



# CAUSE FOR JUSTICE

Portfolio Committee on Women, Children and People with Disabilities  
Parliament of the Republic of South Africa  
CAPE TOWN

30 January 2014

**TO:** The Chairperson, Ms DM Ramodibe

**AND TO:** The Secretary, Neliswa Nobatana

**BY MAIL:** [nnobatana@parliament.gov.za](mailto:nnobatana@parliament.gov.za)

Madam Chairperson, Honourable Members, Honourable Minister,

**SUBMISSION TO THE PORTFOLIO COMMITTEE ON WOMEN, CHILDREN AND PEOPLE WITH DISABILITIES *IN RE: THE WOMEN EMPOWERMENT & GENDER EQUALITY BILL [B50-2013] ("WEGE")***

1. We appreciate the opportunity to provide you with our submissions in respect of WEGE.

**INTRODUCTION: *CAUSE FOR JUSTICE***

2. *Cause For Justice* is a voluntary association called into existence with the purpose to advance constitutional justice in South Africa, primarily through litigation, creating public awareness and participation in the legislative process and governmental decision-making structures.
3. The vision of *Cause For Justice* is the establishment and preservation of a South African society in which justice is dispensed to all through the protection and promotion of the constitutional rights and freedoms of each member of society.
4. Along with its mission and vision, the following core values of *Cause For Justice* gives it a particular interest in WEGE:
  - 4.1 The organization affirms that a stable family unit is the cornerstone of healthy, well-functioning (flourishing) communities and of society at large.
  - 4.2 The sanctity of human life dictates that each human life carries equal value and everyone is entitled to equal protection and benefit of the law.
  - 4.3 Every person has the right to freedom of conscience, religion and opinion, freedom of expression and freedom of association.

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*Executive Members – WW Viljoen, SA Smit, DP Von Fintel, NC Snyders*

## SUBMISSIONS

### **PREFACE**

5. We became aware of the current process and these hearings at a very late stage, within the last two weeks to be exact. Due to time and other constraints we have prepared our submissions without having considered the legislation referred to in Schedule 1 to WEGE, including amongst others:
  - 5.1 Promotion of Equality and Prevention of Unfair Discrimination Act (“PEPUDA”);
  - 5.2 Basic Conditions of Employment Act;
  - 5.3 Employment Equity Act;
  - 5.4 Preferential Procurement Policy Framework Act;
  - 5.5 Broad Based Black Economic Empowerment Act.
6. We have also not considered the -
  - 6.1 South African National Policy Framework for Women’s Empowerment and Gender Equality;
  - 6.2 Convention on the Elimination of All Forms of Discrimination Against Women;
  - 6.3 Beijing Declaration and Platform for Action;
  - 6.4 Millennium Declaration and Development Goals;
  - 6.5 Solemn Declaration on Gender Equality in Africa;
  - 6.6 SADC Protocol on Gender and Development.
7. The aforementioned legislation and policy documents may be of relevance to and may have bearing on the nature and content of our submissions. We ask that the Committee would nonetheless consider our submissions in the light of these policy documents.
8. However, due to the fact that our submissions are primarily based on constitutional principles, we are confident of the relevance and weight of our submissions.
9. Please note that our submissions are not intended to be exhaustive. *Cause for Justice’s* purpose in making these submissions is to address what to it are the most pertinent matters that require further consideration and debate. We endeavour to consider all the relevant material that has bearing on WEGE in order to provide the Minister and this Committee with a more comprehensive response in due course.
10. All references herein to “clause” refer to clauses of WEGE.

**DEPARTMENT OF WOMEN, CHILDREN AND PEOPLE WITH DISABILITIES (“DWCPD”)**

11. We firstly want to commend the Minister and her Department for taking up their mandate and carrying it out with dedication. Any action taken to empower the vulnerable and to work towards true gender equality is a step taken from the right starting point.

**GENERAL SUBMISSIONS**

**A MEMORANDUM ON THE OBJECTS OF WEGE (“THE MEMO”)**

**A.1 INTERACTION WITH EXISTING LEGISLATION AND THE NEED FOR WEGE**

12. The first, and we submit, critical question for Parliament to consider is *if and the extent to which* WEGE overlaps with the existing South African legislation (referred to earlier) that has been enacted to empower the disadvantaged (which includes ‘women’) and to promote equality (which includes ‘gender equality’). WEGE, therefore has to first pass the test of ‘redundancy’.
13. In addition, it has to be borne in mind that these existing Acts of Parliament are being implemented at great cost to South Africans – the taxpaying public who foots the bill in order that our laws may be given effect to.
14. If, by enacting WEGE, government will end up being the chief beneficiary, either by growing its human resources or increasing its budgetary demand or both, it (WEGE) cannot be supported.

