

REPUBLIC OF SOUTH AFRICA

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# PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION BILL

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*(As introduced in the National Assembly as a section 75 Bill; explanatory summary of Bill  
published in Government Gazette No. 20572 of 25 October 1999)  
(The English text is the official text of the Bill)*

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(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

**[B 57—99]**

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# BILL

**To give effect to section 9(4) read with item 23(1) of Schedule 6 to the Constitution of the Republic of South Africa, 1996, so as to prevent or prohibit unfair discrimination as contemplated in the Constitution; to eliminate unfair discrimination; to promote equality; and to provide for matters connected therewith.**

## PREAMBLE

### *RECOGNISING THAT—*

- throughout the history of South Africa, its people have been inspired by the values of equality, social justice and human dignity which formed the foundation of the struggle against colonialism, apartheid and all other forms of social inequality which have caused and continue to cause pain and suffering to the great majority of its people;
- these values originate from the traditional philosophy of *ubuntu* or *botho*, which has shaped the fabric of a free and democratic South Africa and has moulded its human relations;
- the Constitution of the Republic of South Africa, 1996, commits South Africa and its people to the values of unity, human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism;
- South Africa is a proud member of the family of nations and, as such, is bound by the standards and norms of international law relating to human rights in terms of which discrimination based on, among others, race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth, constitutes a gross violation of human rights;
- although progress has been made in reconstructing a society based on equality, justice and human rights and freedoms, forms of structural and systemic inequality still persist which undermine the values of our constitutional democracy;

### *AND BEARING IN MIND THAT—*

- national legislation must be enacted in terms of section 9 of the Constitution to prevent or prohibit unfair discrimination;
- there is a need to make provision for the advancement and protection of persons previously disadvantaged by such discrimination;
- South Africa has international legal obligations in terms of binding treaties and customary international law in the field of human rights relating to the promotion of equality and the prohibition and prevention of discrimination;

### *AND IN ORDER TO—*

- actively promote the building of a South African society that is rich in its diversity, that is caring, compassionate and that strives progressively to achieve equality and live in peace with itself, its neighbours in other African countries and the rest of the world community;

- give effect to the right to equality as contemplated in the Constitution;
  - set out measures for the promotion and achievement of substantive equality;
  - prevent and eliminate any unfair discrimination generally and, being mindful of the history of South Africa, particularly the legacies of the past and discrimination based on race and gender, to focus specifically on the prevention and elimination of unfair discrimination relating to race and gender;
  - conform to the international agreements referred to in section 2, particularly the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women; and
  - address and eliminate the imbalances and inequalities, particularly in respect of race and gender, existing in all spheres of life as a result of present and past unfair discrimination brought about by the *apartheid* system,
- thereby contributing to the total transformation of South African society from one characterised by the inequalities and injustices inherent in apartheid to one where the universal principles of equality, fairness, justice and human dignity apply to everyone;

**B**E IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:—

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## CHAPTER 1

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

#### Definitions

- 1.** In this Act, unless the context indicates otherwise—
- (i) “Commission for Gender Equality” means the Commission for Gender Equality referred to in section 187 of the Constitution; 15
  - (ii) “complainant” means any person who alleges any contravention of this Act and who institutes proceedings in terms of the Act;
  - (iii) “Constitution” means the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996); 20
  - (iv) “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;
  - (v) “Department” means the Department of Justice and Constitutional Development; 25
  - (vi) “disability discrimination” includes—
    - (a) any act, practice or conduct which has the effect of unfairly hindering or precluding any person or persons who have or who are perceived to have disabilities from conducting their activities freely, and which undermines their sense of human dignity and self-worth, and prevents their full and equal participation in society; 30
    - (b) any systemic, societal or individual act, conduct or practice which has the direct or indirect effect of unfairly defining persons with disabilities by—
      - (i) denying or removing from any person who has a visual or hearing impairment or any other disability from their supporting or enabling facility necessary for their function in society, such as a hearing aid, a guide dog, braille, sign language or appropriate information technology; 35
      - (ii) contravening the code of practice or regulations of the South African Bureau of Standards that govern environmental accessibility; 40
      - (iii) failing to take reasonable steps to accommodate the needs of a person or persons with disabilities;
      - (iv) failing to identify or eliminate obstacles that unjustly limit or restrict persons with disabilities from enjoying equal opportunities; 45
  - (vii) “equality court” means a court contemplated in section 47, read with section 53, and includes “court”;
  - (viii) “equality court assistant” means an equality court assistant appointed in terms of section 47, read with section 53, and includes “an assistant”;
  - (ix) “harassment” means engaging in unwanted verbal, non-verbal or physical conduct that denigrates, humiliates or shows hostility or aversion towards a person or a group of persons because of their membership of, association with, or a quality that pertains to, or is imputed to pertain to, a group identified by one or more of the prohibited grounds when such conduct— 55

- (a) is aimed at or has the effect of—
- (i) creating an intimidating, hostile or offensive environment; or
  - (ii) interfering with that person or group of persons;
- (b) adversely affects the opportunities or dignity of that person or that group of persons; 5
- (x) “harassment on the grounds of race” includes an act inciting hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or group of persons and “racial harassment” has a corresponding meaning; 10
- (xi) “marital status” includes the status or condition of being— 10
- (a) single;
  - (b) married, whether in terms of the Marriage Act, 1961 (Act No. 25 of 1961), customary law or any religious law;
  - (c) divorced;
  - (d) widowed; 15
  - (e) in a relationship, irrespective of whether it is a same sex relationship or not, or recognised by law or practice of marriage or partnership, and in which the partners share or shared a reciprocal duty of support;
- (xii) “Minister” means the Minister for Justice and Constitutional Development;
- (xiii) “person” includes a juristic person and any non-juristic entity; 20
- (xiv) “pregnancy discrimination” includes discrimination on the basis of any intended or potential pregnancy, termination of pregnancy or any medical condition related to pregnancy;
- (xv) “prescribed” means prescribed by regulation in terms of section 52;
- (xvi) “presiding officer” means a presiding officer of an equality court contemplated in section 47, read with section 53; 25
- (xvii) “prohibited grounds” includes one or more of the following grounds of discrimination: 30
- race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth or any other recognised ground;
- (xviii) “reasonable accommodation” means any modification, adjustment, change or action that may enable any person or group of persons who is or who are identified by one or more of the prohibited grounds to enjoy full and equal access to, or to participate or advance equally in, any areas or sectors; 35
- (xix) “regulation” means a regulation made and in force in terms of section 52;
- (xx) “respondent” means any person against whom proceedings are instituted in terms of this Act;
- (xxi) “sexual harassment” means engaging in unwanted verbal, non-verbal or physical conduct of a sexual nature, including requests for sexual favours and unwelcome or repeated sexual attention, when— 40
- (a) a person’s rejection or submission to such conduct is used explicitly or implicitly as a basis for decisions adversely affecting that person;
  - (b) it is aimed at or has the effect of creating an intimidating, hostile or offensive environment; 45
  - (c) it is aimed at or has the effect of interfering with that person; or
  - (d) it adversely affects the opportunities or dignity of that person;
- (xxii) “South African Human Rights Commission” means the South African Human Rights Commission referred to in section 184 of the Constitution;
- (xxiii) “substantive equality” means the full and equal enjoyment of all rights and freedoms as contemplated in the Constitution and includes *de jure* and *de facto* equality<sup>1</sup>; 50
- (xxiv) “the State” includes— 55
- (a) any department of State or administration in the national, provincial or local sphere of government;
  - (b) any other functionary or institution—
    - (i) who or which exercises a power or performs a function in terms of the Constitution or a provincial constitution; or

1. “substantive equality” should be understood to include equality in terms of the law and in reality. This takes into account equality in terms of process and outcomes.

