

total of 11 710 complaints of human rights violations. This was the third highest category of complaints following arrested and detained persons (583) and labour matters (840). These cases dealt with the following areas of discrimination:

Types of discrimination matters received by the Commission

Nature of discrimination	Percentage
Race	59%
Disability	14%
Age	8%
Sexual Orientation	5%
Ethnic or social origin	4%
Language	2%
Religion	2%
Gender	1%
Sex	1%
Colour	1%
Conscience	1%
Marital status	1%
Culture	1%
Total	100%

4.10. Reasons for why matters are not referred to Equality Court

There are many reasons for why matters are not referred to Equality Courts. These include:

- Can be better dealt with by other institutions
- Capable of mediation by the Commission
- There is insufficient evidence to ensure that the case will be successful
- Complainants prefer the 'softer' option
- Litigation is viewed as the harsh option by complainants
- Complainants find courts intimidating
- Complainants are poor and do not have taxi fare to go up and down to the court
- Complainants are intimidated to go to magistrates courts on their own due to illiteracy
- Court is too adversarial and damaging for relationships
- There is no Equality Court in their area
- The Equality Court in their area is not operational / functional
- Many complaints arise out of work place disputes and therefore do not fall under the Act. Therefore these matters have to be referred to the department of labour to be dealt with under the Employment Equity Act. Alternatively, the Commission handles the matter in terms of its complaints procedure.

4.11. Reasons why Commission prefers in some instances its own complaint mechanisms

- Creates uniform approach and certainty in decision making
- The Commission has greater control over the process
- The Commission process can be quicker
- There is respect for the Commission and this assists in handling matters speedily
- Regarded as less hostile and more amicable way of resolving dispute
- The spirit of the Act is that only disputes that cannot be resolved in other forums should be heard in court

4.12. Who decides whether a matter is referred to the Equality Court

Members of the public that approach the Commission concerning an equality dispute are informed of all the various options that are available to them. The complainant will then choose which option they wish to follow.

4.13. Mediation of equality matters by the Commission

Mediation is used should the complainant request it after all options to resolve a dispute have been explained. It is a sometimes-favoured option where the respondent is a colleague or family member i.e. there is a close ongoing relationship between the parties.

Interest based disputes have been successfully mediated by the Western Cape office as there was sufficient good faith between the parties. The Gauteng office was of the view that mediation can be used where the merits of a case are not strong and there is little or no corroborating evidence. In KZN, a racial discrimination matter was mediated between union and municipality officials. Strictly speaking it was a labour matter but the Commission decided that it would be in the interests of all concerned to assist and to mediate the matter.

The Commission is yet to have a matter referred to it for mediation by an Equality Court. The Equality Courts therefore are not making use of the provisions of referring matters to the Commission for mediation. The Magistrates may not understand the referral provisions of the Act and may need additional training in this area. The spirit of the Act is that the Equality Court should where possible refer matters to alternative forums. The Commission prepared itself some time back for such referrals and provided mediation training to its provincial managers and head office legal staff.

It is interesting to note that mediation in most cases was reported as being very

successful. This perhaps indicates how discrimination very often takes place within the context of an ongoing relationship. The purpose of resolving the dispute is to mend the relationship that has been harmed in order that the parties can continue with their relationship.

Number of equality mediation matters

Province	Number of cases	Stage of referral
Eastern Cape	Nil	
Free State	Nil	
Gauteng / North West	5	1 referred by the Equality Court
Kwa Zulu Natal	1	Prior to referral to court
Limpopo	3	Prior to referral to court
Mpumalanga	Nil	
Northern Cape	6	Prior to referral to court
Western Cape	3	Prior to referral to court

4.14. Abuse / Incorrect use of the Equality Act

The Commission has picked up on a few instances where the Equality courts are being misused or incorrectly used. These span from outright vexatious litigation to allegations of abuse. A lot of complainants come with labour matters that fall outside of the jurisdiction of both the Equality Court and the Commission. In some instances, poor complainants view the Equality Court as a mechanism to obtain monetary compensation.

