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23 March 2007

Honourable Members
Portfolio Committee on Justice and Constitutional Development

Dear Members,

Re: Draft of the Equality Review Report

Herewith please find the abovementioned DRAFT report, which you are requested to peruse in preparation for the discussion in the Committee on Tuesday 26 May 2007.

Yours faithfully

Ms. F. I. Chohan, MP
Chairperson: Portfolio Committee on Justice and Constitutional
Development

DRAFT

Report on hearings conducted by the Portfolio Committee on Justice and Constitutional Development on the occasion of the Review by the Parliament of South Africa on aspects of equality in our society - 16 October 2006

1. Introduction

Since 1994 Parliament has continued to repeal discriminatory apartheid legislation and pass legislation in compliance with the Bill of Rights contained in the Constitution of the Republic of South Africa (Act No. 108 of 1996).

Legislation passed since 1994, has promoted the fundamental values espoused in our Constitution i.e. equality and dignity. The most pertinent legislation in this regard is the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) (Act No. 4 of 2000). The Act was phased in and came into operation in 2000 and 2003 with the exception of Sections 24 to 28 and 29 (2).

In 2006, the Presiding Officers requested the following Committees to embark on an Equality Review to assess whether new measures implemented by government since 1994 have enhanced equality in the post-apartheid South Africa and inter-alia to assess the success or otherwise of (PEPUDA) in eradicating unfair discrimination in our country:

- The Joint Monitoring Committee on the Improvement of Quality of Life and Status of Women (JMCSW).
- The Joint Monitoring Committee on the Improvement of Quality of Life and Status of Children, Youth and Disabled Persons (JMCCYD).
- The Portfolio Committee on Justice and Constitutional Development.

Co-ordination between the Committees was facilitated by the House Chairperson, the Honourable Sandra Botha, who convened the chairpersons of all the above committees.

The Joint Monitoring Committees held hearings, some in Parliament and some in the provinces, with the relevant stakeholders including those focussing on women and disabled persons. The JMCSW conducted oversight visits in Mpumalanga and Limpopo and held hearings at Parliament during October 2006, whilst the JMCCYD conducted hearings in Parliament. These Committees will report on these outcomes separately.

As part of the Review exercise, the Portfolio Committee on Justice and Constitutional Development held hearings with the relevant units of the Department of Justice and Constitutional Development and the South African

Human Rights Commission to inquire into the implementation and effectiveness of PEPUDA. It should be noted that a written submission by the Commission on Gender Equality was deemed inappropriate for the Equality Review and referred by the convenor to the Ad Hoc Committee on the Review of Chapter Nine Institutions Supporting Democracy for their consideration. Present at the hearings were inter-alia Members of the Joint Monitoring Committees, the Select Committee on Security and Constitutional Affairs and the House Chairperson and convenor of the Review, the Hon. Ms. Sandra Botha, MP.

2. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA)

The Constitution of South Africa provides for the enactment of national legislation to prevent or prohibit unfair discrimination and to promote the achievement of equality. The PEPUDA aims to facilitate 'the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom'.¹

The Act acknowledges that despite the progress made in restructuring and transforming South African society and its institutions, systemic inequalities and discrimination remain deeply embedded. Accordingly, the Act recognises the need to take measures at all levels to eliminate unfair discrimination, hate speech and harassment, particularly on the grounds of race, gender and disability. The legislation deals with the active prevention, prohibition and elimination of unfair discrimination, hate speech and harassment, as well as provisions relating more subtly to the 'promotion of Equality', clauses like s 24 (1) in terms of which the State has a duty and responsibility to promote and achieve equality. In terms of the Act, Cabinet Ministers have a duty to implement measures that are aimed at:

- Eliminating any form of unfair discrimination or the perpetuation of inequality in any law, policy or practice for which those Ministers are responsible.
- Preparing and implementing equality plans. Such plans would not only address issues affecting disabled persons within the Department but would include the Department's plan to promote equality generally, and to address the issue of disability in particular, within the sector.

While such clauses are useful to convey that any inequality in the new democratic South Africa will not be tolerated, the legal effect of such clauses

¹ Preamble, Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA).

on the obligations of the State are enormous, and have impacted on implementation.

