



**CHAPTER 5**

# **EQUALITY AND UNFAIR DISCRIMINATION IN EDUCATION**

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# INTRODUCTION

Unfair discrimination has shaped the South African education system by producing inequality in our schools and society.

Under apartheid, schools were strictly segregated by race. White learners received most of the funding and resources, resulting in an inferior education for the majority of black learners. In *Head of Department, Mpumalanga Department of Education v Hoerskool Ermelo* 2010 (2) SA 415 (CC), the Constitutional Court described this system and its consequences (para 46):

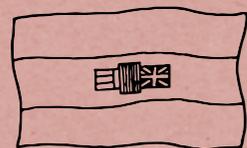
[W]hite public schools were hugely better resourced than black schools. They were lavishly treated by the apartheid government. It is also true that they served and were shored up by relatively affluent white communities. On the other hand, formerly black public schools have been and by and large remain scantily resourced. They were deliberately funded stingily by the apartheid government. Also, they served in the main and were supported by relatively deprived black communities. That is why perhaps the most abiding and debilitating

legacy of our past is an unequal distribution of skills and competencies acquired through education.

Race remains the most visible marker of inequality in our education system; but other, often interlinked inequalities also persist. Unfair discrimination – on the basis of gender, religion, language, sexual orientation and disability, among many other grounds – has been a constant feature of education in South Africa. Often these forms of unfair discrimination have combined, resulting in deeper inequalities.

The chapters in this section of the handbook address different forms of inequality and unfair discrimination in schools. This chapter lays the foundation, by introducing the legal principles that will feature in the chapters to follow.

**These chapters all underline an important point: addressing inequality and unfair discrimination in schools is not only a duty, but also an opportunity to make schools more welcoming, inclusive places that make all children feel valued.**



## APARTHEID SPENDING ON SCHOOLS

One of the clearest indicators of the inequalities in apartheid education was the government's spending per learner.

In 1982, the apartheid government spent an average of:

- R 1 211 on every white child
- R 771 on every Indian child
- R 498 on every coloured child
- R 146 on every black child



# THE CONSTITUTION AND THE EQUALITY ACT

Section 9 of the Constitution guarantees the right to equality. This right has three important parts:

- First, a right to equality before the law, and equal protection and benefit of the law (Section 9(1));
- Second, permission for the state to take positive measures to protect and advance groups that have been disadvantaged by unfair discrimination (Section 9(2)); and
- Third, a prohibition on unfair discrimination by the state (Section 9(3)) and by private individuals (Section 9(4)).

Parliament has passed legislation to give effect to this right. The most important statute is the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act). The Equality Act prohibits unfair discrimination by the state and all individuals. It also prohibits related wrongs, such

as hate speech, harassment and the publication of unfairly discriminatory material. The Equality Act is one of the primary sources of rights and remedies when a learner experiences unfair discrimination in school.

The Equality Act has created a network of Equality Courts around the country. These courts are meant to provide a quick, informal and effective way of resolving unfair discrimination disputes. The process of bringing a claim in the Equality Court is discussed in more detail below.

Other laws, regulations and policies contain more detailed requirements for the prohibition of unfair discrimination and the promotion of equality in particular areas of the education system. These will be discussed in the chapters to follow.

## THE CONSTITUTIONAL RIGHTS

Section 9 of the Constitution:

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

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

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

## INTERNATIONAL LAW

There are many international instruments that expressly prohibit discrimination in education and require positive measures to promote equality. These include:

- The International Covenant on Civil and Political Rights (ICCPR)
- The International Convention on Economic, Social and Cultural Rights (ICESCR),
- The Convention for the Elimination of all forms of Discrimination Against Women (CEDAW)
- The Convention on the Rights of the Child (CRC)
- The Convention on the Rights of People with Disabilities (CRPD)



## THE CONCEPTS

### THE DIFFERENT IDEAS OF EQUALITY

The demand for equal education has great power. But this demand often means different things to different people.

Equality is not a single idea.

There are many types of equality, and not all types are valuable – or valuable for the same reasons.

