

GENDER AUDIT OF COPAC DRAFT CONSTITUTION

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Introduction and Background

- 1.1 The Constitution-making exercise being conducted under the terms of the GPA has now come to the end of the drafting stage. The Group of 20 and the Women's Coalition have participated actively in the Constitution making process by carrying out its own public consultations and producing a Position Paper of women's expectations of the new Constitution.
- 1.2 Zimbabwe is party to three international agreements on the rights of women at the international, regional and sub regional levels: the United Nations Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), the Protocol to the African Union Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol) and the Southern African Development Community (SADC) Protocol on Gender and Development. All three agreements enjoin member states to have Constitutions which adequately address the rights and needs of women¹.

Position Paper

- 1.3 The Position Paper submitted by ZWLA to COPAC during the outreach stage identified four broad needs that women expected to be addressed under the new Constitution namely, recognition, equality, inclusion and protection and suggested the specific constitutional formulations to address these needs, including the drafting language which borrowed from best practices in other Constitutions.
- 1.4 The first official draft ("the COPAC Draft") consisting of 18 chapters has been prepared and made available to the public on July 17, 2012. The Women's Coalition and Group of 20, with the technical analysis of ZWLA and support from UN Women, have scrutinised the draft and this paper is a discussion of their assessment of the extent to which the draft meets the expectations of women as contained in their Position Paper and conforms to international standards on the protection of women's rights in Constitutions.

Structure of the paper

- 1.6 The paper is structured in such a way which makes possible a systematic assessment of each of the relevant provisions of the draft. It will point out and commend the provisions which adequately address women's needs but also point out any inadequacies and suggest improvements. Not every chapter will be discussed but only those provisions which, in the opinion of the writers, have a substantial bearing on the rights and welfare of women in Zimbabwe.

¹ See Art. 2(a) of CEDAW, Art 2(1)(a) of the Maputo Protocol and Art. 4 of the SADC protocol

2. The Preamble

- 2.1 The COPAC Draft contains a preamble that recognises the contribution of women and men in the liberation struggle of Zimbabwe. It also affirms a commitment to the rule of law and a respect for human rights and freedoms. It does not, however, affirm the principle of equality and respect for the inherent dignity of all persons regardless of sex. The preamble could be improved by including the concept of equality as one of the core values of the nation.

3. Chapter 1: Founding Provisions

- 3.1 The chapter on founding provisions, *inter alia*, sets out the founding values of the state and the framework for the interpretation of the Constitution and of public laws and policies. It also paints a vision of the kind of society envisaged under the Constitution.
- 3.2 In their Position Paper, the women expressed the desire for the inclusion of founding principles which affirm the principles of non discrimination and non sexism and the inherent dignity of all human beings.
- 3.3 **Clause 3.1** sets out seven principles and values on which Zimbabwe is founded. Two of these principles / values speaks directly to the need for gender equality by providing for “recognition of the equality of all human beings” and “gender equality”². Two other principles, namely, “fundamental human rights and freedoms” and “recognition of the inherent dignity and worth of each human being” are also important for women in that they address some of the main causes of the suffering that women face.
- 3.4 **Clause 3.2** details the founding principles of good governance which bind all institutions of the state and government. While all the principles impact women, the principle that requires that the electoral system be based on “adequate representation of the electorate” speaks directly to the need for women to participate in the political process in a way that reflects the general population.³

² Clauses 3(1)(e) and (f)

³ Clause 3(2)(b)(iii)

