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SUBMISSION TO THE DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT ON THE AMENDMENTS TO THE PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT, 2000 BY THE LAW TRUST CHAIR IN SOCIAL JUSTICE, STELLENBOSCH UNIVERSITY

11 May 2021

For Attention: Ms F Bhayat

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Proposed Amendments to the Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000

The Chair in Social Justice (CSJ) is grateful for the opportunity to present written comments on the proposed amendments to the Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act).

This is in response to the invitation by the Department of Justice and Constitutional Development for the submission of written comments on the Promotion of Equality and Prevention of Unfair Discrimination Amendment Bill, 2021.

We further request an opportunity to engage with the Department and, as the Bill progresses, with the Justice Committee in Parliament to provide contextual input on this submission.

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A INTRODUCTION

The Department of Justice and Constitutional Development (DOJCD) has invited interested parties to submit written comments on proposed amendments to the Equality Act of 2000. Included in the proposed amendments, are changes to definitions, including the definition of equality and extensive changes to the remedial/restitutive measures.

The bulk of the proposed changes focus on recasting the remedial and restitutive agenda of the original Equality Act as captured in Chapter 5, with specific reference to sections 25, 26, 27 and 28. Worth noting, is that the provisions sought to be amended have remained unimplemented for 21 years following the passing of the Equality Act in February 2000.

The current Minister of Justice and Correctional Services and the current administration as headed by President Cyril Ramaphosa must be applauded for finally signalling an intention to implement the remedial and restitutive agenda of the Equality Act after 21 years of confining the cross-sectoral equality agenda to unfair discrimination prohibitions and related matters.

The failure to implement the promotion of equality provisions of the Equality Act, for a whole 21 years deserves serious scrutiny by Parliament particularly as such was due to pushback by officials between two departments as opposed to a fair and transparent court process. Never again should the will of the people of South Africa be allowed to bend to the whims of government officials to the detriment of the nation.

There is no question that had the remedial and restitutive agenda of the Equality Act been implemented, some of the gross disparities, particularly on the ground of race, gender, disability and socio-economic status, in areas such as education, health, commerce and digital inclusion, laid bare by the challenges of the Coronavirus Covid-19, could have been avoided. More progress may also have been made on gender violence as spatial planning gender disparities could have been systematically reduced.

It is our considered view that the integrated systems and proactive approach to advancing equality has more fidelity to the Constitution of the Republic of South Africa, 1996 (Constitution). The adoption of a transformative Constitution whose provisions include the commitment to healing the divisions of the past and establishing a society based on social justice, among others, was a conscious decision made by the architects of South Africa's post-apartheid democracy led by President Nelson Mandela.

It was the understanding of the architects of South Africa's democracy that for equal enjoyment of all rights and freedoms to occur, the state would have to be the main midwife that takes and leads society to take actions to disrupt the enduring legacy of apartheid,

patriarchy, disability policies and other legalised injustices of the past while preventing new patterns of social injustice. In this regard, it is worth noting the preamble to the Constitution, which in part states:

> *"We, the people of South Africa,*
> ***Recognise the injustices of our past;***
> *Honour those who suffered for justice and freedom in our land;*
> *Respect those who have worked to build and develop our country; and*
> ***Believe that South Africa belongs to all who live in it, united in our diversity.***
> *We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to*
>
> - ***Heal the divisions of the past and establish a society based*** *on democratic values,* ***social justice and fundamental human rights;***
> - *Lay the foundations for a democratic and open society in which government is based on the will of the people and* ***every citizen is equally protected by law;***
> - ***Improve the quality of life of all citizens and free the potential of each person****; and*
> - *Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations…"* **[Our Emphasis]**

In addition to the social justice commitment in the preamble, the Constitution further entrenches the right to equality, with section 9(2) stating that:

> "*equality includes the full and equal enjoyment of all rights and freedoms*"[1]

This understanding of equality, which is referred to as the substantive notion of equality, makes no distinction between equity and equality. It does not view equality as treating persons identically regardless of asymmetrical circumstances or different needs. It is a notion of equality that is mindful of and responds meaningfully to difference and disadvantage in a way that yields actual as opposed to hypothetical equal enjoyment of rights, particularly the fundamental rights and freedoms entrenched in the Bill of Rights.

[1] Preamble to the Constitution of the Republic of South Africa 1996.

According to the Constitutional Court's understanding as expressed by Moseneke J, in *Minister of Finance v Van Heerden*[2], equality as understood from the substantive equality perspective that underpins section 9 of the Constitution, has the same meaning as social justice. This echoes Justice Ngcobo J's preceding observations in *Bato Star*[3].

It is further worth noting that section 7(2) enjoins the state **to "respect, protect, promote and fulfil the rights in the Bill of Rights".** This places an obligation on the state to promote all the rights in the Bill of Rights. The rights in question, include the **right to equality which entitles all,** regardless of identity**, to equal enjoyment of itself and all the other rights and freedoms** in the Constitution and beyond.

There is no question, accordingly, that fidelity to the Constitution required the advancement of equality from the onset of the Equality Act's implementation and that failure to implement the promotion of equality provisions is unquestionably a default on the constitutional equality duty and social justice commitment. This view is congruent with Moseneke J's assertions in *Van Heerden* that without remedial and restitutive measures, the right to equality would ring hollow.[4]

The view that, by not implementing the promotion of equality provisions of the Equality Act for 21 years, the state has defaulted on the equality duty, is further buttressed by section 237 of the Constitution, whose injunction is that:

> *"All constitutional obligations must be performed diligently without delay".*

The gist of the submission of the CSJ is that:

1. The intention to implement Chapter 5, though considerably late, 21 years on, is commendable.
2. Some of the proposed amendments do enhance clarity as purported while some, among them, the definition of equality, simply muddy the waters.
3. The proposed amendments to Chapter 5 which are said to improve clarity and accountability, mostly do the opposite in addition to posing the threat of eroding current own state initiatives that have moved the needle in areas such as equalising higher education and business or economic opportunities through leveraging the licencing power of the state.

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[2] *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC).
[3] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC).
[4] *Minister of Finance v Van Heerden*

4. The main weakness in the proposed amendments to sections 25, 26, 27 and 28, is the inexplicable jettisoning of the requirement of developing and implementing Equality Plans which empowers everyone to hold the state accountable and replacing that with a ***Laissez-faire*** system of seemingly *ad hoc* measures, which does not take advancing equality beyond the blue-sky provisions of the Constitution.
5. The spirit of the amendments further seems oblivious to the fact that advancing equality in and through state services and regulation, is the core business of the state. Instead, the proposed amendments state that local government should not be bothered with specifically planning for equality and be allowed to focus on service delivery as its core business. The constitutional reality is that ensuring equality in and through service delivery is a constitutional duty if you read section 9(2) with section 7(2), the preamble, section 1 and section 237.
6. We further recommend that to mainstream equality by ensuring that all laws, policies, programmes and other government decisions are always congruent with the social justice commitment and equality duty enshrined in the Constitution, a provision similar to section 149 of the United Kingdom (UK) Equality Act, 2010, be included in the Amendment Bill and that the Bill should cross reference to all relevant sections in the Constitution, including sections 9(2), 7(2) 1, 237, 39 and relevant provisions of the preamble.

