Submission to the Department of Justice and Constitutional Development on Amendments to The Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000

by

The South African Research Chair in Equality, Law and Social Justice
School of Law, University of the Witwatersrand, Johannesburg

Research and written by:

Cathi Albertyn *Professor of Law, SARChI Chair in Equality, Law and Social Justice, School of Law, University of the Witwatersrand;*
Coline Bruintjies *PhD candidate, School of Law, University of the Witwatersrand*
Meghan Finn *Lecturer, Faculty of Law, University of Johannesburg; PhD Candidate, School of Law, University of the Witwatersrand*
Justin Jaftha *PhD Candidate, School of Law, University of the Witwatersrand*
Tondi Malaudzi *Lecturer, Faculty of Law, UNISA, Ph D candidate, School of Law, University of the Witwatersrand*
Lyatitima Mate *PhD candidate, School of Law, University of the Witwatersrand*
Chipo Mudimba *PhD candidate, School of Law, University of the Witwatersrand*

30 June 2021

Contact: cathi.albertyn@wits.ac.za

INTRODUCTION

We welcome the proposed amendments to the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 (PEPUDA or the Act). Overall, we endorse the intention to amend provisions on unfair discrimination in chapters 1 to 3 in order to clarify the operation of unfair discrimination and to strengthen the Act's ability to address systemic discrimination, as well as the attempt to amend and strengthen chapter 5 so that it can be more effectively implemented. In our view, the amendments do generally enhance the Act's ability to promote substantive equality by addressing systemic discrimination and disadvantage, via unfair discrimination, and by requiring a range of positive duties and measures to achieve and promote equality by different public and private actors.

This submission sets out our support for many of these proposals. However, in some instances we argue that the amendments are unnecessary, insufficient or incorrect. Here we explain why we adopt this view and, where appropriate, suggest alternative ways of amending the Act. We also take the opportunity presented by this review of the Act to make proposals for additional amendments to PEPUDA, mostly arising out of the extant jurisprudence, the directive in s 34 and the changing nature of inequality and discrimination in our country. This submission is made under the following headings:

PART A – UNFAIR DISCRIMINATION

1 SECTION 1 - DEFINITIONS RELATING TO DISCRIMINATION

This section addresses the proposed amendments to the definitions of 'discrimination' and 'equality' and makes a series of proposals for the inclusion of additional prohibited grounds, including those proposed for consideration in s 34 of PEPUDA, as well as further grounds of discrimination.

1.1 'Discrimination'

The Bill proposes that the definition of discrimination be amended as follows:

> 'discrimination' means any act or omission, including a policy, law, rule, practice, condition or situation which, whether intentionally or not, directly or indirectly—
> (a) imposes burdens, obligations or disadvantage on;[or]
> (b) withholds benefits, opportunities or advantages from[,];
> (c) causes prejudice to; or
> (d) otherwise undermines the dignity of,
> any person [on] related to one or more of the prohibited grounds[;], irrespective of whether or not the discrimination on a particular ground was the sole or dominant reason for the discriminatory act or omission;

The definition of discrimination is the first step of the unfair discrimination enquiry. In cases where unfair discrimination is alleged, the court first considers whether the differentiation amounts to discrimination on a prohibited ground. Once a party is able to show such discrimination, the enquiry shifts to the second stage of determining whether the discrimination is justifiable as being fair or unfair under s 14 of the Act. It is at this stage that Court engages the impact of the discrimination on the complainant and evaluates this in terms of disadvantage and impairment of dignity, as well as the purpose and justifications of the respondent.

The Act aims to be accessible to disadvantaged complainants. For this reason, it is important that the definitions and process of proving unfair discrimination are clear, and do not impose onerous requirements of proof on complainants, at the first stage, as they make out a prima facie case of discrimination. With this in mind, we make the following comments.

1.1.1 Although *intention* has never been a requirement for proving discrimination in South Africa, as confirmed by the Constitutional Court,[1] we agree that confirming this in the wording of the provision is useful.[2] For the same reason, we agree with the clarification that the discrimination on a particular ground need not be the *sole of dominant reason* or purpose of the discrimination. Again motive or reason has not previously been a requirement for proving discrimination at the first stage, although it is important at the justification stage – fairness – when balancing the impact of the discrimination against the purpose and justification of the respondent.

[1] *City Council of Pretoria v Walker* [1998] ZACC 1 para 43.
[2] Indeed, this seems to be confirmed by the fact that so many submissions in opposition to the Bill have relied quite heavily on the incorrect assumption that intention is being removed. See for example the submission by the Institute of Race Relations.

1.1.2 We agree that a 'catch-all' additional category of *prejudice* could be added to the definition of 'discrimination' so that it is more flexible and open-ended in terms of defining discrimination. For this reason, we would also suggest the insertion of the word 'otherwise' in (c).

1.1.3 However, we disagree with the inclusion of *dignity*. Conceptually, this belongs to the enquiry into fairness, and it is thus conceptually and legally incorrect to include it in the discrimination enquiry. In addition, it would add an extra burden of proof onto the complainant, which goes against the spirt of Act (accessible justice) and the intention to reduce the burden on complainants.

1.1.4 Although intersectionality is part of our jurisprudence, and was recently recognised as such in *Mahlangu v Minister of Labour* [2020] ZACC 24, we suggest the addition of the word 'or an intersection of' prohibited grounds can provide clarity to litigants, lawyers and judicial officers on this point.

Accordingly we suggest a revised amended clause that reads as follows:

> 'discrimination' means any act or omission, including a policy, law, rule, practice, condition or situation which, whether intentionally or not, directly or indirectly—
> (a) imposes burdens, obligations or disadvantage on;
> (b) withholds benefits, opportunities or advantages from; or
> (c) otherwise causes prejudice to,~~or~~
> ~~(d) otherwise undermines the dignity of,~~
> any person related to one or more, or on an intersection of, the prohibited grounds, irrespective of whether or not the discrimination on a particular ground was the sole or dominant reason for the discriminatory act or omission;

1.2 'Equality'

> **'equality'** includes—
> *(a)* the full and equal enjoyment of rights and freedoms as contemplated in the Constitution;
> *(b)* equal rights and access to resources, opportunities, benefits and advantages;
> *(c)* **[and includes]** *de jure* and *de facto* equality;
> *(d)* **[and also]** equality in terms of impact and outcomes; and
> *(e)* substantive equality

We agree with the intention to further clarify the meaning of equality, especially in light of the need to implement and enforce chapter 5 on positive measures and the promotion of equality. It is, of course, difficult to fully capture the meaning of a complex and contested concept such as equality, especially as it applies across the public/private sectors, in a variety of different spheres, and is achieved over time. Here it is important to stress that equality is an aspirational idea that should be worked toward, and might not be achieved immediately, but requires ongoing promotion and advancement. It is also important to note that the Constitutional Court has long accepted that the commitment to equality in the South African Constitution is to substantive equality.[3]

[3] *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] ZACC 15 paras 60-61; *Minister of Finance v Van Heerden* [2004] ZACC 3 paras 27-32..

Substantive equality is widely recognised to be a multi-facetted and multi-dimensional concept implicating different aspects of social, economic and political equality, often referred in terms borrowed from Nancy Fraser: Recognition (socio-cultural equality dimensions often seen to align with dignity concerns); redistribution (economic equality dimensions) and participation ('political' dimensions of full inclusion participation in all spheres of public and private life).[4] While it is difficult to translate these theoretical and conceptual ideas into legislative language, it is certainly possible to point to the complex and multi-dimensional nature of the idea of substantive equality in the Act.

For this reason, we generally agree with the idea of adding further detail to the legislative definition, especially as (i) the definition is open-ended, signified by the opening words - 'equality' *includes* – and (ii) equality is a complex and evolving concept. However, we do not agree with some of the proposed amendments as set out below:

1.2.1 We disagree with the inclusion of substantive equality in (e) as one of the listed components as this will create confusion about the relationship between equality and substantive equality. In constitutional terms, equality *is* substantive equality, and this should be reflected in the wording.

1.2.2 The inclusion of 'equal rights and access to resources, opportunities, benefits and advantages' is an important clarification. We note that there has been some opposition to this,[5] but – in fact – this provision merely clarifies what is already present in the law. First it gives substance to (a) in the definition, 'the full and equal enjoyment of rights and freedoms', which is itself a restatement of s 9(2) of the Constitution. Second, it is the logical outcome of removing discrimination as part of the achievement of equality, defined as withholding 'benefits, opportunities or advantages' in s 1 of PEPUDA.

1.2.3 We are less clear about the inclusion of 'impact', and how this might differ from 'outcomes' (which is already in the Act). Insofar as it might emanate from the idea of indirect discrimination as 'disparate impact', we can perhaps see its origin, but we fail to see its actual meaning. Indeed, the solution to disparate impact might be to not be to achieve equality of impact but to remove impact, or enable a different kind of differential impact. In the end, its inclusion seems to import a term best left to the legal evaluation of discrimination ('the impact on the complainant') into a definition of the value of equality. We suggest it be deleted.

1.2.4 We propose the addition of the two further clauses, namely 'the eradication of stigma, stereotype, marginalisation, vulnerability and exploitation' and 'the removal of disadvantage'

---

[4] See N Fraser 'Social Justice in the Age of Identity Politics; Redistribution, Recognition and Participation' in N Fraser & A Honneth Redistribution or Recognition (2003) 1; C Albertyn and S Fredman 'Equality beyond dignity: Multi-dimensional equality and Justice Langa's judgments' 2015 *Acta Juridica* 430. S Fredman 'Substantive equality revisited' (2016) 14 *International Journal of Constitutional Law* 712; C Albertyn 'Contested substantive equality in the South African Constitution: beyond social inclusion towards systemic justice' (2018) 34 *South African Journal on Human Rights* 441.

[5] [5] 'Death knell Christian groups slams proposed changes to laws around religion discrimination' *News24* 12 June 2021, available at *https://www.news24.com/news24/southafrica/news/death-knell-christian-groups-slam-proposed-changes-to-laws-around-religion-discrimination-20210612*, accessed 27 June 2021. FW de Klerk Foundation 'A terrifying bill' *Political Web* 27 June 2021 available *at https://www.politicsweb.co.za/documents/a-terrifying-bill--fw-de-klerk-foundation -Sunday, 27 June 2021- political web*, accessed 27 June 2021. Michael Swain 'PEPUDA Amendment Bill – a fast track to religious persecution?' 3 June 2021 available at *https://forsa.org.za/pepuda-amendment-bill-a-fast-track-to-religious-persecution/*, accessed 27 June 2021. FOR SA – 'PEPUDA Amendment Bill & the death of religious freedom' - Intro (1/5) - May 27, 2021 available at https://www.youtube.com/watch?v=asxsRBvLfK4 – accessed on 27 June 2021.

in order to capture the ideas underlying the achievement of equality by eradicating discrimination and inequality.

