



FREE MARKET FOUNDATION

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COMMENTS

on

PROPOSED AMENDMENTS

to the

**Promotion of Equality and Prevention of Unfair Discrimination Act, 2000
(Act No. 4 of 2000)**

Introduction

On 26 March the Department of Justice and Constitutional Development gazetted an invitation¹ to interested parties to submit written comments on proposed draft Bill that would amend the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000.²

The proposed amendments and a note explaining the background to them were available on the Department's website.³

Period in which comments must be lodged

The invitation stated that comments on the proposed amendments had to be submitted not later than 30 working days after the date of publication of the invitation.⁴

The Department granted to the Free Market Foundation an extension until 30 Jun 2021 to submit comments on the proposed amendments.⁵

Summary

The Constitution states that the Republic is founded on values which include dignity, achievement of equality, and the rule of law. The Constitution's Bill of Rights affirms the values of dignity and equality.

¹ The invitation was gazetted on 26 March three times: Gen N 140 of 2021 (*Gazette* 44333 p 21); Gen N 141 of 2021 (also *Gazette* 44333, p 25); and Gen N 143 of 2021 (*Gazette* 44402 p 3).

² The Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000 as amended to 2017.

³ At <https://www.justice.gov.za/legislation/invitations/invites.htm>.

⁴ A 30-working-day period after 26 March ended on 12 May. Working days are days other than Saturdays, Sundays or public holidays. *British & Mexican Shipping Co Ltd v Lockett Bros & Co Ltd* ([1911] 1 KB 264 at 273; *Reardon Smith Line Ltd v Ministry of Agriculture Fisheries & Food* [1963] 1 All ER 545 (HL) 563-564.

A 30-working-day period after 26 March was interrupted by 14 Saturdays or Sundays (two at March end, eight in April, four in May) and three public holidays (Good Friday on 2 Apr, Family Day on 5 Apr, the Monday after Easter Sunday, and Freedom Day on 27 Apr). See Public Holidays Act 36 of 1994 s 2(1) read with Sched 1.

A public holiday on Workers' Day (Sat 1 May) was not taken in account because Saturdays already were. Only if a public holiday falls on Sunday, is the next Monday a public holiday. Public Holidays Act s 2(1) *ibid*.

Africa Day is not an official public holiday in or under the Public Holiday Act, so is not taken in account. Africa Day was on Tue 25 May (Calendarlabs.com "List of National and Regional Public Holidays of South Africa in 2021" <https://www.calendarlabs.com/holidays/south-africa/africa-day.php>).

⁵ Email on 22 Apr 2021 by F Bhayat (on Dept's behalf) to G Day (on Foundation's behalf).

Unfair discrimination

The Bill of Rights stipulates that the state may not unfairly discriminate directly or indirectly against anyone on any specified ground including race and gender. No person may unfairly discriminate directly or indirectly against anyone on a specified ground. Discrimination on such a ground is unfair, unless it is established the discrimination is fair.

The Bill of Rights required legislation to prevent or prohibit unfair discrimination to be enacted. The Promotion of Equality and Prevention of Unfair Discrimination Act was passed.

The Act states that neither the State nor any person may unfairly discriminate against anyone.

The Act, currently, defines discrimination as any act or omission imposing burdens on or withholding benefits from any person on a prohibited ground.

(A prohibited ground is a listed ground (race, sex, etc) or any ground if discrimination based on it causes systemic disadvantage or undermines dignity, or adversely affects equal enjoyment of anyone's rights in a serious manner akin to discrimination on a listed ground.

(The Act requires an aggrieved person to make out only a *prima facie* case of discrimination. She is not required to prove it on a balance of probabilities, or any unfairness. She need only show she has a reasonable chance of success. The presiding officer need merely be of opinion that available evidence might be found to be credible and acceptable and could (if not disproved) show that the conduct of the respondent against whom she instituted proceedings is unfair discrimination. It is for the respondent to prove that discrimination did not take place, or that his conduct was not on a prohibited ground, or that the discrimination is fair.