The Act also places a duty on private parties directly or indirectly contracting with the State or 'exercising public power' to promote equality by adopting appropriate equality plans, codes, regulatory mechanisms and other appropriate measures for the effective promotion of equality in the spheres of their operation. They must also make regular reports to the relevant monitoring authorities or institutions as may be provided in regulations.² The Act specifically mentions the obligation to promote equality with regard to race, gender and disability. For example, the Act requires State departments to draw up and submit equality plans to the South African Human Rights Commission (SAHRC), as well as implement anti-discrimination policies and practices.³

The State must in terms of section 28:

- Audit laws, policies and practices with a view to eliminating all discriminatory aspects thereof.
- Enact appropriate laws, develop progressive policies and initiate codes of practice in order to eliminate discrimination on the grounds of race, gender and disability.
- Adopt viable action plans for the promotion and achievement of equality in respect of race, gender and disability.
- Prioritise the elimination of unfair discrimination and the promotion of equality in respect of race, gender and disability.

While such clauses are useful to convey that any inequality in the new democratic South Africa will not be tolerated, the *legal effect* of such clauses on the obligations of the State may be onerous, and impacts on their implementation.

The Act also establishes Equality Courts to adjudicate in situations where there have been incidences of unfair discrimination, hate speech or harassment. These specialist courts are key mechanisms in the prevention and elimination of unfair discrimination, and were meant to be accessible and effective in the manner in which cases are heard.

3. Equality Courts (Chapter 4)

The Act establishes a specialised court, known as the Equality Court, within the existing court system to hear complaints concerning:

- Unfair discrimination on a number of listed grounds, including race, gender and disability, and unlisted grounds such as HIV status.

² Section 26, PEPUDA.

³ Section 25, PEPUDA.

- Hate speech.
- Harassment.
- The dissemination and publication of information that unfairly discriminates.

In terms of section 16(1)(a) of the Act, all High Courts are automatically designated as equality courts, while Magistrates Courts can only be designated when they have specially trained personnel in place. The Department of Justice and Constitutional Development was tasked with the roll-out of these courts.

After holding an enquiry, the court may make an appropriate order in view of the circumstances. Besides an interim or declaratory order, this may include a court order for:⁴

- Settlement between the parties.
- Payment of damages.
- Restraining unfair discriminatory practices.
- Directing that specific steps be taken to stop the unfair discrimination, hate speech or harassment.
- Making specific opportunities and privileges, unfairly denied in the circumstances, available to the complainant.
- The implementation of special measures to address the unfair discrimination, hate speech or harassment.
- Directing the reasonable accommodation of a group or class of persons by the respondent.
- An unconditional apology.
- Requiring the respondent to undergo an audit of specific policies or practices as determined by the court.
- Directing the clerk of the Equality Court to submit the matter to the Director of Public Prosecutions for the possible institution of criminal proceedings.
- Complying with any provisions of the Act.

An Equality Court can also issue an order:

- Requiring the respondent to make regular progress reports to the court or the relevant constitutional institution regarding the implementation of the court's order.
- An appropriate order of a deterrent nature.
- An appropriate order of costs against any party to the proceedings, or an order to comply with any provisions of the Act.

4. Prevention, prohibition and elimination of unfair discrimination, hate speech and harassment (Chapter 2)

⁴ Section 21, PEPUDA.

The Act prohibits unfair discrimination on a number of listed, as well as unlisted, grounds. Discrimination is defined as 'any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly imposes burdens, obligations, or disadvantages on, or withholds benefits, opportunities, or advantages from, any person on one or more of the prohibited grounds'. The grounds that the Act lists are those contained in section 9(3) of the Constitution, namely race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. In addition, the Act envisages that there may be grounds for discrimination that are not listed, such as HIV/AIDS status, socio-economic status, nationality, family responsibility and family status⁵. The Equality Review Committee (ERC) was meant to submit a report to the Minister for Justice and Constitutional Development within a year of its establishment to enable the Minister to consider the inclusion of these additional prohibited grounds. Such a report it appears, was not produced.

5. Burden of proof and determination of fairness or unfairness (Chapter 3)

In addition to containing a general prohibition of unfair discrimination, a number of specific examples of unfair discrimination are included in the Act. While respondents may still seek to prove that the discrimination is fair in terms of the factors in section 14, these examples are intended to assist complainants in establishing claims based on socio-economic inequalities. Not only does the Act list disability and gender as grounds for unfair discrimination, it makes specific reference to it in section 9 and section 8 respectively. Thus, in terms of this section, neither the State nor any person may unfairly discriminate against any person on the ground of race, gender or disability.

The Schedule to the Act also contains a list of practices that may be unfair, are widespread and need to be addressed.⁶ The State must, where appropriate, ensure that legislative and other measures are taken to address these practices. This list, however, is not exhaustive and requires continuous revision by the ERC, which is an overseeing and reviewing structure set up by the PEPUDA.

