Chapter 24D
The Commission for Gender Equality

Catherine Albertyn

24D.1 Introduction

24D.2 What is the Commission for Gender Equality (CGE)?

24D.3 The independent nature of the CGE

24D.4 Gender equality

24D.5 Scope of mandate and functions
  (a) The monitoring function
  (b) The educative function
  (c) The investigative function
  (d) The advocacy and advisory function
  (e) The litigation function

24D.6 The CGE, democracy and the achievement of gender equality

---

24D.1 Introduction

Chapter Nine of the Final Constitution\(^1\) creates the Commission for Gender Equality (CGE). As a Chapter Nine entity, the CGE is characterised as a ‘state institution strengthening constitutional democracy’\(^2\) that is independent and impartial, subject only to the Constitution and the law.\(^3\)

Section 187 of the Constitution sets out the broad functions of the CGE. The CGE must ‘promote respect for gender equality and the protection, development and attainment of gender equality’.\(^4\) In addition, the Constitution identifies specific functions and powers: namely, to ‘monitor, investigate, research, educate, lobby, advise, and report on issues concerning gender equality’.\(^5\) These responsibilities are further regulated and amplified by legislation: the Commission on Gender Equality

---

\(^1\) Constitution of the Republic of South Africa Act 108 of 1996 (‘FC’ or ‘Final Constitution’).

\(^2\) FC section 181(1).

\(^3\) FC section 181(2).

\(^4\) FC section 187(1).

\(^5\) FC section 187(2).
24D.2 What is the commission for gender equality?

The Commission for Gender Equality is an unusual institution in comparative international terms. Its institutional origins lie both in the concept of an independent Human Rights Commission and in the need to establish specific structures both within and outside government to advance gender equality and women's human rights. The major task of these gender structures is to transform the institutions, policies, procedures, consultative processes, budgetary allocations and priorities of government to take account of the needs and aspirations of women. The objective is 'to achieve equality for women as participants, decision-makers and beneficiaries in the political, civil, social, economic and cultural spheres of life'. Such structures may be specific government ministries devoted to gender issues, specialised gender units within government departments, gender committees within Parliament, or independent gender advisory and monitoring institutions.

These gender structures (often referred as 'national machinery') have been promoted by the United Nations and other international agencies concerned with gender equality as the best way of mainstreaming women's concerns with government. Hence the Platform for Action of the Fourth World Conference on Women held in Beijing, China in 1995 imposed the following obligation on governments:

Based on a strong political commitment, create a national machinery, where it does not exist . . . for the advancement of women at the highest level of government; it should have clearly defined mandates and authority; critical elements would be adequate resources and the ability and competence to influence policy and formulate and review legislation. Among other things, it should perform policy analysis, undertake advocacy, communication, co-ordination and monitoring of implementation.

The structure, powers and position of 'national machinery' in South Africa were debated extensively within the country in the early 1990s. A consensus emerged
that a 'package' of institutions at all levels of the state and in civil society was the most effective means of mainstreaming gender in the new democracy. As a result, several structures in government and parliament, as well as an independent commission, were established after 1994. They are:

1. A parliamentary structure: the Joint Monitoring Committee on the Improvement of the Quality of Life and Status of Women.\(^\text{13}\)

2. Government structures; namely, the Office on the Status of Women based in the Office of the Presidency; and Gender Focal Points in national line ministries.\(^\text{14}\) These structures are replicated at provincial level.\(^\text{15}\)

3. The Commission for Gender Equality: a national, independent monitoring body, which is directly accountable to Parliament.\(^\text{16}\)

Overall, '[n]ational machinery acts as a vehicle through which South Africa can meet its constitutional and international commitments to gender equality, human rights and social justice'.\(^\text{17}\)

The Commission for Gender Equality was established in 1997. It works closely with the other arms of national machinery, whose roles and functions were elaborated in a national policy document published by the Office of the Status of Women in 2000.\(^\text{18}\) The CGE also co-operates with other Chapter Nine institutions (especially the Human Rights Commission and the Public Protector).\(^\text{19}\)

### 24D.3 The independent nature of the CGE

The CGE is designated an independent and impartial institution, able to exercise its powers and perform its functions 'without fear, favour, or prejudice'.\(^\text{20}\) It is not


\(^{13}\) The Office on the Status of Women (supra) at para 4.4.3.

