

AN ANALYSIS: THE WOMEN EMPOWERMENT AND GENDER EQUALITY BILL

By Phephelaphi Dube: Legal Officer, Centre for Constitutional Rights

The achievement of equality and non-sexism are two of the key founding values of the Constitution. Section 9 of the Constitution gives effect to these values by creating the right to equality before the law and equal protection and benefit of the law. Hence, in late 2013, the *Women Empowerment and Gender Equality Bill* (the Bill) was introduced in Parliament. It aims, according to the preamble of the Bill, to give effect to section 9 of the Constitution by providing for a legal framework to advance empowerment of women, as well as gender equality. The Bill accordingly attempts to create a legislative framework that supersedes all other laws pertaining to women empowerment, although in a manner which seems to disregard the aforementioned laws.

In so far as the Bill seeks to give effect to sections 1 and 9 of the Constitution, the intention of the Bill must, in principle, be welcomed. However, in spite of its well-intentioned stipulations, there are a number of constitutional concerns regarding this Bill. First, the Minister's power to designate almost any public and private entity (as defined by the Bill) to comply with the Bill. No criteria are provided in terms of which the Minister may exercise this power to designate an organisation, which renders the Bill vague and arguably not of general application. This absence of guiding criteria creates so wide a discretion that the Bill would possibly fail the principle of legality, which requires laws to be clear, ascertainable and non-retrospective. The Bill also lacks effective enforcement mechanisms to warrant compliance with its empowerment and equality provisions. Secondly, the Bill - in pursuit of achieving equality - seeks to achieve "*a minimum of 50 percent*" representation of women in various walks of society, which in itself is paradoxical, since anything more than 50% representation will, in effect, create a new inequality. Thirdly, the Bill requires designated private entities to promote and fulfil certain fundamental rights, which, in essence, remain the competency and duty of the state. Fourthly, the Bill fails to recognise or refer to any existing legislation which seeks to protect women and promote gender equality - thus effectively creating a separate and new legal, although vague, framework. Finally, the Bill's glaring omission regarding its relationship with the Commission on Gender Equality (the Commission) or any reference to this constitutionally mandated body seems awkward, to say the least. The latter requires some clarification.

The mandate of the Commission, as a so-called Chapter 9 Institution, is derived from sections 181 and 187 of the Constitution. Section 181 provides that the Commission, as one of the institutions which strengthen constitutional democracy in South Africa, is "*independent, and subject only to the Constitution and the law, and... must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice*". Furthermore, section 181(3) - (5) determines that:

"(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.

(4) No person or organ of state may interfere with the functioning of these institutions.

(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."

In turn, section 187 provides as follows:

"(1) The Commission for Gender Equality must promote respect for gender equality and the protection, development and attainment of gender equality.

(2) The Commission for Gender Equality 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.

(3) The Commission for Gender Equality has the additional powers and functions prescribed by national legislation."

Moreover, section 11(1)(a) of the *Commission for Gender Equality Act (39 of 1996)* states that in order to achieve the objectives referred to in section 187 of the Constitution, the Commission shall "*monitor and evaluate policies and practices of organs of state, statutory bodies or functionaries, public bodies and authorities and private businesses and institutions, in order to promote gender equality.*" This provision is contrasted with the provisions of the Bill, which at various instances parallel the provisions of the Commission. Such instances include the mandatory reporting provision; the ministerial oversight on gender equality; and the Minister's investigative authority. In essence, the ministerial powers contained in the Bill appear to duplicate those of the Commission.

It appears, however, as if the drafters of the Bill - instead of strengthening the mandate, role and functions of Commission - have failed to consider the constitutional and latter legislative provisions altogether. This aforementioned duplication of roles can only lead to unnecessary expenditure on the part of the state, not to mention diminishing the role and duty of the Commission as provided for in the Constitution. Nonetheless, regardless of the other shortcomings, perhaps its biggest flaw is that the Bill appears to usurp the constitutional mandate of the Commission.

The importance of the Commission, as one of the Chapter 9 Institutions, is that it is tasked with creating state accountability through ensuring the consistent adherence by public institutions to the rule of law, as well as encouraging a culture of respect for human rights by both the state and all members of civil society. It forms a link between the state on the one hand, and civil society on the other. The Commission is required by the Constitution to ensure that the state delivers, but also respects, protects, promotes and fulfils constitutional rights pertaining to gender equality. Another critical role of the Commission is to monitor and assess whether the state is complying with international obligations. Whilst the



Centre for
**CONSTITUTIONAL
RIGHTS**

Commission is an excellent institution to address the plight of women in South Africa, it has, according to the Human Science Research Council's 2007 "*A National Review of Chapter 9 Institutions and Civil Society*", been under-resourced and underutilised. Therefore, resources that could have gone towards the implementation of the Bill should instead be used to strengthen the Commission and its activities.

The Commission as a Chapter 9 Institution serves to strengthen and support democracy. These institutions provide a platform from which citizens may express their needs. The Commission is constitutionally mandated to promote, protect, develop and attain gender equality. Therefore it is imperative that all legislation (including this Bill) purporting to promote gender equality recognise the role of the Commission. In addition, South Africa is not without a shortage of gender and equality legislation such as the *Employment Equity Act* (Act No 55 of 1998), the *Recognition of Customary Marriages Act* (Act No120 of 1998), and the *Promotion of Equality and Prevention of Unfair Discrimination* (Act No 4 of 2000). However, the Bill fails to reinforce the latter. It fails to create new and precise initiatives. It also fails to adequately protect and promote gender equality in its widest sense. Instead, the Bill seems to be creating a vague and separate legal framework and a mechanism with demands for compliance which merely creates bureaucratic burdens for its intended, although yet unidentified, subjects.