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PART 2: RECOMMENDED CHANGES TO THE COMMISSION FOR GENDER EQUALITY  
ACT NO 39 OF 1996

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### Name of Act

Section 181 and Section 187 of the Constitution refers to the **Commission for Gender Equality**, whilst the Commission on Gender Equality Act 39 of 1996 refers to the **Commission on Gender Equality**. The CGE notes that the title of the Commission in the Act 39 of 1996 differs from the title of the Commission as stated in the Constitution of 1996.

### Recommendation:

*For the purposes of consistency, we would like to recommend that the title of Act 39 of 1996, be amended to "Commission for Gender Equality" which will correspond with the Constitution of South Africa of 1996.*

### Preamble

In terms of the *Principles relating to the Status of National Institutions (The Paris Principles)*, as adopted by the *General Assembly resolution 48/134 of 20 December 1993*, various principles are espoused in relation to national institutions supporting and promoting human rights.

Our own Chapter 9 institutions are also based on these Principles, which includes the mandate to report to UN or regional treaty bodies on the status of human rights as independent national institutions of human rights.

Central to these is that such national institutions shall be vested with competence to promote and protect human rights, be given as broad a mandate as possible, and that the principle of independence is guaranteed.

The *Vienna Declaration and Programme of Action*, as adopted by the World Conference on Human Rights on 25 June 1993, emphasizes the responsibilities of all States to develop and encourage respect for human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion. It also expressed deep concern by various forms of discrimination and violence, to which women continue to be exposed all over the world. The Vienna Declaration supports a rights-based approach to the protection and promotion of human rights.

The Vienna Declaration emphasizes that "all human rights are universal, indivisible and interdependent and interrelated.

In terms of the *African (Banjul) Charter on Human and Peoples' Rights* to which SA is also a signatory, the adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions and other instruments adopted by the Organization of African Unity, the Movement of Non-Aligned Countries and the United Nations is further reaffirmed.

The State is furthermore obliged by various international and regional instruments that it has ratified to take steps toward the promotion and protection of human rights. For example, the SA Government ratified the *Convention on the Elimination of All forms of Discrimination against Women* (commonly referred to as CEDAW) which places positive as well as negative obligations on state bodies, *inter alia* to ensure the equal rights of men and women to enjoy all economic, social, cultural, civil and political rights. Article 2(a) of CEDAW further

obliges state bodies to embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle.

The preamble usually contains the spirit and purpose of the Act. An important principle such as the independence of a Chapter 9 institution is lacking. To this end, we recommend that the preamble contains the aforesaid principles.

### **Member of the Commission**

The CGE Act fails to clearly define who a 'member' of the Commission is. The word "member" and "Commission" are used interchangeably in the CGE Act. The inclusion of a definition for the word "member" will create consistency in the CGE Act.

#### Recommendation:

*The word "Member" in the CGE Act is to be clearly defined as a Commissioner of the CGE.*

### **Composition of Commissioners**

**Section 3** of the CGE Act provides for the composition of Commissioners. Subject to section 119(2) of the Constitution, the Commission shall consist of a chairperson and no fewer than seven and no more than eleven members.

#### Recommendation:

*The CGE would like to recommend a reduction in the number of Commissioners required for the composition of the Commission. We would like to recommend that the Commission consists of two Commissioners, in addition to the Chairperson of the Commission.*

*We therefore recommend that the Act be amended to: "The Commission shall consist of a Chairperson and two fulltime Commissioners, who shall:-..."*

### **Criteria for the appointment of Commissioners**

Due to the nature and the Constitutional mandate of the Commission, while taking into account the role of Commissioners, it would be prudent for Commissioners to have a strong basis and understanding of the law, governance, as well as the legal framework within which it operates. It is also customary in most jurisdictions to have a retired Chief Justice as the Chairperson of a National Institution of Human Rights.

#### Recommendation:

*We would recommend that Section 3 (1) be amended to include a subsection (c) which states that Commissioners must have no less than fifteen years experience and "at least one of whom has a legal background."*

### **Term of Commissioners**

**Section 3(4)** provides for a fixed term of office for Commissioners, for a period not exceeding 5 years, who may be appointed for one additional term. This provision does not stipulate a minimum term of office for Commissioners. The absence of a minimum term for

Commissioners, as the Act currently stands, has the potential to create uncertainty, which could also impede on the governance and effectiveness of the Commission.

Recommendation:

*Section 3(4) should be amended to provide for a non-renewable term for Commissioners. In addition, the Act should stipulate a minimum term for Commissioners, which should not be less than two years.*

**Powers and Functions of the Commission**

**Section 11** of the CGE Act empowers the CGE to perform certain functions, which includes a list of the following entities which the CGE is empowered to monitor and evaluate, namely: Organs of state at any level; statutory bodies or functionaries; public bodies and authorities; private businesses, enterprises and institutions.

Recommendation:

*Section 11(1)(a) be amended to extend the CGE's powers and functions, to enable them to monitor and evaluate policies and practices of all persons and entities. An additional subsection under Section 11(1) be included as the following: Section 11(1) (v) person or entity.*

### The CGE should be entitled to litigate in its own name

It is concerning that **Section 11** of the CGE Act stipulates the powers and functions of the CGE, and does not in fact accord the CGE any express power to litigate in its own name or on behalf of any other person. This is in conflict with PEPUDA, which empowers the CGE to litigate in its own name.

While, in our view it is strongly arguable that the CGE still has the power to litigate either in its own name or on behalf of a person or group or class of persons, particularly when regard is had to its broader constitutional mandate as well as its structure and composition. The absence of explicit provisions in the CGE Act creates uncertainty in this regard.

To date, although the CGE has engaged in litigation, it has intervened using the rules of the court, which is limited to *amicus* interventions. It is also the practice of the Constitutional Court to request the CGE to provide its perspectives, depending on the matter. This is distinguishable from instances where the CGE would seek to litigate (either in its own name or on behalf of groups of persons) in the capacity of Applicant/ Plaintiff in proceedings. It is the latter situation that we are concerned with. We acknowledge that Section 20(1)(f) of (PEPUDA) expressly empowers CGE to institute proceedings in their own name, but this expressed provision is only restricted to matters before the Equality Courts.

#### Recommendation:

*The CGE Act should be amended to include the following provision: "The CGE may bring proceedings in a competent court or tribunal in its own name, or on behalf of a person or a group or class of persons."*

### **Indemnity against costs**

Section 17 of the CGE Act deals with legal proceedings against the Commission and indemnifies the CGE, and its employees from liability in respect of its mandate, but does not expressly indemnify the CGE from a cost order in respect of litigation. In addition to the CGE's explicit powers to litigate, the Commission runs the risk of having a cost order granted against them in respect of a matter litigated in the name of the CGE. The CGE, as an institution supporting democracy, will not take on frivolous matters, but will litigate in matters concerning public interest. This will assist the CGE to litigate in matters concerning public interest, without the fear of an adverse cost order.

#### Recommendation:

*We would like to recommend that all Chapter 9s be indemnified from all cost orders in respect of public interest litigation.*

### **Executive Authority**

Treasury Regulations identifies the Chairperson as the executive authority. The CGE Act omits to identify the executive authority. In terms of the principles of governance the Chairperson is the executive authority. To prevent any confusion and having regard to the interpretation of statutes, the CGE Act must clearly define the executive authority as the Chairperson of the Commission, as opposed to referring to the regulations for clarity.

#### Recommendations:

*The act must state that the executive authority of the CGE is the Chairperson.*