
GENERAL NOTICE

NOTICE 743 OF 2004

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT, 2000 (ACT 4 OF 2000)

INVITATION TO COMMENT ON THE PROPOSED DATE OF COMMENCEMENT OF CHAPTER 5 OF THE PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT, 2000 (ACT 4 OF 2000) AND THE REGULATIONS UNDER SECTION 30 OF THE ACT

1. You are hereby invited to comment on –
 - (a) the proposed date of commencement of certain provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000) (hereafter referred to as the Act); and
 - (b) the draft regulations to be made under section 30 of the Act which will facilitate the implementation of the provisions concerned.

2. The Act was published in Government Gazette No. 20876 of 9 February 2000. In terms of section 35 of the Act, the Act shall come into operation on a date fixed by the President by proclamation in the Gazette.

3. Sections 1, 2, 3, 4(2), 5, 6, 29 (with the exception of subsection (2)), 32, 33 and 34(1), which mainly deal with the powers and the functions of the Equality review Committee, came into operation on 1 September 2000. Sections 4(1), 7 to 23, 30, 31 and 34(2) of the Act and the Regulations Relating to the Promotion of Equality and Prevention of Unfair Discrimination, 2003, made under section 30 of the Act and which regulate the functioning of the equality courts came into operation on 16 June 2003.

4. It is intended to put the remainder of the Act (sections 24 to 28 and section 29(2)) into operation with effect from 9 August 2004.

5. Section 30(1)(t) and (u) of the Act provide for the promulgation of regulations by the Minister regarding the reports contemplated in sections 25(3)(c), 26(c), the equality plans contemplated in section 25(4)(b) and (5)(a) and section 27(2), as well as the translation of the Act into the official languages and the distribution thereof as contemplated in section 31(2)(b). As it is intended to put the remaining sections of the Act into operation on 9 August 2004, draft regulations addressing the said issues, were formulated. A copy thereof is hereby attached for your attention.

6. In view of the impact of the Act and these regulations on your activities and operations it is important that proper consideration be given to the matter. Draft regulations 1 and 2 are of a very technical nature and you do not need to comment on them. In considering the draft regulations, it is very important to take cognizance of the definitions set out in section 1 of the Act.

7. **Please submit your comment on or before 21 May 2004 to:**

**The Chief Director: Legislative Development
Department of Justice and Constitutional Development
Private Bag X 81
PRETORIA
0001**

or

**Ms K Pillay
Room 9.35
Momentum Centre: East Tower
329 Pretorius Street
PRETORIA
0001**

or

Fax to: (012) 315 1821

or

E-mail to kalapillay@justice.gov.za

8. Please refer to the Equality Booklet, 2003 for more information on the provisions of the Act. This booklet is available on the Departmental website at the following address:

http://www.doj.gov.za/equality%20act/eqc_other%20docs.htm

The Minister may, in terms of section 27 read with section 30 of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000) prescribe a Code of Practice.

ANNEXURE C

CODE OF PRACTICE

1. PURPOSE AND STATUS OF THE CODE

1.1 The code forms part of the regulations promulgated by the Minister of Justice and Constitutional Development in terms of section 30 of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000) (the Equality Act) and has as such the force of law.

1.2 The code aims to improve understanding on the Equality Act to enhance efforts for effective implementation.

1.3. The code also aims to give practical guidelines to assist in auditing policies and practices, developing new policies and practices and adopting action plans for the promotion and achievement of equality.

1.4. A failure of a person to follow the guidelines contained in this code does not in itself render such person/s liable to proceedings of any kind. Evidence of such breach may be admissible in other proceedings, for instance in an Equality Court where matters relating to unfair discrimination will be adjudicated.

2. BACKGROUND

2.1 The Constitution

The Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996) creates a new order in which all South Africans are entitled to a common South African citizenship in a sovereign and democratic state in which there is **equality between men and women of all races. The right to equality enshrined in the Constitution enables all men and women to enjoy and exercise their fundamental rights and freedoms as contemplated in the Bill of Rights.**

The right to equality is entrenched in section 9 of the Constitution. What does this right entail? **Equality includes the full and equal enjoyment of all rights and freedoms.**

Section 9 of the Constitution further provides that **neither the state nor any person may 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. These are called the **grounds of discrimination**.

Direct discrimination occurs where a person is disadvantaged simply on the ground of his or her race, sex, ethnicity, religion or some other distinguishing feature, or on the grounds of some characteristics that are specific to members of a particular group. **Indirect discrimination** occurs when policies are applied which appear to be neutral, but which adversely affect a disproportionate number of a certain group.