B BACKGROUND TO THE LAW TRUST CHAIR IN SOCIAL JUSTICE

The Law Trust Chair in Social Justice (CSJ) commenced operations in 2018 with the inaugural occupant being Prof Thuli Madonsela, the former Public Protector of South Africa, and is anchored in the triple objectives of responsive research, teaching and social impact.

Social justice is said to be "the way in which human rights are manifested in the everyday lives of people at every level of society"[5]. The working definition underpinning the research of the CSJ is that social justice is about the equal enjoyment of all rights and freedoms regardless of human diversity reflected in the just, fair and equitable distribution of all opportunities, resources, benefits, privileges and burdens in a society or group and between societies. In a socially just society, it should not be harder for one group to thrive and easier for another.

[5] Edmund Rice Centre (2000) 1.

One of the research outputs of the CSJ is a Social Justice Impact Assessment Matrix (SIAM). The SIAM instrument seeks to leverage data analytics to predict the likely poverty and equality impact of any planned law, policy, programme, service or decision on any group identified by one or more of the grounds in section 9 of the Constitution.[6]

The idea is to eschew laws, regulations, policies and service delivery plans that may exacerbate social and economic inequality, including poverty. Where inevitable, the idea is to implement such policies and decisions, with a compensation strategy that will mitigate the unfair impact. The SIAM, which has parallels with government's Social and Economic Impact Assessment Systems (SEIAS), which sought to correct deficiencies in the previous Regulatorily Impact Assessment tool (RIA), differs from SEIAS and RIA. The key differences are SIAM's overt grounding in the constitutional social justice commitment and related equality duty plus its emphasis on using sufficiently disaggregated data to predict the future as it relates to narrowing or widening the substantive equality and poverty gaps. Some of the COVID-19 rules that were predicted as likely to widen the inequality gap feeding on existing accumulated advantages and disadvantages as a legacy of past laws and policies, did just that. This can be seen in among others, areas such as education, commerce and access to digitalised government services. Children in historically disadvantaged families and communities and others in the lower social classes, found themselves light years behind after education went online and parents were expected to provide support.

The data analytics focus of the CSJ is part of a broader Musa Plan for Social Justice (Social Justice M-Plan), which is the flagship programme. It is also an avenue for giving effect to the University's social impact objective, particularly regarding the grand constitutional objective of healing the divisions of the past and transforming structural social relations in society to give effect to the constitutional promise of establishing a society based on social justice while freeing the potential of every citizen and improving the quality of all. Named after Palesa Musa, who was imprisoned on June 16 in 1976 for protesting unjust education, the M-Plan is modelled on the US-sponsored post-World World II Europe Recovery Marshal Plan. It is an integrated ground-up civil society plan that seeks to coordinate systematic and integrated academic, business and broader civil society input to support government efforts towards ending poverty and breaking the back of inequality by 2030 as envisaged in the global

[6] Outlined in T Madonsela "Law and the economy through a social justice lens" in R Parsons (Ed) *Recession, Recovery and Reform: South African Economy after Covid-19* (2020).

Sustainable Development Goals and the National Development Plan (NDP) read with the African Union's (AU) Agenda 2063.

The CSJ's approach to teaching weaves together fostering appropriate knowledge, skills and values among decision-makers that drive public policy, planning and monitoring, mainstreaming social justice and the teaching and practice of law and promoting social justice scholarship.

C BACKGROUND TO THE PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT 4 OF 2000 (EQUALITY ACT)

> *Imagine a world where everyone is equal. A world of equals where no one and no group finds it easier to enjoy the opportunities, resources, benefits and privileges in that society or group. Imagine a society where no person or group finds it more difficult to exist, or experience social mobility because they experience higher burdens. Imagine a society where opportunities, benefits, privileges and burdens are levelled and the colour of your skin does not advantage or disadvantage you, where your sex or gender does not advantage or disadvantage you, your disability or no disability does not advantage or disadvantage you. Just imagine what kind of society that would be.*[7]

This was the thinking that undergirded the drafting of the Constitution of South Africa, which was adopted 25 years ago. In that Constitution, this country committed to establish a society based on democratic values, social justice and fundamental human rights. It further committed to establish a society where everyone's life is improved, and everyone's potential is freed. This statement was transformative, because it sought to achieve a new society to replace the one that was founded on the direct opposite of those egalitarian ideals.

To reinforce this vision of a socially just society, the Constitution included a substantive equality clause in section 9 which states that equality includes equal enjoyment of all rights and freedoms, together with a human rights clause, which imposes the burden on the state to advance human rights, in section 7(2) of the Constitution. Section 1 contains the foundational values and clearly presents equality as an aspirational value as opposed to a restatement.

[7] Extract from an address by Prof Thuli Madonsela to the Social Justice Reading Room on the Equality Act Amendment Bill, 2021, at Stellenbosch University, 20 May 2021.

Years later, Justice Ngcobo in *Bato Star* confirmed that it was the understanding behind the Constitution of South Africa that the society inherited was far from egalitarian.[8] It still bore the consequences of past unjust laws that had discriminated based on race, gender, disability and many other factors, but primarily on the basis of race. Therefore, the Constitution, unlike other constitutions, was not a Constitution to restate the way society is organised. It is a constitution that places an aspirational model of society towards which the society was supposed to be transformed and a new society emerge, replacing the old one. This same message can be found in *Minister of Finance v Van Heerden.*[9]

The social justice promise in the Constitution is the foundation upon which the Equality Act was designed. The Equality Act sought to **recognise** everyone, including those that were particularly disadvantaged under apartheid. It sought to provide levers for the establishment of a society where everyone was **represented** in all areas of life, in the economy, in education, in science and technology, in culture, social norms and the ethos of society, in the courts, in Parliament and in all workplaces, and ultimately, in ownership of the economy, including land.

