

REPUBLIC OF SOUTH AFRICA

**PROMOTION OF EQUALITY AND
PREVENTION OF UNFAIR
DISCRIMINATION BILL**

*(As presented by the Ad Hoc Joint Committee on Promotion of Equality and Prevention of
Unfair Discrimination Bill (National Assembly and National Council of Provinces)) (The
English text is the official text of the Bill)*

(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

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BILL

To give effect to section 9 read with item 23(1) of Schedule 6 to the Constitution of the Republic of South Africa, 1996, so as to prevent and prohibit unfair discrimination and harassment; to promote equality and eliminate unfair discrimination; to prevent and prohibit hate speech; and to provide for matters connected therewith.

PREAMBLE

The consolidation of democracy in our country requires the eradication of social and economic inequalities, especially those that are systemic in nature, which were generated in our history by colonialism, apartheid and patriarchy, and which brought pain and suffering to the great majority of our people;

Although significant progress has been made in restructuring and transforming our society and its institutions, systemic inequalities and unfair discrimination remain deeply embedded in social structures, practices and attitudes, undermining the aspirations of our constitutional democracy;

The basis for progressively redressing these conditions lies in the Constitution which, amongst others, upholds the values of human dignity, equality, freedom and social justice in a united, non-racial and non-sexist society where all may flourish;

South Africa also has international obligations under binding treaties and customary international law in the field of human rights which promote equality and prohibit unfair discrimination. Among these obligations are those specified in the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Elimination of All Forms of Racial Discrimination;

Section 9 of the Constitution provides for the enactment of national legislation to prevent or prohibit unfair discrimination and to promote the achievement of equality;

This implies the advancement, by special legal and other measures, of historically disadvantaged individuals, communities and social groups who were dispossessed of their land and resources, deprived of their human dignity and who continue to endure the consequences;

This Act endeavours to facilitate the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom,

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:—

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CHAPTER 1

DEFINITIONS, OBJECTS, INTERPRETATION, GUIDING PRINCIPLES AND APPLICATION OF ACT 5

Definitions

1. (1) In this Act, unless the context indicates otherwise—
- (i) “age” includes the conditions of disadvantage and vulnerability suffered by persons on the basis of their age, especially advanced age; 10
 - (ii) “clerk of the equality court” means a clerk of an equality court appointed or designated in terms of section 17, read with section 31, and includes any reference to “a clerk”;
 - (iii) “Commission for Gender Equality” means the Commission for Gender Equality referred to in section 187 of the Constitution; 15
 - (iv) “complainant” means any person who alleges any contravention of this Act and who institutes proceedings in terms of the Act;
 - (v) “Constitution” means the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996);
 - (vi) “constitutional institution” means any of the relevant institutions supporting constitutional democracy referred to in Chapter 9 of the Constitution and includes the Pan South African Language Board; 20
 - (vii) “Department” means the Department of Justice and Constitutional Development;
 - (viii) “discrimination” means any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly— 25
 - (a) imposes burdens, obligations or disadvantage on; or
 - (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds;
 - (ix) “equality” includes the full and equal enjoyment of rights and freedoms as contemplated in the Constitution and includes *de jure* and *de facto* equality and also equality in terms of outcomes; 30
 - (x) “equality court” means a court contemplated in section 16, read with section 31, and includes any reference to “court”;
 - (xi) “family responsibility” means responsibility in relation to a complainant’s spouse, partner, dependent, child or other members of his or her family in respect of whom the member is liable for care and support; 35
 - (xii) “family status” includes membership in a family and the social, cultural and legal rights and expectations associated with such status;
 - (xiii) “harassment” means unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to— 40
 - (a) sex, gender or sexual orientation; or
 - (b) a person’s membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group; 45
 - (xiv) “HIV/AIDS status” includes actual or perceived presence in a person’s body of the Human Immunodeficiency Virus (HIV) or symptoms of Acquired Immune Deficiency Syndrome (AIDS), as well as adverse assumptions based on this status; 50
 - (xv) “marital status” includes the status or condition of being single, married, divorced, widowed or in a relationship, whether with a person of the same or the opposite sex, involving a commitment to reciprocal support in a relationship; 55

- (xvi) “Minister” means the Minister for Justice and Constitutional Development;
- (xvii) “nationality” means ethnic or national origin and includes practices associated with xenophobia and other adverse assumptions of a discriminatory nature but does not include rights and obligations normally associated with citizenship; 5
- (xviii) “person” includes a juristic person, a non-juristic entity, a group or a category of persons;
- (xix) “pregnancy” includes any condition related to pregnancy, intended pregnancy, potential pregnancy or termination of pregnancy;
- (xx) “prescribed” means prescribed by regulation in terms of this Act; 10
- (xxi) “presiding officer” means a presiding officer of an equality court contemplated in section 16, read with section 31;
- (xxii) “prohibited grounds” are—
- (a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or 15
- (b) any other ground where discrimination based on that other ground—
- (i) causes or perpetuates systemic disadvantage;
- (ii) undermines human dignity; or
- (iii) adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a); 20
- (xxiii) “regulation” means a regulation in terms of this Act;
- (xxiv) “respondent” means any person against whom proceedings are instituted in terms of this Act; 25
- (xxv) “sector” means any sector referred to in section 29, and includes the sectors set out in the Schedule;
- (xxvi) “socio-economic status” includes a social or economic condition or perceived condition of a person who is disadvantaged by poverty, low employment status or lack of or low-level educational qualifications; 30
- (xxvii) “South African Human Rights Commission” means the South African Human Rights Commission referred to in section 184 of the Constitution;
- (xxviii) “the State” includes—
- (a) any department of State or administration in the national, provincial or local sphere of government; 35
- (b) any other functionary or institution—
- (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
- (ii) exercising a public power or performing a public function in terms of any legislation or under customary law or tradition; 40
- (xxix) “this Act” includes any regulation made in terms of this Act.