4. Chapter 2: National Objectives

- 4.1 **Chapter 2** sets out the objectives that should guide all institutions and agencies of the State and Government at all levels, in taking and implementing policy decisions that will lead to the establishment and promotion of a just, free and democratic society in which people can enjoy prosperous and fulfilled lives.
- 4.2 **Clause 2.9** places on the State the obligation to ensure gender balance in Zimbabwean society, including; promote full participation of women on the basis of equality with men; take measures to ensure women are equally represented in all institutions and agencies of the State including Constitutional Commissions and other governmental bodies; take steps to ensure women have access to resources, including land, on a basis of equality with men; and take positive measures to rectify past gender discrimination.
- 4.3 The provisions of **clause 2.9** are progressive and welcome but it should be noted that the provisions of **Chapter 3** are not justiciable and their fulfilment depends largely on political will, resources and the commitment of the State to live up to the values of the Constitution.
- 4.4 **Clause 2.11** provides for national directives in the treatment of children. This clause provides that policies and measures relating to children must promote the best interest of the child. The clause also provides that government policy and programs should aim to ensure children receive family care, shelter, basic nutrition, health and social services, and are protected from abuse and exploitation, in particular in the workplace. **Clause 2.12** provides for government commitment to ensure that youth have access to education and training, opportunities for employment, recreation, protection from exploitation and opportunity to be represented in the political, social and economic sphere of life.
- 4.5 **Clauses 2.11 and 2.12** provide important guidelines for programs promoting the well-being of children and youth. However, girls face special challenges in accessing education and employment and are more vulnerable to exploitation than boys. These clauses would be more effective if they noted that, in certain situations, programs for girls and for boys must be tailored for specific needs and address different barriers experienced by the different genders.
- 4.6 **Clause 2.13** provides for national directives on the treatment of elderly persons including the provision of facilities, food, care and programmes to improve their quality of life and productivity. Again, the challenges faced by elderly women, who were likely to have been dependant on their husbands economically. The clause would be more effective if it noted the particular needs of elderly women.
- 4.7 **Clause 2.16** provides for national directives in the area of work and labour relations. Clause 2.16(2)(d) is of particular interest to women as it directs government to ensure implementation of measures such as family care that enable women to enjoy a real opportunity to work.

- 4.8 **Clause 2.17** provides for protection of the family. Of particular interest to women is the directive for the State to assist parents in caring for their children and to ensure the prevention of domestic violence. This directive is in line with CEDAW general recommendation 19 which recognised violence against women as a form of discrimination against women. However, in addition to preventing domestic violence, the State is obligated to take appropriate measures to provide services and treatment for victims. The provision would be improved by revising so that the State must endeavor to adopt measures for *“the prevention of domestic violence and assistance to its victims.”*

Clause 2.18 provides for policy directives related to marriage. It directs the State to ensure that there is equality of rights and responsibilities of spouses during marriage and at its dissolution; and that in the event of dissolution of a marriage, whether through death or divorce, provision is made for the necessary protection of any children and spouses. This clause also states that no one may be compelled to enter into marriage against their will provides welcome protections for women’s equal rights in marriage.

- 4.9 **Clauses 2.19 through Clause 2.22** provide for policy directives to ensure the social and economic welfare of the people of Zimbabwe. The clauses require the State to take appropriate measures to provide basic education and educational opportunities, access to adequate shelter, health services and social welfare. These social and economic mandates provide a great benefit to women as they are often disparately impacted by their absence.
- 4.10 **Clause 2.26** requires the State to take measures to domesticate international instruments which address gender issues, among others. This is a welcome clause that will ensure that the commitments adopted by the State in conventions such as CEDAW, will benefit the women of Zimbabwe as they were intended.

5. Chapter 3: Citizenship

- 5.1 Citizenship is the membership of an individual to the State. Constitutional provisions on citizenship are important in that they determine the extent to which a person enjoys the benefits and privileges provided for under the Constitution. Similarly, citizenship status defines the extent to which the individual owes certain obligations to the State. Citizenship is also important in that the international law concept of nationality is dependent on citizenship status and defines the extent to which the individual may expect the protection of the State at the international level.
- 5.2 The provisions on citizenship under the current Constitution do not discriminate against women in express terms but it has been noted that the prohibition of dual citizenship provided for under the Citizenship Act, while couched in gender neutral language has a disproportionately negative impact on women due to gender. The Citizenship Act provides that a citizen of Zimbabwe who acquires the citizenship of another country will automatically lose his or her Zimbabwean citizenship. Women who marry foreign men are more likely to be required to assume their spouses citizenship that men who marry foreign wives.

- 5.3 In **Clause 3.5 (2)(b)** the COPAC Draft continues to allow for revocation of citizenship if it becomes known that the citizen is also the citizen of another country. The arguments against dual citizenship relate to the need to ensure that citizens do not have divided loyalty to the country. The Constitution should guarantee the citizenship of citizens by birth. This category of citizen should never be compelled to lose their citizenship because they have acquired the citizenship of another country.
- 5.4 The COPAC Draft does contain certain other provisions protecting women's rights to equal citizenship. **Clauses 3.4 and 3.6** do provide that any individual married to a Zimbabwean citizen for 5 years may apply for Zimbabwean citizenship and that citizenship is not lost through marriage or the dissolution of marriage. These protections are consistent with Article 9 of CEDAW.