In light of the above, we suggest that the amended definition could read as follows:

> **'equality'** means 'substantive equality' and includes—
> *(a)* the full and equal enjoyment of rights and freedoms as contemplated in the Constitution;
> *(b)* equal rights and access to resources, opportunities, benefits and advantages;
> *(c)* **[and includes]** *de jure* and *de facto* equality;
> *(d)* **[and also]** equality in terms of ~~impact and~~ outcomes; ~~and~~
> *(e)* ~~substantive equality~~ the eradication of stigma, stereotype, marginalisation, vulnerability and exploitation; and
> *(f)* the removal of patterns of disadvantage.

1.3 'Prohibited Grounds' - Directive Principle in s 34

Section 34(1) of the Equality Act provides for the Minister to give special consideration to the inclusion of certain prohibited grounds of discrimination: HIV/AIDS status, socio-economic status, nationality, family responsibility and family status. This legislative power has never been exercised. Despite the directive in the Act that the Equality Review Committee, within a year of its establishment, make a recommendation to the Minister regarding the s 34 grounds, no such formal recommendation has been made. Although we are unable to track it down, we understand that the South African Human Rights Commission did recommend acceptance of the grounds as 'prohibited grounds', but no action was taken. Thus it has fallen to the courts to compel South Africa to work towards ensuring that discrimination on the basis of these grounds be addressed. As discussed below, this has occurred in several instances.

Based on the recommendations in s 34, the definitions in s 1, court judgments and developments in comparative legislation, as well as the nature of inequality and discrimination in our society, we make the following recommendations for the inclusion of these s 34 grounds in the listed grounds in (a) of the definition of 'prohibited grounds':

1.3.1 HIV/AIDS status

HIV/AIDS status is now widely recognised a basis for discrimination in all societies. It was endorsed as such by the Constitutional Court in the same year that PEPUDA was enacted, in *Hoffman v South African Airways* [2000] ZACC 17, and has long been a ground of discrimination in the Employment Equity Act, 55 of 1998, in the National Policy on HIV/AIDs promulgated under the National Education Policy Act, 27 of 1996 and in the Medical Schemes Act, 131 of 1998, which obliges medical schemes to provide minimum cover to those who are HIV-positive. As noted by the Constitutional Court in *Hoffmann* para 28:

> People who are living with HIV constitute a minority. Society has responded to their plight with intense prejudice. They have been subjected to systemic disadvantage and discrimination. They

> have been stigmatised and marginalised. ... People who are living with HIV/AIDS are one of the most vulnerable groups in our society. ... In view of the prevailing prejudice against HIV positive people, any discrimination against them can, to my mind, be interpreted as a fresh instance of stigmatisation and I consider this to be an assault on their dignity. The impact of discrimination on HIV positive people is devastating. ... For this reason, they enjoy special protection in our law.

International law and norms generally confirms that HIV/AIDS discrimination should be outlawed by states, including through legislative measures.[6] Comparable jurisdictions might include this as a ground, as evidenced by Nigeria,[7] or recognise HIV/AIDS status as a protected ground in jurisprudence.[8]

It now seems trite that discrimination on the basis of HIV/AID status meets the legislative test, i.e. that is '(i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of rights and freedoms in a manner comparable to discrimination on a ground in paragraph (a)'. It is time to add HIV/AIDS status to the list of prohibited grounds, thus affirming the right to equality for millions of people in South Africa and provide explicit legal protection to a substantial, but marginalised group, in our society.

1.3.2 Socio-economic status

Socio-economic status is defined in PEPUDA to 'include a social or economic condition or perceived condition of a person who is disadvantaged by poverty, low employment status or lack or low-level educational qualifications'. It is equivalent to, but perhaps wider than, the ground of 'poverty'.

In 2018, in *Social Justice Coalition v Minister of Police*, the applicants relied on 'socio-economic status' to argue for the recognition of poverty as a ground for unfair discrimination. The Western Cape Equality Court agreed with the applicants' arguments that poverty was a ground in terms of part (b) of the definition of 'prohibited grounds', recognising that it was an historical and systemic problem, that rendered people 'vulnerable and marginalised' (para 63) and impaired their dignity (paras 64-65). In this case, differentiation on this ground resulted in the non-existent or inferior provision of services. In the Court's words: 'According to the applicant's discrimination on the basis of poverty clearly imparts on the social and economic rights protected in the Constitution as this adversely affects the equal enjoyment of a person's right and freedom in a serious manner that is comparable to discrimination on a listed ground.' (para 65).

Over and above this, courts have recognised the role of poverty as a ground of discrimination indirectly. For example, the 2014 SCA judgment, *Minister of Basic Education v Basic Education for All* [2015] ZASCA 198 concluded that the violation of s 29 of the Constitution, constituted by the failure to deliver textbooks, was exacerbated by unfair discrimination. Reading between the lines, the SCA recognises

---

[6] See, for example, United Nations General Assembly Political Declaration on HIV and AIDS, 2016 at 65.b, ILO's Code of Practice on HIV/AIDS and the World of Work; Office of the United Nations High Commissioner for Human Rights International Guidelines on HIV/AIDS and Human Rights. See also General Comment No. 20, 'Non-discrimination in economic, social and cultural rights' (2009) UN Committee on Economic, Social and Cultural Rights, which lists health status as a prohibited ground and gives HIV discrimination as an example here.

[7] The HIV and AIDS (Anti-Discrimination) Act, 2014 (Act No. 7),

[8] See, for example *Botswana Court of Appeal in Makuto v S*, [2000] BWCA 21; *Malawi Industrial Relations Court in Banda v Lekha* [2005] MWIRCC 44; *Indian High Court in MX of Bombay Indian Inhabitant v M/s XY* 1997 (2) BOMLR 504 and further case law discussed in SALC Litigation Manual Series (2011) Equal rights for all: Litigating cases of HIV-related discrimination.

that the group of approximately 3% of learners affected by the ongoing non-delivery of textbooks were largely from black, rural and poverty-stricken communities and schools ('no-fee' schools), i.e. from some of the most impoverished communities in South Africa.[9] Although not explicitly stated, the SCA appears to find the unfair discrimination occurs on the basis of race, spatial location and, possibly, poverty (see para 49). In the 2020 Constitutional Court decision of *Mahlangu v Minister of Labour* agreed the exclusion of domestic workers from the Compensation for Occupational Injury and Diseases Act, 130 of 1993, was unfair discrimination of a group defined by poverty, and based on intersection of sex, gender, class and other grounds (para 65).

These jurisprudential developments point in the direction of an explicit recognition of socio-economic status in PEPUDA, and follows academic commentary on the inclusion of socio-economic status or poverty as a listed ground in South Africa,[10] as well as in comparative jurisdictions.[11] Indeed jurisdictions in Canada and Europe have already included poverty or socio-economic circumstances or social condition as a protected ground of discrimination. Canada's early adoption of 'social condition' under the Quebec Charter of Rights and Freedoms, 'source of income' under the Nova Scotia Human Rights Act, and 'the recognition of 'receipt of social assistance' by its appellate courts, have now been joined by multiple other jurisdictions.[12]

Support for poverty as a ground of discrimination is also found in international treaties and legislation, and is recognised by the United Nations Committee on Economic, Social and Cultural Rights. Thus, in General Comment 20, it is stated that discrimination on grounds of 'economic and social situation' should be prohibited by contracting states. Notably, both the stigmatic and redistributive dimensions are highlighted. According to the General Comment:

> A person's social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatization and negative stereotyping which can lead to the refusal

[9] See paras 49, 50.

[10] See, for example, Sandra Liebenberg & Beth Goldblatt 'The Interrelation Ship Between Equality and Socio-Economic Rights Und Er South Africa's Transformative Constitution' (2007) *South African Journal on Human Rights* 335-361. Anton Kok 'The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: proposals for legislative reform' *SAJHR*, Vol. 24, No. 3, pp 445-47 at 459. Also see Liebenberg, S and O'Sullivan, M 'South Africa's new equality legislation : a tool for advancing women's socio-economic equality?' (2001) *Acta Juridica* 70.

[11] Juan Carlos Benito Sánchez, 'Towering Grenfell: Reflections around Socioeconomic Disadvantage in Antidiscrimination Law' (2019) 5(2) QMHRR 1; Murray Wesson, 'Social Condition and Social Rights"'(2006) 69 *Sask. L. Rev*. 101; Martha Jackman & Bruce Porter 'Rights-Based Strategies to Address Homelessness and Poverty in Canada: The Constitutional Framework'; A.W. MacKay, T. Piper & N. Kim 'Adding Social Condition to the Canadian Human Rights Act' (2009), Social Condition as a Prohibited Ground of Discrimination under the Canadian Human Rights Act (December 1999), submitted to the Canadian Human Rights Act Review Panel.

[12] According to a survey, nine equality bodies identified that equal treatment legislation in their jurisdiction named a ground related to socio-economic status and one identified it as named in the Constitution. This ground was named in different ways: Albania: 'economic, education or social situation'; Belgium: 'fortune'; Croatia: 'property status' and 'social status'; Cyprus: 'social descent', 'wealth', and 'social class' ; Hungary: 'social origin, property, birth' and 'financial status'; Latvia: 'social status' ; Montenegro: 'social origin' and 'material status' Serbia: 'financial status' and Slovak Republic: 'social origin' and 'property'. See 'Equality bodies contributing to the protection, respect and fulfilment of economic and social rights – document on a ground of socio-economic status' <https://equineteurope.org/wp-content/uploads/2019/02/economic_and_social_rights_electronic-3.pdf> p. 12.

> of, or unequal access to, the same quality of education and health care as others, as well as the denial of or unequal access to public places.[13]

There are two possible concerns about the inclusion of 'socio-economic status' in South Africa. First, that it might be used by the advantaged or privileged groups to roll back socio-economic and transformative developments. Second, that the inclusion of this ground invokes separation of powers concerns as it involves the courts in economic and budgetary questions.

On the first concern, we suggest that both the definition of 'socio-economic status' - as a disadvantaged status (poverty, low income, low education levels) - and the asymmetrical nature of our jurisprudence (a concern with disadvantage and dignity in the fairness enquiry) mean that this is unlikely to transpire. On the second concern, we suggest that the list of criteria for the evaluation of fairness under s 14 mitigate against these concerns and lend plenty of space to courts to resist economic decisions that they feel to be beyond their institutional capacity.