In terms of section 9 of the Constitution **legislative and other measures designed to protect or advance persons, or categories of persons disadvantaged by unfair discrimination, may be taken to promote equality.** This means that redistributive measures are permitted. They are designed to counteract patterns of inequality persisting from the past into the present. In this regard one can, for example, refer to the so-called affirmative action measures which have the effect of ensuring that equality is achieved.

Section 9 of the Constitution also requires that **national legislation be enacted** to prevent or prohibit unfair discrimination. Particulars of the legislation that has been enacted are dealt with in paragraph 2.2 below.

2.2 The Promotion of Equality and Prevention of Unfair Discrimination Act

The Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000) (the Equality Act) was promulgated to give effect to section 9 of the Constitution. It endeavours to facilitate the transition to a **democratic society united in its diversity and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom.**

The Equality Act makes provision for the prevention and prohibition of unfair discrimination. **Discrimination means any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly –**

(a) imposes burdens, obligations or disadvantages on; or

(b) withholds benefits, opportunities or advantages from,

any person on one or more of the grounds of discrimination. The Equality Act sets out the procedures for the determination of circumstances under which discrimination is unfair. The Equality Act also facilitates the setting up of Equality Courts for the hearing of matters relating to this Act.

The Equality Act is based on the premise that there are systemic patterns of discrimination and material disadvantage based on race, gender, class and other forms of inequality. It therefore facilitates the implementation of pro-active measures to eradicate such patterns and hence requires positive action. The Equality Act therefore also provides for the promotion of equality.

The **promotion of equality** entails the promotion of a society in which all people are secure in the knowledge that **they are recognised as human beings equally deserving of concern, respect and consideration.** It also entails the development of opportunities which allow people to realise their full human potential within positive social relationships.

Section 24 read with section 28 of the Equality Act provides that **the State and all persons have a duty and responsibility to -**

- (a) eliminate discrimination on the grounds of race, gender and disability; and
- (b) **promote equality in respect of race, gender and disability.**

In carrying out the aforementioned **duties and responsibilities -**

- (a) **policies and practices must be audited, with a view to eliminating all discriminatory aspects thereof;**
- (b) **progressive policies must be developed and codes of practice must be initiated in order to eliminate discrimination on the grounds of race, gender and disability;**
- (c) **viable action plans must be adopted for the promotion and achievement of equality in respect of race, gender and disability; and**
- (d) **priority must be given to the elimination of unfair discrimination and the promotion of equality in respect of race, gender and disability.**

Section 27 of the Equality Act deals with the social commitment by all persons to promote equality. It includes persons (natural and juristic), non-governmental organisations, community-based organisations and traditional institutions. This section places an obligation on the **Minister** for Justice and Constitutional Development to **develop regulations in relation to the Equality Act, which require companies, closed corporations, partnerships, clubs, sports organisations, corporate entities and associations to prepare, amongst other things, equality plans or abide by prescribed codes of practice.**

3. APPLICATION OF THE CODE

This code applies to all persons (natural and juristic), non-governmental organisations, community-based organisations and traditional institutions as contemplated in section 27 of the Equality Act. This includes, for example, companies, closed corporations, partnerships, clubs, sports organisations, corporate entities and associations.

4. CONTENT OF CODE

4.1 Notes and Explanations

Remember that acts of discrimination are unlawful if all of the following are present:

- (a) people are treated differently;
- (b) the different treatment constitutes discrimination;
- (c) the discrimination is unfair; and
- (d) the discrimination is not reasonable and justifiable in accordance with the provisions of section 36 of the Constitution.

Note that it is not unfair discrimination to take measures to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons.

Further remember that the guidelines provided for in this code must be read within the context of the Equality Act which prohibits unfair discrimination.

Where-ever in this code reference is made to **equal treatment**, this means **treating like cases alike and unlike cases differently in proportion to their likeness or difference**.

This means that in certain cases it is the very essence of equality to make distinctions between groups and individuals in order to accommodate their different needs and interests.

4.2 General aspects

- ❖ **Policies and practices:** Review current policies and practices to eliminate factors that undermine equality. Remove all discriminatory provisions from policies and practices.
- ❖ **Language:** To the extent possible, the language used must accommodate differences. Measures must be taken to ensure that language usage is responsive to the language needs of different persons.
- ❖ **Promotion of equality:** In the first instance, exclusion must be avoided. Secondly, pro-active measures must be designed to address indirect exclusions that are a result of past discriminatory practices. Thirdly, pro-active measures must be implemented to promote equality for the present and the future.