6. Chapter 4. Declaration of Rights

- 6.1 The Declaration of Rights sets out the fundamental rights of individuals in the country. It enumerates the entitlements of the individual against the corresponding obligations of the state. The Declaration of Rights under the current Constitution has the following weaknesses from the women's perspective:
- It fails to adequately protect women against discrimination
 - It omits to provide for socio economic rights
 - It protects cultural rights in a way that is harmful to women
 - It omits to address the work place rights of women
 - It does not provide for the horizontal application of rights
- 6.2 This portion of the paper will assess the Declaration of Rights under the COPAC Draft on the extent to which it addresses each of these weaknesses, and also on the extent to which it incorporates Zimbabwe's obligations under the main Human Rights instruments on the rights of women.

Discrimination against Women

- 6.3 One of the weaknesses of the Declaration of rights under the current Constitution is its failure to provide for a complete set of grounds upon which discrimination is prohibited. Notable exclusions are culture, class and ethnic origin.
- 6.4 Equality and non discrimination are provided for under **Clause 4.13** of the COPAC Draft which, first, states that all individuals have equality before the law and both genders have the right to equal treatment in all spheres of life including political, economic, cultural and social spheres. **Clause 4.13** then prohibits discrimination on the grounds of nationality, race, colour, tribe, place of birth, ethnic or social origin, language, class, religious belief, political affiliation, opinion, custom, culture, sex, gender, marital status, age, disability or economic or social status, or other whether born in or out of wedlock.

- 6.5 This provision is a significant improvement on section 23 of the current Constitution as the grounds of discrimination that are prohibited are much broader under the COPAC Draft. The addition of language, class, culture and whether born in or out of wedlock to the list are all welcome in view of the fact that women have often complained of facing discrimination on these very bases. Unfortunately, pregnancy has not been included, a ground for discrimination the women of Zimbabwe suggested in their Position Paper. It is a pity that the grounds given for non discrimination appear to be exhaustive. It would have been preferable if there had been room to add to the list should the exigencies of the circumstances so require.
- 6.6 All forms of discrimination are prohibited under the COPAC draft, whether the discrimination is direct or indirect and whether it comes by way of denial of a privilege or advantage or through a condition, restriction or imposed disability. This broad prohibition will protect women from all forms of discrimination that may occur unintentionally and as a collateral effect.
- 6.7 Perhaps most importantly, the COPAC Draft jettisons the notorious subsection (3) of section 23 of the current Constitution which permits discrimination in areas of personal law and which protects culture as a permissible basis for discrimination. This attitude resonates with Art. 5 of CEDAW which enjoins states to take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.
- 6.8 Finally, **Clause 4.13(6)** makes clear that affirmative measures are contemplated and required to promote equality and to protect or advance people or classes of people who have been disadvantaged by unfair discrimination.

Socio Economic Rights

- 6.9 The current Constitution is completely silent on socio economic rights. It has been noted that the failure to protect socio economic rights has gender dimensions that place women at a disproportionate disadvantage. It is a well documented phenomenon that in patriarchal societies, when socio economic rights are inadequate, it is the women who bear the greatest burden of the lack. Where resources are scarce, women are likely to be the ones who will go without. For example, in families that cannot afford the cost of educating all the children in the family and choices have to be made on which children to send to school, it is probable that it is the male children who will win. Similarly, failure to provide for a right to health care has a greater impact on women due to the risks that they face in their reproductive roles such as the life threatening risks associated with pregnancy and child birth.
- 6.10 The COPAC Draft provides for the following socio economic rights: environmental rights(**Clause 4.30**); agricultural land (**Clause 4.29**); education (**Clause 4.32**); healthcare

(**Clause 4.33**); food and water (**Clause 4.34**). These rights are justiciable and Zimbabwean courts will no doubt benefit from the rich jurisprudence regarding the progressive realisation of these rights which has developed in other jurisdictions that have greater experiences in such matters such as South Africa.