The Western Cape office made an interesting observation about one case in particular:

"In another matter the Equality Court in George recommended that the defendant undergo sensitivity training under the auspices of the Commission. The training was conducted in Oudtshoorn with other participants of different race groups. The training officer and legal officer who conducted the training observed the respondents interaction with participants and had reservations about whether he was in fact a racist as found by the court. He signed an equality pledge but informed us that he is very sad to be branded a racist. He was of opinion that the presiding officer did not apply his mind and did not take into account his witnesses statements. His witness was of another race that testified that he is not racist and that complainant had lied. He said that the applicant purposefully lied and abused the system. He felt that the Equality Court provides no redress for a person who was wrongfully accused to appeal."¹⁴

The Head Office has had a number of matters where complainants have not been

¹⁴ Western Cape Internal Equality Review Questionnaire, October 2006

awarded tenders and it was too quickly alleged that racial discrimination was the reason for their failing to secure the tender.

Also, in KZN there was a case of an inter-racial HIV positive couple that were denied the opportunity to run a tuck shop across the road from a school. They alleged discrimination on the grounds of race and HIV status. Upon further investigation it turned out that the real reason for the denial was that the school principal did not want a tuck shop across the road from the school, as it would be unsafe for learners to leave the school premises during school hours. This information arose during investigations by the Commission and demonstrates how it is sometimes necessary for initial investigations to be conducted prior to a matter being referred to the Equality Court.

4.15. Crimen iniuria

Most members of the public are not aware of this criminal remedy. However it is found to be an attractive remedy by some complainants when they are advised about it. The Western Cape has had instances where the complainant has chosen the criminal court route, as the Commission's procedures were not viewed as sufficiently punitive.

It has also been picked up on visits to courts by Commission staff that crimen iniuria is being used with the complainant not being advised by the prosecutor that their complaint could be dealt with by the Equality Court. In fact in the George magistrate's court, the clerk of the Equality Court stated that in three years the court had only had one Equality Court matter and that complainants 'preferred' to use the crimen iniuria remedy.

In Mpumalanga, complainants do not want to use the criminal court route because it is rare to receive compensation if the accused is found guilty. Many complainants therefore prefer the Equality Court whether there is the possibility of receiving monetary compensation.

In Limpopo some complainants choose to use this route when they are informed about it. It is felt that there is a general lack of awareness about Equality Courts and this is the reason for why other remedies such as crimen iniuria charges are used.

It has been picked up that there is a possible need to train police officials and prosecutors about the Equality Courts in order that appropriate matters can be referred to the Equality Court.

4.16. The Equality Court is not always the preferred option for organizations

In discussions with some NGO's that embark on civil interest litigation it has

been mentioned that they try to avoid the Equality Court based at the magistrate's court as the decision that is delivered will not have a high precedent level. If they are going to expend resources, time and money on a matter then they prefer to go directly to the high court or the equality chamber of the high court.

5. Conclusion

There is clear under usage of Equality Court at the present time. This is of concern given our past and that we are still in the process of building a human rights culture. The Act was hailed as the most important piece of legislation that was created after the constitution and expectations were created. We are collectively disappointed with the results thus far. The Regulations that will address the promotional aspects of the Act are yet to be promulgated. These regulations are needed to address the lack of public awareness and knowledge about the Act and the mechanisms that are created to address unfair discrimination. We are also disappointed with the manner in which Equality Courts' have functioned and the lack of proactiveness from all quarters in ensuring that it is used. We appear stuck in a formalistic mindset of approaching court matters and the radical mind shift contained in the Act of creating a user friendly and accessible court system appears to have been lost. State institutions have also failed in ensuring that the Act is sufficiently used. A collective responsibility therefore need to be taken for the under usage of these courts. This review comes at an appropriate time when an intervention is needed to ensure that the Act lives up to its expectations.

Annexure "b"



South African Human Rights Commission

A GUIDE ON HOW TO USE THE PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT, 4 OF 2000 (PEPUDA)

EQUALITY UNIT
AUGUST
2006

USEFUL TERMS

<i>Affirmative action:</i>	it is a means of protecting and advancing persons who were previously disadvantaged.
<i>Blacks:</i>	refers to Africans, Indians and Coloureds.
<i>Hate speech:</i>	type of speech used to offend a person on purpose; it may be due to the colour of her skin, religion, culture etc.
<i>Harassment</i>	repeated, conduct or action or words which makes a person angry, to panic or have emotional distress and which is not welcomed by that particular person.
<i>Person</i>	refers to individuals, legal entities, groups or category of persons and the state.
<i>Previously Disadvantaged persons</i>	refers to Africans, Indians and Coloureds.