- (ii) who or which exercises a public power or performs a public function in terms of any legislation, including functionaries or institutions functioning under customary law or tradition;
- (xxv) “this Act” includes any regulation made and in force in terms of section 52 but does not include footnotes; 5
- (xxvi) “unfair discrimination” means an act or omission, including any condition, requirement, policy, situation, rule or practice, that has, or is likely to have, the direct or indirect effect of unjustly or unfairly causing disadvantage to—
  - (a) a person or group of persons on one or more of the prohibited grounds;
  - (b) a person or group of persons on the basis of that person’s or that group’s actual or presumed association with another person who or group which may be identified by any of the prohibited grounds; 10
  - (c) a person or group of persons on the basis of a characteristic that applies generally to persons who are identified by any of the prohibited grounds;
  - (d) a person or group of persons on the basis of a characteristic that is generally attributed to persons who are identified by any of the prohibited grounds; 15
 and includes—
  - (i) the failure to reasonably accommodate the specific needs of disadvantaged persons and groups of persons; 20
  - (ii) racial and sexual harassment;
  - (iii) the failure to identify and take reasonable measures to remove any barriers to the full enjoyment of access to opportunities by persons who were historically denied such opportunities by law or practice; and
  - (iv) racism, racial discrimination and gender discrimination as defined in Part B: 25
 Provided that it is not unfair discrimination to—
  - (aa) take affirmative action measures consistent with the purpose of the Constitution or this Act; or
  - (bb) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job or a situation. 30

## Objects of Act

- 2. The objects of this Act are—
  - (a) to give effect to—
    - (i) the letter and spirit of the Constitution; 35
    - (ii) the promotion of substantive equality;
    - (iii) the values of non-racialism and non-sexism contained in section 1 of the Constitution;
    - (iv) equal enjoyment of all rights and freedoms by every person;
    - (v) non-discrimination and human dignity contained in sections 9 and 10 of the Constitution; and 40
    - (vi) 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 by, amongst others—
      - (aa) making provision for measures to facilitate the progressive eradication of unfair discrimination; and 45
      - (bb) educating the public and raising public awareness on the nature and meaning of substantive equality, including measures to protect or advance persons or categories of persons disadvantaged by unfair discrimination; 50
  - (b) to prevent, prohibit and provide for the redressing of unfair discrimination based on race, gender, disability and all other recognised grounds of unfair discrimination, in line with international law, including treaty obligations that are binding on the Republic, such as—
    - (i) the Convention on the Elimination of All Forms of Racial Discrimination; 55
    - (ii) the Convention on the Elimination of All Forms of Discrimination against Women, by, amongst others—

- (aa) providing remedies for the victims of unfair discrimination and persons whose right to equality is infringed; and
- (bb) preventing and prohibiting unfair discrimination; and
- (c) to address and eliminate the imbalances and inequalities, particularly in respect of race and gender, existing in all spheres of life as a result of present and past unfair discrimination brought about by the *apartheid* system,

### 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 or categories of persons disadvantaged by unfair discrimination;
  - (b) the Preamble, the objects and guiding principles of this Act, thereby fulfilling the spirit, purport and objects of this Act;
  - (c) any prescribed code of good practice.
- (2) Any person interpreting this Act—
  - (a) must, where appropriate, consider international law, particularly the international agreements referred to in section 2;
  - (b) may, where appropriate, consider foreign law;
  - (c) must prefer any reasonable interpretation that is consistent with international law over any alternative interpretation that is inconsistent with international law.
- (3) Any person interpreting this Act must, where a dispute arising from this Act revolves around an issue covered by—
  - (a) a provision of an international agreement that binds the Republic as contemplated in section 231 of the Constitution; or
  - (b) a principle of recognised customary international law as contemplated in section 232 of the Constitution,
 attempt to resolve the dispute in conformity with the principle of recognised customary international law or the provision of the international treaty in question, as the case may be.
- (4) The interpretation and application of this Act must be contextual and purposive.
- (5) Despite any other law to the contrary, the inclusion of—
  - (a) any ground of unfair discrimination;
  - (b) any sector referred to in Parts A to L in Chapter 2; or
  - (c) any forms of unfair discrimination provided in the said grounds or sectors,
 must not be interpreted as an indication of the exclusion of other grounds, recognised sectors or forms of unfair discrimination.

### Guiding principles

- 4. (1) The principle of access to substantive justice must facilitate the interpretation and application of this Act by all persons and in all judicial and other dispute resolution forums and, where necessary, special rules of procedure and criteria to facilitate participation, including special training of judicial officers, as contemplated in section 180 of the Constitution, may be implemented in order to improve the quality of justice and to give effect to the objects of this Act.
- (2) The State and non-governmental service providers must, within their available resources, provide legal assistance, including para-legal assistance, to victims of unfair discrimination who may need such assistance and who have no adequate means of their own to access such assistance in order to protect and realise their rights effectively in terms of this Act.
- (3) In the application of this Act, special attention must be given to the balancing of punitive measures against perpetrators of unfair discrimination and corrective measures, under the supervision of a court or any constitutional institution.
- (4) Dispute resolution must be expeditious, affordable and participative, and where appropriate, informal.
- (5) In the application of this Act, there should be acknowledgement of—
  - (a) the systemic discrimination and inequalities, particularly in respect of race and gender, existing in all spheres of life as a result of present and past unfair discrimination brought about by the *apartheid* system; and

- (b) the need to take measures at all levels, to eliminate such discrimination and inequalities.

### **Application of Act**

5. (1) This Act binds the State.

(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: Provided that this Act only applies to unfair discrimination in respect of issues relating to employment to the extent that it deals with issues which are not regulated by the Employment Equity Act, 1998 (Act No. 55 of 1998).

## **CHAPTER 2**

### **PREVENTION, PROHIBITION AND ELIMINATION OF UNFAIR DISCRIMINATION AND PROMOTION OF EQUALITY**

#### **PART A**

#### **PREVENTION AND GENERAL PROHIBITION OF UNFAIR DISCRIMINATION** 15

##### **Prevention and general prohibition of unfair discrimination**

6. (1) No person may unfairly discriminate directly or indirectly against any person.

(2) No person may—

(a) disseminate or broadcast any information;

(b) publish or display any advertisement or notice, 20

that indicates or could reasonably be understood to indicate an intention to unfairly discriminate.

(3) In the prosecution of any offence, if it is proved that unfair discrimination played a part in the commission of the offence, this must be regarded as an aggravating circumstance for purposes of sentence. 25

#### **PART B**

#### **PREVENTION, PROHIBITION AND ELIMINATION OF UNFAIR DISCRIMINATION RELATING TO RACE AND GENDER AND PROMOTION OF RACIAL HARMONY AND GENDER EQUALITY**

##### **Racism and racial discrimination** 30

7. (1) In this Part—

(a) “racial discrimination” means any distinction, exclusion, restriction or preference, based on race, colour, descent, national or ethnic origin, which is aimed at or has the effect of nullifying, impeding or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other sphere of life; 35

(b) “racism” includes any act, practice or policy which denies or is calculated to deny or undermine the inherent dignity of a person or a group of persons on the basis of race, language, religion or ethnicity, as manifested in violence against such person or group of persons, the denial of free and equal access to, and participation in, all spheres of life. 40

(3) Any form of racial discrimination or racism, similar to what prevailed under *apartheid*, constitutes a crime against humanity, as defined in Articles I, II and III of the International Convention on the Suppression and Punishment of the Crimes of Apartheid, and is hereby prohibited. 45