Protection from Gender-Based Violence and Right to Physical Integrity

- 6.11 The Right to Personal Security in **Clause 4.9** is a very important right for the women of Zimbabwe as it provides the right to bodily and psychological integrity, including the right to be free from violence, make decisions about one's reproduction and right to informed consent prior to participating in medical experiments or the extraction of bodily tissue. The importance of the constitutional right to be free from private violence cannot be overstated as the high prevalence of violence against women (VAW) presents a major obstacle to the empowerment of women and girls in Zimbabwe. It is estimated that 25% of all women experience sexual abuse, 47% are physically abused and 57% are emotionally abused⁴.
- 6.12 Similarly sub clause (b) to **Clause 4.9** providing all persons the right to make decisions concerning reproduction will provide women with much needed constitutional protection over their reproductive role in society. This provision is extremely welcome and reflects an understanding of the way this lack of freedom can hinder women's true equality in other areas of social life.

Right to Life

- 6.13 One perplexing privilege given to women under the COPAC draft of the Constitution is that they are excluded from being subject to the death penalty in **Clause 4.5(c)**. Setting aside the debate around the death penalty in general, there is little justification for making a distinction between men and women for the consequences of crimes committed by them. In fact doing so, reflects a form of discrimination between the sexes on the the responsibilities and privileges of citizenship. ***It is submitted that the issue of the death penalty should be taken under consideration without making distinction between men and women to truly promote equality and non-discrimination.***

Cultural Rights

- 6.14 Cultural rights are important because they enable individuals to express their identities as part of a particular community and to identify with others in the group for mutual benefit. The current Constitution does not provide for the right to culture but it treats culture and customary law in a way that has been heavily criticised by women. Sec 23(3) of the current Constitution recognises culture and customary law by protecting it as a grounds for discrimination. Many laws detrimental to women have been defended successfully on

⁴ Zimbabwe Demographic Health Survey, 2007

the basis of section 23(3) and this may have created an unhealthy perception that culture and customary law are bad for women.⁵

- 6.15 The potential of culture to do harm to women has now been neutralised by **Clause 4.20** of the COPAC Draft which protects the right to language and culture but carries the important qualification that the right to culture should never be exercised in a manner that is inconsistent with the Declaration of Rights. Moreover, in **Clause 4.37(3)** on the Rights of Women, the COPAC Draft explicitly states customary practices and traditions that infringe on women's rights are void. These two clauses can be celebrated by women as truly reflecting a commitment to gender equality and respect for women's rights in all spheres of society.

Rights of Women in the Work Place

- 6.16 Women who venture out into the public sphere suffer special risks emanating from gender stereotypes and cultural attitudes about the "proper place of a woman." These attitudes often translate into workplace discrimination against women in earnings, opportunities for upward mobility and sexual harassment. Women also require special attention of the needs created by their reproductive roles such as adequate maternity leave and benefits and child care.
- 6.17 The current Constitution does not address workplace issues. These are dealt with under the Labour Act (*Chapter 28:01*), which contains provisions on equal pay for equal work, maternity leave and benefits and definition and prohibition of sexual harassment⁶. It was the women's position that the core workplace rights ought to be provided for in the Constitution as a fundamental right where they enjoy full protection rather than in an Act of Parliament.
- 6.18 Rights related to the workplace are provided for under **Clause 4.22** of the COPAC Draft. Sub clause 6 provides that women have a right to equal remuneration for equal work and sub clause 7 provides that women employees have a right to fully paid maternity leave for a period of at least three months. This is in line with the minimum standards set under the ILO Conventions.
- 6.19 These provisions are progressive and welcome but they fall short of addressing the full scope of labour issues from a gender perspective. To reflect the concerns of CEDAW Article 11 and General Recommendation 19, the provision should ensure women have the equal rights to benefits and privileges of employment such as promotions and the right to freedom from sexual harassment in the workplace.
- 6.20 Though the COPAC Draft does provide that assistance and provision of care to parents is a National Objective in **Clause 2.17**, it does not provide a right to child care. Women often fail to reach their full potential at work because much of their time and attention is taken up in their roles as mothers. Failure to guarantee the provision of adequate child

⁵ See the example of Magaya v Magaya 1998 ZLR 210 (SC)

⁶ Section 8(g) and section 18

care facilities for the children of working mothers therefore hinders the professional development of women.

