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**To: The Portfolio Committee on Women, Children and People with Disabilities
Honourable MP - Mrs Dorothy Mapula Ramodibe, Chairperson**

**Secretary to the Committee - Ms Neliswa Nobatana
nnobatana@parliament.gov.za**

**Secretary to the Chairperson – Ms Nomusa Sibisi
nsibisi@parliament.gov.za**

Dear Madam,

COMMENTS ON THE WOMEN'S EMPOWERMENT AND GENDER EQUALITY BILL [B50 – 2013]

The Centre for Applied Legal Studies (CALs) welcomes the opportunity to make submissions to the Portfolio Committee on Women, Children and People with Disabilities on the Women's Empowerment and Gender Equality Bill as published and dated November 2013. The enclosed comments are endorsed by the Centre for the Study of Violence and Reconciliation (CSVr).

CALs, a civil society organisation based at the School of Law at the University of the Witwatersrand, is committed to the protection of human rights through empowerment of individuals and communities and the pursuit of systemic change. CALs' mission is to, inter alia, challenge and reform systems within South Africa which perpetuate harm, inequality and human rights violations and to provide professional legal representation to survivors of human rights abuses. CSVr is a multi-disciplinary institute involved in research, policy formation, community interventions, service delivery, education and training, as well as providing consultancy services. The primary goal of CSVr is to use its expertise in building reconciliation, democracy and a human rights culture and in preventing violence in South Africa and in other countries in Africa.

CALs submits the enclosed comments for consideration by the Portfolio Committee with a view to contributing to the adoption of appropriate legislation that will ensure women's empowerment and the realisation of substantive equality in South Africa. We look forward to participating in all future deliberations on the Bill. Please do not hesitate to contact us should you require further information.

Sincerely,

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EXECUTIVE SUMMARY

CALS commends the Ministry of Women, Children and People with Disabilities (the Ministry) for preparing the Women's Empowerment and Gender Equality Bill (WEGE Bill). We acknowledge the Minister's efforts in attempting to create a framework that will ensure that public and private bodies adopt policy and programmatic measures that promote gender equality and prevent discrimination against women. Such efforts are in conformity with constitutional and international obligations to ensure that legislation on non-discrimination and temporary special measures cover both governmental institutions and private organisations and enterprises.¹

It is our view that twenty (20) years after the abolishment of the apartheid system, most women in South Africa, and in particular, poor black African women in rural and urban settings, are yet to benefit from our constitutional democracy. We recognise that Government, and in this respect the Ministry, is acting in accordance with a constitutional mandate to take all necessary measures, including corrective action and the introduction of quotas, to undo the social and economic effects of three hundred and fifty years of colonialism and apartheid. For these reasons, we acknowledge the importance of elaborating and adopting legislation that will respond to the multitude of challenges confronting women in all aspects of their lives. Consequently, the inclusion of provisions in the Bill relating to education and training; reproductive health; gender-based violence; equal representation and participation; economic empowerment as well as socio-economic empowerment is significant. However, recognising that there are multiple barriers (economic, social, cultural and religious) to women's empowerment and gender equality in South Africa, and the significance of adopting measures that respond to these challenges, we wish, at the outset, to emphasise the following issues of grave concern:

- i. The limited time afforded civil society organisations and members of the public more generally to engage in their own consultative processes so that they can provide appropriate and informed comments on the WEGE Bill has caused some difficulty. The Bill was published for public comment at the end of November 2013, during a busy time for most organisations (noting 16 Days of Activism) and over a major holiday period in the country. We wish to bring to the Portfolio Committee's attention that a three week period to prepare comments on such an important item of legislation is insufficient.
- ii. Women's meaningful participation in the formulation of government policies is a principle that is entrenched in the regional and international human rights treaties that the State has ratified. Women in South Africa have the right to participate fully in and be represented in public policy formulation in all sectors and at all levels. Complying with this requirement facilitates the mainstreaming of gender issues, a strategy that the WEGE Bill is advocating for, and provides women with the opportunity to contribute a gender perspective to public policy-making. It is unfortunate that the Ministry has not engaged in thorough public consultations with women in all the provinces in order to provide an opportunity to all women, either

¹ See in this regard Section 8(2) of the Constitution which provides: A provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and nature of the duty imposed by the right and CEDAW General Recommendation No. 25 on Article 4 para 1 of CEDAW available at: <[http://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20\(English\).pdf](http://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20(English).pdf)>.

through focused groups and workshops or through representative organisations, to raise challenges and propose appropriate responses thereto in respect of their economic empowerment and enjoyment of substantive equality; and

- iii. It is our view that the Bill, in its current form, will not:
 - a) respond to the challenges facing the majority of women in South Africa;
 - b) empower disadvantaged women and achieve the goal of substantive equality as envisaged in the Constitution and under international treaties that the State has ratified.

