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PART 3: PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION  
ACT NO 4 OF 2000

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As a result of our country's notorious history with regard to discriminatory legislation, the Constitution acknowledges that there were various forms of discrimination, such as race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. Therefore the Constitution includes an equality clause in the Bill of Rights, which prohibits discrimination on many grounds, including ethnic or social origin, race, gender, birth and colour.

Women have suffered as a result of gender discriminatory laws and practices, and have also had to endure the additional burden of other forms of discrimination, such as race, gender, birth and colour and so forth.

We do recognise the importance of the right to equality, but emphasise that this should be in accordance with the Constitutional principles of equality. It is not possible to lay down an absolute standard or test for justification of an infringement of rights. One has to apply these principles, and weigh all these factors together.

The prohibition of direct discrimination and the promotion of formal equality, will not guarantee substantive equality. We need to acknowledge the social, religious and cultural context of the lived realities on the ground. Many women continue to choose to live in these realities, while others are coerced into it, which will prevent them from enjoying substantive equality. The promotion of gender equality remains a real challenge to ensure democracy.

Positive steps must therefore be taken to prevent the hardships and effects caused by such discrimination. PEPUDA is a step in ameliorating the position of women in our country.

### **Implementation of the Equality Courts**

While the legislative provisions of PEPUDA remains laudable, implementing and monitoring these provisions remains a challenge. PEPUDA does not make provision for the formulation of specific rules of procedure applicable to the equality courts. These rules of procedure, which must reflect the ethos of 'PEPUDA' have yet to be promulgated. The issue of rules of procedure denies 'access to justice' as currently the Magistrates Court Rules or the High Court Rules are applicable, which makes the functioning of these courts formal.

It is further noted that the Department of Justice has been slow in setting up these courts, and the implementation of further courts must be hastened. The structural setting and design of the courts, are makeshift, usually on the mornings of the hearings often intimidates complainants and witnesses. All Court personnel needs to be sensitised on the provisions of the Act, and the social context issues which underpins the ethos of the Act, including but not limited to gender discrimination. Equality Courts are not given the priority and support as espoused in the legislation.

The CGE has noted the following challenges with regard to the efficiency and effectiveness of the Equality Courts: Equality Courts have not been set up country wide. Ordinary people, who lack means and access to services, are most likely affected by discrimination. Most cases brought to the Equality Courts have been by academics or legal experts, with the intention to develop legal jurisprudence amongst others. While this is laudable, it only goes to a limited extent to address the deep seated and systemic inequalities rife in our society.

## **Preamble**

The Preamble in PEPUDA acknowledges the impact of colonialism, apartheid and patriarchy as a contributor of social and economic inequalities in South Africa, but fails to expressly acknowledge the role of socialisation in the oppression of the great majority of our people. Whilst the preamble refers to CEDAW, at the same time it fails to make adequate reference to the promotion of gender equality against the backdrop of human rights principles.

### Recommendation:

*Issues relating to socialisation should be included in the preamble. Greater emphasis should be placed on gender equality, by including a paragraph dealing specifically with gender equality.*

## **Definition of prohibited grounds of discrimination**

We wish to point out that some of the prohibited grounds of discrimination are not defined in Chapter 1 of PEPUDA.

### Recommendation:

*For the purposes of clarity, we would like to recommend that all the grounds of unfair discrimination be defined in the definition of the act, such as race, gender, sex, disability, ethnic or social origin, colour, sexual orientation, conscience belief, culture, birth and religion.*

### **Legislative Responsibility of Reporting To Parliament**

It is concerning that the CGE is to monitor gender discrimination, while we are not tasked with the legislative responsibility of reporting to Parliament on the extent to which gender discrimination persists. Section 28 of PEPUDA should be expanded to compel the CGE to report to Parliament on the extent of the measures taken by the State and society to address gender inequality.

#### Recommendation:

*We would like to recommend that PEPUDA be amended to compel the CGE to report to Parliament annually, on the status of gender discrimination, as well as measures taken to address gender imbalance in society.*

### **Interpretation of Act**

Section 3(2) provides for the interpretation of this Act to take into account international law and international agreements; customary international law; any relevant law or code of practice in terms of a law; as well as comparable foreign law. No specific reference is made to domestic customary law, which is practiced locally, and indigenous to South Africa.