Equality is often confused for ‘sameness’. Sometimes treating people in the same way is fair, but that is not always true. Identical treatment can often be deeply harmful, particularly for those who have different needs. Forcing all learners to take a written test would exclude partially sighted and blind learners. Making all learners use the stairs would marginalise learners in wheelchairs.

So we need a better, richer idea of equality.

When we talk about equality in education, there are at least three valuable forms of equality that we have in mind:

- First, equality requires the equal enjoyment and protection of constitutional rights. This idea is endorsed by Section 9(2) of the Constitution. This means that equality requires all learners to receive a basic education.
- Second, equality is about accommodating and valuing difference, rather than treating everyone identically or promoting uniformity. Schools that attract learners from diverse backgrounds can promote understanding and tolerance. Learners in diverse schools are also better equipped for life in a diverse country.
- Finally, equality requires us to break down patterns of group disadvantage, and to prevent new patterns of disadvantage from forming. Many learners are not only denied the right to a basic education; they continue to suffer stigma, stereotyping, socio-economic disadvantage, violence, and powerlessness as a result of their race, gender, disability, sexual orientation or other group membership. Equality in education requires that we end these patterns of disadvantage.

These valuable forms of equality are often referred to as ‘substantive’ equality.

The prohibition of unfair discrimination is an important tool in promoting substantive equality.



Equality is not a single idea. There are many types of equality, and not all types are valuable – or valuable for the same reasons.

This prohibition helps to prevent patterns of group disadvantage being perpetuated or created in schools.

It is important to remember that this prohibition on unfair discrimination is just one of the many tools available to promote equality in schools. For example, school feeding schemes, free education, improvements in teacher quality, and many other actions all help to promote equality by breaking down patterns of group disadvantage.

### THE RIGHT TO A BASIC EDUCATION AND EQUALITY

The Section 29(1)(a) right to a basic education is closely linked with the right to equality and the prohibition of unfair discrimination.

The state must provide a basic education to all, without unfairly discriminating against any learner. For example, the state cannot provide an education to some learners but not to others on the basis of their race, gender or sexual orientation.

Unfair discrimination in schools will also have an impact on a learner’s ability to receive a basic education. Racism, sexism, religious intolerance, homophobia and transphobia, among many other forms of unfair discrimination, all prevent learners from realising their full potential.

Almost all forms of unfair discrimination against learners will deprive them of their right to a basic education.

### HOW DO WE IDENTIFY ANALOGOUS GROUNDS?

Section 1 of the Equality Act provides that a ground will be considered to be analogous if it:

- ‘(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 [listed ground].’

These considerations are very broad and open-ended. How would you apply these considerations to grounds that are not listed, such as class, weight, or physical appearance?

## DISCRIMINATION DEFINED

Section 1 of the Equality Act defines discrimination as:

[A]ny act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly –

(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

In *Harksen v Lane* 1998 (1) SA 300 (CC), the Constitutional Court defined discrimination under Section 9(3) of the Constitution in slightly different terms, as "differentiation that is directly or indirectly based on prohibited grounds" (paragraph 47).



## WHAT IS UNFAIR DISCRIMINATION?

In everyday language, we use the word 'discrimination' to mean a very serious type of wrong. In South African law, we use this word in a slightly different way. Discrimination is not against the law by itself; it is only wrong if it is unfair.

## DISCRIMINATION

Discrimination involves actions or omissions that impose burdens or withhold benefits, directly or indirectly, on the basis of prohibited grounds.

### PROHIBITED GROUNDS

Treating people differently only becomes discrimination if it is based on prohibited grounds. Differences in treatment that are not based on these grounds are merely called 'differentiation'.

The prohibited grounds are characteristics that identify certain groups in our society. Section 9(3) of the Constitution and Section 1 of the Equality Act list a number of these grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. These are the 'listed grounds' of discrimination.

These grounds have been used to categorise people for good and bad reasons. Not all distinctions made on the basis of these grounds are wrong; but all of these grounds have been used – and continue to be used – to oppress and marginalise people.

In addition to the listed grounds, courts have the power to recognise other grounds that are 'analogous', meaning that they also deserve protection. Some of the analogous grounds that have been recognised by our courts include citizenship, refugee status, and HIV status.