We note that the South African government has ratified a number of international human rights treaties that impose obligations on the State to adopt appropriate legislative, policy and other measures to eliminate discrimination against women and advance gender equality, including for instance, the Convention on the Elimination of All Forms of Discrimination against Women² (CEDAW) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa³ (Maputo Protocol). We commend the Minister for the preparation and submission of the combined second, third and fourth periodic reports of the Government of South Africa on measures adopted to implement CEDAW and the constructive engagement with the Committee on the Elimination of Discrimination against Women (the Committee) in February 2011 during the consideration of the report.⁴ Of particular significance, we note that the Committee, in its Concluding Observations expressed concern that national legislation does not embody the principle of substantive equality between men and women and urged the Government to speedily draft a Gender Equality Bill.⁵

It is our understanding that the WEGE Bill has been prepared in response to this specific recommendation and in this regard we commend the Ministry for taking steps to comply with the guidance provided by the Committee. Through this recommendation, the Government is urged to incorporate the CEDAW in its entirety into domestic legislation with a view to ensuring substantive equality and the prohibition of direct and indirect discrimination in accordance with Article 1 of CEDAW. Before commenting on the specific provisions of the WEGE Bill, we wish to draw attention to additional areas of critical concern raised in the Concluding Observations and directly related to the objects of the Bill. In 2011, the Committee expressed grave concern about:

- i. the persistent obstacles to the advancement of women and the lack of representation in decision making positions in the public and private sector;⁶
- ii. the disadvantaged position of women in rural and remote areas who constitute the majority of women in South Africa;⁷

² Convention on the Elimination of All Forms of Discrimination against Women G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981. Ratified by South Africa on 12 December 1995.

³ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa adopted by the African Union in 2003 and ratified by South Africa in December 2004.

⁴ State party report submitted in accordance with Article 18 of the Convention available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=345&Lang=en.

⁵ CEDAW/C/ZAF/CO/4 para 14 available at: <
http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fZAF%2fCO%2f4&Lang=en>.

⁶ Ibid para 29.

⁷ Ibid para 37.

- iii. the fact that harmful customary and traditional practices have an adverse impact on women's enjoyment of the rights guaranteed under CEDAW;⁸
- iv. the high levels of sexual and domestic violence against women and girls, seemingly perpetrated with impunity when considering the low rates of prosecution and convictions for these crimes;⁹
- v. that certain provisions of the Traditional Courts Bill may jeopardise women's access to justice and equality of treatment before the law;¹⁰ and
- vi. a major obstacle to the goal of achieving women's empowerment and gender equality, 'the persistence of patriarchal attitudes and deep-rooted stereotypes concerning women's roles and responsibilities that discriminate against women and perpetuate their subordination within the family and society....[and] the inadequate implementation of effective and comprehensive measures to modify or eliminate stereotypes and negative traditional values and practices in South Africa'.¹¹

In summary, our primary concerns with the Bill in its current format are as follows:¹²

- i. The Bill fails to adequately address women's equality or lived realities in a meaningful way.
- ii. While it is commendable that the Bill proposes technical mechanisms to increase the number of women holding senior positions in both the public and private sector, the mechanism for enforcement set out in section 16 is not very clear and may be weak.
- iii. To address pervasive discrimination and violations of women's rights, including gender non-conforming women, it is essential that patriarchal norms, the persistence of racism and harmful cultural, traditional and religious practices are all adequately addressed. It is not necessarily apparent how the Bill intends to deal with these grave obstacles to women's empowerment and gender equality.
- iv. Analysis of the WEGE Bill reveals that it does not necessarily adopt an intersectional approach to discrimination. The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, health status, age, class, and sexual orientation and gender identity amongst various other grounds. This discrimination affects women belonging to such groups to a different degree or in different ways to men and the WEGE Bill, in proposing corrective measures, must recognise such intersecting and multiple forms of discrimination and their compounded negative impact on certain groups of women.
- v. The sections of the WEGE Bill that provide for 50% representation of women in public and private bodies do not necessarily address the persistent inequality between men and women, the economic and social privilege that certain groups of women enjoy as a direct result of

⁸ Ibid para 37.

