

Why we need a separate commission for gender equality

Summary

The brief of the Commission for Gender Equality (CGE) is to make real the achievement of a non-sexist society as envisaged in the Preamble to the Constitution of the Republic of South Africa and to secure the right to gender equality, as reflected in section 9 of the Bill of Rights. This policy brief assesses whether the interests of achieving gender equality in South Africa are best served by retaining the CGE as a separate constitutional Chapter 9 institution, or by locating it under a single umbrella human rights body along with other Chapter 9 institutions.

The brief considers the recommendations of a 2007 report (known colloquially as the Asmal Report) which argues for the eventual consolidation of all constitutional Chapter 9 institutions within a single body. It also reports the findings of a twenty-year review of the CGE conducted by the Human Sciences Research Council (HSRC) in 2016 and presents the most recent official statistics on violence against women. Given the nature and scale of gender-based violence (GBV) in South Africa – herein understood to be violence perpetrated by men against women – we argue that

the country needs a dedicated body to lead efforts to tackle this scourge. We submit that not only should the CGE be retained as a separate Chapter 9 institution, but that it should be capacitated, through the allocation of additional resources, to the point that it is able to make a demonstrable impact on the achievement of non-sexism, gender equality and the concomitant reduction of GBV.

Background

The Commission for Gender Equality (CGE) is one of the institutions established in terms of Chapter 9 of the South African Constitution.¹ Its main function (outlined in section 187 of the Constitution) is to “promote respect for gender equality and the protection, development and attainment of gender equality”. The CGE has the power to “perform its functions, including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality.” As these prescripts suggest, the powers and responsibilities of the CGE are broad and far-reaching.

The CGE’s constitutional mandate to promote equality does not, however, necessarily mean that its continued

existence as a body independent of other human rights bodies is a necessary condition for its ability to perform its legislated functions optimally. This policy brief considers the findings of the 2007 Report of the Ad Hoc Committee on the Review of Chapter 9 and Associated Institutions (the 'Asmal Report'), the findings of a twenty-year review of the activities of the CGE, and the phenomenon of gender-based violence in South Africa in ascertaining whether the CGE is indeed best left as an independent human rights-based institution to fulfil its constitutional mandate.

The Asmal report

Notwithstanding the establishment of the CGE as a special purpose institution under the Constitution, in 2007 an ad hoc Committee of Parliament undertook a review of the practicability of maintaining three human rights institutions whose mandates appeared to overlap. The Committee appointed to review Chapter 9 and associated institutions² indicated by way of background that although there might be duplication in the roles of the CGE and other bodies, "the historical oppression of women in a starkly patriarchal society weighed heavily in the decision to establish the Commission for Gender Equality" as a separate entity.³ The report reflected the fact that the establishment of the CGE as an independent constitutional institution was a decision based on the need to respond to the particular dynamics of the history of deeply entrenched patriarchy in South Africa.

Recommendations of the Asmal Committee

The report of the Asmal Committee⁴ made recommendations about the

CGE's relationships with (1) other Chapter 9 bodies and associated institutions; (2) international institutions; (3) the executive; (4) Parliament; and (5) civil society, as well as recommendations regarding its (6) institutional governance and (7) financial arrangements. While only the first of these seven areas concerned the CGE's relationship with other Chapter 9 bodies and associated institutions, the Committee used the poor performance of the CGE in the other six areas to make two recommendations. In the short term, the Committee concluded that "a strong and effective Commission acting on its own is absolutely necessary for the transformation of gender relations in our country."⁵ In the longer term, the Committee recommended that the CGE be incorporated into a single national human rights institution "which will have a dedicated Commissioner for Gender Equality" – though, given the scale of constitutional amendment this would require, the Committee noted that this might not be implementable immediately.⁶ In its Conclusion to the report, the Committee proposed "a cohesive, strong and comprehensive umbrella human rights body."⁷

Despite this conclusion, since 2007 there has been no substantial (or transparent) initiative to consider or create such an umbrella human rights body – until May 2017, when Parliament published a call for written submissions on a "Process to examine the feasibility of the establishment of a 'single human rights body'".⁸

To assist the Office of Institutions Supporting Democracy (OISD) in its process of examining the feasibility of establishing such a body, three areas of inquiry were suggested by the HSRC in July 2017:

- a) Reasons for raising the possibility of amalgamation at this point in time;
- b) Available evidence warranting consideration of this possibility; and
- c) Process for considering possible amalgamation.

In considering the way forward, the HSRC recommended that the question of amalgamation should be situated within the *broader context* of the constitutional duty to respect, protect, promote and fulfil human rights, which applies equally to the role of the CGE.