### Prohibition of racial discrimination or racism

8. All forms of racial discrimination or racism, including the following, are prohibited:

- (a) The dissemination of any propaganda or idea, suggesting the racial superiority or inferiority of any person or group of persons, including incitement to, or participation in, any form of racial violence; 5
- (b) the operation of any activity which is intended to promote, or has the effect of, exclusivity, based on racism or racial discrimination and which results in the *de facto* exclusion of persons of a particular race group under any principle that appears to be neutral, such as in sport, the recognised professions and health services; 10
- (c) the practice of racial tokenism as a strategy for maintaining racial power imbalances in institutions;
- (d) the provision of different and inferior services or the exclusion from different and superior services or any other advantage to a particular race group or persons belonging to such race group, when compared to the services provided to another race group or persons belonging to such race group; 15
- (e) the use of language which is recognised as being, and is intended in the circumstances to be, hurtful and abusive, including, amongst others, the use of words such as “kaffir”, “kaffer”, “kaffermeid”, “coolie”, “hotnot” and their variations. 20

### Measures to prevent and eliminate racial discrimination and racism and to promote racial harmony

9. (1) In the prosecution of any offence, if it is proved that unfair racial discrimination or racism played a part in the commission of the offence, this must be regarded as an aggravating circumstance for purposes of sentence. 25

(2) The State must take steps to promote racial harmony in all fields by eliminating any form of racial discrimination or racism in any law, policy or practice for which it is responsible.

(3) 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 input on the extent to which racism or racial discrimination persists in the Republic, the effects thereof and recommendations on how best to address the problems identified. 30

(4) The Commission’s report referred to in subsection (3) may include specific mention of worst cases of unfair discrimination as well as best examples in the promotion of equality and the elimination of unfair discrimination. 35

### Gender discrimination

10. In this Part, “gender discrimination” means—

- (a) any distinction, exclusion or restriction made on the basis of sex, pregnancy, marital status, domestic or family responsibilities or sexual orientation, which is aimed at or has the effect of impairing or nullifying the recognition, enjoyment or exercise by women or men, irrespective of their marital status on the basis of equality between women and men, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field; 40
- (b) any act or conduct which has the effect of creating or sustaining systemic forms of domination and disadvantage which perpetuate and re-enforce unequal gender relations and prevent women from being able to develop to their full human potential and participate fully in society. 45

### Prohibition of gender discrimination

50

11. All forms of gender discrimination, including the following are prohibited:

- (a) Gender-based violence, including witchcraft or ritual-related violence;
- (b) the system of preventing women from inheriting family property;
- (c) female genital mutilation;

- (d) any practice, including traditional, customary or religious practice, which unfairly violates the dignity of women and undermines equality between women and men;
- (e) practices that undermine the dignity, equality and liberty of a girl under the age of 18; 5
- (f) any policy that unfairly or unreasonably limits access of women to land, finance and other resources;
- (g) sexual harassment;
- (h) pregnancy discrimination.

### **Measures to prevent and eliminate gender discrimination and to promote gender equality** 10

- 12.** (1) In the prosecution of any offence, if it is proved that gender discrimination played a part in the commission of the offence, this must be regarded as an aggravating circumstance for purposes of sentence.
- (2) The State must take steps to promote gender equality in all fields, by eliminating any form of gender discrimination in any law, policy or practice for which it is responsible, especially in respect of—
- (a) the eradication of gender-based violence;
  - (b) the elimination of the oppression of women by religious, cultural and customary rules and practices; 20
  - (c) the inequality of access to resources;
  - (d) the inequality of access to employment opportunities as a result of the sexual division of labour;
  - (e) the eradication of multiple discrimination.
- (3) The Commission on Gender Equality must, in its report referred to in section 15 25 of the Commission on Gender Equality Act, 1996 (Act No. 39 of 1996), include—
- (a) an input on the extent to which gender discrimination persists in the Republic;
  - (b) the effects of gender discrimination; and
  - (c) recommendations on how best to address gender discrimination.
- (4) The Commission’s report referred to in subsection (3) may include specific 30 mention of worst cases of unfair discrimination as well as best examples in the promotion of equality and the elimination of unfair discrimination.

### **PREVENTION, PROHIBITION AND ELIMINATION OF UNFAIR DISCRIMINATION AND PROMOTION OF EQUALITY IN SPECIFIC SECTORS** 35

#### *PART C*

#### *EMPLOYMENT*

#### **Definitions**

- 13.** In this Part—
- (i) “employment” includes— 40
    - (a) a relationship which requires a person to work for or assist in any manner, in the conduct of the affairs of another person or the State, for any consideration; and
    - (b) a relationship which involves contracting work to another person for any consideration; 45
  - (ii) “unfair discrimination”, or “to unfairly discriminate”, in addition to the definition of “unfair discrimination” referred to in section 1(xxvi), includes—
    - (a) any distinction, exclusion or restriction made on the basis of one or more of the prohibited grounds, or on any other ground which is aimed at or has the effect of impairing or nullifying the enjoyment or exercise by a 50 person or group of persons, of employment opportunities;
    - (b) the failure to identify and take reasonable measures to remove any barriers to the full enjoyment of employment opportunities, by persons who were historically denied such opportunities by law or practice.

### **Prohibition of unfair discrimination in employment**

- 14.** No person may unfairly or unreasonably discriminate against any person in any manner, including the following:
- (a) By advertising in a manner which unjustly excludes or disadvantages potential applicants from any group of persons; 5
  - (b) by creating informal barriers to equal access to employment opportunities;
  - (c) by subscribing to and applying practices relating to selection and recruitment for employment, including the conduct and content of job interviews, which have the effect of unjustly excluding persons from particular groups;
  - (d) by subscribing to and applying human resource utilisation, development, 10 promotion and retention practices which unjustly disadvantage persons from particular groups or have the effect of perpetuating consequences of past discrimination in employment;
  - (e) by subscribing to and applying criteria and practices which have the purpose or effect of unjustly excluding persons from particular groups from access to 15 contracting opportunities;
  - (f) by subscribing to and applying policies and practices that have the effect of unequal pay for work of equal value;
  - (g) by failing to provide reasonable accommodation.

### **Measures to prevent and eliminate unfair discrimination and to promote equality 20 in employment**

- 15.** The Minister responsible for labour, in conjunction with the relevant Ministers responsible for social security policies and legislation must—
- (a) undertake an audit of all laws, policies and practices in these areas;
  - (b) establish the existence of discrimination in such laws, policies and practices; 25 and
  - (c) report within two years after the commencement of this Act in the prescribed manner to the South African Human Rights Commission.

## **PART D**

### **EDUCATION 30**

#### **Definitions**

- 16.** In this Part—
- (i) “educational institution” means—
    - (a) an education institution as defined in section 1 of the National Education Policy Act, 1996 (Act No. 27 of 1996); 35
    - (b) a higher education institution as defined in section 1 of the Higher Education Act, 1997 (Act No. 101 of 1997); or
    - (c) a further education and training institution as defined in section 1 of the Further Education and Training Act, 1998 (Act No. 98 of 1998).
  - (ii) “learner” means— 40
    - (a) a learner as defined in section 1 of the South African Schools Act, 1996 (Act No. 84 of 1996);
    - (b) a student as defined in section 1 of the National Education Policy Act, 1996 (Act No. 27 of 1996), section 1 of the Higher Education Act, 1997 (Act No. 101 of 1997) or section 1 of the Further Education and Training Act, 1998 (Act No. 98 of 1998); or 45
    - (c) any other person who is receiving education or training at any educational institution referred to in subparagraph (i).