Objects of Act

2. The objects of this Act are—
- (a) to enact legislation required by section 9 of the Constitution;
- (b) to give effect to the letter and spirit of the Constitution, in particular— 45
- (i) the equal enjoyment of all rights and freedoms by every person;
- (ii) the promotion of equality;
- (iii) the values of non-racialism and non-sexism contained in section 1 of the Constitution;
- (iv) the prevention of unfair discrimination and protection of human dignity as contemplated in sections 9 and 10 of the Constitution; 50
- (v) the prohibition of advocacy of hatred, based on race, ethnicity, gender or religion, that constitutes incitement to cause harm as contemplated in section 16(2)(c) of the Constitution and section 12 of this Act;
- (c) to provide for measures to facilitate the eradication of unfair discrimination, hate speech and harassment, particularly on the grounds of race, gender and disability; 55
- (d) to provide for procedures for the determination of circumstances under which discrimination is unfair;

- (e) to provide for measures to educate the public and raise public awareness on the importance of promoting equality and overcoming unfair discrimination, hate speech and harassment;
- (f) to provide remedies for victims of unfair discrimination, hate speech and harassment and persons whose right to equality has been infringed; 5
- (g) to set out measures to advance persons disadvantaged by unfair discrimination;
- (h) to facilitate further compliance with international law obligations including treaty obligations in terms of, amongst others, the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women. 10

Interpretation of Act

- 3. (1) Any person applying this Act must interpret its provisions to give effect to—
 - (a) the Constitution, the provisions of which include the promotion of equality through legislative and other measures designed to protect or advance persons disadvantaged by past and present unfair discrimination; 15
 - (b) the Preamble, the objects and guiding principles of this Act, thereby fulfilling the spirit, purport and objects of this Act.
- (2) Any person interpreting this Act may be mindful of—
 - (a) any relevant law or code of practice in terms of a law; 20
 - (b) international law, particularly the international agreements referred to in section 2 and customary international law;
 - (c) comparable foreign law.
- (3) Any person applying or interpreting this Act must take into account the context of the dispute and the purpose of this Act. 25

Guiding principles

- 4. (1) In the adjudication of any proceedings which are instituted in terms of or under this Act, the following principles should apply:
 - (a) The expeditious and informal processing of cases, which facilitate participation by the parties to the proceedings; 30
 - (b) access to justice to all persons in relevant judicial and other dispute resolution forums;
 - (c) the use of rules of procedure in terms of section 19 and criteria to facilitate participation;
 - (d) the use of corrective or restorative measures in conjunction with measures of a deterrent nature; 35
 - (e) the development of special skills and capacity for persons applying this Act in order to ensure effective implementation and administration thereof.
- (2) In the application of this Act the following should be recognised and taken into account: 40
 - (a) The existence of systemic discrimination and inequalities, particularly in respect of race, gender and disability in all spheres of life as a result of past and present unfair discrimination, brought about by colonialism, the apartheid system and patriarchy; and
 - (b) the need to take measures at all levels to eliminate such discrimination and inequalities. 45

Application of Act

- 5. (1) This Act binds the State and all persons.
- (2) If any conflict relating to a matter dealt with in this Act arises between this Act and the provisions of any other law, other than the Constitution or an Act of Parliament expressly amending this Act, the provisions of this Act must prevail. 50
- (3) This Act does not apply to any person to whom and to the extent to which the Employment Equity Act, 1998 (Act No. 55 of 1998), applies.

CHAPTER 2

PREVENTION, PROHIBITION AND ELIMINATION OF UNFAIR DISCRIMINATION, HATE SPEECH AND HARASSMENT

Prevention and general prohibition of unfair discrimination

6. Neither the State nor any person may unfairly discriminate against any person. 5

Prohibition of unfair discrimination on ground of race

7. Subject to section 6, no person may unfairly discriminate against any person on the ground of race, including—
- (a) the dissemination of any propaganda or idea, which propounds the racial superiority or inferiority of any person, including incitement to, or participation in, any form of racial violence; 10
 - (b) the engagement in any activity which is intended to promote, or has the effect of promoting, exclusivity, based on race;
 - (c) the exclusion of persons of a particular race group under any rule or practice that appears to be legitimate but which is actually aimed at maintaining exclusive control by a particular race group; 15
 - (d) the provision or continued provision of inferior services to any racial group, compared to those of another racial group;
 - (e) the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons. 20

Prohibition of unfair discrimination on ground of gender

8. Subject to section 6, no person may unfairly discriminate against any person on the ground of gender, including—
- (a) gender-based violence; 25
 - (b) female genital mutilation;
 - (c) the system of preventing women from inheriting family property;
 - (d) any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child; 30
 - (e) any policy or conduct that unfairly limits access of women to land rights, finance, and other resources;
 - (f) discrimination on the ground of pregnancy;
 - (g) limiting women's access to social services or benefits, such as health, education and social security; 35
 - (h) the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons;
 - (i) systemic inequality of access to opportunities by women as a result of the sexual division of labour. 40

Prohibition of unfair discrimination on ground of disability

9. Subject to section 6, no person may unfairly discriminate against any person on the ground of disability, including—
- (a) denying or removing from any person who has a disability, any supporting or enabling facility necessary for their functioning in society; 45
 - (b) contravening the code of practice or regulations of the South African Bureau of Standards that govern environmental accessibility;
 - (c) failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons. 50

Prohibition of hate speech

10. (1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to—

- (a) be hurtful;
- (b) be harmful or to incite harm;
- (c) promote or propagate hatred.