It also sought to ensure that **restitutive measures** were implemented, to the extent that there were imbalances that would be perpetuated if no restitutive action was taken. In addition, the drafting of the Act was influenced by constitutional jurisprudence such as *Walker*,[10] *Hugo*[11] and the many equality cases in the Constitutional Court that preceded it.[12] Also considered, were international conventions, such as the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)[13] and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).[14]

The Equality Act takes a holistic approach to advancing equality, by giving effect to section 9 as a whole read with section 23(1) of schedule 6 [15] while incorporating elements of South Africa's compliance with international human rights norms and obligations particularly as they

[8] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC).
[9] *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC).
[10] *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC).
[11] *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 (CC).
[12] See J Maluleke & T Madonsela *Women and the Law in South Africa: Gender Equality Jurisprudence in Landmark Court Decisions* (2004)
[13] The Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.
[14] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (CERD).
[15] S Gutto *Equality and Non-Discrimination in South Africa* (2001) 123.

relate to the prohibition of discrimination and advancement of equal enjoyment of human rights.[16]

This piece of "social legislation" seeks to foster progressive redress of accumulated disadvantages causally related to dispossession, exclusion and other systemic injustices of colonial times, apartheid and patriarchy to enable the equal enjoyment of rights and freedoms by all in the political, legal, social, economic and cultural spheres of life, for all citizens and others. In this sense, the Equality Act is informed by South African experiences and realities, while anchored in equity, fairness and substantive justice. [17] In its aim to address systemic social and economic inequalities caused by historical as well as present or emerging disadvantage, the Equality Act's main objective transcends the prevention and prohibition of unfair discrimination, harassment and hate speech, taking a holistic and systems approach to advancing equality.

Regarding women as a historically disadvantaged group, the need to protect women against violence and exploitation is emphasised in South Africa's international obligations and this Act is seen as a positive measure taken to further implement these obligations, in particular CEDAW, which South Africa ratified in 1995 without reservation.[18] However, the realisation of these goals is to a large extent, dependent on the processes, mechanisms and institutions of government.[19]

Consequently, with the focus on disadvantage, the Equality Act, includes a legislative tool/mechanism for facilitating equality claims and positive measures, including the establishment of Equality Courts. This innovative structure that is a cross between a normal and a specialised court with creative provisions such as access rules and procedures, as well as compulsory training for judicial officers and clerks, is meant to enhance access to justice and responsive jurisprudence.

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[16] 1. These other rights include human dignity (s 10), the right to freedom and security of the person (s 12) and freedom of expression (s16).

[17] As such, "social legislation" represents laws directed at normalising the abnormalities of the past and/or extending the boundaries of policies, law and practices, aligned with the directive to build a progressive and caring society with democratic values embedded in all social relations, thereby reducing social inequalities to a minimum. See also the discussion in chapter 3 on the main aspects of modern human rights that inform the bill of Rights and PEPUDA. Gutto *Equality and Non-Discrimination in South Africa* 7-8; 124.

[18] CEDAW. See also the Declaration on the Elimination of Violence Against Women UNGA A/RES/48/104; the CERD; the Beijing Declaration and Platform for Action A/CONF.177/20 (1995); the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (adopted on 25 December 2003, entered into force 25 December 2003) 2237 UNTS 319; the Protocol to the African Charter on Human and People's Rights on the Rights of Women adopted 13 September, entered into force 25 November 2005) CAB/LEG/66.6 (ratified by South Africa in December 2004 and which entered into force in November 2005); and the SADC Protocol on Gender and Development signed on 17th August 2008.

[19] TJ Powys "Benefit or impediment?" *Agenda* (2016) 37; Gutto *Equality and Non-Discrimination in South Africa* 2.

The Equality Act further reinforces the role of constitutional institutions such as the South African Human Rights Commission (SAHRC), Commission for Gender Equality and the Public Protector, regarding the advancement of equality and combatting of discrimination. In this regard, the SAHRC is singled out as the main custodian of the Act, while an Equality Review Committee is provided for to ensure that the response to inequality remains agile efficient and sustainable.

Moreover, it places a responsibility on the state, together with the relevant constitutional institutions, to foster an awareness of fundamental rights and to promote a climate of understanding, mutual respect and equality as prescribed in section 25(1)(a) of the Act.[20] However, data continues to point to problems in the implementation of the Equality Act, including historically disadvantaged groups' usage of these courts.

It is our considered view that some of the challenges in the implementation of the Equality Act, may have been mitigated had Chapter 5 not been frozen away for 21 years. We also believe that proposed amendments should seek to plug the gap created by this lapse and not reverse gains. We further believe that the jurisprudential frameworks to be applied to our Equality Act should not be borrowed from countries with a formal equality ethos but from countries such as Canada that have a substantive equality ethos. In the same token, analytical frameworks that should inform impact assessments under any instrument should ensure the paramountcy of the constitutional commitment to social justice and related equality duty. In this regard, Nancy Fraser's framework, which places importance on the impact on **representation**, **recognition** and **restitution,** is worth considering.[21]

Finally, it is worth paying attention to the assertion by Moseneke J, in *Van Heerden* that, stripped of remedial and restitutive measures to equalise enjoyment of all rights and freedoms in response to the legacy of past injustices, the constitutional promise of equality rings hollow. A similar conceptual framework informs the reasoning in *Daniels v Scribante,* particularly seminal judgements in that case by Justices Madlanga, Froneman and Cameron.[22]

[20] TJ Powys "Benefit or impediment?" *Agenda* (2016) 43, 46.
[21] S Fredman "The Potential and Limits of An Equal Rights Paradigm in Addressing Poverty" in S Liebenberg and G Quinot, *Law and Poverty: Perspectives from South Africa and Beyond* (2011).
[22] *Daniels v Scribante* 2017 (4) SA 341 (CC)

D COMMENTARY ON THE BILL

1. Introduction

The CSJ congratulates government for finally moving forward with the holistic implementation of the Equality Act. even though it is 21 years late. This is in line with the African aphorism that says "The best time to plant a tree was twenty years ago, while the next best time is now." The CSJ further welcomes efforts by the state to improve the protection of complainants against inequality and discrimination.

Several of the proposed amendments seem valid and likely to enhance progress in the advancement of equality and protection against unfair discrimination. This is particularly so for historically marginalised groups and communities. However, several of the proposed amendments appear regressive and vague on key points. Of major concern, is that certain sections, particularly those dealing with proactive advancement of equality, seem to lack a spirit of empathy, *ubuntu* and a commitment to the transformative constitutionalism dictated by our Constitution[23].

First, the stated purpose of the Promotion of Equality Act Amendment Bill 2001(the Bill) is to address certain problems identified around the promotion of equality. However, the background note does not provide adequate information on the nature of these problems. Nor does it refer to case law or reports such as the 2014 Report compiled by the South African Human Rights Commission, in support of this assertion. [24]

Second, we are concerned that while the Bill purports to improve accountability, it, unfortunately, takes away provisions that were originally intended to promote accountability. As such, it asks for *laisse fare* measures that characterise the current approach where international obligations are concerned, and which have been the case while Chapter 5 was frozen. However, we submit that this approach has been unsuccessful.

Third, in attempting to ease the regulatory impact assessment of the Act, the constitutional duty to implement equality is diluted, while the implementation of measures is subjected to heightened scrutiny by introducing the requirement that measures be preceded by a thorough investigation.

Fourth, to have Treasury as accountability monitor, as driving and assessing the regulatory impact of this Act is problematic. It removes the human rights agenda from the Department of Justice and Human Rights Commission and places it with the Treasury and Auditor-General

[23] On transformative constitutionalism, see Mahomed J in *S v Makwanyane* 1995 (3) SA 391 (CC), among others.
[24] South African Human Rights Commission (2014) Equality Roundtable Dialogue Report.

by default given that all must now go into the Strategic Plan.