⁹ Ibid para 24.

¹⁰ Ibid para 16.

¹¹ Ibid para 20.

¹² Concerns expressed by organised civil society, women's human rights groups, in workshops on the WEGE Bill convened by civil society groups in Johannesburg and Cape Town in December 2013. Representatives of CALS participated in the workshop held in Johannesburg.

apartheid policies and will not benefit women who are unemployed and working in the informal sector.

- vi. Since 1996, South Africa has passed a plethora of laws affecting women's lives (see section C below), many of which are in schedule 1 of the WEGE Bill, but without any reflection on how it intends to address the shortcomings in existing legislation, how it relates to proposed amendments to for instance the Employment Equity Amendment Bill which will soon be adopted or ensure coherence.

Specific Areas of Concern and Recommendations

The enclosed comments are based on our analysis of whether or not the WEGE Bill responds to some or all of the above-mentioned concerns; considering that the CEDAW review process is the most recent examination of the extent to which measures taken by the Government to advance gender equality comply with international standards and commitments.

A: Section 1: Definitions

Women's Empowerment

While noting that the Bill refers to section 9(2) of the Constitution, which provides the textual support for the commitment to substantive equality, we are of the view that the term should be clearly defined in a manner that articulates the Ministry's understanding of women's empowerment and the ways in which the proposed positive measures will meet the needs of women; address inequality and remedy historical disadvantage. Furthermore, to ensure that the adopted legislation is accessible to all South Africans, and not just legal professionals, it is our recommendation that term be clearly defined, that is gender-specific and made relevant to the objects and purpose of the Bill and not general reference to the provisions of the Constitution. We refer the Portfolio Committee to the United Nations Population Fund (UNFPA) definition which reads as follows:

Women's empowerment has five components: women's sense of self-worth; their right to have and to determine choices; their right to have access to opportunities and resources; their right to have the power to control their own lives, both within and outside the home; and their ability to influence the direction of social change to create a more just social and economic order, nationally and internationally.¹³

Discrimination

Noting that the purpose of the Bill is to promote specifically gender equality and create an enabling environment in the public and private sector for the empowerment of women, we urge the Portfolio Committee to consider including a clear definition of discrimination in this context. Essentially, we suggest that the term 'discrimination against women' be instead and clearly defined, in accordance with Article 1 of CEDAW which provides:

'...the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment

¹³ UNFPA Guidelines on Women's Empowerment available at <http://www.un.org/popin/unfpa/taskforce/guide/iatfwemp.gdl.html>.

or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.'

Substantive Equality

Considering the objectives of the Act, it is our view that a coherent and concise definition of substantive equality, based on the Constitutional Court's jurisprudence and the authoritative guidance provided by the Committee through its general recommendations is essential.¹⁴ For instance, the Constitutional Court in *City Council of Pretoria v Walker* emphasised the importance of substantive equality, stating

'[section 9(2) is] premised on the recognition that the ideal of equality will not be achieved if the consequences of those inequalities and disparities caused by discriminatory laws and practices in the past are not recognised'.

If indeed the proposed legislation is intended to give effect to section 9 of the Constitution 'women's empowerment' is framed as the advancement of women as contemplated by section 9(2), we request that a broader and meaningful definition of the term be included in the Act.

Additional terms to be included in the definitions section 1

Furthermore, we suggest that the following terms be included with the meaning clearly set out in section 1:

- a) Designated bodies: provide a definition or information regarding the criteria to be used in designating a private or public body;
- b) Intersectional and multiple forms of discrimination; and
- c) Meaningful participation of women.

B: Section 2: Application of the Act

We request that clarity be provided regarding 'designated bodies'; the criteria to be used by the Ministry in designating particularly private sector bodies, and whether or not the legislation will apply to Traditional Authorities and/or Councils and Religious Bodies as relevant.