(2) Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21(2)(n) and where appropriate, refer any case dealing with the publication, advocacy, propagation or communication of hate speech as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation. 5

Prohibition of harassment 10

11. No person may subject any person to harassment.

Prohibition of dissemination and publication of information that unfairly discriminates

12. No person may—

- (a) disseminate or broadcast any information; 15
- (b) publish or display any advertisement or notice,

that could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person: Provided that *bona fide* engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution, is not precluded by this section. 20

CHAPTER 3

BURDEN OF PROOF AND DETERMINATION OF FAIRNESS OR UNFAIRNESS

Burden of proof 25

13. (1) If the complainant makes out a *prima facie* case of discrimination—

- (a) the respondent must prove, on the facts before the court, that the discrimination did not take place as alleged; or
- (b) the respondent must prove that the conduct is not based on one or more of the prohibited grounds. 30

(2) If the discrimination did take place—

- (a) on a ground in paragraph (a) of the definition of “prohibited grounds”, then it is unfair, unless the respondent proves that the discrimination is fair;
- (b) on a ground in paragraph (b) of the definition of “prohibited grounds”, then it is unfair— 35
 - (i) if one or more of the conditions set out in paragraph (b) of the definition of “prohibited grounds” is established; and
 - (ii) unless the respondent proves that the discrimination is fair.

Determination of fairness or unfairness

14. (1) It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons. 40

(2) In determining whether the respondent has proved that the discrimination is fair, the following must be taken into account:

- (a) The context; 45
- (b) the factors referred to in subsection (3);
- (c) whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned.

(3) The factors referred to in subsection (2)(b) include the following: 50

- (a) Whether the discrimination impairs or is likely to impair human dignity;
- (b) the impact or likely impact of the discrimination on the complainant;
- (c) the position of the complainant in society and whether he or she suffers from

patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;

- (d) the nature and extent of the discrimination;
- (e) whether the discrimination is systemic in nature;
- (f) whether the discrimination has a legitimate purpose; 5
- (g) whether and to what extent the discrimination achieves its purpose;
- (h) whether there are less restrictive and less disadvantageous means to achieve the purpose;
- (i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to— 10
 - (i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or
 - (ii) accommodate diversity.

Hate speech and harassment not subject to determination of fairness

- 15. In cases of hate speech and harassment section 14 does not apply. 15

CHAPTER 4

EQUALITY COURTS

Equality courts and presiding officers

- 16. (1) For the purposes of this Act, but subject to section 31—
 - (a) every magistrate's court and every High Court is an equality court for the area of its jurisdiction; and 20
 - (b) any magistrate, additional magistrate and judge may be designated by the Minister, after consultation with the Judge President or the head of an administrative region defined in section 1 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), concerned, as the case may be, as a presiding officer of the equality court of the area in respect of which he or she is magistrate, additional magistrate or judge, as the case may be. 25
- (2) A presiding officer must perform the functions and exercise the powers assigned to or conferred on him or her under this Act or any other law.

Clerks of equality courts 30

- 17. (1) (a) Subject to the laws governing the public service, the Director-General of the Department may, for every equality court, appoint or designate one or more officers in the Department, or may appoint one or more persons in the prescribed manner and on the prescribed conditions, as clerks of the equality court, who must generally assist the court to which they are attached in performing its functions and who must perform the functions as may be prescribed. 35
- (b) If a clerk of an equality court is for any reason unable to act as such or if no clerk has been appointed or designated for any equality court under paragraph (a), the presiding officer concerned may designate any competent officer in the Department to act as clerk for as long as the said clerk is unable to act or until a clerk is appointed or designated under paragraph (a), as the case may be. 40

Witnesses

- 18. The attendance of witnesses and the payment of witness fees in cases arising from the application of this Act must be determined by the Minister in the prescribed manner.

Rules and court proceedings 45

- 19. (1) Except as is otherwise provided in this Act, the provisions of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), and the Supreme Court Act, 1959 (Act No. 59 of 1959), and of the rules made thereunder as well as the rules made under the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985), apply with the necessary changes required by the context to equality courts, in so far as these provisions relate to— 50
 - (a) the appointment and functions of officers;

- (b) the issue and service of process;
 - (c) the execution of judgments or orders;
 - (d) the imposition of penalties for non-compliance with orders of court, for obstruction of execution of judgments or orders, and for contempt of court;
 - (e) jurisdiction, subject to subsection (3), 5
- and in so far as no other provision has been made in the regulations under section 30 of this Act.

(2) All proceedings before the court must be conducted in open court, except in so far as the court may direct otherwise in the interests of the administration of justice.

(3) (a) Subject to paragraph (b), nothing in this Act precludes a magistrates' court sitting as an equality court from making an order contemplated in section 21(2), which exceeds the monetary jurisdiction of a magistrates' court, in which case the order must be submitted in the prescribed manner to a judge of the High Court having jurisdiction for confirmation. 10

(b) The operation of paragraph (a), relating to the confirmation of an order, is suspended until any appeal contemplated in section 23 is finalised. 15

Institution of proceedings in terms of or under Act

20. (1) Proceedings under this Act may be instituted by—

- (a) any person acting in their own interest;
- (b) any person acting on behalf of another person who cannot act in their own name; 20
- (c) any person acting as a member of, or in the interests of, a group or class of persons;
- (d) any person acting in the public interest;
- (e) any association acting in the interests of its members; 25
- (f) the South African Human Rights Commission, or the Commission for Gender Equality.

(2) A person wishing to institute proceedings in terms of or under this Act must, in the prescribed manner, notify the clerk of the equality court of their intention to do so.