- 6.21 While the provision for mandatory maternity leave benefits for women is also commendable, the failure to provide for similar parental leave for fathers may be detrimental to women. One recognised way of effectively addressing discrimination against women is to modify the social and cultural patterns of conduct of men and women, by taking measures which challenge customary and other practices which are based on stereotyped roles for men and women. It is submitted that the provision for maternity leave for women only buttresses the stereotype of women as primarily nurturers and caregivers who are misplaced in the world of paid work. Provision of gender neutral parental leave for both mothers and fathers would have gone some way in facilitating the modification of the social and cultural attitudes on stereotyped roles for women, in fulfilment of the Zimbabwe's obligations under Art. 5 of CEDAW.

Specific Application of the Rights of Women

- 6.22 Another innovation of the COPAC Draft which has no equivalent in the current Constitution is the provision on the specific application of the rights of certain vulnerable groups, among them women. These provisions are useful because they address the specific ways in which the vulnerable groups experience the violation of generally protected rights and emphasise the areas where protection is required the most.
- 6.23 The specific application of the rights of women is provided for under **clause 4.37** which provides for full and equal dignity of the person including equal opportunities in political, economic and social activities. The right of equality of guardianship of children and, as noted previously, the prohibition of all laws customs and traditions which infringe on the rights of women are also provided for.
- 6.24 This provision is most welcome but one cannot help but be disappointed by its brevity. It could have spelt out more rights which are specific to women such as the right to be included in all nation building and peace building initiatives and the right to affirmative action.
- 6.25 The provisions on the specific application of certain rights of children, older people and person with disabilities under **clauses 4.38, 4.39 and 4.40** respectively is welcome. These are all vulnerable groups in which women are represented and suffer the worst effects of the abuses sometimes experienced by these groups.

Horizontal Application of the Declaration of Rights

- 6.26 Traditionally, the declaration of rights seeks to regulate the relationship between the State and the individual wherein the state is the duty bearer and the individual is the rights holder. The weakness of this approach is that it fails to recognise that other actors besides the state are capable of inflicting injury on individuals which may be akin to the injury

which the state and its agents can inflict. This is particularly true of women. The tendency to confine women to the domestic sphere means that their opportunities to interact with the state and its institutions are limited. Instead, women mostly interact with non state actors such as, religious organisations, social clubs, family councils and private business entities. Their relationships with these actors can place them at as much risk of having their rights violated as if they had been interacting with the state. Keeping non state actors out of the discipline of the declaration of rights can therefore mean that women's rights can be violated either with impunity or without adequate redress.

- 6.27 The current Constitution does not expressly extend the application of the Declaration of Rights to non state actors but the courts have found innovative ways of holding juristic persons for violation of rights in appropriate circumstances⁷, making the need for the horizontal application of the declaration of rights abundantly clear. In light of this, the provisions of **Clause 4.2** in the COPAC draft which expressly provide that the declaration of rights bind all natural and juristic persons where appropriate, are welcome.

Enforcement of Rights

- 6.28 Even the most powerful and progressive provisions on the protection of fundamental rights are useless in the absence of an effective enforcement mechanism. The effectiveness of any enforcement mechanism is determined by the extent to which it makes the courts easily accessible to those who seek redress. Accessibility, in turn is affected by such considerations as knowledge of the law and awareness of available remedies, costs of litigation, identity of people with *locus standi* and the “user friendliness” of the rules of the court.
- 6.29 While all litigants will suffer from an ineffective enforcement mechanism, women will especially suffer because they are relatively poorer than their male counterparts and less likely to afford competent legal representation. Generally, they also have less education and learning opportunities. They may also lack the confidence to act for themselves or understand and follow complex rules of procedure. **Clause 4.42** is therefore commendable in that it seeks to make justice accessible to all by widening the scope of actors with *locus standii* to bring an action for redress, by providing that no fee shall be chargeable for commencing proceedings and providing that the rules of procedure should be simplified as much as possible. In line with this, the provisions of **Clause 7** on promotion of public awareness of the Constitution are most welcome.