More broadly, there is no doubt that there are significant 'recognition' issues relating to socio-economic status that Equality Courts can easily address – stigma, stereotyping, social and cultural exclusion, etc, (for example exclusion from credit merely because of stereotype associated with socio-economic status). Indeed, as Liebenberg and Goldblatt argue: 'While it is recognised that legislation alone cannot eliminate the inequalities inherent in a market-based economy, it can at least seek to combat the exclusion of the poor from social goods, services and facilities arising from irrational prejudices and stereotyping.'[14] In addition, if used on its own, or in combination with other grounds, such a race or gender, it can assist in a fairer distribution of social goods and services, as seen in *Khosa*[15] (although poverty not a ground), *Mahlangu*[16] and *Social Justice Coalition.*[17] More broadly, however, we believe that there is sufficient flexibility in the unfair discrimination jurisprudence for the courts to navigate a broad range of issues to address misdistribution, misrecognition and the lack of social participation or political representation linked to socioeconomic status and disadvantage.

Accordingly, we recommend the explicit inclusion of socio-economic status in the list of prohibited grounds in PEPUDA to enable this jurisprudence to develop and evolve. We prefer socio-economic status to poverty, as its definition enables courts to grapple with different kinds of socio-economic disadvantage, including poverty, low income status (including grant recipients) and low education status.

---

[13] General Comment No. 20, 'Non-discrimination in economic, social and cultural rights' (2009) UN Committee on Economic, Social and Cultural Rights, para 35.

[14] Liebenberg, S & O'Sullivan, M 'South Africa's new equality legislation : a tool for advancing women's socio-economic equality?' (2001) *Acta Juridica* 70. Also see Sandra Liebenberg & Beth Goldblatt 'The Interrelation Ship Between Equality and Socio-Economic Rights Und Er South Africa's Transformative Constitution' (2007) *South African Journal on Human Rights* 335-361.

[15] *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC) at para 77, the Court stated that: 'As far as the applicants are concerned, the denial of the right is total and the consequences of the denial are grave. They are relegated to the margins of society and are deprived of what may be essential to enable them to enjoy other rights vested in them under the Constitution. Denying them their right under section 27(1) therefore affects them in a most fundamental way. In my view this denial is unfair.'

[16] Ibid

[17] Ibid

1.3.3 Nationality

'Nationality' differs from citizenship, and is defined in PEPUDA as 'ethnic or national origin and includes practices associated with xenophobia and other adverse assumptions of a discriminatory nature but does not include rights and obligations normally associated with citizenship'. Citizenship refers to one's status as citizen or non-citizen (permanent residents, asylum-seekers, refugee, undocumented migrants) – discrimination claims sift out which rights, resources, protections and obligations are reserved for citizens and which should be extended to non-citizens and, of so, which categories.

The Constitutional Court has accepted that citizenship, or the absence thereof, can be a basis for discrimination of vulnerable and marginalised groups of permanent residents (*Larbi-Odam v Member of the Executive Council for Education (North-West Province)* [1997] ZACC 16 and *Khosa v Minister of Social Development* [2004] ZACC 11). As noted by Mokgoro J in *Khosa*: 'foreign citizens are a minority in all countries, and have little political muscle' (para 19). However, the protection of refuges and asylum seekers under s 9 of the Constitution has been less robust (See *Union of Refugee Women v Director, Private Security Industry Regulatory Authority* [2006] ZACC 23, where requirements placed on refugees for registration on the security industry were not found to be unfair discrimination). What this jurisprudence illustrates is that the mechanisms of 'unfair discrimination' provides ample space to deliberate on the difference between citizens and different classes of residents and migrants in securing protection against discrimination.

The question here, however, is whether discrimination on the basis of nationality should be explicitly included in PEPUDA, in particular to provide extra legal 'muscle' to address systemic discrimination based on xenophobia. Although 'ethnic or social origin' is already a ground, we believe this speaks more narrowly to ethnicity, rather than nationality or national origin. So it captures discrimination based on stereotypes and stigma arising out of one's ethnicity, such as being Zulu, Shangaan or Jewish, partly related to what the Department of Justice refers to as 'tribalism' in the *National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Racial Intolerance* (NAP)[18] Arguably, however, it does not capture discrimination that arises in of the way we stereotype and stigmatise people based on their national origin or nationality, such as being Nigerian, Somalian, Congolese and so on. These forms of discrimination have given rise to significant exclusion, marginalisation and violence against people based on their nationality, as noted in the NAP.[19]

The need to combat xenophobia and discrimination of non-nationals is recognised in international law, especially as it overlaps with forms of discrimination based on race and ethnicity. Thus the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), in article 1, defines racial discrimination as:

> Any distinction, exclusion, restriction or preference based on race, colour, descent, or *national* or ethnic *origin* which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

[18] Department of Justice (2019) available at < https://www.justice.gov.za/nap/docs/NAP-20190313.pdf> 28, paras 83-84. This is for the period 2019 to 2024.
[19] Ibid.

Nationality or national origin is also recognised as a prohibited ground of discrimination in the enjoyment of socio-economic rights as stipulated in the International Covenant on Economic, Social and Cultural Rights, article 2(2).[20]

In South Africa, in *Minister of Home Affairs v Watchenuka* [2003] ZASCA 142, the SCA acknowledged that dignity is inherent in all persons regardless of nationality: 'Human dignity has no nationality. It is inherent in all people – citizens and non-citizens alike – simply because they are human. And while that person happens to be in this country – for whatever reason – it must be respected, and is protected, by section 10 of the Bill of Rights.'[21]

South Africa's National Action Plan to combat Racism, Racial Discrimination, Xenophobia and Racial Intolerance, as the name indicates, aligns xenophobia with forms of racism, but recognises the overlapping grounds of race, ethnicity and national origin/nationality discrimination as listed in ICERD.[22] It further notes the importance of addressing discrimination, hate speech and hate crimes based on 'ethnic or social origin, 'nationality, migrant or refugee status' and race.[23] And it recognises xenophobia to be attitudinal orientation of hostility against non-nationals in a given population, as defined by UNESCO.[24]

Under the auspices of the Department of Justice, the NAP seeks, inter alia, to 'complement ... existing legislation, policies and programmes which address equality, equity and discrimination',[25] and thus to [i]ncrease the effectiveness and coherence of measures against racism, racial discrimination, xenophobia and related intolerance', and to' [f]acilitate the identification of legislation that needs to be amended and or adopted with a view to improving the protection of victims'.[26] It recognizes that the faultlines in our society, such as 'poverty, land and housing, go hand in hand with racism, racial discrimination, xenophobia and other intolerances', giving rise to the need to 'strengthen ... existing policies, [laws] and programmes, within a wider government program of action.[27] Amongst these are PEPUDA, the Employment Equity Act and envisaged Hate Crimes legislation.[28]

Without traversing the NAP in detail, we note that it recognises the deep problems of xenophobia in our society, with 'widespread and violent forms of xenophobia resulting in the deaths and injuries to people as well as looting and destruction of property.' It further notes that '[x]enophobia presents a serious challenge towards the protection of human rights.'[29] Although, it appears that hate crimes legislation has been identified as a major pathway to addressing this,[30] we suggest PEPUDA and the Equality Courts can also play an important role in addressing xenophobia in the stereotyping of foreign nationals and unfair treatment in terms of access to opportunities, good and services. To facilitate this,

[20] 'The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'
[21] Para 25
[22] NAP 28.
[23] Ibid 7-8.
[24] Ibid at 10, citing UNESCO http://www.unesco.org/new/en/social-and-humansciences/themes/internationalmigration/glossary/xenophobia/.
[25] Ibid 12.
[26] Ibid 14.
[27] Ibid.
[28] Ibid 26.
[29] Ibid 27-28.
[30] Ibid 40-42.

and to secure 'the coherency of the legislative and policy environment from a rights-based perspective',[31] we recommend that the inclusion of the ground of 'nationality' in section (a) of the definition of 'prohibited grounds' in PEPUDA This will both symbolically recognise nationality as a cause of substantial discrimination in our society and provide a practical mechanism (a claim for unfair discrimination) as a means of addressing it.

1.3.4 Family responsibility and family status

Family responsibility and family status are closely intertwined. Both are defined in the Act.

Family responsibility means 'responsibility in relation to a complainant's spouse, partner, dependent, child or other members of his or her family in respect of whom the member is liable for care and support'. It is similarly defined in the Employment Equity Act where it has been listed as a prohibited ground for discrimination in the field of employment since 1998. It is important in that it allows us to move beyond a simple connection of women, motherhood and social reproduction to recognise that family responsibility can and should generate obligations of care to which women, men and those who identify beyond the binary, as well as persons beyond that circle, may be subject. It thus a basis for potentially transformative uses of PEPUDA in terms of recognising care responsibilities that have thus far disproportionately fallen upon, and affected, women. It is thus neither gender restrictive nor prescriptive, and able capture caregiving responsibilities generally.

Family status 'includes membership in a family and the social, cultural and legal rights and expectations associated with such status'. While, it might have some overlap with 'marital status', it is wider than this as it speaks less to the nature of the relationship between partners, that to the status that the family, as whole, experiences. It thus addresses stereotype, stigma and hierarchy that attaches to different family forms. Like 'family responsibility' it has the potential for potentially transformative uses of Equality Courts, especially in challenging dominant marriage norms.

International law has addressed the position of 'Workers with Family Responsibilities' in the International Labour Organisation Convention of 1981. More broadly, the CESCR recognises that discrimination in the enjoyment of socio-economic rights can occur on the basis of family status in the ESCR general comment 20 on 'Non-discrimination in economic, social and cultural rights'.[32] The Human Rights Committee in Committee General Comment No. 28 'Article 3 (The equality of rights between men and women) recognises different family forms.[33] Both grounds are accordingly recognised international law, although not necessarily well developed. One is more likely to find some precedent in comparative anti-discrimination law, including Australia[34] and Canada[35], where one or both are included as grounds. One interesting development in comparative law, that we suggest is taken up within the meaning of family responsibility, is discrimination on the basis of breastfeeding, such as found in s 7AA of Australia's Sex Discrimination Act, 1984.

---

[31] Ibid 42.

[32] Committee on Economic, Social and Cultural rights General Comment no. 20 'Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International covenant on economic, social and cultural rights) E/C.12/gGC/20, 2 July 2009, para 31.

