prevail. This is vital in an environment organs of state such as the CGE and DWCPD are required to coexist, collaborate and cooperate with each other. This initiative would prove valuable for both the CGE and DWCPD.