### DIRECT AND INDIRECT DISCRIMINATION

Discrimination can occur directly or indirectly on the basis of prohibited grounds.

Direct discrimination occurs when prohibited grounds are used as the test for different treatment. For example, the apartheid education system directly discriminated on the basis of race, by allocating resources to schools according to the racial classification of their learners. Race was used as the test for deciding the type of education that a person received.

Indirect discrimination occurs when rules or practices are 'neutral', meaning that they do not select people for different treatment on prohibited grounds, but they produce results that leave certain groups worse off than others. For example, a public school in a wealthy, mainly white neighbourhood has a rule that it will only admit learners who live less than ten kilometres from the school. This policy does not select learners based on their race. However, it would exclude many black learners who live outside the wealthy neighbourhood. The result of this policy would be the same as if the school had a rule that said 'only 20 per cent of our learners may be black'. This is indirect racial discrimination.

## INDIRECT DISCRIMINATION AND THE PROVISION OF RESOURCES TO SCHOOLS

Because of the inequalities in our education system, the state's failure to provide adequate resources to schools will generally impact on poor, black learners disproportionately. This is indirect discrimination.

The Supreme Court of Appeal recognised this in *Minister of Basic Education v Basic Education for All* 2016 (4) SA 63 (SCA), concerning the failure to provide textbooks to learners in rural schools in Limpopo:

"[3]... It must be said, at the outset, that it is common cause that the affected learners are from poor communities and are mostly, if not exclusively, located in rural areas. They are also overwhelmingly, if not exclusively, black learners.

...

"[49] Clearly, learners who do not have textbooks are adversely affected. Why should they suffer the indignity of having to borrow from neighbouring schools or copy from a blackboard which cannot, in any event, be used to write the totality of the content of the relevant part of the textbook? Why should poverty-stricken schools and learners have to be put to the expense of having to photocopy from the books of other schools? Why should some learners be able to work from textbooks at home and others not? There can be no doubt that those without textbooks are being unlawfully discriminated against."



## INTERSECTIONALITY

In *Mahlangu and Another v Minister of Labour and Others* 2021 (2) SA 54 (CC), the Constitutional Court explained that intersectionality is at the centre of our unfair discrimination law:

“[76] There is nothing foreign or alien about the concept of intersectional discrimination in our constitutional jurisprudence. It means nothing more than acknowledging that discrimination may impact on an individual in a multiplicity of ways based on their position in society and the structural dynamics at play. There is an array of equality jurisprudence emanating from this Court that has, albeit implicitly, considered the multiple effects of discrimination.”

“[79]... Adopting intersectionality as an interpretative criterion enables courts to consider the social structures that shape the experience of marginalised people. It also reveals how individual experiences vary according to multiple combinations of privilege, power, and vulnerability as structural elements of discrimination. An intersectional approach is the kind of interpretative approach which will achieve ‘the progressive realisation of our transformative constitutionalism’.”

“[85] Crenshaw, who coined the concept of the ‘intersectional’ nature of discrimination, writing as a black feminist on women studies, recognised and demonstrated how overlapping categories of identity (such as gender, sex and race) impact individuals and institutions. Intersectionality aims to evaluate how intersecting and overlapping forms of oppression result in certain groups being subject to distinct and compounded forms of discrimination, vulnerability and subordination.[86] As such, at times black women may experience compounded forms of discrimination as compared to black men or white women. In other cases, they may experience forms of discrimination and vulnerability that are qualitatively different from both these groups.[87] The power of an intersectional approach lies in its capacity to shed light on the experiences and vulnerabilities of certain groups that have been erased or rendered invisible. Unless there is recognition and an articulation of intersectional discrimination, the enormous burden experienced by, in this case, domestic workers will not be sufficiently acknowledged.”

Consider another example of indirect discrimination: a province fails to put in place a proper programme to deliver school textbooks to learners in rural areas. The vast majority of these affected learners are black children. That is indirect discrimination on the basis of race.

## MULTIPLE AND INTERSECTIONAL DISCRIMINATION

Discrimination may occur on one or more grounds. This can involve ‘multiple discrimination’ and ‘intersectional discrimination’.