[33] Human Rights Committee General Comment No. 28 'Article 3 (The equality of rights between men and women)' HRI/GEN/1/Rev.9 (Vol. I), 29 March 2000, para 27.

[34] Section 7A of the Australian Sex Discrimination Act 1984 explicitly lists 'family responsibility' as a prohibited ground.

[35] The Canadian Human Rights Act RSC 1985, c. H-6 includes family status as a prohibited ground.

Although neither ground has yet formed basis of claims under PEPUDA, we argue that both these grounds should be included in PEPUDA as listed grounds both because of their potential to remedy systemic discrimination and to produce transformative outcomes.

1.3.5 Recommendations

In order to reduce the burden of proving these grounds as additional grounds under (b) of the definition of prohibited grounds, and given the wording of s 34 and the definitions in the Act (all of which suggest that the grounds would meet the requirements of (b)), we propose the following amendments to s 1:

The definition of prohibited grounds in s 1(xxii) be amended as follows:

> 'prohibited grounds.' are—
> (a) race, gender, sex, pregnancy, family responsibility, marital status, family status, HIV/AIDS status, socio-economic-status, ethnic or social origin, nationality, colour, sexual orientation, age, disability, religion, conscience. belief, culture, language and birth;

The definition of family responsibility in s 1(xi) be amended as follows:

> 'family responsibility' means responsibility in relation to a complainant's spouse, partner, dependent, child or other members of his or her family in respect of whom the member is liable for care and support, and includes breastfeeding;

1.4 'Prohibited Grounds' – Addition of 'Transgender' and 'Gender Identity'

In light of significant international and national developments in the legal protection of transgender people since the enactment of PEPUDA twenty-one years ago, and their position as a vulnerable and marginalised group in South Africa, subject to violence, discrimination and to misrecognition of their gender identity; we propose that the grounds of 'transgender' and 'gender identity' be added to the listed grounds in the Act.

International principles and comparative law

The Yogyakarta principles[36] established in 2007 as a set of international principles relating to the application of international human rights law in relation to sexual orientation and identity explicitly call for states to:

> (A) 'Embody the principles of equality and non-discrimination on the basis of sexual orientation and gender identity in their national constitutions or other appropriate legislation, if not yet incorporated therein, including by means of amendment and interpretation, and ensure the effective realisation of these principles; ...
> (C) Adopt appropriate legislative and other measures to prohibit and eliminate discrimination in the public and private spheres on the basis of sexual orientation and gender identity;

[36] The Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity (March 2007).

Several comparative jurisdictions have indeed included transgender and gender identity protection into their anti-discrimination laws in Australia,[37] Canada[38] and India.[39]

National legislation and caselaw

In South Africa, the Alteration of Sex Description and Sex Status Act, 47 2003, and the recent Identity Management Policy of the Department of Home Affairs have all improved the legal recognition and protection of transgender people. The need for clear and unequivocal protection against discrimination has become particularly apparent in recent cases: *Kos v Minister of Home Affairs* [2017] ZAHCHC 90 and *September v Subramoney* [2019] ZAEQC.

In the *Kos* case, three married couples brought an application against the Department of Home Affairs for failing to register their sex changes in terms of the Alteration of Sex Description and Sex Status Act. Although not brought in terms of PEPUDA, the Court highlighted that any provisions precluding a party from marrying in terms of the Marriage Act, because the party has an altered documentation in terms of the Alteration of Sex Description and Sex Status Act, would probably constitute unfair discrimination on one or more grounds set out in s 9(3) of the Constitution. The court, however, did not flesh out which specific ground of discrimination would be implicated.

In *September* Ms September (a transgender woman) brought an application against the Minister of Correctional Services for unfair discrimination and harassment because of their failure to allow her to express her gender identity while in prison. The respondents argued that there is no precedent for an interpretation of 'gender' to include 'transgender'. They were accordingly no grounds for discrimination, because she is still legally male and should be treated as such. In doing so, they advanced a binary interpretation of sex and gender which excluded transgender people. In sum: The Constitution does not prohibit unfair discrimination on the ground of transgender identity, but rather on the grounds of gender and sex, and there is no precedent for including transgender identity in gender (*Kos* did not make this finding). Legislation, such as the Births and Deaths Act provides for a binary model to sex identity of male or female, with no provision for transgender. Overall, the sex identity legislative scheme provides for sex alteration within a binary understanding of sex and gender. And although the Equality Act expressly defines 'sex' to include 'intersex', it excludes transgender persons.

The court avoided an express engagement with the meaning of sex or gender to include 'transgender', not did it address the question of gender diverse identities outside of the binary, two-gender model. Nevertheless the Court did find that the failure to recognise the applicant's gender identity was a failure of equality and dignity:

> In the circumstances, I find that, even though 'transgender' is not a listed ground under the Constitution, nor the Equality Act, it is the right to equality that is at the centre of this matter, and in particular how it relates to the right to dignity and the right to freedom of expression. In my view, the right of dignity includes the applicant's right to her gender identity.

[37] Equal Opportunity Acct 2010, available at: https://www.humanrights.vic.gov.au/legal-and-policy/victorias-human-rights-laws/equal-opportunity-act/
[38] Canadian Human Rights Act (R.S.C., 1985, c. H-6) available at: https://laws-lois.justice.gc.ca/eng/acts/h-6/index.html
[39] he Equality Bill 2021. Available at https://clpr.org.in/wp-content/uploads/2020/01/Equality-Bill-2021-8th-January-2021.pdf

The court further found that the failure/refusal to allow Ms September to express her gender constituted unfair discrimination under section 8 of the Equality Act.

An urgent need for timely reform

All of this points to the need for South African legislation to engage in a necessary 'catch-up' and provide legal clarity, certainty and protection for transgender people. We suggest that this is an opportune time to do by expressly including the grounding of transgender and gender identity in PEPUDA. In particular:

1. Transgender people constitute a marginalised group that is vulnerable and a target for discrimination. However, there is no legal certainty of whether they are included and protected under the ground of gender in the Act.
2. The *September* case illustrates the need for clarity to ensure maximum legal protection and to avoid the increased burden of proving an 'unlisted ground' set out in s 13 (2)(b) of the Act.
3. Although there exists protection under paragraph (b) of the definition of prohibited grounds of the Equality Act and we have the confidence that transgender people would be protected as the courts are required to would assess discrimination cases based on ss 13 and 14 of the Act, there is scope for misinterpretation of the Equality Act as excluding transgender persons.
4. Amending the Act will not only clarify any interpretive misconceptions by the courts but also by the State and the public when applying the Act.
5. The current case law is based on a two-gender model that excludes gender diverse individuals that may identify outside of the binary.

Proposed amendments: definitions - transgender and gender identity

Identity terminology is fast paced and ever-changing/evolving. It is thus important that the appropriate distinctions in terminology are recognised and reflected in legislation and that wide protection is offered to the most vulnerable and marginalised. The Act does not include any definition for 'gender'. The question is whether we should define gender to include 'transgender' and 'gender identity', or whether we should add these as two separate grounds. We prefer the former, especially as it points to the fluid nature of gender, beyond a binary understanding.

Transgender has generally been understood as an umbrella term that is inclusive of gender diverse, transgender, transsexual, genderqueer and agender people. Studies find that using transgender as an umbrella term that is inclusive of a wide range of identities is the best way to keep up with the fast paced nature of terminology. Gender identity is a person's internal, deeply felt sense of being a woman, or a man, another gender, a combination of genders, or not having a gender. Gender identity includes 'gender expression' which is each person's presentation of the person's gender through physical appearance, including dress, hairstyles, accessories, cosmetics, mannerisms, speech, behavioural patterns, names and personal references. 'gender expression' as each person's presentation of the person's gender through physical appearance – including dress, hairstyles, accessories, cosmetics – and mannerisms, speech, behavioural patterns, names and personal references. Gender expression may or may not conform to a person's gender identity.

Recognising that transgender people may refer to people who identify with gender within and beyond the binary and the fast paced nature of identity terminology we recommend the following definitions be added to the definition section of the Act:

Gender
'gender' includes 'transgender' and 'gender identity'.

Transgender
'transgender' refers to a person whose gender identity differs from the gender assigned to them at birth.

Gender identity
'gender identity' refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth .

1.5 'Prohibited Grounds' – New Grounds for Consideration

Inequality and discrimination is ever changing, adding potential new grounds of unfair discrimination. At the same time, it can be argued that some groups remain particularly vulnerable and have not yet been recognised as victims of systemic discrimination. We believe that here are additional grounds for consideration, including criminal record; irrelevant criminal record; irrelevant medical record; physical appearance. the, actual or presumed association with a person who has, or is believed or presumed to have, an attribute referred to in the list of prohibited grounds. In view of the constraints of this submission we briefly make the case for discrimination relating to criminal record for consideration.

Criminal record & Irrelevant criminal record

Neither the Employment Equity Act nor PEPUDA currently expressly protect against discrimination based on a criminal record or irrelevant criminal record. People with criminal records may find that it impairs their ability to find employment, operate businesses, travel and it could be an aggravating factor if later found guilty of another criminal offence. This applies despite rehabilitation, the time lapse since conviction/release, and the relevance of the offence to the opportunity. An irrelevant criminal record may refer to criminal proceedings that have not been finally determined; or an offence for which a person has been acquitted; or a conviction that has been quashed or set aside; or a conviction that is not directly relevant to opportunity in question. For some minor offences, it a possible to have a criminal record expunged after 10 years from the date of conviction. Before then, a person's life prospects may be severely limited; and if expungement is not possible then they may suffer a permanent disability, regardless of rehabilitation or the passage of time. A person's criminal record is often inextricably linked to their socio-economic background. Considering the impact of such discrimination on a person's dignity and life prospects, discrimination on basis of a person's criminal record may therefore be unfair, especially if it is not justified. Having a criminal record should not automatically disqualify a person from an opportunity, and each case should be considered on its merits.

We therefore propose that Criminal record and irrelevant criminal record be added to the list of prohibited grounds.

2 SECTION 6 – 'THIRD PARTY' LIABILITY FOR UNFAIR DISCRIMINATION

In proposed amendments to s 6, liability for unfair discrimination is extended to a number of 'third parties', including 'instigators' of discrimination – persons who causes, encourage or request another person to discriminate against others – and employers and principals of employees, workers and agents who discriminate. The proposed amendment reads as follows:

Prevention and general prohibition of unfair discrimination

6. (1) Neither the State, a public body nor any person may unfairly discriminate against any person.

(2) Any person who causes, encourages or requests another person to discriminate against any other person, is deemed to have discriminated against such other person.

