



**SUBMISSION TO THE PORTFOLIO COMMITTEE ON
WOMEN, CHILDREN AND PEOPLE WITH DISABILITIES**

RE: WOMEN EMPOWERMENT AND GENDER EQUALITY BILL [B50-2013]

Prepared by Triangle Project

Submitted 16 January 2014

Enquiries can be directed to:

Ingrid Lynch

Triangle Project

Elta House

3 Caledonian Road

Mowbray

Cape Town

7700

Tel: 021 686 1475

Fax: 021 686 1841

Email: advocacy@triangle.org.za

INTRODUCTION

Triangle Project is a human rights NGO advocating for the rights and wellbeing of lesbian, gay, bisexual, transgender and intersex (LGBTI) persons by working towards a society free of discrimination, prejudice, victimisation, heterosexist violence and the oppression of gender and sexual minorities. Our core programmes are concentrated around LGBTI community development and leadership building; sexual and reproductive health and rights; addressing violence based on gender identity, gender expression and sexual orientation; and LGBTI citizenship.

Triangle Project appreciates the opportunity to make submissions to the Portfolio Committee on the Women Empowerment and Gender Equality (WEGE) Bill [B50-2013]. We welcome the development of a Bill that underscores the values and principles enshrined in the Constitution and reiterates Government's commitment to the full achievement of gender equality. We do not, however, consider the Bill in its current form as adequately addressing women and other marginalised groupings' lack of economic empowerment and widespread gender inequality in other realms, for reasons outlined in this submission, and call for the development of an alternative framework.

Given the focus of the organisation, our submission will highlight gender inequality as it relates to gender identity, gender expression and sexual orientation. However, the arguments and recommendations submitted here also have relevance to gender inequality as defined in the Bill as relating to "women, men, girls and boys" (p. 3). Our organisation's explicit stance is one that seeks to eradicate all forms of inequality, discrimination and violence. Our experience and view is that oppression based on a particular axis of identity cannot be viewed in isolation. Sexual orientation, gender identity and gender expression intersect with other social positions such as those based on race, class, disability, and geographical location (urban-rural). These intersections mediate LGBTI persons' experiences of discrimination, economic exclusion and violence and the extent to which they are able to enjoy constitutional protections. Following from this, matters of empowerment and equality cannot be adequately addressed when taking a narrow view of what constitutes the grouping "women", thereby excluding other aspects of identity that differentially influence vulnerability. Despite the promise of constitutional protection, LGBTI persons remain particularly marginalised and any project that hopes to transform gender inequality in South Africa will necessarily include in its focus the realities of gender and sexual minorities. We expand more on the need to include LGBTI persons in the Bill in other sections of this submission.

Our submission focuses on the following aspects of the Bill:

- The Overall Objectives and Impact of the Bill
- Comments on the Definition of Gender
- Economic Exclusion, Discrimination and Violence Against Gender and Sexual Minorities
- Comments on the Process of Development of the Bill
- Concluding Recommendations

1. OVERALL OBJECTIVES AND IMPACT OF THE BILL

The Bill cites as one of its main objectives the "promotion of women's empowerment and gender equality" including specific provisions aimed at the "implementation of measures to achieve a progressive realisation of a minimum of 50 percent representation and meaningful participation of women in decision-making structures including Boards by designated public bodies and designated private bodies" (p. 4-5). Of concern is that the provisions outlined in the Bill, towards achieving this

objective, are predominantly tailored to benefit women who are employed in the formal sector (public and private) or have access to tertiary education or training that result in increased likelihood to be employed – a grouping that constitutes a minority of women in South Africa. The Quarterly Labour Force Survey for Quarter 3 of 2013 shows the unemployment rate for women at 27.5% while men are at 23.3%ⁱ. This situation is compounded by the fact that women (and particularly black African women) have historically been disadvantaged in their access to education. This can be seen in the 2011 census where 14% of black African women over age 25 had had “no schooling” at all, which is more than 3 percentage points higher than black African men (StatsSA, 2011ⁱⁱ). Following from this, the Bill is unlikely to benefit or protect those most affected by gender inequality, i.e. those on the margins such as poor women in rural areas, women with little access to education and women who are unemployed or employed in the informal sector. While the Bill does make mention of the socio-empowerment of women in rural areas as well as women with disabilities (p. 8), it does not clearly articulate what measures will be implemented to address inequality in these groupings and also does not adequately address class, race and disability status in the rest of the document. These omissions not only risk further widening the political and economic disparities between men and women, but also between *women* and *women*, in that differential vulnerabilities between women are not engaged with. The minor gains made in economic equality, should the stated target of 50 percent representation and participation by women be achieved, will not impact on gender inequality experienced by the majority of South African women. Of further concern is that the Bill lacks persuasive mechanisms for enforcement, defined simply as the Minister using “any dispute resolution mechanisms to address non-compliance with this Act or applicable legislation” (p. 10).