C: Section 3: Objectives of the Act

We note that various items of legislation, relevant to the issues addressed in the WEGE Bill as set out in Schedule 1, have been adopted by the South African government, including for instance:

- a) *Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA), 2000* promulgated to give effect to section 9 of the Constitution and in particular, section 8 and 9 of PEPUDA which prohibit discrimination on the basis of gender and disability;
- b) *Employment Equity Act, 1998* aimed at achieving equality by eliminating unfair discrimination, promoting equal opportunities in employment and introducing affirmative action measures in order to redress the disadvantages in employment experienced by targeted groups. We especially note with satisfaction that the Employment Equity Bill of 2012, recently passed by the National Council of Provinces, introduces amendments and additional provisions that will strengthen the Employment Equity legislation; and

¹⁴ See for instance CEDAW General Recommendation No. 28 on Core Obligations of States Parties CEDAW/C/GC/28 para 24.

- c) *Broad-Based Black Economic Empowerment Act, 2003* with objectives which include, inter alia, increasing black women's access to economic activities and skills training; the extent to which they are able to own and manage business enterprises and empowering rural communities by enabling their access to economic activities.

We further note that the primary challenge facing South Africa is the lack of effective implementation of existing legislation and the fact that the State routinely fails to allocate adequate financial resources to ensure implementation of laws and policies designed to protect women's rights and advance gender equality. The question that arises is whether or not the Bill is absolutely necessary at this stage or whether the efforts and resources of the Ministry should be directed at ensuring that existing legislation makes a difference to the lives of the majority of women in South Africa. In this regard, we draw the Portfolio Committee's attention to the relevant paragraphs of CEDAW General Recommendation No. 25 Article 4 of the Convention:

'States parties should **analyse the context of women's situation in all spheres of life**, as well as in the specific targeted area, when applying temporary special measures to accelerate the achievement of women's de facto or substantive equality. They should evaluate the potential impact of temporary special measures with regard to a particular goal within their national context and **adopt those temporary special measures which they consider to be the most appropriate in order to accelerate the achievement of de facto or substantive equality for women**¹⁵; and [own emphasis added]

'States parties should explain the reasons for choosing one type of measure over another. **The justification for applying such measures should include a description of the actual life situation of women, including the conditions and influences which shape their lives and opportunities** — or that of a specific group of women, suffering from multiple forms of discrimination — and whose position the State party intends to improve in an accelerated manner with the application of such temporary special measures. At the same time, the relationship between such measures and general measures and efforts to improve the position of women should be clarified¹⁶.

We therefore urge the Ministry to engage with the South African Law Reform Commission with a view to assessing the need for a legislative audit which would ultimately inform the content of the WEGE Bill.

D: Section 16: Enforcement

While the WEGE Bill includes an enforcement clause, this is significantly weaker than the measures that were proposed in an earlier version of the Bill. Should the Bill be adopted without further amendments, we are concerned that the use of the term 'any other dispute resolution mechanism' does not provide the requisite to ensure that the objectives of the Bill are achieved and non-compliance is addressed.

E: Additional Comments

Gender Responsive Budgeting: A key omission in our view is the issue of gender-responsive budgeting. The link between a properly responsive budget and the advancement of gender equality is vital. In other words, we cannot talk about gender equality and the empowerment of women without clear guidance regarding costs and adequate budget allocation by the Government generally and the Ministry in particular.

¹⁵ CEDAW General Recommendation No. 25 at para 27.

¹⁶ Ibid para 28.

Ratification of other treaties: While acknowledging that South Africa has ratified most of the international human rights instruments which are relevant to the advancement of women's human rights, we take this opportunity to call for the speedy ratification, without reservations, of the International Covenant on Economic Social and Social and Cultural Rights (1966); and the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (1990).

Submission of follow-up report: The CEDAW Committee, in its Concluding Observations pursuant to consideration of the second periodic report requested South Africa to provide, within two years, written information on the steps taken to implement the recommendations contained in paragraph 15 (incorporating the Convention into domestic legislation) and para 42 (preparation of a unified family code in conformity with the Convention) of the concluding observations. The follow-up report was due in 2013 and the Committee sent a reminder letter in August 2013 requesting the report.¹⁷ We call on the government and / or the Ministry to make the necessary efforts to prepare and submit the follow-up report.

Concluding Remarks

We would value the opportunity to further engage with the Portfolio Committee and the Ministry on the WEGE Bill and welcome the opportunity to elaborate further on our comments.

¹⁷ Follow-up report - reminder letter available at:
http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/ZAF/INT_CEDAW_FUL_ZAF_15061_E.pdf.