4.3 Specific sectors

In this part of the code, reference is made to different sectors such as education, pensions and employment. In respect of each sector, general statements are made, followed by specific do's and don'ts as examples.

❖ Membership of organisations, clubs or sport associations

Pro-active measures should be developed and implemented to include persons who were previously excluded from membership due to past patterns of discrimination. Membership criteria must be of such a nature to ensure representivity.

The following are examples:

- (a) No person is excluded from membership solely because of him or her being a member of a particular group for example exclusion on the grounds of race, gender, disability, etc;
- (b) Certain groups are not relegated to certain categories of membership;
and
- (c) Every member enjoys the same rights, for example the right to vote, to elect the leadership of organisations, clubs or sport associations, etc, and the equal right to participate in the decision-making processes of such entities.

❖ Procuring goods and services

In procuring goods and services, no person must be excluded solely on the basis of her or his race, gender or disability. Moreover, measures must be developed and implemented to ensure that goods and services are procured from persons who were previously disadvantaged.

The following are examples:

- (a) An invitation for the procurement of goods and services must be formulated in a manner that ensures that every person has an equal opportunity in supplying the goods or rendering the service. The specifications and the conditions in the invitation must not by their mere nature have the effect of excluding persons from disadvantaged groups.

- (b) The media used in inviting persons to supply the goods or to render the services must be chosen with circumspection so as to ensure that all categories of the community have access thereto and are allowed an equal opportunity to respond to the invitation. It must therefore be as inclusive as possible and include new ways to reach people previously excluded.
- (c) The time periods mentioned in the invitations must ensure that all persons are afforded an equal opportunity to respond timeously thereto.
- (d) The language used in the invitation must, as far as possible, be understandable to all persons.
- (e) The criteria for selection must be non-discriminatory. It must furthermore include measures to address historical imbalances particularly in terms of race, gender and disability.
- (f) Contracts for the procurement of goods and services must not contain discriminatory (directly or indirectly) clauses. Contracts must also not bring about less favourable terms for persons previously disadvantaged.
- (g) In securing accommodation for events, make sure that the facilities are accessible to all. This includes accommodating differences, for example disability, or accessibility by means of public transport, etc.
- (h) In securing accommodation for events, special measures must be implemented and efforts must be made to make use of accommodation owned or controlled by previously disadvantaged persons.

❖ **Accommodation, property, land and facilities**

Accommodation refers to residential and business accommodation. Equal opportunity and non-discrimination must guide policies and practices relating to the above.

The following are examples:

- (a) Make sure that your business premises and the facilities are accessible to all persons. This includes accommodating differences such as disability.
- (b) If you provide accommodation as part of your business, all persons making use thereof must be treated equally.
- (c) If you have property to let, all prospective tenants must be treated equally and you may not refuse to offer premises to a person owing to his or her race, gender, disability, etc.

- (d) No person may be evicted solely on the basis of him or her being a member of a particular group.
- (e) No person may refuse to sell his or her property to a person solely based on his or her race, gender, disability, etc.
- (f) Steps must be taken to remove existing obstacles that unfairly limit or restrict disabled persons from access to accommodation.

❖ **Employment**

The following is applicable to any person who is not included in the definition of “designated employer” in section 1 of the Employment Equity Act, 1998. It includes local spheres of government, the National Defence Force, the National Intelligence Agency and the South African Secret Service.

Employment policies and practices must not have the effect of excluding persons from groups identified through grounds of discrimination. Pro-active measures must be adopted and implemented to address indirect exclusion that is the result of systemic discrimination based on gender and past forms of discrimination and practices.

Employment practices and policies include –

- (a) recruitment procedures, advertising and selection criteria;
- (b) the appointment process and appointments;
- (c) job classification and grading;
- (d) remuneration, employment benefits and terms and conditions of employment;
- (e) job assignments;
- (f) the working environment and facilities;
- (g) training and development;
- (h) performance evaluation systems;
- (i) promotion;
- (j) transfer;
- (k) demotion;
- (l) disciplinary measures other than dismissal;
- (m) dismissal;
- (n) adoption of measures to prevent harassment;
- (o) adoption of measures prohibiting hate speech.