\(^{14}\) Ibid at para 4.4.2.

\(^{15}\) Ibid at para 4.5. The document contained proposals for gender structures in local government. Ibid at para 4.6.

\(^{16}\) Ibid at para 4.4.4.

\(^{17}\) Ibid at para 4.2.3.

\(^{18}\) The Office on the Status of Women (supra).

\(^{19}\) The CGE is required to do so in terms of section 11(1)(e) and (f) of the Act.
accountable to government. Rather, it reports, at least annually, to the National Assembly of Parliament.

Despite this political accountability, and ostensible independence, the Commission has been dependent upon government, and particularly the Department of Justice, for its operational funds. Initially, the moneys allocated by the Department barely covered salaries. Funding has improved in subsequent years.\(^{21}\) In addition, the CGE has secured grants from international donors for its programmes.\(^{22}\) The CGE, together with the Human Rights Commission and Public Protector, has argued that its financial dependence upon government interferes with its independence. It has advocated a direct relationship with Parliament for budgetary appropriations.\(^{23}\)

The selection of commissioners is the task of Parliament. However, the President appoints persons nominated by a joint Parliamentary committee and approved by both houses of Parliament in a joint sitting.\(^{24}\) Commissioners are expected to be duly qualified in terms of their record of commitment to gender equality and their knowledge and experience.\(^{25}\) The selection process has attracted criticism for being overly politicised.\(^{26}\)

### 24D.4 Gender equality

The CGE has a broad constitutional mandate of promoting and protecting gender equality. Gender equality is a foundational principle of our constitutional democracy. However, it is not defined in the Constitution. The Constitutional Court has concluded that the Constitution enshrines a commitment to substantive equality.\(^{27}\) The CGE articulated the following understanding of substantive gender equality in its first annual report:

> Gender equality means the equal employment by men and women of socially valued goods, opportunities, resources and rewards. Because what is valued differs among

---

\(^{20}\) FC section 181(2).


\(^{22}\) The reliance on independent donors is on all fours with the Commission’s status as an independent structure.

\(^{23}\) CGE 1998 (supra) at 33; CGE 1999 (supra) at 37.

\(^{24}\) Section 3(2).

\(^{25}\) Section 3(1).


\(^{27}\) Pretoria City Council v Walker 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 at para 46.
societies, a crucial aspect of equality is the empowerment of women to influence what is valued and share in decision-making about societal priorities. Equality does not mean that men and women are the same, but that opportunities and life chances will not depend on sex.\textsuperscript{28}

One of the first tasks of the CGE was also to define a vision of a society free from inequality:

The [CGE] is committed to creating a society free from gender discrimination and all other forms of oppression, in which all people will have the opportunity and means to realise their full potential, regardless of race, gender, class, religion, sexual orientation, disability or geographic location.\textsuperscript{29}

The mention of 'forms of oppression' in this vision refers to the existence of inequalities amongst women beyond those enumerated above. The CGE has sought to prioritise the concerns of the most vulnerable and marginalised groups of women. It states that 'while the constituency of the CGE is all the people of South Africa, its target group is people living on the periphery, especially women in rural areas, on farms, in peri-urban areas, and in informal settlements'.\textsuperscript{30}

The constitutional mandate of the Commission grants it a privileged status in promoting gender equality and in representing the interests of women in our society. This eminence was recognised by the Constitutional Court in \textit{S v Jordan}\textsuperscript{31}. In \textit{Jordan}, the CGE intervened as \textit{amicus curiae} in support of the decriminalisation of sex work.\textsuperscript{32} Writing for the minority that supported decriminalisation, Judges O’Regan and Sachs stated that

