

DISPUTES

Proposed Amendments to the Equality Act

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Equality Act or PEPUDA

In March 2021, the Department of Justice and Constitutional Development (“**DOJ**”) invited interested parties to comment on a bill aimed at amending the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (hereafter “**the Act**”; but often colloquially referred to as the “**Equality Act**” or “**PEPUDA**”). In an explanatory note, the DOJ explains that the purpose of the amendments proposed in the Bill is to address various concerns that were identified following an internal review process of the Act.

The first part of the Bill seeks to introduce provisions aimed at improving the protection of complainants against unfair discrimination. In this regard, the Bill proposes to broaden the scope of the definitions of:

1. “*discrimination*”, by doing away with the requirement that discrimination must be intentional. The DOJ avers that it is the effect of any act or omission that matters “and this makes it easier for complainants to make out a case of discrimination” in terms of the Act. If the Bill passes in its current form, this would mean unintentional acts or omissions may be found to constitute unfair discrimination; and
2. “*equality*”, by introducing “substantive equality” and “equal right and access to resources, opportunities, benefits and advantages” to the existing definition. Both of these proposed inclusions appear to be aimed at enhancing social justice and reducing the systemic inequality that is prevalent in South Africa.

Additionally, the “general prohibition of unfair discrimination” in the Act is sought to be expanded in two ways. First, by prohibiting any person from causing, encouraging or requesting another person to discriminate against another. Secondly, by introducing a provision that both an employer and employee may be held jointly and severally liable for any discrimination committed by an employee in the course of that employee’s work, unless the employer can show that they took reasonable steps to prevent the employee from doing so.

The Bill also seeks to introduce a new provision which would prohibit any retaliation against a person who either objects to discriminatory conduct, or who brings a complaint in terms of the Act.

The second part of the Bill seeks to introduce an array of regulatory measures that specified bodies or entities – namely organs of State, public bodies, constitutional institutions, persons contracting with the State, non-governmental organisations, community-based organisations or traditional institutions; as well as entities in the private sector – are required to comply with to promote equality. Oddly, however, these measures are sought to be introduced to address “the regulatory burden placed on all sectors of society, both public and private”, and the principal means by which the DOJ intends to achieve this is by “[clarifying] and [reducing] certain duties relating to promotion of equality of the State and public bodies to some extent” by effectively spreading some obligatory measures from the State to the abovementioned broad range of bodies or entities.

While Government’s dual objective of preventing unfair discrimination and promoting equality may be well intended, the manner in which the proposed amendments seek to achieve this objective is not without controversy.

In conclusion, it is worth noting that a conspicuously absent omission from the amendments proposed in the Bill is a much-needed amendment to section 10 of the Act, which deals with hate speech. Section 10, and in particular the manner in which it should be interpreted and applied by the courts, has been the subject of endless litigation. An example of such a case is **South African Human Rights Commission v Khumalo** (EQ6-2016; EQ1-2018) [2018] ZAGPJHC 528 wherein the South African Human Rights Commission was represented

by Werksmans’ pro bono department in a matter that dealt with, amongst other things, how section 10 should be interpreted (see: <https://werksmans.com/legal-updates-and-opinions/what-constitutes-hate-speech-the-equality-court-answers/>).

Another case dealing with hate speech – and in particular, whether or not section 10 is constitutional – is ***Jonathan Dubula Qwelane v South African Human Rights Commission & Another*** which was heard in the Constitutional Court in September 2020 (see: <https://werksmans.com/legal-updates-and-opinions/constitutional-court-to-finally-give-clarity-on-hate-speech/>). Given that, as things currently stand, judgment in the ***Qwelane*** matter was reserved, it is possible that the DOJ may have refrained from amending section 10 in the present Bill until such a time as the Constitutional Court has handed down judgment in that matter.

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