

# **SUBMISSION TO THE AD HOC COMMITTEE ON THE COMMISSION FOR GENDER EQUALITY**

## **Introduction – the role and significance of the Commission for Gender Equality**

1. Almost 2 decades into South Africa's democracy, gender inequality remains pervasive and damaging to the country's development and the well-being of its people. On the economic front, 60% of those unemployed are women, and when they are employed, women on average earn 30% less than men. Simultaneously, women continue to bear the primary responsibility for raising children (the SAIRR reported last year that in 2009 the proportion of children living with absent, living fathers was 48%) and spend between two and a half hours (in urban areas) and four and a half hours (in rural areas) per day more than their male counterparts doing 'unpaid' housework. Alongside unacceptably high levels of gender based violence, there can be no doubt that the impact of such power disparities undermines the dream of a prosperous and peaceful nation.
2. For much of the last decade the work of the Commission on Gender Equality (CGE), the Chapter 9 institution mandated to promote gender equality, has been hampered by serious institutional problems, organisational conflicts and a failure to act strategically. In 2007/08 and 2008/09 the commission received qualified reports from the auditor general and in 2010 was called by SCOPA to explain its financial affairs.
3. The report released by the ad hoc on the Review of Chapter 9 and Associated Institutions in 2007 lamented that:  
  
*"the Commission represents a lost opportunity as until now it has failed to engage in a sustained and effective manner with the policies, approaches and mechanisms to eliminate all forms of gender discrimination and to promote gender issues in South Africa".*
4. Specifically, the Commission was criticised for failing to deliver on the mandate of building relationships with civil society and other Chapter 9 institutions, its reticence to use its subpoena and other powers, and its reluctance to take public positions on issues pertinent to gender equality.
5. Over the course of 2011, however, signs of progress and turnaround were discernable. While serious management concerns remain, the Commission received an unqualified audit for the year 2009/10. It held provincial civil society consultations on its strategy, for the first time in a number of years. Again, these were wanting in a number of respects but in principle should be welcomed.
6. This week, the Ad Hoc committee on the CGE will have the opportunity to decide whether such trends can be continued: interviews will be conducted to replace nine Commissioners. This is a key moment. Their choice of appointees will be decisive to the body's future.

7. Questions asked of the candidates should ensure that commissioners are appointed who are capable of assisting the Commission in properly fulfilling its mandate. In order to determine what questions should be asked, one must ask what qualities an ideal Commissioner should possess.

### **Qualities and Attributes of a Commissioner for Gender Equality**

8. We do not claim that the qualities described below are a closed list. There may be others which are important and should be added to those we identify. However, we submit that the criteria we identify provide a foundation for assessing the merits of the candidates – based, as they are, primarily on the criteria found in the Constitution and the legislation governing the Commission.
  
9. The Constitution sets out the following general requirements for members of the Commission and all other members of Chapter 9 institutions:
  - Commissioners must be South African **citizens** [Section 193(1)(a)];
  - Commissioners must be **fit and proper** persons [Section 193(1)(b)];
  - The need for the Commission to reflect broadly the **race and gender composition** of the country must be considered when Commissioners are appointed [Section 193(2)]
  
10. The following further criteria may be gleaned from the Commission on Gender Equality Act 39 of 1996 (the legislation governing the functioning of the commission):
  - Commissioners must have “a **record of commitment** to the promotion of gender equality” [Section 3(1)(a)];
  - Commissioners must “be persons with **applicable knowledge or experience** with regard to matters connected with the objects of the Commission.” [Section 3(1)(b)]
  - The Commission must be independent, and members of the Commission must perform their functions **in good faith** and **without fear, favour, bias or prejudice** [Section 10(1)]
  
11. We proceed to suggest how the content of some of these criteria may be fleshed out.

### **A fit and proper person**

12. This requirement suggests persons of high competence and integrity.<sup>1</sup> Integrity and high ethical standards of the individual commissioners is at the heart of the fair and impartial Commission envisaged by the Constitution. The expression “fit and proper person” takes its meaning from the activities in which the person is or will be engaged 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 fit and proper person test incorporates considerations of honesty, integrity, reputation, knowledge, and ability. Considerations of a “proper person” may incorporate aspects of credibility and conduct.
13. In determining a person’s honesty, integrity and reputation, the following issues need to be examined:<sup>2</sup>
- 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;
  - Whether the person has been dismissed, or asked to resign, from employment or from a position of trust, a fiduciary appointment or similar position;
  - Whether the person has the ability to execute the role without malice or partiality;
  - Whether the person has acted carelessly or in a dishonest or criminal manner.
14. The Nigerian Human Rights Commission Act of 1995 disqualifies a commissioner who becomes of unsound mind; or becomes bankrupt or makes a compromise with his creditors; or he is convicted of a felony or of any offence involving dishonesty.

**Race and Gender composition:**

15. This criterion may seem self-explanatory, especially for the gender composition of a body tasked with dealing with gender issues. However, gender alone ought not to be sufficient for a candidate to be appointed. The candidate must also demonstrate a strong track record in, and commitment to, promoting gender equality. The Act requires as much.