(3) If a worker, employee or agent of a person contravenes the Act in the course of his or her work or while acting as agent, both the person and the worker, employee or agent, as the case may be, are jointly and severally liable for a contravention and proceedings under the Act may be instituted against either or both of them unless the person took reasonable steps to prevent the worker, employee or agent from contravening the Act.

These sections, and especially the introduction of ss 6(2) and 6(3), aim to address more systemic forms of discrimination. In other words, they recognise that, while to is important to provide protection against individual acts of discrimination, and to hold such discriminators to account; the problem of discrimination in society is not only a problem of individual acts, so also a problem of embedded norms, values and attitudes that perpetuate negative stereotypes, stigma, social and economic exclusion, and so on, on the basis of race, sex, gender, sexual orientation and other prohibited grounds. To address this, the amended sections seek to widen liability for unfair discrimination, and thus the duty and responsibility to prevent it, beyond individual claims against discriminators to a wider group of actors. These sections aim to do this by allowing claims of unfair discrimination to be brought against a wider range of persons. In this way, these sections also align with the positive duties placed public and private actors in chapter 5

2.1 Section 6(1) – including 'public body'

Depending upon the approach taken to our suggestions in the previous section, public body may or may to need to be inserted into s 6(1).

2.2 Section 6(2) – holding accountable those who 'cause, request or encourage' discrimination.

Section 6 (2) confers liability on those we might call 'instigators' of discrimination, i.e. persons who 'cause, encourage or request' another person to discriminate, by way of a deeming provision.

In principle, to hold accountable those who cause others to discriminate recognises that the problem of unfair discrimination is not just the result of individual acts, but also of wider social attitudes, norms, values and practices that cluster in groups and communities, and are out of kilter with our Constitution's

commitment to an equal and egalitarian society. Thus, apparently individual acts of discrimination are often linked to wider patterns of systemic discrimination, and might even be directly triggered by the actions and ideas of others. Insofar as PEPUDA self-consciously aims to address and contribute to the eradication of discrimination across our society (preamble, s 2), it makes sense that its provisions also hold 'instigators' of unfair discrimination liable for the offence. This strengthens our ability to address the manner in which discriminatory attitudes, values and conduct vest in groups, and thus to target systemic discrimination.

At the same time, it is important that this is done in a manner that respects an 'instigator' respondent's rights to due process. What precisely is required to find an 'instigator' liable must be clear and certain. We do not believe that the amendment achieves this by way of the deeming provision as it stands. It is entirely unclear as to (i) *who* needs to prove (ii) *what* in order for the deeming provision to take effect. This lack of clarity is problematic insofar as the deeming provision creates no 'rebuttable presumption', no ability to escape liability once there is a finding of the primary claim of unfair discrimination.

Accordingly, we suggest that the question of liability in s 6, be separated from the processes of establishing liability which could be set out in more detail in s 13. Section 6(2) should establish the liability of 'instigators', while s 13 provides and clarifies the procedures by which liability is established.

Liability under section 6(2)

We recommend that s 6(2) be amended as follows:

> 6(2) No ~~Any~~ person ~~who~~ may cause~~s~~, encourage~~s~~ or request~~s~~ another person to discriminate <u>unfairly</u> against any other person. ~~is deemed to have discriminated against such other person~~.

Establishing the liability of a person who instigates unfair discrimination – new section 13(3)

We suggest that a new section, s 13(3), be developed to set out the process of establishing the liability of 'instigators' for unfair discrimination. Although we do not suggest the actual wording, we recommend the following steps:

(i) A complaint of instigating discrimination must be laid at the same time, and/or in the same matter, as the primary complaint of unfair discrimination. In other words, the instigator becomes a respondent in the case, albeit subject to a different claim.

(ii) In establishing the prima facie case of discrimination as required in s 13(1), the complainant must also make a prima facie case that the alleged instigator/s caused, encouraged or requested the alleged discriminator to so discriminate.

(iii) Provision must be made for the instigator respondents to prove that they did not cause, encourage or request the unfair discrimination, as alleged.

(iv) If it is established:
   a. that the instigator did, in fact and in law, 'cause, encourage or request' the discrimination; and
   b. the discrimination is found to be unfair under s 14;

   then the instigator is deemed to have discriminated unfairly against the complaint.

We believe that this sort of approach achieves the appropriate balance between the imperative to eliminate unfair discrimination and the due process rights of respondents.

2.3 Section 6(3) – holding employers and agents liable

Insofar as the Employment Equity Act only applies to discrimination in the employer/employee relationship, and the Equality Act or PEPUDA applies where the EEA does not have jurisdiction as per s 5(3); this provision is clearly targeted at vicarious liability for acts of discrimination by employees, workers and agents against others (employees, co-workers, clients, customers, contractors etc.). As such, similar to the law on employment equity, including sexual harassment,[40] it places an obligation on employers and principals to act reasonably, or take reasonable steps, to prevent unfair discrimination.

As with s 6(2), this is aimed at addressing systemic discrimination. In the same way that the law requires employers to develop workplaces that are free of unfair discrimination and sexual harassment in contravention of the EEA, so too does PEPUDA require employers and principals to ensure that those who work for or represent them act in ways that are free of unfair discrimination. This maps onto, and widens the existing liability of employers and agents.

Important, however, there is 'escape clause', for employers and agents, namely, that they only need act reasonably or take reasonable steps to prevent unfair discrimination by their employees and agents. There is already a wealth of information as to what might constitute reasonable steps, including relevant policies, procedures, complaint mechanisms, codes of conduct and educational measures. In addition, the task of employers and agents should be rendered much simpler by the promulgation of chapter 5 and the development of positive measures under the provisions of that chapter. In that chapter, too, are provisions that recognize the burden on smaller enterprises and subject their obligations and responsibilities to qualifications, see for example, proposed s 24(4) that takes account of 'size, resources and influence'. This might factor into a court's assessment of reasonableness, should a complaint be made, and provides a way of distinguishing between the 'reasonableness' obligations of large versus small enterprises.

We support this amendment.

3 SECTION 9A - RETALIATION

The Bill proposes an amendment to s 9 of PEPUDA: s 9A 'Prohibition of retaliation'

> No person may retaliate or threaten to retaliate against a person who—
> (a) objects to a discriminatory act or omission; or
> (b) instituted or wishes to institute proceedings in terms of or under the Act.

Protection against retaliation is typically found in labour legislation. It aims to protect those who speak out about discriminatory practices and/or lay complaints about discrimination from any negative consequences for their actions.[41] Thus it seeks to mitigate against an environment in which people do

[40] Section 60 of the EEA.
[41] The idea of reprisal in PEPUDA was mooted by Anton Kok in The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: proposals for legislative reform' (2008) 24 *SAJHR* 445-47 at 459.

not speak out for fear of reprisals. It is most often found in an employment setting. For example, witnesses in a complaint concerning employment may still be working for the respondent and may fear repercussions for their participation. Protection against retaliation provides some reassurance that they cannot be penalized by the employer. Additionally, complainants may be in a position where they may face reprisals for exercising their rights in bringing the complaint.

South African labour law does have a developing jurisprudence on retaliation, particularly in relation to 'unfair dismissals' under the Labour Relation Act, 66 of 1995.[42] We think it is appropriate that the development of law and jurisprudence in relation to retaliation in the workplace should stay within the domain of labour law. However, because retaliation can occur in any institution and in response to any type of discrimination challenge, the problem of retaliation cuts across discrimination law broadly and is not limited to any one legal context. PEPUDA must therefore address retaliation in other areas, one example of which might be (threatened) evictions from accommodation, housing or retirement complexes (to silence or intimidate complainants or witnesses). Other important institutions and actors includes schools and educational institutions, as well as independent contractors and suppliers.

There is a substantial comparative jurisprudence on retaliation but, again, it tends to be in the area of labour law. US employment law and harassment legislation, for example, provides for anti-retaliation statutes at both the federal and state levels[43] and the concept of retaliatory termination for protected activity is well accepted by the United States Supreme Court. In Canada, there are several anti-discrimination legislations make reference to retaliation in employment legislation. Here, however, there are also examples of prohibition of retaliation beyond the employment sphere. For example the Nova Scotia Human Rights Act of 1989, c. 214, s 11 states that:

> No person shall evict, discharge, suspend, expel or otherwise retaliate against any person on account of a complaint or an expressed intention to complain or on account of evidence or assistance given in any way in respect of the initiation, inquiry or prosecution of a complaint or other proceeding under this Act.

More broadly, the Canadian Human Rights Act of 1985, c. H-6, s 14.1 states that:

> It is a discriminatory practice for a person against whom a complaint has been filed under Part III, or any person acting on their behalf, to retaliate or threaten retaliation against the individual who filed the complaint or the alleged victim.

This refers to a broad range of areas beyond employment, including provision of goods, service, facilities, accommodation, commercial premises and residential accommodation.

---

[42] See e.g. N Abader & N Coleman 'Dismissing the aggrieved' (2020) *Without Prejudice* September – the Labour Court was prepared to accept that a dismissal in reaction to an employee lodging a grievance is automatically unfair. See *Mackay v ABSA Group* 1999] ZALC 116. Also see *De Klerk v Cape Union Mart International* [2012] ZALCCT 22, finding the dismissal of the employee was not in retaliation to the employee lodging a grievance. Also see *DBT technologies (PTY) (Ltd)*. On retaliation in grievance procedures, see *DBT Technologies (Pty) Ltd v Mariela Garnevska* [2020] ZALAC 26 (18 May 2020) (*DBT*).

[43] In the US, retaliation occurs when an employer unlawfully takes action against an individual in retribution for exercising rights protected by the equal employment opportunity laws, that is, those laws enforced by the EEOC. See Title VII of the Civil Rights Act of 1964, Section 704, subsection 2000e-3(a); The Age Discrimination in Employment Act of 1967, section 4(d)); The Fair Labour Standards Act of 1938, section 3; the Age Discrimination in Employment Act, the Americans with Disabilities Act of 1990, section 503(a) and (b);.the Rehabilitation Act, the Equal Pay Act, and the Genetic Information Non-discrimination Act.

Insofar as discriminatory practices often hidden from the public eye, and need complaints and whistle blowers to render them visible and allow us to deal with the sources of discrimination, we support this provision. Doubtless, the jurisprudence will need to be developed over time, especially in what would be required to prove retaliation. However, there is a substantial body of such jurisprudence upon which to draw upon. For example, in US labour law, a retaliation claim has three distinct elements: A protected activity (e.g. complaint, whistle-blower, witness); an adverse action by the respondent; and a causal connection between the protected activity and the adverse action. We are comfortable with leaving this development to the courts.