In determining whether the discrimination is unfair, we pay particular regard to the affidavits and argument of the Gender Commission. It is their constitutional mandate to protect, develop, promote respect for and attain gender equality. This Court is of course not bound by the Commission’s views but it should acknowledge its special constitutional role and its expertise. In the circumstances, its evidence and argument that section 20(1)(aA) is unfairly discriminatory on grounds of gender reinforces our conclusion.\textsuperscript{33}

\textbf{24D.5 Scope of mandate and functions}

The Commission’s constitutional mandate of promoting gender is both vertical and horizontal. Its monitoring function extends to the state, statutory and public bodies,

\begin{itemize}
  \item \textsuperscript{28} CGE 1998 (supra) at 13.
  \item \textsuperscript{29} CGE 1998’ (supra) at 3.
  \item \textsuperscript{30} Ibid.
  \item \textsuperscript{31} \textit{S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) 2002 (6) SA 642 (CC), 2002 (11) BCLR 1117 (CC)(’Jordan’)}.
  \item \textsuperscript{32} Ibid at para 70.
  \item \textsuperscript{33} Section 11(1)(a) of the Act.
\end{itemize}
as well as 'private businesses, enterprises and institutions'.\textsuperscript{34} It is also authorised to investigate 'any gender related complaint' in the public or private domains.\textsuperscript{35}

The Commission on Gender Equality Act sets out the details of the Commission's functions and powers. These can be summarised as powers: (a) to monitor (the watchdog function); (b) to educate; (c) to investigate and settle complaints; (d) to conduct research; (e) to advocate for gender equality; (e) to report, advise and make recommendations; and (f) to litigate.

\textbf{(a) The monitoring function}

The CGE's most important function is to act as a watchdog for gender equality, and hence of democracy. This watchdog role extends beyond the state to the private sector and civil society. Section 11(1)(a) of the Act explicitly authorises the CGE to monitor and to evaluate the policies and practices of all organs of state, statutory bodies or functionaries, public bodies and authorities and private business, enterprises and institutions.\textsuperscript{36} Section 11(1)(c) requires the CGE to evaluate any Act of Parliament or aspect of the common law, with particular emphasis on systems of personal, family and customary law. In terms of s 11(1)(h), the CGE is expected to monitor compliance with relevant international instruments, especially the Convention on the Elimination of All Forms of Discrimination Against Women. It shares this task with the Office on the Status of Women and Parliament's Joint Monitoring Committee of the Improvement of the Quality of Life and the Status of Women.\textsuperscript{37}

The monitoring function is linked to a number of other powers and functions, including conducting research and giving advice and making recommendations on how to improve or promote gender equality. Section 11(d) empowers the CGE to recommend to Parliament the adoption of new legislation to promote gender equality and raise the status of women. Often such recommendations may be better made to relevant government departments that have the authority to draft and develop laws in their particular area of jurisdiction.

Although the scope of the Commission's monitoring function extends across the entire spectrum of the state and civil society, much of its work has been aimed at the state. It has been especially engaged in the development of the government's legal and policy framework. In 1998, it commissioned an audit of discriminatory legislation to identify gaps in laws.\textsuperscript{38} It has also made regular submissions to the South African Law Commission and to Parliament on laws affecting gender equality.

\begin{itemize}
  \item \textsuperscript{34} Section 11(1)(e) of the Act.
  \item \textsuperscript{35} Ibid at s 11(1)(a).
  \item \textsuperscript{36} Ibid.
  \item \textsuperscript{37} See The Office on the Status of Women (supra) at para 4.4.3.1. The Office on the Status of Women has the official task of reporting to the United Nations, whereas the other institutions have a more internally focussed monitoring role.
  \item \textsuperscript{38} Centre for Applied Legal Studies: Audit of Legislation that Discriminates on the Basis of Sex/Gender (1998). See also CGE 1999 (supra) at 28-29.
\end{itemize}
including customary laws.\textsuperscript{39} More recently, it has addressed the issue of implementing law through the idea of an Annual Report Card of progress by various government departments.\textsuperscript{40}