Multiple discrimination occurs when a learner faces discrimination on separate protected grounds over time. For example, a black, female, Muslim learner may experience racism, sexism and religious prejudice at different times while at school.

Intersectional discrimination occurs when a learner is discriminated against because of a combination of protected grounds. For instance, a school that prohibits Muslim learners from wearing the hijab in schools would discriminate on the overlapping grounds of religion, culture and gender, among other grounds. This is because this rule does not discriminate against all Muslim learners, or all female learners, or even all female Muslim learners. Instead, it discriminates against Muslim female learners whose particular cultural and religious practices require the hijab.

‘Intersectionality’ is an important idea in discrimination law. We are not defined by single identities. Instead our identities are shaped by our membership of different social groups. Experiences of discrimination and inequality are equally complex, and generally cannot be reduced to a single protected ground.

# UNFAIRNESS

Discrimination is only wrongful in law if it is found to be unfair.

Unfairness is a complex concept. The Equality Act sets out a long list of factors that help in identifying whether discrimination is unfair (see the box below). The courts have also added their own guidelines and considerations, which help to identify unfairness.

These considerations assist in answering two different questions:

- First, what is the **impact** of this discrimination on the learner or group of learners, taking into account the context and historical or existing patterns of group disadvantage?
- Second, is there a proper **justification**, based on some legitimate purpose, for the discrimination?

In this approach, discrimination is unfair if it has a severe impact on the learner or group of learners that is not justified. The factors listed in the Equality Act are a guide to answering these questions.

## THE BURDEN OF PROOF

Under the Equality Act, the person alleging unfair discrimination must set out the facts that indicate that discrimination has occurred. The person who is accused of unfair discrimination must then prove that no discrimination has occurred, or that the discrimination is fair.

This burden of proof is placed on the discriminator, no matter whether the ground for discrimination is listed in the Equality Act or is an analogous ground. For example, HIV status is not listed in the Act, but it is an analogous ground

of discrimination. As a result, if a school discriminates against learners on the basis of HIV status, then the school will have to prove that this discrimination is fair.

This burden of proof is slightly different under the Constitution, although it is not necessary to go into the details here. The Equality Act applies to all cases of discrimination except a few narrow exceptions, such as if you want to challenge a discriminatory law or if you want to challenge the Equality Act itself. Only in those cases would you need to rely on Section 9(3) of the Constitution directly.

## FAIR DISCRIMINATION

Some forms of discrimination in schools are fair. For example, all schools divide learners by age for sports teams and other extramural activities. That is age discrimination, but it is fair, in most cases. It would hardly be fair to make nine-year-olds play competitive soccer against fully grown 18-year-olds.

While some forms of discrimination may be fair, we should still consider each case of discrimination very carefully. Many of the forms of discrimination that we have taken for granted in the past are now unthinkable. Discrimination against black people, women, gay people, transgender people and many other groups was all thought natural and normal at one time. The test for unfair discrimination makes us think long and hard about whether different forms of discrimination are justified.

## UNFAIRNESS FACTORS

Section 14(3) of the Equality Act sets out the following factors to consider in deciding whether discrimination is unfair:

- Whether the discrimination impairs or is likely to impair human dignity;
- the impact or likely impact of the discrimination on the complainant;
- 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;
- the nature and extent of the discrimination;
- whether the discrimination is systemic in nature;
- whether the discrimination has a legitimate purpose;
- whether and to what extent the discrimination achieves its purpose;
- whether there are less restrictive and less disadvantageous means to achieve the purpose;
- whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to –
  - address the disadvantage which arises from or is related to one or more of the prohibited grounds; or
  - accommodate diversity.

## REMEDIES FOR UNFAIR DISCRIMINATION

Section 21 of the Equality Act gives Equality Courts wide-ranging powers to grant appropriate remedies. These remedies include:

- Declaratory relief, declaring the rights of the parties;
- Damages;
- An unconditional apology;
- Interdicts prohibiting certain actions or requiring action to be taken;
- Reporting duties.

See Chapter 1 for more information about remedies.

## BRINGING A CLAIM IN THE EQUALITY COURT

If you or someone you know has suffered from unfair discrimination, it is best to approach the South African Human Rights Commission or a public interest law organisation. They will be able to provide you with free advice or assistance.