7. Chapter 5: The Executive

- 7.1 The importance of women's significant and equal presence in the country's leadership, in particular in government, cannot be overstated. Only by ensuring women are decision-makers at the highest level will women's interests and needs be addressed. As such,

⁷ See for example Mandizvidza V Morgenster Teacher's College 1999 HH 236 (SC) where a private teachers training college was found to qualify as a duty bearer under the Constitution only because the court found that it possessed sufficient governmental characteristics

women should be represented as Ministers and Deputy Ministers in every sector to ensure their impact on policy-making and program implementation.

- 7.2 The current Constitution contains no provision promoting or ensuring women's presence as government decision-makers. In **Clause 5.17(4)**, the COPAC draft addresses this issue by indicating that the appointment of Ministers and Deputy Ministers must take into account ethnic, regional and gender balance considerations. This provision, against the backdrop of **Clause 2.9** which requires the State to take reasonable measures to ensure both genders are equally represented in all institutions and agencies of the State and government, provides a clear mandate for women's equal presence at all levels of government.
- 7.3 That said, application of these provisions will have to be diligent in fulfilling the State's commitment under the SADC Protocol on Gender and Development to reach at least 50% of female representation in public decision-making posts.

8. Chapter 6: Parliament

- 8.1 Parliament is the highest representative body and the most important policy making authority in the country. Women should be represented in Parliament in numbers reflecting Zimbabwe's population so that they can participate in decision-making at the highest level and bring their perspectives to bear on national policies to ensure effective representation of the general public.
- 8.2 Art. 7 of CEDAW enjoins States Parties to take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, to ensure that women have, on equal terms with men, the right to vote in all elections and public referenda and to be eligible for election to all publicly elected bodies; to participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government.
- 8.3 Art. 10 of the Protocol to the African Charter on Human and People's Rights on the Rights of women in Africa echoes the same sentiments as Art. 7 of CEDAW. It provides that States Parties shall take measures to promote participative governance and the equal participation of women in the political life of their countries through affirmative action, enabling national legislation and other measures to ensure that women are represented equally at all levels with men in all electoral processes; women are equal partners with men at all levels of development and implementation of State policies and development programmes. State parties are also required to ensure increased and effective representation and participation of women at all levels of decision-making.
- 8.4 These sentiments are also repeated in art. 12 of the SADC Protocol on Gender and Development.

Senate

- 8.5 **Clause 6.5** of the COPAC Draft sets forth the composition of the Senate, detailing an electoral system of proportional representation in accordance with the Electoral Law which must ensure that Senators are elected under a party-list system based on votes cast in the general election for the National Assembly combined with reserved positions elected by the Council of Chiefs and people with disabilities. The party-lists submitted must include male and female candidates alternatively, with each list being headed by a female candidate. This mechanism is intended to promote women's equal representation in the Senate, as is later clarified by **Clause 7.3 (2)** which states that an Act of Parliament must detail the system of proportional representation electing members of the Senate that ensures women's equal representation in the candidates elected through this mechanism.
- 8.6 Though this mechanism is a step in the right direction to women's equal representation in the Senate, it ensures gender balance only for the representatives elected through proportional representation. The representatives elected through alternate means which total 28 seats are not subject to gender balance considerations. As such, it is unlikely that the provision will result in women's equal representation in the Senate, failing to meet women's demands for equal representation that reflects their presence in the general population as well as the goals agreed to by the government in the regional agreements detailed above. ***It is strongly suggested that this provision be improved so as to ensure women's equal representation in the Senate.***

National Assembly

- 8.7 **Similarly, Clause 6.9(1)** aims to ensure women's presence in the National Assembly by creating a temporary measure of 60 additional seats reserved for women in during the life of the first two Parliaments after the effective date of the Constitution. Though the language is not explicit, at the conclusion of the time period stated presumably these seats are eliminated.
- 8.8 This provision is disappointing from a gender equality perspective. First, it does not ensure women's equal representation as even with the 60 additional temporary seats, women are assured only 28% representation in the National Assembly. Secondly, the measure is only temporary with a termination clause that is not contingent on women actually achieving some level of representation in the National Assembly. As such, at the conclusion of the term for the temporary additional seats, it is possible the National Assembly could be composed of no women at all in the next election. ***At minimum, the clause should contain language that states that the 60 additional seats will expire so long as women have achieved a certain level of representation in the 210 permanent seats in the National Assembly.***
- 8.9 In view of international commitments and the views expressed by the people during the outreach period of the Constitution making process, it is submitted that the new Constitution should contain a gender balance requirement in the National Assembly that will realistically achieve women's equal representation. Given that women are 52% of the population and have been consistently and actively participating in political life, suitable candidates for the position should be found and/or steps must be taken to identify such candidates and build capacity where necessary.