**Recommendation 1:**

The Committee, DWCPD and the Select Committee should carefully consider the extent to which duplication exists in respect of the areas covered by WEGE and existing legislation (referred to in paragraphs 5.1 to 5.5 above) and determine the extent to which there is scope for WEGE to exist. The proper implementation of existing empowerment and equality legislation should be the first priority.

**A.2 OBJECTS OF WEGE**

15. According to the DWCPD, WEGE “... carries forward the constitutional vision of equality by requiring the development and implementation of plans and measures to redress gender imbalances...” (Paragraph 3.1 of The Memo)
16. Without providing the South African public with statistics regarding the status (facts) of gender imbalances in our country (currently), it is very difficult for the public to decide whether to support WEGE or not. If imbalances are limited to specific geographical areas and/or are mainly the result of unemployment or LSM profiles (for example), WEGE in its current form, with its national / broad scope, may be unnecessary and unwanted.
17. Sections 25(1)(c)(ii) and 28 of PEPUDA provide no basis for WEGE, as these sections are not operative yet.

**Recommendation 2:**

18. We accordingly invite the DWCPD to provide the public and Parliament with the necessary statistics to make an informed decision about whether to support WEGE or not.

**B DESIGNATION**

19. WEGE imposes burdensome obligations on designated public and private bodies (“bodies”). As a result, bodies should be allowed to opt out or dispute their designation based on their existing policies, measures and statistics regarding the promotion of women empowerment and gender equality (“wege”) within their organisations.

**Recommendation 3:**

20. We propose that a detailed designation process should be drafted to provide for identification of bodies that are not yet promoting *wege* by, amongst others, -
- 20.1 Starting with an initial assessment of a body selected for designation, by for example the completion of a *wege* assessment form or by requiring the body to submit a report of its existing policies, measures and current gender demographic statistics; and
- 20.2 Providing specifically that the body may request reasons and requiring the Minister to give reasons (upon request) for the selection of the body for designation.

**C HEALTH AND REPRODUCTIVE HEALTH**

HEALTH

21. In terms of clause 5.(1) bodies “*must ... develop and implement models for delivering women’s health, **including reproductive health**, in order to achieve the progressive realisation of access to health and **reproductive rights** for women, in compliance with the applicable legislation and international agreements such as the Millennium Declaration and Development Goals.*”
22. We invite the DWCPD to provide the public / Parliament with the research facts indicating that women have less access to health care than other groupings in South Africa. In a country where access to health care is not readily available to all persons, the promotion of health care for a particular grouping, will undoubtedly be at the expense of other groupings and would therefore amount to unfair discrimination.

**Recommendation 4:**

23. There is therefore a risk that clause 5.(1) would require bodies to act unconstitutionally. This risk must be investigated properly and reported on before clause 5.(1) is accepted in its current form.

## REPRODUCTIVE HEALTH

### **Recommendation 5:**

24. The terms “*reproductive health*” and “*reproductive rights*” are ambiguous and must be defined to enable bodies to know what they are dealing with.
25. To the extent that these terms refer to contraception and more problematically, to abortion, there is a risk that clause 5.(1) is unconstitutional to such extent. The interaction with the Choice on Termination of Pregnancy Act (“CTPA”), would be crucial to the question of constitutionality (we submit).
26. There are bodies in South Africa (of which *Cause For Justice* is but one) who affirm the sanctity of a human life and hold the view that to terminate a pregnancy prematurely / unnaturally is to end a human life.
27. Bodies who oppose abortion on demand, do so based on deeply held beliefs and convictions, which in some instances may be based in religion. To force such bodies to facilitate and pay for their female employees or fund members (in the case of medical aid schemes) to abort their children, would infringe upon their constitutional right to freedom of conscience, religion, thought, belief and opinion and the right to freedom of association. Although these bodies may not physically restrain women from aborting their children, they may not be forced to be part of something that offends against their convictions.
28. These bodies may however be inclined to provide for a termination of an employee or fund member’s pregnancy where medical opinion indicates that both mother and child will die and that termination of the pregnancy will allow at least the mother to live.
29. South Africa should avoid the situation currently experienced in the United States of America, where litigation based on the infringement of employers’ right to freedom of conscience and religion by the Patient Protection and Affordable Care Act (“Obamacare”), is abounding.