4 SUGGESTED AMENDMENTS TO SECTIONS 14 AND 21.

In this section we suggest a few amendments to ss 14(3) and 21(1) to strengthen the link between unfair discrimination and positive measures to promote equality as set out in chapter 5. Overall we believe that these amendments will strengthen both our ability to address unfair discrimination and encourage positive measures to promote equality. We also make a proposal about balancing competing rights in s 14(3).

4.1 The fairness enquiry in section 14 and chapter 5.

The enquiry into fairness in s 14 facilitates an evaluation of the impact on the complainant and the justifications of the respondents, and a balancing of these within the overall purpose of addressing unfair discrimination, and achieving equality, dignity and freedom. In assessing the responsibility of the respondents, s 14(3)(i) requires courts to take account of:

> whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to—
>
> (i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or
>
> (ii) accommodate diversity.

In evaluating these reasonable steps, we suggest that courts can, and indeed should, take account of the extent to which the respondents have complied with the provisions of chapter 5. Accordingly we propose a small amendment to s 14(3)(i) both for purposes of clarity, and to give further 'teeth' to the chapter 5 obligations and responsibilities. We recommend the inclusion of an additional sub-section (iii) so that the provision reads as follows:

> whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to—
>
> (i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; ~~or~~
>
> (ii) accommodate diversity; <u>or</u>
>
> (iii) <u>carry out the relevant obligations and responsibilities set out in chapter 5 of this Act.</u>

4.2 Remedies in section 21 and chapter 5

Section 21(1) sets out an extensive, innovative and varied set of remedies for unfair discrimination. These include provision for special measures to address the harassment in s (21(1)(h); for reasonable accommodation in s 21(i) and to comply with any provision of the Act in s 21(1)(p).

Again to enable and enforce the implementation of chapter 5, we suggest that it be linked to possible remedies. For example, it could be included in s 21(1)(p) to allow a court to make an order:

> (p) an order to comply with any provision of the Act, <u>including the relevant sections of chapter 5.</u>

4.3 Section 14 and competing rights

In assisting the courts to evaluate the balance of fairness between the impact on the complainant and the justifications of the respondent, s 14(3)(f) points to 'whether the discrimination has a legitimate purpose' and s 14(3)(g) asks 'whether and to what extent the discrimination achieves its purpose'. This has obvious application in equality cases concerning the state and public bodies where they have to specify their purpose and their means of achieving this. It can have slightly different application in cases of private discrimination where it allows for a balancing exercise in cases where a private person discriminates in the exercise of another right. For example, the private person claims freedom of religion as a defence in a case of unfair discrimination (the classic clash between religious freedom and equality).

Although we believe that it is entirely warranted in South Africa for equality to weigh more heavily than other rights is seeking the balance between rights, we do think that courts should more actively engage in an express balancing enquiry than they have done thus far. For example, in the recent case of *Palestinian Solidarity Commission v Labia* [2021] ZAWCHC 63, the Labia argued that it had a legitimate purpose under s14(3)(f) in refusing to screen a documentary, namely, the exercise its rights to 'refus[e] to be subjugated against its will as an instrument for the PSC's political campaign'.[44] However, the court did not really engage with this argument.

Accordingly, we suggest that courts could be given further guidance by amending s 14(3)(f) to say:

> (f) whether the discrimination has a legitimate purpose, <u>including the lawful exercise of a legally protected</u> <u>right</u>.

We believe that this is more principled jurisprudence where courts actually engage with the competing rights at play, as opposed to pretending that there is no real clash whatsoever. The 'legally protected' qualifier is helpful for suggesting that certain exercises of fundamental rights may not be legally protected. For example, it is already recognised that it is not a legally protected exercise of freedom of religion to discriminate on the grounds of race.[45] In the end, issues of private discrimination often give rise to many cases of rights conflict, especially with rights of religion and culture – it is best to deal with these openly and fairly. We suggest that the proposed amendments will facilitate that goal.

[44] Para 39.
[45] *iSmangaliso Wetland Park v Sodwana Bay Guest Lodge* [2018] ZAKZDHC 62.

PART B – POSITIVE MEASURES AND THE DUTY TO PROMOTE EQUALITY

In this section, we consider the proposed amendments to the definition of the state and to chapter 5 as they are closely related to each other.

5 SECTION 1- DEFINITIONS RELATING TO THE STATE AND PUBLIC BODY

The Bill seeks to separate the current definition of 'the State' into two: the State and public bodies.

> 'the State' [includes—] means
> **[(a)]** any department of State or administration in the national, provincial or local sphere of government;
> **[(b)]** **any other functionary or institution—**
> **(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or**
> **(ii) exercising a public power or performing a public function in terms of any legislation or under customary law or tradition;].**
>
> 'public body' means any institution or functionary—
> (a) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
> (b) exercising a public power or performing a public function in terms of any legislation or under customary law or tradition;";

This separation appears to be because of the need to accord different obligations under chapter 5. However, we are concerned that the separation overly complicates the position.

Instead, we suggest that the Bill retains the current definition of the state, which accords with the definition of 'organ of state' provided for in s 239 of the Constitution. This definition is sufficiently broad to include certain nominally/ostensibly private entities, to the extent that they perform public functions or exercise public powers to the exclusion of traditional state entities doing so, as was the case in *AllPay Consolidated Investment Holdings v Chief Executive Officer of the South African Social Security Agency (No 2)* [2014] ZACC 12.

We further note that the duty of persons contracting with the state is already independently regulated by the proposed s 27 in chapter 5, which we support retaining.

We note that s 26A in chapter 5 differentiates between public entities that are required in terms of the Public Finance Management Act, 1999 (PFMA), to prepare an annual budget and corporate plans, and those that are not. The former are governed by s 52 read with Schedule 2 of the PFMA, and constitute major public entities such as ESKOM. Such entities are required to report on funds provided for the implementation of chapter 5 PEPUDA duties. We support retaining this provision, but referring instead to 'public entities' (in line with the wording used in the PFMA).

These suggestions allow for PEPUDA more coherently to differentiate between the duties imposed on the state (in line with the definition in s 239 of the Constitution), specific major public entities, persons contracting with the state and private persons.

6 POSITIVE MEASURES AND THE DUTY TO PROMOTE EQUALITY

This section addresses the proposed amendments to chapter 5 of PEPUDA, which governs the duty to promote equality and positive duties. Chapter 5 of PEPUDA was originally put in place to encourage the achievement of equality and to bring about structural change, but has never been brought into force. The proposed amendments are an attempt to operationalise the chapter, and we broadly support this and the renewed commitment to tackling inequality on a systemic level, including through the imposition of positive duties to implement a range of positive measures to achieve and promote equality. For this reason, chapter 5 constitutes an imperative legislative intervention that is required by s 9(2) of the Constitution.

In what follows, we outline some general considerations in support of the purpose of chapter 5, before turning to particular aspects of the chapter. While the intention to bring into force chapter 5 is both welcome, necessary and overdue, not all of the proposed amendments are needed or desirable and we make some proposals in this regard.

6.1 Broad observations in support of chapter 5

Chapter 5 of PEPUDA is underpinned by s 9(2) of the Constitution, which sets out that—

> Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

This provides the framing norm and justificatory basis for chapter 5. While chapters 2 and 3 of PEPUDA concern individual claims of unfair discrimination, chapter 5 is oriented to addressing ways in which inequality is structurally and systemically embedded. It is thus proactive, requiring institutional and policy-oriented steps, as opposed to being reactive (i.e. concerned with litigation arising from particular complaints in respect of discrete discriminatory acts). As Fredman observes,

> There is now increasing acceptance that the causes of inequality and discrimination extend well beyond the acts of individual perpetrators directed at individual victims. Instead, inequality is embedded in the structures and institutions of society. As a result, individual rights to protection against discrimination by specific perpetrators are inevitably limited in their ability to address such structural inequalities. Attention has therefore shifted to innovative methods to address structural discrimination.[46]

This is in line with a commitment to substantive equality, which envisages tackling existing systemic inequalities, and so requires positive action from the state as well as other actors.[47] It is now trite that South African law endorses this conception of equality. The Constitutional Court has emphasised that 'equality is envisaged as something to be achieved through the dismantling of structured and practices which unfairly obstruct or unduly attenuate its enjoyment';[48] and that '[e]quality before the law

[46] S Fredman 'Breaking the Mold: Equality as a Proactive Duty' (2012) *American Journal of Comparative Law* 60 (1) 254-287.
[47] C Albertyn & B Goldblatt 'Equality' in *Constitutional Law of South Africa* (2013) 35–4; P Shin, 'Is There a Unitary Concept of Discrimination Law?' in D Hellman & S Moreau (eds), *Philosophical Foundations of Discrimination Law* (Oxford University Press 2013) 180.
[48] *City Council of Pretoria v Walker* [1998] ZACC 1 para 109.

protection in section 9(1) and measures to promote equality in section 9(2) are both necessary and mutually reinforcing'.[49] The imposition of positive measures and duties is thus warranted:

> Absent a positive commitment progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalized under-privilege, the constitutional promise of equality before the law and its equal protection and benefit must, in the context of our country, ring hollow.[50]

The above animates the need for a clear and implementable chapter 5. Individual remedies are necessary but far from sufficient – instead, a variety of positive measures and duties are needed for the full and equal enjoyment of all rights and freedoms. Equality considerations should therefore inform how the state, public bodies and private bodies exercise their powers.[51]

We note that a number of other jurisdictions have also put in place legislative measures that govern positive (or mainstreaming) duties with respect to equality and anti-discrimination.[52] Chapter 5 is thus not without precedent, although South Africa's particular context warrants more exacting duties to eliminate unfair discrimination, promote equality and, on an aspirational and ongoing basis, achieve equality.

6.2 General responsibility to promote equality

The Bill proposes that s 24 (headed 'General responsibility to promote equality') be amended as follows:

> (1) The State and public bodies have a duty and responsibility to eliminate discrimination and to promote and achieve equality.
> (2) All persons have a duty and responsibility to eliminate discrimination and to promote equality.
> (3) The State, public bodies and all persons have a duty and responsibility in particular to—
> (a) eliminate discrimination on the grounds of race, gender and disability; and
> (b) promote equality in respect of race, gender and disability.
> (4) The State, public bodies and the organisations and institutions referred to in section 28(1) must take reasonable measures, within available resources, to make provision in their budgets for funds to implement measures aimed at eliminating discrimination and promoting equality referred to in this Chapter.