(In determining if he has proved the discrimination is fair, account must be taken of: The context; factors including—likely impact of the discrimination on the complainant, whether she belongs to a group suffering from patterns of disadvantage, the nature and extent of the discrimination, whether it is systemic, whether it has a legitimate purpose, the extent to which it achieves its purpose, whether there are less restrictive means to achieve the purpose, and to what extent the respondent has taken reasonable steps to address the disadvantage related to a prohibited ground or to accommodate diversity; and whether the discrimination reasonably and justifiably differentiates on objectively determinable criteria intrinsic to the activity.)

The Bill would expand the Act's definition of "discrimination" to include conduct that causes prejudice to anyone or undermines their dignity. These two varieties of discrimination are subjective, in contrast to the Act's existing forms of discrimination (conduct which imposes burdens on or withholds benefits from a person). This subjectivity will enable a complainant to allege

discrimination on any plausible assertion that the respondent undermined her dignity or prejudiced her. The respondent would have the heavy onus of proving he had not. This differentiation between discrimination on an objective ground and on a subjective ground would violate his right to equal protection of the law. The respondent's practical inability to prove that his conduct did not undermine a complainant's dignity or prejudice her would violate the Rule of Law, because he bears the onus of having to disprove her subjective allegation. Adjudicative procedures should be fair.

The Bill would also amend the definition to cover conduct that, even unintentionally, has any such objective or subjective consequence, even if that was not the reason for the conduct. A statute placing a reverse onus on the respondent is all the more objectionable if he is in practice unable to discharge it even though any discrimination was unintentional and incidental. As said, adjudicative procedures should be fair.

Equality

The Bill of Rights equality clause declares everyone is equal before the law and entitled to equal protection of the law, and equality includes equal enjoyment of all rights and freedoms.

The clause provides that, to promote achievement of equality, legislative measures may be taken to protect or advance categories of persons disadvantaged by unfair discrimination.

The Promotion of Equality and Prevention of Unfair Discrimination Act was enacted. It currently defines "equality" as including equal enjoyment of rights and freedoms, *de jure* and *de facto* equality, and equality in terms of outcomes (i.e., consequences or results).

The draft Bill would expand the Act's equality definition to include "equal right and access to resources, opportunities, benefits and advantages", equality in terms of "impact", and "substantive equality".

These proposed inclusions (although their meaning is unclear) go beyond the Constitution's equality clause (equality before the law and entitlement to its equal protection, and equal enjoyment of rights) and beyond the Act's current equality definition of equal consequences.

The Bill's proposed inclusions in the Act's definition of equality (i.e., equal right to resources, equality of impact and substantive equality) go further than mere equality of consequences, and contemplate an entitlement to material equality.

The overall meaning of these envisaged inclusions in the Act's equality definition is elusive. This violates the Rule of Law, which requires laws to be clear.

Currently, the Act imposes on all persons a duty and responsibility to “promote” equality. It is unclear what this entails. To promote something means to further or advance it. But in the context of the Act, the meaning of a duty to further or advance equality is uncertain.

This uncertainty would be aggravated if the Bill’s amendments of the Act’s “equality” definition were implemented. It is unclear how a person would discharge her obligation to promote equal access to resources, equality of impact and substantive equality.

This vagueness would violate the principle of the Rule of Law that a citizen should have an adequate indication of the legal rules applicable to a given case.

The Bill would amend this provision of the Act imposing a duty and responsibility on all persons to promote equality, so that it would stipulate that all persons also have a duty and responsibility to “eliminate discrimination”. Everyone would then be obliged to eliminate any conduct that, intentionally or not, imposes burdens on, withholds benefits from, causes prejudice to or undermines the dignity of any person related to a prohibited ground, whether the discrimination on a particular ground was the reason for the conduct or not. To “eliminate” means “get rid of”. But the meaning of a duty to get rid of discrimination is unclear. This would violate the Rule of Law. A citizen should have an adequate indication of the law applicable.

