



THE PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION BILL, 1999

*SUBMISSION BY THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION
TO THE PARLIAMENTARY PORTFOLIO COMMITTEE, 23 November 1999*

The South African Human Rights Commission is proud to be associated with this bill. The Commission was invited by the previous Minister of Justice, Dr A M Omar, MP to join forces with the Ministry in order to prepare for the enactment of legislation to give effect to Section 9(4) of the Constitution, 1996. The Minister charged us with the responsibility to set out a conceptual framework for the proposed legislation and to undertake public awareness and consultation programmes in order to inform such a framework. The Equality Legislation Drafting Unit was established based in our Commission. For about 18 months, the Unit undertook research, held public consultations, consulted with experts at home and overseas and gradually refined and shaped legislation to meet the needs of the new South Africa. Many of the NGOs that have made submissions and presented before you participated in that process at various levels. It is also my understanding that various government departments were also invited to the various activities of the Unit. Many chose not to participate at that stage.

The Unit was assisted by a Reference Group. It was drawn from across the spectrum of academics, legal practitioners and social scientists. The Reference Group was a forum to test ideas as they emerged and to construct the framework for the legislation. One of the critical elements in drawing the framework, was that the historical, social and legal context of South Africa had to be taken into account. The legislation was to advance the national project of transformation and give effect to the values and ideals enshrined in our Constitution. Second, the legislation had to consider our international obligations especially to treaty bodies we were committed to. The Minister directed that the law should be comprehensive in order to avoid the need to promulgate separate pieces of legislation to cover the various grounds of discrimination as tends to be the case elsewhere. The cultural context of South Africa had to be the guide. In particular, the Minister was anxious that the right to equality should be substantive and that there should be adequate enforcement mechanisms that are accessible, and as much as possible,

informal. We were also made aware of the fact that with financial constraints in mind, no new institutions will be entertained.

The framework document was submitted to the Minister, on the eve of his departure from the Ministry of Justice, on 15 June 1999. From that time onwards, the SAHRC, as it were, handed over the project to the government. We recognise that the content of the draft bill is the responsibility of the Ministry and the State Law Advisers. Nonetheless, even afterwards we continued to be available in an advisory capacity.

This presentation, Chairperson, is designed to supplement the submission which we have already made. The intention here is to supplement the submission, address some critical issues as we understand them in the process leading up to these Hearings and to strengthen the argument and motivate for the changes proposed in our submission. We believe that we are qualified to give Honourable Members of the Committee some background to the bill which will help explain the thinking that went into its construction. We are ready to respond to some questions from the Committee afterwards.

Essential Principles

The first principle to contend with is that the bill should reflect South Africa's application of international obligations. Articles 4 and 5 of the International Convention on the Elimination of All Forms of Racial Discrimination, for example, requires states not only to condemn various forms of racial discrimination but also to take measures, to declare an offence punishable by law, to prohibit and to eliminate and to adopt "immediate and effective measures..." Because of that it becomes necessary to make legal provision for the various compliance measures required by the treaty. A similar obligation exists with regard to CEDAW. Because of this obligation, there is justification for placing some prominence on race and gender discrimination. But these are there for another reason. The Constitution has found reason to declare as the founding values of the democratic South Africa, among others, non-racialism and non-sexism. In any event, it would have been odd, in the extreme, if the new South Africa were to fail to make special provision on these two elements of discrimination that have defined so much of our history and which continue to cause so much hurt and pain to this day.

Notwithstanding that, however, the Commission believes that there is equal justification for giving due prominence to the discrimination experienced by people with disability. In a sense all these visible grounds of discrimination cut across all sectors of human interaction.

The drafters of the bill have also deemed it necessary to include sectors where discrimination is ordinarily experienced by so many of our people. The sectors, no doubt, are not comprehensive. They serve a didactic purpose and

they point to ways in which discrimination operates and is experienced in much of common life in our country. They beam a spotlight on those aspects of human commerce so as to indicate an awareness of and to assist those that are inclined to practice discrimination to put their house in order. Without that, many would ignore the precepts of this bill as irrelevant to them.

And yet the bill has to be comprehensive and all-encompassing. The sections on general prohibitions become an interpretative tool which can cover other aspects of national life that may have been left out. If this bill is to meet the needs of the modern and developing South Africa, it has to be forward looking and far-reaching. To limit the scope as some suggest, Chairperson, would not only create a lawyer's paradise and a judge's nightmare, it would make it very difficult for victims of unfair discrimination to obtain redress. The UN Committee on the Elimination of Racial Discrimination (CERD) and the Human Rights Committee in their General Comments and Recommendations which are important tools for interpreting the treaties, make that explicit.

That explains, Chairperson, why we will not join the chorus of those who want the bill to be severely limited in scope. We do not accept that the bill should be confined only to horizontal application. We say that when the Constitution says the "No person may unfairly discriminate directly or indirectly against anyone...", we believe that the drafters intended the application section (Section 8) to come into operation. It must be remembered that the Bill of Rights specifically binds the state and may be applicable to natural or juristic persons (Section 8)

The bill seeks to strike a balance between a law which is readily accessible to those who seek to use it and clear enough to those who need to know the meaning, extent and nature of prohibited discrimination. The law, therefore, should not be over-legalistic. It should hold in balance the need for access and legal clarity. For that reason we welcome the role that is given to institutions like the South African Human Rights Commission and the Commission on Gender Equality. We also welcome the provision for assessors, the provisions for locus standi and jurisdiction of the courts. We also welcome the fact that provision for alternative dispute resolution mechanisms as in mediation and conciliation. We believe that that may become the most important innovation of the law.

