SUBMISSIONS ON BEHALF OF:

FOR SA
(Freedom of Religion in South Africa)

WITH REGARD TO:

WOMEN EMPOWERMENT AND GENDER EQUALITY BILL OF 2013 ("WEGE")

(B 50 – 2013)

DELIVERED TO:

THE PARLIAMENTARY PORTFOLIO COMMITTEE ON WOMEN, CHILDREN AND PEOPLE WITH DISABILITIES

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INTRODUCTION

1. "FOR SA" (Freedom of Religion in South Africa) is a forum of different Churches in South Africa, which forum is currently in the process of being registered and established as a non-profit company ("NPC"). Recently, the forum was able to rally the signed support of Church leaders representing 12 million citizens on another issue relating to religious freedom. FOR SA is confident that it will ultimately end up with the same number of people as members and/or supporters of the organisation.

2. The mandate of FOR SA, is to be a voice for freedom of religion[1], freedom of (religious) expression[2], freedom of association[3] and the rights of religious communities[4] in South Africa - all of which are fundamental rights entrenched in our Constitution and which the State is therefore enjoined to respect, protect and promote.[5]

3. Although a Christian initiative, FOR SA's overall mission is to protect and promote freedom of religion in South Africa, rather than advocating a particular religion or theology. The organisation is therefore pro choice, i.e. pro laws and legislation that allow individuals "*the right to entertain such religious beliefs as a person chooses, the right to declare such religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination*."[6]

[1] S 15 of the Constitution
[2] S 16 of the Constitution
[3] S 18 of the Constitution
[4] S 31 of the Constitution
[5] As stated by Sachs J in *Christian Education SA v Minister of Education* (2000) (10) BCLR 1051 (CC): "*The constitutional right to practice one's religion is of fundamental importance in an open and democratic society. It is one of the hallmarks of a free society*."
[6] *S v Lawrence* 1997 (4) SA 1176 (CC), Chaskalson P (Langa DP, Ackermann J and Kriegler J concurring) defining the "essence of the concept of freedom of religion" as borrowed from the Canadian courts.

FOR SA's INTEREST IN THE BILL ON WOMEN EMPOWERMENT AND GENDER EQUALITY ("THE BILL" OR "WEGE")

4. As already explained, FOR SA concerns itself with matters (incl. proposed legislation) that may impact upon South Africans' freedom of religion. We believe that the Bill, given its wide scope of application (that potentially includes Churches and charitable / religious organisations), may do just that.

5. The application of the Act is described in s 2 of the Bill, as follows:

   "2(1) Unless otherwise indicated in this Act, this Act applies to all public bodies and private bodies designated under subsection (2).
   (2) The Minister may, in order to achieve the progressive realisation of this Act, by notice in the Gazette, designate public bodies and private bodies which must comply with one or more provisions of the Act specified in the notice.
   (3) The Minister may from time to time, for the purposes of subsection (2), designate different public bodies and private bodies which must comply with the relevant provisions" (my emphasis).

6. In terms of s 1 of the Bill, "*private body*" (in the above context) means –

   "(a) a natural person who carries on any trade, business or profession, but only in such capacity;
   (b) a partnership which carries on any trade, business or profession; or
   (c) any juristic person, but excludes a public body" (my emphasis).

7. A "*juristic person*", in turn, is defined and understood in South African law as including associations incorporated in terms of enabling legislation (e.g. companies and non-profit companies ("NPCs") registered and incorporated as such in terms of the Companies Act, No. 71 of 2008), and associations which comply with the common law requirements for the establishment of a juristic person (known as "*universitates*") (e.g. Churches and/or private charitable / religious organisations that are not NPCs in terms of the Companies Act).

8. As such, Churches as well as charitable / religious organisations (whether in the form of a NPC or *universitas*) clearly fall within the definition of a "*private body*" for purposes of the Act, and may therefore be designated by the Minister as bodies to which the Act apply.[7]

9. It is our respectful submission that Churches and charitable / religious organisations should not be included in the potential scope of application of the Bill (i.e. that the Minister should not have the power, at any time, to designate such bodies as being subject to the Act), on the basis set out hereinbelow.