The Bill will not require all persons to eliminate “unfair” discrimination. They will have to eliminate discrimination even if it is fair.

The Act’s current provisions about the promotion of equality have not yet been brought into operation. A reason may be uncertainty about the meaning of the duty to promote equality. The Department’s note about the background to the draft Bill says a reason that the Act’s provisions about promotion of equality are not in operation is the regulatory burden placed by them on society, and the Bill addresses it. On the contrary, the Bill increases the burden.

Constitution's provisions about dignity and equality, and rule of law

The Constitution⁶ declares that the Republic is⁷ founded on values which include—
Human dignity, the achievement of equality and the advancement of human rights;⁸
non-racialism and non-sexism;⁹ and
the rule of law.¹⁰

The Constitution maintains¹¹ that—
Its Bill of Rights enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom;¹²
those rights are subject to limitations contained or referred to in its provision about limiting those rights¹³ or elsewhere in the Bill;¹⁴
a court must when interpreting the Bill of Rights promote the values that underlie a society based on dignity, equality and freedom.¹⁵

UNFAIR DISCRIMINATION

Bill of Rights provisions about unfair discrimination

The Bill of Rights¹⁶ stipulates regarding unfair discrimination that—
The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth;¹⁷
no person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of the aforesaid provision (prohibiting the state from discriminating unfairly on listed grounds);¹⁸ and

⁶ Constitution of the Republic of South Africa, 1996.

⁷ Constitution s 1 (republic).

⁸ Constitution s 1(a).

⁹ Constitution s 1(b).

¹⁰ Constitution s 1(c).

¹¹ Constitution s 7 (rights).

¹² Constitution Ch 2 (bill of rights) s 7 (rights) ss (1).

¹³ Constitution Ch 2 s 36 (limitation of rights).

¹⁴ Constitution s 7(3).

¹⁵ Constitution Ch 2 s 39(1)(a) (interpretation of Bill of Rights).

¹⁶ Constitution Ch 2 (bill of rights) s 9 (equality).

¹⁷ Constitution s 9(3).

¹⁸ Constitution s 9(4), read with s 9(3).

discrimination on one or more such listed grounds¹⁹ is unfair, unless it is established that the discrimination is fair.²⁰

Legislation must prohibit unfair discrimination

The Bill of Rights stipulates²¹ that national legislation to prevent or prohibit unfair discrimination had to be enacted²² in three years of the date the Constitution took effect²³ (viz., by 4 Feb 2000²⁴).

Parliament enacted the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000²⁵ on 2 February 2000.²⁶

The Act refers to the Bill of Rights provision requiring the enactment of legislation to prevent or prohibit unfair discrimination.²⁷

Current definition of discrimination in Act

The Promotion of Equality and Prevention of Unfair Discrimination Act stipulates that neither the State nor any person may unfairly discriminate against any person.²⁸

Currently, the Act defines “discrimination” as any act or omission which imposes burdens (or obligations or disadvantage) on, or withholds benefits (or opportunities or advantages) from, any person on any of the prohibited grounds.²⁹

¹⁹ The grounds listed in ss (3), just mentioned.

²⁰ Constitution s 9(5).

²¹ Constitution Sched 6 (transitional provisions) item 23(1).

²² Enactment of a statute means assent and signature by the President:
A Bill assented to and signed by the President becomes an Act of Parliament, must be published promptly and takes effect when published or on a date determined in terms of the Act. Constitution s 81 (publication of Acts).

²³ Constitution s 9(4) *ibid*.

²⁴ The 1996 Constitution took effect on 4 Feb 2007, as mentioned above.

²⁵ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

²⁶ See Govt N 136 of 9 Feb 2000 (*Gazette* 20876).

²⁷ Promotion of Equality and Prevention of Unfair Discrimination Act preamble, read with Constitution Bill of Rights s 9(4).