You do not need a lawyer to bring a claim in the Equality Court, but these cases can become very complex. A lawyer can help to guide you through the process and present your case in a persuasive way.

The Legal Aid Board has prepared a comprehensive guide to the process of bringing an Equality Court claim, called the 'Equality Court Handbook'.

# APPLYING THE TEST FOR UNFAIR DISCRIMINATION

Let us now put these concepts to use by considering how the unfairness test would be applied to real-life situations.

### EXAMPLE 1

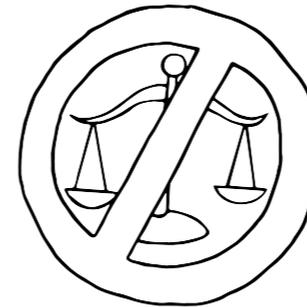
A school has a policy that all pregnant learners must leave school when they fall pregnant, and that they may only return in the year after they have given birth. Mpho falls pregnant in January of her Grade 11 year and gives birth in October. She is forced to miss a whole year of school. She brings a claim of unfair discrimination against the school in the Equality Court.

The school's policy clearly discriminates on the basis of pregnancy, a listed ground in the Equality Act and the Constitution. This is also a form of sex and gender discrimination. The school will bear the burden of proving that this discrimination is fair. In the Equality Court, the school argues that this discrimination is necessary to deter learners from falling pregnant.

To assess whether this discrimination is unfair, the Equality Court will consider the two parts of the unfairness analysis: impact and justification.

The **impact** of this discrimination is severe, and takes different forms. It has had a serious impact on Mpho, as she was forced to miss a full year of education. It will have a similar impact on all other learners who fall pregnant. This discrimination also has a wider impact on society. The school's policy suggests that young women are to blame for falling pregnant, reinforcing stigma and harmful double standards. It also entrenches the socio-economic disadvantage that women experience in society. The failure to accommodate pregnant women and the burden of childcare responsibilities stand in the way of many women accessing education and meaningful work opportunities. This policy continues this pattern of disadvantage and exclusion.

Having assessed the impact of the discrimination, the Equality Court would then consider whether the school can **justify** this impact.



There are obvious problems with the school's attempt at justification. If the aim is to stop learners from falling pregnant, it is not clear why pregnant learners are singled out for this harsh treatment, while the fathers of their children are allowed to continue their schooling. There is also no basis to believe that this policy will in fact prevent learners from falling pregnant. Better education and greater availability of contraceptives are far more effective strategies to limit teenage pregnancy. Finally, even if the policy had some deterrent effect, this could not outweigh the significant harm of depriving learners of a full year or more of education, and reinforcing a stigma against women and girls.

As a result, the Equality Court would have little difficulty in finding that the school has discriminated unfairly against the pregnant learner.

### EXAMPLE 2

Charlene attends a co-ed school. She identifies as a girl, but is classified as a boy on her birth certificate. She wants to wear a skirt and grow out her hair. The school's uniform and hair policy has separate rules for girls and boys. Only children who are classified as girls on their birth certificates may wear skirts and have long hair. Children who are classified as boys must wear long trousers and have short hair. Charlene sues the school in the Equality Court, seeking an order directing the school to change its policy.

The school's policy discriminates on the listed grounds of sex and gender. The Equality Court will presume that it is unfair unless the school can show otherwise.

The discrimination has a serious impact. Transgender learners such as Charlene are made to feel trapped in a gender identity that does not match

their self-image, causing significant psychological harm. The policy also impacts on all other learners, who are forced into strict binary gender roles. This reinforces the stereotype that boys and girls are fundamentally different, removing all possibility for fluid gender expression.

The school offers the justification that its uniform policy is necessary to maintain discipline and to ensure neatness. But these aims could be achieved without forcing a strict division between girls and boys. A gender-neutral uniform policy would allow learners of all genders to choose between specified skirts and trousers. Equally, a gender-neutral hair policy could require basic standards of neatness, without prescribing separate hairstyles for boys and girls.

As a result, the school would probably be required to come up with a new policy.