#### **Prohibition of unfair discrimination in education**

- 17.** (1) No person may unfairly or unreasonably discriminate against any person in 50 the provision of education in any manner, including the following:
- (a) In the admission of a learner to an educational institution, including a learner with special needs: Provided that nothing in this Act prohibits the provision of gender-specific schools;

- (b) in the granting of scholarships, bursaries, or any other form of assistance to a learner;
  - (c) in the provision of standard education;
  - (d) in the provision of benefits, facilities or services related to education;
  - (e) in the discipline of a learner; 5
  - (f) in the expulsion of a learner;
  - (g) in the forcible segregation of learners with special needs into special schools, based on their disabilities and not on their educational interests or capabilities;
  - (h) in the provision of reasonable accommodation relating to cultural and religious diversity. 10
- (2) Any person who or that sets educational or vocational standards may not set standards that unfairly discriminate against any person.

### **Measures to prevent and eliminate unfair discrimination and to promote equality in education**

- 18.** The Minister responsible for education must take steps necessary to prevent and eliminate unfair discrimination and to promote equality in the area of education as contemplated in section 51(4). 15

## **PART E**

### **HEALTH CARE 20**

#### **Definitions**

- 19.** In this Part—
- (i) “health care services”—
    - (a) includes those services necessary to ensure a state of complete physical, mental and social well-being and not only services aimed at ensuring the absence of disease and infirmity; and 25
    - (b) are not limited to those services aimed at preventing, diagnosing, alleviating, curing, healing and treating conditions that threaten or compromise a person’s state of complete physical, mental and social well-being; 30
  - (ii) “health care benefits” includes but are not limited to subsidies, health insurance and pensions. 30

#### **Prohibition of unfair discrimination in respect of health care services and benefits**

- 20.** (1) No person may unfairly or unreasonably discriminate against any person in the provision of health care services in any manner, including the following: 35
- (a) By denying or refusing any person access to health care facilities or failing to make health care facilities accessible to any person;
  - (b) in the nature or type of health care services that are provided;
  - (c) in the terms, conditions or criteria in terms of which access to health care services are provided; 40
  - (d) in the manner in which access to health care services are provided;
  - (e) in the quality of health care services that are provided;
  - (f) by assuming that persons with disabilities should not or cannot procreate, adopt or care for a child, or foster or nurture a family environment purely on the grounds that a person or a couple may have a disability or disabilities; 45
  - (g) by precluding a person from contributing to his or her medical care or treatment purely on the grounds that the person has a psychiatric or mental disability;
  - (h) by refusing to provide standard treatment or health care services to a person purely on the grounds that the person has a disability; 50
  - (i) by revealing a person’s health status to an employer, family member or other person or body without receiving the person’s written permission or authorisation, but taking into account national laws and policies relating to specific notifiable diseases;
  - (j) by subjecting any person to any unfair disadvantage regarding access to health care services; 55

- (k) by refusing to provide emergency medical treatment on any of the prohibited grounds.
- (2) No person who is in authority of, or responsible for, the provision of health care benefits, either as a principal or agent, may unfairly or unreasonably discriminate against any person in any manner, including the following: 5
- (a) By refusing or denying a person access to health care benefits or failing to make those health care benefits available and accessible to that person;
  - (b) in the terms, conditions or criteria for eligibility for health care benefits;
  - (c) in the nature or quality of health care benefits provided;
  - (d) in the amount of health care benefits allocated for particular health care services; 10
  - (e) in the manner in which a person can gain access to health care services.

**Measures to prevent and eliminate unfair discrimination and to promote equality in health**

21. The Minister responsible for health must, in conjunction with other relevant Ministers, take steps necessary to prevent and eliminate unfair discrimination and to promote equality in the area of health as contemplated in section 51(4). 15

**PART F**

**ACCOMMODATION, LAND AND PROPERTY** 20

**Prohibition of unfair discrimination in respect of accommodation**

22. (1) No person, whether as principal or agent, may unfairly or unreasonably discriminate against any person in relation to accommodation in any manner, including the following:
- (a) By refusing a person's application for accommodation or lease; 25
  - (b) in the terms or conditions in respect of which accommodation or a lease agreement is concluded in favour of any person;
  - (c) by giving a person's application for accommodation or a lease agreement in that person's opinion, a lower order of precedence in any list of applicants for the accommodation or lease agreement in question; 30
  - (d) by denying a person access to, or limiting a person's access to, any benefit associated with accommodation or leasehold occupied by the person in question;
  - (e) by refusing to allow a person to lease or acquire accommodation on the grounds that the person requires reasonable accommodation to make the occupation more accessible; 35
  - (f) in the eviction of a person;
  - (g) by subjecting a person to any other disadvantage in respect of the accommodation or lease.
- (2) For purposes of this section, it shall be unfair discrimination to lease to any person or permit any person the use of premises for commercial sexual exploitation of a child under the age of 18. 40

**Prohibition of unfair discrimination in respect of land and property**

23. No person, whether as principal or agent, may unfairly or unreasonably discriminate against a person in respect of land or property in any manner, including the following: 45
- (a) By refusing or failing to dispose of or lease land or property or any other interest or right therein to any person;
  - (b) in the terms or conditions in respect of which land or property or any interest or right therein is disposed of or leased; 50
  - (c) in any condition subject to which land or property or any interest or right therein, is used;
  - (d) by failing to provide accessible accommodation in any development of land or property to the aged or disabled;

- (e) by obstructing the realisation of the constitutional obligations in terms of section 25 of the Constitution to strengthen security of tenure, facilitate equitable access to land and to undertake land reform.

**Measures to prevent and eliminate unfair discrimination and to promote equality in land matters** 5

24. The Minister responsible for land matters, in conjunction with other relevant Ministers, must take steps necessary to prevent and eliminate unfair discrimination in the area of land matters and to promote equality in this area as contemplated in section 51(4).

**PART G** 10

**INSURANCE**

**Definitions**

25. In this Part—
- (i) “insurance policy” includes an annuity policy, a life assurance policy, an accident insurance policy or an illness or injury policy, but does not include a retirement annuity fund, underwritten by an insurer; 15
  - (ii) “insurer” means a person who issues insurance policies or makes such policies available to others.

**Prohibition of unfair discrimination in provision of insurance services**

26. No insurer may unfairly or unreasonably discriminate against any person in the provision of insurance in any manner, including the following: 20
- (a) By refusing to provide or to make available an insurance policy to any person;
  - (b) in the terms or conditions in terms of which or the manner in which an insurance policy is provided or made available;
  - (c) in the provision of benefits, facilities and services related to insurance; 25
  - (d) in any other manner, including any policy or practice which unfairly disadvantages a person or persons on one or more of the prohibited grounds, including the refusal to grant services to persons solely on the basis of HIV or AIDS status.

**Measures to prevent and eliminate unfair discrimination and to promote equality in provision of insurance services** 30

27. The Minister responsible for trade and industry, in conjunction with other relevant Ministers, must take steps necessary to prevent and eliminate unfair discrimination and to promote equality in the area of insurance provision as contemplated in section 51(4). 35

**PART H**

**PENSIONS**

**Definitions**

28. In this Part—
- (i) “beneficiary” means a person who has received or is to receive benefits from a retirement fund in terms of the rules of the fund as a result of the person’s relationship with a member of that retirement fund; 40
  - (ii) “retirement fund” means a pension fund, a provident fund or a retirement annuity fund;
  - (iii) “rules” means the constitution or rules of a retirement fund. 45

**Prohibition of unfair discrimination in respect of pensions**

29. The Minister responsible for pensions must, by notice in the *Gazette*, determine a date after which no existing or future rules may provide for—

- (a) the exclusion of any person from membership of a retirement fund or from receiving any benefits from the fund on one or more of the prohibited grounds;
- (b) unfair discrimination against one or more members or other beneficiaries of a retirement fund.