9. Chapter 8: The Judiciary and Courts

- 9.1 As the branch of government responsible for interpretation of the constitution and legislation, it is important that the judiciary approach its duties in a gender sensitive manner. The presence of women judges is an important way to promote gender sensitivity in judicial decisions. Unfortunately, the COPAC Draft does not contain any considerations of gender in the judicial appointments process. It is submitted that, as with the appointments of ministers and members of independent commissions (discussed below), that a consideration of the gender composition of the various courts would be appropriate and beneficial to a proper interpretation of constitutional obligations and standards.

10. Chapter 9 to Chapter 11: Public Administration, Civil Service, and Security Services

- 10.1 In **Clause 9.1**, the COPAC Draft states that one of the principles of public administration is equality of men and women. However, apart from this general provision, these chapters, which set out the duties and functions of public administration, civil and security services do not set basic standards for the presence of women in these sectors. The COPAC Draft would be much improved with the addition of language indicating that efforts should be made to ensure women are sufficiently represented at all levels in these sectors.
- 10.2 Though, as noted previously, **Clause 2.7**, requires the State to take reasonable measures to ensure both genders are equally represented in all institutions and agencies of the State and government, this provision is not justiciable and its enforcement is purely dependant on political will.
- 10.3 Women's presence in the security sector is worth noting as particularly important to achieving true women's equality in decision making matters. Moreover, as reflected in the SADC Protocol Article 28, it is imperative that women actively participate in security related matters such as peace-building and conflict resolution processes.

11. Chapter 12: Independent Commissions Supporting Democracy

- 11.1 **Chapter 12** of the COPAC Draft provides for the creation of five Commissions: the Zimbabwe Electoral Commission, the Zimbabwe Human Rights Commission, the Zimbabwe Gender Commission, the Zimbabwe Media Commission and the National Peace and Reconciliation Commission. Of particular interest is the Gender Commission whose establishment and functions are provided for under **Part 4 of Chapter 12**. This is a

welcome innovation absent from the current Constitution. The provision of this commission is also in keeping with Zimbabwe's obligation under Art. 2(c) of CEDAW to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination.

- 11.2 Similarly, the National Peace and Reconciliation Commission is a promising innovation. It is imperative that women be adequately represented on this Commission as well to ensure to ensure perspectives of both gender in discussions of conflict resolution, peace-building and community dialogue.
- 11.3 Recalling **Clause 2.9** in Chapter 2 on National Objectives, women should be half the membership of all Commissions. The only provision for gender balance in Commissions can be found in **Chapter 18, Clause 3** which requires that the chairperson and deputy chairperson of each commission be of a different gender. It would have been preferable if this mandate was set forth in Chapter 12 in clauses on the composition of each commission so as to make sure the gender balance mandate is justiciable.

12.Chapter 14: Provincial and Local Government

- 12.1 **Clauses 14.5** on Provincial Councils makes some provision for the presence of women. First, it requires the presence of the women from the province occupying the temporary seats in the National Assembly. Second, sub clause 3 requires the 10 persons elected through a system of proportional representation in sub clause 1(f) to be elected through a party-list mechanism in which women and men are listed alternately, with a woman heading the list.
- 12.2 **Clause 14.6** on Metropolitan Councils contains a temporary measure to ensure some presence of women by including the women members of the National assembly elected to the temporary seats from the metropolitan province in sub clause (d).
- 12.3 Neither clause effectively ensures that women are equally represented at all levels of government as contemplated by the Gender Balance **Clause 2.9 in National Objectives**. ***It is recommended that additional efforts be taken to ensure actual gender balance at all levels of government, including provincial and local governments.***

13.Chapter 15: Traditional Leaders

- 13.1 Traditional leaders play an important role in communities as custodians of traditional values and customs. They preserve a community's unique identity and cultural diversity. It must be noted, however, that too often, women suffer the worst forms of discrimination by way of justifications grounded in cultural values and practices. As such, traditional leaders are in the unique position to promote equality and women's rights within the context of tradition and cultural preservation. Their unique role as resolving community disputes and promoting community and family values can create important opportunities for empowering women and increasing their participation in public life.