²⁸ Promotion of Equality and Prevention of Unfair Discrimination Act s 6 (prevention and prohibition of unfair discrimination).

²⁹ Promotion of Equality and Prevention of Unfair Discrimination Act s 1 *sv* “discrimination”.

Prohibited grounds

The Act defines prohibited grounds as—

Certain listed grounds (race, sex, social origin, sexual orientation, age, disability, religion, language, etc);³⁰ or

any other ground where discrimination based on it causes systemic disadvantage or undermines dignity, or adversely affects equal enjoyment of rights and freedoms in a serious manner comparable to discrimination on a listed ground.³¹

(The draft Bill does not alter the prohibited grounds.³²)

Burden of proof reversed and imposed on respondent

The Act requires an aggrieved person only to make out a *prima facie* case of discrimination.³³ She is not required to prove discrimination against her on the normal balance of probabilities, or any unfairness.

This means that an aggrieved person need only show that she has a reasonable chance of success. She does not have to show that the probability of success is in her favour. It suffices that she makes a case on which a reasonable presiding officer might find in her favour. She would make such a case if her application sets out facts which, if established, would support the conclusion she seeks (that she has been unfairly discriminated against), and if her story is not clearly impossible or so inherently improbable as to verge on the ridiculous or absurd. Nor need she corroborate her allegations just because her opponent denies them.³⁴

³⁰ Promotion of Equality and Prevention of Unfair Discrimination Act s 1 svv “prohibited grounds” par (a).

³¹ Promotion of Equality and Prevention of Unfair Discrimination Act s 1 svv “prohibited grounds” par (b).

³² The Act defines “prohibited grounds”, in full, as—

- (a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth and HIV/AIDS status; or
- (b) any other ground where discrimination based on it—
 - (i) causes or perpetuates systemic disadvantage;
 - (ii) undermines human dignity; or
 - (iii) adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a).

Promotion of Equality and Prevention of Unfair Discrimination Act s 1 svv “prohibited grounds”.

³³ Promotion of Equality and Prevention of Unfair Discrimination Act s 13(1) (burden of proof) read with s 1(1) svv “complainant” and “discrimination”.

³⁴ *Stender v Stender* 1938 NPD 125 at 126–127 per Selke J.

This is a low threshold,³⁵ less stringent than showing a balance of probabilities.³⁶

The presiding officer need merely be of opinion that evidence is available which might be found to be credible and acceptable, and which (if not disproved) could show that the conduct of the person against whom she instituted the proceedings (the respondent³⁷) amounts to unfair discrimination.³⁸

The Act says it is for the respondent to prove that discrimination did not take place, or that his conduct was not on a prohibited ground, or that the discrimination was fair. (The Act states that, if the complainant makes out a *prima facie* case of discrimination, the respondent must prove that the discrimination did not take place as alleged³⁹ or that his conduct was not based on any prohibited ground.⁴⁰ If discrimination did take place on a prohibited ground, then it is unfair, unless the respondent proves the discrimination was fair.⁴¹)

(The draft Bill does not alter these provisions of the Act governing the burden of proof.)

Determination of fairness or unfairness

The Act states⁴² that it is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination.⁴³

The Act states that, in determining whether the respondent has proved that discrimination is fair, account must be taken⁴⁴ of—

The context,⁴⁵

factors including—

- Whether the discrimination impairs or is likely to impair human dignity;
- the impact or likely impact of the discrimination on the complainant;
- the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;
- the nature and extent of the discrimination;

³⁵ *Cape Bar v Minister of Justice and Correctional Services and others (National Bar Council of South Africa and others as amici curiae)* [2020] 3 All SA 413 (WCC) par [54].

³⁶ *Social Justice Coalition and others v Minister of Police and others* [2018] ZAWCHC 181; 2019 (4) SA 82 (WCC) par [66].