## DISABILITY AND REASONABLE ACCOMMODATION

Reasonable accommodation has a particularly important role in determining the rights of learners with disabilities.

In the *Pillay* case, the Constitutional Court quoted the following passage from the Supreme Court of Canada's decision in *Eaton v Brant* [1997] 1 SCR 241 at para 67:

Exclusion from the mainstream of society results from the construction of a society based solely on 'mainstream' attributes, to which disabled persons will never be able to gain access. Whether it is the impossibility of success at a written test for a blind person, or the need for ramp access to a library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual. The blind person cannot see and the person in a wheelchair needs a ramp. Rather, it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them.

The rights of learners with disabilities are discussed more extensively in the next chapter.

# REASONABLE ACCOMMODATION AND INCLUSIVE EDUCATION

Equality in education requires the accommodation of difference, not strict uniformity. The failure to reasonably accommodate those whose needs are different will often result in unfair discrimination. Reasonable accommodation is required to achieve inclusive education. An inclusive education is an education that welcomes learners from diverse backgrounds, caters to their diverse needs, and makes all learners feel safe and valued.

In *MEC for Education, KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) (Pillay), the Constitutional Court explained this concept of reasonable accommodation (para 73):

At its core is the notion that sometimes the community, whether it is the State, an employer or a school, must take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally.

It ensures that we do not relegate people to the margins of society because they do not or cannot conform to certain social norms.

What the Court is saying is that schools and the government must be prepared to make some effort to accommodate learners from diverse backgrounds. This may cost time and money; but it is a price worth paying to allow people to participate in schools and in their communities.

...the failure to make accommodation will generally be a form of indirect discrimination, as neutral rules or practices may disproportionately exclude or have an impact on certain learners.



The same test for unfair discrimination applies where a school or the state has failed to accommodate the needs of a learner or group of learners.

First, the failure to make accommodation will generally be a form of indirect discrimination, as neutral rules or practices may disproportionately exclude or have an impact on certain learners. For instance, if a school is only accessible by stairs, this will indirectly discriminate against learners in wheelchairs.

Second, the unfairness analysis will focus on the consequences of the failure to accommodate learners and the justification for this failure. This will often involve a balancing enquiry, weighing the impact of the discrimination against the cost of making the accommodation. As the Court indicated in *Pillay*, 'the essence of reasonable accommodation is an exercise of proportionality' (para 86).

Let us return to the example of the school which is only accessible by stairs. This has a significant impact on learners

in wheelchairs. They may be denied entry to the school entirely, or they may have to go through the humiliation of being carried up and down the stairs each day. This impact must be weighed against the cost of installing a ramp for wheelchairs. The cost of that action will probably be limited in comparison with the benefits it will bring for the learners. As a result, it would be unfair discrimination to refuse to install a wheelchair ramp, unless there are strong reasons not to do so.

# POSITIVE DUTIES TO PROMOTE EQUALITY AND AFFIRMATIVE ACTION

The prohibition of unfair discrimination is an important tool in promoting equality, but it has its limits.

This is because the prohibition does not directly address existing patterns of disadvantage caused by historical unfair discrimination. For example, a black learner at a poorly resourced township school may not face any immediate acts of unfair discrimination. The prohibition on unfair discrimination can offer her no immediate solutions. Other positive steps must be taken to undo the disadvantage that she experiences as a result of apartheid.

The prohibition on unfair discrimination is also backward-looking, as it responds to unfair discrimination that has or is about to occur, rather than putting in place measures to prevent unfair discrimination from occurring in future.

It also generally relies on the courage and resources of individuals who have to bring unfair discrimination claims to court.