(3) (a) The clerk of the equality court must, within the prescribed period of receiving such notification, refer the matter to a presiding officer of the equality court in question, who must, within the prescribed period, decide whether the matter is to be heard in the equality court or whether it should be referred to another appropriate institution, body, court, tribunal or other forum (hereafter referred to as an alternative forum) which, in the presiding officer's opinion, can deal more appropriately with the matter in terms of that alternative forum's powers and functions. 30 35

(b) If the presiding officer decides that the matter is to be heard in the equality court, the presiding officer must refer the matter to the clerk of the equality court who must within the prescribed period of such referral assign a date of hearing of the matter.

(4) The presiding officer, before making a decision to refer a matter as contemplated in subsection (3), must take all relevant circumstances into account, including the following: 40

- (a) The personal circumstances of the parties and particularly the complainant;
- (b) the physical accessibility of any contemplated alternative forum;
- (c) the needs and wishes of the parties and particularly the complainant; 45
- (d) the nature of the intended proceedings and whether the outcome of the proceedings could facilitate the development of judicial precedent and jurisprudence in this area of the law;
- (e) the views of the appropriate functionary at any contemplated alternative forum. 50

(5) (a) If the presiding officer decides that the matter must be referred to an alternative forum he or she must, in the prescribed manner, make an order, directing the clerk of the equality court to transfer the matter to the alternative forum mentioned in the order.

(b) When making an order contemplated in paragraph (a), the presiding officer may attach to the order any comments he or she deems necessary for the attention of the alternative forum. 55

(6) On receipt of an order referred to in subsection (5), the clerk of the equality court must transfer the matter and notify the parties to the matter of the transfer in the prescribed manner.

(7) On receipt of a matter transferred to it, the alternative forum in question must deal with the matter expeditiously in terms of its powers and functions. 60

(8) If the alternative forum referred to in subsection (7)—

- (a) fails to deal with the matter within a reasonable period in the circumstances;
or
- (b) is not able to resolve the matter to the satisfaction of one or both the parties
and one or both parties so request,

the alternative forum must, in the prescribed manner, refer the matter back to the equality court from which it was transferred, for adjudication, within the prescribed period from the date on which it was returned to the equality court.

(9) The State and constitutional institutions must, as far as reasonably possible, assist any person wishing to institute proceedings in terms of or under this Act, amongst others, by ensuring that the person is directed to the appropriate functionary in order to take the necessary action in the furtherance of the matter in question.

Powers and functions of equality court

21. (1) The equality court before which proceedings are instituted in terms of or under this Act must hold an inquiry in the prescribed manner and determine whether unfair discrimination, hate speech or harassment, as the case may be, has taken place, as alleged.

(2) After holding an inquiry, the court may make an appropriate order in the circumstances, including—

- (a) an interim order;
- (b) a declaratory order;
- (c) an order making a settlement between the parties to the proceedings an order of court;
- (d) an order for the payment of any damages in respect of any proven financial loss, including future loss, or in respect of impairment of dignity, pain and suffering or emotional and psychological suffering, as a result of the unfair discrimination, hate speech or harassment in question;
- (e) after hearing the views of the parties or, in the absence of the respondent, the views of the complainant in the matter, an order for the payment of damages in the form of an award to an appropriate body or organisation;
- (f) an order restraining unfair discriminatory practices or directing that specific steps be taken to stop the unfair discrimination, hate speech or harassment;
- (g) an order to make specific opportunities and privileges unfairly denied in the circumstances, available to the complainant in question;
- (h) an order for the implementation of special measures to address the unfair discrimination, hate speech or harassment in question;
- (i) an order directing the reasonable accommodation of a group or class of persons by the respondent;
- (j) an order that an unconditional apology be made;
- (k) an order requiring the respondent to undergo an audit of specific policies or practices as determined by the court;
- (l) an appropriate order of a deterrent nature, including the recommendation to the appropriate authority, to suspend or revoke the licence of a person;
- (m) a directive requiring the respondent to make regular progress reports to the court or to the relevant constitutional institution regarding the implementation of the court's order;
- (n) an order directing the clerk of the equality court to submit the matter to the Director of Public Prosecutions having jurisdiction for the possible institution of criminal proceedings in terms of the common law or relevant legislation;
- (o) an appropriate order of costs against any party to the proceedings;
- (p) an order to comply with any provision of the Act.

(3) An order made by an equality court in terms of or under this Act has the effect of an order of the said court made in a civil action, where appropriate.

(4) The court may, during or after an inquiry, refer—

- (a) its concerns in any proceedings before it, particularly in the case of persistent contravention or failure to comply with a provision of this Act or in the case of systemic unfair discrimination, hate speech or harassment to any relevant constitutional institution for further investigation;
- (b) any proceedings before it to any relevant constitutional institution or appropriate body for mediation, conciliation or negotiation.

(5) The court has all ancillary powers necessary or reasonably incidental to the performance of its functions and the exercise of its powers, including the power to grant interlocutory orders or interdicts.

Assessors

22. (1) In any proceedings in terms of or under this Act, the court may, at the request of either party, or of its own accord if the presiding officer considers it to be in the interests of justice, summon to its assistance one or two persons who are suitable and available and who may be willing to sit and act as assessors. 5

(2) Assessors appointed in terms of subsection (1) are, subject to subsection (3), deemed to be members of the court for purposes of this Act. 10

(3) Any matter of law arising for decision at the proceedings concerned and any question as to whether a matter for decision is a matter of fact or a matter of law must be decided by the presiding officer in the prescribed manner.

(4) On all matters of fact the finding or decision of the majority of the members of the court is the finding or decision of the court, and in the event of one assessor, the finding or decision of the court prevails. 15

(5) (a) If an assessor dies, or in the opinion of the presiding officer becomes unable to act as an assessor, or is for any reason absent, or has been ordered to recuse himself or herself or has recused himself or herself, at any stage before the completion of the proceedings concerned, the presiding officer may, in the interests of justice and after due consideration of the arguments put forward by the parties to the proceedings or their legal representatives— 20

(i) direct that the proceedings continue before the remaining member or members of the court;

(ii) direct that the proceedings start afresh; or 25

(iii) if an assessor is absent, postpone the proceedings in order to obtain the assessor's presence.