Background to the Equality Act

South Africa comes from a history of inequality between blacks and whites. Blacks were victims of racist laws, which not only separated people in terms of race but also declared them as being unequal to whites. The unequal treatment was evident in the allocation of resources, which included distribution and access to land, the quality of education, the provision of social services, participation in the processes of governance, type of education and employment opportunities were determined by the colour of a persons skin. To restore these past differences, equality has been included as one of the core values in the Constitution of the Republic of South Africa Act, 108 of 1996. It is contained in section 9 of the Constitution and provides, amongst others, that a law must be passed to put a stop to unfair discrimination. The legislature in view of that the legislature passed the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000.

The Promotion of Equality and Prevention of Unfair Discrimination Act

The Promotion of Equality and Prevention of Unfair Discrimination Act is commonly known as PEPUDA. It recognises our unjust past, aims to change the present inequalities and build a society wherein everyone would be treated equally. It has been passed to:

- Ensure that all the rights and freedoms included in the Bill of Rights are achieved.
- Promote equality.
- Curb unfair discrimination and protect human dignity as contained in sections 9 and 10 of the Constitution.
- Disallow hate speech based on ones colour, religion, gender and ethnicity.
- Facilitate the Republic's compliance with international obligations such as the Convention on the elimination of discrimination against women,
- Disallow harassment.

Application of PEPUDA

PEPUDA applies to all persons except those to which the Employment Equity Act, 55 of 1998 applies. These are independent contractors, South African National Defence Force and the Secret Services. PEPUDA is the most important legislation after the Constitution because when a conflict relating to a matter dealt with in this Act occurs between it and the section(s) of any other law other than the Constitution or an Act of Parliament making changes to it, this Act applies.

In applying PEPUDA the following should be recognised and taken into consideration:

- The existence of the present inequalities, which are as a result of colonialism and apartheid.
- The need to take steps at all levels to deal with the present

inequalities.

What is Equality?

Equality means treating people in the similar situation in the same manner and treating those in different situations differently according to their similarities and differences. The right to equality is included in section 9 of the Constitution and says amongst others, that equality includes the full and equal enjoyment of all rights and freedoms. Therefore, a person would be said to be enjoying his or her right to equality when he/she enjoys all the other rights included in the bill of rights such as access to health care, water, basic education, privacy etc.

Promotion of equality

The promotion of equality requires the promotion of a society in which all people are safe in the knowledge that they are accepted as human beings equally deserving of concern, respect and consideration

Who is responsible to promote equality?

PEPUDA requires every person to promote equality in every sphere of their lives i.e. in their workplace, communities, social clubs etc.

Prevention of unfair discrimination

Before a person can understand what unfair discrimination, one must first understand what discrimination is:

What is discrimination?

It is an act or error, including a procedure, law, practice or situation that makes a distinction between persons and directly or indirectly:

- Causes difficulty, duty or disadvantages on; or
- Deny benefits, opportunities or advantages from any person on one or more of the disallowed or listed grounds.

Types of discrimination

- I. Direct discrimination
- II. Indirect discrimination

Direct discrimination is the most obvious type of discrimination, it happens when a person is treated less favourably than the other in a similar situation because of their gender, skin colour, disability, religion etc.

Example:

1. A job advertisement specifies as follows: A legal secretary is required for a reputable law firm, but "disabled people need not apply".

Indirect discrimination is a less obvious type of discrimination. It happens when a practice, law, policy or situation consists of a requirement which appears to be neutral, which a person with a certain skill or quality is unable to comply with, and which a higher proportion of people without the skill or quality can comply with. In this instance the principle of reasonableness would be used to determine whether the requirement amounts to indirect discrimination or not. Reasonableness would depend on the circumstances and consequences of not being able to comply and the cost of alternatives.

Example:

An employer demands that all the employees must speak and understand Afrikaans fluently so that they will be able to follow or understand all the employment rules. This policy leaves out people who can't speak or understand Afrikaans.

In this instance an employer could have avoided to discriminate against those who cannot speak or understand Afrikaans by translating employment rules into several languages and offering training on the employment rules.

Indirect or direct discrimination may be fair or unfair.

What is fair discrimination?