Finally, the Bill says civil society must be consulted for measures without specifying the need for representative representation, particularly of historically disadvantaged groups identified in terms of the grounds in section 9 of the Constitution, in line with the SIAM and the Nancy Fraser analytical framework. Worth noting is that its own drafting also appears to have lacked input from diverse societal and equality/social justice experts, including the architects of the original Act.

This is important given that legislation drafters are not subject matter experts and, as Cameron J once said of judges, legislation drafters are not ideological virgins. The situation is compounded by the absence of some policy paper either preceding or accompanying the Bill, wherein the purpose and problem being solved are explained in detail. In this regard, it would be interesting to test the proposed amendments on SEIAS and SIAM.

We therefore submit that we should retain the requirement of time-bound Equality Plans (preferably 10-year plans) for all organs of state and courts. This would foster accountability for promoting equality as a human right as envisaged in section 7(2) read with sections 9, 1, the preamble and section 237.[25] This approach should be accompanied by an equality audit, Equality Plans and an accountability home for advancing equality, which we would suggest remains with the Human Rights Commission as the sole custodian to deal with the plans in consultation with appropriate constitutional institutions.

The blue-sky provisions of the Equality Plan must be integrated into the Strategic Plan or Integrated Development Plan (IDP) at local government level. In addition, and in line with our policy and accountability framework, the reports on the Plan should be submitted to the SAHRC on a biannual basis, while high-level elements are highlighted in the annual report submitted to Parliament as the normal accountability custodian. The involvement of the SAHRC ensures an expert analysis of plans and reports as the Auditor-General does with funds and presents teaching and learning opportunities for the advancement of equality. In this regard, the SAHRC needs to consider designating an Equality Commissioner to head an Equality Unit/Chamber that focuses on the Equality Act.

It is concerning that equality is viewed as an add-on for municipalities. The Constitution is very clear. It is the duty of the state to advance human rights in terms of sections 7(2) and 237 requires constitutional responsibilities to be given priority. This mentality has seen rich wards coexist with extremely poor wards in municipalities with an extremely high gross

[25] Section 237 provides that all constitutional obligations must be performed diligently and without delay.

domestic product resulting in extremely high Gini-coefficients in such municipalities and the broader country.

A community member who attended the Reading Room on the Equality Act Amendment confirmed this and posed it as a challenge that must be addressed by legislation, adding that the right to equality includes equal enjoyment of all rights and freedoms and as such, is a human right.

We further submit that the design of all laws, policies, services and decisions in all state affairs should comply with the equality duty in the Constitution and related social justice commitment. To this end, any person or entity that proposes a law, policy, regulation or service delivery plan, should be required to certify that its likely impact on equality, including poverty, has been assessed through the use of appropriately disaggregated data. Such certification should confirm that such proposed law or action will not have a regressive effect on equality for any group identified in terms of one or more of the grounds in the Constitution. Where such exacerbation of inequality, including poverty, is inevitable, the person or entity planning the proposed action must certify that a compensation strategy to mitigate the deleterious impact, has been devised for concurrent implementation.

The proposal we are making is influenced by section **149 of the UK Equality Act, 2010, which imposes the following public sector equality duty:**

> (1) A public authority must, in the exercise of its functions, have due regard to the need to—
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
>
> (b) **advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it**;
>
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

In the South African case, the provision should include bearing in mind section 7(2) imposing a duty to advance human rights and section 237 requiring giving priority to constitutional responsibilities. In this regard, a municipality could not claim it has no funds to diminish

infrastructural inequalities in historically disadvantaged communities while having funds for discretionary expenditure items.

2. Commentary and recommendations

Section 1 of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000) (hereinafter referred to as the principal Act), is hereby amended by—

(a) the substitution for the definition of "discrimination" of the following definition:

*(b) "**'discrimination'** means any act or omission, including a policy, law, rule, practice, condition or situation which, whether intentionally or not, directly or indirectly—*

*(c) imposes burdens, obligations or disadvantage on;**[or]***

*(d) withholds benefits, opportunities or advantages from**[,]**;*

(e) causes prejudice to; or

(f) otherwise undermines the dignity of,

*any person **[on]** related to one or more of the prohibited grounds**[;]**, irrespective of whether or not the discrimination on a particular ground was the sole or dominant reason for the discriminatory act or omission;*

Recommendation

We submit that subsection (d) seems overly broad and vague and therefore requires an explanatory note. Our concern is around this subsection affecting people who may be contravening this provision without their knowledge. Consequently, there is a need to clarify what amounts to causing someone or to encouraging someone to discriminate. We submit that a sledgehammer approach to problems can create new unexpected problems.

the substitution for the definition of "equality" of the following definition:

"***'equality'** includes—*

(a) the full and equal enjoyment of rights and freedoms as contemplated in the Constitution;

(b) equal right and access to resources, opportunities, benefits and advantages;

*(c) **[and includes]** de jure and de facto equality;*

*(d) **[and also]** equality in terms of impact and outcomes; and*

(e) substantive equality;

Recommendation

We reject the substitution of the definition of equality and submit that the definition should stay in its current form. The substituted definition is confusing. The worst part is its suggestion that substantive equality is not equality but one of its many dimensions. The substituted definition makes substantive equality one dimension of equality whereas the notion of equality as a whole, as developed by the Constitutional Court in numerous decisions, is a substantive notion of equality.[26] In addition, it should be borne in mind that dignity alone cannot represent all of the inequalities and harms that substantive equality aims to address, especially those that are less visible.

the insertion after the definition of "prohibited ground" of the following definition:

"***'public body'*** *means any institution or functionary—*

(a) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or

(b) exercising a public power or performing a public function in terms of any legislation or under customary law or tradition; and

Recommendation

We concur with the insertion of this definition. The inclusion of traditional institutions is commendable.

(d) the substitution for the definition of "the State" of the following definition:

"***'the State' [includes—]*** *means*

[26] See for example *Brink v Kitshoff* 1996 (6) BCLR 752 (CC) para 40; *Fraser v Children's Court, Pretoria North* 1997 2 BCLR 153 (CC); *Harksen v Lane NO* 1997 11 BCLR 1489 (CC); *Pretoria City Council v Walker* 1998 (3) BCLR 257; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (12) BCLR 1517 (CC); *Daniels v Campbell* 2004 (7) BCLR 735 (CC); *Hoffmann v South African Airways* 2000 11 BCLR 1211 (CC); *Moseneke v Master of the High Court* 2001 (2) BCLR 103 (CC); *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC); *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 (CC) para 41.

[(a)] *any department of State or administration in the national, provincial or local sphere of government;*

[(b)] ***any other functionary or institution—***

(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation or under customary law or tradition;]*".*

Recommendation

We disagree with this definition. The use of the word "*means*" limits the scope of interpretation. The insertion of "*means*" has the effect that the intention is to exclude whatever is not included, thereby making it a closed list.