The Commission has evaluated the participation of women in politics,\textsuperscript{41} and the gender policies of political parties. It has monitored national and local elections to assess the participation of women in political parties and in voting.\textsuperscript{42}

As noted above, the CGE's oversight responsibilities capture relationships within civil society. The CGE monitors traditional practices that are harmful to women: it has conducted research and engaged in dialogue with communities and traditional leaders on issues such as witchcraft and virginity testing.\textsuperscript{43} The CGE has also developed a particular focus on gender equality in the private sector. It has recently undertaken a survey of the sector and produced a report entitled ‘Best Practice Guidelines for Creating a Culture of Gender Equality in the Private Sector’.\textsuperscript{44}

The monitoring function of the CGE is extended in the Equality Act. The innovative remedies section of that Act provides for the CGE to receive regular progress reports as to how a person found guilty of unfair discrimination is implementing the court's order.\textsuperscript{45} This delegation recognises the particular expertise of the CGE and reduces the burden of ‘supervisory jurisdiction’ on a court. Obviously the Commission has no power to enforce a court order. It would have to refer the matter back to the court.

The Commission's monitoring role under this Act also extends to powers to 'request' any part of the state or any person 'to supply information on any measures relating to the achievement of equality, including, where appropriate, on legislative and executive action and compliance with legislation, codes of practice and programmes'.\textsuperscript{46}

Finally, the Equality Act permits the Commission to monitor cases that are adjudicated under the Equality Act. Section 25(3)(c) authorises the CGE to 'request

\begin{itemize}
\item \textsuperscript{39} The various annual reports of the CGE list submissions on, \textit{inter alia}, customary marriages, religious law, domestic violence, sexual offences and traditional courts.
\item \textsuperscript{40} Commission on Gender Equality Annual Report 2000 (2000) at 21-22 ('CGE 2000').
\item \textsuperscript{41} Commission on Gender Equality 'Redefining Politics–Women and Democracy in South Africa' (1999).
\item \textsuperscript{42} Commission on Gender Equality 'Report on the 1999 General Elections: A Gender Perspective' (1999).
\item \textsuperscript{43} Commission on Gender Equality Annual Report 2000/2001 (2001) 9 ('CGE 2001').
\item \textsuperscript{44} Commission on Gender Equality 'Gender and the Private Sector' (1999).
\item \textsuperscript{45} Section 21(2)(m) of the Equality Act (supra).
\item \textsuperscript{46} Ibid at s 25(3)(2).
\end{itemize}
from the Department [of Justice] . . . regular reports regarding the number of cases and the nature and outcome thereof'.

(b) The educative function

Section 11(b) of the Act requires the CGE to develop and conduct public information and education programmes to foster public understanding of gender equality. In terms of section 25(1) of the Equality Act, the Commission must assist the state 'to develop an awareness of fundamental rights in order to promote a climate of understanding, mutual respect and equality'47 and 'conduct information campaigns to popularise' the Act.48 These are important functions in addressing the social norms and attitudes that underpin gender inequalities.

One of the Commission's main programmes has been to engage the media on sexism in the media.49 The CGE also runs public education initiatives through the media and in rural and urban communities on a range of issues relating to women's rights.50

The Commission founded the now annual Sixteen Days of Activism on No Violence Against Women.51 It has produced a 'Working Women's Manual' on the rights of women in workplace.52

(c) The investigative function

The CGE is mandated to investigate any gender-related complaint and resolve it through mediation, conciliation or negotiation.53 Section 11 makes provision for two types of investigations: (1) those related to individual complaints brought to the Commission; and (2) those initiated by the Commission. This flexibility enables the CGE to identify and act upon significant areas of gender inequality in society.

The complaints function sets up a tension between expending resources on addressing the needs of those who bring their problems to the CGE and ensuring that interventions are strategic and have the maximum transformative impact.54 In order to diminish this institutional and budgetary strain, the Commission has sought to refer complaints to other institutions where possible, and to address the systemic problems that prevent women from using such institutions effectively.