(b) The presiding officer must give reasons for any direction referred to in subparagraph (i) or (ii).

(6) (a) A presiding officer who is assisted by assessors at an enquiry where a party to the proceedings has an order made against him or her must record the reasons for his or her opinion— 30

(i) if that party to the proceedings is not assisted by a legal representative; and

(ii) if the presiding officer is of the opinion that the assessors concerned have clearly made an incorrect finding. 35

(b) The clerk of the equality court must as soon as is practicable, submit those reasons and the record to the appeal court in question for review in the prescribed manner.

(c) The appeal court has the power to confirm the said findings or to make any appropriate order in respect of such finding that, in the opinion of the appeal court, should have been made in the circumstances. 40

Appeals and reviews

23. (1) Any person aggrieved by any order made by an equality court in terms of or under this Act may, within such period and in such manner as may be prescribed, appeal against such order to the High Court having jurisdiction or the Supreme Court of Appeal, as the case may be. 45

(2) On appeal, the High Court or the Supreme Court of Appeal, as the case may be, may make such order in the matter as it may deem fit.

(3) Notwithstanding subsection (1), any person aggrieved by any order made by an equality court may, subject to the rules of the Constitutional Court, appeal directly to the Constitutional Court. 50

(4) In the event of conflicting decisions being made by presiding officers in matters in respect of paragraph (b) of the definition of "prohibited grounds", the Minister may refer a stated case to the Supreme Court of Appeal or the Constitutional Court for a determination.

(5) (a) If a presiding officer in a magistrates' court makes a determination relating to a ground of discrimination referred to in paragraph (b) of the definition of "prohibited grounds", the decision must, after the finalisation of the proceedings and in the prescribed manner, be submitted to the High Court having jurisdiction for review. 55

(b) The High Court in question must, after considering the matter, make a determination in respect of the ground referred to in subsection (5)(a) and thereafter may make any order in terms of this Act as it deems fit.

(c) The operation of subsection (5)(a) is suspended until any appeal contemplated in this section is finalised.

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CHAPTER 5

PROMOTION OF EQUALITY

General responsibility to promote equality

24. (1) The State has a duty and responsibility to promote and achieve equality.

(2) All persons have a duty and responsibility to promote equality.

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Duty of State to promote equality

25. (1) The State must, where necessary with the assistance of the relevant constitutional institutions—

(a) develop awareness of fundamental rights in order to promote a climate of understanding, mutual respect and equality;

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(b) take measures to develop and implement programmes in order to promote equality; and

(c) where necessary or appropriate—

(i) develop action plans to address any unfair discrimination, hate speech or harassment;

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(ii) enact further legislation that seeks to promote equality and to establish a legislative framework in line with the objectives of this Act;

(iii) develop codes of practice as contemplated in this Act in order to promote equality, and develop guidelines, including codes in respect of reasonable accommodation;

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(iv) provide assistance, advice and training on issues of equality;

(v) develop appropriate internal mechanisms to deal with complaints of unfair discrimination, hate speech or harassment;

(vi) conduct information campaigns to popularise this Act.

(2) The South African Human Rights Commission and other relevant constitutional institutions may, in addition to any other obligation, in terms of the Constitution or any law, request any other component falling within the definition 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.

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(3) In addition to the powers and functions of the constitutional institutions these institutions are also competent to—

(a) assist complainants in instituting proceedings in an equality court, particularly complainants who are disadvantaged;

(b) conduct investigations into cases and make recommendations as directed by the court regarding persistent contraventions of this Act or cases of unfair discrimination, hate speech or harassment referred to them by an equality court;

45

(c) request from the Department, in the prescribed manner, regular reports regarding the number of cases and the nature and outcome thereof.

(4) All Ministers must implement measures within the available resources which are aimed at the achievement of equality in their areas of responsibility by—

(a) eliminating any form of unfair discrimination or the perpetuation of inequality in any law, policy or practice for which those Ministers are responsible; and

(b) preparing and implementing equality plans in the prescribed manner, the contents of which must include a time frame for implementation of such plans, formulated in consultation with the Minister of Finance.

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(5) (a) The equality plans must, within two years after the commencement of this Act, be submitted to the South African Human Rights Commission to be dealt with in the prescribed manner.

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(b) The South African Human Rights Commission must consult with the Commission on Gender Equality when dealing with the plans contemplated in paragraph (a).

Responsibility of persons operating in public domain to promote equality

- 26.** It is the responsibility of any person directly or indirectly contracting with the State or exercising public power to promote equality by—
- (a) adopting appropriate equality plans, codes, regulatory mechanisms and other appropriate measures for the effective promotion of equality in the spheres of their operation; 5
 - (b) enforcing and monitoring the enforcement of the equality plans, codes and regulatory mechanisms developed by them; and
 - (c) making regular reports to the relevant monitoring authorities or institutions as may be provided in regulations, where appropriate. 10

Social commitment by all persons to promote equality

- 27.** (1) Pursuant to section 26, all persons, non-governmental organisations, community-based organisations and traditional institutions must promote equality in their relationships with other bodies and in their public activities.
- (2) The Minister must develop regulations in relation to this Act and other Ministers may develop regulations in relation to other Acts which require companies, closed corporations, partnerships, clubs, sports organisations, corporate entities and associations, where appropriate, in a manner proportional to their size, resources and influence, to prepare equality plans or abide by prescribed codes of practice or report to a body or institution on measures to promote equality. 15 20