6. (1) Neither the State, a public body nor any person may unfairly discriminate against any person.

(2) Any person who causes, encourages or requests another person to discriminate against any other person, is deemed to have discriminated against such other person.

(3) If a worker, employee or agent of a person contravenes the Act in the course of his or her work or while acting as agent, both the person and the worker, employee or agent, as the case may be, are jointly and severally liable for a contravention and proceedings under the Act may be instituted against either or both of them unless the person took reasonable steps to prevent the worker, employee or agent from contravening the Act.

Recommendation

We submit that section 6(3) unnecessarily specifies and thereby creates restrictive situations and should therefore be removed. For instance, the specific inclusion of "employee" unnecessarily crosses the boundary into labour law and excludes alternate situations such as where a subcontractor or business partner who does not qualify to be classified as your agent, is asked to discriminate. We submit it would be more conducive to insert a more general provision that says "anybody who acts for another as an agent" instead of restricting it to an employee-employer relationship.

Furthermore, instead of including the detail in this section, it would be better to include an interpretive guide, such as was done with the Employment Equity Act. In this way, changes could be made with greater ease and references to actual cases can be included to assist people in understanding the context within which the inclusions are necessary; and the context within which it will be applicable in their specific circumstances.

9A-Prohibition of retaliation.

No person may retaliate or threaten to retaliate against a person who—

(a) objects to a discriminatory act or omission; or

(b) instituted or wishes to institute proceedings in terms of or under the Act.

Recommendation

The reason for the inclusion of this section is unclear. What inadequacies of the old Act are being remedied through this section? As such, we are unaware of references to case law where people who have been wronged for challenging discrimination did not receive the remedies they sought. Consequently, we are yet to be persuaded by the necessity of this section. What necessitated the inclusion of this section? How much data has been gathered around people being threatened for objecting to discrimination, who was being discriminated against and on what grounds? Our concern is that it may tie government in a lot of litigation in matters where transformative action that is unpopular to a group that was advantaged by the *status quo*, is taken.

24. (1) The State [has] and public bodies have a duty and responsibility to eliminate discrimination and to promote and achieve equality.

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

(3) The State, public bodies and all persons have a duty and responsibility in particular to—

(a) eliminate discrimination on the grounds of race, gender and disability; and

(b) promote equality in respect of race, gender and disability.

(4) The State, public bodies and the organisations and institutions referred to in section 28(1) must take reasonable measures, within available resources, to make provision

in their budgets for funds to implement measures aimed at eliminating discrimination and promoting equality referred to in this Chapter.

Recommendations

We reject this change, because there is an unacceptable qualification created in section 24(4) through the inclusion of the phrase *"take reasonable measures, within available resources, to make provision in their budgets for funds to implement measures".*

The qualification sought to be included, is similar to the budgetary constraints qualification in the *Grootboom*[27] case which related to socio-economic rights and not the equality right in the Constitution.[28] The Constitution says you have the right to equality and that right includes equal enjoyment of all rights and freedoms. That right must be read with section 7(2) which states, the state has a duty to advance equality. Section 7(2) does not give the right to equality any qualification. The acceptable limitation is the one contained in section 36 of the Constitution. Section 24, therefore, limits the state's constitutional mandate to advance equality which is clearly inconsistent with the Constitution.

We further object to section 24(3) to the extent that it specifically lists only three grounds of equality and discrimination to be eliminated and promoted. We do not understand why there are now specific listed grounds included in this section and why it is these specific three, namely race, gender and disability.

We accept the original Act prioritises these three, but it does not limit the advancement of equality to them. We submit that section 24 as it stood in the old act should remain until an explanation has been given as to why certain duties, such as the duty to create an egalitarian society and the state's responsibility to assist other marginalised communities, are no longer a priority for the state.

25. Duty of State to promote equality. —

(1) The State must —

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

(b) conduct information campaigns to popularise this Act;

[27] *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).
[28] *Government of the Republic of South Africa v Grootboom*

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

d) adopt and implement, within available resources, measures to eliminate discrimination and to promote and achieve equality in line with the objectives of this Act.

Recommendation

We reject section 25(1) since the original purpose of this section was to advance equality, not to deal with pushback against unfair discrimination, therefore we submit that the inclusions of 25(1)(c) should be removed as being misplaced in section 25.

We further reject section 25(1) due to the removal of section 25(1)(b) and (c) in the old Act. These provisions were never implemented in the past 21 years and to date, the reasons for this failure has not been explained. In particular, the regulatory impact by Treasury is vague, devoid of data analytics and disaggregated data. Moreover, other jurisdictions with similar provisions in their equality acts have done far more with no negative regulatory impact. Furthermore, if you consider the administrative nightmare that BEE legislation has visited on small and medium businesses of all colours and gender, there is nothing in the original Equality Act that comes close to such regulatory burdens. If anything, it is the new provisions that pose a regulatory threat in that there is no timeline for measures therefore no systems approach which invites a low intensity impact that will prolong the pain and related polarisation. Furthermore, the provisions requiring that measures be preceded by a thorough investigation may derail and delay progress through litigation whereas a plan will be consulted on and agreed as a once-off for ten years or more. Having plans in one sector further promotes sector synergies thus fostering the systems approach underpinning the original Act.

Therefore, we reject the removal of section 25(1)(b) and (c), until reasons have been advanced for not only the lack of implementation but also the removal of the sub-sections.

25. Duty of State to promote equality. —

(2) The measures referred to in subsection (1)(d) must be included—

(a) in the case of a department of State or administration in the national or provincial sphere of government, in the strategic plans contemplated in the Regulations issued under section 76 of the Public Finance Management Act, 1999 (Act No. 1 of 1999); and

(b) in the case of a department of State or administration in the local sphere of government, in the integrated development plans contemplated in the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000).

Recommendation

We reject section 25(2) to the extent that it restricts local government integrating equality advancing measures in the municipal systems plan, as this is bound to be difficult for municipalities. We recommend that municipalities be required to draw up an Equality Plan that should subsequently be integrated into the IDP.[29] This would allow the municipality to focus on equality, with expert help. Once the Equality Plan is in place, its provisions can be integrated into the municipal systems plan. We submit that this two-document approach, firstly, a broader Equality Plan with fleshed-out points, and secondly, an IDP with an integration of the Equality Plan, would be more conducive. This approach would allow for the making of an equality assessment which could then be used for an Equality Plan which would then be integrated into the IDP.

We further reject section 25(2) to the extent that it removes the role the of Human Rights Commission (HRC) in monitoring the broader equality agenda. A human rights body is best equipped to monitor human rights' compliance, in this case, the right to equality.

The amendment claims to be strengthening accountability, yet in effect, it weakens accountability by excluding it from the purview of our human rights watchdog. As such, Parliament needs to explain why supervision would only occur through the normal annual report.