Twenty-year review of the Commission for Gender Equality

To commemorate the CGE's twentieth anniversary in 2016, the Commission contracted the HSRC to review its activities over this period. The ensuing report⁹ documented the achievements and impact of the Commission in the four five-year periods of its existence, highlighting successes and challenges faced by the organisation and making recommendations for improvements to its work.

The research indicated that, while the CGE had moved through four distinct five-year phases, it was in the last five-year phase (2011–2015) that the Commission had come into its own in meeting its mandate. Though the CGE operates in a patriarchal environment where gender-related concerns are not taken seriously or are not widely understood (and in this respect the Asmal report's characterisation of "the historical oppression of women in a starkly patriarchal society" remains accurate a decade later), the reviewers found that the Commission's work had nevertheless impacted positively on the lives of many individuals and communities.

Performance of the CGE, 2011–2015

In spite of the challenges experienced by the CGE since its establishment – challenges in terms of its funding, its strategic approach to enhancing gender empowerment, and its appointment processes – the reviewers' examination of the 2011–2015 period revealed that performance on various policy and legislative matters had been extremely impressive. In some years, submissions on over twelve different legislative issues were covered. A number of these submissions were evidence-based, backed by high-quality research. In fact the CGE was found to have been involved throughout its existence in landmark Constitutional Court cases that had changed the lives of many rural women, including cases such as *Bhe v Khayelitsha Magistrate* (CCT 49/03) [2004] allowing women to inherit under customary law, *Shilubana v Nwamitwa* (CCT 03/07) [2008] where the Court allowed a woman to succeed as a traditional leader, and *Modjadji v Ngwenyama* [2013] ZACC 14 where the Court held that a first wife had the right to consent to a second marriage under customary law. There is also emerging evidence that CGE law clinics and awareness campaigns had encouraged more stakeholders to understand the role of the CGE and to use enabling legislation to protect and promote gender rights.

Recommendations for improving CGE efficiency and effectiveness

Recommendations for improving the efficiency and effectiveness of the CGE were proposed by the HSRC in four areas: funding; relationship with the state; use of powers; and reach.

- Funding: the state should review the budget allocation to the CGE in the light of its broad mandate and the enormous gender-related challenges confronting South African women.

- Relationship with other South African state institutions: the National Gender Machinery (NGM) should establish and maintain a clear separation of powers between the CGE, as an independent Chapter 9 institution, and the government of the day.
- Use of powers: the CGE should see through to completion all interventions involving the courts, government departments, other arms of the public sector, the private sector, and communities, ensuring that all its stakeholders are and remain accountable on matters concerning gender equality.
- Reach: the CGE should align its strategic focus to the gender-related needs of the majority of the population. This would involve extending its reach to communities and individuals in a bid to bring about profound socio-economic transformation through challenging the assumptions behind the perpetuation of unequal power relations and patriarchy, and the concomitant perpetuation of violence against women.

Gender-based violence

The above assertion of the perpetuation of violence against women is supported by statistics. The most recent report on domestic violence in South Africa¹⁰ showed that 21% of women aged 18 or older who had ever been in a relationship had experienced physical violence from a partner at some point, while 8% had experienced physical violence in the 12 months prior to the survey. Statistics on *sexual* violence – included by Statistics South Africa in the same 2017 report – while not as disturbing as those for physical violence, are nevertheless cause for concern. Six per cent of “ever-partnered women” aged 18 years and older had experienced sexual violence at the

hands of a partner at some point, while 2% had experienced such violence in the 12 months prior to the survey.¹¹

United Nations initiatives on gender-based violence

Article 1 of the United Nations Declaration on the Elimination of Violence against Women (which South Africa has ratified) states that “... the term ‘violence against women’ means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.”¹²

Following a visit to South Africa in 2015, the United Nations Special Rapporteur on violence against women, Ms Dubravka Šimonović, reported that the violence inherited from apartheid “still resonates profoundly in today’s South African society dominated by deeply entrenched patriarchal attitudes towards the role of women in society which makes violence against women and children an almost accepted social phenomenon.”¹³ Manifestations of violence against women and girls included femicide, domestic violence, rape, and gang-rape. Šimonović encouraged South Africa to establish a “femicide” or “gender-related killings” watch through which the number of such killings would be reported annually. “Such data and information about each case ... is needed to identify any failure of protection in the response-chain to gender-based violence and would bolster improving and developing further preventive measures.” She also stressed the need for immediate protection to be afforded to victims of domestic violence and for protection orders to be strictly enforced.