This general responsibility to promote equality is the first operative provision of chapter 5. It provides for both a duty and a responsibility, to be borne by state, public bodies and (to an attenuated extent) private persons, with respect to equality. We make the following comments.

[49] *Minister of Finance v Van Heerden* [2004] ZACC 3 para 31.
[50] Ibid para 31.
[51] S Jagwanth 'Expanding Equality' (2005) *Acta Juridica* 131.
[52] United Kingdom Equality Act, 2010 (section 149); Northern Ireland Act, 1998 (section 75); Pollach and Hafner-Burton 'Mainstreaming Gender in the European Union' (2000) *Journal of European Public Policy* 7(3) 432-456 (on both soft law, policy and some discrete legislative measures).

6.2.1 The use of the terms both duty and responsibility suggest that the two have distinctive content. While the term 'duty' has an existing meaning in constitutional and anti-discrimination law, the term 'responsibility' is more inchoate, and perhaps tracks a more diffuse moral norm rather than a strict legal standard. We envisage that if both terms are retained, it will fall to the courts to interpret this distinction.

6.2.2 The proposed amendment has added a duty to eliminate discrimination. In general, this is welcome – for it requires that not only the state and public bodies, but also all persons (including private persons) must take active steps to address existing discrimination. It is also not at all unprecedented, as a similar duties exist on employers in the ss 5 and 15(2) of the Employment Equity Act, 55 of 1998. However, the Constitution proscribes unfair discrimination, rather than discrimination *simpliciter,* and allows for discrimination to be justified on the basis that it is fair. We suggest that this provision tracks this wording to reflect the existing legal position.

6.2.3 We note that while the state and public bodies bear duties to eliminate unfair discrimination, to promote equality and to achieve equality, all persons (including private persons) bear only the first two duties, and do not bear the duty to achieve equality. This distinction is warranted, because the state and public bodies have greater capacity, means and expertise in respect of achieving equality (in part as an aspirational ideal and ongoing process that may not be immediately realisable). The Constitutional Court has previously recognised that it would be unreasonable for private persons to bear the exact same obligations as those borne by the state.[53] This does not mean, however, that private persons are immune from any obligations in respect of unfair discrimination and promoting equality, as we detail in 6.4 below.

6.2.4 We note our earlier recommendation regarding the definition of public bodies (and retaining the definition of the state in the Act's current form), and so suggest that this provision omit the unnecessary references in this regard.

6.2.5 While we welcome introducing an express obligation to fund measures that eliminate unfair discrimination and promote equality, the wording of s 24(4) is problematic on three grounds. First, and most importantly, it incorrectly imports the internal limitations wording that applies to socio-economic rights ('must take reasonable measures, within available resources'), notwithstanding that s 9(2) contains no such internal qualifier. Second, it adds the additional caveat that the steps are 'to make provision in their budgets for funds', which, in this provision, unnecessarily proceduralises the duty and thus weakens it. Third, the duty is redundant, given the requirements imposed by s 25(1)(d), s 25(5), s 25(6), s 26A, and s 28. We do agree that there are resource and budgetary constraints on both the state and private bodies in carrying out their positive duties, but we suggest these are best addressed in ss 25, 26 and 28 as duties to fund and make provision for positive measures, and are qualified as appropriate.

6.2.6 Finally, we welcome the specific protection accorded to the grounds of race, gender and disability, given the continuing legacies of structural racism and patriarchy, and the imperative to take positive measures to address disadvantage on the grounds of disability (and a recognition of the importance of a social model of disability[54]) in an ableist society. We also recommend the inclusion of sexual orientation as a ground warranting particular protection, in light of the

[53] *Daniels v Scribante* [2017] ZACC 13 para 40.
[54] White Paper on the Rights of Persons with Disabilities *Government Gazette* No. 39792, 9 March 2016.

scourge of rampant and violent homophobia, including attacks and murders, and the continued lacuna of legislation prohibiting hate crimes against LGBTQIA+ persons.

Accordingly, we suggest a revised amended clause that reads as follows:

(1) The State ~~and public bodies have~~ has a duty and responsibility to eliminate unfair discrimination and to promote and achieve equality.
(2) All persons have a duty and responsibility to eliminate unfair discrimination and to promote equality.
(3) The State~~, public bodies~~ and all persons have a duty and responsibility in particular to—
  (c) eliminate unfair discrimination on the grounds of race, gender, sexual orientation and disability; and
  (d) promote equality in respect of race, gender, sexual orientation and disability.
~~(4) The State, public bodies and the organisations and institutions referred to in section 28(1) must take reasonable measures, within available resources, to make provision in their budgets for funds to implement measures aimed at eliminating discrimination and promoting equality referred to in this Chapter.~~

6.3 Duty of the state to promote equality

The Bill proposes introducing various express duties on the state to allocate resources and introduce a variety of positive measures to eliminate unfair discrimination, promote equality and achieve equality. In addition to s 24(4) (which we discussed above), the Bill proposes the following amendments:

Section 25, headed 'Duty of State to promote equality' provides in relevant part:

(1) The State must—
  (a) develop awareness of fundamental rights in order to promote a climate of understanding, mutual respect and equality;
  (b) conduct information campaigns to popularize this Act;
  (c) develop appropriate internal mechanisms to deal with complaints of unfair discrimination, hate speech or harassment; and
  (d) adopt and implement, within available resources, measures to eliminate discrimination and to promote and achieve equality in line with the objectives of this Act.

(2) The measures referred to in subsection (1)(d) must be included—
  (a) in the case of a department of State or administration in the national or provincial sphere of government, in the strategic plans contemplated in the Regulations issued under section 76 of the Public Finance Management Act, 1999 (Act No. 1 of 1999); and
  (b) in the case of a department of State or administration in the local sphere of government, in the integrated development plans contemplated in the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000).

(3) The measures referred to in subsection (1)(d) must include—
  (i) the amendment of existing legislation or the enactment of further legislation;

(ii) the amendment of existing policies or the development of new policies;
(iii) the amendment of existing codes or the development of new codes;
(iv) the amendment of existing practices or the adoption of new practices; or
(v) the adoption of any other measure giving effect to the objectives of the Act.

…

(5) The measures referred to in subsection (1)(d) may only be adopted after—
(a) proper investigation and analysis of the aspects in question;
(b) in-depth research in respect of the aspects in question; and
(c) consultation with civil society on the measures to be adopted.

(6) The measures to be adopted by the State to achieve equality must—
(a) proactively address systemic and multidimensional patterns of inequality and discrimination found in social structures, rules, attitudes, actions or omissions which prevent the full and equal enjoyment of rights and freedoms as contemplated in the Constitution, including equal access to resources, opportunities, benefits and advantages and social goods; and
(b) provide for reasonable accommodation of the needs of persons on the basis of any of the prohibited grounds.

(7) In the annual reports referred to in section 40 of the Public Finance Management Act, 1999, and section 121 of the Local Government: Municipal Finance Management Act, 2003 (Act No. 56 of 2003), a report should be included—
(a) on the funds provided for the particular year for the implementation of the measures referred to in subsection (1)(d); or
(b) on the reasons why no funds for the particular year have been provided for the implementation of those measures.

We broadly welcome this legislative intervention, compelling the state to dedicate funds and to undertake a number of positive duties to institute measures in respect of the right to equality. In particular, we support the duty imposed by s 25(6), which recognises that substantive equality requires proactive steps, and that the systematic, structural patterns and drivers of inequality must be tackled.

We also support the retention of the obligation on the State to amend existing legislation, policies, codes and practices (and to enact, develop and adopt further and new legislation, policies, codes and practices). This constitutes an ongoing obligation of the State and its fulfilment is imperative. This is vividly demonstrated in the recent Constitutional Court judgment, *Sithole v Sithole* [2021] ZACC 7, where the Court declared apartheid-era legislation unconstitutional on the basis that it constitutes unfair discrimination on the grounds of gender and race. It is deeply troubling that we continue to have blatantly unfairly discriminatory legislative provisions in force, and notwithstanding numerous reports from the South African Law Reform Commission on apartheid-era legislation across all government departments.[55]

[55] See, for example, the SALRC Project 25: Statutory Law Revision which considered legislation administered by all government departments from 2011 to date, < https://www.justice.gov.za/salrc/reports.htm>, as well as the envisaged project of the SA Law Reform Commission : Project 179: Repeal of Colonial and Apartheid Legislation, < https://www.justice.gov.za/salrc/projectlist.htm>.

In addition, we make the following comments on particular aspects of this provision.

6.3.1 The qualification suggested in s 25(1)(d) that the State must adopt and implement measures 'within available resources' is only appropriate in the Act if it does not, at the same time, import the standard and qualification applicable to socio-economic rights, especially that of reasonableness. As discussed above, the constitutional right to equality is not similarly subject to the internal limitations of socio-economic rights. While we welcome the imposition of these positive duties on the state, which necessarily have budgetary impacts, we suggest that the wording of the provision generally tracks s 9(2) of the Constitution and emerging jurisprudence to require that positive measures be taken. In our view, s 25(7) in its current form makes it clear that the obligations set out in s 25 more broadly require that funds be allocated by the organ of state in question. Nevertheless, we understand the need for fiscal caution to enable the chapter to be promulgated, and we suggest that a qualification of 'available resources' alone would meet this.

6.3.2 We note some concerns with the formulation of s 25(5). First, s 25(5)(b) appears to be redundant, as a proper investigation and analysis of the aspects in question (as required by s 25(5)(a)) should include in-depth research. Second, the consultation duty is restricted to consultation with civil society, which is not defined. We propose instead that the provision is worded more broadly to provide for consultation with interested parties. Third, the requirement that measures be adopted by the State "only after" compliance with (a), (b) and (c) risks hampering the achievement of the objects of the Act, by in effect making the operationalisation of these chapter 5 duties overly onerous. For this reason, we suggest that the relevant wording be amended to limit this outcome.

6.3.3 We again note that the wording in s 25 should reflect <u>unfair</u> discrimination, rather than discrimination *simpliciter*.