**Record of Commitment:**

16. In determining the person’s competence and capability matters including, but not limited to, should be considered:
- Whether the person has demonstrated by experience and training that the person is able to, or will be able to perform his/her duties;
  - Whether the person possesses relevant qualifications (apart from being a technical requirements, this may demonstrate a deep seated and long standing interest in and commitment to the subject matter);

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<sup>1</sup> Enver Surty, Commonwealth Magistrates and Judges Association Conference, <[www.info.gov.za/speeches/2008/08101011451004.htm](http://www.info.gov.za/speeches/2008/08101011451004.htm)> accessed 23 January 2012.

<sup>2</sup> See ‘The Fit and Proper Person Handbook’, available at [www.fsa.gov.uk/pubs/hb-releases/rel27/rel27fit.pdf](http://www.fsa.gov.uk/pubs/hb-releases/rel27/rel27fit.pdf) accessed 23 January 2012.

- A proven track record of commitment to the values of the Constitution, human rights and gender equality;
- Any previous relevant experience;
- Whether the person has demonstrated commitment to gender equality at the national or local level, such as the promotion, protection and fulfilment of the human rights of women, speaking out publically on issues of gender justice, including demonstrating an ability to challenge cultural or religious practices that may undermine gender equality;
- A commitment to working in partnership with a wide range of stakeholders, at all levels, including forging links with civil society that will forward the Commission's objectives.

### **Applicable knowledge or experience**

17. The importance of a candidate's abilities is recognised in other jurisdictions. In Australia, Section 8 B(2) of the Australian Human Rights Commission Act 125 of 1986 states that a person is not qualified to be appointed as the Human Rights Commissioner unless the Minister is satisfied that the person has appropriate qualifications, knowledge or experience. In Ireland, Section 4 of the Irish Human Rights Commission Act 9 of 2000 provides that a commissioner shall not be appointed unless they are suitably qualified for such appointment by reason of possessing such relevant experience, qualifications, training or expertise as is appropriate.

18. An assessment of knowledge and experience includes aspects such as:

- academic qualifications and knowledge (including a candidate's postgraduate qualifications and postdoctoral research, if any);
- experience in working on gender issues, including interactions with relevant civil society organisations;
- Any specialist training the candidate may have received on gender-related issues.
- A candidate's knowledge includes an awareness and understanding of relevant laws and policies affecting the Commission, including international and regional treaties, case law, administrative mechanism and legislation,
  - Whether the candidate has an understanding of South Africa's obligations in terms of international and regional treaties dealing with gender equality;
  - Whether the candidate is familiar with the statutory framework that sets out the duties and powers of the Commission, such as the Promotion of Equality and Prevention of Unfair Discrimination Act (the Equality Act);
  - Whether the candidate is familiar with the Public Finance Management Act, including its financial reporting, due diligence and financial stewardship

requirements and demonstrates a commitment to good governance or the capacity to acquire such an understanding rapidly;

- A candidate's understanding of the mandate and responsibilities of other oversight bodies;
- A candidate's understanding of the relationship between issues of gender, HIV and AIDS, poverty and disability and the impact of the intersection of grounds of discrimination on equality;
- A candidate's commitment to engaging men as part of the solution to gender inequality.

#### **Without fear, bias, favour or prejudice**

19. Section 10(4) of the Commission on Gender Equality Act prohibits any person from conducting an investigation, or assisting with one, in any matter where they have a pecuniary or other interest which could preclude them from exercising their powers and functions in a fair, unbiased and proper manner. Thus, potential commissioners should be scrutinised for their probity in relation to their financial and other interests. Candidates who are likely to find themselves in a position of conflicting interests when performing functions of the Commission ought not to be appointed.
20. Commissioners will be expected to advance and fulfil the mandate of the Commission, as set out in the Constitution, the Commission on Gender Equality Act and the Equality Act. In performing their duties, they must be impartial, and should not be influenced by external pressures. The Commission and the Commissioners must, at all times, be willing to act independently, and without fear, favour or prejudice. Thus, the Commissioners should be capable of acting without being influenced by political pressure, and should be able to make decisions regarding the investigations entirely on legal considerations.
21. In determining whether a Commissioner will act independently and impartially, one can draw on a test developed by the Constitutional Court in the *SARFU* judgement<sup>3</sup>. In this case, the Constitutional Court ruled, that in evaluating whether a judicial officer will exercise his or her powers impartially, one will have to ask whether a reasonable, well-informed, person, armed with all the relevant facts, would have a reasonable apprehension that the relevant officer would potentially be biased in his or her decision making. Though the decision related to judges, a similar conclusion can be reached when it comes to the members of the Commission for Gender Equality, since both are categories of public officials tasked with the duty to protect and uphold the Constitution.

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<sup>3</sup> *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* (CCT16/98) [1998] ZACC 21.

22. We trust that these suggestions will be of some assistance to the Committee in performing their crucial constitutional task.

**WOMEN'S LEGAL CENTRE**

**DEMOCRATIC GOVERNANCE AND RIGHTS UNIT**

**UNIVERSITY OF CAPE TOWN**

**LAW, RACE AND GENDER UNIT**

**UNIVERSITY OF CAPE TOWN**

**THE COMMUNITY LAW CENTRE**

**UNIVERSITY OF THE WESTERN CAPE**

**24 JANUARY 2012**