**Measures to prevent and eliminate unfair discrimination and to promote equality in respect of pensions** 5

30. The Minister responsible for pensions, in conjunction with other relevant Ministers, must take steps necessary to prevent and eliminate unfair discrimination and to promote equality in the area of pensions as contemplated in section 51(4).

**PART I** 10

**GOODS, SERVICES AND FACILITIES**

**Definitions**

31. In this Part “services” includes services—
- (a) relating to banking and the provision of grants, loans, credit or finance;
  - (b) relating to entertainment, recreation or refreshment;
  - (c) relating to transport or travel;
  - (d) provided by the State.

**Prohibition of unfair discrimination in provision of goods, services and facilities**

32. No person who provides goods or services, or makes facilities available, whether for payment or not, may unfairly or unreasonably discriminate directly or indirectly against any person or persons, in any manner, including the following:
- (a) By refusing or failing to provide the goods or services in question or to make the facilities in question available to any person or group of persons;
  - (b) in the terms or conditions in terms of which the goods, services or facilities are provided or made available, as the case may be;
  - (c) in the manner in which the goods, services or facilities are provided or made available;
  - (d) by imposing terms, conditions or practices that perpetuate the consequences of past discrimination or exclusion regarding access to financial resources.

**Measures to prevent and eliminate unfair discrimination and to promote equality in the provision of goods, services and facilities**

33. The Minister responsible for finance, in conjunction with other relevant Ministers, must take steps necessary to prevent and eliminate unfair discrimination and to promote equality in the provision of goods, services and facilities as contemplated in section 51(4).

**PART J**

**ASSOCIATIONS AND PARTNERSHIPS**

**Prohibition of unfair discrimination in respect of associations**

34. (1) No association may unfairly or unreasonably discriminate directly or indirectly against any person who is not a member of the association in question in any manner, including the following:
- (a) In the manner in which members are recruited;
  - (b) by refusing or failing to consider a person’s application for membership of the association;
  - (c) in determining the terms or conditions in terms of which the association in question is prepared to admit a person as a member.
- (2) No association may unfairly or unreasonably discriminate directly or indirectly against any member, in any manner, including the following:

- (a) In the terms or conditions of membership which are afforded to a member;
- (b) by refusing or failing to accept a person's application for a particular class or type of membership;
- (c) by denying a member access to, or by limiting a member access to, any benefit provided by the association; 5
- (d) by depriving a member of membership or varying the terms of membership.

### **Prohibition of unfair discrimination in respect of partnerships**

- 35.** (1) No person who is a member of a partnership may unfairly or unreasonably discriminate against any person in any manner, including the following:
- (a) In determining who should be invited to become a partner in the partnership in question; 10
  - (b) in the terms or conditions in terms of which a person is invited or admitted to become a partner.
- (2) No person who is a partner in a partnership may unfairly or unreasonably discriminate against any other partner in the partnership in any manner, including the following: 15
- (a) By denying that partner access to or by limiting that partner's access to, any benefit arising from being a partner in the partnership;
  - (b) by expelling that partner from the partnership.

### **Measures to prevent and eliminate unfair discrimination and to promote equality in associations and partnerships 20**

- 36.** The Minister responsible for trade and industry, in conjunction with other relevant Ministers, must take steps necessary to prevent and eliminate unfair discrimination and to promote equality in the areas of associations and partnerships as contemplated in section 51(4). 25

## ***PART K***

### ***CLUBS AND SPORT***

#### **Definitions**

- 37.** In this Part—
- (i) "club" includes an association of persons or an association of clubs that is established for any social, literary, cultural, political, sporting, athletic, recreational, community service or any other similar lawful purpose, whether incorporated or otherwise and includes specifically any company incorporated for purposes of managing the professional affairs of a club; 30
  - (ii) "designated groups" means— 35
    - (a) persons previously classified as Africans, Coloureds or Indians;
    - (b) women; or
    - (c) persons with disabilities;
  - (iii) "Minister" means the Minister of Sport and Recreation;
  - (iv) "national sport structure" means the national union of any sport code; 40
  - (v) "provincial sport structure" means the provincial union of any sport code.

#### **Prohibition of unfair discrimination by clubs**

- 38.** (1) No club, or committees, management or members thereof, may unfairly or unreasonably discriminate directly or indirectly against any person who is not a member of the club in question, in any manner, including the following: 45
- (a) In determining the terms or conditions in terms of which the club in question is prepared to admit a person as a member;
  - (b) by refusing or failing to consider a person's application for membership of the club;
  - (c) in the manner in which members are recruited or membership is processed. 50
- (2) No club may, unfairly or unreasonably discriminate directly or indirectly, against a member in any manner, including the following:
- (a) In the terms or conditions of membership which are afforded to a member;

- (b) by refusing or failing to consider a person's application for a different class or type of membership;
- (c) by denying or limiting access to any benefit, arising from membership, that is provided by the club;
- (d) by depriving a member of membership or varying the terms of membership; 5
- (e) by treating a member unfavourably in any manner in connection with the membership or affairs of the club;
- (f) by subjecting the member to any other unfair disadvantage.

**Measures to prevent and eliminate unfair discrimination and to promote equality in respect of clubs and sport** 10

**39.** (1) All clubs and national and provincial sport structures which benefit directly or indirectly from public resources must identify all forms of inequality and discrimination in this sector and take steps to eradicate such inequality, paying particular attention to the recruitment and equitable representation of designated groups in selection, administration, coaching and refereeing. 15

(2) The Minister must take steps necessary to prevent and eliminate unfair discrimination and to promote equality in the areas of sport and recreation as contemplated in section 51(4).

***PART L***

***PROFESSIONS*** 20

**Definitions**

- 40.** In this Part—
- (i) “profession” means an occupation that requires tertiary education and specialised training and skills, and that is regulated by a professional body;
  - (ii) “professional body” means a recognised body which is established to exercise control over and regulate the profession in question and its members. 25

**Prohibition of unfair discrimination by professional bodies**

**41.** (1) No professional body may, unfairly or unreasonably discriminate directly or indirectly, against any person who wishes to become a member of the profession in question in any manner, including the following: 30

- (a) In the manner in which members are recruited to the profession;
- (b) by refusing access to training;
- (c) by refusing or failing to accept a person's application for membership of the profession;
- (d) in the terms or conditions in respect of which the professional body is prepared to admit a person as a member of the profession. 35

(2) No professional body may, unfairly or unreasonably discriminate directly or indirectly, against a member of the profession in any manner, including the following:

- (a) In the terms or conditions of membership which are afforded to the member;
- (b) by denying the member access to, or by limiting the member's access to, any benefit or facility provided by the professional body; 40
- (c) by depriving a member of membership or varying the terms of membership of the professional body;
- (d) by subjecting the member to any other disadvantage;
- (e) by imposing terms and conditions which perpetuate present disadvantages emanating from the past. 45

**Measures to prevent and eliminate unfair discrimination and to promote equality in professions**

**42.** The Minister responsible for labour, in conjunction with other relevant Ministers, must take steps necessary to prevent and eliminate unfair discrimination and to promote equality in the area of professions as contemplated in section 51(4). 50

### CHAPTER 3

#### DEFENCES, ACTS DONE FOR MORE THAN ONE REASON AND BURDEN OF PROOF

##### Defence to claim of unfair discrimination

43. (1) It is a defence to a claim of unfair discrimination that the act or omission is reasonable and justifiable in the circumstances. 5

(2) The factors to be taken into account in deciding whether the act or omission is reasonable and justifiable in the circumstances include—

- (a) the purpose of the discrimination;
- (b) the nature and extent of the discrimination, including the nature and extent of the resultant disadvantage; 10
- (c) the relationship between the discrimination and its purpose; and
- (d) whether there are less restrictive and disadvantageous means to achieve the purpose.