The Role of the Commission

Chairperson, the bill places some duties on the South African Human Rights Commission. Those duties are of the nature of promotion, protection and monitoring. Naturally, this builds on the tasks already allocated to the Commission and, in this instance, makes them more explicit. We believe that in four years of operations, the Commission has developed some expertise in handling discrimination matters. The relationship of the independent state

institutions like the SAHRC and CGE is akin to that of the African Commission on Human & Peoples' Rights to the proposed African Court on Human and Peoples' Rights or the former European Commission to the European Court of Human Rights before the merger of the two in 1997. What it means is that ordinarily most complainants would first approach the Commission who investigates the complaint and determine whether a right has been violated or not. The courts both interpret the law and make binding determinations for redress. In our experience and indeed internationally, only about 10% of cases received will end up in court. In addition, the commissions will have the duty of education, training and raising public awareness about the right to equality. The courts also carry out similar functions, in particular, by the way in which they handle these cases and develop or advance jurisprudence. It is worth noting that the national human rights commissions of Australia and Canada have their mandates confined virtually to the equality and prevention of discrimination. They are assisted in dealing with violations of equality by independent tribunals.

Prohibited Grounds

We have indicated, Chairperson, that while we were honoured to have had a hand in the early preparation of this bill, the final product has to be attributed to the Ministry of Justice. There are aspects of the bill in its present form which we would like to see improved. For example, we sincerely believe that the inclusion of HIV/AIDS, socio-economic status and nationality as prohibited grounds of discrimination are essential for a modern South African law given our contemporary situation. HIV/AIDS is a new phenomenon and, by all accounts will be with us for a long time. There is a debate as to whether HIV/AIDS is a form of disability or not. Nonetheless, people living with HIV/AIDS are subject to intolerable levels of discrimination and even violence in the workplace, in places of leisure and at home. Much of this is due to ignorance and prejudice. To be silent on this would be to sentence people living with HIV/AIDS to silent discrimination. We also believe that to make this matter explicit would be in keeping with current government policy.

It is also vital that Socio-economic status be included. In a land where so many are poor and for whom facilities are rendered unreachable simply because of their socio-economic status even though these could have been more affordable, is a shame on our society. In a society where provision for socio-economic rights is made explicit in our Bill of Rights, it is inconceivable that such rights could be rendered unachievable by application of unlawful discrimination. Article 5(e) of ICERD, for example, has deemed it fit to make reference to the manner in which racial discrimination operates in the economic and social sphere.

Nationality, is another important matter. South Africa is suffering from intolerable levels of xenophobia. The UN Special Rapporteur on Racism and

Racial Discrimination, Chairperson, had reason to comment unfavourably to the scourge of xenophobia prevailing in our country. And yet, globalisation, of necessity, enjoins us to seek skills and to trade with people from across nations. The unlawful discrimination, in our view is not simply that between citizens and non-citizens, there are instances where that is justifiable. Nor do we refer simply to refugees and asylum seekers. That is taken care of by our international obligations. South Africa, to our knowledge, has neither signed nor ratified the International Convention on the Rights of Migrant Workers and their Families. Discrimination of migrant workers in areas like employment, promotion and access to financial services is rife in our country. The Constitutional Court has already pronounced on the matter. There are, however, ways in which the limitation clause can legitimately be used to limit this right in appropriate circumstances.

There is some hysteria that gets bandied about in an uninformed way, Chairperson, that I believe needs to be addressed firmly. The prohibition of discrimination does not mean that there will be no acceptable differentiation in society. Those who are trying to resist the passage of this bill because they want unlawful discrimination to continue in the new South Africa under a number of guises, should not ridicule or trivialise the issues at stake here. Discrimination is an unlawful and unjustifiable distinction that is made and on the basis of which someone is excluded or restricted from enjoying rights which others in similar circumstances might have enjoyed or which were it not for that person's characteristic, they could have enjoyed. Discrimination is a denial of the right to equality. There are many circumstances where differentiation may be called for in normal human intercourse. But there are instances where differentiation may become unlawful discrimination. That is what this bill is about. Let there be no equivocation about the intention of this law: to promote genuine, substantive equality and to prohibit unfair discrimination!

Enforcement

We accept that there has been understandable anxiety in government about the cost of implementing this law. That is what motivated the choice of the courts to serve as Equality Courts. We shall do our best to make that system work. Nonetheless, Chairperson, we wish to record our concern about the choice of this mechanism and we believe that an alternative and more credible mechanism that works could have been just as effective. For the moment, though, our view is that the choice of Equality Courts must eventually lead to the establishment of fully-fledged specialist courts.

Our view is that the courts may not be the most effective mechanism for enforcing this right. To rely on the courts might lead to an over-legalistic system caught up in the bureaucracy and barely accessible. We believe that a minimal tribunal would be the ideal way to go. We have indicated in our

submission that the precedent of the Pensions Adjudicator may have some lessons for us. We are convinced that any system chosen will have some cost implications for government.

Conclusion

We would like to encourage Honourable members of this Committee to view this law as one of the most essential pieces of legislation in our democracy. If the promises and benefits of our Constitution are to reach out to those who need them most, then the time for this law is five year overdue. This marks another stage in the transformation process of our society. This bill should take pride of place in our constitutional and democratic system. Those who have power should not continue to be allowed to use their power to deprive others of the enjoyment of their rights with impunity. We should not allow this notion of business as usual from apartheid to the present to take root in our country. I urge us to hammer the nail into the apartheid coffin. This law, at least, shows that we mean business.

N Barney Pitso
CHAIRPERSON

**Houses of Parliament,
Cape Town,
23 November 1999.**