The following are examples:

- (a) Review current employment practices and policies to eliminate factors or criteria that undermine equal access and enjoyment of employment opportunities.
- (b) The wording of a job advertisement must be drafted in such a way as to ensure that it reaches all potential applicants from all sectors of society, be it geographical, gender based, or other means of differentiation, for example advertisements must not have a gender bias towards men or urban based communities.
- (c) Methods and procedures used in selecting applicants for employment must be fair. The same processes and procedures for assessing all applications must be followed. The processes and procedures must be inclusive and culturally friendly.
- (d) Terms or conditions of employment must be equal for all applicants, include the full range of benefits available from employment and be non-discriminatory. This includes the salary package, promotion, leave, training, transfers, retrenchment and any other benefits
- (e) Conditions of service must accommodate differences relating to parental responsibilities and disability, for example employees must be afforded sufficient time for child rearing responsibilities and they may not be disadvantaged as a result of having such time. This includes adequate leave, or the arrangements to work flexi-time, etc.
- (f) Persons previously disadvantaged may not be appointed on less favourable terms.
- (g) The endorsement of a policy prohibiting hate speech.
- (h) The endorsement of a policy addressing harassment.
- (i) The removal of existing obstacles that unfairly limit or restrict disabled persons from obtaining employment.

❖ Rendering of services and provisioning of goods

In rendering services and providing goods -

- (a) persons previously excluded on grounds of discrimination must be included; and
- (b) equal and non-discriminatory policies and practices must guide your actions.

In planning and rendering services, attention must be given to differences in respect of clients with regard to gender, race, language, disability and other appropriate factors such as economic status.

The following are examples:

- (a) If part of your business is to render a service, you must ensure that the quality of your service is always the same, irrespective of who your client is.
- (b) In rendering your services, you must ensure that you properly understand your client and where possible, make use of somebody who is conversant with the language used by your client.
- (c) If you are an NGO or CBO make sure that your funds are utilised for the betterment of all the citizens.
- (d) You may not refuse or fail to provide any goods or render any service to any person or group of persons on one or more of the grounds of discrimination.
- (e) You may not impose any term, condition or follow any practice that perpetuates the consequences of unfair discrimination or make an exclusion regarding access to financial resources.
- (f) You may not unreasonably refuse to grant a service to persons solely on the basis of their HIV/AIDS status.
- (g) You may not refuse to make available a policy to any person on one or more of the grounds of discrimination.
- (h) You also may not unfairly discriminate in the provisioning of benefits, facilities and services related to insurance.
- (i) You may not unfairly deny or refuse a person access to health care facilities.
- (j) You may not unfairly fail to make health care facilities accessible to any person.
- (k) You are not allowed to refuse to provide emergency medical treatment to persons of particular groups identified by one or more of the grounds of discrimination.
- (l) Special measures must be developed and implemented to ensure that persons, who were previously excluded from receiving treatment at a particular facility, are benefiting from the service.
- (m) Staff at health care facilities must be responsive to the needs of all people and treat them as equals, with compassion and respect.
- (n) Steps must be taken to remove existing obstacles that unfairly limit or restrict disabled persons from access to goods and services.

❖ Partnerships

No one must be excluded as a partner in a partnership solely on the grounds of his or her race, gender or disability. Pro-active measures must be taken to include as partners persons who were excluded as a result of historical patterns of discrimination.

The following are examples:

- (a) You may not determine in an unfair and discriminatory manner who should be invited to become a partner in a partnership.
- (b) A person who is invited to become a partner or is admitted as a partner must be so invited or admitted on equal terms as other partners.
- (c) Special measures must be adopted and implemented to include persons from previously disadvantaged groups as partners.

❖ Professional bodies

No person may be excluded as a member of a professional body on one or more grounds of discrimination. Measures must be adopted and implemented to broaden access to such bodies for members of historically disadvantaged groups.

The following are examples:

- (a) You may not unfairly refuse to consider a person's application for membership on any of the grounds of discrimination.
- (b) You may not unfairly deny a member access to or limit a member's
- (c) Conditions to become a member should not unfairly exclude people on the basis of, amongst other things, race, gender or disability.
- (d) Bodies must review their governing structures such as boards, councils, etc, and other decision-making structures to assess the extent of representation and inclusiveness of particular groups. access to any benefit provided by a body.
- (e) Measures must be adopted and targets must be set to achieve equitable representation of historically disadvantaged groups particularly women and disabled persons.

- (f) There must be active promotion of diversity awareness.
- (g) A policy prohibiting hate speech must be endorsed.

- (i) Steps must be taken to remove existing obstacles that unfairly limit or restrict disabled persons from access to membership of and participation in professional bodies.

5. CONTACT PARTICULARS

Should you require any advice or assistance relating to any aspect of the promotion of equality, the following institutions can be contacted:

- The South African Human Rights Commission.
 - The Commission on Gender Equality.
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