(3) If unfair discrimination is alleged, there may be no finding that it is reasonable and justifiable in the circumstances unless it is established that the person or group affected by the discrimination cannot be accommodated without unjustifiable hardship. 15

(4) In determining the term “unjustifiable hardship” all relevant circumstances must be taken into account, including—

- (a) the nature of the benefit accruing to, or disadvantage suffered by, any person; 20
- (b) the effect of the disadvantage suffered by the person unfairly discriminated against;
- (c) the financial circumstances of the person who has a duty not to discriminate unfairly in the particular circumstances;
- (d) the estimated costs involved in addressing the unfair discrimination; 25
- (e) any plan of action.

##### Acts done for more than one reason

44. It is not a defence to a claim of unfair discrimination in terms of or under this Act that the complainant’s membership of a group identified by one or more of the prohibited grounds was not the dominant or the substantial cause of the unfair discrimination. 30

##### Burden of proof

45. (1) If the complainant makes out a *prima facie* case of unfair discrimination in terms of this Act, the respondent must—

- (a) prove that the discrimination is not based on one or more of the prohibited grounds; or 35
- (b) if it is proved that the discrimination is based on one or more of the prohibited grounds, that the discrimination is reasonable and justifiable in terms of section 43.

(2) For purposes of this section the requirements to make out a “*a prima facie* case of unfair discrimination” include a differentiation or failure to differentiate on a prohibited ground which causes prejudice to a person of a disadvantaged group or which causes violation of the right to dignity. 40

### CHAPTER 4

#### EQUALITY COURTS 45

##### Institution of proceedings in terms of or under Act

46. (1) (a) If a court, at any stage during an inquiry, is of the opinion that the matter before it could be dealt with more appropriately in another dispute resolution forum, that court may refer or transfer the proceedings to the forum in question in the prescribed manner. 50

(b) In order to facilitate the channelling of appropriate matters to the courts for adjudication in terms of this Act, the Minister must, as soon as possible after the

commencement of this Act and after consultation with the relevant role-players, issue and distribute guidelines to all State Departments and courts on the operation of this Act, setting out the categories of matters which could be dealt with more appropriately in other dispute resolution forums.

- (2) The following may institute proceedings in terms of or under this Act: 5
- (a) Any person acting in that person's interest;
  - (b) any person acting on behalf of another person who cannot act in that person's own name;
  - (c) any person acting as a member of, or in the interests of, a group or class of persons; 10
  - (d) any person acting in the public interest;
  - (e) any association acting in the interests of its members;
  - (f) the South African Human Rights Commission or any other relevant person designated by the Minister by notice in the *Gazette*.
- (3) No proceedings may be instituted in terms of or under this Act in relation to unfair discrimination in respect of issues relating to employment if the issues in question are regulated by the Employment Equity Act, 1998 (Act No. 55 of 1998). 15

### Equality courts

47. (1) For the purposes of this Act, but subject to section 53—
- (a) every magistrate's court and every High Court is an equality court for the area of its jurisdiction; and
  - (b) every magistrate, additional magistrate, assistant magistrate and judge may be designated by the Minister to be a presiding officer of the equality court of the area in respect of which he or she is magistrate, additional magistrate, assistant magistrate or judge, as the case may be. 25
- (2) A presiding officer designated by the Minister must perform the functions and exercise the powers assigned to or conferred on him or her by this Act or any other law.
- (3) (a) Subject to the laws governing the public service, the Director-General of the Department may, for every equality court, appoint one or more officers in the Department, or may appoint one or more persons in the prescribed manner and on the prescribed conditions, as equality court assistants, who must generally assist the court to which they are attached in performing its functions and who must perform the functions of such assistants as may be prescribed. 30
- (b) If an equality court assistant is for any reason unable to act as such or if no court assistant has been appointed for any equality court under paragraph (a), the presiding officer concerned may designate any competent officer in the Department to act as court assistant as long as the said assistant is unable to act or until a court assistant is appointed under paragraph (a), as the case may be. 35
- (4) (a) On the application of an equality court assistant in the prescribed manner, the clerk of the court or registrar, as the case may be, must subpoena any witness to give evidence or to produce a book, document or any other information at any proceedings of the court. 40
- (b) On the application of any person who is likely to be affected by any order which may be made by the court as a result of any proceedings therein or his or her legal representative or any person or institution that instituted the proceedings in question, the clerk of the court or the registrar, as the case may be, must subpoena any witness to give evidence or to produce a book, document or any other information at any proceedings of the court. 45
- (c) A subpoena referred to in paragraph (a) or (b) must be served on the witness concerned as if it were a subpoena in a criminal trial in a magistrate's court. 50
- (d) Sections 188 and 189 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), apply with the necessary changes required by the context in connection with a person subpoenaed under paragraph (a) or (b) or required by a presiding officer.
- (e) A witness referred to in paragraph (a) or witness subpoenaed at the request of the presiding officer is entitled to such an allowance as would be due to him or her if he or she were attending criminal proceedings as a witness for the State. 55
- (f) The court may, on the application of a witness referred to in paragraph (b), on good grounds shown, direct that such witness be paid such allowance as may be paid to a witness for an accused person in criminal proceedings.
- (5) 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 to equality courts, in so far as these provisions relate to—

- (a) the appointment and functions of officers;
- (b) the issue and service of process; 5
- (c) the conduct of proceedings;
- (d) the execution of judgments or orders;
- (e) the imposition of penalties for non-compliance with orders of court, for obstruction of execution of judgments or orders, and for contempt of court;
- (f) jurisdiction, 10

and in so far as no other provision has been made in the regulations under section 52 of this Act for any matter mentioned in this subsection.

(6) 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.

#### **Powers and functions of equality court** 15

**48.** (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 has taken place, as alleged.

(2) After holding an inquiry, the court may, if it is satisfied that unfair discrimination has taken place, as alleged, make an appropriate order in the circumstances, including— 20

- (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 in question; 25
- (e) an order for the payment of damages in the form of an award to a body or organisation responsible for addressing unfair discrimination; 30
- (f) an interdict restraining unfair discriminatory practices;
- (g) an order directing that specific steps be taken to stop the unfair discrimination;
- (h) an order to make specific opportunities and privileges unfairly denied in the circumstances, available to the complainant in question;
- (i) an order for the implementation of special measures to address the unfair discrimination in question; 35
- (j) an order directing the reasonable accommodation of a group or class of persons by the respondent;
- (k) an order that an unconditional apology be made;
- (l) an order requiring the respondent to undergo an audit of specific policies or practices; 40
- (m) an order to comply with any provision of the Act;
- (n) an order suspending a licence of a person;
- (o) 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; 45
- (p) an order of costs against any party to the proceedings.

(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— 50

- (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 for further investigation;
- (b) any proceedings before it for mediation, conciliation or negotiation,

to the relevant constitutional institution: Provided that nothing precludes the court from attempting to resolve any dispute or to rectify any act or omission which gave rise to the proceedings in question. 55

(5) The court has all ancillary powers necessary or reasonably incidental to the performance of its functions and the carrying out of its powers, including the power to grant interlocutory orders or interdicts. 60

## Assessors

49. (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 interest 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, who, subject to subsection 5 (5), are also members of the court for purposes of this Act.

(2) In this section “assessor” means a person whose name is registered on a roll of assessors, in terms of the regulations.