25. Duty of State to promote equality. —

(3) The measures referred to in subsection (1)(d) must include—

(i) the amendment of existing legislation or the enactment of further legislation;

(ii) the amendment of existing policies or the development of new policies;

(iii) the amendment of existing codes or the development of new codes;

[29] According to section 25 of the Local Government: Municipal Systems Act 32 of 2000, each municipal council must, after the start of its elected term, adopt a single, inclusive and strategic plan (Integrated Development Plan or IDP) for the development of the municipality which links, integrates and coordinates plans and takes into account proposals for the development of the municipality and which aligns the resources and capacity of the municipality with the implementation of the said plan.

(iv) the amendment of existing practices or the adoption of new practices; or

(v) the adoption of any other measure giving effect to the objectives of the Act.

Recommendation

We reject section 25(3) to the extent that it removes the old section 25(3)(a)(b) and (c). Section 25(3)(a) of the old Act is essential for promoting the achievement of equality in that it mandates constitutional institutions to assist complainants in accessing justice, through the institution of proceedings in the equality courts. The mandate was never strenuous because the section, by using the words "*these institutions are also competent to*", gave institutions a discretion on whether to assist complainants. This raises the question of why this non-strenuous obligation to advance equality through assisting complainants, is being completely thrown out when it is clearly counter-intuitive to the achievement of equality.

Section 25(3)(b) of the old Act gives institutions the competency to request regular reports from the Department regarding the number of cases, the nature and the outcome thereof. Once again, this amendment seeks to remove an important tool that can be used by state institutions to advance equality without any apparent reason. We submit that section 25(3)(b) should rather be reinforced to improve effectiveness by specifying that it is the "SAHRC" that should provide these reports, thereby putting the responsibility to act on a specific and specialised entity that can be held accountable. A specialised "equality" division within the SAHRC could even be created to specifically monitor and assist state institutions with equality compliance. This arrangement has worked well in the UK.

A provision is replacing the old provisions that lists measures to be included to eliminate discrimination and to promote and achieve equality. This is unacceptable, as the use of the word "measures" further waters down the efficacy of section 25, because it implies vagueness in action as opposed to the use of words that would specify that plans needed to be made and specified actions taken to ensure the achievement of those plans. In any event, the substitution of the old section with the new one is unnecessary, as the issues under this new section can be regulated elsewhere in this Act, without disturbing the essential provisions of the old Act. In summary, we submit that the old provisions of section 25(3) should not be replaced but should rather be improved in the ways suggested above.

25. Duty of State to promote equality. —

(4) In order to determine which measures must be adopted to eliminate discrimination and to promote and achieve equality, the State must—

(i) prepare a list of the laws, policies, codes, practices, structures or other measures which have a bearing on equality;

(ii) scrutinise these laws, policies, codes, practices, structures and measures with a view to identifying discriminatory aspects thereof;

(iii) consider possible remedial measures to remove the discriminatory aspects;

(iv) identify areas or potential areas of inequalities; and

(v) consider possible measures to promote social and economic equality.

Recommendations

No comment

25. Duty of State to promote equality. —

(5) The measures referred to in subsection (1)(d) may only be adopted after—

(a) proper investigation and analysis of the aspects in question;

(b) in-depth research in respect of the aspects in question; and

(c) consultation with civil society on the measures to be adopted.

Recommendation

While we generally support the inclusion of this new provision, particularly the requirement to consult with civil society on any measures to be adopted, we submit that it should be made clearer that all groups identifiable in terms of section 9 of the Constitution and all groups affected by the measures should be consulted. Keeping the consultation requirement contained to the broad description of "civil society", creates the risk that the exclusion of affected groups could occur, which would result in hollow consultations and community engagement.

We further submit that the inclusion of the wording "proper investigation" in section 25(5)(a) results in locking what the process of investigation includes into an area of Administrative Law. Administrative law has specifically defined a "proper investigation" in *Mail*

& Guardian v Public Protector.[30] This definition would exclude a lot of things that government does in terms of advancing equality as some would not qualify as a proper investigation.

We essentially submit that government need not do a proper investigation, rather an audit of the situation should be done, coupled with the inclusion of affected groups and communities in consultation, in a *de facto* inclusive way as opposed to a *de jure* inclusive way.

Another point of concern is the deletion of the old section 25(5) provisions to the extent that it provided that Equality Plans should be submitted to the SAHRC. The amendments do not address the alternative body to whom Equality Plans or measures should be submitted. This effectively removes the role of the SAHRC in holding state institutions accountable, without offering alternative accountability measures. We strenuously oppose this amendment and once again submit that the role of the SAHRC in advancing equality should be enlarged, not removed.

While we do accept that an integrative approach is needed, we submit that it should not be a choice between integration and specialisation. It should be both. A specific analysis should be conducted and a plan submitted to the SAHRC within two years of passing this Act. Furthermore, when the annual report to Parliament is done, an addendum on equality should be submitted in addition to references in the main body.

What we would like to emphasise is that we do not agree with the suggestion of "measures" and recommend retaining Equality Plans as no case has been made for the deviation. The content of the plans should be determined by what is found on the ground and their vision of the future. We do not consider this to have an onerous regulatory impact. In addition, we submit that the plans need to cover a long-term, larger picture and therefore cannot be a three-year plan but a ten year or more plan.

> *25. Duty of State to promote equality. —*
> *(6) The measures to be adopted by the State to achieve equality must—*
> *(a) proactively address systemic and multidimensional patterns of inequality and discrimination found in social structures, rules, attitudes, actions or omissions which prevent the full and equal enjoyment of rights and freedoms as contemplated in the Constitution, including equal access to resources, opportunities, benefits and advantages and social goods; and*

[30] *M & G Media Limited v Public Protector* [2010] 1 All SA 32 (GNP).

(b) provide for reasonable accommodation of the needs of persons on the basis of any of the prohibited grounds.

Recommendation

We welcome the inclusion of section 25(6) but suggest that the provision should come earlier in the Act, more specifically right after the introduction of the notion of promoting equality.

25. Duty of State to promote equality. —
(7) In the annual reports referred to in section 40 of the Public Finance Management Act, 1999, and section 121 of the Local Government: Municipal Finance Management Act, 2003 (Act No. 56 of 2003), a report should be included—
(a) on the funds provided for the particular year for the implementation of the measures referred to in subsection (1)(d); or
(b) on the reasons why no funds for the particular year have been provided for the implementation of those measures.

Recommendation

We once again submit that the annual reports to Parliament should include an addendum on equality which should then also be separately submitted to the SAHRC for compliance analysis.

We submit that the problem with section 25(7) is that it provides an escape route for state institutions to avoid accountability by merely saying that their lack of effort in advancing equality was due to budgetary constraints. We reject this and submit that the section should require that state institutions ~~should~~ submit a report without requiring section 25(7)(a) and (b).