FOR SA's CONCERNS REGARDING THE BILL

10. As an organisation, FOR SA is pro women and unequivocally believes that the dignity, value and capabilities of women equal that of their male counterparts, and are therefore equally worthy of respect, protection and promotion. As such, FOR SA commends the intent of the Bill and supports the upliftment and empowerment of women that the Bill sets out to achieve[8].

11. We do however have two primary concerns regarding the Bill in its current form, namely:

    11.1. The broad powers given to the Minister for Women, Children and People with Disabilities ("the Minister"); and

    11.2. The Bill's infringement of other constitutional rights

[7] It is noteworthy that in an earlier draft of the Bill (as published in the *Government Gazette* of 29 August 2012, Notice 701 of 2012 - henceforth referred to as "the earlier draft of the Bill"), the definition of "*private body*" for purposes of the Act expressly included "religious organisations" and "non-governmental organisations" (s 1); and subject to s 13(1) of the Act, "companies" (including therefore NPCs), "non-profit organisations" and "other private bodies" were expressly included in the scope of application of the Act.

[8] The purpose of WEGE in terms of the Bill, is "*to give effect to section 9 of the Constitution of the Republic of South Africa, 1996, in so far as the empowerment of women and gender equality is concerned; to establish a legislative framework for the empowerment of women; to align all aspects of laws and implementation of laws relating to women empowerment, and the appointment and representation of women in decision making positions and structures; and to provide for matters connected therewith*".

The broad powers given to the Minister

12. On a plain reading of the Bill, it is apparent that the Minister will have broad powers and a wide discretion *inter alia* to:

    12.1. Decide and designate who the Act will apply to from time to time (s 2 read with definition of "*private body*" and "*public body*" in s 1)[9]; and

    12.2. Enforce compliance with the Act (s 14(2)[10] read with s 16[11]).[12]

13. It is submitted that no proper or adequate guidelines are given to the Minister in the exercise of his discretion relating to the above. Accordingly, the particular sections are vague, open for arbitrary use by the Minister, and open to constitutional challenge.

The Bill's infringement of other constitutional rights

14. While the Bill seeks to eliminate discrimination against women on the basis of gender, the Bill (in its current form) has the effect of discriminating against persons (including women) on other grounds, namely religion, conscience and belief. In so doing, the Bill undermines and falls foul of the very section of the Constitution to which it intends to give effect (s 9[13]).

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[9] See paras 5 to 8 above.

[10] "S *14(1) The Minister may, on the basis of the information obtained in exercising his or her powers in terms of this Act and with regard to the applicable legislation, in consultation with the relevant Minister, provide guidance to the relevant designated public body or designated private body, for them to promote women empowerment and gender equality. (2) Failure or refusal to comply with the guidance provided by the Minister to a designated public [...] or private body will be addressed in terms of the enforcement procedures as contemplated in section 16*."

[11] "*16. Subject to the Intergovernmental Relations Framework Act, 2005 (Act No. 13 of 2005), the Minister, acting in the interests of women as a group or class of persons, may use any dispute resolution mechanisms to address non-compliance with this Act or applicable legislation.*"

[12] It is noteworthy that in terms of the earlier draft of the Bill, an offence in terms of the Act would, upon conviction, be punishable by a fine or, in default of payment, to imprisonment for a period not exceeding five years (s 13(3)).

[13] S 9(3) "*The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, cultural language and birth*".

15. Furthermore, while the Bill (in its current form) gives positive effect to the constitutional right to equality and non-discrimination on the basis of gender, it negatively affects and infringes the constitutional rights to freedom of religion, freedom of religious expression, freedom of association and the rights of religious communities. Read together, these rights also guarantee a degree of autonomy for religious organisations or groups to run their affairs without interference (i.e. the institutional aspect of the right to freedom of religion).[14]

16. Where constitutional rights are in conflict with each other, a balancing exercise has to be performed in terms of the Limitations Clause of our Constitution (s 36). Where the conflict involves "religious" rights however, the balancing of rights has proven to be no easy task. As a result, the Courts have hitherto tended to avoid a limitation clause analysis where possible, preferring instead to restrict the scope of the right - where possible, but depending on whether the belief relied upon in fact forms part of the religious doctrine or practices of the person concerned or is a central tenet of the person's religion[15].