⁵ Department of Justice and Constitutional Development. Equality for All. Brochure.

⁶ The practices on the list refer to labour and employment; education; health care services; housing accommodation, land and property; insurance services; pensions; partnerships; professions and bodies; provision of goods, services and facilities; and clubs, sport and associations.

6. General provisions and implementation of the Act (Chapter 6)

Chapter 6 of the Act deals with regulations and the implementation of the Act. Relevant Ministers may also develop regulations requiring private sector organisations (for example, companies, partnerships, corporate entities) 'to prepare equality plans or abide by prescribed codes of practice or report to a body or institution on measures to promote equality'.

7. Review of Act, short title and commencement (Chapter 7)

Sections 32 and 33 of the PEPUDA, deal with the establishment of the ERC, its powers functions and term of office. The ERC must advise the Minister on the operation of the Act and on laws that impact on equality. It must make regular reports to the Minister on the operation of the Act, addressing whether the objectives of the Act and those of the Constitution have been met and must make recommendations on any necessary amendments to the Act to improve its operation. Sections 33 (5) makes specific reference to the work of the Committee and states that the administrative work of the Committee must be performed by officers designated by the Director-General of the Department.

8. Presentation by the Department of Justice and Constitutional Development

The following sectors from the Department of Justice and Constitutional Development were represented at the hearings:

- Court Services
 - Directorate: Promotion of the Rights of Vulnerable Groups
 - Directorate: Victim Support and Specialised Services
 - Chief Directorate: Policy, Research Co-ordination and Monitoring
 - Chief Directorate: Facilities

The following officials represented the Department:

- Adv. Pieter Du Rand
- Ms. Shireen Said
- Ms. Lulama Nongogo
- Ms. Bonnie Makhene
- Ms. Tshilidzi Ramanyimi

The Department reported as follows:

8.1 Establishment of Chief Directorate

The Chief Directorate Promotion of the Rights of Vulnerable Groups, currently consisting of 11(eleven) personnel, was officially established in April 2005. The administration of Equality Courts, fall with the ambit of this newly

established Directorate. The Chief Directorate was established to ensure access to justice of the vulnerable in courts, as well as, to facilitate the development of programmes, policies, guidelines, inform standards relating to the promotion and protection of the rights of vulnerable groups (women, children, persons with disabilities, the elderly and victims of crime) in family, civil and criminal courts, guided by three strategic goals, namely: access to justice for all (each magisterial district should have an equality court); and enhancing organisational efficiency.

8.2 Designation of further Equality Courts

There currently exist 366 (Three hundred and sixty six) magisterial districts; 220 (two hundred and twenty) of these magisterial districts have designated equality courts. In 2007/2008 the remaining 146 magisterial districts will have been designated. As all High Courts are already designated, by April 2008 every magisterial district will have an Equality Court.

8.3 Infrastructure and setting of the Equality Court

The Act makes provision for Equality Court cases to be heard in an informal boardroom-like setting and not in a criminal court room setting. In the last financial year over R6 million rand was spent on providing the 220 (two hundred and twenty) designated Equality Courts in the provinces with the necessary furniture in order that the courts are in compliance with the Act in as far as their setting is concerned.

An audit is being conducted by the Department in all of the existing Equality Courts to firstly, locate the furniture that was provided as these seemed to have been used for other purposes in certain courts; secondly, to determine the needs of those courts that were not provided with the necessary furniture; thirdly to determine whether the structure or setting of the existing Equality Courts is in compliance with the Act and lastly, the readiness of the undesignated courts to be designated.

The courts in the Provinces of the Northern Cape, Free State and Mpumalanga are now being prioritised for receipt of proper infrastructure.

Staff is being permanently employed in these courts and 139 (one hundred and thirty nine) clerks who were appointed on a temporary basis will now be made permanent. A pool of trained clerks from the existing complement of court staff is being trained in a simultaneous process.

8.4 Accessibility to courts

Courts have historically not been designed as service centres. The Justice Department is in the midst of a program to ensure that court buildings are more accessible. It is projected that upgrading all courts to ensure access to

the disabled will cost in the region of R563 million. R10 million will be spent this year, and R10 million will be committed for the next financial year.

8.5 Utilisation of the Equality Court

Due to the fact that the Directorate was only established in April 2005 and that not all of the posts were filled, the statistics collated may not be completely accurate, as there was insufficient capacity to follow up with courts that may have been receiving cases but not submitting these figures.