³⁷ Promotion of Equality and Prevention of Unfair Discrimination Act s 1(1) sv “respondent”.

³⁸ *In re Goniwe and others (Inquest)* [1994] 4 All SA 298 (SE) at 300 per Zietsman JP.

³⁹ Promotion of Equality and Prevention of Unfair Discrimination Act s 13(1)(a).

⁴⁰ Promotion of Equality and Prevention of Unfair Discrimination Act s 13(1)(b).

⁴¹ Promotion of Equality and Prevention of Unfair Discrimination Act s 13(2)(a) or (b)(ii).

⁴² Promotion of Equality and Prevention of Unfair Discrimination Act s 14 (determination of fairness or unfairness).

⁴³ Promotion of Equality and Prevention of Unfair Discrimination Act s 14(1).

⁴⁴ Promotion of Equality and Prevention of Unfair Discrimination Act s 14(2).

⁴⁵ Promotion of Equality and Prevention of Unfair Discrimination Act s 14(2)(a).

whether the discrimination is systemic in nature;
whether the discrimination has a legitimate purpose;
whether and to what extent the discrimination achieves its purpose;
whether there are less restrictive and less disadvantageous means to achieve the purpose;
whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to—
 address the disadvantage which arises from or is related to one or more of the prohibited grounds; or
 accommodate diversity;⁴⁶ and
whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria intrinsic to the activity concerned.⁴⁷

(The draft Bill does not alter the Act’s provisions about determining fairness or unfairness.)

Bill would expand “discrimination” to include conduct with subjective consequences

The draft Bill⁴⁸ would expand the Act’s definition of “discrimination” to include any act or omission that “causes prejudice to” or “undermines the dignity of” any person.⁴⁹

These two new varieties of discrimination (conduct undermining the dignity of or prejudicing anyone⁵⁰) are subjective, in contrast to the Act’s existing objective forms of discrimination (conduct which imposes burdens, obligations or disadvantage on, or withholds benefits, opportunities or advantages from, a person⁵¹).

This subjectivity would enable any complainant to allege discrimination on a reasonably likely assertion that the respondent had undermined her dignity or prejudiced her.⁵²

The respondent would have the difficult burden of proving that⁵³ he had not undermined her dignity or prejudiced her. It would probably be an insurmountable challenge for him to prove that he had not caused her such subjective consequences.

⁴⁶ Promotion of Equality and Prevention of Unfair Discrimination Act s 14(2)(b) read with s 14(3)(a)–(f)(i) and (ii).

⁴⁷ Promotion of Equality and Prevention of Unfair Discrimination Act s 14(2)(c).

⁴⁸ Proposed draft Promotion of Equality and Prevention of Unfair Discrimination Amendment Bill 2021.

⁴⁹ Related to a prohibited ground. Proposed draft Amendment Bill cl 1(a) sv “discrimination”.

⁵⁰ Related to a prohibited ground.

⁵¹ On a prohibited ground.

⁵² Related to a prohibited ground such as her age or disability.

⁵³ *Inter alia*.

This differentiation between discrimination on subjective grounds, and discrimination on objective grounds, would violate his fundamental right to equality⁵⁴ and in particular his right to equal protection and benefit of the law.⁵⁵ Such differentiation would be arbitrary, and thereby inconsistent with the right to equal protection and benefit of the law.⁵⁶

The respondent's inability to disprove an allegation by the complainant that his conduct subjectively undermined her dignity or prejudiced her would violate the Rule of Law:

It is true that the Bill of Rights provides that everyone has inherent dignity and the right to have their dignity respected and protected,⁵⁷ and that the right to dignity is a foundational constitutional right.⁵⁸

But this does not validate statutory provisions which penalise alleged discrimination undermining her dignity or prejudicing her, particularly where the respondent bears the reverse onus of having to disprove a complainant's subjective allegations.