Special measures to promote equality with regard to race, gender and disability

- 28.** (1) If it is proved in the prosecution of any offence that unfair discrimination on the grounds of race, gender or disability played a part in the commission of the offence, this must be regarded as an aggravating circumstance for purposes of sentence.
- (2) The South African Human Rights Commission must, in its report referred to in section 15 of the Human Rights Commission Act, 1994 (Act No. 54 of 1994), include an assessment on the extent to which unfair discrimination on the grounds of race, gender and disability persists in the Republic, the effects thereof and recommendations on how best to address the problems. 25
- (3) (a) The State, institutions performing public functions and all persons have a duty and responsibility, in particular to— 30
- (i) eliminate discrimination on the grounds of race, gender and disability;
 - (ii) promote equality in respect of race, gender and disability.
- (b) In carrying out the duties and responsibilities referred to in paragraph (a), the State, institutions performing public functions and, where appropriate and relevant, juristic and non-juristic entities, must— 35
- (i) audit laws, policies and practices with a view to eliminating all discriminatory aspects thereof;
 - (ii) enact appropriate laws, develop progressive policies and initiate codes of practice in order to eliminate discrimination on the grounds of race, gender and disability; 40
 - (iii) adopt viable action plans for the promotion and achievement of equality in respect of race, gender and disability; and
 - (iv) give priority to the elimination of unfair discrimination and the promotion of equality in respect of race, gender and disability. 45

Illustrative list of unfair practices in certain sectors

- 29.** (1) Without detracting from the generality of the provisions of this Act, the Schedule to this Act is intended to illustrate and emphasise some practices which are or may be unfair, that are widespread and that need to be addressed.
- (2) The State must, where appropriate, ensure that legislative and other measures are taken to address the practices referred to in subsection (1). 50
- (3) The Minister must, on the recommendation of the Equality Review Committee, on an ongoing basis, assess the relevance of the practices contained in the Schedule for purposes of expanding, altering, varying or amending the list of practices in the Schedule. 55
- (4) The Schedule is also intended to provide an illustrative list of practices that are or may be unfair discrimination in order to—

- (a) address and eliminate these practices; and
 - (b) assist persons in interpreting their experiences and practices.
- (5) The illustrative list of practices in the Schedule is not conclusive and must be considered and revised by the Equality Review Committee on a continuous basis.

CHAPTER 6

5

GENERAL PROVISIONS AND IMPLEMENTATION OF ACT

Regulations

- 30.** (1) The Minister may, and where required in the circumstances, must, make regulations relating to—
- (a) the procedures to be followed at or in connection with an inquiry in terms of or under this Act, including the manner in which proceedings must be instituted, the referral of matters contemplated in section 20 and the hearing of urgent matters; 10
 - (b) the form of any application, authority, certificate, consent, notice, order, process, register or subpoena to be made, given, issued or kept in terms of or under this Act, and any other form required in carrying out the provisions of this Act; 15
 - (c) the granting of legal aid at State expense in appropriate cases in consultation with the Legal Aid Board;
 - (d) the appearance of persons on behalf of the parties to the proceedings in court, which may include suitable persons other than attorneys or advocates; 20
 - (e) the appointment, powers, duties and functions of a clerk of an equality court;
 - (f) the attendance of witnesses in cases arising from the application of this Act and the payment of witness fees;
 - (g) the confirmation of court orders emanating from magistrates' courts sitting as equality courts as contemplated in section 19(3)(a); 25
 - (h) the procedure to be followed at, and criteria to be applied for, the designation and registration of persons from the community who are suitable and available to serve as assessors in each equality court;
 - (i) the method to be followed in respect of the allocation of assessors in respect of proceedings in terms of or under this Act; 30
 - (j) the factors to be taken into account by an equality court when deciding whether to summon assessors in the administration of justice;
 - (k) the taking of the oath or making an affirmation by assessors;
 - (l) the role of presiding officers and the procedure to be followed in cases where an equality court is assisted by assessors; 35
 - (m) the recusal of assessors and the procedure to be followed in the case of such recusal;
 - (n) a code of conduct for such assessors, and mechanisms for the enforcement of the code of conduct, including the liability of an assessor if any provision of the code of conduct is contravened by him or her; 40
 - (o) the establishment of a mechanism to deal with any grievance or complaint by or against an assessor;
 - (p) the training of assessors;
 - (q) the payment of allowances to assessors; 45
 - (r) any other matter which is necessary to prescribe in order to regulate the service of assessors in the equality courts;
 - (s) the procedures to be followed at or in connection with appeals or reviews as contemplated in section 23;
 - (t) the reports contemplated in sections 25(3)(c) and 26(c) and the equality plans contemplated in section 25(4)(b) and (5)(a) and section 27(2); 50
 - (u) the translation of this Act into the official languages and the distribution thereof as contemplated in section 31(2)(b);
 - (v) the powers and functions of the Equality Review Committee contemplated in section 33; 55
 - (w) any matter required or permitted to be prescribed by regulation under this Act;
 - (x) any other matter which is necessary to prescribe in order to achieve the objects of this Act.

(2) Any regulation made under this section which may result in expenditure for the State, must be made in consultation with the Minister of Finance.

(3) A regulation made under this section may provide that any person who contravenes a provision thereof or fails to comply therewith is guilty of an offence and on conviction is liable to a fine or to imprisonment for a period not exceeding 12 months. 5

(4) (a) Any regulation made under this section must be tabled in Parliament 30 days before publication thereof in the *Gazette*, if Parliament is then in session.

(b) If Parliament is not in session as contemplated in paragraph (a), the regulations must be submitted to the Speaker of Parliament, 30 days before publication thereof in the *Gazette*. 10

(5) The regulations made in terms of this section, and particularly subsection (1)(a) relating to the procedure at an inquiry, must, as far as possible, ensure that the application of the Act is simple, fair and affordable.