(3) (a) In considering whether the summoning of assessors under subsection (1) would be in the interest of justice, the presiding officer must take into account— 10

- (i) the cultural and social environment of the parties to the proceedings;
- (ii) the educational background of the parties to the proceedings;
- (iii) the nature and the seriousness of the unfair discrimination in question;
- (iv) the views, if any, of the parties to the proceedings regarding the summoning of assessors in respect of the proceedings concerned; 15
- (v) any particular interest which the community in general, or any specific community, may have in the proceedings concerned; or
- (vi) any other matter or circumstance which he or she may deem to be indicative of the desirability of summoning an assessor or assessors.

(b) The presiding officer may question the parties in relation to the matters referred to in paragraph (a), or obtain such information from their legal representatives. 20

(4) Every assessor must, upon registration on the roll of assessors referred to in subsection (2), in writing take an oath or make an affirmation subscribed by him or her before the magistrate of the district concerned or the judge of the High Court concerned in the form set out below, namely— 25

“I ..... (full name) do hereby swear/solemnly affirm that whenever I may be called upon to perform the functions of an assessor in terms of section 49 of the Promotion of Equality and Prevention of Unfair Discrimination Act, 1999, I shall to the best of my ability make a considered finding or decision, or give a considered opinion, as the case may be, according to the evidence tendered in the matter.”. 30

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

(b) The presiding officer must adjourn the proceedings regarding any matter or question referred to in paragraph (a) and must sit alone for the hearing of such proceedings and the decision of such matter or question. 35

(c) Whenever the presiding officer makes a decision in terms of paragraph (a) he or she must give his or her reasons for that decision.

(6) 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. 40

(7) Whenever a presiding officer is assisted by assessors, he or she must, after the conclusion of the arguments by the parties or their legal representatives, but before judgment is passed in the matter, explain to the assessors any specific rule of evidence or any other matter that is relevant in respect of the evidence tendered to the court. 45

(8) The record of any proceedings where a presiding officer has been assisted by assessors—

(a) regarding the evidence adduced at the proceedings, must include any explanation or instruction given to the assessors by the presiding officer in respect of any applicable rule of evidence or any other matter; and 50

(b) regarding the judgment must indicate clearly whether the findings in respect of each material aspect of the evidence—

- (i) are the unanimous findings of the members of the court; and
- (ii) in the event of any member of the court making a finding different to that of the other members, set out the reasons for such different finding. 55

(9) (a) A presiding officer who is assisted by assessors may, on application by any of the parties to the proceedings, order the recusal of an assessor or assessors from the proceedings if he or she is satisfied that—

- (i) an assessor has a personal interest in the proceedings concerned; 60
- (ii) there are reasonable grounds for believing that there is likely to be a conflict of interests as a result of an assessor’s participation in the proceedings concerned; or

- (iii) there are reasonable grounds for believing that there is a likelihood of bias on the part of an assessor.
- (b) An assessor may recuse himself or herself from the proceedings for the reasons contemplated in paragraph (a).
- (c) The parties to the proceedings must— 5
- (i) before the recusal of an assessor is ordered in terms of paragraph (a); or
  - (ii) in so far as it is practicable, before the recusal of an assessor in terms of paragraph (b),
- be given an opportunity to address arguments to the presiding officer on the desirability of such recusal. 10
- (d) The assessor concerned must be given an opportunity to respond to any arguments referred to in paragraph (c), and the presiding officer may put such questions regarding the matter to an assessor as he or she may deem fit.
- (e) The presiding officer must give reasons for an order referred to in paragraph (a).
- (10) (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— 15
- (i) direct that the proceedings continue before the remaining member or members of the court;
  - (ii) direct that the proceedings start afresh; or
  - (iii) if an assessor is absent, postpone the proceedings in order to obtain the assessor's presence. 20
- (b) The presiding officer must give reasons for any direction referred to in subparagraph (i) or (ii).
- (11) A presiding officer who is assisted by assessors at an inquiry where a party to the proceedings has an order made against him or her, must, if that party to the proceedings is not assisted by a legal representative and if the presiding officer is of the opinion that the assessors concerned have clearly made an incorrect finding in a material respect which probably led to a finding or an order which is incorrect, record the reasons for his or her opinion and transmit them, together with the record of the proceedings, to the registrar of the High Court having jurisdiction, and such registrar must, as soon as is practicable, submit the said reasons and the record to a judge in chambers for review, who has the power to confirm the said finding or to make any appropriate order in respect of such finding that, in the opinion of the judge, should have been made in the circumstances. 30 35

## Appeals

**50.** (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. 40

(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 think fit. 45

## CHAPTER 5

### PROMOTION OF EQUALITY

#### Promotion of equality

**51.** (1) The State must, where necessary with the assistance of the relevant constitutional institutions— 50

- (a) develop awareness of fundamental rights in order to promote a climate of understanding, mutual respect and substantive equality;
- (b) take measures to develop and implement programmes of action in order to promote substantive equality;
- (c) where necessary, develop action plans to address any unfair discrimination; 55

- (d) where appropriate, enact further legislation that seeks to promote substantive equality and to establish a legislative framework in line with the objectives of this Act;
  - (e) where appropriate, develop codes of good practice in order to promote equality, and develop guidelines, including codes on reasonable accommodation; 5
  - (f) provide assistance, advice and training on issues of equality;
  - (g) where necessary, develop appropriate internal mechanisms to deal with complaints of discrimination;
  - (h) conduct information campaigns with a view to the popularisation of this Act. 10
- (2) The provisions of subsection (1), where appropriate, are also applicable to the constitutional institutions, which in addition, may request any organ of State or person to supply them with information on any legislative, executive or other measures adopted, relating to the achievement of substantive equality, including their compliance with legislation, codes of good practice and programmes of action. 15
- (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 the equality court, particularly complainants who are disadvantaged in any way;
  - (b) conduct investigations into cases of persistent contravention of this Act or cases of systemic unfair discrimination referred to them by an equality court; 20
  - (c) receive regular reports regarding the number of cases and the nature and outcome thereof dealt with by the equality courts within a specified period of time.
- (4) The Ministers responsible for the sectors referred to in Parts D to L in Chapter 2 must promote equality in those sectors by— 25
- (a) eliminating any form of inequality in any law, policy or practice for which those Ministers are responsible; and
  - (b) preparing and implementing equity plans in the prescribed manner— 30
    - (i) which are intended to achieve reasonable progress towards equality in those sectors; and
    - (ii) the contents of which must include a time frame for implementation of such plans in consultation with the Minister of Finance.
- (2) The prescribed equity plans must, within two years after the commencement of this Act, be submitted to the South African Human Rights Commission. 35

## CHAPTER 6

### GENERAL PROVISIONS AND IMPLEMENTATION OF ACT

#### Regulations

- 52.** (1) The Minister may make regulations relating to—
- (a) the powers, duties and functions of an equality court assistant; 40
  - (b) 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 and the hearing of urgent matters;
  - (c) 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; 45
  - (d) 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; 50
  - (e) the method to be followed in respect of the allocation of assessors in respect of proceedings in terms of or under this Act;
  - (f) 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; 55
  - (g) the establishment of a mechanism to deal with any grievance or complaint by or against an assessor;
  - (h) the training of assessors;
  - (i) the payment of allowances to assessors;

- (j) the granting of legal aid at State expense in appropriate cases in consultation with the Legal Aid Board;
  - (k) the appearance of persons on behalf of the parties to the proceedings in court, which may include suitable persons other than attorneys or advocates;
  - (l) any other matter which is necessary to prescribe in order to regulate the service of assessors in the equality courts; 5
  - (m) any matter required or permitted to be prescribed by regulation under this Act;
  - (n) 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. 10
- (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 three months. 15
- (4) Any regulation made under this section must be tabled in Parliament before publication thereof in the *Gazette*.
- (5) The regulations made in terms of this section, and particularly subsection (1)(b) relating to the procedure at an inquiry, must, as far as possible, ensure that the application of the Act is simple, fair and affordable. 20