A statute placing a reverse burden of proof on the defendant is objectionable if the burden is one that the defendant is in practice unable to discharge. It is a principle of the Rule of Law that adjudicative procedures provided by the state should be fair.⁵⁹

Bill would expand "discrimination" to include unintentional and incidental conduct

The draft Bill⁶⁰ would also expand the Act's definition of "discrimination" to cover any act or omission that "intentionally or not" imposes burdens etc on, withholds benefits etc from, (or causes prejudice to or undermines the dignity of) any person related to a prohibited ground, "whether or not the discrimination on a particular ground was the sole or dominant reason" for the conduct.⁶¹

⁵⁴ Constitution Ch 2 Bill of Rights s 9 (equality).

⁵⁵ Constitution s 9(1).

⁵⁶ See *Mahlangu and ano v Min of Labour and others (Commission for Gender Equality and ano as amici curiae)* 2021 (1) BCLR 1 (CC) par [72] *per* Victor AJ with Mogoeng CJ, Khampepe, Majiedt, Madlanga, Theron and Tshiqi JJ concurring.

⁵⁷ Constitution Ch 2 Bill of Rights s 10 (dignity).

⁵⁸ *Changing Tides 17 (Pty) Ltd NO v Mabiletsa and others and a related matter* [2019] 1 All SA 619 (GJ) fn 1.

⁵⁹ Lord Bingham (then Senior Law Lord), "The Rule of Law" (Sixth Sir David Williams Lecture 2006, Centre for Public Law, Univ. of Cambridge), seventh sub-rule. *Sheldrake v Director of Public Prosecutions, Attorney General's Reference (No 4 of 2002)* [2004] UKHL 43, [2005] 1 AC 264 (HL).

⁶⁰ Proposed draft Promotion of Equality and Prevention of Unfair Discrimination Amendment Bill 2021.

⁶¹ Proposed draft Amendment Bill cl 1(a) *sv* "discrimination".

This means that discrimination would then include any conduct that, even unintentionally, has such a consequence, even if that was not the reason for the conduct.

A statute placing a reverse burden of proof on the respondent is all the more objectionable, if the respondent is unable to discharge it even though any discrimination was unintentional and incidental. As said, adjudicative procedures should be fair.

EQUALITY

Bill of Rights provisions about equality

The first clause of the Constitution protecting a specific right concerns equality.⁶² The equality clause in the Bill of Rights stipulates that—

Everyone is equal before the law and has the right to equal protection and benefit of the law;⁶³
and
equality includes the full and equal enjoyment of all rights and freedoms.⁶⁴

Legislation may promote achievement of equality

The equality clause in the Bill of Rights provides that, to promote the achievement of equality, legislative⁶⁵ measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.⁶⁶

It has been held that measures so taken must be “designed” to protect or advance persons disadvantaged by unfair discrimination in order to advance the achievement of equality.⁶⁷

Restitutionary measures taken within the limits which the Constitution imposes are steps towards the attainment of substantive equality.⁶⁸

⁶² Constitution Ch 2 (bill of rights) s 9 (equality).

⁶³ Constitution s 9(1).

⁶⁴ Constitution s 9(2).

⁶⁵ And other.

⁶⁶ Constitution s 9(2) *ibid*.

⁶⁷ *Minister of Finance and ano v Van Heerden* 2004 (11) BCLR 1125 (CC) par [28] per Moseneke J, with Chaskalson CJ, Langa DCJ, Madala, O'Regan, Sachs, Van der Westhuizen and Yacoob JJ concurring.

⁶⁸ *South African Police Service v Solidarity obo Barnard (Police and Prisons Civil Rights Union as amicus curiae)* 2014 (10) BCLR 1195 (CC) par [35] per Moseneke ACJ, with Skweyiya ADCJ, Jafta, Khampepe, Madlanga, Zondo JJ and Dambuzza AJ concurring.

Act defines “equality”

As mentioned, the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 was enacted.⁶⁹

The Act refers to the Bill of Rights clause envisaging legislative measures to promote the achievement of equality.⁷⁰

The Act defines “equality”.