25. Duty of State to promote equality—
(8) The Board of Directors, appointed in terms of section 6 of the Legal Aid South Africa Act, 2014 (Act No. 39 of 2014), must, when making recommendations to the Cabinet member responsible for the administration of justice for purposes of the regulations to be made in terms of section 23 of that Act, consider recommending, subject to the criteria determined by that

member in terms of the said regulations, that legal aid be granted to persons who wish to institute proceedings in terms of this Act.

Recommendation

While we do not understand the basis of the inclusion of section 25(8) and restate our concern that section 25 is being diluted. The reason for the continued inequality in South Africa is not because of a lack of access to the courts. The reason for the continued inequality in South Africa is and has been the failure of proper action to undo the damage that has already been done.

25. Duty of State to promote equality.—
(9) A judicial officer presiding in any civil or criminal matter must, where an equality issue is raised, inform the relevant party of his or her rights in terms of the Act and, where appropriate, refer the matter to the clerk of the equality court having jurisdiction who must deal with the matter in accordance with section 20(3).

Recommendation

We submit that section 25(9) and all other provisions concerning litigation on equality should rather be moved to the equality court provisions and should not be inserted amongst the equality planning and monitoring provisions.

25. Duty of State to promote equality. —
(10)(a) The Department must keep a register of all the codes of practice referred to in this Act and make available the Register on the website of the Department.
(b) The Director-General of the Department must decide the form of the register and ensure that the register is updated regularly.".
(c) All functionaries who have, prior to the coming into operation of this section, issued codes of practice relating to the elimination of discrimination or the promotion of equality in terms of any law, policy or other document requiring such codes, must within three months after the coming into operation of this

section submit to the Director-General the codes already issued for inclusion in the Register.

(d) A Minister who has, after the coming into operation of this section, issued a code of practice in terms of this Act, must ensure that the code is submitted to the Director-General for inclusion in the register.

(e) An amendment of a code referred to in paragraph

(d) must be submitted to the Director-General of the Department so that the register can be updated.

(f) The purpose of the register is to ensure that a Minister, before issuing a code of practice in terms of this Act, has regard to the codes issued by other Ministers, in order to prevent overlapping or duplication of, or contradictions between, the codes.

Recommendation

We generally agree with section 25(10), except to the extent that section 25(10)(c) provides that the submission of codes to the Director-General must occur within three months of the coming into operation of this section. We submit that this would ignore the reality of the speed at which government operates. We recommend that a six-month deadline should rather be adopted.

"Specific duty of constitutional institutions

26.(1) The constitutional institutions must—

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

(b) conduct information campaigns to popularise the Act; and

(c) provide assistance, advice and training on issues of discrimination and equality.

(2) The constitutional institutions may, in addition to any other obligation in terms of the Constitution or any law, request the State or any person to supply information on any measures relating to the promotion or achievement of equality, including where appropriate, on legislative and executive action and compliance with legislation, codes of practice and programmes.

(3) The constitutional institution which requested information as contemplated in subsection (2), may make recommendations relating to the measures which must be considered by the department, administration or person that supplied the information.

(4) In addition to any other powers and functions of the constitutional institutions, these institutions are also competent to—

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

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

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

(5) The South African Human Rights Commission must, in its report referred to in section 18 of the South African Human Rights Commission Act, 2013 (Act No. 40 of 2013), include an assessment on the extent to which unfair discrimination on the grounds of race, gender and disability persists in the Republic, the effects thereof and recommendations on how best to address the unfair discrimination and any effects thereof.".

Recommendation

We concur with section 26 of the Bill in general. However, we would recommend that the powers granted to state institutions be limited to only the SAHRC. Moreover, a duty must be imposed on the SAHRC, as the only state institution, to create a structure that involves the CGE and the other commissions to deal with the assessment of plans and the assessment of reports. Furthermore, the SAHRC should report on: (1) progress made in advancing equality; (2) the progress made by state institutions regarding the submission of equality plans and progress made in relation to those plans; (3) a general reporting duty on progress made in other sectors on equality and non-discrimination policy. This should include information on equality and anti-discrimination court cases from the Equality Court and the other tribunals.

Insertion of section 26A in Act 4 of 2000

The following section is hereby inserted in the principal Act after section 26:

Duty of public bodies to promote equality

26A.(1) Public bodies must adopt and implement measures to eliminate discrimination and to promote and achieve equality in line with the objectives of this Act.

(2) A public body, which in terms of the Public Finance Management Act, 1999, is required to prepare a strategic plan, corporate plan or business plan, must include the measures referred to in subsection (1) in its plan.

(3) In the annual report of a public body referred to in section 55 of the Public Finance Management Act, 1999, there must be included a report—

(a) on the funds provided for the particular year for the implementation of the measures referred to in subsection (1); or

(b) on the reasons why no funds for that year have been provided for the implementation of the measures referred to in subsection (1).

(4) The provisions of—

(a) section 25(3)(a), where applicable, (b), (c), (d) and (e), (5) and (6); and

(b) section 25(4), with the necessary changes as may be required by the context, are applicable to the public bodies referred to in subsection (2).

(5) A public body which is not required to prepare a strategic plan, corporate plan or business plan in terms of the Public Finance Management Act, 1999, must—

(a) adopt and implement the measures determined by regulation or otherwise; or

(b) abide by the code of practice issued, by the Minister responsible for the public body.

(6) The Minister in question must, when determining the measures or issuing the code referred to in subsection (4), have regard to the existing measures relating to the elimination of discrimination and the promotion of equality provided for in any law, policy or other document, with which the public body must comply.

Recommendation

We submit that this provision is inadequate. We recommend that the provision should rather mandate a plan on which a progress report must be provided setting out whether targets have been met and where targets have not been met, reasons must be provided – instead of adopting and implementing *measures*. Section 26A (3) which places a duty to provide financial information is superfluous. The inclusion of the duty to prepare a strategic plan is accepted. Furthermore, we suggest that the Act should not follow a fragmented approach regarding the Equality Plan, but a proper assessment of a whole sector must be done to determine the stance of people's rights enshrined in the Constitution in order to develop a plan.

27.(1) Any person exercising a power or performing a function on behalf of the State in terms of a contract, which constitutes a public power or public function, must—

(a) adopt and implement measures to eliminate discrimination and to promote equality, determined by regulation or otherwise; or

(b) abide by the code of practice issued,

by the Minister on whose behalf the person is exercising the power or performing the function.

(2) The Minister in question must, when determining the measures or issuing the code referred to in subsection (1), have regard to the existing measures relating to the elimination of discrimination and the promotion of equality provided for in any law, policy or other document, with which that person must comply.

Recommendation

The duty of all persons is now reduced to only people who contract with the state. This provision follows an American approach which makes sense because they do not have a substantive equality clause. Consequently, according to this approach, if a person does not discriminate, then that person complies with the right to equality and therefore no duty is imposed to advance equality.

We submit that instead restricting positive responsibilities to the state procurement system, those bearing responsibility should include beneficiaries of the state licencing powers. Regarding state contractors, leave that to BEE laws. Otherwise it is going to have a double

bite and onerous regulatory impact on small businesses, whether black, white, female or foreigner.