### **Recommendation 6:**

30. We propose that clause 5 should be redrafted to provide protection for bodies’ rights to freedom of conscience, religion, thought, belief and opinion and the right to freedom of association.
31. If clause 5 is to be persisted with at all, a clear link would have to be established with the detailed provisions of the CTPA regarding the bases for the termination of individual pregnancies.
32. *Cause For Justice* is willing to assist in such redrafting process.

**D FORMAL GENDER EQUALITY (EQUAL TREATMENT) OR SUBSTANTIVE GENDER EQUALITY (EQUAL OUTCOMES)**

33. WEGE contains a number of references to *substantive* equality. However, we propose that the South African people and therefore Parliament should debate the issue of gender equality and whether the nation agrees that both formal and substantive gender equality should be legislated.
34. *Cause For Justice* is of the view that *formal* gender equality, i.e. striving to treat all people equally and enabling them to exercise choices on an equal basis, is a constitutional aspiration and imperative. However, to legislate substantive gender equality is to divorce equality from reality and from human dignity. To impose an arbitrary percentage, 50% or any other percentage, is to force choices onto people, thereby preventing them from making their own free choices and consequently infringing upon their right to human dignity.

**BODIES**

35. As an example, assume a body (Body A) truly wants to act in the best interest of the business it operates and therefore in the best interest of all its employees. It determines to grow the business as quickly and sustainably as possible, which would include continually growing its work force to alleviate unemployment and poverty in South Africa. It goes through a robust process and determines that to achieve their goals, they must appoint candidates that are best qualified and best suited for each role within the body. The body determines to make no distinction based on race, gender, disability or any other ground and record their employment policy in writing.
36. When the body invites candidates to apply for vacancies, they implement and follow their employment policy faithfully. Candidates who apply for positions in the body know that if they are appointed, they truly are the best suited for the position and are therefore affirmed in their human dignity. Because the body does not discriminate based on gender, the gender demographics within the body fluctuate continually. All candidates are treated equally, because the criteria used to determine their appointment gives each one an equal opportunity.
37. To force such a body to maintain a 50% (or any other percentage) gender split, would not only infringe on its own right to freedom of association, but would also infringe on both male and female candidates' rights to human dignity and equal treatment.

**INDIVIDUAL CHOICE**

38. As a further example, assume Body A has 20 vacancies to fill. Assuming further that the people of South Africa has accepted that substantive gender equality should be legislated and must be implemented in terms of WEGE's current 50% quota, the body has to appoint at least 10 women.
39. The application is open to all people. The body receives 100 applications, of which 10 are women. Clearly, women, in exercising their right to choose, based on human dignity, have indicated that one in 10 or 10% representation would satisfy the requirement of substantive equality. If the body were to disregard this clear indication and appoint all 10 female

applicants, its actions would be substantively unequal and would be disrespecting the choice and human dignity of the women who have freely indicated their preference to be appointed in the available positions.

40. The converse scenario may also happen, in which case a 50% representation would be completely inadequate to provide for substantive equality. We accordingly submit that measures to promote gender equality that do not take into account people's free choice in respect of their employment, would both be unconstitutional and irrational. Any unqualified percentage, 50% or any other, that government attempts to force onto people, would be arbitrary, as it could not have any rational base.

#### PREVAILING CULTURAL CHOICES

41. We submit that people's cultural choices play an undeniable role in their employment choices and choices about the associations they make. People who come from, prescribe to and believe in a specific family culture or belong to a particular religious community, may choose, as a general norm, for mothers to be homemakers and take primary responsibility for the day-to-day care of children. Their choices may be based on deeply held beliefs regarding the gender roles that are most beneficial for family life and for society as a whole. Section 30 and 31 of the Constitution are instructive in this regard.
42. If people exercise their life choices in this manner, which would result in a lesser percentage of women wanting to and being available for appointment to bodies, the state and the law should respect the cultural choices of its citizens.
43. Also in this scenario, 50% or any other percentage, that government attempts to impose on people, would be arbitrary as it would be divorced from the basis of a rational percentage.

#### **Recommendation 7:**

44. We propose that the South African people and therefore Parliament should debate the issue of gender equality to determine whether the nation agrees that both *formal* and *substantive gender equality* should be legislated. We note that to proceed with WEGE without having such debate, would result in the enactment of legislation without a policy mandate from the people of South Africa.
45. We accordingly propose that the current 50% requirement be replaced with an alternative measure(s) or measuring stick to promote the empowerment and equal treatment of women in bodies. The measures taken by fictitious Body A (referred to above) may be a helpful starting point in this regard.
46. The proposed pre-designation process (referred to in recommendation 3 above) will then ensure the screening out of those bodies that are already promoting *wege* within their organisations.