Statistics for January to August 2005 reveal that 362 (three hundred and sixty two) were reported nationally and the breakdown per province is as follows: Limpopo 6 (six) cases; Gauteng 146 (one hundred and forty six) cases; Mpumalanga 18 (eighteen) cases; North West 48 (forty eight) cases; Northern Cape 5 (five) cases; Western Cape 20 (twenty) cases; Eastern Cape 12 (twelve) cases; Free State no cases; and KwaZulu-Natal 95 (ninety five) cases. The highest numbers of complaints were received from Gauteng followed by KwaZulu-Natal, with Free State having reported no cases. Racism and hate speech combined make up the highest number of cases received being 253 cases. Since 2003, less than 700 cases had been dealt with through the Equality Courts.

8.6 Public Education and Awareness

A major concern with respect to the Equality courts is their under-utilisation, considering South Africa's history of racial, gender and other forms of discrimination. Two reasons have been cited for the under-utilisation, that of lack of public awareness and perhaps the legalistic nature of the Equality legislation, (which makes it difficult for lay persons to know when an action is discriminatory or amounts to hate speech and therefore falls within the ambit of the Equality Court).

8.7 Equality Review Committee and Regulations

The Equality Review Committee (ERC) was established in terms of Section 32 of the Act as amended by Act No. 52 of 2002 and Act No. 55 of 2003. The 7 (seven) members of the ERC were appointed in terms of Section 32 of the Act. The terms of office of the ERC members has since expired.

8.8 ISONDLO

The Department also presented an update on "Operation Isondlo" which is its campaign to secure the recovery of maintenance funds for children and a vital service to reduce poverty and enhance equality and dignity. The Strategic objectives of this campaign accord with the Convention on the Rights of the Child, to which South Africa is a signatory. These are inter alia:

- Enforcement of maintenance orders

- Decreasing backlogs in maintenance matters
- Public Education and awareness campaigns

8.9 Discussions and deliberations

The following matters were inter-alia raised during discussions:

- The complaints by some court officials to the JMCSW that they did not even have access to copies of the PEPUDA
- The difficulty that deaf and blind people experienced in courts given that sign language and brail were not mainstreamed
- The finalisation of PEPUDA Regulations
- Under-utilisation of courts by members of the Public
- Lack of adequate training court personnel, and challenges faced.

9. Presentation by the South African Human Rights Commission (SAHRC)

The following officials represented the SAHRC:

- Mr. Karthy Govender (Commissioner)
- Mr. Tseliso Thipanyane (CEO)
- Ms. Judith Cohen
- Mr. Lufuno Mbadi
- Mr. Ashraf Mohamed

The SAHRC reported as follows:

9.1 PEPUDA and the SAHRC

The SAHRC's work relating to the PEPUDA focussed mainly only two categories of unfair discrimination: race and disability as much of the matters relating to unfair discrimination based on gender is dealt with by the Commission on Gender Equality (CGE). (It should be noted that in its report which was referred to earlier the CGE did not stipulate how many cases it dealt with).

Due to the fact that section 25 of the Act was, as yet, not in operation and therefore the Regulations have not yet been enacted, data was not being collected systematically.

It was also the contention of the SAHRC that Equality Courts were being under utilised.

That in reference to section 22 of the Act, there were not many referrals to the SAHRC.

9.2 Cases presented before the Equality Courts

The SAHRC made reference to the following cases that appeared in the Equality Courts in Mpumalanga:

- In the case of *Rajah*⁷, the complainant stated that the denial of accommodation at a resort was on the basis of race. This matter took sometime to be resolved as the parties attempted to solve the matter out of court.
- In the case of *Fishman*⁸, the SAHRC was approached in July 2005. The matter was heard before the Equality Court in July 2006 and was found to be related to hate speech. The findings of the SAHRC on the handling of the matter was that the clerks of the Court were unsure of how to deal with the matter, that the clerks were appointed temporary which resulted in constant change and delays.
- In the case of *Ranto*⁹, the SAHRC took the matter directly to the Equality Court without attempting mediation. The matter pertained to racial harassment. The SAHRC indicated that it was their view that the clerk of the Equality Court did know which documentation was relevant, which resulted in delays in the process of finalisation.

The SAHRC made reference to the following cases that appeared in the Equality Courts in the Western Cape:

- In the case of *De Vos*¹⁰, racism was alleged. The matter was settled out of Court.
- In the case of *Mkhize*¹¹, racial discrimination was also alleged and the matter was also settled out of Court.

