



**PARLIAMENT**  
OF THE REPUBLIC OF SOUTH AFRICA

NATIONAL ASSEMBLY  
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Parliament: Following up on our constitutional promises to the people

## MEMORANDUM

**TO:** L Tsenoli, MP  
Deputy Speaker of the National Assembly

**CC:** Ms N Ndaba-Ncube  
Chairperson of the Ad Hoc Committee on Filling of Vacancies for CGE

**FROM:** Mr K Zweni  
Head: OISD

**SUBJECT: STANDARD GUIDELINES FOR THE APPOINTMENT OF COMMISSIONERS AT THE COMMISSION FOR GENDER EQUALITY (CGE)**

### 1. Introduction and background

Parliament is currently considering to develop a more systematic and comprehensive approach for the appointment of commissioners and other office bearers of Institutions Supporting Democracy (ISDs). This is necessitated by the ad hoc basis; which Parliament finds itself entangled when dealing with the appointments of members of ISDs. Both the Constitution and enabling legislation encompass differences in the appointment processes hence the need to develop a model of standardized framework guidelines to be considered when processing these appointments. More importantly, the ultimate objective is to approach all ISD appointments in a coherent, effective and efficient manner.

The appointment process, in most instances, requires a committee of Parliament to make a recommendation to the National Assembly (NA) for adoption. Therefore, the

proposed guidelines seek to outline some considerations to be taken into account by a committee of Parliament in its recommendation process. Parliament strives to ensure that appointment procedures provide for minimum variation (depending on the different mandates, powers and functions of each ISD) to ensure reasonable degree of consistency in appointments. The NA and Portfolio Committee (PC) need to ensure that, amongst others

- Appointment procedures or selection criteria remain consistent with the provisions of the Constitution and the enabling legislation of each ISD;
- Appointments are staggered, where relevant, to enhance continuity;
- Chairpersons are appointed either by the relevant authority or as stipulated in the enabling legislation of each ISD; and
- Public participation in appointment process is enhanced

In most instances, the Constitution and enabling legislation provide some guidance in the manner of ISDs appointments. Parliament is expected to develop a standardised appointment procedure framework to regulate the issues outlined above. To map a comprehensive framework can take a longer period hence the purpose of this document is to provide guidelines to assist the Ad hoc Committee on the Filling of Vacancies in the Commission for Gender Equality (CGE).

## **2. Selection criteria**

### **2.1 Legislative Framework**

The selection criteria for commissioners at CGE is enshrined in section 193 of the Constitution and the composition of the Commission is provided for in the CGE Act No 39 of 1996, as amended. Included in the constitutional provisions is that the appointees must be men or women who are South African citizens, fit and proper persons to hold the particular office. The appointee must also comply with any other requirements prescribed by national legislation. The most significant requirement espoused in the Constitution is that the composition of the Commission must reflect the race and gender composition of South Africa.

The issue of citizenship is clearly defined in section 2, 3 and 4 of Citizenship Act No 88 of 1995.

In compliance with the Constitution the CGE Act in section 3(1) sets out the fundamental criteria for selection of commissioners, as persons who shall

- (a) have a record of commitment to the promotion of gender equality; and
- (b) be persons with applicable knowledge or experience with regard to matters connected with regard to matters connected with the objects of the Commission.

The mandate of the CGE is entrenched in section 187 of the Constitution. This is to promote respect for gender equality and the protection, development and attainment of gender equality. The above Constitutional provision is almost identical to the statutory prescripts of gender advocacy and activism. Without being prescriptive of the number of years of activism, the bottom line at the discretion of the Ad hoc Committee is the extent of interest or a record of involvement in matters related to the functions of the specific body. This should take into cognizance that the footprint of CGE in the rural areas is marginal compared to the mileage received in urban areas.

In addition, 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. This criterion warrants a paradigm-shift of activism, but is inclusive of education. In order to perform these duties and in a transformative context the Ad hoc Committee in the Filling of Vacancies at CGE should consider balancing education, gender and age of upcoming Commissioners.

## **2.2 Fit and proper person to hold the particular office**

This criterion is implicitly captured by section 3(2) of the CGE Act, which stipulates that a commissioner shall be a person with applicable knowledge or experience with regard to matters connected with the objects of the Commission. Without being prescriptive to the legal phraseology of a “fit and proper person”, this criterion implies a person of high competence and integrity. This incorporates considerations of honesty, reputation, knowledge and ability. The expression “fit and proper person” takes its meaning from

the activities in which the person is or will be engaged in and the ends to be served by those activities. It is a consideration of the person's suitability, appropriateness, and legal eligibility to undertake the particular activity.

The issue of eligibility is also synonymous with capability characterized by terms of office spelt out in section 3(7) of the CGE Act. It provides "any person, whose term of office as a member of the Commission has expired, may be reappointed for one additional term." A term of office is fixed and does not exceed five years as the President may determine at the time of appointment. Consideration of "proper person" may incorporate aspects of credibility and conduct.

In determining a person's honesty, integrity and reputation, the following issues could be considered:

- Whether a person has been convicted of any criminal offence;
- Whether the person has been the subject of any adverse finding or any settlement in civil proceedings;
- Is not declared an unrehabilitated insolvent by a court of law;
- Whether the person has been dismissed, or asked to resign, from employment or from a position of trust, fiduciary position;
- Is not enlisted in the National Register of Sexual Offenders;
- Whether the person has the ability to execute the role impartially and without prejudice;
- Any other relevant factor.

Shortlisted candidates will have to be screened and that may be done by Parliament's Human Resource section, SAPS and SSA. Affected candidates should be given the opportunity to clarify, refute findings of the screening report prior to the interview.