17. In this regard, our Courts have held that it is immaterial whether the particular belief is, in the opinion of the Court (and by parity of reasoning and for present purposes, in the opinion of the Portfolio Committee or indeed, the legislature) acceptable, logical, consistent or comprehensible[16].

18. In the present context, two central beliefs in particular are threatened or undermined by the Bill, namely:

    18.1. It is a central tenet of the Christian faith that the husband is the head of the home, as Christ is the head of the Church (Ephesians 5:23[17]); and

[14] De Waal et al, *The Bill of Rights Handbook* (Juta), 4th Edition at p 291; Sachs J in *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) at para 19.
[15] De Waal (supra) at p 293; Liebenberg J in *Christian Education v Minister of Education of the Government of South Africa* 1999 (9) BCLR 951 (SE) at 958E.
[16] Liebenberg J in *Christian Education v Minister of Education (SE) (supra)* at 958E.
[17] In this regard, Scripture specifically commands husbands to "*love* [their] wives, just *as Christ loved the church.*" (Ephesians 5:25). The command is therefore not to lord it over their wives, but to affirm, protect and serve them as image-bearers of Christ.

18.2. As an extension of the aforegoing, the Roman Catholic Church as well as many Christian Churches hold that, according to their interpretation of the Holy Scripture, governance[18] of the Church (as the spiritual home) (i.e. eldership) is reserved for men (1 Timothy 2:12), which belief forms part of their religious doctrine and practices.

19. If the Bill were to be promulgated in its current form, it will have the following consequences:

19.1. The State (i.e. the legislature) will:

19.1.1. Be undermining pluralism and diversity as a core value of our Constitution.[19] Neither the Constitution nor the Promotion of Equality and Prevention of Unfair Discrimination Act, No. 4 of 2000 ("PEPUDA"), require uniformity (identical treatment) in order to bring about equality. What they require, is equal concern and equal respect[20];

19.1.2. Be seeking to legislate values based on its value system and interpretation of Holy Scriptures. In so doing, the State will effectively be dictating (on the ground of gender) what people should believe or not believe (which amounts to a degree of thought control, for which there can never a justification[21]), thereby interfering also with individuals' freedom of choice (which in itself, again, is a core value of our constitutional democracy);

19.1.3. Be interfering with the autonomy of religious organisations, guaranteed to them by the Constitution[22], to govern their own

[18] "Governance" in this context refers to the setting of doctrine, giving of direction and applying of discipline in accordance with the Holy Scriptures, within the Church.
[19] In this regard, it has long been recognised that "[o]*ur Constitution does not tolerate diversity as a necessary evil, but as one of the primary treasures of our nation*" (*MEC for Education: KZN v Pillay* 2008 (2) BCLR 99 (CC)).
[20] *MEC for Education: KZN v Pillay* 2008 (2) BCLR 99 (CC).
[21] De Waal (supra) at p 296.
[22] S 15, read with s 16, 18 and 31 of the Constitution.

affairs, as well as to teach and give practical expression to their beliefs according to their interpretation of Holy Scripture;

19.2. As a further, practical consequence:

19.2.1. Women who themselves hold to the aforesaid beliefs and who are part of Churches or religious organisations who adhere, practice and teach those beliefs, will be forced (against their will and conviction) to take up leadership positions in decision-making structures of the Church and/or organisation[23];

19.2.2. Churches and/or religious organisations who adhere, teach and practice the aforesaid beliefs, themselves will be forced to choose between their faith and respect for the law (with the possibility of facing harsh consequences, should they choose to adhere their faith rather than the law) – a situation that should as far as possible be avoided[24] in an open and democratic society based on human dignity, equality and freedom;

19.3. Companies and/or organisations who, as a result of the nature of the industry/sector/organisation etc, do not have a sufficient number of females in their workforce (or serving as volunteers within the organisation) to attain a 50% representation of females in decision-making structures, may find it a factual impossibility to comply with the Bill.