The Bill has as another objective the alignment of existing government programmes, legislation and policies relating to women empowerment and lists relevant legislation on page 12. Existing legislation aimed at addressing gender-based violence and gender inequality (e.g. the Sexual Offences Act 2007 and Domestic Violence Act 1998) is however widely acknowledged as plagued by poor implementation (e.g. Shukumisa, 2012ⁱⁱⁱ; Vetten et al., 2008^{iv});). The Bill does not engage with the limitations of existing legislation and states that the Bill “does not aim to create new anti-gender discrimination legislation, or additional mechanisms to enforce existing legislation and policies” (p. 18). Further to this, the Bill does not make reference to how the apparent overlap between the duties outlined in the Bill and the mandate of the Commission for Gender Equality and other Chapter Nine institutions will be resolved. It therefore remains unclear how the Bill will contribute to the current legislative landscape in terms of gender equality, either in providing new legislation or strengthening implementation of existing legislation.

2. THE DEFINITION OF GENDER INFORMING THE BILL

The definition of gender that informs the Bill is one which relies on a normative binary that organises people into two mutually exclusive categories, that of “male” and “female”: quoting from the Bill, “gender’ refers to the roles, duties and responsibility which are culturally or socially ascribed to women, men, girls and boys” (p. 3). Such a definition does not recognise that the heteronormative patriarchal organisation of gender negatively impacts not only women and girls (or men and boys) but also impacts LGBTI persons who are often considered as existing outside of such a normative gender binary. Legislation informed by a narrow, exclusionary definition of gender perpetuates instead of transforms the patriarchal systems it wishes to challenge. We propose that it is more constructive to assume a definition of gender that is sensitive to the effects of the historical binary organisation of gender, which marginalises LGBTI persons as well as any other gender non-

conforming persons. The Alteration of Sex Description Act 49 already has established that “male” and “female” or not fixed categories in any physical or legal sense. While this act only goes so far to accommodate transgender and gender non-conforming persons in changing gender markers on their identity documents, and the need to acknowledge gender identity is still there, it does show that the gender binary is too complex to rigidly uphold in a legal context.

This narrow definition of gender is continued in the section of the Bill that describes “gender discrimination” as referring to “any distinction, exclusion or restriction made on the basis of gender and sex which has the effect or purpose of impairing or nullifying the equal recognition, enjoyment or exercise by a person of her or his human rights and fundamental freedoms in any spheres of life”; gender-based violence is defined in the Bill as “all acts perpetrated against women, girls, men and boys on the basis of their gender and sex which cause or could cause them physical, sexual, psychological, emotional or economic harm, and includes any threat to cause such harm” (p. 3). Neither of these definitions take into account the widespread discrimination and violence perpetuated against LGBTI persons. The Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 (PEPUDA) specifically defines unfair discrimination in relation to “sex, gender or sexual orientation”^v. The Employment Equity Act of 1998 also explicitly mentions sex, gender and sexual orientation as prohibited grounds for unfair discrimination^{vi}. The omission of LGBTI persons from the definition of gender discrimination and gender-based violence in the Bill stands in clear contrast with existing legislation. This omission is also incongruent with Government’s rejection of violence against LGBTI persons, the formation of the Department of Justice and Constitutional Development-led task team against violence against LGBTI persons, and the pending hate crime legislation aimed at addressing crimes committed based on prejudice regarding gender identity and/or sexual orientation, amongst other social characteristics. With this in mind, the Bill is not in alignment with either existing or pending legislation.

3. ECONOMIC EXCLUSION, DISCRIMINATION AND VIOLENCE AGAINST GENDER AND SEXUAL MINORITIES

The International Labour Office (2013)^{vii}, in research conducted on workplace discrimination perpetuated on the basis of sexual orientation and gender identity in three countries including South Africa, notes that “discrimination and harassment are commonplace for LGBTI workers. Discrimination often begins in education, which hampers future employment prospects. It continues in access to employment and throughout the employment cycle” (p. 2). Documented experiences of discrimination and violence at school include victimization and sexual violence faced by lesbian students (SAHRC, 2007)^{viii}. Further to this, many LGBTI persons face rejection from their families due to their sexual orientation and/or gender identity and the resultant lack of support complicates access to secondary and tertiary education. A lesbian woman in research conducted by Human Rights Watch (2003)^{ix} describes the challenges faced by LGBTI persons in an already harsh employment market as follows: “Because of the struggles we face to be who we are when growing up, especially as women and lesbians, most of us will never go to tertiary school or to have some skills that will make it easy for us to be employed. For some of us it was difficult to just reach matric” (p. 212). When LGBTI persons do find employment they often experience harassment and discrimination in the workplace. The International Labour Office (2013) cites heteronormative preconceptions of “normal” gendered presentation as typically fuelling workplace victimisation and exclusion: “Often women who are perceived to be ‘masculine’, or men who are perceived to be ‘feminine’, in behaviour or appearance, suffer discrimination or harassment on the basis of their