## **SPECIFIC SUBMISSIONS**

### **E DEFINITIONS**

#### **Recommendation 8.1 to 8.4:**

47. **“gender equality”**: As indicated before, we propose that the South African people and therefore Parliament, should debate the issue of gender equality and whether the nation agrees that both formal and substantive gender equality should be legislated. Depending on the outcome of such debate, the reference to *“outcomes”* may need to be deleted, as well as the whole of the definition of **“substantive gender equality”**.
48. We propose that a new definition should be included to give meaning to the term **“equal enjoyment”**. *Cause For Justice* is willing to assist in the development/drafting of such definition.
49. **“gender mainstreaming”**: We propose that the definition be clarified by adding the words: *“from such policies and programmes”* after *“equally”*.
50. **“women empowerment”**: We propose that the definition be reworded to clarify how section 9(2) of the Constitution contemplates the advancement of women.

### **F OTHER**

#### CLAUSE 4.(1)

51. We propose that the wording in clause 4.(1) be amended to delete the following offensive and irrelevant words:  
  
*“... [address the pervasive discriminatory patriarchal attitudes and the lingering effects of apartheid faced by women in the education system]...”*
52. If the DWCPD insists on maintaining these words, we invite them to provide factual evidence to support it.
53. We invite the DWCPD to explain how and why *“[to] improve access to education on reproductive rights for women, particularly young women”* (clause 4.(1)(d)) is relevant to *wege*.

#### CLAUSE 8.(2)(c)(ii)

54. We invite the DWCPD to be specific about the *“disparities”* (between men and women) to which they are referring.

CLAUSE 9.(4)(a)

**Recommendation 9:**

55. We propose that this clause should be deleted, alternatively be amended to include the words “*over which it has full control*” after the word “*circumstances*”.

CLAUSE 11(1)

56. We invite the DWCPD to explain what is meant by the phrase “... *sustainable livelihoods and decent work for women* ...” in subclause (a).
57. We regret the focus in subclause (b) on distinguishing between men and women in respect of land ownership. It is our view that in general the focus should not be on the individual, but rather on families and promoting of family.

CLAUSE 12

58. We invite the DWCPD to provide the public / Parliament with the research facts indicating that women with disabilities are currently worse off than men with disabilities. If this is not factually the case, promoting the economic empowerment of women only, i.e. at the exclusion of men with disabilities, is likely to amount to unfair discrimination.

**Recommendation 10:**

59. There is therefore a risk that clause 12 would require bodies to act unconstitutionally. This risk must be investigated properly and reported on before clause 12 is accepted in its current form.

CLAUSE 15 AND 16

60. We submit that placing the responsibility for the implementation of gender mainstreaming and women empowerment on a single individual in an organisation (the accounting officer) is overly burdensome and unfair. The unfairness is made worse when viewed in the light of the Minister’s wide enforcement powers conferred by the current clause 16.

**Recommendation 11:**

61. We submit that the compliance burden/responsibility should be carried jointly by all the members of the Board of a particular body.

**Recommendation 12:**

62. We submit that the Minister’s enforcement powers should be clearly defined and confined to mechanisms appropriate to the field of equality, for example a referral to the Human Rights Commission and/or the Equality Court.

**Recommendation 13:**

63. We submit that a clause or clauses should be added containing the maximum penalties to which individuals that are responsible for the implementation of the WEGE Act within bodies, could be subjected. Such maximum penalty should not include the possibility of a prison sentence.

CLAUSE 17 AND 18

**Recommendation 14:**

64. We submit that the Code of Good Conduct and Frameworks should be published prior to the enactment of WEGE and must be published only after a proper public consultation process had been followed.

65. To publish these instruments only after the law has passed through Parliament, would place bodies in a prejudiced position as they would have compliance obligations without knowing what to aim for or where the process is headed. We submit that such a situation would be untenable.

SUNSET CLAUSE

**Recommendation 15:**

66. We propose that consideration should be given to including a sunset clause into WEGE – i.e. a date by which the proposed affirmative action will cease and the people of South Africa be allowed to freely choose the nature and level of their economic activity or inactivity.
67. We trust that the Committee finds our submissions helpful and thank you for the opportunity to contribute.

Yours faithfully,

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