Based on the above cases, the SAHRC made the following observations:

- Matters are generally taken to the Equality Courts (via the SAHRC) by complainants who have the means to approach the Courts themselves.
- The Equality Courts are not being utilised by the poor and vulnerable.
- The Courts and the SAHRC, through creatively using the forms of relief granted by the Act, are trying to strengthen the enforcement and implementation of the Act.
- There is a fear that the Courts will be used purely for punitive cases.
- Complainants don't see the Equality Court as being "remedial" enough.
- The SAPS do not inform people that they can approach the Equality Court.

⁷ Raja v Merry Pebbles, Sabie Equality Court, Mpumalanga

⁸ Fishman v Barkhuizen, White River Equality Court, Mpumalanga

⁹ Ranto v Van Rooyen, Nelspruit Equality Court, Mpumalanga

¹⁰ Pillay v De Vos v Silver Club, Cape Town Equality Court, Western Cape

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¹¹ *Mkhize v Edgemead High School*, Blue Downs Equality Court, Western Cape

- The Act calls for a fundamental mind-shift, and currently the Act is simply not working optimally.

9.3 Utilisation and functioning of Equality Courts

The SAHRC diverted matters away from the Equality Courts for inter-alia the following reasons:

- The matters may be better suited to mediation as there may be insufficient evidence or the complainants prefer another forum.
- There is some uncertainty as to which cases belong in the Equality Court and which belong in the CCMA/Labour Court.

Concern was expressed over the number of Courts that were functional. It was also noted that some of the Courts in existence are not functioning optimally and were therefore inaccessible. In addition, accessibility to some courts was problematic for persons with disabilities.

9.4 Provincial breakdown of cases finalised

Province:	Number of equality court cases finalised and referred to Equality court by the SAHRC
Eastern Cape	1
Free State	0
Gauteng/North West	6
KwaZulu Natal	0
Limpopo	1
Mpumalanga	3
Northern Cape	2
Western Cape	2
TOTAL	15

NOTE:

The 15 cases noted above only reflect those cases that are referred to the Equality Courts by the SAHRC.

9.5 Training

The SAHRC explained that it was involved in the equality training of clerks and magistrates. Clerks were only given a few days' training and are expected to do a variety of other tasks, hence they lack confidence in dealing with such cases. With regards to the magistrates' training, there was great enthusiasm for the courses, however, the training needs to be ongoing, with magistrates keeping abreast of the latest developments. The SAHRC also noted that there should be more equality litigation, so as to enhance and build the capacity of magistrates and clerks in our courts.

9.6 Regulations

The SAHRC reiterated that the Act was passed six years ago and that it was concerning that certain sections are not in operation. In response to whether an incremental implementation of the Act would not work better, the SAHRC explained that the Department of Justice and Constitutional Development was not in a position to provide an overview of the situation in Equality Courts, as it did not until now have an internal monitoring mechanism.

9.7 Mediation

The SAHRC explained that mediation was an important aspect in handling some of the cases referred to Equality Courts. They were however of the opinion that mediation should be utilised in creative ways, more so than the manner in which it was currently used. It was pointed out that mediation while sometimes preferable reduced the opportunity of the courts to deal with these cases.

10. Recommendations

The Portfolio Committee on Justice and Constitutional Development recommends:

- The Office of the Chief Justice, together with the Judicial Service Commission, the Magistrate's Commission and Justice College must ensure that continuous training in respect of PEPUDA takes place and that all Judicial Officers are reached;
- That the Department of Justice and Constitutional Development and Justice College must ensure that necessary support staff are appropriately trained in respect of PEPUDA;
- That the Department of Justice and Constitutional Development submits a report to Parliament on the status of the phased implementation or amendment of sections 24, 28 and 29 (2) or any other aspect of PEPUDA, in particular the status and effectiveness of the Equality Review Committee;
- That the Department of Justice and Constitutional Development submit a report on the status of the Report of the ad hoc Joint Committee on the Promotion of Equality and Prevention of Unfair Discrimination Bill, in particular that an investigation into the feasibility of including HIV status, socio-economic status, nationality and family responsibility and status as further prohibited grounds be conducted by the Equality Review Committee and recommendations made to the Minister for Justice and Constitutional Development for consideration;
- That the Department of Justice together with other stakeholders particularly South African Human Rights Commission (SAHRC), embark on a public education campaign to increase awareness of the existence and functioning of Equality Courts specifically aimed at the poor and more vulnerable sectors of our community.
- That the Commission on Gender Equality (CGE) produce a report indicating how many cases they have referred to equality courts since the promulgation of the PEPUDA.
- That the Department of Justice table regular quarterly reports in Parliament detailing progress in regard to the target set by them pertaining to designation and equipping equality courts in the remaining magisterial districts by the end of April 2008, and regular updates on the training of court staff and Judicial Officers.