20. In light of the aforegoing, the Bill (in its current form) is likely to attract constitutional challenge, which will be time-consuming, costly and indeed, very unfortunate given the good intent and objectives of the Bill to liberate and strengthen the hands of women in SA.

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[23] With a view to achieving equal representation and empowerment, the Bill *inter alia* obliges designated public and private bodies to "*within their ambit of responsibilities and available resources, develop and implement measures, in order to achieve the progressive realisation of a minimum of 50% representation and meaningful participation of women in decision-making structures including Boards*" (s 7(1)).

[24] De Waal (supra) at 295.

21. To sum up: while FOR SA supports the Bill generally, we respectfully submit that there may be some unintended and unlawful consequences if the Bill were to be passed in its current form, namely that while one constitutional freedom (i.e. gender equality) will be won, another very important freedom (i.e. freedom of religion, and the autonomy of religious organisations to govern their own affairs) will be lost or at the very least, diminished.

22. Once again, it is emphasised that FOR SA's concern and mission is that of freedom of religion and choice, rather than defending or promoting a particular faith or theological position. In so far as the present submissions refer to the Christian faith or certain theological positions within the Christian faith, these only serve as an example of the prejudicial effects that the Bill in its current form may have on freedom of religion. (Similar examples could be drawn from the Jewish or Muslim belief system).

23. In addition to the above constitutional concerns, FOR SA:

    23.1. Points out that the Bill will place an additional administrative and financial burden on Churches and charitable / religious organisations (large and and small), who are entirely reliant on voluntary contributions from donors and members and who therefore do not have the financial means and/or institutional machinery required to comply with legislation such as the present Bill; and

    23.2. Questions whether the Bill, while having laudable objectives that seek to give expression to foundational values of our Constitution, will actually achieve what it sets out to do or whether, like other legislation with similar goals (e.g. Employment Equity Act, No. 55 of 1998; the Promotion of Equality and Prevention of Unfair Discrimination Act, No. 4 of 2000; the Broad-Based Black Economic Empowerment Act, No. 53 of 2003), it will fail to accomplish, in fact, that which it, by law, hoped to achieve. Put differently, does our country really need "additional" equity legislation, or should the estimated budget of R150 million over three

years to implement WEGE, not be better spent on implementing and enforcing existing laws and legislation?

PROPOSED AMENDMENTS TO THE BILL

24. We submit that the presumably unintended, but nonetheless unconstitutional, consequences of the Bill in its current form, can be avoided or eliminated by making certain amendments to the Bill, particularly in relation to:

24.1. S 2, read with s 1, of the Bill pertaining to "Application". In particular, we propose that the Bill be amended to expressly exclude religious organisations from its scope of application[25]. This can be achieved, for example, by amending paragraph (c) of the definition of "private body" in s 1 of the Bill to read as follows:

"*any juristic person, but excludes a public body and any religious or charitable organisation*." (our insertion); and

24.2. S 14(2), read with s 16, of the Bill pertaining to "Enforcement". In particular, we propose that the Bill be amended to expressly set out the dispute resolution mechanism and steps to be employed by the Minister, to compel compliance (either in the Act, or by way of Regulations to the Act).

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on behalf of FOR SA
29 January 2014

[25] As already explained, s 2 of the Bill specifically provides that "[u]*nless otherwise indicated in this Act, this Act applies to all public bodies and private bodies designated under subsection* (2)" (my emphasis). It is noteworthy that the earlier draft of the Bill provided that "*good cause can be shown why women are not so empowered in a particular instance*" (s 8(1)) , referring to "*justifiable inherent requirements related to the nature of the relevant area or sector, but does not include lack of capacity, scarcity of skills or limited resources"*. This exemption has not been included in the current Bill.