perceived sexual orientation” (p. 2). Transgender persons face particular challenges such as difficulties in obtaining identity documents reflecting their appropriate gender, despite legislation enacted to facilitate this, along with severe harassment and victimisation by employers and co-workers. These factors all contribute to transgender persons being excluded from formal employment^x. Furthermore, it is necessary to understand that transgender persons face violence specifically due to interpretation of “male” and “female” in certain legislation, where there is no proper and inclusive definition in place. An example of this is the Criminal Procedures Act 51 of 1977 which makes reference to “male” and “female” without any qualifying definitions; in practice this results in a narrow, stereotypical and exclusive interpretation which adversely affects transgender and gender non-conforming persons, leading to stigma and discrimination. Opperman (2009)^{xi}, in research about sexual orientation-based discrimination in South African municipalities, notes that constitutional protection and the provisions of the Employment Equity Act and PEPUDA do not filter down to LGBTI employees’ every day experiences – in general South African public organs lack a safe and inclusive environment for LGBTI persons, there is an apathetic approach from human resource departments regarding LGBTI concerns, and inadequate processes to report sexual orientation-based discrimination.

Further to this, with its focus on economic empowerment, narrowly defined as equity in the workplace, the Bill does not adequately address other aspects of structural inequality such as violence based on gender identity, gender expression and/or sexual orientation. LGBTI persons in South Africa, and notably black lesbian women residing in township areas, live within a homophobic and patriarchal social order where “compulsory heterosexuality” is violently enforced. LGBTI hate crimes are fuelled by strong sanctions against transgression of prescribed gendered roles, and therefore function to “discipline” gender non-conformity and deviations from heterosexuality (Currier, 2011^{xii}). In a 2002-2004 survey of 145 black lesbians interviewed in Gauteng, 36% reported experiences of verbal abuse, 15% reported physical abuse and 10% experienced sexual abuse or rape; of the sample of 141 black gay men surveyed, 40% reported verbal abuse, 15% reported physical abuse and 9% reported sexual abuse or rape^{xiii}. Various studies exist that report on cases of homophobic violence, rape and harassment targeting LGBTI persons who challenge heteronormative and patriarchal binary gender roles (e.g. Anyamele, Lwabaayi, Nguyen, & Binswanger, 2005^{xiv}; Human Rights Watch, 2003^{xv}; 2011^{xvi}; Lynch & Van Zyl, 2013^{xvii}).

The failure to include gender and sexual minorities as a grouping adversely affected by patriarchal norms and gender inequality contradicts the lived experiences of economic exclusion, violence and discrimination routinely reported by LGBTI persons.

4. THE PROCESS OF DEVELOPMENT OF THE BILL

The process followed in developing the Bill has not been conducive to public participation. Written comments on the amended Bill, released on 6 December 2013 with responses requested by 20 December 2013, allowed only two weeks for stakeholders to analyse and provide meaningful input into this important document. While we appreciate the concession to extend the deadline to 16 January 2014, the period still remained within a time of the year when it is difficult to meaningfully engage our constituency; this severely limits the public's ability to participate and compromises the integrity of the process. Ultimately, such a process of consultation limits direct engagement with the Bill to a small number of organisations actively tracking parliamentary processes and is not accessible to ordinary South Africans whose lives will be impacted by the Bill.

Considering the important objectives of the Bill, we suggest a process of national consultation with men and women, including LGBTI persons, accessible to ordinary citizens and aimed at developing a Bill that will truly address gender inequality.

5. CONCLUDING RECOMMENDATIONS

The proposed Bill takes a restricted view of women's lives from the vantage point of economic empowerment of the few, without adequately taking into account structural causes of inequality. The Bill also marginalises LGBTI persons who are also affected by gender inequality. What is needed is large-scale social transformation and currently the Bill does not contribute to such a project. We contend that the Bill is unsound in both its content and the process of its development. We call on parliament to withdraw the Bill and seek an alternative framework to address gender inequality. To be effective, any alternative framework should:

- be developed through a process of national consultation with sufficient notice and in accessible venues throughout all provinces. Such a process should include the voices of ordinary people and be deliberately inclusive of gender and sexual minorities who are also oppressed through patriarchal systems;
- extend beyond the context of formal employment to also meaningfully address other axes of inequality such as informal employment, unemployment, harmful social norms and cultural practices, and violence based on gender identity, gender expression and/or sexual orientation;
- meaningfully address intersecting forms of oppression such as race, class and disability, that all impact on women and gender and sexual minorities' full realisation of rights;
- identify and address limitations of existing legislation, including poor implementation.