Accordingly, we recommend a number of amendments to this provision, so that it reads as follows (relevant parts only produced below) :

(1) The State must—
- (a) develop awareness of fundamental rights in order to <u>eliminate unfair discrimination and</u> promote ~~a climate of~~ understanding, mutual respect and equality;
- (b) conduct information campaigns to popularize this Act;
- (c) develop appropriate internal mechanisms to deal with complaints of unfair discrimination, hate speech or harassment; ~~and~~
- (d) adopt and implement, ~~within available resources~~, <u>positive</u> measures to eliminate <u>unfair</u> discrimination and to promote and achieve equality in line with the objectives of this Act; <u>and</u>
- (e) <u>fund and make provision in their budgets for such positive measures, subject to available resources.</u>

…

(3) The measures referred to in subsection (1)(d) must, <u>within a reasonable time,</u> include—
- (a) the amendment of existing legislation or the enactment of further legislation;

(a) the amendment of existing policies or the development of new policies;
(b) the amendment of existing codes or the development of new codes;
(c) the amendment of existing practices or the adoption of new practices; or
(d) the adoption of any other measure giving effect to the objectives of the Act.

…

(5) In adopting the measures referred to in subsection (1)(d), the state must undertake, within a reasonable time- ~~may only be adopted after~~ —
(a) proper investigation, research and analysis of the aspects in question; and
~~(b) in-depth research in respect of the aspects in question; and~~
(c) consultation with interested parties ~~civil society~~ on the measures to be adopted.

(6) The measures to be adopted by the State to achieve equality must—
(a) proactively address systemic and multidimensional patterns of inequality and unfair discrimination found in social structures, rules, attitudes, actions or omissions which prevent the full and equal enjoyment of rights and freedoms as contemplated in the Constitution, including equal access to resources, opportunities, benefits and advantages and social goods; and
(b) provide for reasonable accommodation of the needs of persons on the basis of any of the prohibited grounds.

…

6.4 Provision of legal aid

Section 25(8) of the Bill proposes the possibility of amendments to the Legal Aid South Africa Act, to provide for the grant of legal aid to persons instituting proceedings in terms of PEPUDA.

(8) The Board of Directors, appointed in terms of section 6 of the Legal Aid South Africa Act, 2014 (Act No. 39 of 2014), must, when making recommendations to the Cabinet member responsible for the administration of justice for purposes of the regulations to be made in terms of section 23 of that Act, consider recommending, subject to the criteria determined by that member in terms of the said regulations, that legal aid be granted to persons who wish to institute proceedings in terms of this Act.

We support this provision. We note that while the Constitution expressly provides for the right to legal representation at state expense in sections 28(1)(h), 35(2)(c) and 35(3)(g), the Constitutional Court has recognised that proceedings may warrant legal representation at state expense where unfairness would result, and in vindication of sections 9 and 34 of the Constitution (rights to equality and access to courts).[56]

We suggest, however, that the current framing of the provision is overly subject to caveats, as, in the end, it simply requires that the Board of Directors must 'consider recommending' the grant of legal aid. We consider the qualification that legal aid would be "subject to the criteria" determined in regulations to be sufficient, as it does not guarantee the provision of legal aid at state expense in all proceedings in terms of PEPUDA. Accordingly, we suggest the following amendment:

[56] *Magidiwana v President of the Republic of South Africa* [2013] ZACC 27.

(8) The Board of Directors, appointed in terms of section 6 of the Legal Aid South Africa Act, 2014 (Act No. 39 of 2014), must, when making recommendations to the Cabinet member responsible for the administration of justice for purposes of the regulations to be made in terms of section 23 of that Act, ~~consider recommending~~ recommend, subject to the criteria determined by that member in terms of the said regulations, that legal aid be granted to persons who wish to institute proceedings in terms of this Act.

6.5 Scope of duties on private persons

The Bill proposes section 28, which would replace the current section 27 (headed 'Social commitment by all persons to promote equality') to impose a duty on all persons to promote equality. The current section 27 provides that all persons, non-governmental organisations, community-based organisations and traditional institutions 'must promote equality in their relationships with other bodies and in their public activities', and requires the Minister to develop regulations in this regard, requiring certain private entities (companies, closed corporations, partnerships, clubs, sports organisations, corporate entities and associations', where appropriate, to prepare equality pans or to abide by codes of practice and report 'in a manner proportional to [private entities'] size, resources and influence'.

The proposed section 28 similarly requires that all persons promote equality in their relationships with other bodies and in their public activities, and similarly requires the Minister to regulate these persons, including. The bill proposes the following:

(1) All persons, non-governmental organisations, community-based organisations or traditional institutions must promote equality in their relationships with other bodies and in their public activities.
(2) Subject to subsection (3), the Minister who is responsible for the portfolio in which persons, non-governmental organisations, community-based organisations or traditional institutions contemplated in subsection (1) operate must—
    (a) determine, by regulation or otherwise, the measures to be adopted and implemented; or
    (b) issue a code of practice, dealing with the elimination of discrimination and the promotion of equality, in respect of those persons, non-governmental organisations, community-based organisations or traditional institutions.
(3) A Minister who has, at the date of commencement of this Act, already issued measures or a code as contemplated in subsection (2) is exempted from the obligation imposed under that subsection.
(4) Different measures may be determined and different codes may be issued for different persons, non-governmental organisations, community-based organisations or traditional institutions, depending on their size, resources and influence.
(5) A Minister must, when determining measures or issuing a code in terms of this section, have regard to any existing measures in place in any law, directive, policy or charter which relate to the elimination of discrimination and the promotion of equality.

We generally support the proposed section 28. We note that, contrary to claims made by organisations voicing strident opposition to the Bill, the provision does not constitute a dramatic shift from the current wording of the Act, and is in step with South Africa's current jurisprudential position and the contextual demands of substantive equality.

For centuries, the state and the structure of society more generally legitimised discrimination of the most stark, pernicious forms. Both colonial and apartheid systems, as well as cross-cutting systems of patriarchy, ableism, heteronormativity and so on, were characterised by inequality and discrimination that was systematic, extensive and pervaded almost all aspects of public and private life. Private persons wield great power, and can profoundly impair the realization of others' rights. In South Africa's context of deep structural inequality, certain private persons are in entrenched positions of power that, if unregulated, encourage exploitation and further entrenchment of extant inequality.[57]

For these reasons, we welcome the imposition of certain duties on private persons, and not only on the state and public bodies. We note that the Constitution envisages that rights may apply horizontally to private persons, both in the general terms of s 8(2) and more specifically in s 9(4), which explicitly provides that 'No person' may unfairly discriminate against another. A commitment to substantive equality imposes both negative and, in some instances, positive duties on private persons. The Constitutional Court has confirmed that private persons can, in principle, be held to positive duties in respect of others' fundamental rights.[58]

South African courts have also recognised that the private sphere is not insulated from equality's demands, including most recently in *King NO v De Jager* [2021] ZACC 4 and *Wilkinson v Crawford NO* [2021] ZACC 8. Chapter 5's regulation of the private sphere confirms this existing position. However, chapter 5 gives more specific content to these duties, including in s 28.

In addition to those principled points in favour of the provision, we make the following suggestions:

6.5.1 Section 28 should be amended to also include a duty on all persons to eliminate unfair discrimination, as well as to promote equality. This accords with the proposed wording of s 24(2), the duty in s 9(4) of the Constitution and the imperative to tackle existing disadvantage and inequality. It is not unusual to require this of private persons, as it is found in the EEA, and is already contemplated in another part of the Act insofar as the fairness enquiry, in s 14(3)(i), considers the steps taken by respondents in addressing disadvantage and accommodating diversity.

6.5.2 We suggest that, where it is appropriate and proportional to do so, non-governmental organisations, community-based organisations or traditional institutions must provide funds to eliminate unfair discrimination and promote equality. This provision serves as a replacement to s 24(4) which we recommended omitting above. The duty to provide funds can be further subject to a proportionality requirement, to take account of constraints and competing rights of private entities.

6.5.3 We agree with the proposed subsection (4) that permits different measures and codes to be determined, subject to an entity's size, resources and influence. However, we suggest that these requirements be disjunctive rather than conjunctive – (i.e. size, resources or influence) to allow for more flexible regulation, and to avoid irrationality (for example, where a small but highly influential entity evades sufficient regulation).

[57] M Madlanga, 'The Human Rights Duties of Companies and Other Private Actors in South Africa' (2018) *Stellenbosch Law Review* 14, 376.
[58] See for example *Daniels v Scribante* [2017] ZACC 13 para 40*; AB v Pridwin Preparatory School* [2020] ZACC 12 paras 125, 180.

6.5.4 We suggest that the provision could also include an express justification defence available to private bodies, along the lines of the proposed amendment to s 14(3)(f) detailed earlier.

Accordingly, we propose the following amendments to this provision:

> (1) All persons, non-governmental organisations, community-based organisations or traditional institutions must eliminate unfair discrimination and promote equality in their relationships with other bodies and in their public activities.
> (2) Where appropriate and proportional, organisations and institutions contemplated in subsection (1) must provide for funds to implement measures aimed at eliminating discrimination and promoting equality
> (3) Subject to subsection (~~3~~4), the Minister who is responsible for the portfolio in which persons, non-governmental organisations, community-based organisations or traditional institutions contemplated in subsection (1) operate must—
> (a) determine, by regulation or otherwise, the measures to be adopted and implemented, including measures contemplated in subsection (2) above; or
> (b) issue a code of practice, dealing with the elimination of unfair discrimination and the promotion of equality, in respect of those persons, non-governmental organisations, community-based organisations or traditional institutions.
> (4) A Minister who has, at the date of commencement of this Act, already issued measures or a code as contemplated in subsection (2) is exempted from the obligation imposed under that subsection.
> (5) Different measures may be determined and different codes may be issued for different persons, non-governmental organisations, community-based organisations or traditional institutions, depending on their size, resources ~~and~~ or influence.
> (6) A Minister must, when determining measures or issuing a code in terms of this section, have regard to any existing measures in place in any law, directive, policy or charter which relate to the elimination of unfair discrimination and the promotion of equality.

6.6 Implementation concerns

The main concern with chapter 5 is its ability to be implemented, and the capacity of the state, public bodies and private persons to fulfil the duties that the chapter imposes. The chapter delegates much of the nuts and bolts of operationalisation to relevant Ministers, who are charged with putting in place regulations and codes of practice for particular sectors. There are three concerns with this: first, this risks that the force of the chapter may be attenuated if Ministers do not exercise this power diligently or timeously; second, this risks that the distribution duties across sectors will be ad hoc, and overly dependent on the particular Minister responsible for that sector; and third, that it constitutes an excessive devolution of decision-making powers to Ministers, who have wide discretion to give content to the duties.

Finally, the implementation of chapter 5 will inevitably contend with the limits of law's ability to achieve social and attitudinal change. For this reason, the success of chapter 5's implementation turns in part on the educational, awareness and informational campaigns envisaged by s 25(1) of the Bill.