28.(1) All persons, non-governmental organisations, community-based organisations or traditional institutions must promote equality in their relationships with other bodies and in their public activities.

(2) Subject to subsection (3), the Minister who is responsible for the portfolio in which persons, non-governmental organisations, community-based organisations or traditional institutions contemplated in subsection (1) operate must—

(a) determine, by regulation or otherwise, the measures to be adopted and implemented; or

(b) issue a code of practice,

dealing with the elimination of discrimination and the promotion of equality, in respect of those persons, non-governmental organisations, community-based organisations or traditional institutions.

(3) A Minister who has, at the date of commencement of this Act, already issued measures or a code as contemplated in subsection (2) is exempted from the obligation imposed under that subsection.

(4) Different measures may be determined and different codes may be issued for different persons, non-governmental organisations, community-based organisations or traditional institutions, depending on their size, resources and influence.

(5) A Minister must, when determining measures or issuing a code in terms of this section, have regard to any existing measures in place in any law, directive, policy or charter which relate to the elimination of discrimination and the promotion of equality.

Recommendation

We submit that section 28 as currently constituted does not make sense. We suggest that the amended section 28 should be integrated into section 25 while keeping the old section 28. Alternatively, we suggest that section 28(2)(b) should be section 28(2)(a). The entails they

must abide by the code of good practice in their sector and then 28(2)(b), they should implement measures. In addition, add (c), the minister must use their licencing and other powers to ensure compliance with the code of good practice. Therefore section 28(2)(a) and section 28(2)(b) should not be '*or*", it should be "*and*".

Insertion of section 29A in Act 4 of 2000

29A. If it is proved in the prosecution of any offence that unfair discrimination on the grounds of race, gender or disability played a part in the commission of the offence, this must be regarded as an aggravating circumstance for purposes of sentence.

Recommendation

No comment

Section 30 of the principal Act is hereby amended by the substitution for paragraph (t) of subsection (1) of the following paragraph:

"(t) the reports contemplated in ***[sections]*** *section* ***[25(3)(c) and 26(c)]*** *26(4)(c) and the equality* ***[plans]*** *measures contemplated in* ***[section]*** *sections* ***[25(4)(b) and (5)(a) and section 27(2)]*** *25(1)(d), 26A, 27(1) and 28(2);"*

Recommendation

We submit that a regulation should be included that gives an entry point for the right to equality, namely a certificate of compliance with the equality duty. Furthermore, it must provide for an impact analysis on inequality, stating, what will be reduced as well as a compensation strategy where exacerbating inequality is inevitable, for Parliament to scrutinise.

We ask for a new regulation, aligned with the public sector equality duty set out in section 149 of the UK Equality Act, 2010, that is states:

(1)A public authority must, in the exercise of its functions, have due regard to the need to—

(a) (a)eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) (b)advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) (c)foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

E CONCLUSION

Most recently, and for the first time in South Africa, poverty was accepted as a ground of unfair discrimination in *Social Justice Coalition v Minister of Police*.[31] This case confirmed the constitutional imperative to move closer to a more socially just world. The call for transformative constitutionalism that evolves requires us to raise the consciousness of public policymakers and other decision-makers regarding their constitutional responsibility to advance social justice and related achievement of equality and poverty eradication. In addition, it requires us to enlist civil society's active role in the midwifery of the social democracy envisaged in the South African Constitution. This can only be achieved if we do not regress in the advances made by progressive decisions such as the *Social Justice Coalition* case.

We have paid for 21 years of failure to systematically advance equality, through polarisation and the failure of making progress concerning healing the divisions of the past. Advancing equality is not just a human rights issue, it is also an issue of creating a thriving economy and ensuring sustainable development. A thriving economy requires us to invest in everyone. To this end, we reject this Bill in its current form and call for a public engagement to ensure the strengthened advancement of equality and the restitutive measures of the Equality Act.

F RESOURCES

1. Human rights documents

African Charter on Human and People's Rights (adopted 27 June 1981 entered into force 21 October 1986) 1520 UNTS 217

Beijing Declaration and Platform for Action A/CONF.177/20 (1995)

Chapter 2 of the Constitution of the Republic of South Africa, 1996– Bill of Rights Chapter 2

Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13

Declaration on the Elimination of Violence Against Women UNGA A/RES/48/104

[31] *Social Justice Coalition v Minister of Police* 2019 4 SA 82 (WCC).

Preamble to the Constitution of the Republic of South Africa, 1996.
Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (adopted on 25 December 2003, entered into force 25 December 2003) 2237 UNTS 319
Protocol to the African Charter on Human and People's Rights on the Rights of Women adopted 13 September, entered into force 25 November 2005) CAB/LEG/66.6
SADC Protocol on Gender and Development signed on 17th August 2008
Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 (III)

2. Legislation

Local Government: Municipal Systems Act 32 of 2000
Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000
United Kingdom Equality Act, 2010

3. Case law

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism 2004 (4) SA 490 (CC)
Brink v Kitshoff 1996 (6) BCLR 752 (CC)
City Council of Pretoria v Walker 1998 (2) SA 363 (CC)
Daniels v Campbell 2004 (7) BCLR 735 (CC)
Daniels v Scribante 2017 (4) SA 341 (CC)
Fraser v Children's Court, Pretoria North 1997 2 BCLR 153 (CC)
Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC)
Griggs v Duke Power Co. 401 US 424 (1971)
Harksen v Lane NO 1998 (1) SA 300 (CC)
Hoffmann v South African Airways 2000 11 BCLR 1211 (CC)
Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit NO 2001 (1) SA 545 (CC)*
M & G Media Limited v Public Protector [2010] 1 All SA 32 (GNP)
Minister of Finance v Van Heerden 2004 (6) SA 121 (CC)*
Moseneke v Master of the High Court 2001 (2) BCLR 103 (CC)
National Coalition for Gay and Lesbian Equality v Minister of Justice 1998 (12) BCLR 1517 (CC)
President of the Republic of South Africa v Hugo 1997 6 BCLR 708 (CC)
Pretoria City Council v Walker 1998 (3) BCLR 257

S v Makwanyane 1995 (3) SA 391 (CC)

Social Justice Coalition v Minister of Police 2019 4 SA 82 (WCC)

4. Literature

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Gutto S *Equality and Non-Discrimination in South Africa* (2001)

Madonsela T "Law and the economy through a social justice lens" in R Parsons (Ed) *Recession, Recovery and Reform: South African Economy after Covid-19* (2020)

Maluleke J & Madonsela T, *Women and the Law in South Africa: Gender Equality Jurisprudence in Landmark Court Decisions* (2004)

Powys TJ "Benefit or impediment?" Agenda (2016)

South African Human Rights Commission (2014) Equality Roundtable Dialogue Report

Submitted by the Chair in Social Justice

University of Stellenbosch

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