- 13.2 As noted previously, the COPAC Draft's clear mandate that customs and practices must respect women's rights and equality is welcome. It is, however, disappointing that the promotion of women's equality is not listed in the functions of traditional leadership. Nor does the COPAC Draft contain any provision for encouraging women's representation among traditional leaders or on the Council of Chiefs.

14. Chapter 16: Agricultural Land

- 14.1 As Zimbabwe is primarily an agrarian society, with about 80% of the population living in rural areas and gaining income from farming, access to productive land is crucial to individual economic well being. The COPAC Draft recognizes the importance of ensuring women have equal access to land. In **Clause 16.2**, the Draft states that the principles of land distribution must take into account that allocation of land must be fair and equitable, with regard for gender balance. Moreover, the Land Commission, responsible for oversight of distribution mechanisms, is mandated to make recommendations to the government on equitable access and the elimination of gender discrimination. Finally, **Clause 16.9** detailing the terms of membership in the Land Commission requires that the members reflect the diversity of Zimbabwe's population, with a focus on achieving gender balance. These provisions are most welcome in ensuring women's voice and needs are taken into account in the distribution and use of land.

15. Chapter 17: Finance

- 15.1 **Clause 17.1(b)** recognizes that one of the principles of public financial management is to make special provision for marginalized groups. This is a welcome acknowledgment but the need for taking into account women's needs in particular in public finance is well recognized and should be reflected in the constitution.
- 15.2 *It is submitted that the Constitution should reflect a mandate for gender-responsive budgeting (GRB)*, government planning, programming and budgeting that contributes to the advancement of gender equality and the fulfillment of women's rights. Such an approach to finance would entail identifying and reflecting needed interventions to address gender gaps in sector and local government policies, plans and budgets. Through this mechanism, many of the constitutional rights to equality guaranteed to women by the COPAC draft would be effectively actualized.

16. Conclusion

- 16.1 In conclusion, it can be said that the COPAC Draft is a significant improvement on the current Constitution in the area of women's rights. It contains the core components of a gender sensitive framework and provides a much needed platform upon which women's equality can be based for generations to come. Should this Draft become Zimbabwe's new constitution, there will be much for women to celebrate, including constitutionally protected gender equality, affirmative action, prevention of domestic violence, equal representation in parliament, and equality in access to land.

There is, however, room for significant improvements that will better protect women and promote gender equality. Listed below are the most urgent issues that should be addressed for the COPAC draft to effectively promote gender equality and balance:

1. **Exclusion of Women from the Death Penalty in Clause 4.5(c):** It is submitted that the issue of the death penalty should be taken under consideration without making distinction between men and women to truly promote equality and non-discrimination.
2. **Women's Representation in the Senate in Clause 6.5:** As currently drafted, it is unlikely that the provision will result in women's equal representation in the Senate, consequently failing to meet women's demands for equal representation that reflects their presence in the general population as well as the goals agreed to by the government in the regional human rights agreements. It is strongly suggested that this provision be improved so as to ensure women's equal representation in the Senate.
3. **Women's Representation in the National Assembly in Clause 6.9:** The provision does not ensure women's equal representation but only creates 60 additional temporary seats for a period 10 years. Even with this provision, women are assured only 28% representation in the National Assembly for a limited period. Secondly, the measure is not sustainable as the expiration of the additional seats is not contingent on women actually achieving some level of representation in the National Assembly. As such, at the conclusion of the term for the temporary additional seats, it is possible the National Assembly could be composed of no women at all in the next election. At minimum, the clause should contain language that states that the 60 additional seats will expire so long as women have achieved a certain level of representation in the 210 permanent seats in the National Assembly.
4. **Women's Representation in Provincial and Metropolitan Government in Clauses 14.5 and 14.6:** It is recommended that additional efforts be taken to ensure actual gender balance at all levels of government, including provincial and local governments. Currently, women are temporarily allocated a few seats at each level.
5. **Budgeting for Women's Equality and Advancement in Clause 17.1(b):** It is submitted that the Constitution should reflect a mandate for gender-responsive budgeting (GRB), government planning, programming and budgeting that contributes to the advancement of gender equality and the fulfillment of women's rights.