In addition, the Special Rapporteur noted that the practice of *ukuthwala*, in which young girls were forced into marriage through abduction, kidnapping, assault or rape, “violate[d] the constitutional rights to dignity, freedom and security of the person.” The UN Special Rapporteur also drew attention to the lack of specialised training “for all front-line actors involved in the responses to gender-based violence, namely the police, prosecution office, and courts”.¹⁴

Further evidence of UN intervention in the fight against GBV is to be found in two of the Sustainable Development Goal (SDG) targets that speak specifically to violence against women:

Target 5.2: Eliminate all forms of violence against women and girls

Target 5.3: Eliminate all harmful practices, such as child, early and forced marriage, and female genital mutilation.¹⁵

The collection and analysis of national data on violence against women is essential to addressing the universal challenge of gendered violence to ensure that South Africa achieves these SDG targets.

Recommendations

The above evidence indicates the nature and the scale of the phenomenon of violence against women in South Africa (which is probably understated in that violence is underreported by women) and underscores the need for action on the part of multiple role-players to protect women and girls from violence. This is not only a moral issue, a social imperative and a constitutional obligation, but is South Africa’s responsibility under international law and the SDGs.

While a multi-pronged approach is needed, a central body must spearhead such action. None is better placed to do so than the CGE. As the country’s constitutionally mandated agency dealing with issues of gender, the CGE is obliged to address human rights abuses against women of a physical and sexual nature – including abuses of a psychological nature. The track record of the CGE in the five-year period 2011–2015 and since suggests that, having gained greater credibility than at any previous point, the Commission is well-placed to lead a concerted campaign aimed at South Africans of all races and genders to educate people about gender and proactively to thwart GBV.

The CGE has the infrastructure to lead such a campaign, including a growing reach into rural areas which relocating it under a central human rights umbrella might weaken. Given greater financial and human resources and greater political independence from government, the CGE could impact significantly on the gender landscape to reduce the national crisis of GBV. Indeed, the onus is on government to demonstrate that relocating the CGE under a single human rights body would strengthen the Commission’s ability to promote gender equality and reduce the incidence of GBV. Such relocation would itself be expensive and time-consuming, and might divert energy and attention from the fight for women’s rights and against GBV that has assumed a particular urgency.

A related recommendation is that the overlapping mandates of Chapter 9 institutions involved with gender issues be rationalised by means of an agreement facilitated by the Forum for Institutions Supporting Democracy (FISD) to the effect that all gender-related human rights violations reported to Chapter 9 institutions other than

the CGE be referred automatically to the CGE.

References

- 1 Republic of South Africa. 1996. *Constitution of the Republic of South Africa, 1996*. As set out in section 1(1) of the Citation of Constitutional Laws Act 5 of 2005. Pretoria: Government Printer.
- 2 Asmal K, et al. 2007. Report of the ad hoc committee on the review of chapter 9 and associated institutions. A report to the National Assembly of the Parliament of South Africa. Parliament of the Republic of South Africa.
- 3 Asmal et al., 2007: 147.
- 4 Asmal et al., 2007.
- 5 Asmal et al., 2007: 162.
- 6 Asmal et al., 2007: 164.
- 7 Asmal et al., 2007: 205.
- 8 Parliamentary Monitoring Group. 2017. “*Single Human Rights Body*” feasibility. <https://pmg.org.za/call-for-comment/545/> (accessed 6 September 2017).
- 9 Bohler-Muller N, Cosser M, Makiwane M, Motala S and Pienaar G. 2016. *Twenty-year review of the Commission for Gender Equality: Final report*. Pretoria: Democracy, Governance and Service Delivery, Human Sciences Research Council.
- 10 Statistics South Africa. 2017. *South Africa Demographic and Health Survey 2016: Key Indicator Report*. Pretoria.
- 11 Statistics South Africa, 2017: 56.
- 12 United Nations. 1993. *Declaration on the Elimination of Violence against Women*. A/RES/48/104. <http://www.un.org/documents/ga/res/48/a48r104.htm> (accessed 23 August 2017).
- 13 United Nations Human Rights. 2015. “*South Africa’s still long walk to free women from the shackles of violence*”: UN expert calls for change. <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?News>

ID=16885&LangID=E (accessed 23 August 2017).

14 UN Human Rights, 2015.

15 United Nations Sustainable Development Goals 2017. *Goal 5: Achieve gender equality and empower all women and girls*. <http://www.un.org/sustainabledevelopment/gender-equality/> (accessed 23 August 2017).

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