### **3. Best practices**

#### **3.1 Staggering of appointment**

The Report of the Ad hoc Committee on the Review of Chapter 9 and Associated Institutions constructed in 2007 (commonly referred as the Asmal Report) notes the

simultaneous expiry of terms of office of all, or even a large portion, of the members of a commission negatively impacts on the effectiveness and efficiency of the institution. Emphasis on this matter is also enunciated in the caveat of section 3(4) CGE Act: "provided that the term of office of the full-time members shall not expire simultaneously."

Therefore, the Ad Hoc Committee on the Filling of Vacancies at CGE should ensure that its processes facilitate a transfer of knowledge from outgoing to newly appointed commissioners to avoid loss of institutional memory. The staggering of appointments may give the Commission time to take shape of a seamless transition. An official handover is necessary, as part of an induction, workshop and continuity instead of the institution operating like a disorganized portfolio.

### **3.2 Leadership**

Amongst the outgoing Commissioners is the Chairperson, therefore the Ad hoc Committee on the Filling of Vacancies should assist the President by nominating one of the candidates to be the Chairperson. The nominated chairperson may be either from existing commissioners or from the newly recommended candidates. It is important that the interview questions of the Ad hoc Committee should test the leadership attributes of the candidates. In theory, at least, the parliamentary committee (Ad hoc in this case) charged with the appointment of commissioners is in a better position to assess eligible candidates as it would have studied their qualifications and would have conducted in-depth interviews.

The leadership qualities expected of Commissioners can be gleaned from CGE Commissioner's Handbook on their roles and responsibilities. This inter-alia include:

- Lead the Commission ethically for sustainability in terms of the economy, environment and society, taking into account impact on internal and external stakeholders;
- Ensure the creation of an ethical culture supportive of gender equality, setting necessary principles, practice and standards, measuring adherence with and

incorporating these into its risk management, operations, performance management and disclosure mechanisms.

- The Commission has a reflective role with collective authority and decision-making as a Commission, but Commissioners must carry individual responsibility for delivery on assigned work areas.
- Act in the best interest of the organization, including managing conflicts. The Ad hoc Committee has a discretion to expand on what does it mean to act in the best interest. They must look into:
  - (a) loyalty,
  - (b) trust,
  - (c) due diligence in carrying the fiduciary duties of the Commission; and
  - (d) managing conflict.

### **3.3 Public Participation**

Section 193(6) of the Constitution provides for the involvement of civil society in the appointment process, as envisaged in section 59(1) (a). The latter section provides that the NA must facilitate public involvement in the legislative and other processes of the Assembly and its committees. It calls for the active involvement and participation of the citizenry as well as more defined interest groups. Manifestly, the legislative sector has a constitutional obligation to facilitate public participation in its processes, which cannot be gainsaid.

The Constitutional values of openness, responsiveness and accountability must be expressed to fully realise a democratic and participatory democracy; a 'living democracy'. The realisation of such a democracy encompasses Committees conducting their business in an open and transparent manner. Such openness and transparency would include public participation of South African civil society. To implement the concept of public participation, the Ad hoc Committee must underscore the understanding of it within the context of recruitment vis-a-viz legislative process.

According to the Constitutional mandate promoting public participation in the legislature, is not only important to promote a people-centred democracy, it is also

critical in strengthening the function of the legislature. One of the founding values of the Republic of South Africa that is enshrined in the Constitution is a system of democratic government to ensure accountability, responsiveness and openness. The Supreme Court of Appeal in *King and Others v Attorneys Fidelity Fund Board of Control and Another*,<sup>1</sup> found that the above mentioned values contained in the Constitution require, that the rules and orders of the NA for the conduct of its business must be made with due regard not only to representative democracy, but also to participatory democracy.

Despite the purpose of public participation defined above, the Supreme Court of Appeal gives content to the concept of public involvement in the case of King. It defined it thus: "Public involvement" is necessarily an inexact concept, with many possible facets, and the duty to facilitate it can be fulfilled not in one, but in many different ways. Public involvement might include public participation through the submission of commentary and representations: but that is neither definitive nor exhaustive of its content. The public may become involved in the business of the NA as much as by understanding and being informed of what it is doing as by participating directly in those processes. It is plain that by imposing on Parliament the obligation to facilitate public involvement in its processes, the Constitution sets a base standard, but then leaves Parliament significant leeway in fulfilling it. Whether or not the NA has fulfilled its obligation cannot be assessed by examining only one aspect of public involvement in isolation of others, as the applicants have sought to do here. Nor are the various obligations section 59(1) imposes to be viewed as if they are independent of one another, with the result that the failure of one necessarily divests the NA of its legislative authority."<sup>2</sup>

Having said that public participation must be realized without compromising democratic processes. To achieve this, various components need to be considered such as the purpose and strategic objectives of public participation for CGE. CGE plays a critical role in the promotion and protection of gender equality in the country. The Ad hoc in

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<sup>1</sup> [2005]ZASCA 96; [2006]1 All SA 458 (SCA); 2006 (4) BCLR 462 (SCA)

<sup>2</sup> Para [22]

the Filling of Vacancies at CGE should determine the model of public participation desired.


### Conclusion

These guidelines are not comprehensive on the issues that arise in the recruitment process, but they may assist the Ad hoc Committee in the Filling of Vacancies at CGE. To develop a standardized framework is a process that might take time.

  
Kaya Zweni

31/10/2018  
Date

~~APPROVED/ NOT APPROVED~~

  
L Tsenoli, MP

01/11/2018  
Date

Deputy Speaker of the National Assembly