The Act’s current definition of “equality” states that equality includes the full and equal enjoyment of rights and freedoms as contemplated in the Constitution, *de jure* and *de facto* equality, and equality in terms of “outcomes”.⁷¹

Bill adds to “equality” equal right to resources, equality of impact, substantive equality

The draft Bill⁷² would expand the Act’s definition of “equality”.⁷³

The Bill would expand the Act’s definition of equality to include—

“equal right and access to resources, opportunities, benefits and advantages”;
equality in terms of “impact”; and
“substantive equality”.⁷⁴

Bill’s proposed inclusions go beyond fundamental right to equality

This clause of the draft Bill would appear to go beyond the rights in the Constitution’s equality clause⁷⁵ (that everyone is equal before the law and has the right to equal protection and benefit of the law,⁷⁶ and that equality includes the full and equal enjoyment of all rights and freedoms⁷⁷).

⁶⁹ See Govt N 136 of 9 Feb 2000 (*Gazette* 20876).

⁷⁰ Promotion of Equality and Prevention of Unfair Discrimination Act preamble, read with Constitution Bill of Rights s 9(2).

⁷¹ Promotion of Equality and Prevention of Unfair Discrimination Act s 1(1) sv “equality”.

⁷² Proposed draft Promotion of Equality and Prevention of Unfair Discrimination Amendment Bill 2021.

⁷³ Promotion of Equality and Prevention of Unfair Discrimination Act s 1(1) sv “equality”.

⁷⁴ Proposed draft Promotion of Equality and Prevention of Unfair Discrimination Amendment Bill 2021 cl 1(b).

⁷⁵ Constitution Ch 2 (bill of rights) s 9 (equality).

⁷⁶ Constitution s 9(1).

⁷⁷ Constitution s 9(2).

The draft Bill's proposed inclusions (although their meaning is unclear⁷⁸) appear to go beyond the current equality definition in the Act of equality of outcomes (i.e., consequences or results).

The Bill's inclusions in the Act's definition of "equality" (equal right to resources, equality of impact and substantive equality) seem to go further than a mere equality of consequences or results, and contemplate an entitlement to material equality.

Bill's proposed inclusions in Act's equality definition are vague

The meaning and scope of the Bill's envisaged inclusions in the Act's equality definition are not clear. The Bill's proposed inclusions (equal right and access to resources, opportunities, benefits and advantages; equality in terms of impact; and substantive equality) are vague.

The overall meaning of these broad terms is elusive, and determining what precisely they embrace may not be possible at all.⁷⁹

This violates the Rule of Law. It is a principle of the Rule of Law that laws must so far as possible be intelligible, clear and predictable.⁸⁰

The Rule of Law is⁸¹ a foundational value of the Constitution.⁸²

Act places duty and responsibility on "all persons" to "promote" equality

Currently, the Act stipulates⁸³ that "all persons" have a "duty and responsibility" to "promote" equality.⁸⁴

It is unclear what this general obligation of "all persons" to "promote" equality entails.

⁷⁸ See the immediately following discussion of vagueness.

⁷⁹ See *South African National Defence Union v Minister of Defence and ano* 1999 (6) BCLR 615 (CC) par [8].

⁸⁰ Bingham (supra), "The Rule of Law" (Sixth Sir David Williams Lecture 2006, Centre for Public Law, Univ. of Cambridge) first sub-rule.

⁸¹ As mentioned.

⁸² Constitution s 1(c).

⁸³ Promotion of Equality and Prevention of Unfair Discrimination Act s 24 (general responsibility to promote equality).

⁸⁴ Promotion of Equality and Prevention of Unfair Discrimination Act s 24(2).

To “promote” something probably means to “further”, “advance” or “encourage” it.⁸⁵ But in the context of the Act, the meaning and extent of a duty to “promote equality” is uncertain.