It is an acceptable act, situation, treatment or practice that differentiates between persons or a group of persons and disadvantages others.

What is unfair discrimination?

It is an unacceptable act, situation, treatment or practice that disadvantages a person or a group of persons. The Constitution and PEPUA both aim to put a stop to unfair discrimination and they contain a list of grounds upon which a person is not supposed to be discriminated against. These are: race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, religion, disability, conscience, belief, culture, language and birth.

PEPUA also protects a person or group of persons against unfair discrimination on the grounds that are not listed in it, e.g on the grounds of socio-economic status, HIV etc. If a person basis a complaint of direct or indirect unfair discrimination on a ground not listed in the Constitution or PEPUA, she must prove that she has been treated differently in a way that injures her dignity.

Example 1:

Edward is denied admission into the Department of Water Affairs Internship Program only because he is HIV positive. Edward can raise a complaint of unfair discrimination on the basis of HIV.

Determination of fair and unfair discrimination

In order to determine whether an act, situation, legislation or practice amounts to fair or unfair discrimination, the following questions have to be answered:

- Is there a differentiation or a failure to differentiate?
- Does it cause harm or prejudice?
- Whether or not is it on a prohibited ground?

If there is differentiation that disadvantages a person and causes harm to a person's dignity, there is discrimination. Then it has to be established whether it is on the listed or unlisted grounds. If it is on the ground not allowed by both the Constitution and PEPUA, the differentiation is unfair unless a person who is said to have differentiated between people can prove that it is fair.

Determination of fair discrimination

In order to establish whether the differentiation is fair, it must be proved that it is aimed at achieving a rightful purpose. Most importantly there should be a rational connection between the differentiation and a purpose. In other words the said legitimate purpose must be justifiable in an open and democratic society. Affirmative action is an example of such a legitimate purpose.

Example:

The South African Revenue Services advertises a position for a Senior Manager and interviews three black women, three black men and two white women. It then appoints a black woman having all the requirements needed for the position. Then a white woman complains that she is being unfairly discriminated against because she meets all the requirements for the position and takes the matter to the Commission for Conciliation Mediation and Reconciliation (CCMA). The CCMA would decide that she has not been unfairly discriminated against because she does not fall within the group of the previously disadvantaged. However, it must be kept in mind that Blacks, women and the disabled person would not be appointed only because they have been previously disadvantaged but issues such as qualifications and skills have to be taken into consideration.

Determination of unfair discrimination

As it has already been said, if the differentiation is based on any of the grounds included in the Constitution and PEPUDA, automatically it is unfair. A person who is alleged to have differentiated between persons would have to prove that it is fair. In order to determine whether a practice, treatment, legislation or situation amounts to unfair discrimination, the following factors must be taken into consideration:

- Position of the complainant in a society and whether he or she is a member of a group that has suffered unfairness and patterns of disadvantage in the past.
- The nature of the power in terms of which it was carried out.
- The extent to which the discrimination impairs the rights and interests of the complainant or his/her group, and amounts to the invasion of dignity.
- Vulnerability of the complainant or a group of person such as women and the disabled.
- Whether the person who is alleged to have disadvantaged another has taken reasonable steps to address the disadvantage.

Example1:

A black learner applies for admission into grade 4 in a former Model C school and there is only one vacant position. Her application is not successful because her English or Afrikaans is not good, instead an English or Afrikaans-speaking learner is admitted regardless of the fact that she applied later than a black learner.

Given the fact that black people have been previously disadvantaged in the past, this would amount to unfair discrimination on the basis of race and

language. Failure to admit her to the also school injures her dignity and violates her right to Basic Education. In this instance the school will have to give reasons for their failure to admit a black learner and such reasons must be acceptable in an open and a democratic society. Should the school not give acceptable reasons, this would mean that she has been unfairly discriminated against and her right to equality has been infringed.

PEPUDA has created equality courts to deal with issues of unfair discrimination, hate speech and harassment. Any person, who has been unfairly discriminated, subjected to hate speech and harassment can approach an equality court in their area for suitable assistance.

Example of Hate Speech guess

An Afrikaner says to an African that you Black people don't want to pay for anything you want to get things for free. This would amount to hate speech because the said words indicates a clear intention to be hurtful, cause harm and to promote hatred.