47 Section 25(1)(a) of the Equality Act (supra).

48 Ibid at s 25(1)(c)(vi).

49 CGE 1999 (supra) at 23-25; CGE 2000 (supra) at 31-32.

50 CGE 2001 (supra) at 6-8.

51 CGE 1999 (supra) at 37.

52 CGE 2000 (supra) at 27.

53 Section 11(1)(e) of the Equality Act (supra).

54 CGE 1999 (supra) at 29-31.
In addition, the CGE has sought to prioritise complaints received from its target constituency of disadvantaged women. The Commission reports that the majority of individual complaints relate to maintenance, family issues (divorce and custody), and domestic and other forms of gender violence.56

The CGE has powerful investigative powers, including the power to subpoena persons and documents,57 compel evidence58 and powers relating to entry of premises and search and seizure.59 These powers have yet to be used.

The CGE plays an important role in settling complaints on unfair discrimination, harassment or hate speech under the Equality Act. This Act identifies the CGE as an 'alternative forum'. This means that Equality Courts can refer matters to the CGE to be dealt with in terms of the CGE's functions and powers, instead of hearing the matter in an Equality Court.60 In such cases, the Equality Court retains overall jurisdiction should the dispute resist resolution by the CGE.61

Section 21(4) of the Equality Act further provides that a court may either before, during or after a hearing, refer a complaint to the CGE for 'mediation, conciliation or negotiation'. The Commission is also competent to conduct investigations into cases that are referred to them by an Equality Court and to make recommendations as directed by the court regarding those cases or the persistent contravention of the Act.62

(d) The advocacy and advisory function

As a constitutional protector of democracy, the CGE is expected to advance gender equality and hence contribute to the consolidation of democracy in South Africa. This responsibility demands engagement with the state and civil society on a broad range of issues relating to gender equality. These interventions have the dual objectives of removing barriers that impede progress to equality and developing positive measures to advance equality.

Chapter five of the Equality Act sets out several duties of the state to promote equality. Constitutional institutions, such as the CGE, are expected to assist in these

---

55 CGE 1999 (supra) at 29-31.

56 Ibid at 20; CGE 2000 (supra) at 25-26; CGE 2001 (supra) at 15-17.

57 Section 12(4)(b) of the Equality Act (supra).

58 Ibid at s 12(5).

59 Ibid at s 13.

60 Ibid at ss 20(5)-(7).

61 Ibid at s 20(8).

62 Ibid at s 25(3)(b).
duties. These duties include taking measures to 'develop and implement programmes . . . to promote equality'; developing action plans, codes of practice and guidelines to promote equality; and ‘providing advice and training on equality’. Finally, in terms of s 25(4), read with ss 25(5) and (6), the CGE must assist the Human Rights Commission in receiving and evaluating the equality plans of all government departments.

(e) The litigation function

Although the power to litigate is not expressly mentioned in its Act, the CGE has asserted its prerogative to do so with respect to the enforcement of women's rights. It has tended to do so, however, not by initiating cases, but by lending support to, or participating in, cases that raise important gender issues. The CGE intervenes primarily in those cases that relate to systemic gender inequality or the rights of disadvantaged groups of women.

In some instances, the Commission has been invited by the Constitutional Court to make submissions in a particular case. The CGE has also applied to be an amicus curiae in various courts. Here the Commission has argued on behalf of the interests of vulnerable groups of women and/or has placed contextual evidence before the courts on systemic practices of gender inequality. The CGE has also participated as a party in several cases.

The Commission was invited by the Constitutional Court to make representations in *Amod v MMF* and in *S v Baloyi*. *Baloyi* dealt with the constitutionality of a provision of the Prevention of Family Violence Act that arguably placed an onus on a defaulter to prove that he had not wilfully violated an interdict. In finding that this imposed a permissible burden of proof rather than an onus, the Court explicitly recognised that the state was under a series of constitutional mandates which include the obligation to deal with domestic violence: to protect the rights of everyone to enjoy freedom and security of the person and to bodily and psychological integrity and the right to have their dignity respected and protected.