Duty to promote equality would be even more unclear if “equality” definition amended

This uncertainty about the meaning of such a duty to promote equality would be aggravated if the Bill’s proposed amendments of the Act’s “equality” definition were implemented.

It is unclear what a person would have to do to discharge her obligation to promote equal access to resources, equality of impact and substantive equality.

This vagueness would violate the Rule of Law. It is a principle of the Rule of Law that the law must be adequately accessible, so that the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case.⁸⁶

Bill would add duty and responsibility of all persons to “eliminate discrimination”

The Bill would amend the abovementioned provision of the Act (that imposes on all persons a duty and responsibility to promote equality⁸⁷), so that the provision would also stipulate that all persons have a duty and responsibility to “eliminate discrimination”.

Everyone would then⁸⁸ have a duty and responsibility to eliminate any conduct that, intentionally or not, imposes burdens on or withholds benefits from (or causes prejudice to or undermines the dignity of) any person related to a prohibited ground, whether the discrimination on a particular ground was the reason for the conduct or not.

To “eliminate” means to “get rid of”.⁸⁹

The meaning and extent of a person’s duty and responsibility to “get rid of” discrimination is unclear. This would violate the Rule of Law. A citizen should have an adequate indication of the legal rules applicable to a given case

⁸⁵ *R v Bunting* 1929 EDL 326 at 332; *R v Thaele* 1930 CPD 332 at 333; *S v Letaoana* 1997 (11) BCLR 1581 (W) at 1591.

⁸⁶ European Court of Human Rights: *Sunday Times v United Kingdom* (1979) 2 EHRR 245 271 par 49. See Bingham (supra), “The Rule of Law” first sub-rule.

⁸⁷ Promotion of Equality and Prevention of Unfair Discrimination Act s 24(2).

⁸⁸ Assuming that the draft Bill’s proposed amendments to the Act’s definition of “discrimination” were adopted.

⁸⁹ *Shorter Oxford English Dictionary* sv “eliminate”.

The Bill does not provide that all persons will have a duty and responsibility to eliminate “unfair” discrimination. Everyone will have an obligation to eliminate discrimination which is fair.

Act’s provisions about promotion of equality have not yet been brought into operation

The Act’s current provisions about the promotion of equality⁹⁰ have not yet been brought into operation.⁹¹ A reason for that may be the uncertainty about the meaning and scope of those provisions’ duties to promote equality.

The Department’s note explaining the background to the proposed draft Bill gives, as a reason for the Act’s provisions dealing with promotion of equality not being in operation, the “regulatory burden” placed by the Act’s equality provisions “on all sectors of society”. The Department avers that the Bill “intends to address these challenges”.

However, the Bill does not address the burden placed on society by the Act’s equality provisions. On the contrary, the Bill would make the burden more oppressive.

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Gary Moore
23 June 2021

The Free Market Foundation

The Free Market Foundation (Southern Africa) is an independent public benefit organisation founded in 1975 to promote and foster an open society, the rule of law, personal liberty, and economic and press freedom as fundamental components of its advocacy of human rights and democracy based on classical liberal principles.

It is financed by membership subscriptions, donations and sponsorships.

⁹⁰ Promotion of Equality and Prevention of Unfair Discrimination Act, Chap 5 (promotion of equality): s 24 (general responsibility to promote equality), s 25 (duty of State to promote equality), s 26 (responsibility of persons operating in public domain to promote equality), s 27 (social commitment by all persons to promote equality), s 28 (special measures to promote equality with regard to race, gender and disability).

⁹¹ The great bulk of the Act has been brought into operation:
Sections 1, 2, 3, 4(2), 5, 6, 29(1), (3), (4) and (5), 32, 33 and 34(1) were brought into operation on 1 Sep 2000. Proc 54 of 2000 (*Gazette* 21517 of 1 Sep);
All other provisions (except the said provisions about promotion of equality) were brought into operation on 16 Jun 2003. Proc 49 of 2003 (*Gazette* 25065).