Example of harassment

Ronny keeps on asking Lebo to go with her to his place for dinner over and over again and she refuses. She even told him a number of times that he should stop it but he continues referral.

Example of Unfair Discrimination

They have been provided above.

What is an Equality Court?

- These are specialised courts that have been established in terms of section 16 (1)(a) of PEPUDA to deal with issues of unfair discrimination, hate speech or harassment.
- These courts came into operation on the 16th June 2003.
- Only incidents that occurred after the launch could be brought before the equality courts.
- There are no fees required to lodge a complaint in these courts.
- Legal representation is not a requirement; any person other than a lawyer may represent the complainant in the Equality Court.

Who can lodge a complaint in the Equality Court?

- Any person who believes that he or she is a victim of unfair discrimination, harassment or hate speech.
- Any person acting on behalf of another person who cannot act in his or her own name.
- Any person acting in the public interest.
- Any association acting in the interests of its members.
- Any person acting as a member of or in the interest of a group or class of persons
- South African Human Rights Commission or the Commission on Gender Equality.

Where can I access services of Equality Court?

Authorised Magistrate and High Courts in the country serve as Equality Courts.

Whom do I approach for assistance to lodge a complaint in the Equality Court?

An Equality Court Clerk

Duties of an Equality Court Clerk?

- The equality court clerk at the Magistrates Court must assist the complainant with filling the form relating to details of the complaint and the particulars of the person against whom the complaint is made.
- The clerk of the equality court must within seven days after receipt of the complaint, notify the respondent of the complaint lodged against him and the respondent has ten days within which to respond to the allegation.
- A copy of the response must be sent to the complainant within seven days after the clerk has received the response from the respondent.
- All these documents pertaining to the matter must be sent to the Magistrate within three days after the clerk has collected the needed information.

Referral to an appropriate forum

- The Magistrate will decide whether the matter should be referred to an alternative forum such as the SAHRC, CGE or the CCMA. This should be done within seven days after the magistrate has read all the information and decided on what should be done.

Allocation of date for hearing

- If the presiding officer decides that the matter is to be heard in the equality court, the presiding officer must refer the matter to the clerk of the equality court who must within the prescribed period of such referral assign a date of hearing of the matter.

The hearing

- The clerk of the court will subpoena both parties to attend the hearing. It is obligatory for the respondent to attend this hearing. In the event that the respondent does not attend the hearing, he will be held in contempt of court, and the usual warrant of arrest will be issued. Further more the court can grant a default judgment in the absence of the respondent.

Referral during the hearing

- If a presiding officer decides that the matter must be referred to an alternative forum he or she must in the prescribed manner, make an order directing the clerk of the equality court to transfer the matter to an alternative forum mentioned in the order. When making an order, the presiding officer may attach to the order any comments he or she

deems necessary for the attention of the alternative forum. On receipt of an order, the clerk of the equality court must transfer the matter and notify the parties to the matter of the transfer in the prescribed manner

Remedies

- If it has been proven that unfair discrimination, hate speech or harassment has taken place, then an equality court can provide a suitable relief to the complaint. There are a number of remedies that can be granted such as the unconditional apology, diversity training, payment of damages, etc.
- The ruling of an equality court carries the same weight as a ruling of any other court.

Appeal

If a complainant is not satisfied with the decision of the Equality Court, he/she may appeal against it within 14 days of the judgement to the High Court or Supreme Court of Appeal or directly to the Constitutional Court.

Review

If a presiding officer in a magistrate court has decided on a matter relating to prohibited grounds that are not listed in PEPUDA or the Constitution. Such decision must be submitted to the High Court having the authority for review.

Annexure "a"



FREE STATE: EQUALITY COURT SUVERY REPORT

Equality Courts	Name of the Court	Date Established	Training Provided Yes/No	Cases Received	Cases Withdrawn	Cases Finalist	Cases Referred
Kroonstad	No Equality Court	Nil	Nil	Nil	Nil	Nil	Nil
Welkom	No Equality Court	Nil	Nil	Nil	Nil	Nil	Nil
Bethlehem							
Harrismith	No Equality Court	Nil	Nil	Nil	Nil	Nil	Nil
Koppies							
Parys							
Sandveld/Hoopstad	Hoopstad Equality Court	2005	2 days	2 Cases	Nil	Nil	Nil