63 Ibid at s 25(1)(b).

64 Sections 25(1)(c)(i) and (iii) of the Equality Act (supra).

65 Ibid at s 25(1)(c)(iv).

66 1998 (4) SA 753 (CC), 1998 (10) BCLR 1207 (CC) (dealing with the jurisdiction of the Constitutional Court and the Supreme Court of Appeal).

67 2000 (2) SA 425 (CC), 2000 (1) BCLR 86 (CC) ('Baloyi').

68 Act 133 of 1993.

69 *Baloyi* (supra) at para 11 (Sachs J). See also *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), 2001 (1) BCLR 995.
These are constitutional mandates that the CGE is well positioned to monitor.

The CGE has acted as *amicus curiae* in several cases. In the Supreme Court of Appeal hearing of *Amod v MMF*, the CGE intervened on behalf of Muslim women whose marriages were not legally recognised and who were therefore unable to claim damages from the Motor Vehicle Accident Fund. The CGE argued that the common law should be interpreted to recognise a duty of support in these relationships. The Supreme Court of Appeal found that the appellant's claim was worthy of 'public recognition and protection'.

In *Bannatyne v Bannatyne*, the CGE was admitted by the Constitutional Court as an *amicus curiae* to lodge empirical data on the state of the maintenance system in South Africa and its effect on the rights of women and children in seeking effective relief under the Maintenance Act 99 of 1998. The Court commented that

> [t]his evidence proved most useful and gave the necessary context by providing information regarding the frailties inherent in the functioning of the maintenance system and more particularly its effect on the promotion and advancement of gender equality in this country.

The CGE has also supported cases by appearing as a party. In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, the CGE supported the National Coalition by appearing as the fourteenth applicant in a case that challenged permanent-residence requirements which discriminated against gay and lesbian partners. The Commission joined the case of *Christian Lawyers Association v Minister of Health* as a party to assist the government in defending a challenge to women's rights to reproductive choice enshrined in the Choice of Termination of Pregnancy Act 92 of 1996. However, the CGE has not yet initiated a case in its own name to address a gender equality issue directly.

The Equality Act also envisages a litigation function by the CGE. It authorises the Commission to institute proceedings in its own name under that Act. It also mandates the CGE to assist persons wishing to bring proceedings under the Act.

---

70 *Amod v Multilateral Vehicle Accidents Fund (Commissioner for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA).

71 2003 (2) SA 363 (CC), 2003 (2) BCLR 111 (CC) (*'Bannatyne'*).

72 *Bannatyne* (supra) at para 3. See also paras 26–30 (on the nature of the evidence placed before the Court).

73 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC).

74 *Christian Lawyers Association of SA and Others v Minister of Health and Others* 1998 (4) SA 1113 (T).

75 Section 20(1)(f) of the Equality Act (supra).

76 Ibid at ss 20(9) and 25(3)(a).
The commission, democracy and the achievement of gender equality

The Commission's constitutional mandate is to promote democracy through the protection and advancement of gender equality. This duty not only refers to the promotion and protection of women's constitutional rights, but also to the task of achieving gender equality in legal, social, economic and political life. The CGE is accordingly authorised to intervene in the affairs of the state, civil society and the private sector. This constitutional mandate is, as we have noted above, grounded in, and amplified by, two important laws: The Commission on Gender Equality Act, and the Promotion of Equality and Prevention of Unfair Discrimination Act.

In carrying out this mandate, the Commission is subject to significant fiscal and personnel constraints. As a result it has had to make hard choices about its priorities and the way in which it carries out its mission. It does so through annual planning and review procedures. It does so by co-operating closely with other constitutional institutions and with the governmental and parliamentary structures of the 'national machinery', as well as with civil society organisations. The location of the Commission as an independent, constitutional institution enables it hold government accountable to its mandate of achieving gender equality. Similarly, the Commission facilitates the strengthening of civil society by working independently, and in partnership with other organisations, to ensure that government is accountable, open and responsive to civil society.