### Implementation of Act

- 53.** (1) Despite section 47(1)(a) and (b), and until the Minister determines by notice in the *Gazette*, no proceedings may be instituted in any court unless—
- (a) a presiding officer is available who has been designated as such by the Minister after consultation with the Magistrates' Commission or the Judicial Service Commission, as the case may be, by reason of his or her training, experience, expertise and commitment to the values of equality and human rights; and 25
  - (b) one or more trained equality court assistants are available.
- (2) For purposes of giving full effect to this Act and making the Act as accessible as possible and in giving effect to subsection (1), the Minister may designate suitable magistrates, additional magistrates, assistant magistrates or judges, as the case may be, and equality court assistants referred to in subsection (1) as presiding officers and equality court assistants, respectively, for one or more equality courts. 30
- (3) The Minister must take all reasonable steps within the available resources of the Department to achieve the progressive realisation of the appointment of at least one presiding officer and equality court assistant for each court in the Republic. 35
- (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— 40
- (a) establishing uniform norms, standards and procedures to be observed by presiding officers and equality court assistants in the performance of their functions, in the carrying out of their duties and in the exercising of their powers as such in terms of or under this Act; and
  - (b) building a dedicated and experienced pool of trained and specialised presiding officers and equality court assistants. 45
- (5) The Minister must table in Parliament a copy of any policy directives and training courses issued or developed in terms of subsection (4) as soon as possible after the finalisation thereof.

## CHAPTER 7 50

### REVIEW OF ACT, SHORT TITLE AND COMMENCEMENT

#### Establishment of review committee

- 54.** The Minister must, within five years after the commencement of this Act, by notice in the *Gazette*, establish a Review Committee consisting of—
- (a) a senior judicial officer with appropriate qualifications; 55
  - (b) the Chairperson of the South African Human Rights Commission;

- (c) a member of any relevant constitutional institution, a representative of civil society and an expert in the field of human rights, especially the right to equality.

#### **Functions of Review Committee**

- 55.** (1) The Review Committee— 5
- (a) must advise the Minister about the operation of this Act;
  - (b) may advise the Minister about any law that impacts on equality;
  - (c) has the other functions and powers as prescribed;
  - (d) must, as soon as practicable, submit a report to the Minister on the operation of the Act, which must address 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. 10
- (2) The Review Committee may conduct its business and proceedings at its meetings as it deems fit.

#### **Short title and commencement** 15

- 56.** (1) This Act is called the Promotion of Equality and Prevention of Unfair Discrimination Act, 1999, 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.

**MEMORANDUM ON THE OBJECTS OF THE PROMOTION OF  
EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION  
BILL, 1999**

1. Section 9 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”), which deals with the right to equality, read with item 23(1) of Schedule 6 to the Constitution, requires the enactment of national legislation within three years of the commencement of the Constitution (that is by 3 February 2000) to give full effect to the right to equality as contemplated in the Constitution.

2. The objects of the Bill are, amongst others, to:

- give effect to the letter and spirit of the Constitution, especially to the founding values of equality, human dignity and freedom of expression;
- prevent, prohibit and provide redress for unfair discrimination, and give effect to South Africa’s international treaty obligations relating to human rights;
- provide for the progressive eradication of current systemic discrimination which is a legacy of previously legalised discrimination, thereby transforming South Africa into a country which is based on respect for the dignity and equal worth of all human beings.

3. Clause 3 in Chapter 1 requires all persons interpreting the Bill to look to the Constitution, the Preamble to the Bill, the purpose thereof (clause 2), the guiding principles thereof (clause 4), any prescribed code of good practice, international law, including relevant international treaties, foreign law and customary international law for guidance, in preference to other sources of judicial precedents. The interpretation clause makes it clear that the specific forms of grounds of unfair discrimination or sectors provided in the Bill do not infer the exclusion of other recognised grounds, sectors or forms of unfair discrimination.

4. The guiding principles in clause 4 “pave the way” as it were for special rules of procedure, special training of judicial officers, the facilitation of legal assistance in deserving cases, the balancing of punitive measures and corrective or positive measures and the facilitation of expeditious, affordable, participative and, where possible, informal dispute resolution procedures. Regarding the application of the legislation, the proposed Act binds the State (defined in clause 1) and all persons (also defined in clause 1 to include juristic persons and non-juristic entities).

5. Chapter 2 of the Bill deals with the prohibition and elimination of unfair discrimination. Part B in Chapter 2 concentrates on unfair discrimination in respect of race and gender. It sets out what racism, racial discrimination and gender discrimination mean and provides specific examples of discrimination of this nature which are prohibited. It also sets out specific measures to eliminate the unfair discrimination in question.

6. Parts C to L in Chapter 2 set out the prohibition and elimination of unfair discrimination in specific sectors. The sectors dealt with, but not to the exclusion of others, are employment, education, health care, accommodation, land and property, insurance, pensions, goods, services and facilities, associations and partnerships, clubs and sport and the professions. In respect of each sector, the relevant Minister or Ministers are mandated to take steps to promote equality by eliminating any form of inequality in any law, policy or practice and by preparing and implementing equity plans which are intended to achieve reasonable progress towards equality in the various sectors and to report to the South African Human Rights Commission in respect thereof.

7. Chapter 3 of the Bill deals, amongst others, with general defences and burden of proof.

8. Chapter 4 deals with the enforcement of the legislation. Clause 46 allows an equality court to transfer or refer proceedings before it to another appropriate dispute resolution forum and also requires the Minister for Justice and Constitutional Development (“the Minister”) to issue guidelines, setting out categories of matters which could best be dealt with in other dispute resolution forums. Clause 46 also sets out

the persons or institutions which can institute proceedings in the equality courts. Every Magistrate's Court and High Court is, in terms of clause 47, an equality court, within its existing monetary jurisdictional limits, but initially and in terms of clause 53, no proceedings may be instituted in any such court in terms of this legislation unless a presiding officer (that is a magistrate or judge, as the case may be) is available who has been designated as such by the Minister, after consultation with the Magistrate's Commission or the Judicial Service Commission, by reason of his or her training, experience, expertise and commitment to the values of equality and human rights. Clause 48 sets out a range of orders which an equality court can make. Clause 49 deals with the appointment and regulation of assessors, who are members of the court for purposes of the legislation, except in so far as a finding on a question of law is involved. Clause 50 deals with appeals from equality courts, either to the High Court having jurisdiction or the Supreme Court of Appeal.

9. Chapter 5, dealing with the promotion of equality, sets out the duties of the State, as defined in clause 1, and the constitutional institutions supporting democracy relating to the promotion of equality, requiring them to take certain positive measures to ensure that real equality is achieved as far as possible.

10. Chapter 6, dealing with general provisions and the implementation of the legislation, empowers the Minister to make regulations in respect of a number of matters, eg the powers, duties and functions of equality court assistants, the procedure to be followed in an inquiry in terms of the legislation (which must be simple, fair and affordable), the appointment of assessors, the question of legal aid and the appearance of persons on behalf of parties to the proceedings in court, which may include suitable persons other than attorneys or advocates.

11. Chapter 7 of the Bill, dealing with the review of the legislation and the short title and commencement thereof, empowers the Minister to establish a review committee to advise the Minister on the operation of the legislation, any other law that impacts on equality and any changes that should be made to the legislation to improve its operation.

#### **FINANCIAL IMPLICATIONS**

12. 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, the granting of legal assistance to complainants 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.

13. 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.

#### **PARLIAMANTARY PROCEDURE**

14. 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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