Triangle Project thanks the Portfolio Committee for the opportunity to make this written submission. We wish to state our willingness to engage with and assist the Committee in any way we can to support the development of a Bill that advances gender equality broadly and the full realisation of rights for LGBTI persons.

THIS SUBMISSION HAS BEEN ENDORSED BY THE FOLLOWING ORGANISATIONS AND INDIVIDUALS:

- Community Law Centre, University of the Western Cape
- Durban Lesbian and Gay Community and Health Centre
- Gay & Lesbian Network (Pietermaritzburg)
- Gender Dynamix
- Good Hope Metropolitan Community Church
- LEGBO Northern Cape
- Out in Africa South African Gay & Lesbian Film Festival
- OUT LGBT Well-being
- Prof Juan Nel
- Sisonke
- SWEAT
- The Inner Circle

-
- ⁱ StatsSA. (2013). *Quarterly Labour Force Survey, Quarter 3, 2013*. Accessed from: www.gov.za/documents/download.php?f=202294
- ⁱⁱ StatsSA. (2011). *Gender statistics in South Africa, 2011*. Accessed from: <http://www.statssa.gov.za/publications/Report-03-10-05/Report-03-10-052011.pdf> at 19
- ⁱⁱⁱ Shukumisa. (2012). *Monitoring the implementation of sexual offences legislation & policies: Findings of the monitoring conducted in 2011/2012*. Accessed from <http://www.shukumisa.org.za/index.php/2013/05/the-shukumisa-monitoring-report-for-2011-2012/>
- ^{iv} Vetten, L., Jewkes, R., Sigsworth, R., Christofides, N., Loots, L., & Dunseith, O. (2008). *Tracking justice: The attrition of rape cases through the criminal justice system in Gauteng*. Johannesburg: Tshwaranang Legal Advocacy Centre, the South African Medical Research Council and the Centre for the Study of Violence and Reconciliation.
- ^v Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Accessed from <http://www.justice.gov.za/legislation/acts/2000-004.pdf>
- ^{vi} Employment Equity Act 55 of 1998. Accessed from <http://www.info.gov.za/view/DownloadFileAction?id=70714>
- ^{vii} International Labour Office. (2013). *Discrimination at work on the basis of sexual orientation and gender identity: Results of pilot research*. International Labour Office: Geneva.
- ^{viii} South African Human Rights Commission. (2007). *Report of the public hearing on school-based violence*. Pretoria: SAHRC; “‘Corrective rape’ at schools” (12 March 2008), South Africa News 24.
- ^{ix} Human Rights Watch & IGLHRC. (2003). *More than a name: State sponsored homophobia and its consequences in Southern Africa*. New York: Human Rights Watch.
- ^x International Labour Office. (2013). *Discrimination at work on the basis of sexual orientation and gender identity: Results of pilot research*. International Labour Office: Geneva.
- ^{xi} Opperman, T. (2009). *An analysis of the sexual orientation discrimination framework in the public sector: The case of Stellenbosch municipality*. Unpublished MA dissertation, Stellenbosch University, Stellenbosch.
- ^{xii} Currier, A. (2011). Representing gender and sexual dissidence in Southern Africa. *Qualitative Sociology*, 34, 463-481.
- ^{xiii} Joint Working Group. (2007). *Summary report on levels and trends of hate victimization of lesbian, gay, bisexual and transgender (LGBT) persons in Gauteng, KwaZulu-Natal and Western Cape*. Accessed from: http://www.asiphephe.org.za/modules/MDCatalogue/resources/97_39_summary_report_on_levels_and_trends_of_hate.pdf
- ^{xiv} Anyamele, C., Lwabaayi, R., Nguyen, T. & Binswanger, H. (2005). Sexual minorities, violence and AIDS in Africa. *Africa Region Working Paper Series*, 84, 1-35. Accessed from: <http://www.worldbank.org/afr/wps/wp84.pdf>
- ^{xv} Human Rights Watch. (2003). *More than a name: State-sponsored homophobia and its consequences in Southern Africa*. New York: Human Rights Watch and International Gay and Lesbian Rights Commission.
- ^{xvi} Human Rights Watch. (2011). *“We’ll show you you’re a woman”: Violence and discrimination against black lesbians and transgender men in South Africa*. New York: Human Rights Watch.
- ^{xvii} Lynch, I. & Van Zyl, M. (2013). *Justice delayed: Activist engagement in the Zoliswa Nkonyana murder trial*. Cape Town: Triangle Project.