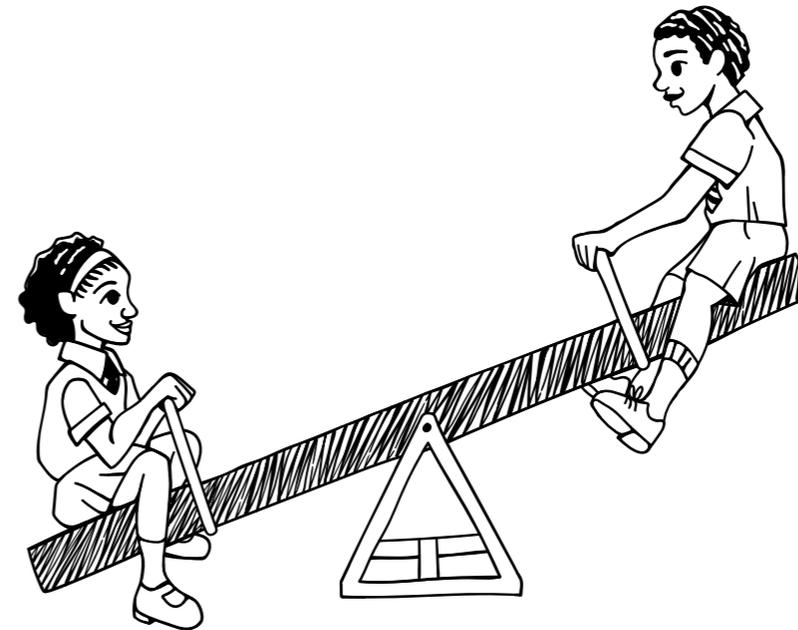
This does not make the prohibition of unfair discrimination any less important. What it shows is that other tools are needed to promote equality.

## POSITIVE MEASURES

Chapter 5 of the Equality Act places positive duties on the state and all other persons to promote equality. This part of the Equality Act is still not in force, but it does indicate the type of actions that schools should adopt to promote greater equality. These measures may include:

- Putting in place plans and policies to address unfair discrimination and to promote equality
- Proactively monitoring policies and practices to ensure that they do not unfairly discriminate
- Promoting access for learners from all backgrounds
- Providing adequate training and assistance to teachers and staff members, and
- Integrating equality and unfair discrimination issues in lessons.

The next chapters will discuss other concrete positive measures that can be taken to address inequality in different areas of the education system.



## AFFIRMATIVE ACTION

Positive measures to protect or advance groups that have experienced historical discrimination are referred to as 'affirmative action'. Section 9(2) of the Constitution expressly allows for affirmative action measures when it says "[t]o promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken".

The Equality Act makes it clear that legitimate affirmative measures are not unfair discrimination. Section 14(1) of the Equality Act provides:

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.

In *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC), the Constitutional Court developed a three-part test for assessing whether an affirmative action measure is legitimate under section 9(2) of the Constitution:

- First, it must be targeted at a group that has experienced unfair discrimination in the past, such as black learners or disabled learners.
- Second, it must be reasonably likely to benefit that group, meaning that the affirmative action measure should be

capable of protecting them or advancing their interests.

- Third, the measure must promote equality, meaning that the benefits it brings to the beneficiaries should outweigh the costs it may impose on others. It should also not be used to mask abuses of power.

If an affirmative action measure passes this test then it cannot be challenged as unfair discrimination.

There is still some uncertainty about whether this test applies under the Equality Act. The courts will be required to settle this question in future cases.

## CONCLUSION

Unfair discrimination and inequality are complex social problems that can take many different forms. This is reflected in the detailed laws that have developed in response.

While these laws are intricate, they exist to serve clear aims: to ensure that all learners receive a basic education, to accommodate difference, to promote diversity, and to break down patterns of group disadvantage.

The next chapters will assess how these aims are being realised in law and in practice in different areas of the education system.

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### CASES

*Harksen v Lane* 1998 (1) SA 300 (CC).

*Head of Department, Mpumalanga Department of Education v Hoerskool Ermelo* 2010 (2) SA 415 (CC).

*Mahlangu and Another v Minister of Labour and Others* 2021 (2) SA 54 (CC).

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*Minister of Basic Education v Basic Education for All* 2016 (4) SA 63 (SCA).

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### CONSTITUTION AND LEGISLATION

Constitution of the Republic of South Africa, 1996.

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

### INTERNATIONAL AND REGIONAL INSTRUMENTS

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979.

Convention on the Rights of the Child (CRC), 1989.

International Convention on Economic, Social and Cultural Rights (ICESCR), 1966.

International Covenant on Civil and Political Rights (ICCPR), 1966.

United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), 2007.

### SOURCE MATERIAL AND FURTHER READING

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