Implementation of Act

31. (1) Despite section 16(1)(a) and (b), and until the Minister determines by notice in the *Gazette*, no proceedings may be instituted in any court unless— 15

(a) a presiding officer is available who has been designated, by reason of his or her training, experience, expertise and suitability in the field of equality and human rights; and

(b) one or more trained clerks are available. 20

(2) For purposes of giving full effect to this Act and making the Act as accessible as possible—

(a) and in giving effect to subsection (1), the Minister may designate suitable magistrates, additional magistrates or judges, as the case may be, and clerks referred to in subsection (1) as presiding officers and clerks, respectively, for one or more equality courts; 25

(b) the Minister must make the Act available in all official languages in the prescribed manner within a period of two years after the commencement of this Act.

(3) The Minister must take all reasonable steps within the available resources of the Department to designate at least one presiding officer and ensure that a trained clerk is available for each court in the Republic. 30

(4) The Minister must, after consultation with the Magistrates Commission and the Judicial Service Commission, issue policy directives and develop training courses with a view to— 35

(a) establishing uniform norms, standards and procedures to be observed by presiding officers and clerks in the performance of their functions and duties and in the exercise of their powers; and

(b) building a dedicated and experienced pool of trained and specialised presiding officers and clerks. 40

(5) The Minister must table a copy of any policy directive issued in terms of subsection (4) in Parliament within a reasonable period after the finalisation thereof.

CHAPTER 7

REVIEW OF ACT, SHORT TITLE AND COMMENCEMENT

Establishment of Equality Review Committee 45

32. The Minister must, immediately, upon promulgation of this Act, by notice in the *Gazette*, establish an Equality Review Committee and appoint members, consisting of—

(a) a senior judicial officer with appropriate qualifications;

(b) the Chairperson of the South African Human Rights Commission;

(c) the Chairperson of the Commission on Gender Equality; 50

(d) a representative of civil society;

(e) an expert in the field of human rights, especially the right to equality;

(f) a member of the National Assembly;

(g) a member of the National Council of Provinces.

Powers, functions and term of office of Equality Review Committee

- 33.** (1) The Equality Review Committee—
- (a) must advise the Minister about the operation of this Act;
 - (b) must advise the Minister about laws that impact on equality;
 - (c) must submit regular reports to the Minister on the operation of the Act, addressing whether the objectives of the Act and the Constitution have been achieved and must make recommendations on any necessary amendments to the Act to improve its operation; 5
 - (d) has the other powers and functions as prescribed.
- (2) The Equality Review Committee may conduct its business and proceedings at its meetings as it deems fit. 10
- (3) Members of the Equality Review Committee referred to in section 32(a), (d) and (e) are appointed for a period of five years and may be reappointed upon the expiry of their term of office.
- (4) The other terms and conditions of appointment of members of the Equality Review Committee are as prescribed. 15
- (5) The administrative work connected with the performance of the functions of the Equality Review Committee must be performed by officers designated by the Director-General of the Department.
- (6) The members of the Equality Review Committee are entitled to such remuneration, allowances and other benefits as may be determined by the Minister in consultation with the Minister of Finance. 20

Directive principle on HIV/AIDS, nationality, socio-economic status and family responsibility and status

- 34.** (1) In view of the overwhelming evidence of the importance, impact on society and link to systemic disadvantage and discrimination on the grounds of HIV/AIDS status, socio-economic status, nationality, family responsibility and family status— 25
- (a) special consideration must be given to the inclusion of these grounds in paragraph (a) of the definition of “prohibited grounds” by the Minister;
 - (b) the Equality Review Committee must, within one year, investigate and make the necessary recommendations to the Minister. 30
- (2) Nothing in this section—
- (a) affects the ordinary jurisdiction of the courts to determine disputes that may be resolved by the application of law on these grounds;
 - (b) prevents a complainant from instituting proceedings on any of these grounds in a court of law; 35
 - (c) prevents a court from making a determination that any of these grounds are grounds in terms of paragraph (b) of the definition of “prohibited grounds” or are included within one or more of the grounds listed in paragraph (a) of the definition of “prohibited grounds”. 40

Short title and commencement

- 35.** (1) This Act is called the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.
- (2) Different dates may be so fixed in respect of different provisions of this Act. 45

SCHEDULE

ILLUSTRATIVE LIST OF UNFAIR PRACTICES IN CERTAIN SECTORS (Section 29)

Labour and employment

1. (a) Creating artificial barriers to equal access to employment opportunities by using certain recruitment and selection procedures. 5
- (b) Applying human resource utilisation, development, promotion and retention practices which unfairly discriminate against persons from groups identified by the prohibited grounds.
- (c) Failing to respect the principle of equal pay for equal work. 10
- (d) Perpetuating disproportionate income differentials deriving from past unfair discrimination.

Education

2. (a) Unfairly excluding learners from educational institutions, including learners with special needs. 15
- (b) Unfairly withholding scholarships, bursaries, or any other form of assistance from learners of particular groups identified by the prohibited grounds.
- (c) The failure to reasonably and practicably accommodate diversity in education. 20

Health care services and benefits

3. (a) Subjecting persons to medical experiments without their informed consent.
- (b) Unfairly denying or refusing any person access to health care facilities or failing to make health care facilities accessible to any person. 25
- (c) Refusing to provide emergency medical treatment to persons of particular groups identified by one or more of the prohibited grounds.
- (d) Refusing to provide reasonable health services to the elderly.

Housing, accommodation, land and property

4. (a) Arbitrary eviction of persons on one or more of the prohibited grounds. 30
- (b) "Red-lining" on the grounds of race and social status.
- (c) Unfair discrimination in the provision of housing bonds, loans or financial assistance on the basis of race, gender or other prohibited grounds.
- (d) Failing to reasonably accommodate the special needs of the elderly. 35

Insurance services

5. (a) Unfairly refusing on one or more of the prohibited grounds to provide or to make available an insurance policy to any person.
- (b) Unfair discrimination in the provision of benefits, facilities and services related to insurance. 40
- (c) Unfairly disadvantaging a person or persons, including unfairly and unreasonably refusing to grant services, to persons solely on the basis of HIV/AIDS status.