#### Recommendation:

*Amend Section 3.2 (b) of the Act by inserting the word "domestic" to the clause to read: "international law, particularly the international agreements referred to in section 2, domestic and international customary law.*

### **Additional ground of discrimination against women**

The prohibition of unfair discrimination on the ground of gender seems limited to those listed under Section 8 of PEPUDA. This fails to take into account the psycho-social forms of discrimination against women, which impact on their dignity, and their right to substantive equality. The concept of discrimination should be broader than taking into account the material impact of discrimination, but should also acknowledge the social interaction and institutional context of structures which impacts adversely on women.

#### Recommendation:

*The following be included as an additional ground under subsection 8(j) of PEPUDA : any other form of direct or indirect discrimination which impacts adversely on women.*

### **Children**

Section 8(d) refers to the dignity and well being of a girl child. We believe that the safety net for girl children should be extended to all children.

#### Recommendation:

*The word "the girl child" be replaced by the word "children"*

### **Prohibition of harassment**

Section 11 prohibits anyone to subject a person to harassment. This section as it stands in the Act appears to be an after thought, and not clearly defined. Due recognition is not given to harassment in our country. It is recommended that this section be expanded to include, but not limited to, sexual harassment in the workplace, stalking, bullying or any other behaviour that impacts adversely on the dignity of a human being.

#### Recommendation:

*The word "harassment" should be defined in Section 1 of PEPUDA. The definition should also make reference to cross cutting issues, e.g. the intersection between race and gender.*

### **Prohibition of Dissemination and Publication of Information**

Section 12 deals with the prohibition of dissemination and publication of information that unfairly discriminates. It is noted that, despite the fact that the purpose of the section is commendable, the section needs to focus more on the actual impact of the alleged discrimination on the aggrieved party. For example, many gender-related complaints about advertising are reported to the CGE, and we have noted that on many occasions, such complaints are dismissed on the basis of the absence of intent on the part of the respondent.

Emphasis should rather be placed on the impact of the alleged discrimination on the aggrieved party, rather than focusing on whether or not there was an assumed "clear intention" on the part of the respondent to unfairly discriminate. This would be in line with

current constitutional interpretation approaches and substantive equality jurisprudence in terms of focusing on the actual impact on the aggrieved party.

Recommendation:

*The focus should be shifted from the clear intention to discriminate, to the actual impact of the dissemination or the publication of information.*

**Protection of witnesses**

PEPUDA fails to protect witnesses and complainants wishing to lodge complaints, or provide evidence in court. This has the effect of limiting cases of discrimination being processed in these courts.

Recommendation:

*PEPUDA is to provide for the physical protection of complainants and witnesses in need of protection, at the expense of the state.*

**Legal Representation**

People who appear before the court are informed of their right to legal assistance, and at times are referred to the Legal Aid Board or Justice Centres. They are rarely referred to Chapter 9 Institutions, who are obliged in terms of their mandate, to legally assist and support complainants in matters of discrimination. Whilst this is contained in Section 20(9) of



PEPUDA, in practice, referrals to Chapter 9's are rarely made, and in some cases it is dependent on the personality of the presiding officer. This principle should be consistently applied, and hence it is recommended that presiding officers must be legally obliged to refer persons requiring assistance to the relevant Chapter 9 Institution.

Recommendation:

*It must be incumbent upon the state to refer unrepresented parties in matters before the Equality Court to Chapter 9 Institutions.*

**Indemnity of cost order**

S21(o) of PEPUDA empowers the Equality Court to make an appropriate cost order against any party to the proceedings. Costs against litigants will, and have deterred matters of serious discrimination, for fear of an adverse cost order. This is one of the reasons for the limited number of cases before the Equality Courts. In practice thus far, it is arguable that in the majority of matters before the court, litigants have the material means. The issue of costs unintentionally perpetuates the inequality in society by excluding financially disadvantaged persons from taking matters to the Equality Courts.

Recommendation:

*All persons including Chapter 9 institutions should be exempt from a cost order in matters before the Equality Court. Cost orders should only be granted in matters that are frivolous or vexatious.*