Pensions

6. (a) Unfairly excluding any person from membership of a retirement fund or from receiving any benefits from the fund on one or more of the prohibited grounds. 45
- (b) Unfairly discriminating against members or beneficiaries of a retirement fund.

Partnerships

7. (a) Determining in an unfair discriminatory manner who should be invited to become a partner in the partnership in question.
 (b) Imposing unfair and discriminatory terms or conditions under which a person is invited or admitted to become a partner. 5

Professions and bodies

8. (a) Imposing conditions that unfairly limit or deny entry into the profession of persons from historically disadvantaged groups.
 (b) Unfairly limiting or denying members access to benefits or facilities on the basis of a prohibited ground. 10

Provision of goods, services and facilities

9. (a) Unfairly refusing or failing to provide the goods or services or to make the facilities available to any person or group of persons on one or more of the prohibited grounds.
 (b) Imposing terms, conditions or practices that perpetuate the consequences of past unfair discrimination or exclusion regarding access to financial resources. 15
 (c) Unfairly limiting access to contractual opportunities for supplying goods and services.

Clubs, sport and associations 20

10. (a) Unfairly refusing to consider a person's application for membership of the association or club on any of the prohibited grounds.
 (b) Unfairly denying a member access to or limiting a member's access to any benefit provided by the association or club.
 (c) Failure to promote diversity in selection of representative teams. 25

**MEMORANDUM ON THE OBJECTS OF THE PROMOTION
OF EQUALITY AND PREVENTION OF UNFAIR
DISCRIMINATION BILL**

Section 9 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), requires the enactment of national legislation to give full effect to the right to equality. This Bill is drafted to give effect to the letter and spirit of the Constitution, especially the founding values of achieving equality and human dignity.

The Bill does this by eradicating systemic forms of discrimination and disadvantage which are a legacy of our colonial, apartheid and patriarchal past. It also gives further effect to our commitment to international treaty obligations, especially those in the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination Against Women.

The list of prohibited grounds in the Constitution that elucidate these systemic forms of discrimination and disadvantage are:

race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

Additional grounds can be established by the courts if they cause or perpetuate systemic disadvantage, undermine human dignity or adversely affect a person's enjoyment of rights and freedoms. The Bill emphasises the importance of eradicating unfair discrimination on the basis of race, gender and disability.

The Bill also outlaws hate speech and harassment on the prohibited grounds.

The State and all persons (which includes juristic and non-juristic entities and natural persons) are prevented and prohibited from unfairly discriminating on any of the prohibited grounds.

An important part of the Bill is the responsibility of the State and all persons to promote equality but the Bill imposes a heavier burden on the State to introduce measures to achieve equality. Any person who contracts with the State or exercises public power must promote equality by adopting and enforcing equality plans and codes of practice in their day to day activities. In addition to this, all companies, closed corporations, partnerships, clubs, sports organisations, corporate entities and associations, where appropriate, will be required in terms of regulations to prepare and abide by equality plans and prescribed codes of practice. They may also be required to report to a body or institution in terms of the regulations. The principle that the Bill adopts, takes cognisance of the fact that big companies may require big equality plans and small companies may require small equality plans.

The Bill includes a Schedule of practices of unfair discrimination that are widespread in our society and need to be addressed. The Schedule illustrates and emphasises specific practices that are unacceptable. Complainants are expected to use the list to gain a sense of when they should apply for redress and respondents are expected to use the list to gain a sense of what type of practices they should desist from adopting and implementing.

All magistrates' courts and High Courts are equality courts and start operating when the Minister designates a trained presiding officer and clerk to the court. Assessors may also be appointed in specific cases.

In terms of this Bill the complainant must establish his or her case of unfair discrimination in the court on one or more of the prohibited grounds. Once the court finds that the complainant has achieved this, it will require the respondent to bear the onus of proving that the discrimination was fair. The court makes the finding of fairness or unfairness after taking into account the context of the discrimination, the factors that are set out in clause 14(3) and whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria which are intrinsic to the activity concerned. The court has the power to make a very wide range of orders.

Affirmative action or measures designed to protect and advance disadvantaged persons is not regarded as unfair discrimination.

Appeals and review to higher courts are provided for.

In the light of the overwhelming evidence of the importance, impact on society and link to systemic disadvantage and discrimination on the grounds of HIV/AIDS status, socio-economic status, nationality, family responsibility and family status, the Minister has been given the responsibility of considering the inclusion of these grounds into the list of prohibited grounds, after receiving recommendations of the Equality Review Committee, established in terms of the Bill.

The Bill does not apply to any person to whom and to the extent that the Employment Equity Act, 1998 (Act No. 55 of 1998), applies.

The Bill has been drafted in a manner to ensure, as far as possible, that existing personnel and structures can be used to implement and apply the legislation. While every effort will be made to use existing resources to implement this legislation, it is foreseen that there will be financial implications if the legislation is to be implemented successfully, for example the development of training programmes, the training of presiding officers, equality court assistants and assessors, the payment of allowances to assessors and the possible expansion of the South African Human Rights Commission. It has been suggested that an amount of R50 million be set aside on a contingency basis for the proper and successful implementation of the Bill.

During the research into and the preparation of the legislation, extensive consultation took place in the form of reference groups and workshops, to which relevant role-players, including State Departments, were invited.

In the opinion of the Department and the State Law Advisers, this Bill should be dealt with in terms of section 75 of the Constitution, since it contains no provisions to which the procedure set out in section 74 or 76 of the Constitution applies.

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